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WOMEN, MARRIAGE, AND DIVORCE IN CALIFORNIA, 1849–1872

BONNIE L. FORD*

PREFACE

I wish to express my family's great appreciation to the California Supreme Court Historical Society, and to *California Legal History*, for publishing this portion of Dr. Bonnie L. Ford's "Women, Marriage, and Divorce in California, 1849–1872," a dissertation my mother completed in 1985 as part of her doctorate in history from the University of California, Davis. My mother's path to the Ph.D. was not without challenge, because of her gender.

She was inspired to study history by a female high school teacher; in college she was further encouraged by her advisor to pursue a Ph.D. With this strong example and support, my mom enrolled in Stanford University's graduate program in History in 1960. At that time, Stanford steered women into the M.A. degree rather than the Ph.D. for history. After earning her M.A., my mother taught at the junior and senior high school level.

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* This selection from Bonnie L. Ford's Ph.D. dissertation (History, University of California, Davis, 1985) is presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at https://dissexpress.proquest.com/search.html.

In the late 1960s, after I was born, my mom still yearned for her Ph.D. She applied to graduate programs, but was rejected, in one case with a stinging comment that the advanced study of history was not for "bored housewives."

A dedicated feminist, my mom found a professional home at Sacramento City College, where she taught women's studies and directed the Women's Center, one of the earliest such affinity spaces. For nearly thirty years, my mother taught women's history under the auspices of California's American Institutions requirement for public university graduates of the UCs, CSUs, and community colleges. Her curricular innovation transformed a conventional course of study into a more inclusive and representative history of the United States.

Still, the advanced study of history called. While my brother and I were in elementary school, my mother applied to UC Davis's Ph.D. program, and was accepted. My mom had the good fortune to work with Ruth Rosen and the late Roland Marchand, renowned scholars at UC Davis. While working full time as a professor and raising two children with her husband, Judge James T. Ford, of the Superior Court of California, she earned her doctorate.

Re-reading "Women, Marriage, and Divorce in California" today, at the invitation of *California Legal History*, I am struck by the exceptional quality of its scholarship, force of expression, and relevance. The work offers a veritable clinic in how to do legal history and how to read primary sources generated by lawyers, judges, and court rulings for the study of U.S. history, broadly and inclusively. "Women, Marriage, and Divorce" reveals how disfranchised Americans have routinely sought to use the courts to redress inequalities and injustices, as best they could, and, at times, successfully so — even where powerful and pervasive cultural beliefs, such as gendered "separate spheres," operated.

Our California family has been dedicated to the intertwined study of US history and practice of law in this state. My mother's example in completing her doctorate was a powerful one for me. I, too, earned my Ph.D. in history at UC Davis. I also studied the nineteenth century, including the ways Black Americans looked to the courts to pursue citizenship rights before the Civil War. My brother, Dylan Ford, and his wife, Kathy, are attorneys today in Los Angeles, and my husband, Bryan Lamb, is a trial

attorney in San Francisco. Following my father's death in 2004, my mom has provided care and boundless love for grandchildren Theo and Iris, as we have pursued our own careers in history and law.

My father enthusiastically supported my mother's scholarship; in turn, his own successful tenure on the Superior Court bench was informed by this history of women's experiences in California's courts, that my mother so sensitively and carefully recovered.

What follows is a superb example of legal history as a means to understand how the disempowered have sought a fuller ounce of justice in their lives through California's courts.

DR. BRIDGET FORD

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* * *

INTRODUCTION

Recent historical interpretations of women in the West have interpreted women's experience on the western frontier as proof of the acceptance of the ideology of woman's separate sphere by both middle-class and working-class women.[1] This separate sphere consisted of the following elements: women were seen as the moral superiors of men; they ruled the home and created its special tranquil atmosphere; they had notable instincts for parenting not granted to men; and they possessed sensitivity of feeling and delicacy of physique. In evaluating the acceptance of this model, Julie Roy Jeffrey writes in *Frontier Women*:

> Women's participation in the Westward movement provided a test for the power of nineteenth century beliefs about woman's place. Although these conceptions seemed farfetched on the frontier, even counterproductive, they lost little potency, for they helped women hold on to their sexual identity and offered them hope of an ever-improving life. Ideology proved to be as pervasive as it was

[1] Julie Roy Jeffrey, *Frontier Women "Civilizing" the West? 1840–1880* (New York: Hill and Wang, 1979); Robert Griswold, *Family and Divorce in California, 1850–1890* (Albany: State University of New York Press, 1982).

powerful. Pioneer women's records suggest the extent to which ideology seems to have crossed class and regional lines.[2]

Carrying this argument a step further, Robert Griswold, in his examination of family life in *Family and Divorce in California, 1850–1890*, theorizes that not only did women of the middle and working-classes accept the ideology of woman's separate culture and role, but that men and women together adhered to a new conception of marriage based on that ideal. The new marital ideology that emerged in the nineteenth century centered on the companionate marriage and family. Using divorce records from San Mateo and Santa Clara counties, Griswold found that the phenomenal rise in the divorce rate during the latter half of the nineteenth century represented the assumption of the ideal of the companionate marriage by both middle-class and working-class couples. He writes, "As the expectations and importance of marriage went up in the nineteenth century and as companionship, love, affection, and mutuality became the accepted norm, husbands and wives who fell short of such high standards found themselves vulnerable in divorce trials."[3]

He further defines the companionate marriage in the following manner: it was a partnership between husbands and wives founded on domestic equality; family relations were based on affective values; men respected women and treated their wives kindly; and parents conceived of childhood as a special stage of life demanding nurturance and care. Griswold shows how prescriptive themes changed from the patriarchal pattern of the seventeenth century to the companionate ideal of the nineteenth. He then attempts to prove that both middle-class and working-class people accepted the newer formula. "Men and women from all class backgrounds," he writes, "evinced concern about women's chastity, social respectability, domestic tranquility, and moral rectitude and with men's diligence, industriousness, sobriety, sexual decorum and kindness."[4]

The present work disagrees with these two interpretations and hypothesizes that evidence from divorce records in Sacramento County from 1849–1872 shows just the opposite — that working-class women did not,

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[2] Jeffrey, *Frontier Women*, xiii.

[3] Griswold, *Family*, 3.

[4] Ibid. 172.

in fact, demonstrate the absorption of the ideology of the special role of women nor did their marriages exemplify the acceptance of the companionate ideal. What accounts for these opposite conclusions?

In the case of Julie Jeffrey's work, the letters, journals and reminiscences of women in California that were her primary sources reflected the values of middle-class women. Not only were such women as Eliza Farnham, Sarah Royce and Louisa Amelia Knapp Clappe especially gifted observers, but they were also well educated for the time and decidedly middle-class in background. In contrast, the divorce records that I consulted were most notably the records of working-class women. Jeffrey admits that the women whose works she consulted were literate and frequently middle-class. Yet she asserts that "internal evidence suggests the lower-class origins of at least some of the women and almost all of the Mormon pioneers." I would submit that the fact these women were literate and articulate places them in a very different class from those women who are found in the divorce records I examined. The class composition of my study is the opposite of Jeffrey's. In the case of the divorce files that I examined, most of the women were working-class and only a few of the women were middle-class. I agree with Jeffrey that in the sources she relied upon, the women do indeed reveal an acceptance of the moral superiority of women as well as their belief in separate spheres. However, I believe that her sources represent the more visible and articulate segment of Western women while mine represent more of the inarticulate women of that time and place.

Griswold's sources are similar in nature to those upon which this work is based; therefore, the divergence between his conclusions and mine demands close analysis. In fact, though the two works ostensibly cover the same time period, they are not really contemporary. Sacramento was populated immediately at the beginning of the Gold Rush and experienced its greatest population growth by 1860. The growth of San Mateo and Santa Clara counties took off after 1860. All of the cases studied in this work were litigated from 1849 to 1872 with 90 percent occurring in the 1850s and 1860s. In contrast, the bulk of Griswold's cases (88 percent) were litigated in the 1870s and 1880s. In addition, the population of the two counties studied in the Griswold work were agricultural and rural, while Sacramento began as an "instant" commercial city, around which agriculture developed only gradually.

But equally important, the terms of the two analyses are vastly different. Whereas Griswold sees the importance of divorce litigation as the evidence of dashed expectations, I see the litigation as evidence of real behavior. He focusses on the prescriptions that are violated, while I concentrate on the standards that are revealed. Conduct resulting in divorce can be looked on as aberrant behavior — a departure from the norm — or it can be seen as an example of existing behavior — perhaps extreme or perhaps representative of many similar cases that did not reach the courts.

Since attorneys, judges and legislators were overwhelmingly middle-class, it is likely that considerable attention would be paid to middle-class conventions in divorce cases. It is important to sift behavior from homilies. Certainly, the formula with which each complaint was drafted showed an acceptance of the middle-class standard of behavior, but that acceptance was the result of the lawyer's beliefs and his determination of what might impress the court. The behavior itself shows that the realities of working-class marriages were far from the companionate ideal.

It seems appropriate at this point to discuss the uses and limitations of divorce records as historical sources. Given the nature of the documents contained within such records, questions may be raised about truthfulness, comprehensiveness and representativeness.

The question of truthfulness arises because claims in divorce cases are made to seek a favorable outcome in an adversarial process. Consequently, certain facts are emphasized or distorted to support a case, and information that is unfavorable is omitted. However, I looked for behavior, rather than ideals. The divorce laws of this period were strict when it came to issues of fact. Charges had to be corroborated by witnesses. Usually, the witnesses' testimony was believable. While I did see a few cases where the witnesses were obviously coached, for the most part, testimony seemed authentic in voice and detail. It is true that divorce became formulaic in later years, but in the first two decades of the divorce law's existence evidence was carefully taken. Clearly, the court's bias, especially in the first decade, was to deny divorces if charges of wrongdoing were not corroborated by witnesses. For this reason, I believe most of the charges that stood up in court were sufficiently verified to serve as historical evidence.

Second, there is a question of comprehensiveness. The only information required by the court to obtain a divorce at this time consisted of the

names of the spouses, the date and place of marriage and the charge of the plaintiff. Many facts about the marriage were omitted. On the other hand, many unsolicited facts were presented as well as details necessary to prove charges. By means of these other facts I was able to quantify many other characteristics. In none of the characteristics that I quantified did the data appear in less than 25 percent of the cases.

In regard to representativeness, I believe the difficulties placed in the path of a divorcing partner were so great that only the most persistent would prevail. For that reason, it seems likely that many others experienced similar situations but failed to obtain divorces.

Unlike Griswold, I do not give as much weight to the ideologies expressed in the divorce cases as I do to the behaviors they revealed. What was significant to me was the extent to which the women in these cases did not conform to the ideology of nineteenth-century womanhood rather than the extent to which they paid obeisance to it in their statements. In fact, some of the women appeared to have contempt for the conventions. Not all divorcing women showed these tendencies, but the women who had different standards of behavior were usually working-class women, while middle and upper-class women tended to respect the conventions.

In contrast to the behavior of working-class women, the marital law of California was harmonious with the companionate ideal and was influenced by the feminist movement in the East. It was also deliberately reformist. A constitutional provision perceived to be in the mainstream of this reform was included in the Constitution. From 1850 to 1872, the law included a community property system with such protections for married women's property as separate property registration, provision for antenuptial contracts and the availability of sole trader status. In addition, a liberal divorce law embodied the grounds of divorce common in the most progressive laws of the time. The basic outlines of marital law that were to govern California were developed during this period and at length summarized in the Civil Code of 1872. This code was a compilation of statutory and case law from the previous twenty-two years and combined to form a system whose essential principles governed California family law for over a century, until the feminist movement of the 1970s.

The laws governing marriage, while copied from the reforms of the East, had little relevance to the West. The eastern laws were incubated in

a developed society with a significant number of propertied, middle-class women. In the West in this early period, few women or married couples had acquired enough property to put the laws to any use. Few women saw any benefit to the separate property registers or the antenuptial agreements. Divisions of community property at divorce were uncommon because there was usually nothing to divide. Most of the marital reforms simply did not fit actual circumstances.

The divorce law was the most utilized of the reforms, and 70 percent of plaintiffs in divorce cases were women. This does not prove, however, that women expected companionate marriages as Griswold concluded. The absent husband whose whereabouts were unknown violated the companionate ideal. To expect the presence of a husband in marriage is hardly a high standard, and yet this is where most of the husbands failed. Cases litigated under this ground also showed the desperate circumstances of many women who were abandoned in a strange land with few friends or family to help them.

The duty of a husband to support his family so that his wife could pursue domesticity was a key part of the companionate ideal. Yet the court commonly refused to grant divorces on that basis. To grant a divorce wherever a wife contributed to the support of the family would have been folly in early California. Cases pursued under this provision of the law demonstrated the extent to which women supported the family rather than the extent to which they were keepers of the domestic hearth. Such cases also confirmed that it was immaterial to the court whether a husband supported his wife or not. That the wife supported the family was perfectly acceptable to the court, at least for working-class families.

If the court was reluctant to enforce the husband's unaided support of the family, it tried valiantly to compel female purity. Adultery was the most frequent and most successful charge made by male plaintiffs. That so many divorces were obtained by men on the basis of this charge illustrated that the courts believed in the purity of womanhood, but it also proved that women's behavior reflected something less than devotion to the ideal. In contrast to the tenets of Victorian morality, many working-class women evidenced a lack of concern for observing the confinements of marriage, given that over 50 percent of male plaintiffs alleged adulterous conduct on the part of their wives and that most of these men proved their cases in court.

The lie was also given to the commitment of husbands to a new ethic of gentleness and consideration to their wives. One of the most common images invoked by proponents of liberal divorce laws was the cruel husband, whose violence could be curbed by the woman's ability to seek divorce. However, cruelty was a difficult charge to prove at the beginning of this period. The court proved less than sympathetic unless a woman's life was in danger. Cases under this charge disclosed instances of serious physical cruelty in the lives of working-class women. I did note a trend toward higher expectations in the expanded definition of cruelty that was gradually broadened during this period to encompass mental suffering.

Like the charges of failure to provide support and extreme cruelty, the charge of habitual intemperance did not work to a working-class woman's advantage as reformers had expected that it would. Instead of relieving the married woman of her addicted spouse, the charge of drinking to excess was easier to prove against a woman than a man. A double standard emerged in judicial response to the charge of habitual intemperance; the seriousness of women's drunkenness far outweighed that of men in the eyes of court, witnesses and jury. Men could understand the drinking habits of other men, but found women's excessive drinking particularly obnoxious. The ample evidence in these court cases that working-class women did drink and did buy liquor at bars and saloons also suggests that lower-class women did not experience the domestic cloistering that was decreed by the ideal of true womanhood.

Not only did financial support during marriage prove illusory, but so did a husband's responsibility for support after marriage. Financial awards at divorce were so rare as to be nearly nonexistent.

Though courts had the power to award community property and make orders for support, less than 1 percent of women in the cases I studied received any form of support — child support, spousal support, or alimony. Less than 5 percent sought any of these forms of relief. Probably working-class women rightly suspected that awards, if granted, would in most instances be useless where husbands were absent or impecunious. That men frequently avoided equal division of any community property by using their control of property to sell it and abscond with the proceeds hardly shows great respect for the equality of women.

When a judgment for divorce was handed down, the court could also make an award of child custody. Neither the court nor the parties to the divorces seemed to believe that women had some special instinct toward motherhood. Usually, the woman did in fact get custody of the children, not because of her special qualities, but rather because the father was missing. Laws were vague and left child custody issues to the discretion of the court. At the trial court level, the custody of children was usually determined on the basis of the guilt or innocence of the party in the divorce suit. On the whole, few cases of child custody were contested. The major problem for children in the period was orphanhood, not custody.

This dissertation examines the enactment and actual enforcement of a system of marital law formulated on the bourgeois assumption of woman's separate sphere and moral superiority. Yet the women who came in contact with these laws were primarily working-class women whose behavior did not meet the criteria of the ideal standard. What is most noticeable about this conjunction is the inappropriateness of the legal system to these women's lives and the way in which their violations of middle-class standards had the ironic effect of sometimes turning the laws to their disadvantage.

In order to cogently analyze the data available in the divorce records, we must examine the legal context in which the litigation occurred. California's law of marriage and the family, to which we now turn, seemed to hold out significant promise for all women.

MARITAL LAW IN CALIFORNIA 1849–1872

California's first marital law was based on the companionate ideal. Laws most consonant with women's equality in marriage at the time were part of the constitutional scheme and enacted by statute. Experience eventually showed, however, that the law was unsuited to the men and women expected to live under it. It was a system too advanced for the population to make use of or to accept. The new system was inspired by legal debates in New York and other eastern states. As the law impinged on people's lives, however, significant and steady change was required to adjust the law to popular mores and sentiments. This chapter will explore the innovations and the retrenchments and will set the legal scene, a critically important aid to our understanding of marriage and divorce in the new state.

On September 1, 1849, delegates to California's constitutional convention assembled at Monterey to write a constitution. Delegates were anxious to obtain statehood as gold-seekers swarmed into the state.[5] An important question for this convention was what form marital property law should take; the delegates had to choose between the common law and the civil law of marital property. They could also choose from a number of common law reforms then being advanced in other parts of the U.S.

By 1850, seventeen states had passed some form of a married women's property act to reform the common law.[6] The traditional system of common law merged the identity of wife with husband at marriage and declared the wife civilly dead. Its origins lay in feudal society and its main function was to prevent estates from being divided. The marriage settlements that wives brought with them to marriage became a part of their husbands' estate that would be handed down intact to the eldest sons under the system of primogeniture. Because the married woman had no property, she could not contract, sue or be sued, or make a will. In the event of dissolution of the marriage, her rights were limited. Divorce was almost unobtainable, and at the death of her husband she had only dower rights in his estate, which allowed her the use of one-third of her deceased husband's estate until her death. Even her earnings came under her husband's control.[7] This civil death at marriage was termed coverture.

The married women's property acts, which purported to mitigate the disabilities of the married woman under the common law, predated the organized women's movement. Though they embodied a powerful challenge to the subordinate status of women under the law, their main purpose was to reinstate rights of middle- and upper-class women who had lost the right to hold equitable trusts by reason of legal codifications that had taken place in order to simplify the law. Women who had customarily protected their property by means of a trust could no longer do so.

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[5] Susan Westerberg Prager, "The Persistence of Separate Property Concepts in California's Community Property System, 1849–1975," *UCLA Law Review* 24 (October 1976): 10–12.

[6] Lawrence M. Friedman, *A History of American Law* (New York, Simon and Schuster, 1973), 186.

[7] Prager, "Community Property," 3.

In addition to reinstating a means by which married women could hold property, proponents of married women's property acts saw the possibility of aiding debtors by shielding that property. In an increasingly commercial economy, the hazards of the boom-and-bust cycle had plunged many families into want. By preserving the wife's property, some help for debtors could be enacted. In the process of dealing with these two problems, the disabilities of coverture were scrutinized and brought to public attention. This scrutiny led to women's consciousness of their legal position in marriage and gave the women's movement a powerful claim of victimization by the law. Perhaps the most important effect of the legislative debate and passage of women's property acts was the impetus given by the very process to the women's rights movement in general.[8]

The reform acts of the 1840s declared the right of a wife to the separate property she brought to the marriage and to the property she received by gift or inheritance during the marriage. More conservative separate property acts gave the husband the right to control and manage his wife's separate property. A more radical version of the married women's property act not only secured her separate property but also gave her the legal right to its management and control. Other provisions of these marital property acts provided a married woman with the right to her earnings as her separate property.[9]

Instead of the common law, or a reformed version of the common law, the delegates to the constitutional convention could choose the community property system of marital law that had come to California via Spain and Mexico. The community property system in the civil law significantly differed in theory from the common.

It emphasized the shared property of the marriage rather than separate property. All earnings of either spouse during the marriage became the property of both. Consequently, the housewife's contribution was theoretically equal to the wage-earner's. However, community property also recognized separate property and defined it in much the same manner as the married women's property acts did. Separate property was that property which a husband or wife brought to the marriage or that which they received as a gift or

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[8] Norma Basch, *In the Eyes of the Law: Women, Marriage and Property in Nineteenth Century New York* (Ithaca: Cornell University Press, 1982), 39–49.

[9] Prager, "Community Property," 4.

inheritance during the marriage.[10] The debate at the constitutional convention concerning marital property law devolved upon the issue of whether or not separate property for married women would be recognized. Both the married women's property acts and the community property system provided for separate property for married women, and little or no distinction was made between the two systems in the discussions. The more revolutionary aspect of community property law — the sharing of property in marriage — was ignored by the delegates in their debate.

The starting point for the argument over separate property was a proposed constitutional provision that stated:

> All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.[11]

This was taken verbatim from the Texas Constitution of the time.[12] The words "common property" meant community property in a civil law context.[13] The word "common" appeared in the provision and, while the debaters considered this a question of the civil law versus the common law, no one expressed concern about the possible ramifications of the sharing principles of community property law. It appears that the constitutional provision under discussion was recognized as enacting community property law but that the delegates' understanding of community property law was unclear.[14]

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[10] Elizabeth A. Cheadle, "The Development of Sharing Principles in Common Law Marital Property States," *UCLA Law Review* 28 (October 1981): 1276.

[11] Ross J. Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution* (Washington, D.C.: John T. Tower, 1850), 259–60.

[12] William A. Reppy, Jr., *Community Property in California* (New York: The Michie Co., 1980), 18.

[13] Peter Thomas Conmy, *The Historic Spanish Origin of California's Community Property Law and its Development and Adaptation to Meet the Needs of an American State* (San Francisco: Grand Parlor, Native Sons of the Golden West, 1957), 1.

[14] Prager, "Community Property," 10.

The forty-eight delegates to the convention, identified according to origin and recency of migration, comprised four groups: the native Californians of Mexican or Spanish descent; the old-line Americans who had resided in California for a long period of time (ten to twenty years); the more recent American immigrants, most of whom had come at the time of the Mexican-American War (three to ten years previous to the convention); and the very recent immigrants who had come fewer than three years previous to the convention.[15] Interestingly neither the native Californians nor the old-line residents participated in this debate. In Mexican California, marital property seldom became an issue because of the rarity of divorce and the conservative nature of the land-based rancho society that was not highly commercial.[16] The newer emigrants who had come to California from four months to three years previous to the convention played the leading roles on this issue.

Presumably these more recent immigrants were familiar with the debates concerning married women's property acts that had taken place during the last decade in the eastern states, while the natives and older residents were largely unaware of these developments. The seven men who took extensive part in the polemics, Henry Halleck, Kimball H. Dimmick, Frances Lippitt, Charles T. Botts, Myron Norton, John M. Jones, and Henry A. Tefft had a number of characteristics in common. First, they were all recent immigrants. Second, they were all lawyers.[17] Finally, five of the seven were born in or had lived most recently in New York.

The New York link is significant because New York had recently undergone major legal reforms, including marital property reform. From 1841 to 1848 eight bills were introduced in that legislature which provided for married women's separate property, four of which were considered in 1846 and 1847.[18] At the New York constitutional convention of 1846, a clause almost identical to the one proposed at the convention in California was put forward. It too was probably copied from the Texas Constitution but

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[15] *Biographical Sketches of the Delegates to the Convention to Frame a New Constitution for the State of California* (San Francisco: Francis and Valentine, Publishers, 1878), 8–9.

[16] Prager, "Community Property," 13.

[17] Of the forty-eight members of the convention, only fourteen were attorneys.

[18] Basch, *Eyes of the Law*, 138.

slightly modified to eliminate the phrase "common property." This constitutional provision was not passed, but in 1848 a married woman's property act was passed that was similar in content.[19] The controversy resulting from this lengthy process of reforming the New York law and the law of other common law states had resulted in a number of articles in national publications.[20]

New York was the previous residence of Dimmick, Halleck, Lippitt, and Norton. As lawyers, they were no doubt familiar with the arguments that had been advanced in the campaign. Many of their arguments were similar to those voiced in the New York debates. Jones had most recently been a resident of Louisiana where community property law governed. The remaining recent arrival was Charles T. Botts who took the conservative position championing the unreformed common law. Botts was born and raised in Virginia before coming to California eighteen months previously.

The content of the debates indicates that the issue paramount to the delegates was the economic condition of married women under the law. Subtopics of the debate included the ramifications for creditors' rights and the disruption that would result to the native Californian tradition if the law were changed. The undesirability of the common law was mentioned because of its complexity. Delegates expressed a desire for a simple understandable law. The most important question, however, was that of women's rights. The focus of the New York debate had shifted in California. The main questions in New York had been how to reinstate trusts for married women after they had been removed by changes made to simplify the law and how to relieve debtors. In California, the broader question of the legal position of married women was the major issue.

Botts argued for the traditional common law including coverture on the basis of the natural law:

> In my opinion, there is no provision so beautiful in the common law, so admirable and beneficial as that which regulates this sacred contract between man and wife. Sir, the God of nature made woman frail, lovely, and dependant [sic]; and such the common law pronounces her. Nature did what the common law has done

[19] Ibid., 150.

[20] Ibid., 138.

> — put her under the protection of man; and it is the object of this clause to withdraw her from that protection, and put her under the protection of the law. I say, sir, the husband will take better care of the wife, provide for her better and protect her better, than the law. He who would not let the winds of heaven too rudely touch her, is her best protector. When she trusts him with her happiness, she may well trust him with her gold. You lose the substance in the shadow; by this provision you risk her happiness forever whilst you protect her property. Sir, in the marriage contract, the woman, in the language of your protestant ceremony, takes her husband for better, for worse; that is the position in which she voluntarily places herself, and it is not for you to withdraw her from it.[21]

Botts, was the most conservative of the debaters. It was his belief that a married woman should be totally dependent on her husband economically, that the husband should be the head of the family, and that a married woman's property act would destroy the harmony of the marital relationship and transform marriage into a battleground by placing the wife's interests in opposition to her husband's. Dimmick, who represented a large native Californian constituency in San Jose, was unimpressed by the dependency of women assumed by the common law.

> We are told, Mr. Chairman, that woman is a frail being; that she is formed by nature to obey, and ought to be protected by her husband, who is her natural protector. That is true, sir; but is there anything in all this to impair her right of property which she possessed previous to entering into the marriage contract?[22]

In order to bolster his argument, Botts invoked Blackstone and the Bible. " 'By marriage,' says Blackstone, 'the husband and wife are one person in the law.' " Botts continued:

> This is but another mode of repeating the declaration of the Holy Book, that they are flesh of one flesh, and bone of bone. It is a principle, Mr. Chairman, not only of poetry, but of wisdom, of truth, and of justice. Sir, it is supposed by the common law that the

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[21] Browne, *Debates*, 259–60.

[22] Ibid., 263.

> woman says to the man in the beautiful language of Ruth: "Whither thou goest I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God."[23]

Jones, the representative of San Joaquin and the youngest of the debaters at twenty-five, pleaded the cause of reform by stating that the despotism of the husband had been the subject of reform in the eastern United States for the past forty or fifty years[24] and that he favored simplification of the common law.[25]

Botts replied that despotism was warranted in the case of husband and wife. He also blamed the woman's rights movement for the married women's property acts saying, "This doctrine of woman's rights, is the doctrine of those mental hermaphrodites, Abby Folsom, Fanny Wright, and the rest of that tribe."[26]

Some delegates predicted a rise in the divorce rate if married women were allowed to hold property.[27] Dimmick replied that the community property system with its separate property provisions had been in effect in California since the coming of the Spanish without destroying marriage.

In addition, Dimmick voiced his concern for the native Californians who had operated under that system, stating:

> Women now possess in this country the right which is proposed to be introduced in the Constitution. Blot it out, and introduce the common law, and what do you do? The wife who owns her separate property loses it the moment the common law prevails, and it is to avoid taking away that right of control over her property that I would wish to see this provision engrafted in the Constitution.[28]

Still professing doubts about the wisdom of the measure, Lippitt expressed his fears for creditors' rights. He contended, "If the husband is a dishonest man, gets in debt, and cannot or will not pay his debts, he has only to

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[23] Ibid., 267.

[24] This was clearly an overstatement, since the first Married Woman's Property Act was passed in 1839.

[25] Browne, *Debates*, 264.

[26] Ibid., 260.

[27] Ibid., 267.

[28] Ibid., 262.

pretend, when a bill or execution is sent against his property, that it belongs to his wife — that it is her separate property."[29] Botts agreed arguing:

> The husband and wife together may enjoy my property and yours, and become possessed of thousands and thousands, leaving us beggars; and then, sir, under this system, while they are indebted to us together for that which they have jointly used and occupied, under the pretence [sic] of this clause, they may leave us penniless while they revel in luxury.[30]

Several of the proponents of the measure saw the provision from the perspective of aiding debtors. It was a means of saving families from ruin when the hazards of speculation bankrupted a family.[31] Tefft foresaw a chaotic economy in California that would be characterized by "wildness of speculation." As a means of preventing women and children from suffering from destitution because of the speculation of their husbands, Tefft wanted to offer them some security.[32] Returning to the question of woman's rights, Lippitt finally said that the provision was simply not necessary because a woman's separate property could be protected by an antenuptial agreement or marriage contract. The constitutional provision would not help those women who always yielded to their husbands — they would never use the provision. On the other hand, those women who wore the "breeches" in the family would only be stirred up by such a right and dissension would be increased, according to Lippitt.[33]

Jones admitted there were two kinds of women, those who wore the breeches and those who didn't, but he drew the opposite conclusion. To him it was the latter woman who needed the constitutional provision because she would never suggest a marriage contract. The assertive woman would protect her property anyway, and "it is to those who do not wear the breeches — it is to those gentle and confiding creatures who do not think of contracts — that the protection of the law is designed to be given."[34]

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[29] Ibid.
[30] Ibid., 268.
[31] Ibid., 259.
[32] Ibid., 258.
[33] Ibid., 261.
[34] Ibid., 267.

In sum, the arguments advanced at the convention by the proponents of separate property rights for women were as follows: that the traditional common law annihilated the rights of the married woman and that in this enlightened age her separate property should be protected; that a provision for separate property would save families from want and deprivation when husbands speculated unwisely; that the system of law of the native Californians should be continued so that their property rights would not be disrupted. But, above all, the debate had been transformed from the emphasis in the eastern states on legal reforms and creditors' concerns to that of a debate on the "woman question."

It is clear from the debate that delegates did not foresee the full impact of the sharing principles of community property. They considered community property under the civil law to be similar to separate property provisions enacted in the eastern states under the heading of married women's property acts.[35] The section was approved as written and became a part of the first Constitution of the state of California. That Constitution mandated that "laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband."[36] The delegates, intending to erase the disabilities of married women under the law, at least so far as their separate property was concerned, had gone much further toward companionate marriage by unwittingly adopting the radical principles of community property. The separate property reform was well ahead of the circumstances of the people then involved in divorce, and it would not be until the twentieth century that the promise of community property would come to fruition.

The first legislature followed the mandate of the Constitution by enacting a law on April 17, 1850 entitled, "An act defining the rights of husband and wife."[37] According to Orrin K. McMurray, this law was substantially taken from Texas law governing husband and wife, just as the constitutional provision concerning separate property had been taken from the Texas Constitution.[38] Succeeding legislatures amended this measure and

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35 Prager, "Community Property," 9.

36 Browne, *Debates*, 259–60.

37 *Laws of the State of California*, First Session, 1850, 254–55.

38 Orrin K. McMurray, "The Beginnings of the Community Property System in California and the Adoption of the Common Law," *California Law Review* 5 (June 1915): 377.

adopted other statutes that pertained to the married woman during the period at issue — 1849 to 1872. During this time amendments and additions overlaid a common law tradition upon the community property law in order to conform to the experience of what was now a predominantly American population with a common law heritage.[39]

The original act defined separate property as that property, both real and personal, owned by a spouse before marriage or obtained after marriage by gift or inheritance. Community property was simply defined as all property acquired after marriage by either husband or wife that was not separate property.

The husband was granted complete management of both the community property and the wife's separate property, though her separate property could not be sold without her consent in writing. In addition, she could be examined in private to determine if her signature had been obtained by coercion. If the wife believed that her husband was mismanaging her property she could go to court and ask the judge to appoint a trustee to manage the funds under the supervision of the court. This aspect of the law placed it in the category of the conservative reformed common law states. Under Mexican community property law, she would have had exclusive control of her separate property.[40]

In addition to the protection of the wife s separate property, eight out of twenty-three sections of the marriage law provided for the regulation of marriage contracts.[41] These provisions enabled wives to gain their husband's prenuptial consent to management and control of their own separate property.

While extensive protections for the wife's separate property were enacted, with regard to community property the husband had seemingly unlimited control. What then did community property mean to the married woman? The answer came in a California Supreme Court case in 1860. In *Van Maren v. Johnson*, Chief Justice Field characterized the wife's interest in the community property as a "mere expectancy." Ruling on whether the community property was liable for the husband's premarital debts, Field wrote,

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39 Prager, "Community Property," 34.

40 Ibid., 7.

41 *Laws of the State of California*, First Session, 1850, 254–55.

> Yet the common [community] property is not beyond the reach of the husband's creditors existing at the date of the marriage, and the reason is obvious; the title to that property rests in the husband. He can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor.[42]

In other words, the wife's half interest only materialized at the death of her spouse or at divorce. This lack of recognition of the sharing principles of community property is consistent with the constitutional convention's ignorance of the differences between common law and community property law. In reality, during the existence of the marriage, community property and the common law marital property systems were virtually indistinguishable.[43] If the "mere expectancy" could only be realized at death or divorce, what was the nature of the wife's interest in these two circumstances?

When a spouse died, one-half of the community property went to the survivor and the other half to the descendants of the deceased husband or wife. This was a radical departure from common law where the husband retained full rights to the property upon the death of the wife while the wife, upon the death of her husband, only received the use of one-third of the property until her death. In the 1850 act both parties were entirely equal. "The major problem with this approach was that it resulted in property, which those reared in the common law thought of as the husband's property, being passed on the wife's death to people other than the husband."[44] When this aspect of the law became clear — that men would lose half the community property at the death of their spouses — it was quickly challenged in the courts. In the case of *Panaud v. Jones*, the court ruled that the provision of the act that fixed such parity was unconstitutional. The Court stated, "It would be a startling doctrine to hold that, on the death of the wife, one half of the community property immediately vested in the children of the marriage, without reference to the payment of debts contracted by the husband for the benefit of the joint community."[45]

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42 Van Maren v. Johnson, 15 Cal. 308, 311 (1860).

43 Prager, "Community Property," 39.

44 Ibid., 36.

45 Panaud v. Jones, 1 Cal. 488, 517 (1851).

Despite the plain language of the statute, the court refused to recognize the liberalized marriage laws. It was too "startling" to those reared and educated in a common law tradition.

In 1861, the legislature revised the provision to conform to the court decision and specified that if the wife died, all the property went to the husband. If the husband died, one-half of the property went to the wife and the other half to his descendants after his debts had been paid. In addition, it was provided that the husband could will one-half of the community property while granting no such testamentary rights to the wife.[46] Very quickly, the more radical aspects of community property law were being brought into conformity with common law doctrine.

The disposition of the community property upon divorce also necessitated revision. The original act of 1850 provided for the equal division of the property in the event of divorce. This meant that, in terms of property at least, a form of no-fault divorce existed. In practice, it galled victims of adultery and extreme cruelty to divide their property equally. In 1857 the provision was amended to state that, in those two causes for divorce, the court could divide the property at its discretion on the basis of what it considered just.[47] Still, in all other cases the marital property was to be divided evenly. In common law jurisdictions at this time, a wife was entitled to nothing upon divorce. In this one circumstance — that of divorce — the radical nature of the sharing principles of community property law were inescapable.

The laws concerning the rights of married women to make wills already conformed to the common law. Wives could make wills according to the legislation of 1850, but only with the consent of their husbands, unless they had a marriage contract that provided differently, Wills made by unmarried women were revoked upon marriage and were not revived upon the death of the husband.[48] In 1866, the legislature liberalized the will statutes by providing that a married woman could dispose of her separate estate without the consent of her husband, "in like manner as a person under no disability may do."[49] This language, referring to the disability of being a married woman, was common law terminology.

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46 *Statutes of California*, Twelfth Session, 1861, 310–11.

47 *Laws of the State of California*, First Session, 1850, 254–55.

48 Ibid., 178–79.

49 *Statutes of California*, Sixteenth Session, 1866, 316–17.

Just as statutes regarding the making of wills by married women showed the influence of the common law so also did a statute passed in 1852 that was taken directly from the common law. This statute was called "An Act to authorize Married Women to transact business in their own name as Sole Traders." A reference to *femme sole* showed the common law heritage of this act. Under the common law, it had become customary to allow married women to provide for their own support in cases where husbands were absent or unable to work. Obviously, a woman operating under coverture, who could neither sue nor make contracts, could hardly enter into business. In order to make it possible for her to support her family, a special category was constructed that made a married woman single for certain purposes and under circumstances that were well regulated by law. According to the California act, a woman could designate herself as a sole trader by declaring her intention to carry on business in her own name before a notary public or other official and by recording that declaration in the County Recorder's office. In addition, she was required to publish in the newspaper her intention to enter into business. Once she had fulfilled those requirements, the debts and credits of the business were hers alone. That her earnings as a sole trader should be her separate property offended community property principles and showed the inevitable contradictions that appeared when combining aspects of common law with civil law.[50]

Moreover, according to the sole trader statute, a married woman could sue and be sued and make contracts, but her liability would extend only to her separate property. She could not invest more than five thousand dollars in her business unless she took an oath that sums over five thousand dollars did not come from her husband.[51] The intent of this legislation was to enable a woman with a dissolute or absent husband to support herself. It was the one statute that working-class women found useful. Legislators had feared that a husband might shield his property from liability by placing it under his wife's name under the sole trader enactment, and by 1862 they were convinced that fraud was common under the 1852 act. After that year a woman could be a sole trader only upon application to the district court where she had to explain why it was necessary for her to earn her

[50] Prager, "Community Property," 40.

[51] *Laws of the State of California*, Third Session, 1852, 102.

own livelihood. It also stated that "nothing contained in this Act shalt be deemed to authorize a married woman to carry on business in her own name, when the same is managed or superintended by her husband."[52] A year later the legislature made it a felony for a woman to fraudulently represent herself as a sole trader.[53] After an initially bold move, again the legislature retrenched.

Other enactments during the period allowed a married woman to execute powers of attorney and to insure her husband's life.[54] In 1870 an act was passed that protected her earnings from liability for the debts of her husband. If she were living apart from her husband her earnings were her separate property.[55] This was much less progressive than common law reforms of the time in eastern states that considered her earnings as her separate property even when she was still living with her husband.

The original work of the legislature defining the rights of husbands and wives conformed closely to the Spanish civil law and showed the legislature's desire to fulfill the assumed constitutional mandate to adopt the community property law. But as the law was tried and tested, modifications were made in a common law direction. The legislature and the courts little by little transformed the concept of community property law into little more than a reformed version of the common law. By the enactment of the Civil Code of 1872, the constitutional provision was defined as follows: "The term 'separate property' . . . is used in its common law sense, and by that law 'separate property' means an estate held, both in its use and in its title, for the exclusive benefit of the wife."[56] The writers of the code seemed unaware of the community property origins of the section. The true implications of the choice of community property at the constitutional convention of 1849 would not be manifest until well into the twentieth century except in the case of divorce, but in order for a divorce to take place it was first necessary to adopt a divorce law for California.

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52 *Statutes of California*, Thirteenth Session, 1862, 108–9.

53 *Statutes of California*, Fourteenth Session, 1863, Ch. 189.

54 *Laws of California*, Fourth Session, 1854; *Statutes of California*, Fourteenth Session, 1863, 165.

55 *Statutes of California*, Twentieth Session, 1870, 226.

56 *The Civil Code of the State of California* (Sacramento: T.A. Springer, State Printer, 1872), 54.

Most northeastern states by this period had divorce statutes that provided for judicial divorce on grounds of adultery, desertion, extreme cruelty, and failure to provide support. The only restrictive state north of the Mason–Dixon line was New York, which allowed for divorce only in cases of adultery.[57] Most of these laws had been passed soon after the Revolution, and divorce was well established long before the Civil War. Divorce became a part of the antebellum reform movement in the 1840s with the attempt to enlarge the number of grounds on which a divorce in New York could be obtained. According to Max Rheinstein, the long argument for increased grounds for divorce in New York turned upon the plight of women in marriage: "The possibility of divorce was urged as a means of protection for women abused by tyrannical, profligate or abusive husbands."[58] The reformers failed to liberalize the divorce law in New York.

When California legislators took up the question of divorce in 1851, a highly emotional struggle ensued. The Assembly sent a divorce bill to the Senate after a lengthy debate and a close vote of 17 ayes to 16 nays.[59] The bill was referred to a select committee of the Judiciary Committee, which in turn recommended that it be rejected because of concerns about its effect upon marriage and womanhood. The committee saw the marriage tie as sacred and "indissoluble except by death." More importantly, the committee believed that divorce would

> subvert the purity of woman and unloose the restraints which have accompanied and helped to construct a refined civilization. If marriage is only conventional, so is the chastity of woman, as is her modesty, her delicacy, her refinement, and if we desire that these qualities should remain unimpaired, it behooves us to look well to

[57] Nelson Manfred Blake, *The Road to Reno: A History of Divorce in the United States* (New York: The Macmillan Co., 1962), 50.

[58] Max Rheinstein, *Marriage Stability, Divorce, and the Law*, (Chicago: University of Chicago, 1972), 37–39.

[59] Theodore H. Hittell, *History of California*, 4 vols. (San Francisco: N. J. Stone and Co., 1897), 4 (1897), 68.

> the effect which our legislation will have in . . . relaxing those rules which have fixed a high standard of female excellence.[60]

Divorce was squarely faced as a woman's issue, and fears of woman's sexuality being "unloosed" were very much in evidence.

Finally, the committee believed that if divorce were allowed, people would enter into marriage impetuously, whereas if divorce were impossible, marriage would be approached cautiously.[61] Against this majority view, a minority of the committee issued a report supporting the divorce law. The members of this dissenting group argued that

> when by the fault of either of these parties . . . respect and affection has ceased — when joy has departed from the family circle; when discord, and outrage, and violence have usurped the very inner temple of the household; when virtue itself has deserted the family altar; when children are trained up, both by precept and example, to indulgence in hatred, passion, and vice — the marital obligations become a distressing burden to the parties themselves, and a festering curse upon the community.[62]

The minority report also saw divorce as an issue of woman's right to the pursuit of happiness. The report clearly showed that the members of this group saw the husband as the menace to married happiness:

> When a husband has forgot his duty to his God, his country, his family, and himself, and prostrates himself below the level of the brute — when he has become a miserable, wretched, loathsome drunkard, a living carcass, bringing naught but wretchedness and misery into the bosom of his family — he has violated every obligation of the marriage contract, and it becomes . . . the bounden duty of those who are watching over the interests of the innocent and the oppressed to interpose the shield of the law, and to rescue the suffering wife and children from their pitiable condition.
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> When he becomes a demon, and dares descend to the vile crime of cruelty to her whom he has sworn to cherish and protect,

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60 Senate Committee on the Judiciary, "Divorce Report, 1851," California State Archives, Sacramento, 3–4.

61 Ibid., 5.

62 *Journal of the Senate*, "Minority Report on Divorces," 1851, Appendix N, 667.

> it would scarcely seem possible that any one could be found who would seek to arrest the sword of justice, when wielded to sever such abominable ties.[63]

Never did the committee write similar arguments intimating that the wife might be at fault. Divorce was clearly seen by the writers of this report as a reform to ameliorate the condition of women. The legislators, by means of the divorce law, would save women from cruel, drunken husbands. The final paragraph of the report amply illustrated the paternalistic motives of the committee's minority. "It appears to your committee," they wrote, "that the law should throw its protecting arm around the unfortunate, and rescue them from the abyss into which one false step has plunged them."[64]

The key assumption of the law according to this minority report was that divorce was a matter of guilt and innocence. The guilty party committed a wrong against the innocent, aggrieved party. These senators believed that a woman needed protection against the cruel, bestial, besotted male. She would, of course, be a morally upright and sympathetic victim.

The full Senate voted on the bill, passed it by a vote of seven-to-three and sent it to the governor for signature. The governor signed the divorce bill into law March 26, 1851.[65] According to the act, the District Courts (today the Superior Courts) had exclusive jurisdiction over divorce. This followed the constitutional convention's determination to avoid legislative divorce and to turn the process over to the courts. The act also authorized divorce from bed and board (legal separation) as well as divorce from the bonds of matrimony. Annulment was not available.

Grounds for divorce were similar to most other states at the time. Divorces could be granted for impotence and marriage contracted by force or fraud. In addition, six other grounds were available under which to file suit. They were adultery, extreme cruelty, habitual intemperance, willful desertion, failure to support, and conviction of a felony.[66]

Adultery was hedged in statements that prevented the ground from being used in a manner not intended by the legislature. It was specified that the party guilty of adultery could not initiate the proceedings, nor could the

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[63] Ibid.

[64] Ibid.

[65] Hittell, *California*, 69.

[66] *Laws of the State of California*, Second Session, 1851, 186–87.

partners collude in the adultery, nor could adultery be considered a cause of divorce if the partners had lived and cohabited as man and wife after the victim's knowledge of the act of adultery. Adultery was considered a grave offense, but one that should not be manipulated so as to make divorce consensual.[67]

Extreme cruelty, habitual intemperance, willful desertion for three years, or neglect on the part of the husband to provide the common necessaries of life for three years, assuming he had the ability, and imprisonment for a felony were next in order.[68] No stipulation required that wives must provide housework or sexual services comparable to the duty of the husband to support. These grounds reflect the assumption that the husband's duty was to provide support for his wife. All of these grounds relate to his neglect of that duty. It is not surprising that more women than men should file for divorce because the divorce law was implicitly designed to serve the needs of women.

The financial obligations of the parties were defined in the divorce act and in the act concerning the relation of husbands and wives. In the latter statute, the community property provisions were spelled out — that the property should be divided equally at the dissolution of the marriage.[69] This was to be later (1857) amended regarding cases of adultery and extreme cruelty. The divorce act itself provided for orders for support of the wife and children.[70] One interesting omission in the law was a section pertaining to the custody of children. No law during this period specified rules regarding the custody of children.

The divorce law of California was liberal in the sense that divorce was definitely obtainable, but it was strict in the sense that cause had to be shown and proved to the satisfaction of the court and that proper corroboration and legal forms had to be complied with. This divorce law in its essentials — the concept of fault and the grounds enumerated — were to remain the divorce law of California until 1970. With the major legislation concerning marriage and divorce in place, some critics were sure that California was on its way to perdition and others thought that the laws in California with regard to women were exceedingly progressive. Those laws were grounded

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67 Ibid.

68 Ibid.

69 *Laws of the State of California*, First Session, 1850, 254–55.

70 *Laws of the State of California*, Second Session, 1851, 186–87.

solidly in the ideology of companionate marriage. Women would have their own economic base in marriage; husbands and wives would be able to fashion a marriage contract according to their own wishes devoid of patriarchal common law strictures. Should the marriage fail, divorce was the ultimate remedy and a divorce law the ultimate security.

The remainder of this dissertation will consider the reality of the law rather than the theory of the law. How was it interpreted and enforced? How did women make use of it? The economic aspects of the law will be closely examined since the major point of all the legislation heretofore discussed was to ease the economic thralldom of women. We will investigate the use women made of such laws as separate property provisions, sole trader statutes and marriage contracts. The community property provisions will also be tested against the outcome of divorce cases and each major ground of divorce — failure to provide, desertion, adultery, extreme cruelty and intemperance — will be examined to see how it functioned for women. If the women of early Sacramento who took advantage of these laws were predominantly middle-class then the legal scheme should be found appropriate to their needs. If, on the other hand, they were largely working-class, we are more likely to find a system of marital law ill-suited to the real lives of women in this urban society. To put all of this in context, however, we should first examine the environment and social structure of early Sacramento, and particularly the class origins of California's new citizens. We must identify them and the circumstances of their daily lives in order to correctly analyze their behavior under the new legal system.

* * *

CONCLUSION

Sacramento was the second largest city in California in the period from 1849–72. It was typical of small cities throughout the United States in size and occupational structure, but it was unique in its sex ratio (in which men greatly outnumbered women) and the hardships its residents suffered. In addition, immigrants had to survive a rigorous journey even to reach California. Because of these conditions, I submit that women who lived in Sacramento from 1849–72 were either women of unusual boldness and adventurousness or women who did not have the option of remaining in the East while their husbands sought fortunes in the West. The data suggests that the latter predominated.

Recent works on the history of women in the West have concluded that women of all classes, especially the working class, accepted the ideology of separate spheres for the sexes and that the companionate marriage was adopted by most working-class families. In contrast, I have shown that divorce records indicate that, for most working-class families, the ideal was impractical and unrealistic. The behavior of the divorcing women of the working class was the contrary of the ideal of domesticity, purity, and modesty. Their husbands, too, failed to exhibit sobriety, conscientiousness, and gentle concern for their spouses. Marriages lacked domestic equality,

child-centeredness and a separation of spheres. But did these failing marriages show only unrealized expectations of the ideal? I think not. I believe that the deportment of the divorcing couples represented the behavior of many more couples who did not pursue legal redress. The divorce records give us a window into the private lives of an inarticulate class that is rarely scrutinized. The lack of economic security evidenced by the propertylessness of this class intimates that, for them, middle-class values were a luxury too lofty to achieve. The following examples give credibility to this position.

Life in California did not readily allow exclusive domesticity for wives. In order to support families in the boom-and-bust atmosphere, it was frequently necessary for women to work for wages. Some husbands had bad luck, some were irresponsible, and others became addicted to liquor, gambling and prostitutes. All of these circumstances made it difficult to embrace the domestic ideal. Fidelity to marital vows was also an impossible standard in many cases, and living with a man who was not one's lawful husband was tolerated. In contrast, for middle-class couples, adultery was the stuff of tragedy and suicide. The contrast between the classes stands out in high relief in the divorce records. Middle-class prohibitions for women such as walking alone on the streets were not observed by working-class women who had no choice but to go out in the streets. Forbidding women the solace of alcohol was to deny them an important palliative against harsh circumstances.

Men who felt no qualms about telling their wives to support themselves, even by prostitution if necessary, appear commonly in the divorce documents. Physical and mental cruelty abounded as did husbands who drank and visited brothels. Marriages did not reflect domestic equality, nor did child-centeredness appear in the legal actions of the period. This evidence suggests that the manners and mores of the working class during this period were distinct from those of the middle class. While working-class standards of behavior have been inaccessible to historians, middle-class norms have been well documented. It is these working-class mores that the divorce records reveal. Though Robert Griswold draws the opposite conclusion from divorce records, it is possible that his thesis and mine are reconcilable. Perhaps the trickling down of middle-class mores did occur from 1850–1890 as he has stated, but it happened after 1870 when the bulk of the divorce cases he examined were litigated. The other possibility is that the opposite conclusions of our respective investigations are due to

the contrast between the rural population of San Mateo and Santa Clara counties and the urban population of Sacramento County.

In juxtaposition to the working-class pattern of family behavior that I have delineated, early political leaders formulated a family law system that articulated the companionate ideal of marriage. The family law that governed this early population was derived from the more advanced middle-class reform movements of the East. The law reflected the expectations of the middle class and was largely irrelevant to the working class, which did not share the same prospects. Reform of the disabilities of married women under the common law was heavily weighted toward the regulation of property-holding in marriage. Such reforms were truly of little import to the propertyless. At times separate property laws and sole trader laws functioned to allow couples to avoid creditors and bankruptcy, but such loopholes were soon closed. The anomaly of a working-class population governed by laws formulated by middle-class reformers is amply demonstrated in the legal records.

In addition to the class bias of the law, there was also a sex bias that appeared in the litigation. Laws formulated with a view to the improvement of women's status were sometimes turned upside down in the courtroom. Male judges, lawyers and juries had difficulty enforcing the acceptable conduct for husbands that the reformers had envisioned. It was difficult to persuade the legal authorities to find a man guilty of not supporting his wife, drinking too much, or treating his wife cruelly. It was too easy for the men in the legal system to empathize with the man who had difficulty providing for a family. It was even harder to discriminate between husbandly authority and cruelty unless a woman's life was seriously endangered, and it was impossible to distinguish excessive drinking from normal male drinking habits. On the contrary, it was easy to find a woman's drunkenness repulsive and to find her adultery reprehensible.

Domestic relations law encompasses an intersection of class and sex that provides historians with invaluable insights into the past. I have considered the legal and social setting of this germinal period in frontier history. Against that background, I have analyzed not the expectations but the actions and deeds of an urban population. For the working class, the laws represented an ideal that was an unattainable luxury. Marriages of working-class women consisted in large measure of hard work, domestic

inequality, and sometimes brutality and intemperance, but little of kindness, respect or concern. There was no soft and special place for these women.

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THE EVOLUTION OF WORKERS' COMPENSATION POLICY IN CALIFORNIA, 1911–1990

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This chapter from Glenn Shor's Ph.D. dissertation (Public Policy, University of California, Berkeley, 1990) is presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at https://dissexpress.proquest.com/search.html.

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Chapter 2

ORIGINS OF WORKERS' COMPENSATION IN CALIFORNIA

THE ROLE FOR HISTORY IN POLICY ANALYSIS

In this part of the dissertation, I discuss the historical evolution of workers' compensation[1] policy in California. Workers' compensation is a complex of problems. This leads to asking, if this institution is so problematic today, how did we first construct or devise it? An ability to identify the elements that first created the problem is an excellent starting point for any effort to ameliorate it.

The problems we see in today's workers' compensation system need to be analyzed through the lens of history. Armed with an understanding of the system's history, we can better explore the questions of what is possible to change. History allows us to question policy that we believe to be inevitable through examining thoroughly the factors that together led to what evolved.

Policy often starts with high hopes and ideals. Problems present real opportunities for achievement of progress, and improving how they are conceptualized and handled can lead to a reduction in the problem. But problems,

[1] Until 1974 in California, the system was known as "workmen's compensation."

especially ones that have become public, can also be extremely resistant to change. Legislative compromises, institutional rigidities, and administrative complexities often combine to limit the effect of policy goals.

Through an understanding of these limitations and how they affect outcomes, policy analysts can learn lessons from history. An historical focus allows analysts to look at an institution in tandem with looking at the conditions of its birth. The problems that the original institution was formed to deal with may be different than the problems existing today, yet the institution may be stuck in the past, attempting to handle new problems with old solutions. Studying history can help us see the evolution of problems as well as the programs set up to deal with them.

History can inform public policy analysis and decision making in many ways. History can help us analyze the past in ways that expand the range of choices available to decisionmakers. It can help give decisionmakers an accurate sense of what alternatives have previously surfaced. It can provide the context in which a present policy began, or conversely the context in which alternatives were not chosen. History can help to remove barriers to change by clarifying and exposing the political roles of the parties. Current policy gets some of its legitimacy from the notion that an institution or practice has always been with us and further that it will therefore always be with us. The study of history can demystify a subject by showing it was not always what it is now, and by showing that policy is fluid and thus not without hope for change. Thus, it is important to ask, "Did it have to turn out this way? How could it have been different?" Through a study of history as a comparative device, the pieces of the present system appear less determined and fixed. David Rothman and Stanton Wheeler note that historical inquiry challenges a source of legitimacy of current policy — the notion that since an institution or practice has always been with us that it must necessarily always be with us. Rather, by exposing the past record and showing that what goes into the present construct is not totally determined and fixed, the policymaker is freer to propose change. In their words, "an aura of inevitability gives way to sense of experimentation."[2]

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[2] David Rothman and Stanton Wheeler, eds., *Social History and Social Policy* (New York: Academic Press, 1981), 7.

We look at the past not to copy it but to search it for possibilities that may again be relevant. Knowing that some things may have been possible in the past does not necessarily mean they are possible now; however, it is more informative than thinking that whatever is not present today was never possible. With this purpose in mind, we begin with the origins of workers' compensation.

ORIGINS OF WORKERS' COMPENSATION

In the late 1800s and the early 1900s, occupational injury and illness increased dramatically as a result of massive industrialization. Realization of the problem and a policy response to it began in many nations of Europe, with Germany being the first country to establish a governmental program.

In the United States, it took longer for the problem to be perceived as a social issue deserving of government action. However, between the turn of the century and the First World War, a broad-based social movement arose in the United States generally, and California particularly, to achieve a safer and more healthful work environment.[3] The movement began with notions of employer liability as reflected in state laws defining negligence, and evolved into a complex structure of prevention and compensation with specified ways to ensure that the system operated efficiently — namely through regulated insurance that would spread the costs of work-related injury and illness.

This chapter describes the context in which workers' compensation was developed and then established in California in the early twentieth century The chapter includes an articulation of the process by which policymakers became convinced of the need for governmental intervention into the problem; the major debates regarding what kind of intervention would be most appropriate and effective; how the problem was addressed elsewhere, and how the policy evolution that took place in California responded to the perceived problem.

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[3] David Rosner and Gerald Markowitz, "The Early Movement for Occupational Safety and Health, 1900–1917," in Judith Walzer Leavitt and Ronald L. Numbers, eds., *Sickness and Health in America: Readings in the History of Medicine and Public Health* (Madison: University of Wisconsin Press, 1985), 467–82.

HISTORICAL CONTEXT

Industrialization in the United States at the turn of the twentieth century was characterized by changes in the organization of work that had profound impact on worker health and safety. Work was increasingly mechanized, with much of the nation's employment shifting to big factories with high speed machinery powered by belts and pulleys running off steam-driven generators. The development of the elevator allowed larger construction projects. The chemical age was also beginning, as was widespread use of electrical power.

The physical hazards of mechanized work were complicated by what the Somers call the "impersonal corporate organization of industry" which separated employers physically and socially from their workers. Finally, the widespread use of low-paid immigrant labor reduced attention to health and safety on the job.[4] In some Western states like California, beyond the hazards of factory work much of the workforce was engaged in agriculture and other inherently hazardous occupations related to resource exploitation, such as mining and logging, and railroad work.

The occupational injury rate in the United States probably peaked around 1907, the year the Interstate Commerce Commission reported 4,534 fatalities among railroad workers, and the federal Bureau of Mines counted 2,534 dead in bituminous mines.[5] Frederick Hoffman, statistician of the Prudential Life Insurance Company, estimated there were approximately 17,500 work-related accidental fatalities among the 26 million men gainfully employed in 1908.[6] Allegheny County, Pennsylvania, recorded a death a day among coal miners in 1909.[7] In 1911 John Mitchell, vice president of the American Federation of Labor cited a statistic of the American Institute of Social Service "that 536,165 workmen are killed or injured

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[4] Herman and Anne Somers, *Workmen's Compensation* (New York: John Wiley and Sons, Inc., 1954), 7.

[5] Interstate Commerce Commission, "Accident Bulletin 119" (1951), 112; U.S. Bureau of Mines, "Injury Experience in Coal Mining: 1948," Bulletin 509 (1952), 72.

[6] Frederick L. Hoffman, "Industrial Accidents," *Bulletin of the Bureau of Labor* 78 (September 1908), 418. Cited in Anthony Bale, "Compensation Crisis: The Value and Meaning of Work-Related Injuries and Illnesses in the United States, 1842–1932" Ph.D. diss., Brandeis University, 1987), 141.

[7] Crystal Eastman, *Work Accidents and the Law* (New York: Russell Sage Foundation, 1910).

every year in American industry." The statistician of the Prudential Life Insurance Company estimated the annual number of industrial accidents at 2 million.[8]

While industrial injury was clearly a leading cause of death and disability among working men and women, there was little being done by employers to address the problem. Incentives to reduce the trend were largely nonexistent. In the first decade of the century, safety requirements or standards were minimal in most industries. In California, the political strength of the railroads even insulated that industry from state government controls.[9] Legislation on factory inspections that did exist was vague and budgets for enforcement were meager. There were no state inspectors enforcing any minimum levels of worker protection, and no mechanisms in place allowing regulatory agencies to create standards.

Compounding the problem, workers received little if any compensation for job-related injury and illness. Workers trying to recover damages against their employers for injuries faced many obstacles under common law. The law provided that if a person were injured on the job due to employer negligence, he or she could sue for all damages. But, under the "master-servant" structure of the common law, employers had three strong defenses that effectively shielded them against most such claims: 1) that the worker had assumed the risks of the employment by accepting wages for it ("assumption of risk"); 2) that the injury was due to the negligence of another worker and thus not of the employer ("fellow servant doctrine"); and 3) that the worker himself had contributed to the act ("contributory negligence"). Given the lack of job security, it was also difficult to convince co-workers to testify on behalf of injured workers. These realities together meant that workers had extremely limited chances of achieving compensation for a job related injury.

Under these liability rules, although employers bore indirect costs such as retraining, down time, and damage to machinery caused by accidents, they were able to externalize much of the cost of industrial injury by not having to pay full compensation for a worker's losses, both economic and

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[8] John Mitchell, "Risks in Modem Industry: Burden of Industrial Accidents," *Annals of the American Academy of Political and Social Science* 38, no. 1 (July 1911): 76.

[9] See Walton Bean, *California: An Interpretive History* (New York: McGraw-Hill Book Co., 1968, 1973), especially Chapter 25.

social.[10] The lack of regulation, compounded by insignificant compensation, meant employers had few incentives to prevent occupational injury and illness.

After 1900, muckraking journalists began to expose the extent and effects of the injury problem to the general public, creating sympathy for workplace injury victims. Further, the problem was seen as an indication that the capitalist system was insensitive and unable to correct itself without outside intervention. Academic reformers connected with the Progressive movement saw the problem as contributing to the erosion of the social fabric. The Knights of Labor adopted the slogan, "An injury to one is the concern of all," and organized a campaign of strikes and boycotts over the issue of control of working conditions, including abolition of child labor and limitations on hours of work.[11] As injuries mounted and victims were left to the responsibility of family or community care to compensate their losses, it gradually became clear that employers got most of the benefits while undercompensated workers assumed most of the risks.

Crystal Eastman, lawyer, sociologist and later secretary of the New York State Employers' Liability commission, first focused the debate in the U.S. on two questions in her 1910 Russell Sage Foundation Report:[12] Who was responsible for work injuries, and what were the economic consequences? If workers were the cause of most injuries, then there would be little sympathy to their plight after injury. If employers were guilty of subjecting employees to excess danger, then they should be punished and made to pay damages. But if the work itself was dangerous and could not easily be made safer, then Eastman concluded that the loss should be distributed. "Equity

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[10] Under the economic theory of hazard pay, one would expect workers in more dangerous jobs to have higher pay, either before or after an injury to compensate for the extra risk. But dual labor market theorists posit the existence of two parallel labor markets, a primary sector of privileged workers one in which people work for high wages in relatively good working conditions, with job security and the administrative mechanisms to back up rules, and a secondary sector of poor working conditions, low wages, high turnover and frequent job changes by individuals. There is also very little mobility between the two tracks.

[11] Sidney Lens, *The Labor Wars: From the Molly MacGuires to the Sitdowns* (Garden City, N.Y.: Anchor Press, 1974), 65.

[12] Crystal Eastman, *Work Accidents and the Law* (New York: Russell Sage Foundation 1910), volume 6 of *The Pittsburgh Survey*, edited by Paul Kellogg.

demanded that the economic loss (or part of it) be transferred from the worker to the employer and, ultimately, to the consumer."[13]

In the interest of preserving the social fabric, analyses like Eastman's study of the Pennsylvania coal mining districts documented the costs of industrial injury, and showed that the burden of disability lay "directly, almost wholly, and in likelihood finally, upon the injured workmen and their dependents." In a majority of cases, she found, employers assumed no losses after injuries. Thus, to the employer, the economic costs of avoiding injury exceeded any economic benefits. In an earlier era, employers had direct contact with their workers and might have felt social and political benefits of assisting their injured "servants." But Eastman argued that with competitive pressures, the primary motivations were "economy and rapidity of production." Only by instituting a "uniform and inescapable penalty" against each accident, she believed, could "one economic motive be set off against another." Thus workers' compensation was perceived by one of its earliest American theoreticians as an injury tax.

Increasing outrage about industrial working conditions and increasing numbers of disabling work injuries had led to the enactment of safety requirements and regulations both at state and national levels. Violation of these statutes was presumed as employer negligence and created liability on their part. These laws also began to tighten loopholes. For example, under the "safety appliance" act affecting interstate railroad workers, the U.S. Supreme Court found that employers were under an absolute duty not only to install specified safety appliances, but also to keep them in working order.[14]

The employers' liability statutes, however, were based upon negligence or violation of statutory duty, and thus would not cover those accidents not traceable to legal fault. The alternative principle of workers' compensation was that industry in general should bear the financial burden of all industrial injuries, regardless of fault.

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[13] Roy Lubove, *The Struggle for Social Security* (Cambridge: Harvard University Press, 1968), 48.

[14] American Federation of Labor and The National Civic Federation (AFL-NCF), *Workmen's Compensation: Report Upon Operation of State Laws* (Washington, GPO, 1914), 14.

COMPENSATION IN THE UNITED STATES

Introduction

In the late 19th and early 20th centuries, there was increasing perception of the problem of work-related injury and illness in the United States and a gradual shift toward replacing laissez-faire individualism with a new ethic of social responsibility. The evolution of this early attempt at problem-solving went through several stages. First, beginning in the 1880s and 1890s, there was a focus on employer liability for these injuries and to what increased degree employers were to be responsible. Through legislative enactment and court decisions, employer defenses against negligence lawsuits were reduced. For example, some states made unlawful the practice of allowing workers to sign away their rights to compensation as a condition of employment. While these changes helped a few workers, the changes were inadequate for most.

Next, in the first decade of this century, reformers began systematically analyzing these employer liability systems and found numerous shortcomings. The laws were found to be based on anachronistic assumptions that were not consistent with realities of industrial society. (The narrow liability rulings assumed that workers had knowledge of all the hazards they were facing and could therefore assume the risks of the job knowing full well the tradeoff between risk and compensation. They assumed that if a worker had in any way contributed to the causation of an injury, the company was not to blame because if it were not for the fault of the worker, the accident would not have happened. The rulings further assumed unless the actual employer had caused the injury directly, the worker could not recover against him or her. Thus, employers would be off the hook if injuries had been caused by the acts of a "fellow servant" to the master.) Great majorities of injured workers received little if any compensation, and there was inconsistency between awards made. The systems were wasteful, slow, and inefficient. The systems of lawsuits inevitably aroused antagonism between labor and management. For most employers, the systems involved minimal financial incentive to practice prevention, and because they did, left many injured workers without compensation and created a burden on the public welfare.[15]

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[15] Herman Somers and Anne Somers, *Workmen's Compensation* (New York: John Wiley and Sons, 1954), 22–26.

Having generated public indignation against existing plans, the next step involved efforts to develop and pass state legislation that would address many of these inadequacies. Progressive reformers looked to the European experiences and settled on the concept of assessing liability without fault, and allocating the costs of industrial accidents to employers as legitimate costs of production. Early attempts in several states confronted state constitutional barriers, but beginning around 1911, most states found ways to adopt workers' compensation systems that could withstand legal challenges.

In designing the new compensation systems, most reformers chose to rely more on the English experience of private insurance companies, court administration, elective coverage, and no inherent injury prevention program, than on the German model of mutual insurance associations, collective responsibility of the industry with self-governing administration, mandatory coverage, and accident prevention and enforcement in the hands of the associations themselves.[16]

Employers' Liability

The English common law served as precedent for liability for negligence in the United States in the late nineteenth century. In some states, factory inspection laws of the 1880s and 1890s had provided a foot in the door for those seeking restitution for workplace injuries by specifying what conditions would constitute employer negligence. Juries had begun making awards that reflected their sympathy to the plight of the industrially disabled. The outcome, however, was generally not large monetary awards to injured workers, but rather more litigation and delay as employers and insurers appealed decisions.

Different strategies of intervention were posed. For example, some tried to curb or remove common law defenses through legislation. They contended that making employers responsible for the costs of workplace injuries would gradually drive down the number of injuries; when

[16] Theoretically, the merging of individual risks with others in the same trade led to a "direct and obvious interest of the employers in each trade to keep down the mutual premiums, and they can only do that by making their mills and factories safer working places." Durand Van Doren, *Workmen's Compensation* (New York: Moffat, Yard, and Co. for Department of Political Science, Williams College, 1918), 139.

prevention became less costly than compensation, it would be practiced. But the objective of making employers responsible conflicted with an objective of keeping firms solvent. Many small and medium size businesses would be unable to pay any significant settlements to an injured worker. Any series of injuries, intentional or accidental, could easily lead to financial ruin without some kind of insurance.

Thus, as the law for employer negligence broadened, so did the market for insurance. The first employers' liability policy in the U.S. was issued in 1886 by the London-based Employers' liability Assurance Corp. Ltd, and the first domestic company (Travelers Insurance Company) entered the market in 1889.[17] Nationwide, employers' liability insurance premiums rose from about $150,000 in 1887 to $14.7 million in 1904 to $35 million in 1912.[18]

Among employers, the liability policies were generally popular because they offered protection from employee lawsuits. Private insurance companies took over the defense of the claim from the first determination of whether there was employer negligence to the final judgement. If the injured employee filed a claim, insurers handled the settlement and claims adjustment process, generally pitting their lawyers against unrepresented plaintiffs. If the adjustment process did not resolve the claim, workers could take their case to court. If workers could prove employer negligence by a preponderance of the evidence, relying on their fellow workers for testimony, they could win a jury judgement against the employer. In the extremely improbable scenario that an injured worker won his or her case, and the judgment was not appealed, policyholders would be indemnified by the insurance carrier up to the policy limits.

By 1905, however, there was growing dissatisfaction with the system from all quarters. Some employers were dissatisfied with the liability system because insurance policies, which limited coverage to damages of $5,000 per person or $10,000 per accident, only covered some of their potential losses.[19] Juries were less reluctant to award damages against large

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[17] W. F. Moore, "Liability Insurance," *Annals of the American Academy of Political and Social Science* 26, no. 2 (September 1905): 499; Edson Lott, *Pioneers of American Liability Insurance* (New York: United States Casualty Company, 1938), 103, 35.

[18] Lubove, *Struggle for Social Security*, 51.

[19] Ibid., 52.

employers, and appellate courts increasingly were upholding the decisions.[20] The cost and efficiency of the policies were also being criticized; high commission fees and administrative overhead meant that private insurers paid losses amounting to 40 percent or less of premiums.[21]

From the employee's viewpoint, the ability to take one's employer to court, even under liberalized conditions, was of little value. The delays and uncertainty of cases usually weighed against the injured claimant, forcing the injured worker into a low settlement. Where studies were done, it was clear that while some workers were beginning to win large judgements, the vast majority of injured workers received inadequate compensation for their injuries.[22]

Employers' liability laws were a stopgap measure that eventually pleased no one. The next stage was to design a social welfare system under which the needs of injured workers could be balanced against the resources of business.

Movement for Social Welfare

Sensing an opportunity to use the public indignation and rising value of injured workers claims to mobilize for change, some reformers proposed a broad platform of social welfare initiatives, including universal health insurance, prohibition of child labor, and unemployment relief, as had already been done in many European nations. The American Association for Labor Legislation (AALL) was formed in 1906 by a small group of academic economists, including John Commons and Richard Ely of the University of Wisconsin, and Henry Seager of Columbia University. After factfinding trips to Europe, they became among the first Americans to lobby for introduction of a no-fault industrial injury compensation plan.

In 1908, during the Progressive-era administration of Theodore Roosevelt, the first limited workers' compensation act for federal civilian employees was passed. It applied only to federal civilian employees in hazardous occupations, excluded injuries due to the negligence or misconduct of the worker, and provided for the payment of full wages during

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[20] Bale, "Compensation Crisis," p. 127–28.

[21] Moore, "Liability Insurance."

[22] See discussion on "Financial Recoveries" in Bale, "Compensation Crisis," 166–76.

disability.[23] While the plan applied to relatively few workers, it put the federal government in the position of advocating compensation mechanisms, and allocated federal resources to the study, design, and dissemination of plans.

Throughout the first part of the century, many individual states had become aware of the social upheaval caused by work accidents and began to study workers' compensation schemes as methods of protecting the welfare of private sector workers injured on the job. Generally, attempts to legislate compensation systems applied to specific dangerous occupations, in which injuries were seen less as preventable accidents than simply as expected outcomes of the work. The fact of injury, rather than the determination of negligence, was the gateway to benefits. In some jurisdictions, the system of workers' compensation was an added, rather than a replacement remedy, as modeled on the British system. That is, injured workers would have the choice of whether to pursue a tort remedy for employer negligence, or choose limited benefits under compensation.

Constitutional Issues

The principles of liability without fault, and the nonexclusivity of remedy were to confront serious challenges of constitutionality. A short description of some state proposals illustrates this.

In Maryland, an act passed in 1902 applied to specified dangerous occupations, such as mining, quarrying, transportation, municipal, and construction work. It paid a death benefit of $1,000 to dependent families and was financed by a public Employers and Employees Cooperative Insurance Fund created with equal contributions from workers and employers. The law abolished the fellow servant doctrine and made the employer defense of contributory negligence only useful in reducing damages paid. The act was declared unconstitutional on the grounds that it deprived employers and employees of trial by jury, and that it vested judicial power in an executive office.

In Montana, a 1909 compensation act applying to coal mine employment was passed but then also struck down on Constitutional issues in 1911. The Act provided for a co-operative fund, with employers contributing based on their production, and employees on their gross earnings.

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[23] 35 U.S. Statutes at Large, 556; noted in Van Doren, *Workmen's Compensation*, 52.

The act set up a State-administered system, with fixed sums payable to injured persons in case of disability. While the law was obligatory in requiring contributions from both employers and workers, injured miners and their dependents could ignore the provisions of the compensation law and choose to sue for damages under common law. The Montana Supreme Court found that "in reserving to the employee his right to an action at law, the act denies to the mine operator the equal protection of the laws . . . . [A]fter full compliance with the terms of the act, the employer is not exonerated from liability. He may still be sued and compelled to pay damages in a proper case."[24] The court cited other state acts as examples of what it might accept. Washington State had traversed the "equal protection" problem by abolishing all actions for negligence, and the early Maryland act allowed employers to deduct settlement costs in lawsuits from required contributions to the compensation fund.[25]

Because of its economic prominence, the struggle over New York State's compensation law attracted national attention. The law, passed in 1910, was mandatory for eight especially dangerous occupations.[26] Under the act, employees were covered by a compensation act for accidents in which no negligence of the employer could be shown, while workers retained the right to sue for all accidents due to the fault or negligence of the employer.[27] The law struck down the "fellow-servant," "contributory negligence," and "assumption of risk" defenses, retained all existing liabilities based on negligence against the employer, and permitted the injured

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[24] Cunningham v. Northwestern Improvement Co., 44 Mont. 108, 119 Pac. 554, quoted in James Harrington Boyd. *Workmen's Compensation and Industrial Insurance Under Modem Conditions* (Indianapolis: Bobbs–Merrill Co., 1913), vol. 1, 141–42.

[25] Chapter 74, Session Laws, Washington, 1911; Laws of Maryland, 1910, chapter 153; quoted in Boyd, vol. 1, 143–44.

[26] Erection or demolition work involving iron or steel framework; operation of elevators or hoisting devices for conveyance of materials in iron or steel erection or demolition; work on scaffolds greater than twenty feet high; construction, operation, alteration or repair of wires or cables charged with electricity; work close to blasting or involving explosives; operation, construction or repair on railroads; construction of tunnels and subways; and all work carried out under compressed air. Boyd, *Workmen's Compensation and Industrial Insurance*, vol. 1, 84–85. The number of trades is counted as twelve in Harry Alvin Millis and Royal Ewert Montgomery, *Labor's Risks and Social Insurance* (New York: McGraw–Hill Book Company, 1938), 194.

[27] AFL/NCF, *Workmen's Compensation*, 15.

employee to elect *after an accident* which remedy — employers' liability or workers' compensation — he or she would pursue.

The legislative commission writing the bill feared the consequences of a continuing high injury rate without victim relief. "Not the least of the motives moving us is the hope that by these means a source of antagonism between employer and employed, pregnant with danger for the State, may be eliminated."[28] But, the New York statute had been modelled on the system adapted by the British parliament, and failed to consider what one commentator called the "rigidity" of a written constitution: It "may at times prove to be a hindrance to the march of progress." On March 24, 1911, the act was labelled "plainly revolutionary" and declared unconstitutional by the New York Court of Appeals.[29]

In its decision, the New York Court declared that making an employer liable to pay compensation for an injury due in no part to the fault or neglect of law by the employer violated due process. While supporting the "public good" theory of compensation, the Justices wrote that they could not justify it under the law. "Courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided. If such economic and sociological arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe." Without this protection from the Legislature, "the guarantees of the Constitution are a mere waste of words."[30]

In a disastrous coincidence, on the day following the appeals court declaration that the New York statute was unconstitutional, a major fire at the Triangle Shirtwaist Manufacturing Co. in New York City killed 145 of the 500 trapped employees.[31] Ironically, garment workers were not among the eight dangerous trades in the New York Act. The disaster fueled demands for better workplace safety and health regulation, and led to calls for universal compensation coverage

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[28] Ibid., 95.

[29] Ives v. South Buffalo Railway Company, 201 N.Y. 271, 94 N.E. 431.

[30] Ibid.; decision quoted in Boyd, Workmen's Compensation and Industrial Insurance, 104–5.

[31] Under the New York law, the garment trade was not considered a hazardous occupation, and workers were not covered under the workers' compensation act.

WORKERS' COMPENSATION IN CALIFORNIA

Context

In the first decade of the 1900s, California's state government was under the control of narrow private interests, primarily the Southern Pacific Railroad. The urban districts of the state were also confronted by an intense struggle between organized labor and organized business. By the end of the decade, however, a massive political upheaval put Republican Progressive reformers in control of the governor's chair and the Legislature. The Progressives' broad platform for change included measures to increase political democracy through direct action like the initiative, referendum and recall, and to mediate the struggles between labor and capital through social reform by instituting government measures that strengthened the state in relation to any private interest.

Conditions of Work in the Early 1900s

Under factory inspection laws enacted in 1889 and amended in 1901, 1903, and 1909, California employers of more than five workers were expected to keep their workplaces clean, with sufficient water-closets within reasonable access and separated for the sexes, and ventilated sufficiently so that the air would not become injurious to health.[32] Yet according to a report of the State Bureau of Labor Statistics in 1912, these provisions were "practically of no value." "Its provisions were too indefinite, there were no precise standards erected by law and the Bureau's authority to insist upon rigid regulations was limited."[33]

The Law of Employers' Liability Before 1911

Before 1911 in California, there had been no widespread agitation for compensation, except a statement in the founding platform of the new Progressive faction. Professor Ira Cross, the first secretary to the California Industrial Accident Board, wrote that prior to the Progressive administration, "the state had been rather backward in legislating for the welfare of

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[32] California Statutes 1889, 3. Amended Statutes 1901, 571; 1903, 16; and 1909, 43.

[33] Earl C. Crockett, "The History of California Labor Legislation, 1910–1930," Ph.D. diss., University of California, 1931), 195.

its workers."[34] Even the Aetna Insurance Company, a national leader in employers' liability insurance coverage, agreed that pre-1911 conditions in California "have been such as to permit remarkably few recoveries by injured employees, for damages arising out of injuries sustained within the course of their employment, as compared with many other States. This is clearly evidenced by the [premium] rates chargeable for Employers' Liability insurance by the various companies operating in California. The State as a whole has been rated lower than practically any other State in America."[35]

While backward, California had not been totally insulated from liberalizing its treatment of injured workers. The state's first legislative limitations on employers' common law defenses appeared in 1907. Employers were made responsible for the negligence of employees supervising injured workers, and the fellow servant doctrine could not be applied to employees working in different departments or on machines or appliances than the one on which the injured worker was working.[36] Furthermore, court decisions began to reduce the burden of proof for claimants by restricting the defenses. In 1910, the California Appellate Court declared that employers had the burden of proof in cases alleging contributory negligence. Decisions also clarified that once the employee gave notice to the employer that machinery might be defective and the employer promised to fix it, the employer thereby assumed the risk of injuries caused by the defect. The court found that a person could not assume risk for working in hazardous environment if they hadn't been warned, and that without evidence that a worker knew of dangers, there was no implied assumption of risk. Thus, employers were found to have an active responsibility to warn of hazards and instruct workers in safe work methods. Finally, the level of court awards began to have some impact. Employers faced $5,000 verdicts in one death case, one case of the loss of a right arm, and one case

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[34] Ira Cross, "Workmen's Compensation in California," *American Economic Review* 4 (June 1914): 454.

[35] Aetna Life Insurance Co. (Western Branch), *Employers' Liability and Workmen's Compensation in California: The Roseberry Law* (1911; 32 pages). The authors compare the "manual" rate for machine shops as twenty-five cents (per $100 payroll) in California compared to sixty cents in Illinois.

[36] Cal. Stats. 1907, 119–20.

of scalding burns from steam; each award was upheld as appropriate and not excessive.

The combination of broadened legislative and judicial decisions had begun to shift the balance in industrial injury cases even before the Progressives came to power in California in 1911. As employers began to feel the burden of industrial injuries, they also began to see the problem as a social issue worthy of government intervention.

The Progressives and Workers' Compensation in California

On May 21, 1907, a small group of "Lincoln Republicans" met in Los Angeles to announce the objective of "emancipating" the state Republican Party "from domination by the Political Bureau of the Southern Pacific Railroad Company and allied interests." The reform platform of what was to become the California Progressives included: a direct primary; initiative, referendum and recall; effective regulation of railroad tariffs and other utility rates; outlawing racetrack gambling; conservation of forests; women's suffrage; a minimum wage for women; and a workers' compensation act for California.[37] Just over three years later, the Progressives won the Governor's office and were given the chance to set policy in many of these areas.

The middle-class California Progressives viewed human nature through "an Emersonian optimism about man's innate capacity for good, with strong faith in the political abilities of 'the people.' "[38] But this group of "small independent free enterprisers and professional men"[39] were distrustful and critical of the power of organized capital and organized labor. They "wanted to preserve the fundamental pattern of Twentieth Century industrial society at the same time [they] sought to blot out the rising clash of economic groups," but to do it all without profound economic reform.[40] The workers' compensation ideal closely followed this philosophy.

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[37] Bean, *California: An Interpretive History*, 323.

[38] Telegram. Harris Weinstock to Governor Hiram Johnson, October 28, 1911; in Hiram Johnson papers (Bancroft Library, University of California).

[39] There is an entry for "woman's suffrage" but none for "women" in the index of George Mowry's respected work on the California Progressives. I am unaware of any women in leadership positions of the Progressives during in California during the Johnson era.

[40] Bean, *California: An Interpretive History*, 327.

In December 1910, after being elected on a platform supporting "an Employers' Liability act which shall put on industry the charges of its risks to human life and limb along the lines recommended by Theodore Roosevelt," California Governor-elect Hiram Johnson appointed a committee "to investigate and report upon the need of considering human beings as more entitled to help than broken machines."[41] In his 1911 inaugural address, the governor said that "in this State all parties stand committed to a just and adequate law whereby the risk of the employment shall be placed not upon the employee alone, but upon the employment itself. Some new legal questions will be required to be solved in this connection, and the fellow servant now in vogue in this State will probably be abrogated and the doctrine of contributory negligence abridged."[42]

One of the measures intended to reduce the increasing tensions between the laboring and employing classes was a system of workers' compensation with the primary goals of adequately compensating workers for injuries at work and creating incentives to prevent further injuries. The reformers assigned to design and implement California's workers' compensation system had the advantage of coming to power at a time when the public was ready for reform, and when others around the country had already done much of the groundwork and analysis of alternative arrangements, and had tested arrangements in the courts. Given a mandate and the opportunity to assess already extensive experiences elsewhere, the California Progressives were able to put together a system that could withstand Constitutional challenges, be relevant to the needs of both employers and workers, and follow the lead of Progressive leaders elsewhere in the nation.

The program that emerged in California had four major goals. It was meant to: 1) Create a mixed system of social regulation and economic incentives to reduce hazards at work and prevent injuries on the job; 2) Provide injured workers and their families with a living wage during times of disability and cover their medical and rehabilitative expenses; 3) Create a model mixed system of public and private insurance to efficiently and effectively raise the capital needed for compensation, and distribute the

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[41] Franklin Hichborn, *The Story of the California Legislature of 1911* (San Francisco: Press of the James H. Barry Company, 1911), 236. The commission was chaired by Meyer Lissner, a future commissioner of the Industrial Accident Commission.

[42] Address quoted in full in Hichborn, *Story of the California Legislature of 1911*, iii.

benefits in a timely and nonadversarial manner; 4) Establish and maintain a management information system to continually evaluate the nature of the problem of occupational injury and its economic consequences, and to assess the progress toward meeting the other three goals.

The Roseberry Employers' Liability Act

When the 1911 session of the Legislature convened, there was general agreement that the state's liability law needed liberalization, but no consensus over specific changes. Organized labor and their Progressive supporters from the San Francisco delegation to the Legislature wanted a liability law that would abolish the "assumption of risk," "fellow servant," and "contributory negligence" defenses. More conservative Progressive legislators from Los Angeles and mid-state, however, hesitated over abrogating the employers' common law defenses.[43] In the context of important national events and a sense that the state constitution could not support radical change, a compromise bill written by Senator Louis H. Roseberry (Santa Barbara) and supported by the governor gave employers the choice of remaining under common law, or of choosing to be covered under the new compensation principle.[44]

The first part of the Roseberry bill covered employers wishing to remain under a liability system. The bill abrogated the defenses of assumed risk and the fellow servant rule, provisions that even conservative legislators

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[43] George E. Mowry, *The California Progressives* (Berkeley and Los Angeles: University of California Press, 1951; Chicago: Encounter Paperbacks, 1963), 145.

[44] The bill was actually the third draft of a pending measure in Wisconsin. Ex-President Theodore Roosevelt's 1910 Labor Day address had mentioned the Wisconsin study that preceded the bill:

> The United States still proceeds on an outworn and curiously improper principle, in accordance with which it has too often been held by the courts that the frightful burden of the accident shall be borne in its entirety by the very person least able to bear it. Fortunately, in a number of states — in Wisconsin and in New York, for instance — these defects in our industrial life are either being remedied or else are being made a subject of intelligent study, with a view to their remedy.

Quoted in Hichborn, *The Story of the California Legislature of 1911*, xv. Harris Weinstock had given the governor a copy of the New York state statute, later declared unconstitutional, in December 1910, but Roseberry took the lead on the issue in the Legislature and no variations on the New York law were introduced.

could not justify in the modern context of work. But, in early versions of the bill, the doctrine of "contributory negligence" was left intact; thus, if the injured employee could be shown to have been even slightly negligent leading to the injury, the employer would be absolved of all responsibility. If not eliminated completely, labor at least wanted a shift to a system of comparative negligence which would let a jury decide the balance of fault in the case and determine the level of benefits appropriately.[45] In the final compromise, workers could recover damages under the liability section of the bill if their contributory negligence was minor, relative to that of the employer.

By limiting employers' defenses against liability lawsuits, Roseberry hoped to encourage participation in the voluntary system of workers' (then workmen's) compensation. Employers could relieve themselves from liability if they elected a no-fault compensation system and agreed to pay a fixed schedule of benefits in injury cases. As a voluntary act in which employees would, in most cases, choose their remedy before injuries took place, the bill hoped to sidestep the constitutional barriers that had befallen Montana and would negate New York's system.

While the California Legislature was considering the measure, New York State's mandatory act was declared unconstitutional, giving labor pause in pushing for a compulsory statute. Then, coincidentally, a series of industrial tragedies shocked the country. On March 25, 146 workers were trapped and killed in the Triangle Factory Fire in New York. During the first week of April, more than 75 miners died in a mine cave-in in Scranton, Pennsylvania and 150 convicts were killed in a coal mine explosion in Alabama.[46] Florence Kelly, general secretary of the National Consumers League, while cautious about implying a cause-and-effect character of the events, noted that in elections during the two-week period prior to April 7, twenty-six Socialist mayors were elected in the U.S.[47] On April 8,

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[45] California State Federation of Labor, *Proceedings — 12th Annual Convention* (Oct. 2–6, 1911), 94.

[46] The tragedies occurred while the American Academy of Political and Social Science was holding a conference on "Risks in Modern Industry" in Philadelphia. See speech of John Mitchell, "Burden of Industrial Accidents," *Annals of the American Academy of Political and Social Science* 38, no. 1 (July 1911): 77.

[47] Florence Kelly, "Risks in Modern Industry: Our Lack of Statistics," *Annals of the American Academy of Political and Social Science* 38, no. 1 (July 1911): 94–97.

seventeen days after the Triangle fire, the Roseberry Act was accepted by labor as a practical interim solution and approved unanimously in the Senate and Assembly.

Benefits Under the Compensation Alternative

The benefit package for those covered under the compensation system included both employer-paid medical care and adequate levels of lost income indemnification. Employers were required to furnish "such medical and surgical treatment, medicines, medical and surgical supplies, [and] crutches and apparatus, as may be reasonably required at the time of the injury and thereafter during the disability." Medical benefits were, however, subject to a cutoff after ninety days or $100. Income replacement benefits for most industrial accident victims were limited to approximately $21 per week, with total aggregate benefits in any single injury not exceeding three times the average annual earnings of the employee or $5,000, whichever was lower.[48] (The average weekly wage at the time was about $18.) As an acknowledgement that disability often meant more than just lost wages and included its own extra costs, the act provided that totally incapacitated injured workers requiring the services of a nurse would receive weekly benefits of 100 percent of lost earnings, rather than the 65 percent awarded to all others.

Exclusive Remedy

In most cases, workers covered under the compensation statute traded off their rights to sue employers for the expectation of quick, sure and adequate benefits. Yet, following the lead of British compensation legislation, the Roseberry Act recognized an additional remedy was appropriate "when the injury was caused by the personal gross negligence or willful personal misconduct of the employer, or by reason of his violation of any statute designed for the protection of employees from bodily injury." Under such egregious circumstances, injured workers had the option to either claim compensation under the act, or "maintain an action for damages therefor."[49]

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[48] Note by Industrial Accident Board (IAB) to accompany Section 1, Chapter 399, Laws of California, 1911, hereafter Roseberry Act.

[49] Roseberry Act, Sections 12, 9, 8(1). As a comparison, the act provided for an annual salary for IAB members of $3,600, or about $72 per week.

Coverage

As a voluntary measure, the Roseberry Act applied only to those employers who elected coverage, and only if the employees at the workplace affirmed the decision. While initial hopes were that the voluntary system of liability without fault would attract significant numbers of employers, experience proved otherwise.

To encourage their enrollment, employers were told that the limited benefits of the compensation option offered them economic security and certainty, in contrast to the volatile liability system where awards were exceeding insurance coverage limits.[50] A New York State commission had found that 2.1 percent of fatal industrial injury cases had exceeded the insurance limit, and that larger sums still were being paid in cases of permanent disability. There had been a $92,000 liability judgement against a California employer. "These instances plainly show that insurance under the old system of employers' liability is wholly inadequate, and that only through compensation, with its limited risks, can the employer be fully protected."[51]

Despite these inducements, the voluntary law failed to catch on. The compensation provision only enrolled a small percentage of workers. The Roseberry Act became effective in September 1911, but by December 1912 only about 45,000 of the 750,000 workers in the state came under its coverage, and most of these worked for large employers.[52] There had been no provisions in the law to regulate insurance premium rates and many employers found the private insurers' rates for workers' compensation coverage to be prohibitive. Premiums for employers' liability coverage averaged $1.71 per $100 payroll, while premiums for workers' compensation were triple that amount. Many of the large employers who did enroll in the compensation plan did so after self-insuring their risk, and others sought

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[50] "In determining whether or not he will elect compensation, a prudent employer will take into consideration his increased liability, the present tendency of the courts and juries to allow heavy damages for personal injuries, and the fact that the ordinary indemnity insurance is limited to $5,000 for a single injury, and to $10,000 where more than one person is hurt through a single accident."

[51] Hichborn, *Story of the California Legislature of 1911*, 236–45.

[52] While the average workplace in 1912 employed less than four workers, employers electing coverage under the Roseberry Act had, on average, 100 workers.

to set up mutual inter-insurance funds.[53] In any event, the disappointing levels of voluntary signup were due in part to exorbitant and unregulated insurance rates, and in part to fear of the unknown and ignorance about the new program.

The Industrial Accident Board

An important feature of the statute was the introduction of a new principle of administration in the form of an Industrial Accident Board (IAB) independent of the courts, with power to adjudicate any disputes or controversies. It was given no other official duties, but the three Progressive activist members appointed by the governor saw the IAB's role as broader than simply judging cases. These Progressives believed in professional administration, divorced from politics and run by specialists. Arthur Judson (A. J.) Pillsbury, Will J. French, and Willis Morrison each took on informal representation of a separate constituency — the public interest, organized labor, and employer — and they used the IAB as on-the-job training for their specialties.

Progressives generally believed that problems of government could be addressed intellectually; by collecting data, studying an issue and thinking it through, one could come to the right solutions.[54] In 1912, during a special legislative session, Senator Roseberry sought to strengthen the IAB's power by carrying legislation requiring employer recordkeeping on injuries and giving the IAB the authority to gather and disseminate statistical information regarding industrial accidents and their probable causes, and to investigate methods and devices for the prevention of accidents. It also authorized study of alternative systems of industrial accident insurance. Small employers and farmers, growers, and poultry raisers opposed the IAB's authority to enforce these statutes, and after a long fight, the Legislature exempted many of these farm and small employers from having to comply with the act. Nevertheless, the Board went to work gathering data wherever it was available.

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[53] Industrial Accident Board of California, "First Report to Governor — September 1, 1911 to December 31, 1912" (hereafter IAB, 1912).

[54] See discussion of the importance of governmental organization in Richard Hofstadter, *The Age of Reform* (New York: Vintage Books, 1955), 257–71.

Economic Outcomes of Disability

The statistics generated by the new law helped to define the problem of industrial injury and risks of work, and more importantly, to highlight the differences in economic outcomes between those covered under the employers' liability and those opting for workers' compensation. The data showed that those whose disabilities occurred while under workers' compensation were more likely to receive compensation without a dispute and lengthy court battle, and got substantially larger settlements as well.

According to the IAB, during 1912, 10,385 Californians suffered disability on the job, with 412 injuries resulting in death. Of 9,627 that were disabled for more than one week, 4,311 (45 percent) received financial assistance from their employers; 912 of the injured workers were in employments covered under the compensation provision of the Roseberry Act, and were paid according to the schedule of benefits. Only 10 of the 912 required a hearing before the IAB. Of 8,715 cases under the existing liability system, however, only 3,399 were able to negotiate settlements, and these were at low levels. "Settlements were made for losses of thumbs at the rate of $66.94 per thumb, index fingers went at $114.02, left arms for average of $586.66 and right arms for $1,577.65. Feet brought $624.73 each and eyes brought $649.09."[55] Settlements in death claims averaged $989; the average age of those killed was 33 years and the average wage was $19 per week. The IAB publicized the outrageously low sums that were the outcomes of liability law and asked: "Is California so rich in men that it can afford to sell them to insurance companies, in their very prime of life and heyday of earning power, at less than $1,000 per head." They estimated that only 10 percent of the total wage loss of injured persons was borne by employers and insurance carriers under the liability provisions, with the rest "thrown upon those least able to bear the burden, the injured workers and their families."[56]

As had the German autocracy in 1884, and the New York commission in 1910, the Progressives perceived the industrial injury problem as creating conflict that threatened the "social fabric." "When the State enacts a

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[55] Letter from Harris Weinstock to Hiram Johnson, February 13, 1910. In Harris Weinstock papers, C-B 581, Part 1 (Bancroft Library, University of California, Berkeley).

[56] IAB, "First Report to Governor," 4.

compensation law, it does so, not primarily to establish justice between an employer and his injured employee, but to safeguard itself against a prolific source of poverty which may become a burden to the State." They declared that "industrial accident ranks third among the causes of poverty in the world" and that there was an obligation to attack it at its roots. They argued that if tort remedies only paid 10 percent of lost wages, the State would be left with a significant problem of "pauperism" that could not be handled by any private insurance scheme.[57]

The Next Round: Proposals for a Mandatory Compensation Act

The Roseberry Act had been passed as an interim measure as the Progressives, supported by organized labor, recognized that defects in the State Constitution made a strong mandatory act impossible. They accepted the need to pass a Constitutional amendment before attempting a more comprehensive system.[58] Senate Constitutional Amendment 32 created that authorization.[59] Even with its limited success, however, the implementation of the Roseberry Act could be seen as a dry run for a more comprehensive statute. The act provided experience in administration, time for investigation and analysis of other states' and nations' policies toward injured workers, and data for policy analysis activities to design and evaluate alternatives.

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[57] 22 million American workers held industrial accident insurance policies, but their "only purpose is to furnish the holder with his narrow six feet of earth outside the Potter's field, and a decent funeral without passing the hat." One funeral in every ten was a pauper funeral.

[58] California State Federation of Labor, *Proceedings — 12th Annual Convention* (Oct. 2–6, 1911), 94.

[59] The complete text of Section 21, Article XX, as quoted by Hichborn, *Story of the California Legislature of 1911*, 244n280 reads:

> The Legislature may by appropriate legislation create and enforce a liability on the part of all employers compensate their employees for any injury incurred by the said employees in the course of their employment irrespective of the fault of either party. The Legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, by an industrial accident board, and by the courts, or either of these agencies, anything in this Constitution to the contrary notwithstanding.

In November 1911, the voters of the state approved the amendment 147,567 to 65,255. Industrial Accident Board, "Program for Workmen's Compensation Legislation" (1913), 1.

The Workmen's Compensation, Insurance and Safety Act of 1913

To weaken support for employers' liability insurance in California, the IAB published reports both to shock the public with stories of the low indemnity payments paid under liability, and to cajole employers with assurances of improved labor-management relations if they adopted compensation coverage. While labor and employers took little initiative on their own, the IAB proposed a new type of compensation law, broad in scope and addressing not only the aftereffects of injuries, but a system of state regulation of insurance and industrial hazards as well, all concentrated in a single professionally administered commission.

Their proposal for an integrated system of compensation, insurance, and safety law was introduced by Senator Boynton in 1913.[60] Under the proposal, the Industrial Accident Commissioners would: 1) design and administer a statistical system designed to quantify the problem and structure of the problem of industrial injury; 2) coordinate a safety department through promulgating rules ("safety orders"), and assessing penalties for noncompliance; 3) provide oversight and direction to a state-run public enterprise insurance company; and 4) sit as judge and jury in the adjudication of disputed work injury cases. The proposals laid out by the Industrial Accident Board in 1913 still constitute the basis for California's system of injury compensation and regulation.

Benefits

The Progressives saw workers' compensation as a first step toward a comprehensive social welfare system, and always expected that health and medical care insurance was soon to come. Thus, their suggestion to remove the $100 medical care coverage maximum of the Roseberry Act, and furnish "full medical and surgical relief" is not out of line. Cost and utilization containment was taken care of by giving control of medical care to the employer or insurer, by restricting the pool of physicians eligible to provide service, and by instituting a fee schedule for participating physicians.

Under the Roseberry Act, injuries lasting at least one week were compensable, but as a move to shift benefits to more severely disabled workers, the IAB proposed lengthening the "waiting period" for temporary total

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[60] California Legislature, Senate Bill 905, Session of 1913.

disability benefits to 2 weeks, in effect reducing the number of compensable injuries by 30–36 percent.[61] Organized labor opposed the lengthening of the waiting period but accepted the rationale, hoping that in time it would be remedied in their favor.[62] The provision of the 1911 Act that gave those requiring full-time nursing care a higher level of replacement income was dropped without apparent opposition.

Insuring the Risk

As the IAB proposal was being formulated, the insurance market seemed untrustworthy. In California, many insurers had gone bankrupt in the aftermath of the San Francisco earthquake and fire of 1906. Those insurers that survived were shielded from Federal anti-trust action, and through rate-fixing cartels could force up prices, especially in a new market with little claims experience.[63] Insurers had shown this propensity with the high rates charged for compensation coverage under the 1911 act. Policymakers were faced with the knowledge that mandating compensation would require stricter insurance regulation or other means of assuring an adequate market with both available and affordable insurance coverage.

In an early exercise in policy analysis, the IAB studied various systems of insurance oversight and decided to attempt regulation through public enterprise competition.[64] Seeing private insurers as an obstacle to successful

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[61] The higher figure came from estimates prepared for the National Civic Federation by the IAC, and covered the first ten months of 1913. AFL/NCF Report (1914), 198.

[62] Paul Scharrenberg (secretary, California State Federation of Labor), "Labor Legislation," in *Labor Clarion*, Feb. 21, 1913, 5.

[63] Insurers maintained their cartels by subscribing to and adopting "advisory" rates of insurance premium rating bureaus. Insurers were protected from federal antitrust action before 1944 by Supreme Court rulings that insurance was not interstate commerce and thus not subject to federal antitrust law. After 1944, antitrust exemption was granted through the McCarran-Ferguson Act.

[64] Industrial Accident Board of California, "Program for Workmen's Compensation Legislation, 1913." The board laid out four policy alternatives in the area of insurance regulation: 1) the *status quo* — leaving the question of rate setting to the competition of the private marketplace. According to their research, such a policy existed in Great Britain, Russia, Spain and Greece but the members stated that it resulted in extortionate rates or "a savagery of competition" that drove hard bargains with injured persons or threatened the carriers' solvency. 2) *Compulsory state insurance* had been seriously

implementation of the compensation law, the Board cited examples in Wisconsin, where a mutual insurance association was organized under the laws of the state, and in Michigan, where a "tentative, optional" state insurance fund was set up. The Board concluded that competition with private insurance carriers could equalize rates for compensation and liability coverage; a state-run insurance carrier would stand "ready to accept all risks brought to it at what it costs the State to do the business, leaving the field free to other responsible carriers to operate with so much of profit as they may be able to make by doing the business more efficiently and at less cost than the State can do it."[65] The IAB stressed that "the State should invade the sphere of private enterprise" in order to secure "just rates for employers and just treatment for injured workers."

The proposed State Compensation Insurance Fund (SCIF) would be assisted by a State Workmen's Compensation Insurance Rating Bureau (WCIRB) to provide advisory rates, with the intent "that the insurance rates shall be the most effective police force for making places of employment safe." Instead of a large bureaucracy, SCIF would be small, with an annual budget of $68,000, and a 25-person staff. The WCIRB would operate with little additional staff (four clerks and two stenographers) on a $12,500 annual budget.

Safety

The third element of the IAB proposal gave the Industrial Accident Commission power to make and enforce safety rules and regulations, to prescribe safety devices, to fix safety standards, and to order the reporting of industrial accidents. Such safety orders would be subject to review by the

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attempted in Norway and Washington state, but the IAB said neither of these systems included coverage of all workers, and to do so would require "an army of officials" to administer. "To make a state monopoly inclusive of all employments would create a bureaucracy of intolerable proportions and high cost, while not to include under the protection of a compensation law all who labor is to fail of safeguarding the state from poverty due to industrial accident." 3) *State Control of Insurance Carriers* was dismissed by the IAB as "unworkable," a scheme which was abandoned by those jurisdictions that had attempted it. Instead, the IAB proposed 4) *Competitive State Insurance*, an idea borrowed from New Zealand (where Board member Will French was born) and other states of continental Europe.

[65] IAB, "First Report to Governor," 1912, 14.

courts. In addition, the IAB sought funding to set up safety museums in San Francisco and Los Angeles, "in order to show employers how to make their employments safe and make then show employees how and why they must help in saving themselves from harm." Standards were intended to have the force of law, "without being as inflexible and difficult to change and adapt to experience as legislative enactments necessarily might be."[66] With unbridled optimism, the Board expected that by instituting safety procedures, the injury rate could be cut in half.

Interest Group Response

Private Insurance Carriers. The proposed State Insurance Fund brought out significant opposition to the IAB plan, led by insurance companies wishing to protect themselves against attacks on their growing and profitable industrial insurance business. Premiums for employers' liability insurance nearly quintupled from 1906 to 1913, and paid losses never exceeded 50 percent of premiums collected.[67]

Large insurers tried to scuttle the State Insurance idea before it had a chance to prevail. Soon after the release of the IAB proposal, the Aetna Life Insurance Company (the state's second largest liability insurer in 1912) sent letters to agents and other insurers urging vigorous opposition to the measures. "If you are selling casualty insurance, do you intend to sit idly by and allow the State to establish a business which eventually will abolish this source of income for you?"[68] Aetna raised the specter that successful encroachment in the compensation area would eventually lead to State insurance in all other areas as well. Aetna predicted that if the 100,000 people "interested" in the insurance business in California were to unite,

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[66] Industrial Accident Board of California, "Program for Workmen's Compensation Legislation, 1913."

[67] Premiums had grown from $500,000 in 1906 to $1.27 million in 1911, and passed the $2 million mark the next year, rising to $2.3 million in 1913. Paid losses fluctuated between 23 and 34 percent of premiums between 1906 and 1912, but jumped to nearly 48 percent of premiums in 1913 as more liability claims were won under the liberalized measures of the Roseberry Act. In 1906, fourteen companies wrote liability coverage in California, with only one company, Pacific Coast Casualty, headquartered in the state. The number of companies doubled by 1912, with all but two located outside California. Reports of Insurance Commissioner of California, 1906–1913.

[68] Quoted in San Francisco Labor Council, *Labor Clarion*, February 21, 1913, 8.

that state insurance could be defeated. Insurer representatives sought to ally themselves with employers by charging that the employees' interest in the workers' compensation area was to see "how much he can get out of the industries of California."[69]

Employers Response. Perhaps spurred by the accident insurers, the California Employers Federation was set up in early 1913 by large employer to "pull the teeth" from the compensation act and other labor bills pending in the Legislature.[70] Among other amendments to the compensation provision, the employers proposed that indemnity benefits pay 50 percent rather than 65 percent of lost wages. Several conservative newspapers around the state kept up an attack on the Boynton bill after its introduction. The San Diego Union called it "a sop to the Labor Unions."[71] The Los Angeles Times said the bill would "paralyze production in California and perpetuate the stranglehold of the State political machine."[72] And the *San Francisco Chronicle* criticized the plan as a dangerous scheme to centralize power in the proposed Industrial Accident Commission.

Labor Response. Labor was extremely pleased by several parts of the IAB proposal, particularly those concerning insurance and safety regulation. In arguing for an alternative source of compensation insurance coverage, the San Francisco Labor Council charged that the private casualty insurers had dictated employment practices for employers, frequently calling upon them "to discharge workers who refused to allow the insurance adjusters to defraud them out of compensation." The inclusion of a state fund would allow employers to take out insurance at fair rates. The establishment of the safety department, moreover, would be "tantamount to the passage of hundreds of minor safety acts," enabling the IAC "to regulate industries as effectually as the Railroad Commission regulates public utilities."[73] For this and other reasons, organized labor, represented by the State Federation of Labor, saw the Boynton bill as the "greatest achievement" of the 1913 session.

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69 Quoted in *Labor Clarion*, March 28, 1913, 10.

70 *Labor Clarion*, March 28, 1913, 10.

71 *Labor Clarion*, May 14, 1913.

72 *Labor Clarion*, April 17, 1913.

73 Paul Scharrenberg, "Labor View of Legislature," *Labor Clarion*, May 16, 1913, 4.

The Legislative Process

The IAB Proposal (Senate Bill 905) was introduced by Senator Boynton on January 28 and referred to the Committee on Labor and Capital. On April 8, after the "get-together" stage of the legislative process,[74] and many hearings, the bill was reported out of committee, with a majority recommendation of "do pass" and a minority report attached to a substitute bill authored by Senator Wright. The bill was returned to committee April 18 for further amendment, emerging on April 21. During Senate debate beginning on April 23, opponents first tried to make the bill elective, then tried to strike the provision for state insurance, and finally attempted to strike out the safety provisions, but were able to muster at most six votes for these amendments. During final Senate debate on April 28, opponents tried to exempt farmers and stock raisers from the Act, and to allow these employers the defenses in force before the 1911 law. This was rejected by a 9–25 vote. A measure to ensure that no more than two of the three IAC commissioners could belong to the same party was rejected 7–27. The Senate then approved the compensation, insurance, and safety package by a 30–5 margin.

In the more conservative Assembly, opponents were somewhat more successful. Farm employers won exemption from the Act just as they had convinced the Assembly to absolve them from injury reporting the previous year, leaving farmers to elect coverage if desired. Household domestics were also exempted. The Assembly consented to removing the $100 maximum on medical assistance, but the 90-day limit on medical benefits remained. Labor continued to oppose, but was unable to stop, the elongation of the waiting period on benefits to two weeks after injury, during which only medical care, and no indemnity benefits would be paid. Three days before adjournment, the bill passed 55–13. By final passage, it had changed little from the plan written by the IAB. Temporary total disability

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[74] *Labor Clarion*, March 28, 1913. "On many subjects different bills have been introduced, entirely irreconcilable as to aims and means to accomplish them. The authors and other persons behind such bills are advised by the solons to get together and settle their differences out of court, that is, before pressing them for action by a committee. . . . Many a measure thus concocted will be but a miserable compromise, satisfying neither side, but exempting the representatives of the people from going on record either for or against a clean-cut policy."

would be compensated at 65 percent of average weekly earnings, subject to a maximum aggregate of three times average annual earnings, and extending for no more than 240 weeks; 40 weeks of benefits would be payable for each 10 percent of permanent disability, with life pensions of 10–40 percent for those above 70 percent disability. Unlike other states, there was no list of benefits for specific injuries, such as loss of a member (finger, hand, etc.); rather, all payment would be related to disability level under a schedule to be promulgated by the IAC. Death benefits payable to dependents ranged from $1,000 to $5,000, with only burial expenses paid in cases where the decedent had no dependents.[75] As in the earlier Roseberry Act, compensation was the exclusive remedy available to injured workers, except when the employer was guilty of gross negligence or willful misconduct. In those cases, the employee had the option to claim compensation or sue at law for damages. Insurance carriers were prohibited from offering insurance against such gross negligence.

A year after the law was passed, some IAC officials boasted that the workers' compensation law's safety regulations had reduced the number of industrial accidents by 50 percent.[76]

CONCLUSION

Between 1907 and 1913, the burden of job-related injuries began to shift., slowly but perceptively, from workers to employers until both parties saw common interest in developing a new order. A major shift occurred in the way in which California workers were compensated for injuries occurring on the job. As industrialization changed the systems of work, the courts began to adapt laws to follow new circumstances. Constitutional problems were at first sidestepped, then dealt with through the direct Constitutional amendment process made possible by other Progressive reforms. Policy

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[75] By pocket veto, the governor rejected a bill (SB 1519) "to protect married men under new compensation law." The bill would have required employers to pay the death benefits incurred on account of death to an unmarried employee into the state Accident Prevention Fund. The bill was designed to prevent discrimination against married workers "as it is feared that employers will prefer to employ unmarried men so as to save the cost of death benefits." State Federation of Labor, Summary of Legislation, 1913.

[76] "Millions paid to injured workmen," *Insurance and Investment News* 15, no. 3 (January 1915): 83.

analysis was used to identify and clarify program objectives, evaluate criteria and alternative institutional structures. A new system of social insurance was launched with high hopes and expectations. The passage of the Roseberry Act in 1911 and the Boynton Act in 1913 gave California the tools to begin implementing a comprehensive system of workers' compensation, insurance, and safety. While it has been through many changes, the basic structure remains even today.

With roots in Germany and in British common law, the laws were reformist measures with several objectives, but committed the state to ameliorating the problems of industrial injury for both injured workers and their employers. In passing the 1913 Act, the state also undertook to establish a state enterprise that would try, through example and competition, to change the structure of insurance coverage. As had been the case in Germany, the planners saw workers' compensation as a first step in a comprehensive state system of welfare for its people; its expectation was that other parts would follow. It was intended to help reduce the number of injuries, as well as their after-the-fact compensation. But passage of the law was only the beginning; the complex problem of implementation was to follow.

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INVENTING THE PUBLIC TRUST DOCTRINE:

California Water Law and the Mono Lake Controversy

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These selections from Randal Orton's Ph.D. dissertation (Environmental Science and Engineering, University of California, Los Angeles, 1992) are presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at https://dissexpress.proquest.com/search.html.

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PREFACE

A great university harbors many educational philosophies, some of which allow students to seriously overextend themselves. In this particular case, the Graduate Division allowed me to pursue doctorates in both Biology and Environmental Science and Engineering for much longer than I would ever have thought possible. The early goal of this extended multidisciplinary exercise was to provide a broad and deep overview, by case study, of the environmental movement, in particular its presence in science, law, and political advocacy. The end product is a dissertation on what is, in essence, the legal and moral basis for an emerging and very powerful political class. Their agenda is addressed to a controversy that increasingly faces citizens today; how shall we regulate society, what rules are both needed and just, and who shall have the authority to make them?

Most biologists who get outdoors occasionally have some familiarity with natural resource law, especially statutory laws such as the Endangered Species Act, the National Environmental Policy Act (NEPA), and the California Environmental Quality Act (CEQA). However, the Public Trust Doctrine is neither statutory law nor even a reasonably well-defined body of case law. I think I am the first to reduce it to an acronym, but this is solely because the need is great in a document of any length. That other

authors have not is, I think, some indication of an unconscious understanding that acronyms suggest rather more institutionalization than is true of the Public Trust Doctrine.

However, this situation is changing fast. As I write this, another symposium on the PTD is scheduled for May 7 [1992], sponsored by the State Lands Commission. This is interesting because several authors have recently suggested that public land management is not quite ready for the PTD. An expanded, institutionalized PTD has also found support in the California Attorney General's Office, the California Department of Fish and Game, and the State Water Resources Control Board.

In retrospect, I was not prepared to find a live, statewide political movement in my research. Nor did I realize that I had until I was deeply involved in it. This realization came about at a time when I believed that the legal aspects of the Mono Lake controversy could be dealt with quickly, and without much original thought. When this proved not to be the case, naivete rescued me from despair; I simply attributed my difficulties to insufficient legal coursework. However, with time, I realized that the problem lay not with the curricula of my law classes, but more with the nature of "Public Trust" advocacy itself, wherein an attempt has been made, under apparent compelling need, to legislate, *sensu lato*, what cannot easily be legislated *sensu stricto*.

I doubt that most authors will agree anytime soon on what defines the proper scope of the Public Trust Doctrine, or even Public Trust adjudication. In this regard, this dissertation does not and cannot purport to definitively circumscribe the Public Trust Doctrine. This is primarily because the PTD differs from state to state, but also because the doctrine remains in a state of flux, particularly in California. I think I have provided enough of a geographic and historical overview of the Doctrine to enable a reader to grasp its character, but I cannot guarantee that readers will agree with the conceptual boundaries I have placed around the subject. However, I have tried to be very broad in this regard, and I hope that most of these readers will find too much included within the fabric of the Public Trust Doctrine, rather than finding that I have omitted a particular thread of the doctrine.

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Chapter 1

THE PUBLIC TRUST DOCTRINE AND THE REFORMATION OF CALIFORNIA WATER LAW:

Overview of Critical Issues

The Invention of the Public Trust Doctrine is about the modification of water rights in the state of California, and the doctrine that serves as its legal and moral basis. It is about law, politics, and science, because these are the tools that were used to invent the Public Trust Doctrine in a water rights context. It is about a reduction in water rights for a city of 3.5 million people, because that is what the Doctrine found necessary. It is about the reform of California water law, because this is what the use of the Doctrine could not avoid. And finally, and perhaps most importantly, it is about the evolution of the Public Trust Doctrine beyond California water law, because it is my conviction that this is what the Public Trust Doctrine is poised to do.

The literature is replete with descriptions of the Public Trust Doctrine, but the literature is mainly notable for its failure to converge on a single definition or definitive principle. This is an odd finding for a doctrine capable of sustaining a constitutional challenge,[1] particularly given the

[1] Illinois Central Railroad v. Illinois. 146 U.S. 387 (1892). Often cited as the "lodestar" in Public Trust litigation (Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, *Michigan Law Review* 68 (1970): 489), this case involved a large grant of Chicago waterfront to the Illinois Central Railroad

scrutiny that any legal doctrine must endure when it threatens established water rights.

The reasons for this state of affairs provide a good introduction to the origins of the Public Trust Doctrine. From its recognition by the Supreme Court in *Illinois Central Railroad v. Illinois*,[2] the Public Trust Doctrine has continually evolved through court decisions, and these decisions have often changed the Doctrine's scope and content. Also, in the United States, the Doctrine is primarily a creation of state jurisprudence, and the courts of each state have developed their own version of the Public Trust Doctrine to meet the needs that statutory law could not.

Each state's version of the Public Trust Doctrine differs on such basic issues as the permissible uses of Public Trust resources, which resources are clothed in Public Trust protections, what remedies are available when the Trust is violated, what conditions must be met in abridging the Trust, and what constraints limit the accommodation of competing public interests. In my opinion, the level of development found in each state reflects the status of the environmental crisis that is imminent, or appears to be so.

In California, Public Trust litigation has realized the state's reputation for legal innovation. Landmark state Supreme Court decisions in 1970 (*Marks v. Whitney*[3]) and 1983 (*National Audubon Society v. Superior Court*[4]) significantly expanded the scope of the Public Trust Doctrine beyond the limits set by previous courts in any state. Further, in *Marks v. Whitney*, the court asserted that the Doctrine was "sufficiently flexible to encompass changing public needs," thereby ensuring that any future definition of the Public Trust Doctrine would be as labile as the public interest itself.

The Court's ruling in *National Audubon* demonstrated that the stage for reform set in *Marks* would indeed be played. In this decision, the Court found the public's interest in Mono Lake sufficient to revise water rights

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through an act of the Illinois State Legislature. The legislature subsequently sought to revoke the grant without compensating the railroad, citing its constitutionally based sovereign authority over navigable waters and their submerged beds. The railroad contested the revocation on the grounds that it violated the due process clause of the Constitution. The Supreme Court ruled in favor of the state.

[2] *Id.*

[3] 6 Cal. 3d 251 (1970).

[4] 3 Cal. 3d 419 (1983).

that the city of Los Angeles had depended on for over seventy-five years. Justice Broussard's introduction in this decision clearly recognized the precedent set with respect to both the Public Trust Doctrine and California water law:

> This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values . . . the two systems of legal thought have been on a collision course.

Perhaps the best evidence of the political impact of these rulings is found in *Putting the Public Trust Doctrine to Work*, a survey of the status of the Public Trust Doctrine in thirty-one states and territorial possessions.[5] In this study, attorneys general and administrative agencies were asked to characterize the nature and the direction of the Public Trust Doctrine in their states, and to describe its impact on resource management issues. The results were provocative; what emerges is a record of nascent but similar actions by these agencies, their staff and supervisors, to effect broad reforms under the authority of the precedents set by the California judiciary. The relatively modest assertions of sovereign authority found in earlier Public Trust lawsuits have been replaced with a tool of unprecedented potential to reform the state's stewardship of its water resources.

In 1988, a hearing convened by the state Assembly introduced the Public Trust Doctrine as one of the most critical developments in California water law since the creation of the appropriative rights system.[6] This hearing was specifically convened to address the precedent set by the Supreme Court's decision in *National Audubon Society v. Superior Court*. However,

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[5] David C. Slade et al., *Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine to the Management of Lands, Waters, and Living Resources of the Coastal States* (Connecticut Department of Environmental Protection, Coastal Resources Management Division, 1990).

[6] California Legislature, Assembly Committee on Water, Parks and Wildlife, "Public Trust Doctrine Application to Water Rights" (November 21, 1988), Jim Costa, Chair.

legislation[7] intended to provide statutory guidelines for the application of the Public Trust Doctrine to California water rights went no further than subcommittee review. As of 1992, the impact and the scope of the Doctrine's application to existing water rights in California was very uncertain, due in part to the state's continuing effort to relicense the rights originally revisited by the Supreme Court in *National Audubon*.

*The Invention of the Public trust Doctrin*e reviews the Supreme Court's decision in *National Audubon* and examines the controversy that precipitated it. It places the state's original allocation decision in an historical context, and reviews the environmental problems this decision caused. It also considers the reasons why the Court in *National Audubon* found the Public Trust Doctrine necessary to resolve them. This research will find that, more than a legal doctrine, the Public Trust emerges as a *political* doctrine, a tool of political advocacy that is capable of reforming the laws and regulations that water agencies — and governments — must abide by.

Central to this finding is the study of the origins of the Public Trust Doctrine provided in Chapter 2. Several of the Doctrine's most important elements are found in the laws of earlier societies, and more than one American jurist has cited this history in support of an important ruling. In reviewing this history, we will discover a thread of public activism that has repeatedly, and successfully, challenged the authority of previous sovereigns in their stewardship of natural resources. In effect, we will find that the Public Trust Doctrine has survived governments.

Nor has this survival been passive. This research will find that the Doctrine has served to reform and, occasionally, to contract sovereign authority over the natural resources that earlier societies found most useful. Once this perspective is understood, those early elements of the Public Trust Doctrine found in the Roman Institutes of Justinian, the Spanish Plan of Pitic, and the common laws of medieval England reveal themselves as concessions of sovereign authority, concessions that were either imposed by political forces, or offered in exchange for some service to the state.

To an important degree, the historical issues found in earlier Public Trust controversies have repeated themselves in the Mono Lake controversy, the subject of Chapter 3. This controversy can be traced to an error

[7] Assembly Bill 4439.

in water allocation in 1940, and it eventually led to the California Supreme Court's affirmation of the Public Trust Doctrine's earliest precept: that no government has an ultimate authority to disenfranchise its citizens from their inheritance of natural resources.

This affirmation comes at a time when government agencies are rapidly investing themselves with an *administrative* authority for the Public Trust Doctrine. Implicit in these efforts is the idea that the terms of the Public Trust Doctrine are purely a matter of implementing the authority created by judicial opinion. Through this process, the Public Trust Doctrine appears as merely one more set of environmental regulations promulgated under the authority of legislative edict.

If this were true, this dissertation could have restricted its attention to the scientific and political issues associated with the application of the Public Trust Doctrine to the city's water rights. The dissertation would be no more nor less than an analysis of the necessity and the adequacy of environmental review for a CEQA[8] project, albeit a very controversial one.

However, the Public Trust Doctrine springs from no act of Congress, which on one occasion has squarely rejected the Public Trust Doctrine, and the investiture of authority sought by administrative agencies is proceeding with relatively little attention from those agencies of American government most directly responsible for translating the public will into law. However, it is an investiture whose goals seem unimpeachable, because they are clearly, unmistakably popular.

These are uncomfortable statements in a democracy, but they bear important implications for the Public Trust Doctrine in the United States. The contests of sovereign authority, so prevalent in the Doctrine's historical use, have reemerged in an American context. However, in contrast to the outcome of earlier societies, the American case history reveals a steady growth of sovereign authority, with each judicial ruling incrementally expanding the scope of the Doctrine.

This research explores some of the reasons for this uniquely American direction that the Public Trust Doctrine has taken. Some of these reasons will find their origins in the physical character of the American frontier, wherein the rules and precedents of European doctrine proved awkward

[8] California Environmental Quality Act.

or unjust. Other reasons will be traced to the absence of government itself, wherein the public will found little opposition from sovereign interests. Most significantly, however, we will find that the form of American government, which so persistently substituted democracy for minority rule, had the odd result of investing the government with unprecedented stewardship over natural resources.

Ultimately, we will find that the adversarial character of the Public Trust Doctrine, so definitive in its historical development, has faltered. In *National Audubon Society v. Superior Court*, the fight between citizen and state is very brief. The fight, in fact, did not last beyond the Court's opinion, which simply, and brilliantly, incorporated the Doctrine into California water law.

Nonetheless, this reconciliation leaves many questions unanswered. The actual allocation of Mono Basin water must still be made, and it is not at all clear what consequences will follow either a reduction of the water supply of Los Angeles, or the continued diversion of water from Mono Lake. In Chapters 3 and 4, this research will examine some of the scientific, legal, and public policy issues associated with the Mono Lake controversy (Chapter 3) and its resolution by the State Water Resources Control Board (Chapter 4). It will also investigate the quasi-democratic nature of the decision-making process created by the Court, exploring in particular its potential for scientific, political and legal abuses.

Ultimately, we will explore the impact of the Mono Lake controversy on the Public Trust Doctrine itself. In Chapter 5, this exploration takes a step back from the immediate problems found in the controversy, and reexamines the common thread that seems to run through the literature and the historical record of the Public Trust Doctrine. From its assertion of civil rights in Roman law, to its presence in England as a source of early parliamentary annoyance for the king, the Public Trust Doctrine marks reforms in the terms of the social contract. In the United States, the Doctrine repeatedly emerges amidst the most heated and stubborn civil disputes; it justified the government when the early New York subways arrived in the basements of angry storefront owners; it transferred property rights from titled landowners to squatters in nineteenth-century San Francisco; it provided coastal access for Californians in 1970. In every case, the Public Trust Doctrine served one public interest to the detriment of others.

More than implementing the public interest, we will find that the Doctrine *defines* the public interest.

It is this use that requires an explanation of the Public Trust Doctrine. We must ask if there is some general principle, beyond contemporary public needs, that allows a legal theory — an "it" — to adjudicate between competing interests. For, absent a general principle, an "it," we must then ask "who?" In whom does the authority of the Public Trust Doctrine vest, and who shall decide what is in the public interest?

Several authors have proposed a general principle for the Public Trust Doctrine. In Chapter 2, I have provided my own. However, it would be pure hubris to suppose that all readers will find these principles all that general after all. This underscores the nature of the Public Trust Doctrine as an exercise in political advocacy. In the Mono Lake controversy, *political* advocacy has become environmental advocacy. Separate elements emerge: environmentalism as a *political* endeavor, a matter of advertising one's assertions; environmentalism as a *scientific* endeavor, ensuring that one's assertions withstand objective scrutiny; environmentalism as a *legal* endeavor, ensuring that one has the power to effect reforms (insofar as the rule of law prevails).

With the Superior Court's decision to delegate the initial allocatory decision to the State Water Resources Control Board,[9] the locus of Public Trust authority shifted from the courts to a state administrative agency. Thus, from its initial filing in May of 1979 to its arrival at the State Board in August of 1989, the *National Audubon* lawsuit transformed the PTD from a legal theory to a legal requirement in the administration of water rights. Further, after a relatively short period of stasis, it appears that the SWRCB will indeed act on the precedents set in the Mono Lake controversy. In May 1992, the SWRCB released a Notice of Public Hearing to consider "interim water rights actions *pursuant to Water code Sections 100 and 275 and the Public Trust Doctrine* to protect the San Francisco Bay/Sacramento–San Joaquin Delta Estuary" (emphasis added). Under *Future Actions and*

[9] A significant feature of the Court's decision in *National Audubon* was their refusal to rule on the main issue, the proper allocation of Mono Basin water, and the Court's finding that the legitimacy of the PTD was codified "in part" in the California Water Code. The Superior Court's delegation to the State Water Resources Control Board was partly a logical consequence of these features of the *Audubon* decision.

Authorities, the Water Board parenthetically provided the complete lineage of its authority under the PTD: "See National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 189 Cal. Rptr. 346."

In addition to its penetration of the State Water Resources Control Board, the emergence of a powerful regulatory agent of indeterminate scope has attracted the attention of the California Legislature, which held a hearing in November, 1988, to collect the opinions of utilities, environmental groups, water law attorneys, and state agencies on the nature of the PTD and its applicability to water rights.[10] The PTD has also developed on a parallel track in the area of coastal zone management, and, here too, the PTD has attracted the attention of a very broad coalition of proactive state administrative agencies and the offices of state attorneys general.[11]

These events herald the assimilation of the PTD into existing government. In this regard, it is unclear whether the government's "rediscovery" and incorporation of the PTD into water rights administration will require any change in existing administrative rules and practices. One of the remarkable features of the judiciary's conveyance of the PTD to the State Board is that it supplied little additional definition to the PTD itself. The essence of the "administrative rule" imposed by *National Audubon* is that the state must "take such [Public Trust] uses into account in allocating water resources."[12] How might this "accounting" be made?

To date, the State Board's relicensing of Mono Basin exports does not provide a clear indication of how the SWRCB will proceed in the "post-*Audubon*" era. As of early 1992, beyond rhetorical references to the PTD, the specifics of the State Board's relicensing of the city's water rights in the Mono Basin were indistinguishable from the CEQA process it follows for

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[10] Assemblyman Jim Costa, Chair.

[11] Slade et al., *Putting the Public Trust Doctrine to Work*. Additionally, Felix Smith, a policy spokesperson for the State Department of Fish and Game, issued a recent statement (Appendix A) on his department's position with respect to the trusteeship responsibilities associated with the PTD. It provides a detailed declaration of the specific duties adopted by the department to implement this trusteeship. While not necessarily engendered with the force of law, this policy statement nonetheless reflects the willingness of state administrative agencies to embrace the PTD as a source of expanded authority over natural resources.

[12] *National Audubon*, 33 Cal. 3d at 452.

any controversial project.[13] In my opinion, absent any substantive definition of the PTD from the State Board staff, the substance of the PTD in a water rights context could be set in a *de facto* fashion by the methods, choices, and preferences of the scientists and technical consultants involved in the State Board CEQA process. Indeed, one of the difficult tasks facing the State Board is evaluating the credibility and utility of a decade of research conducted in an adversarial arena.

In this regard, the perspective offered in this research is that of a scientist who has participated directly in the scientific, legal, and administrative arenas that contain the Mono Lake controversy. It is a perspective that takes issue with many of the truths established by court precedent (Chapter 3), and critiques the process by which some of the unanswered questions in the Mono Lake controversy will be resolved (Chapter 4).

However, it is a perspective that also recognizes a deeper merit to the Public Trust Doctrine. The Mono Lake controversy is a microcosm of the global environmental problems that have appeared in recent years. The parallels are striking: a resource allocation decision, driven by the public interest, emerges decades later as an apparently imminent threat to the native ecosystem. The only solution that law can support is to revisit the original allocatory decision, suspending in the process the sovereign authority that was used to provide and ensure the allocation in the first place. In both cases, the value of a legal doctrine that can transcend sovereign authority is evident. The question, though, is who shall decide when it should?

In this regard, both the destination and the overt motive for this research is an argument for a broader consideration of the Public Trust Doctrine by the public it purports to serve. It is my conviction that the Public Trust Doctrine is poised to effect significant reforms in the management of California's water resources, and it is vital that the public, the legislature, and water agencies understand that these reforms will accommodate virtually any level of public participation. If there is any duty incumbent on a democratic government, it is to ensure that this level is very broad indeed.

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[13] This particular relicensing effort is the first time that the State Board has had to explicitly address the PTD, and the Superior Court's delegation to the Board was conditioned on the Court's final review of the Board's performance and final decision.

Conclusion:

THE PUBLIC TRUST DOCTRINE AS SOCIAL CONTRACT

The threads of the PTD found in the Institutes of Justinian refer to things subject to varying degrees of human control; the air, the sea, running waters, and access to fishing grounds.[1] For the Roman citizen of 500 A.D., the inclusion of the air and the sea in this list may have seemed the product of either hubris or ambition. However, over millennia, the natural elements addressed by the Institutes of Justinian have become increasingly subject to human control and impacts. As we approach the twenty-first century, the original fifth-century list seems incomplete.[2] For

[1] Many authors trace the roots of the PTD to Roman law in general, and the Justinian code in particular. For examples, see Molly Selvin, *This Tender and Delicate Business: The Public Trust Doctrine in American Law and Economic Policy, 1789–1920* (New York: Garland, 1987); Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," *Michigan Law Review* 68 (1970): 471–566 and "Liberating the Public Trust Doctrine from Its Historical Shackles," *UC Davis Law Review* 14 (1980): 185–94; or John Franklin Smith, "The Public Trust Doctrine and *National Audubon Society v. Superior Court*: A Hard Case Makes Bad Law or the Consistent Evolution of California Water Rights," *Glendale Law Review* 6 (1984): 201–25.

[2] Contemporary questions of global warming and ozone loss come to mind here, although a modern list could also embrace DNA, the electromagnetic spectrum, and near-earth space as things that are common to humanity, potentially subject to a Public Trust, and potentially in need of regulation.

example, how could the Roman lawmakers have foreseen the coining of the Dutch word, "impoldering," which refers to the destruction of inland seas by landfill? The Dutch effort to provide living space rendered obsolete an entire class of sailing vessel, while inventing three entirely new types of ships whose purpose is to lay what is, in effect, artificial sea bottom.

Some legal commentators have argued that these coda in Roman common law reflect only an attempt to classify the natural world, and should not be identified as an early effort to realize environmental law.[3] Other authors have argued that this history, regardless of its intent, is not particularly relevant to modern formulations of the PTD.[4] In my opinion, both of these criticisms deflect the reader away from the essence of the PTD as a fundamental feature of the social contract between citizen and state.

A Public Trust suit brings before the court an argument that the state has breached a contract of sorts. Implicit in the act of bringing such a suit is the affirmation that the state exercises an inalienable dominion over water resources. However, it also implies that the state cannot do whatever it wants with these resources. Rather, the state's authority is contingent on its adherence to the public interest.[5] This result may be derived from a number of sources, including the PTD,[6] constitutional language,[7] or the general rationale for government found in various theories of social contract.[8] This contingency does not imply that a lapse by the state alienates it from the resource, and it would be foolish to contend that such a lapse invalidates the state itself. However, the trust in which the state holds public resources does imply some constraints.

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[3] Several references for this idea are provided by Jan G. Laitos, *Natural Resource Law: Cases and Materials* (St. Paul: West Publishing, 1985).

[4] For an example of this argument see Harrison C. Dunning, "The Significance of California's Public Trust Easement for California Water Rights Law," *UC Davis Law Review* 14 (1980): 357–98.

[5] *Illinois Central R.R.*

[6] *Id.*

[7] Preamble.

[8] Thomas Hobbes, *Leviathan* (1651); Immanuel Kant, *Metaphysics of Morals* (1797); John Locke, *Treatise of civil government* [1689] *and A letter concerning toleration* [1690], ed. by Charles L. Sherman (New York: D. Appleton–Century, 1937); Rousseau, *The Social Contract* (1762).

Previous authors have struggled (somewhat unsuccessfully, in my opinion), to identify those constraints, finding their substance elusive, immaterial, or in a constant state of flux. In this regard, the reader may recall the state Supreme Court's language in *Marks* and *National Audubon*, wherein the Court referred to the "flexibility" of the PTD and its ability to encompass changing public needs.

We may detect in these observations the presence of an active relationship between citizen and state with respect to the allocation and management of natural resources. A "chain of custody" for natural resources illustrates the potential loci of these "feedback loops," and highlights some of the structural features of sovereign authority. What is clear from the diagram is that the PTD can potentially apply to virtually any level of government, a result that follows from its basic attachment to the legitimacy of sovereign authority over natural resources.

To date, Public Trust lawsuits have avoided pitting coequal branches of government against each other, although the City argued that this situation was present in *National Audubon*. The court in that case answered this charge by holding that it did not dictate any particular allocation of Mono Basin water. Rather, it left this decision to an unspecified "responsible body,"[9] eventually being the State Water Resources Control Board. It is noteworthy that the SWRCB did not challenge the Court's revisitation of the Board's earlier water rights decision. That is, the SWRCB avoided an intra-sovereign conflict. Equally noteworthy is the specific manner in which the Court reconciled the potentially conflicting sources of public will, being the 1940 Water Code and the emergent PTD.[10]

However, in language important to the issue at hand, the Court found that its reconciliation of these two sources of sovereign authority does

> not render the judicially fashioned public trust doctrine superfluous. Aside from the possibility that statutory protections can be repealed, the non-codified public trust doctrine remains important both to confirm the state's sovereign supervision and to

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[9] *National Audubon*, 33 Cal. 3d at 447.

[10] By reference to the Water Code's requirement that all water allocatory decisions must be "in the best public interest," the Court found the PTD to "codify in part the duty of the Water Board to consider public trust uses of stream water." *National Audubon,* 33 Cal. 3d at 446 n.27.

> require consideration of public trust uses in cases filed directly in the courts without prior proceedings before the board.[11]

From the court's promotion of the PTD as a remedy for legislatively repealed protections, it follows that future courts would have to construct their opinions very carefully to avoid the appearance of a conflict with the public will. Further, the Court's language implies an investiture of political power in the judiciary that would likely be hotly contested by the legislature, if not other members of the judiciary itself.[12]

Regardless of one's position on this issue, two questions come to mind. First, assuming the judiciary is correct in its assumption, via *National Audubon*, of a penultimate role as public trustee, what remedy is available should the Court eventually decide against a plaintiff? Under such conditions, should a plaintiff accept that the PTD is completely contained within the state, or can the contest be carried further? Secondly, what serves as a basis for the legitimacy of a PTD that exists independent of the courts or the government itself?

Most legal commentators would likely view a PTD existing independent of formal state institutions as more of a political than a legal doctrine. This view, while probably correct, does not necessarily deprive the PTD of its force, or even the major part of it. In this regard, we may return to the Doctrine's roots in Roman law, in particular the concept of jus gentium, translated as the law of nations or, more accurately, the law applicable to the citizens of nations other than Rome.

The relevance of such a legal construct is plain for one who rejects the legitimacy of a governing body, particularly when that body continues to enjoy majority support. However, it is equally relevant *within* the framework of existing institutions; the concept of political self-determination, promoted forcefully by the current political administration, supplies a contemporary example of a *jus gentium*.

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[11] *Id.*

[12] We may note in this regard that higher courts have not addressed the constitutional questions implicit in the *Audubon* Court's language. In *Illinois Central R.R. v. Illinois*, the U.S. Supreme Court found only that the legislature could not sever its title in a manner that prevented it from subsequently exercising its will for the public good. The Supreme Court was supported in its ruling by the state itself. That is, even this landmark Public Trust suit did not pit the PTD against the legislative will.

What remains to be answered is the political forum where these issues might be settled, the scope of the debate, and the content of an extra-governmental PTD. With respect to the first question, we may note that common law is notorious for geographic inconsistencies, and whereas higher courts may defer to local custom, the invocation of a "public trust" for water resources could have far-reaching regional impacts. In this situation, democratic principles should dictate a fairly general assay of the public will.

With respect to the second question, presumably the scope of reform would be guided by the standard against which the violation of the trust appeared. That is, the state's mismanagement of the trust could not be detected without some reasonably clear standard of performance. Most importantly, this standard must be independent of the particular form of government found in the state. If not, then the state would be not only the administrator and guardian of the trust, but also the author of its terms and its standards for performance.

The matter of content returns us to the central problem of natural resource allocation and management. In this regard, very few commentators have proposed a particular substantive principle for the PTD, in the manner of a *jus naturale*, for example.[13] Rather, advocates have promoted the PTD as a *procedural* tool,[14] whereby the allocation of public resources

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[13] Sax (1970) is a notable exception. As noted by Smith (1984):

> Sax used conceptual terms to define the purpose of the PTD to be prevention of the destabilizing disappointment of expectations, not formally recognized, yet held in common by a community. He asserted that the PTD would be used to help reduce the tensions derived from the destabilization of an expectation whether it be in expectation of private property ownership, or, the expectations of the public for a ready water supply and the protection of our ecological system. The obligation of the decision making trustee under the PTD is to insulate those expectations which support social, economic and ecological systems from avoidable disruption (p. 224).

Of course, in the context of *National Audubon*, this interpretation of the purpose of the PTD is problematic, since the social and economic disruption attending the revocation of a fifty-year-old water right must be weighed against ecological disruption. We may note, however, that this was precisely the problem addressed by the *Audubon* Court.

[14] Smith (1984) notes that, whereas "the case-by-case expansion of the Public Trust Doctrine by the courts in California has left the scope and purpose of the Public Trust Doctrine poorly defined," the procedural aspects of the PTD in the context of California water rights were clarified by the California Supreme Court in *National Audubon v. Superior Court*.

is brought under greater scrutiny by the public,[15] by state agencies such as the state Fish and Game Department[16] and the Office of the Attorney General,[17] or by the courts.[18] There is no shortage of volunteers for the position of Public Trustee.

Regardless, it is probable that, had the State Water Board been aware of the eventual outcome of its decision in 1940 (both in its legal and ecological consequences), it would have responded differently. In 1989, the City itself adopted an explicit policy of limiting its diversions to the degree necessary to avoid adverse impacts to the Mono Lake ecosystem. However, it is important to recognize that many[19] of the impacts that drive the current controversy were not anticipated in 1940. For example, impacts on California gulls, arguably the centerpiece of the plaintiff's position in *National Audubon*, were not mentioned by the individuals who protested the Water Board's decision in 1940.

This observation underscores the central dilemma in natural resource management, and one which any *jus naturale* must address: Assuming an allocation decision is found to be equitable at the time it is made, how should the state respond to the unforeseen consequences of its decisions? In the public's view, what responsibility does the state have for its decision-making? Or, in more contemporary terms, what is the government's liability for damages to the public weal?

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15 Sax (1970).

16 Robert Baiocchi, "Use It or Lose It: California Fish and Game Code Section 5937 and Instream Fishery Resources," *UC Davis Law Review* 14 (1980): 431–60.

17 Slade et al., *Putting the Public Trust Doctrine to Work*.

18 Sax (1970); Martha Guy, "The Public Trust Doctrine and California Water Law: National Audubon Society v. Department of Water and Power," *Hastings Law Journal* 33 (1982): 653–81.

19 Though not all. Impacts on air quality and recreation were raised during *City of Los Angeles v. Nina B. Aitken*, Superior Court Tuolumne County, No. 5092 (1934), and aesthetic and recreational impacts were raised before the Water Board in 1940 (Div. Water Resources Declaration 7055, 8042 and 8043, April 11, 1940 at 26). In a letter to the City and the State Fish and Game Commission, Eldon Vestal, an employee of the Fish and Game Department, cited the impacts of stream diversion on the fishes that had been introduced into the streams for decades in the previous century (LADWP Records).

The search for such standards of performance provides an intersection for science and the social contract.[20] Does the existing social contract imply citizen consent to every technological dependency authorized by government? In democratic systems of government, what are the rights of minorities who are identified by the loss of a resource, either directly or as the unanticipated result of an allocation decision made by the sovereign as trustee? In his introduction to social contract theory, Lessnoff distinguishes between consent and agreement, noting that "there is more to contract theory than mere consent. Consent can be a unilateral act: contract is bilateral or multilateral. One may consent to an existing state of affairs: one contracts with another contracting party or parties, in order to bring about a new state of affairs."[21]

One can argue that the "bringing about of a new state of affairs" is attended more by scientific than political advances. Further, scientific advances under Lessnoff's view of contract theory emerge and are often applied with minimal contact to democratic processes. In fact, Lessnoff viewed science's relative insulation from democratic controls as itself an expression of the existing social contract.[22]

However, too much emphasis on the virtues of science can raise alternative issues of its adverse impacts. In this regard, perhaps the critical issue concerns the rate at which these adverse impacts manifest themselves. As we have seen in the Mono Lake controversy, the impacts of decision-making can accumulate over a long period of time without public awareness, to emerge suddenly, and in a manner that challenges existing means of redress, adaptation, and reform.

Substantial concerns have been voiced by scientists and environmental advocates that the incidence of such impacts will increase. Global warming, to cite a current popular concern, is either a ploy of political activists, a natural and unavoidable phenomenon, or a consequence of our own reliance on fossil and extant organic fuels. From nuclear power to ozone chemistry to drift gill nets, the number of environmental issues seemingly

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[20] It also underscores the increasingly important role played by science and scientists in the governance of resource use.

[21] Michael H. Lessnoff, *Social Contract Theory* (New York: New York University Press, 1990), 3–4.

[22] This association is primarily derived from rights of free speech.

multiplies geometrically. Most importantly, like the Mono Lake controversy, nearly all of them involve rights vested in various sovereigns, and promise dire and immediate consequences if these rights are not curtailed in some way.

In this regard, the Court's use of the PTD in *National Audubon* is an act of reform that might be construed as an adjustment not only to water law, but to the social contract itself. In terms of political mechanism, it purports to represent the public will, and thus implies a democratic process. In a constitutional context, it is a mechanism that makes no statement about the precedent it sets for existing democratic institutions. Most importantly, it highlights that the PTD is an agent of change,[23] a fact not often appreciated in environmental controversies.

Buchanan comes closer than most authors to the practical questions inherent to social contract theories. This is, perhaps, the result of his preoccupation with what he terms, "continuing contract," or post-constitutional contract. This area of social contract theory is not as concerned with explanations for society and government as it is with the practical needs expressed in social reform. However, even here, Buchanan almost states the case against a realistic contract theory too well. He writes of his "temptation" to accept the idea that social structure merely exists, and that "there is relatively little point in trying to understand or to develop a contractual metaphor for its emergence that would offer assistance in finding criteria for social change."[24]

He supports this contention by reference to economics, a field that he notes has not resolved "major analytical complexities,"[25] even though it is concerned only with exchange processes, which can be considered a subset of the social contract.

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[23] In Public Trust adjudication, there is often the sense that the PTD is conservatory in character, and that the point of a Public Trust lawsuit is to correct a deviant use of natural resources. In this sense, one can argue that the purpose of the PTD is limited to changing the "state of affairs" only insofar as it returns the status quo to an earlier, more legitimate condition. However, it is only prudent to treat any change in government or natural resource allocation as nothing more than simple reallocation, i.e., change.

[24] James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago: University of Chicago Press: 1975), 53.

[25] *Id.*

It is easy to become frustrated with social contract theory, particularly when one attempts to relate it to the PTD. Although the idea of a "social contract" is nearly irresistible, even its component parts resist analysis. Buchanan is clearly, and eloquently, aware of the subject's important pitfalls.[26] He does not purport to supply a theory of social contract that is completely free of presupposition, but he does endeavor to render it free of all but the most basic requirements. Buchanan requires only "rational, self-interested behavior" in his theory, a position that contrasts starkly with earlier writers such as Hobbes and Pufendorf,[27] who argued that self-interest in a state of nature led to consequences that are considered to be the antithesis of social behavior, such as universal warfare. In fact, Buchanan purports to not require the principle that "all are equal in the state of nature," a principle that is common to most social contract theories in one form or another.[28]

The challenge, then, posed by the Public Trust Doctrine is to identify exactly what it is that we wish the state to hold in trust for us. After *National Audubon*, responsibility for the future has returned to the public will, and we should be very careful in determining what it is that we wish to preserve. We should also be very quick about it. With very few exceptions, we may presume that a central feature of our will is our own survival. Without making any statement of what threats impend, we can be reasonably certain that their recognition will leave us little time to respond.

Like the Mono Lake controversy, many of these threats might require, or seem to require, the sacrifice of earlier sovereign commitments. Here, perhaps the only guidance available is that we adopt another meaning for the phrase "public trust:" that the concerns voiced both by advocates and

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[26] For example, where he notes that the basic problem of contract theory is to "explain and to understand the relationships among individuals, and between individuals and the government," he immediately raises the issue of normative standards, and admits that "the temptation to introduce normative statement becomes extremely strong at this level of discourse." Explanation itself presupposes the existence of mutually agreed-upon standards of adequacy, proof, and expectation — in short, a social contract of sorts.

[27] Hobbes, *Leviathan* (1651); Samuel Pufendorf, *De Jure Naturae et Gentium* [1688], trans. by C. H. and W. A. Oldfather as *On the Law of Nature and Nations* (Oxford: Clarendon Press, 1934).

[28] See in particular John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), for a clear exposition of this principle.

their critics are sincere, and are not derived from narrow interests. Hopefully, we will proceed in a world whose benefits warrant dangers no worse than their predecessors.

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"HUSH, HUSH, MISS CHARLOTTE":

A Quarter Century of Civil Rights Activism by the Black Community of San Francisco, 1850–1875

JEANETTE DAVIS MANTILLA*

These selections from Jeanette Mantilla's Ph.D. dissertation (History, The Ohio State University, 2000) are presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at http://rave.ohiolink.edu/etdc/view?acc_num=osu1488195633521235 and https://dissexpress.proquest.com/search.html.

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INTRODUCTION

The history of Civil War and Reconstruction-era California Blacks is often overlooked, overshadowed by a more familiar history that recounts an earthshaking national drama permeated with pro-slavery and abolitionist rhetoric and replete with romanticized recitals of the devastating but heroic battles of brother against brother. Yet closer investigation reveals that a small community of Blacks centered in the rapidly developing city of San Francisco, while vocally participating in the national crisis, persistently forged ahead in a more localized battle for Black rights that has been undervalued and largely ignored.

The struggle lasted a quarter century, approximately from 1850 to 1877, and encompassed a series of civil rights issues — from an original battle for the right to freely testify in court to a culminating fight for equal access to public education. While historians have studied, investigated, analyzed, and remarked on some of the individual events, the connections between the battles and the ties between the participants have received short shrift, when they have been considered at all.[1] 1 This study undertakes

[1] The bibliography for this study provides examples of the specialized texts that focus on a single issue, a specific ethnic group, or a particular event or time. Overall, Philip Montesano's work, *Some Aspects of the Free Negro Question in San Francisco,*

to understand how the particular environment of San Francisco, with its polyglot population and rapid social and economic changes, influenced, fueled, and finally helped to circumscribe the Blacks' struggles.

Traditionally history has been written from the viewpoint of white males, the portion of the population that controlled the laws, politics, finances, and social mores for the other members of the greater community. Belatedly, historians have begun to give "voice" to women, Blacks, and other formerly silent segments of the population. This study joins that effort. This narrative begins and ends with the experience of Miss Charlotte L. Brown, a middle-class, single, young adult, Black female who dared to raise her voice in protest at a time when even most white women usually remained mute on matters of serious concern in the public sphere. Other historical characters and important episodes in the quarter-century civil rights effort are introduced and analyzed before the concluding epilogue looks back at Miss Charlotte's personal experience at civil rights protest in light of what came before and after.

The participants in this civil rights struggle were tied together in an intricate web where the subtle connections between them sometimes were not evident until years later, when seemingly insignificant actions or chance happenstance were revealed to have been of vital importance to subsequent events. Looking at the participants' specific motivations and goals is a way to understand the personal motivations that rationalized public deeds. Thus, this narrative investigates a number of power brokers welding great personal influence in the white community, as well as at

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1849–1870 (M.A. thesis, University of San Francisco, 1967; reprint, San Francisco: R & E Research Associates, 1973), most closely investigates the early civil rights struggles of the San Francisco Black community. Additionally, Rudolph Lapp, *Afro-Americans in California* (San Francisco, Boyd & Fraser Publishing Company, 1979), addresses the larger number of relevant issues from the quarter-century of 1850 to 1875. Yet, Montesano and Lapp look at the Black community more or less in isolation, and Lapp provides only a quick overview of this period in two brief chapters before moving on to more recent times. No modern work was uncovered that attempts to incorporate evidence from across the spectrum of race, gender, and class for this time frame and location. While works that investigate a specific group or a particular issue are extremely valuable and informative, additional texts that refocus by incorporating the new information from these specialized studies into the larger picture will help to provide an equally valuable new perspective.

various members of the Black community fighting stubbornly against pervasive racial discrimination.

Hush, Hush, Miss Charlotte often goes forward and backward in time, covering a particular issue or event from various perspectives. In this manner, American Indians, Hispanics, Chinese, and Irish emigrants enter this story to reveal that racial prejudice is not just a Black and white issue.[2] Rather, the manner in which one minority was treated influenced the treatment of the others. Additionally, the gold rush attracted far more males than females. Not only did males outnumber females for at least a decade (even longer among the Chinese), but the crowded conditions and hectic pace of life in San Francisco seemed to foster "precisely those appetites that reformers damned as unchristian and immoral." As a result of this demographic imbalance, many males were forced to take responsibility for various tasks that traditionally were considered "women's work." Even as these changes allowed Chinese and Blacks to enter the labor market to perform work deemed undesirable to most white males (laundry, cooking, domestic duties), the shortage of white women increased their economic value and fueled concerns for the protection of white female virtue. Hence, matters of race, class, and gender percolate to the surface of public

[2] *Hush, Hush, Miss Charlotte* does not undertake the task of fully investigating the development or evolution of the various ethnic communities in San Francisco. Rather, it seeks to incorporate Chinese, Irish, Indian, and Mexican perspectives in those areas where these groups interacted or shared concerns with the Black and white communities that are the focus of this narrative. Sucheng Chan, *Asian Americans*: An Interpretive *History* (New York: Twayne Publishers, 1991), or, Jack Chen, *The Chinese of America* (San Francisco: Harper & Row Publishers, 1980), each provides a comprehensive analysis of the experience of the Chinese in early California. R. A. Burchell, *The San Francisco Irish, 1848–1880* (Manchester, England: Manchester University Press, 1979) is the definitive work on the Irish community of early San Francisco, while Noel Ignatiev, *How the Irish* Became *White* (New York: Routledge, 1995), or, John Duffy Ibson, *Will the World Break Your Heart?: Dimensions and Consequences of Irish-American Assimilation* (New York: Garland Publishing, 1990), both address the complicated subject of how the Irish were persecuted on their arrival in the United States, and then, in turn, persecuted Blacks and Chinese. Recent increasing interest in the study of ethnicity, cultural development, and the American West promises to produce equally valuable works on Mexicans and American Indians in California. For now, Charles Wollenberg's often-cited contribution, *Ethnic Conflict in California History* (Los Angeles: Tinnon-Brown, Inc., 1970) is a valuable and concise reference.

consciousness throughout the sequence of events that unfolds before Miss Charlotte is allowed to reenter the spotlight at the close of this narrative.[3]

One of the main duties imposed upon each professional historian is the responsibility to justify his or her research and results by locating his or her individual work in its proper place among the earlier texts produced from decade after decade of prior research conducted by generations of historical scholars over the years. The cumulative outcome of this task is called "historiography," more or less, the history of professional history. In the process of declaring the importance of new findings, historians often revise older theories and reasoned assertions. The author of each new publication is aware that if his or her ideas and evidence are insightful, they will prompt additional research which, in turn, may lead to new ideas, new research, and additional revisions. This researcher did not escape the responsibility to add to the professional historians' accumulation of historiographical arguments.

This study focuses on approximately twenty-five years of civil rights struggles conducted by a small community of San Francisco Blacks, aided by a handful of local whites, during a period in which the American nation underwent a civil war and a subsequent interval of troubled reconstruction (1850–1877). Perhaps understandably, most historical works that cover this time frame focus on the South — on conditions in the states that seceded from the Union, lost the war, and were forcefully reconstructed in an attempt to fit the victorious North's evolving plan of reunification. For example, John Hope Franklin's *Reconstruction: After the Civil War,* recognized as a significant contribution to Southern history, Black history, and Reconstruction history, covers the changing status of Reconstruction in the South — from the peacemaking efforts of President Lincoln, on to the radical policies imposed by Congress in reaction to President Andrew Johnson's blundering attempts to continue Lincoln's policies, and finally to the period

[3] Albert L. Hurtado, "Sex, Gender, Culture, and a Great Event: The California Gold Rush," *Pacific Historical Review* 68 (February 1999): 1–19, laments the fact that many historians still do not understand the importance of including the long-silent voices of women, Blacks, and ethnic peoples. Hurtado emphasizes the value of including these often-ignored perspectives when investigating early California history, especially considering the rapid demographic changes that took place in that multicultural region at that time.

of "Redemption" when local interests reclaimed control from the hands of Congress and the military to the detriment of local Blacks.[4] *Hush, Hush, Miss Charlotte* moves the investigation of the Civil War and Reconstruction era geographically far to the west, to frontier California, a newly established state that joined the Northern effort to compel the Southern states to continue to participate in the Union.

Following the Civil War, contemporaries often analyzed the events of the war or Reconstruction by admittedly interjecting their personal passions and prejudices into the historical record, producing voluminous biographies of military and political figures and epic accounts of battles and major events that glorify the war years while adding little dispassionate insight into the causes or results of the national drama. Even Jefferson Davis and Alexander Stephens, the former president and vice-president of the Confederacy, each wrote historical treatises, *The Rise and Fall of the Confederate Government* and *War between the States,* respectively. Northerners were no less prolific in their written accounts, with presidential aspirant and newspaper editor Horace Greeley leading the way with *American Conflict.* By consensus, the historiographical record acknowledges these works as historical documents but passes over them as historiographical texts to begin the account of the era's historiography approximately a half-century after the war, after the task of historian had become professionalized by a wave of "scientific" thinking that allegedly eliminated the biased emotionalism so prevalent in previously written history[5] While professionalizing the task of historian curbed the practice of blatant impassioned proselytizing, historians are human beings who continue to have personal interests and biases that find subtle, or not so subtle, ways to influence their work. Undoubtedly, *Hush, Hush, Miss Charlotte* was influenced by the author's life experiences and political outlook, most consciously by the 1960s civil

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[4] John Hope Franklin, *Reconstruction: After the Civil War,* The Chicago History of American Civilization Series, ed. Daniel J. Boorstin (Chicago: The University of Chicago Press, 1961).

[5] Edwin C. Rozwenc, ed., Introduction to *Reconstruction in the South,* Problems in American Civilization (Boston: D. C. Heath and Company, 1952), vi; George Catkin, *Reluctant Modernism: American Thought and Culture, 1880–1900* (New York: Twayne Press, 1992), xii, 28, 35, 54–55.

rights movement and by personal ties to Native American Indians and the Latino immigrant community.

In 1907, William A. Dunning, destined to become a long-acknowledged expert in Reconstruction history, presented an historical analysis that appeared to embody the new scientific methods of research and analysis. Dunning's *Reconstruction, Political and Economic, 1865–1877,* synthesized contemporary historical works into a coherent theory that contended that the former Confederate states accepted defeat valiantly, and readily acquiesced to the well-intentioned directives of presidents Abraham Lincoln and Andrew Johnson, but balked at the strident policies enforced by the corrupt and vindictive Radical Republicans who usurped political power and redirected Reconstruction for their own selfish ends.[6] Although the Dunning school's pro-South, anti–Radical Republican interpretation was eventually discredited as highly partisan and contemptuous of Blacks, the debate on the motivation and exact nature of the Reconstruction policies imposed upon the South continues.[7]

The intricacies of this extensive historiographical debate had little direct bearing on the research for *Hush, Hush, Miss Charlotte,* but the expanding arguments that continue to analyze the Dunning school and its successors encompass a variety of political, economic, and social issues that enter into any research covering the period, if only to provide comparisons over time between the regions and states. For example, important areas for additional research include a comparison of the legal, social, and political restrictions placed on Blacks; a comparison and analysis of the ways Blacks attempted to actively participate in the changing political, social, and economic spheres; or a comparison of the racial attitudes of

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[6] William A. Dunning, *Reconstruction, Political and Economic, 1865–1877* (New York: Harper and Brothers, 1907); Roberta Sue Alexander, "Presidential Reconstruction: Ideology and Change," *The Facts of Reconstruction: Essays in Honor of John Hope Franklin,* ed. Eric Anderson and Alfred A. Moss, Jr. (Baton Rouge: Louisiana State University Press, 1991), 29–30.

[7] Kenneth M. Stampp and Leon F. Litwack, eds., *Reconstruction: An Anthology of Revisionist Writings* (Baton Rouge: Louisiana State University Press, 1969) offers a useful summary of Reconstruction historiography; Eric Anderson and Alfred A. Moss, Jr., eds., *The Facts of Reconstruction: Essays in Honor of John Hope Franklin,* (Baton Rouge: Louisiana State University Press, 1991), completes the summary by providing a glimpse at more recent scholarship.

Northern and Southern whites during the Civil War and Reconstruction years. Such comparisons, however, have not been readily forthcoming for a wide geographical base because most historical texts continue to focus attention primarily on the South or on the political proceedings emanating from Washington, D.C.[8] One notable exception is Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790–1860,* a well documented analysis of prejudicial laws and practices throughout the northern states. Yet, as Litwack's title reflects, there remains a need for additional work focusing on the North. *North of Slavery* ends just as the painfully slow, occasionally retrogressive, process of removing restrictions placed upon Blacks in the North, that Litwack so skillfully describes, is moving toward the critical years of Civil War and Reconstruction. By adding the western component, *Hush, Hush, Miss Charlotte* provides additional information for comparisons of the treatment of Blacks in the South, North, and West.[9]

Because California entered the union in 1850 and rapidly grew in population and importance due to the gold rush, that state was forced to immediately construct its legal system from "whole cloth" without a substantial legacy of prejudicial restrictions in place. The influx of settlers included a great number of Southern pro-slavery advocates and a substantial number of New Englanders with anti-slavery leanings. Thus, California provides an excellent opportunity to study whites' evolving attitudes on racial issues, along with the corresponding social and political ramifications during the Civil War and Reconstruction era. Additionally, research and scholarship on the development of racial prejudice in the United States may help modern Americans understand and deal with the concomitant discrimination, violence, and social and political

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[8] Vernon Lane Wharton, *The Negro in Mississippi, 1865–1890* University of North Carolina Studies in History and Political Science (Chapel Hill: University of North Carolina Press, 1947) is an early attempt to gauge Blacks' participation in the restructuring of postwar Southern life and politics; Howard N. Rabinowitz, "Segregation and Reconstruction," *The Facts of Reconstruction: Essays in Honor of John Hope Franklin,* ed. Eric Anderson and Alfred A. Moss, Jr. (Baton Rouge: Louisiana State University Press, 1991) 79–97, provides a concise update on newer scholarship that follows this regional focus; and David Donald, *The Politics of Reconstruction, 1863–1867* (Cambridge, Massachusetts: Harvard University Press, 1984) is an example of the strictly political approach to Reconstruction.

[9] Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790–1860* (Chicago: The University of Chicago Press, 1961).

conflict that lingers on to reappear zealously in modern American society periodically.

In 1955, historian C. Vann Woodward first published *The Strange Career of Jim Crow,* prompted in part by the U.S. Supreme Court's landmark decision in *Brown* v. *Board of Education of Topeka,* 349 U.S. 294 (1954), that declared unconstitutional the common dual practice of establishing separate schools for "colored" children while concurrently prohibiting those same students from attending "white" schools. *The Strange Career of Jim Crow* inspired a flood of new historical scholarship intent upon investigating the development of segregation. Segregated schools had been sanctioned by the Court over a half-century earlier through the "equal but separate" policy successfully defended in *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), a lawsuit justifying the practice of racially segregated seating in railroad cars. For over thirty years, C. Vann Woodward and his disciples polished and supplemented his original thesis, looking to pinpoint the beginning of segregation in the South. The Woodward Thesis, as it was succinctly articulated by Woodward in the late 1980s, asserted that racial segregation was not a basic Southern practice of long standing inherent in a slave society, but rather, was a gradual response to postwar societal changes. According to the Woodward school of thought, segregation in the South did not solidify into a rigid practice until several decades after Reconstruction ended. Woodward asserted that segregation laws were not immediately put in place following the restoration of Southern home rule, rather such Jim Crow laws were first instituted by Northern whites as a response to competitive and unsettling urban conditions. C. Vann Woodward, acting as his own harsh critic, explained that after thirty-odd years of reflection he realized that he "got off on the wrong foot" by putting "the question of *when* before the question of *how.*"[10] *Hush, Hush, Miss Charlotte* provides information useful in answering both questions.

After a false start that practically ignored the historical role of Blacks themselves, the historical profession finally recognized that any serious

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[10] C. Vann Woodward, *The Strange Career of Jim Crow,* 3rd rev. ed. (New York: Oxford University Press, 1974), 12–17, 69–74; C. Vann Woodward, *Thinking Back: The Perils of Writing History* (Baton Rouge: Louisiana State University Press, 1986), pp. 81–99; C. Vann Woodward, *The Future of The Past* (New York: Oxford University Press, 1989), 295–311.

consideration of the question of how segregation developed, of how United States race relations evolved, or of any other subject that encompasses American society must allow all of the historical participants to take an active part in the story. The historian must consider the motivations and actions of all the historical actors throughout the process of discovery and explanation. Like a candle, the intensity of focus on this new inclusive history wavered with the ebb and flow of time, shining brightly during the 1950s–60s civil rights movement, but flickering with the fracturing of that movement by the trauma of Vietnam, the aftershock of Watergate, and the preoccupation with global politics and global finance that dominated the remaining years of the twentieth century. Early in the modern civil rights era the historical profession recognized that Blacks and Black history, along with that of women, Native Americans, and other minorities, had been uniformly, if often unconsciously, written out of most of popularly accepted United States history. The paucity of any meaningful mention of Blacks in contemporary textbooks, outside of a cursory description of slavery, provided the incontestable proof. The problem was to figure out the best way to address this insufficiency. Introducing a full range of Black experiences into the historical record, including the moral paradox of slavery and its aftermath from the perspective of the Black historical actors, presented the members of the modern historical profession with an abundance of intriguing research questions that historians are still attempting to answer.[11]

Understandably, partly in response to the modern civil rights era, modern African Americans were anxious to read history about Blacks, written by Blacks for Blacks. The 1960s and early 1970s witnessed a much-needed proliferation of Black history, much of it written by Blacks themselves despite the comparatively small number of Black professional historians. John Hope Franklin, one of the most highly respected Black professional historians, began his career during the transition to the modern civil

[11] Woodward, *The Future of the Past,* 29–52, contains useful insights about the evolution of Black history, including a quote from W. E. B. Du Bois (1877–1965), a renowned Black activist and historian. Du Bois criticized Charles A. Beard (1874–1948), an equally distinguished white historian famous for historical works that focus on the relationship between economics and politics, as lacking any consciousness that the historical treatment of Blacks involved moral questions.

rights era. Over several decades Franklin wrote extensively on the Civil War and Reconstruction era, incorporating the contributions and experiences of Black Americans without diminishing the importance of the fact that white Americans controlled the political, social, and economic spheres throughout that period. Franklin's *Reconstruction After the Civil War* emphasized the "counter-Reconstruction" that erased the postwar reforms and replaced them with racially biased laws that locked Blacks in the position of second-class citizens for almost a century.

In "What the Historian Owes the Negro," an article published in the *Saturday Review* in 1966, historian Benjamin Quarles articulated his fellow Blacks' ongoing desire for additional works by Black historians. As Quarles explained, "Emergence of long obscured facts of Negro history brings with it the challenge to develop new perspectives on this nation's past." Quarles also added an additional insight, "Manuscripts that challenged deeply held beliefs about the Negro have not been welcomed by publishers, who have not wished to antagonize potential white buyers." Quarles explained that the process of reexamining the nation's past would be painful, forcing Americans to reevaluate the meaning of their most revered tenets of liberty and equality in light of years of government-sanctioned entrenched racial prejudice. Benjamin Quarles's carefully researched and well-written monographs covering the Black experience greatly contribute to the nation's enlightenment, earning numerous academic awards and a large and diversified readership. Quarles's *The Negro in the Civil War, Lincoln and the Negro, Black Abolitionists,* and *Black Mosaic: Essays in Afro-American History and Historiography* exemplify the outstanding scholarship written by Black historians in the last half-century.[12]

Although Black writers evidenced a very early interest in researching and writing the history of Blacks in California, most of these aspiring authors lacked the professional training necessary for the task. Reportedly

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[12] John Hope Franklin, *Reconstruction: After the Civil War* (Chicago: The University of Chicago Press, 1961); Benjamin Quarles, "What the Historian Owes the Negro," *Saturday Review,* no. 49 (September 3, 1966), 10–13 and also by Benjamin Quarles, *The Negro in the Civil War* (Boston: Little, Brown, 1953; New York: Da Capo Press, Inc., 1989); *Lincoln and the Negro* (New York: Oxford University Press, 1962; New York: Da Capo Press, Inc., 1990); *Black Abolitionists* (New York: Oxford University Press, 1969); and *Black Mosaic: Essays in Afro-American History and Historiography* (Amherst: The University of Massachusetts Press, 1988).

one of the most dedicated researchers of the history of Blacks in California was a Black woman and former newspaper reporter Delilah Beasley,[13] writing just after World War I, who unfortunately did not adequately document her extensive research. By the end of the 1960s, universities across the country were matriculating a proud generation of skilled Black historians, yet their numbers remained small compared with the opportunities for historical investigation. As the sub-discipline of Black history came into its own, Black and white historians acknowledged the importance of working together to include various perspectives in order to provide a balanced view of history. Yet, the task was made more difficult by the fact that the *very* tools of the trade — the personal letters, local and state documents, old newspapers, official statistics, federal census reports, and the like, either had never adequately documented the Black experience or had not been carefully archived and cataloged with preserving the Black experience in mind. Fortunately, for researchers of California history, guidebooks and indexes were forthcoming detailing the expanding inventory of the essential historical documents placed in the various archives and depositories.[14]

While much is being published on the history of California Blacks, rather than focusing on the early Black community of San Francisco, the bulk of the studies focus on later developments in the larger Black communities of Oakland and Los Angeles. The years surrounding World War I, World War II, and the modern civil rights movement attract more interest than the Civil War and Reconstruction era.[15] In the fall of 1996, *California History,* the official magazine of the California Historical Society, published a special edition to "examine the nature, scope, and significance of the African American presence in California." Historian Shirley Ann

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[13] Delilah L. Beasley, *The Negro Trail Blazers of California* (Los Angeles, 1919; reprint, New York: Negro University Press, 1969).

[14] James de T. Abajian, comp., *Blacks and Their Contributions to the American West: A Bibliography and Union List of Library Holdings Through 1970* (Boston: G. K. Hall & Co., 1974) and James de T. Abajian, comp., *Blacks in Selected Newspapers, Census, and Other Sources: An Index* to *Names and Subjects* (Boston: G. K. Hall & Co., 1977).

[15] For example, Albert S. Broussard, *Black San Francisco: The Struggle for Racial Equality in the West, 1900–1954* (Lawrence, Kansas: University Press of Kansas, 1993); Lawrence P. Crouchett, Lonnie G. Bunch, III, and Martha Kendall-Winnacker, *The History of the East Bay Afro-American Community, 1852–1977* (Oakland: Northern California Center for Afro-American History and Life, 1989).

Wilson Moore, editor of the special edition, acknowledged the work of the leading experts in the field such as Douglas Daniels, Rudolph Lapp, Albert S. Broussard, and Kenneth G. Goode, but nonetheless articulated the need for additional research on California Blacks — particularly work that focuses on "African American cultural expressions," "economic, political, and social dynamics," and "community-formation in the Golden State."[16]

Hush, Hush, Miss Charlotte begins to address this insufficiency in the historical record by concentrating on multiple aspects of the civil rights struggles initiated by the Black community of San Francisco during a critical period of grave national political and social change. *Hush, Hush, Miss Charlotte* follows San Francisco's Black community throughout its first twenty-five years, disclosing the way Blacks repeatedly turned to each other to gather sufficient strength to battle discrimination. It follows their legal battles seeking justice, and emphasizes their faith in the new Reconstruction-era Constitutional amendments. *Hush, Hush, Miss Charlotte* lays the groundwork for consideration of the significance of the struggles and accomplishments of this early generation of Blacks in light of the modern civil rights movement and the evolution in the U.S. Supreme Court's interpretations of the Thirteenth, Fourteenth, and Fifteenth Amendments. It also follows the evolution of discrimination from the perspective of the white community, detailing their use of illegal force, economic power, social custom, and law. In essence, *Hush, Hush, Miss Charlotte* is an historical narrative, meant to be enjoyed for the story it tells, even as it presents an informative and analytical interpretation of important historical issues.

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[16] Shirley Ann Wilson Moore, "African Americans in California: A Brief Historiography," *California History* 75 (Fall 1996): 194–97. For works by Daniels, Lapp, Broussard, and Goode, see the Bibliography for *Hush, Hush, Miss Charlotte*.

Chapter 2

A PICTURE WORTH A THOUSAND WORDS:

A Cartoon for Miss Charlotte

As a white male practicing law in mid-nineteenth-century San Francisco, Wellington Cleveland Burnett may have marveled at the tenacity of one of his clients, Miss Charlotte L. Brown, a young Black woman who brought suit against the Omnibus Railroad Company in an effort to obtain the right to ride in the horse-drawn railed streetcars of that burgeoning port city. Surely someone made attorney Burnett and his suddenly notorious client aware of the publication of a biting critique of her actions. A curious drawing clipped from a contemporary newspaper, although yellowed and worn, retains its ability to impart to even the casual peruser a most telling glimpse of the societal values and conditions of San Francisco during the Civil War and Reconstruction era. This yellowed clipping eloquently reveals the arduous task that Miss Brown undertook in her effort to assert her own personal dignity amid the local Black community's ongoing battle for civil rights, justice, and equality.

This unidentified newspaper clipping, a detailed cartoon of the inside of a streetcar, is a direct commentary on Miss Charlotte Brown's legal struggle. The car, identified as belonging to the Omnibus Railroad's local North Beach and South Park line, is depicted with a motley assemblage of passengers. The drawing bears the heading, "THE EFFECT OF JUDGE

PRATT'S DECISION." The artist skillfully aligned a row of passengers, seating them on a long bench that faces the center aisle and abuts the windowed exterior wall of the streetcar. The subjects were carefully posed in order to leave no doubt regarding the intended message. Glancing down the line of passengers from left to right, there is first revealed *a leering Black man* turned to face *a cowering young white lady*, who is seated next to *a large and apparently unconcerned Black man*, with *another alarmed and crowded white lady* pushed up against *a massive and observant Black woman*, who safeguards a basket and overshadows *the final passenger, a frail, older Black gentleman*, facing straight ahead and seemingly making himself as small as possible in order to avoid any confrontation over the situation.

The facial expressions and body language of these fictional characters perfectly symbolize the racist message of the accompanying text. The presence of Blacks on the streetcars will make the cars an unpleasant, unsafe, and intimidating environment for white women — those delicate repositories of virtue and all that is good in society. The editorial legend printed with the cartoon reads:

> Our artist this week gives us a glimpse of that "good time coming," when all the narrow distinctions of caste and color shall be abolished, and when our colored brethren shall come into the full inheritance of their rights, — shall sit in the cars and the dress circles of our theatres, with none to molest them or make them afraid. For the inauguration of this happy era, we are mainly indebted (under Providence) to Judge Pratt. Poor Charlotte Brown, in spite of the efforts made by the *Gaz* [Gazette] to influence the jury, only got one tithe of what she demanded as a salve to her injured feelings. She said that her sensitive feelings were hurt to the amount of $5,000 by being led out of the car by a conductor and a jury only gave her $500. Try again, Charlotte, you may do better next time; and above all don't pay the editor of the *Gaz* to write editorials in your favor, it will only injure your case. You owe a lasting debt of gratitude to Judge Pratt for putting you in the way of making an honest penny. He is very partial to niggers, is the Judge, the darker the complexion the better it suits Pratt and the family. You are a

> *real* nigger, are you not, Charlotte? You did not use burnt cork for the purpose of gaining your point, did you? Having received $500 from the Omnibus Railroad Company, you will, of course, think it your duty to show your gratitude by patronizing them. Invest the money in car tickets, and you may possibly have the luck to be turned out again.[1]

The cartoon's text sarcastically refers to a lawsuit filed by Miss Brown against the Omnibus Railroad Company of San Francisco for ejecting her from one of their horse-drawn street railway cars on April 17, 1863. Ironically, this was a time when many local Black men looked forward to proving their loyalty and worth as Yankee soldiers in the effort to preserve the Union.[2] Seeking both to undermine Confederate morale and to secure political alignment with Great Britain by mollifying British abolitionists, President Lincoln previously had given lip service to the idea of improving the condition of "the Negro" by issuing the preliminary Emancipation Proclamation (effective January 1, 1863). This token political pronouncement actually freed no slaves, but it increased the hopes of free and enslaved Blacks and added to the fears of prejudiced whites on both sides of the Mason Dixon line.[3] Although the Thirteenth Amendment declaring slavery unconstitutional did not become effective until December, 1865, earlier news of the possible abolition of slavery prompted San Francisco's Black community actively to formulate a way to attack the residue of prejudice that they believed would outlast the "peculiar institution" of slavery itself.[4]

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[1] CHS Scrap Book No. 3, California Historical Society, San Francisco. The clipping carries no information as to the name of the originating newspaper or publication date. "S.F. — Negro. From: CHS Scrap Book No.3 page #76" has been typed in the margin. Considering the reference to the *Gaz*, the paper may have been the *California Police Gazette*, a paper published in San Francisco from 1859 through 1865 and usually embellished with elaborate woodcut illustrations.

[2] "Arming the Blacks," *Pacific Appeal*, August 16, 1862.

[3] For a discussion of Lincoln's political motivation and personal reluctance to issue the Emancipation Proclamation, see Benjamin Quarles, *Lincoln and the Negro*, 165–67 and Richard N. Current, "The Friend of Freedom," *Reconstruction: An Anthology of Revisionist Writings*, ed. Kenneth M. Stampp and Leon F. Litwack (Baton Rouge: Louisiana State University, 1969), 25–47.

[4] "The Visibility of Prejudice," *Pacific Appeal*, April 26, 1862.

This polemical newspaper cartoon is testimony to the state of race relations in San Francisco during the Civil War and Reconstruction era. The cartoon's caption endeavors publicly to humiliate Judge Pratt of California's 12th District Court for his alleged partiality to Blacks, even as it belittles Charlotte Brown's attempt to obtain justice in the courts. The writer prods Charlotte to reconsider any further efforts at legal redress in light of her own vulnerable position as a social inferior to the dominant white race. Yet, he dares her to purchase more tickets and then attempt to ride the streetcars again. The writer need not have bothered to challenge Miss Charlotte. Assured of family support and aware of related efforts within the Black community, Miss Charlotte L. Brown was not about to be silenced by a newspaper's cartoon or by its faceless subscribers.

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Epilogue:

MISS CHARLOTTE TAKES HER RIGHTFUL PLACE IN HISTORY

In April 1893, a time when the cable car that had replaced the street railroad was in turn being replaced by the electric trolley, Edward F. Drum, reportedly the first conductor employed on San Francisco's first horse-drawn street railroad, gave an interview to a reporter from the *Morning Call.* Drum talked about his experiences as an employee of the Omnibus Railroad Company. He claimed to have a multitude of anecdotes, "both thrilling and ludicrous" that he could relate about those past times.[1]

Drum explained that he had been one of the early California pioneers, having come west across the plains from Lancaster, Ohio. He took a job driving a stage [old-fashioned omnibus] "on the only route there was then along Third street to North Beach and South Park." Then, he switched to the railed horse-drawn streetcars when the first one was instituted in the city. After serving as a conductor for the Omnibus Railroad, Drum accepted a position as assistant superintendent for that same street railroad, working under Mr. Gardner. He served in that capacity for thirteen years. Later, Drum sat in the California legislature as a state senator. Drum related that, in the early days, there was always something interesting happening, but

[1] "San Francisco's First Things," *Morning Call,* April 9, 1893.

that he specifically remembered two occasions that were rather out of the ordinary. He admitted that he had taken them very seriously at the time, but had since come to laugh about them.

Edward Drum explained that, early on, the company had established a rule that Blacks were not to ride inside the cars. Then, one night, rather late, when he was driving along with the car empty, he was hailed by a Mr. Brown who used to run a livery stable and who, Drum believed, was the father of the younger Mr. Brown, the editor of the *Vindicator.* The elder Mr. Brown entered the car in the company of "three colored women, his daughters, his son, James E. Brown, and his son-in-law named Dennis." It was "a wet, drizzly, nasty night" and Drum decided to let the women ride inside the car. But, when Drum approached the elder Brown, probably feeling magnanimous for allowing the women to take a seat, Brown refused to exit to a place on the platform as ordered. Instead, Brown inquired, "Why isn't there room here?" Then, when Drum acknowledged that, indeed, there was room but that the company forbade such liberties, Brown replied that Drum would have to throw him out. Hence, Drum, although a man of small stature, took Brown by the lapels and jerked him forcefully down upon the nearest seat. The Black man came down with such force that he broke a window!

In response to the commotion, the Black women began to scream. From the way in which Drum related the incident to the reporter it is evident that the conductor had been surprised and alarmed at the turn of events. It is best to allow Drum to speak for himself:

> Then the women screamed out "You low white trash," jumped off the seats and sailed into me, and they were fighters too. I can tell you. It became a regular free fight for awhile with the whole gang on me. Sometimes I was on top and sometimes I was underneath. The air for awhile was full of petticoats and legs and arms flying around like a windmill. All the windows in the car were smashed to atoms and my clothes were badly torn, but I was determined I would not give in. I was going to show them who was the boss of that car, and finally after a hard tussle I succeeded in getting them all out, but the car was so badly damaged that it had to be hauled

> up for repairs and cost the company a tidy little sum to put it in shape again.[2]

As the promised second exciting incident, Drum explained to the reporter what happened subsequently. He continued:

> A result of this incident was a suit against the company, in which it was contended for the first time in this city that under the fourteenth amendment to the constitution colored people were entitled to ride in cars that were common carriers. This contention was upheld by the courts.[3]

Apparently, the incident to which Drum referred was the catalyst prompting Miss Charlotte's father to instigate his own lawsuit against the Omnibus Railroad. If so, Drum seems to have combined Charlotte's original suit with her father's case and prematurely inserted the Fourteenth Amendment as a legal factor. Probably, the incident that Drum described is actually the one that drove the Omnibus Railroad Company to offer James Brown the lucrative monetary settlement about which so many people have gossiped. In her suit, Charlotte Brown originally sued the Omnibus Railroad for $5,000, and, ironically, that is the exact amount that James Brown is credited with getting when he settled his own lawsuit.[4]

Drum may have gotten a few details confused, but on one thing he was right on target. The Brown family was in the forefront of litigation that resulted in the local courts acknowledging that Blacks had full rights to ride common carriers, and Drum, as a former state senator, was not the only political figure to acknowledge this fact.

Senator Charles Sumner, the renown abolitionist and faithful spokesman for Black rights, once used Miss Charlotte Brown's lawsuit to underscore an argument for passage of his latest attempt at civil rights reform. His comments became part of the official Congressional record. During the second session of the 38th Congress, in February 1865, Senator Sumner took the floor to introduce a bill to repeal the charter of the Washington and Georgetown Railroad. He explained that when Congress previously

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[2] Ibid.

[3] Ibid.

[4] Thurman, 8.

granted that charter, it had reserved the right to alter, amend, or repeal it at will. Then, the senator explained the reason behind his request:

> The present proprietors of that charter, acting under it, insist daily upon outraging the law of the land, as that law has been declared in this Chamber by eminent Senators again and again to the effect that no corporation is justified in any exclusion from a public conveyance on account of color. That, sir, is the law of the land; but in the face of that positive principle, this successful, rich, and pampered corporation insists upon outraging it daily.[5]

Next, Senator Sumner read an excerpt from an undisclosed newspaper that reported on a recent ejection of an eighteen-year-old Black woman because a fellow passenger, a white woman, complained to the conductor and identified the "whiter and fairer" passenger as a Black woman. Sumner also told of a recent incident in which the local street railroad had ejected a Black soldier, in uniform, from the cars when a female former-rebel complained of his presence. Then Senator Sumner turned to his fellow senators to declare:

> There is evidence of this outrage. I have said that the law has been often declared in this Chamber, but it has been declared also from the courts. I have in my hand the opinion of a judge in California, . . . I should like to call particular attention to the able and emphatic statement of the law by this learned judge in San Francisco . . . who I name to honor, Judge O.C. Pratt.

Whereupon, Senator Sumner quoted Judge Pratt as follows:

> "That the plaintiff is one in whose veins flows blood of the African race, or whose skin has a darker color than the majority of other human beings with whom we are daily surrounded in life in no respect impairs her rights, nor do such blood and color, in any manner, place her outside of the protection of courts and juries when invoked to redress her alleged injuries."[6]

Senator Sumner continued to read Judge Pratt's words, revealing that the judge had directed the jurors on their duties in Miss Charlotte's case. Pratt

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[5] *Congressional Globe,* Second Session of the 38th Congress, 915.

[6] Ibid., 916.

told the jurors that, if they believed the evidence given by the defense, then they were bound to find the plaintiff guilty.

Furthermore, the judge instructed the jury that if they found that the railroad's employee had willfully inflicted pain and suffering on the plaintiff then they could grant both pecuniary and punitive damages. Finally, Senator Sumner asserted the following declaration addressed to Senator Conness of California:

> Sir, that is the common law laid down by a learned judge in California. I thank that State on the Pacific for teaching us here in Washington the law of the land.[7]

Senator Sumner explained that the California jury found for the defendant and awarded a fine of $500 damages. Sumner said that he would like to see the Washington street railroad pay $500 for every racially-motivated ejectment case. He also asserted that if the Washington Railroad failed to mend its ways, then Congress should simply revoke its charter. Congress decided not to vote on Senator Sumner's proposal that day, but not before another senator had voiced the following retort:

> Considering the amount of the legislation of Congress which is devoted to this negro race, it is time it should stop and that the poor degraded white should have some consideration.[8]

That insensitive and prejudiced remark was uttered in Congress early in 1865. By early 1877 many a white American would agree with that mean-spirited remark; but, in 1865, and for a handful of years to follow, there was a sufficient number of political radicals still in the nation's capital who steered additional Reconstruction reforms through Congress despite such opposition.

During the years that the nation struggled to reconstruct its federal alliance, California's Black activists responded to national issues by turning their attention to matters of suffrage, citizenship, and education. For a while, it was just "business as usual" for the street railroads largely because the California Supreme Court overruled Judge Pratt in the Turner and Pleasants cases on the issue of punitive damages. The proliferation of

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[7] Ibid.

[8] Ibid.

ejectment suits in the 1860s produced such small damage awards that the issue easily could be ignored by the street railroad companies if they so chose. Almost a decade of litigation failed to produce sufficient motivation for the street railroad industry to change its prejudicial policies.

The "Rules and Regulations for Conductors of the Omnibus R. R. Company, San Francisco, Cal.," published in 1873, contain a host of company mandates that bear the approving signature of Superintendent Gardner. Conductors were not allowed to sit while on duty. They were ordered to walk the horses around curves and to call out the names of the streets as they were passing each intersection. Conductors were admonished not to permit smoking inside the cars, but to be "civil and attentive to passengers, giving proper assistance to ladies and children getting in or out." Conductors were reminded to "never start the car before passengers are fairly received or landed." There were joint rules for Conductors and Drivers that concentrated on safety and maintenance of schedules, including two pages of "Laws and City Orders," extracted from the Penal Code of the State of California. Yet, nowhere in this official handbook can be found the company regulation, verbally put in force when the company was founded in 1862, barring Blacks from riding in the streetcars of San Francisco. Neither did the company provide a positive rule directing company employees to accept Blacks as passengers.[9] It appears that despite public attempts to hush the protests of Miss Charlotte, it was the Omnibus Railroad that ultimately chose to be officially silent on the matter of Black access to its cars.

Charlotte Brown's suit against the Omnibus Railroad did not end the discriminatory practices of San Francisco's street railroads. Long after it became quite clear that common carriers were legally required to transport anyone willing and able to pay the fare if reasonably expected to obey the legal rules of the line, Blacks were occasionally removed by force when attempting to assert their right to ride. During the hiatus between Charlotte Brown's suit and the U.S. Supreme Court's approval of separate but equal standards in 1896, Jim Crow proved to be just as stubbornly supported by attachments to prejudicial custom as it had been before the Reconstruction reforms brought previously legitimizing laws and customs into question.

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[9] "Rules and Regulations for Conductors of the Omnibus R. R. Company, San Francisco, Cal." (San Francisco, 1873), Manuscript Collection, F869S38055BL, Bancroft Library, University of California, Berkeley.

Before and after the Fourteenth Amendment was ratified, Jim Crow was alive and well in California, and as the school test case proved, monetary considerations proved a stronger weapon against Jim Crow.

Traditionally, when historians analyzed the Reconstruction era, they focused on the South. It is only more recently that a few scholars have investigated circumstances in the North or the Mid-west. Thus, Miss Charlotte Brown's valor and determination, for the most part, have gone unnoticed and uncelebrated in all but the most specialized histories. With the new interest in western history, and with the continued investigation and exposure of Black history and women's history, the importance of such individual struggles for justice, across the nation, may finally be recognized and applauded. Yet, seldom will an investigation of one individual incident provide sufficient insights to understand the larger struggle. Taken alone, Miss Charlotte Brown's ejectment experience would only hint at the local Black community's decades-long determined resistance to entrenched ignorance and prejudicial restrictions. Placed in context, preceded by the battle for testimony rights, accompanied by William Bowen's, Emma Jane Turner's, and Mary Ellen Pleasants's lawsuits, and followed by Mary Francis Ward's assault on the closed door of the schoolhouse, Miss Charlotte's fight for justice and the right to ride the San Francisco streetcars reveals its true significance.

Looking at the San Francisco Blacks' quarter-century of civil rights struggles in a vacuum of Blacks' only experiences is misleading. The other components of San Francisco's polyglot society demand attention as well. Even a swift consideration of the white community's treatment of other groups that historically have been targets of oppression helps to focus the Black community's experience. Comparing the prejudiced treatment of various ethnic or religious groups (such as the Indians, Mexicans, Chinese, Irish, Jews, or Catholics) reveals that San Francisco's white community usually considered its Black population of minor concern when compared to other "inferior" or "undesirable" people. More detailed investigations of the Irish and Chinese experiences reveal that political and economic circumstances greatly influenced, both the white community's prejudicial attitudes toward any particular group, and each group's ability to fight back. In San Francisco, first, the Irish, then the Chinese, were targets of physical violence and determined prejudiced treatment.

During the vigilante years the Irish were persecuted, hanged, and banished. As San Francisco's economic situation stabilized and even prospered, the once-hated Irish Catholic community was welcomed as a productive component of the white community. In turn, the Chinese suffered increasing oppression after they were no longer needed to build the transcontinental railroad. Despite continued litigation and demands for equitable treatment and promised civil rights, the local Black community never suffered the concentrated rage that the Irish and the Chinese endured at the hands of the local whites. Yet, the potential for just such treatment was always present — making the Blacks' continued demands for justice all the more remarkable.

Consideration of the dynamics between the oppressed groups produces troubling insights. Locally and nationally, the Irish community often instigated oppression against Blacks instead of recognizing their shared experiences as targets of the larger white community's resentment and prejudice.

Studying the motivations and tenacity of both the white power brokers who resisted change and the handful of whites who worked with the Black community to accomplish reform provides valuable insights as well. This study is unusual for the scope of its investigation into the backgrounds and motivations of the white judges, jury members, lawyers, and financial leaders that influenced community values in San Francisco. Looking at Peter Donahue's life discloses the driving ambition that motivated and consumed a considerable number of the era's white entrepreneurs. A look at the merchant-led Vigilance Committees and their subsequent political participation underscores the power of money and discloses the potential threat inherent in such concentrated power. The participation of such a large number of merchants as jury members for the ejectment cases after years of merchant-class neglect of such duties documents the growth of that power.

An in-depth study of Peter Donahue's life reveals that the streetcar industry leader preferred a more subtle form of influence — such as employing only white workers for the various enterprises of his expanding empire, and contributing to the political career of his crony, Eugene Casserly. On the other hand, the Irish senator was unabashedly overt in his hatred of Blacks. Casserly purposefully attempted to block enforcement of the Reconstruction amendments in as determined a manner as he earlier

had tried to prevent Miss Charlotte from riding the Omnibus Railroads streetcars in peace.

Charlotte Brown's stubborn fight to ride the street railway cars of San Francisco was one of the earliest instances of Blacks' determined fight to attain redress in the courts of American justice. She was in the vanguard of a long procession of Black women and men who risked physical danger and public humiliation from the threats and taunts of prejudiced whites, many of whom, like Senator Eugene Casserly or entrepreneur Peter Donahue, greatly influenced or controlled the political, financial, and social institutions of the local and national communities. In their struggles for reform the members of the Black community were joined by a small number of determined whites as well, with outspoken advocates such as Judge Pratt and Attorney Dwinelle leading the assault. As the individual stories of each of these resolute men and women reveal, the struggle for justice and equality crossed gender lines, racial barriers, and class strata, with the ranks of the militant reformers open to Black and white, male and female, rich and poor.

In California, Charlotte Brown, Emma Jane Turner, Mary Ellen Pleasants, William Bowen, and Mary Francis Ward were joined by Peter Anderson, Philip Bell, James E. Brown, Thomas Starr King, Wellington Cleveland Burnett, Judge O.C. Pratt, Judge Samuel Cowles, and John W. Dwinelle. The Black recruits outnumbered the whites, but an assortment of Californians fell in step with Miss Charlotte Brown to take their place in front-line positions in their individual battles in the collective struggle for reform. They each earned the right to be accorded membership amid the pantheon of civil rights activists who engaged in the centuries-long fight to force the American nation to live up to its self-proclaimed declarations of freedom, justice, and equality for all.

This study is a comprehensive analysis of twenty-five years of civil rights struggle led by a determined group of Black and white activists in San Francisco during the Civil War and Reconstruction era. This narrative, when considered in conjunction with related historical studies, provides abundant data for comparative analysis of similar struggles in other localities, in other regions, in other years. Many of the circumstances and actions experienced by the San Francisco residents during this unusual time in American history were replicated by other Americans whether at the

same time, before, or after. This is certainly true of the Black community's efforts to ride the streetcars or to access the public school system. Other events and experiences, such as the interaction with the Chinese community or the Vigilance Committees were unique to this time and place. One broad generalization is readily evident — the apparently-endemic prejudicial attitudes of white Americans concerning Blacks and other "inferior" groups were shared by the majority of white Americans throughout this twenty-five-year period and beyond. A hundred years passed before Miss Charlotte Brown's dream became Rosa Park's reality. In the interim, that dream was not forgotten. By striving to understand these San Francisco activists' stories and experiences, hopefully we may be better prepared to do our part in the struggles against prejudice, ignorance, and hate. Some day, perhaps the American dream of justice and equality for all will actually be a reality.

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WITH BALLOTS AND POCKETBOOKS:

Women, Labor, and Reform in Progressive California

DANIELLE JEAN SWIONTEK*

This selection from Danielle Swiontek's Ph.D. dissertation (History, University of California, Santa Barbara, 2005) is presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at https://dissexpress.proquest.com/search.html.

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INTRODUCTION

This dissertation examines the activism of California women around suffrage and reform during the 1910s and 1920s. Although it begins with the 1911 suffrage campaign, it is more than a story of suffrage. It is a story of Progressivism, domestic reform, organized labor, and understandings of political economy. The sixth state in the nation to enfranchise women, California enacted woman suffrage in 1911, nine years before the passage of the Nineteenth Amendment. As a result, women exercised the right to vote at the height of the state's Progressive movement, making it a unique moment for reform, women's activism, and an evaluation of suffrage. In many ways, I argue, the importance of the suffrage campaign for California women lay less in their attainment of voting rights than in their development of a vision of society and a reform agenda. [Were I to write this work today, in 2021, it would be much less Anglo-American centered and more inclusive of the diversity of California's history, but it is published here as a work of its own time.]

More than simply advocating women's rights, California suffragists grappled directly with the construction of industrial capitalism as they sought to create an ideal society. In pursuing a "better" California, they developed a number of strategies and arguments for reform, turning to both

legislation and consumption in their efforts to harness the power of the state and the marketplace to restrain the worst excesses of industrial capitalism. Although some of the legislation pursued by activist women can be seen as "maternalist," aimed at protecting women as mothers and potential mothers, in reality these laws came out of broad concerns with social and economic equity for both men and women. Similarly, California women's consumption efforts sought to deal with pressing problems of the industrial order, particularly the high cost of living, the growth of monopoly, and state prosperity. This commitment to social and economic justice continued into the 1920s, halted only by the paralyzing effect of the postwar Red Scare and the increasing political conservatism of the decade.

At the heart of this study are a number of questions about California women's use of suffrage as means of both social criticism and political mobilization specifically and the challenges of translating a vision of reform into political activism more generally. Utilizing collections located at UCLA's Special Collections, the Huntington Library in San Marino, California, the Bancroft Library at UC Berkeley, and the Labor Archives and Research Collection at San Francisco State University, the dissertation uses prominent middle- and working-class women reformers, women's clubs, trade unions, and middle-class reform organizations in Los Angeles and San Francisco as a window into women's broad-based reform activism. Focusing on two very different cities — Los Angeles, an open-shop town, and San Francisco, a strong union enclave — provides a comparative context that invites attention to the effect of local economic conditions, political culture, and class structure on reform efforts. To discern the public and private "faces" of California women's suffrage and reform activism, I paid attention to the content, language, and purpose of specific records as I sought to answer the following questions. How did working- and middle-class women construct a vision of the franchise during the 1911 suffrage campaign? How did they expand on their vision of the ballot to critique the existing political economy? Once enfranchised, how did they use political strategies, including coalition-building, grass-roots mobilization, and the existing party system, to achieve their reform goals? How did they implement consumption strategies, such as union and "California" label campaigns, boycotts, and boosterism, towards the same goals? How

were these strategies affected by political successes and losses as well as by the increasingly conservative political environment of the 1920s?

In fighting for suffrage and other reform measures, California women employed both "state" and "market" arguments in rallying voters to their cause. Focused on specific legislative goals, middle- and working-class women constructed a vision of activist citizens using their ballots and pocketbooks to create a more equitable society. By voting and buying properly, informed citizens could refashion capitalism into a system that would ensure adequate food, shelter, and clothing, personal dignity, and ideal communities for all Californians. Social and economic equity rested on safe working conditions, good wages, stable homes, a social safety net, and social equality among all classes (although not necessarily among all racial and ethnic groups). For activist women, industrial capitalism in its Progressive-era form posed the greatest threat to this vision. Their goal in attaining the ballot and wielding their purchasing power, then, was to restrain and reshape the existing economic system.

California suffragists initially used the language of boosterism and progress as a way of unifying a diverse suffrage campaign and appealing to male voters' interests in creating a "better" California. At the same time, they detailed the different kinds of women's productive labor to justify their claims to the ballot. Women needed the vote, they frequently argued, to perform their duties to home and family. By fulfilling these obligations, enfranchised women too could help create an ideal California. Through these arguments, suffragists constructed the figure of the wage-earning woman, one who needed the ballot — and sometimes trade unions — to secure protections in the workplace. Over time, the "working woman" became a trope for discussing issues of political economy. Suffragists warned of the dangers of "wage slavery," the evils of monopoly, and the threat of unrestrained industrial capitalism to the republic. It is through this trope that suffragists presented their critique of the state's political economy and laid out a framework for post-suffrage reform.

After winning the franchise, activist women turned their attention to specific reform measures to move the state towards fulfilling their vision of equity. Middle- and working-class women rallied around the women's eight-hour day as a way of protecting women workers and establishing a precedent for a universal hours law.

Similarly, their concern with providing broad social provision to care for workers vulnerable to sickness, injury, and death resulted in a long, volatile campaign for social health insurance. Both efforts fell short, undone by ideological limitations on state provision and the heightened nationalism of World War I. As we shall see, the failure of the social insurance amendment at the polls left only mothers' pensions as its limited legacy. In the wake of the defeat of the universal hours law, the women's eight-hour day persisted as an important political symbol in California, although it was ultimately undone by the state's "reactionary" governor, Friend Richardson. Rather than a victory for the protection of women and children, this ostensibly "maternalist" legislation represented the failure of activist men and women to achieve their reform goals.

In addition to pursuing legislative reforms, California women attempted to use the power of the marketplace to reshape capitalism. Recognizing the potency of politically minded purchasing, suffragists maintained that, with the franchise, women would be more aware of the consequences of their buying decisions and thus purchase with an eye towards social and economic equality. As a complement to their efforts to secure state-provided social welfare and labor protections, women and labor activists sought to rally consumers around union and "home products" labels in an effort to counter the growth of monopoly and to protect workers. The problem, of course, was that these efforts could become disconnected from their political objectives, leaving these reform campaigns open to co-optation by opponents. With both legislative and consumption campaigns, reformers' ability to remain focused on specific political goals — and to sustain the interest of the rank-and-file — proved crucial. Even so, male and female activists found that external political conditions, from World War I to the Red Scare, from fears of Kaiserism to fears of Bolshevism, could derail even the most well-orchestrated effort.

In pursuing legislative and consumption strategies, middle- and working-class women formed alliances with predominately male organized labor groups and middle-class male reformers. As historian Kathryn Kish Sklar has asserted, women's activism in the Progressive era frequently "served as a surrogate for working class social-welfare activism." The structure of the political arena provided middle-class women with the political "space" to lobby for a nascent welfare state, Sklar suggests, while other

interest groups, especially male trade unionists, found their social welfare activism hamstrung by a conservative court system.[1] In California, however, middle-class female reformers were not acting because organized labor was excluded from the political process. Both groups actively lobbied for political reforms aimed at addressing larger concerns with class oppression and the excesses of industrial capitalism. With similar goals and an ability to mobilize rank-and-file members, the clubwoman-labor alliance proved to be powerful force in California's Progressive-era politics. This partnership developed out of both parties' legislative efforts, beginning with the women's eight-hour day when middle-class clubwomen and male labor leaders discovered an effective political affinity. Although their broader reform goals were thwarted at times, they were able to stake a claim for the state's role in providing social welfare and labor protections for all citizens. Perhaps more important, this coalition was able to defend their reform achievements from the worst "reactionary" attacks, at least for a time. The clubwoman-labor alliance was not without costs, however. Over time, working-class women were pushed out of the political arena. Their silence on crucial legislative issues points to the ways in which social reform became increasingly focused on the needs of (white) male breadwinners. Similarly, the breakdown of this alliance in the face of growing political conservatism left their Progressive achievements vulnerable to political assaults by long-standing opponents.

California women's focus on reshaping industrial capitalism and the power of the clubwoman-labor alliance revealed itself through the wider scope of this dissertation. By connecting suffrage to reform and the women's movement to the labor movement, this study offers new understandings of the meaning of suffrage, Progressive reform, and the origins of the welfare state. Due to issues of periodization and conceptualization, most scholarship on woman suffrage and women's reform activism have tended to treat the issues as discrete topics, focusing either on suffrage or reform. A few studies have brought the two together. Historian Ellen DuBois, for example, has examined suffragist Harriet Stanton Blatch's efforts to include

[1] Kathryn Kish Sklar, "The Historical Foundations of Women's Power in the Creation of the American Welfare State, 1830–1930," in *Mothers of a New World: Maternalist Politics and the Origins of Welfare States*, eds. Seth Koven and Sonya Michel (New York: Routledge, 1993), 44–45.

working-class women in the suffrage movement and to place legislative politics at its center, resurrecting Blatch's efforts to create a third path of "constructive" feminism focusing on women's economic equality.[2] More recently, historian Maureen Flanagan has documented Chicago women's efforts to transform city politics based on an alternative "female" vision of municipal government that made the welfare of its residents, especially women, children, and families, its central purpose. Flanagan explores the difference that municipal suffrage made for these activist women in working for improved schools, protective legislation, garbage disposal, pure milk, and other reforms. Although Flanagan does find evidence of female alliances with particular men's groups, especially the Men's City Club, her focus is on Chicago women and their cross-class, cross-race efforts.[3] My study joins this scholarship uniting women's suffrage and political activism, recognizing that the suffrage campaign itself could be a politicizing event. By examining a broader milieu, including working- and middle-class women, organized labor, male middle-class proponents and opponents, this dissertation reveals not only the power of women's alliances with male activist groups, including organized labor, but also the ways in which "women's" legislation could serve broader political functions. Like Flanagan, I find that women were central to California Progressivism, and their inclusion recasts our understanding of this reform movement.

This dissertation contributes to three broad historiographical conversations on woman suffrage, the origins of the welfare state, and the politics of consumption. Students of the woman suffrage movement have complicated our understanding of suffrage by closely examining the campaign strategies, ideological and rhetorical justifications, and regional variations in pro- and anti-suffrage campaigns, as well as women's post-suffrage political and party involvement. Rather than a story of decline or a moment of triumph (as suggested in early studies by historians Aileen Kraditor and Eleanor Flexnor, respectively), the woman suffrage movement has come to be seen as more contested ground, a site where competing notions of gender, democratic and pluralist politics, and race were played out. As

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[2] Ellen Carol DuBois, *Harriot Stanton Blatch and the Winning of Woman Suffrage* (New Haven: Yale University Press, 1997).

[3] Maureen A. Flanagan, *Seeing With Their Hearts: Chicago Women and the Vision of the Good City, 1871–1933* (Princeton and Oxford: Princeton University Press, 2002).

proponents chose deliberately to narrow their focus from broadly defined "woman's rights" to the specific goal of suffrage, political scientist Sarah Hunter Graham has shown that suffrage organizations, such as the National American Woman Suffrage Association (NAWSA), became more hierarchical and less democratic, damping down grass-roots activism and "crippl[ing] the women's movement after the vote was won." As a result, woman suffrage seemed only to have brought about women's political ineffectiveness.[4]

Early scholarship suggested that the post-suffrage decline of women's political power also stemmed from suffragists' shift from nineteenth-century arguments concerning "justice" to a twentieth-century emphasis on "expediency." First developed by historian Aileen Kraditor, this framework divides suffrage arguments into those based on the premise that women had the same natural rights as men, including the right to vote ("justice") and those emphasizing the benefits woman suffrage would bring to society ("expediency"). With the turn towards expediency, Kraditor argued, suffragists compromised women's moral power and tainted the ultimate suffrage victory.[5] Subsequent scholars have argued that Kraditor's

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[4] Sara Hunter Graham, *Woman Suffrage and the New Democracy* (New Haven: Yale University Press, 1996), quote on 153; Elna Green, *Southern Strategies: Southern Women and the Woman Suffrage Question* (Chapel Hill: University of North Carolina Press, 1997); Marjorie Spruill Wheeler, *New Women of the New South: The Leaders of the Woman Suffrage Movement in the Southern States* (New York: Oxford University Press, 1993); Suzanne M. Marilley, *Woman Suffrage and the Origins of Liberal Feminism in the United States, 1820–1920* (Cambridge: Harvard University Press, 1996); Susan E. Marshall, *Splintered Sisterhood: Gender and Class in the Campaign against Woman Suffrage* (Madison: University of Wisconsin Press, 1997); and Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (Chicago: University of Chicago Press, 1995), 165–71.

The two early seminal works on woman suffrage are Eleanor Flexnor, *A Century of Struggle: The Woman's Rights Movement in the United States*, revised edition (Cambridge: Belknap Press of Harvard University Press, 1959; revised 1975); and Aileen Kraditor, *The Ideas of the Woman Suffrage Movement, 1890–1920* (New York: Columbia University Press, 1965). In general, Kraditor depicted the woman suffrage movement as a story of decline, with suffragists sacrificing broader ideas of democratic justice for "expedient" arguments for woman suffrage, while Flexnor saw the woman's rights movement as a "century of struggle" resulting ultimately in a hard-won suffrage victory for women.

[5] Kraditor, *Ideas of the Woman Suffrage Movement*, 44–46, 52–74. See also William O'Neill, *Everyone Was Brave: A History of Feminism in America* (Garden City: Quadrangle Press, 1971).

model is overly reductive,[6] noting that the two sets of arguments coexisted harmoniously as suffragists alternated between them throughout much of the seventy-year national suffrage campaign. That alternation, historian Rebecca J. Mead notes, was less a moral failing than a pragmatic response to a "political struggle" that "demanded . . . constant . . . negotiation" among various ideas and rhetorical strategies. More important for this study, Kraditor's model and thesis, which relied on the ideas and experiences of elite, national leaders in the east, ignored early woman suffrage in the West.[7] As a result, the difference made by a reformist political climate, such as that flourishing in Progressive-era California, in shaping women's arguments for — and subsequent use of — the ballot has been generally overlooked.

The early attainment of woman suffrage in California thus offers a moment to reevaluate ideas and consequences of suffrage. Woman suffrage came early in the West, with Wyoming, Idaho, Colorado, and Utah all enfranchising women by 1896. In 1911, California became the sixth state to enact woman suffrage. By 1914, one territory and ten states, all located west of the Mississippi, had given the ballot to women.[8] Relatively few historians have attempted to explain this phenomenon. Historian Alan P. Grimes, for example, placed woman suffrage in the context of the West's "Puritan revival" that focused on cleaning up American politics through "purifying" legislation such as alcohol prohibition, immigration restriction, and

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[6] See Nancy Cott, *The Grounding of Modern Feminism* (New Haven and London: Yale University Press, 1987), 29–30; Graham, *Woman Suffrage and the New Democracy*, 30–31; Marilley, *Woman Suffrage and the Origins of Liberal Feminism,* 1–2. Even newer frameworks, such as Marilley's description of early twentieth century suffrage thought as the politics of personal development and personal freedom, tends to obscure suffragists' concerns with political economy, workers' rights, and corporate capitalism and tends to overlook the still fairly vigorous socialist movement in the west during the Progressive era.

[7] Rebecca J. Mead, *How the Vote Was Won: Woman Suffrage in the Western United States, 1868–1914* (New York and London: New York University Press, 2004), 4–5.

[8] Kathryn L. MacKay, *Battle for the Ballot: Essays on Woman Suffrage in Utah, 1870–1896*, edited by Carol Cornwall Madsen (Logan: Utah State University Press, 1997), viii; and Sandra L. Myres, *Westering Women and the Frontier Experience, 1800–1915* (Albuquerque: University of New Mexico Press, 1982), 233–34. Western states that enacted woman suffrage were (in order of enactment) Wyoming (1869 as a territory, 1890 as a state), Colorado (1893), Idaho (1896), Utah (1870 as a territory, 1896 as a state), California (1911), Oregon (1912), Arizona (1912), Kansas (1912), Alaska (1913 as a territory), Montana (1914), and Nevada (1914).

child labor laws, while historian Beverly Beeton argued that early western suffrage resulted from political expediency, as westerners sought to attract settlers and investors, embarrass political opponents, recruit eastern suffragists' support for statehood bids, and shore up white voter dominance by pitting white women against Hispanics and new immigrants. Historian Sandra Myers, on the other hand, supported a variation of Turner's "frontier theory," arguing that the frontier's practice of social and political "innovation" and "lack of restrictive tradition" fostered the "diffusion" of woman suffrage across the West.[9]

Only a single work explains the spread of suffrage across the West or, more importantly for students of California's past, accounts for the enactment of suffrage in specific states. In that study, historian Rebecca J. Mead demonstrates that western suffragists in Colorado, Washington, California, and Nevada gained critical urban support by working through trade unions and party organizations in their successful campaigns for the ballot.[10] Less concerned with how and why California women won the vote, this dissertation explores suffragists' ideas and rhetoric during the campaign, examining proponents' suffrage language, their understandings of the ballot's potential for change, and the political consequences of their rhetoric. As we shall see, suffragists relied on the language of boosterism and "civilization" to gain broad support for the reform, while simultaneously basing their claim for full citizenship rights on different notions of women's productive labor. In so doing, California suffragists both expanded and limited the meaning and power of the ballot.

Scholars of the national suffrage movement have noted a decline in women's political participation following the Nineteenth Amendment, suggesting that suffragists' narrow focus on achieving the vote somehow deprived

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[9] Alan P. Grimes, *The Puritan Ethic and Woman Suffrage* (New York: Oxford University Press, 1967); Beverly Beeton, *Women Vote in the West: The Woman Suffrage Movement, 1869–1896* (New York: Garland Publishing, 1986); and Beeton, "How the West Was Won for Woman Suffrage," 99–116, in *One Woman, One Vote, Rediscovering the Woman Suffrage Movement*, ed. Marjorie Spruill Wheeler (Troutdale, Ore.: New Sage Press, 1995); Myres, *Westering Women*, 233–34; and Mead, *How the Vote Was Won*. In the latter article, Beeton argues that the process of drafting state constitutions forced Westerners to rethink assumptions about who should have the right to vote, frequently resulting in the enactment of woman suffrage.

[10] Mead, *How the Vote Was Won*, 1–4, 119–21.

them of the kind of broad political agenda necessary to wield the vote effectively. Recent scholarship suggests that suffragists' campaign strategies were not entirely to blame for the post-suffrage fall-off in female political activism. Although politics and parties opened up to include women voters, political scientist Kristi Andersen has shown, party organizations in the 1920s typically relegated women activists to subordinate roles, redrawing gender boundaries within the parties and confining female politicians to low-status positions focused on "women's" issues. The failure of women's suffrage groups to reform as a "woman's party," political scientist Anna Harvey has argued, maintained women's subordinate status in the political arena. Political scientist Jo Freeman, on the other hand, finds that political parties did make room for women following suffrage. Valued for their organizing skills and their votes, women played important roles as party workers, performing much of the difficult organizing work from grassroots to national levels. Although suffrage did not result in the immediate sharing of political power with women, Freeman argues that this early party work laid the groundwork for the political gains of 1970s "second wave" feminism.[11]

As part of this debate over the consequences of suffrage, many historians have viewed the period before suffrage as a time of greater and more effective women's political activism. Studies of women's reform efforts in the late nineteenth and early twentieth centuries have noted middle-class women's success in attaining the passage of "municipal housekeeping" and "maternalist" legislation, such as clean milk and water laws, mothers' pensions, kindergarten movements, and minimum hours laws for women. Despite their disenfranchised status, historians have argued, middle-class female reformers successfully employed the "politics of influence" to achieve municipal improvements, early welfare legislation, and labor protections for working-class women that labor groups and other middle-class (male) reformers were unable to achieve.[12]

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[11] Kristi Andersen, *After Suffrage: Women in Partisan and Electoral Politics Before the New Deal* (Chicago: University of Chicago Press, 1996); Anna L. Harvey, *Votes Without Leverage: Women in American Electoral Politics, 1920–1970* (Cambridge, U.K.: Cambridge University Press, 1998); and Jo Freeman, *A Room at a Time: How Women Entered Party Politics* (New York: Rowman & Littlefield, 2000).

[12] Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Belknap Press of Harvard University Press, 1992); Robyn Muncy, *Creating a Female Dominion in American Reform, 1890–1935*

California women pursued this kind of legislation as enfranchised citizens, a fact that allows a new understanding of the origins of these reforms. In examining laws such as mothers' pensions, social insurance, and protective laws for women workers, scholars Theda Skocpol, Gwendolyn Mink, and Linda Gordon, among others, have demonstrated the central role women reformers played in the construction of a "maternalist" welfare state during the Progressive era. Not only did middle-class women justify their public activism based on their duty as mothers and potential mothers, these scholars have shown, but they conceived of, lobbied for, and implemented a variety of statist welfare reforms that ultimately restricted aid to a narrow segment of poor women and their children.[13] Although more recent scholarship on other social insurance measures, such as historian Beatrix Hoffman's work on New York's health insurance campaign, has broadened its focus to include the participation of organized labor, manufacturers, insurance companies, and policy groups — as well as women reformers — it has continued to concentrate on single welfare policies.[14] Examining these policies independently has obscured the larger contemporary debates over social provision. In the process, this work has tended to overemphasize the role of particular groups, especially clubwomen in the case of maternalist legislation, concealing the contingent nature of the development of the welfare state and the more complicated nature of

(New York: Oxford University Press, 1991), Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare* (Cambridge: Harvard University Press, 1994); Lori Ginzburg, *Women and the Work of Benevolence: Morality, Politics, and Class in the 19th Century United States* (New Haven: Yale University Press, 1990); Gwendolyn Mink, *The Wages of Motherhood: Inequality in the Welfare State, 1917–1942* (Ithaca: Cornell University Press, 1995); Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy (Chicago: University of Chicago Press, 1995), 165–71.*

[13] This scholarship includes Gwendolyn Mink, *The Wages of Motherhood: Inequality in the Welfare State, 1917–1942* (Ithaca and London: Cornell University Press, 1995); Gordon, *Pitied But Not Entitled*; Molly Ladd-Taylor, *Mother-Work: Women, Child Welfare, and the State, 1890–1930* (Urbana and Chicago: University of Illinois Press, 1994); Skocpol, *Protecting Soldiers and Mothers*; and Muncy, *Creating a Female Dominion*, among others. These reforms ranged from the establishment of the U.S. Children's Bureau in 1912, to state-level mothers' pension programs and birth registration drives, to the passage of the Sheppard-Towner Maternity and Infancy Act in 1921, the first federally funded social welfare program.

[14] Beatrix Hoffman, *The Wages of Sickness: The Politics of Health Insurance in Progressive America* (Chapel Hill and London: University of North Carolina Press, 2000).

maternalism itself. Although maternalism frequently functioned as an effective rhetorical strategy during particular legislative campaigns, as an ideology it did not necessarily reflect the entirety of women reformers' policy agenda.

In addition to scholarship on the origins of the welfare state, protective legislation, such as women's eight-hour day and minimum wage laws, has invited the attention of students of legal, labor, and gender history. These scholars have explored the dual functions of these laws as protections for women workers and legal precedents for broader labor legislation. Legal historians have traced the twists and turns of the arguments for protective legislation, as sympathetic lawyers sought to find the constitutional basis for state "interference" in the freedom of contract between workers and employers. The winning strategy emphasized the state's social interest in protecting female workers as "mothers of the race," thereby permitting limitations on women's hours and other kinds of work.[15] Legal and labor historians have also examined how labor leaders and other reformers aimed to use protective legislation as an "entering wedge" to broader, "universal" legislation benefiting the working class and especially male workers. For these scholars, state labor organizations' willingness to engage in partisan politics and legislative lobbying demonstrated a flexibility and pragmatism often absent at the national level of the American Federation of Labor (AFL). Ultimately, this entering wedge strategy foundered on maternalist ideology, as courts and lawmakers became convinced of women's need for protection, but not men's.[16]

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[15] Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* (Ann Arbor: University of Michigan Press, 2001), 77–182; David A. Moss, *Socializing Security: Progressive-Era Economists and the Origins of American Social Policy* (Cambridge and London, England: Harvard University Press, 1996), 97–116; and Melvin I. Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," *Journal of American History* (June 1985): 63–91.

[16] K. R. Willoughby, "Mothering Labor: Difference as a Device Towards Protective Labor Legislation For Men, 1830–1938," *Journal of Law and Politics* 10 (Spring 1994): 445–89; Miriam Cohen and Michael Hanagan, "The Politics of Gender and the Making of the Welfare State, 1900–1940: A Comparative Perspective," *Journal of Social History* (Spring 1991): 469–84; Elaine Johnson, "Protective Legislation and Women's Work: Oregon's Ten-Hour Law and the Muller v. Oregon Case" (Ph.D. diss., University of Oregon, 1982), cited in Holly J. McCammon, "The Politics of Protection: State Minimum Wage and Maximum Hours Laws for Women in the United States, 1870–1930," *Sociological*

More recently, feminist scholarship has used protective legislation as window into analyzing maternalism as a legal and political strategy. According to these studies, the success of protective legislation in legislative halls and courtrooms rested on gendered assumptions of women workers' physical frailties and reproductive functions, the state's interest in protecting them as mothers and potential mothers, and the belief that women were short-term workers. Feminist scholars, in particular, have noted the ways in which the ideology of maternalism discriminated against women in the long run, working to confine them to low-wage, sexually segregated jobs and limiting their access to employment-based welfare benefits.[17] As insightful as this work has been, its close focus on maternalism has obscured the

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Quarterly 36 (Spring 1995): 217–49; and Urofsky, "State Courts and Protective Legislation," 63–91. Urofsky notes that state courts upheld most protective legislation during this period; thus, state labor groups were not being naive in pursuing entering wedge and legislative strategies to gain high wages, shorter hours, and improved working conditions. On state labor organization's willingness to pursue legislative strategies, see Julie Greene, *Pure and Simple Politics: The American Federation of Labor and Political Activism, 1881–1917* (Cambridge, U.K.: Cambridge University Press, 1998); and Gary M. Fink, *Labor's Search for Political Order: The Political Behavior of the Missouri Labor Movement, 1890–1940* (Columbia: University of Missouri Press, 1973). For a good overview of protective legislation for women, see Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* (New York and Oxford: Oxford University Press, 1982), 180–214.

[17] Skocpol, *Protecting Soldiers and Mothers*, 373–423; Mink, *Wages of Motherhood*; Mimi Abramovitz, *Regulating the Lives of Women: Social Welfare Policy from Colonial Times to the Present* (Boston: South End Press, 1988); *Women, the State, and Welfare*, ed. Linda Gordon (Madison, WI: University of Wisconsin Press, 1990); and Miriam Cohen and Michael Hanagan, "The Politics of Gender and the Making of the Welfare State, 1900–1940: A Comparative Perspective," *Journal of Social History* 24 (Spring 1991): 469–84. The maternalist label has been used particularly to describe efforts by middle-class clubwomen to build a nascent welfare state. Historian Kathryn Kish Sklar notes Florence Kelley's use of maternalism as a legal strategy for justifying protective legislation. See Kathryn Kish Sklar, *Florence Kelley and the Nation's Work: The Rise of Women's Political Culture, 1830–1900* (New Haven and London: Yale University Press, 1995), 258–59. On working-class women's use of maternalism to gain protective legislation, see Annelise Orleck, *Common Sense and a Little Fire: Women and Working-Class Politics in the United States, 1900–1965* (Chapel Hill and London: University of North Carolina Press, 1995), 121–68. On the effects of the enforcement of protective legislation on women workers, see Holly J. McCammon, "Protection for Whom? Maximum Hours Laws and Women's Employment in the United States, 1880–1920," *Work and Occupations* 23 (May 1996): 132–64. Other scholars have examined the construction of

ways in which protective legislation was bound up with the larger political issues at the time. As we shall see, the popularity of protective legislation for women among voters and lawmakers in California had as much to do with navigating Progressive-era politics as assisting wage-earning women in the workplace.

Recent scholarship on consumption (and even President George W. Bush's exhortation, in the immediate aftermath of the terrorist attacks on 9/11, that Americans should do their patriotic duty and go shopping) has highlighted "the relationship between material culture and citizenship," the way that states as well as grassroots organizations have attempted to persuade "consumer-citizens" to use their purchasing power in politically minded ways.[18] Students of consumption have typified the Progressive era as a critical period of transition[19] to a "consumers' republic" beginning in the 1930s and 1940s, where citizens turned to the private marketplace, constructed and supported by the state, to pursue economic, political, and social goals for "a more equal, free, and democratic nation."[20] As historians Dana

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a maternalist welfare state without specifically discussing protective labor legislation. See, for example, Gordon, *Pitied But Not Entitled*.

Not all scholars of protective legislation have emphasized maternalism in their analysis, although they note the ways in which the laws accommodated capitalism's contradictory needs for a cheap, female labor supply and a reproducing labor class. See, for example, Susan Lehrer, *Origins of Protective Labor Legislation for Women, 1905–1925* (Albany: State University of New York Press, 1987). For a general overview of protective legislation, see Nancy Woloch, *Muller v. Oregon: A Brief History with Documents* (Boston and New York: Bedford Books of St. Martin's Press, 1996. Woloch notes the dual purpose of these laws to protect women workers and to provide a precedent for universal labor legislation.

[18] Matthew Hilton and Martin Daunton, "Material Politics: An Introduction," in *The Politics of Consumption: Material Culture and Citizenship in Europe and America*, eds. Matthew Hilton and Martin Daunton (Oxford and New York: Berg, 2001), 3, 5. See also Meg Jacobs, "The Politics of Purchasing Power: Political Economy, Consumption Politics, and State-Building, 1909–1959" (Ph.D. diss., University of Virginia, 1998), 31–32; and Charles McGovern, "Consumption and Citizenship in the United States," in *Getting and Spending: European and American Consumer Societies in the Twentieth Century*, eds. Susan Strasser, Charles McGovern, and Matthias Judt (Cambridge and New York: Cambridge University Press, 1998), 37–58.

[19] Meg Jacobs, *Pocketbook Politics: Economic Citizenship in Twentieth-Century America* (Princeton and Oxford: Princeton University Press, 2005), 15–52.

[20] Lizabeth Cohen, *A Consumer's Republic: The Politics of Mass Consumption in Postwar America* (New York: Vintage Books, 2003), 13.

Frank, Kathryn Kish Sklar, and Margaret Finnegan have shown, effective consumption campaigns in the early twentieth century required the tight linkage of consumer behavior to specific political goals in order to motivate consumers to buy union label goods, follow National Consumer League guidelines, or support woman suffrage. Even with clear objectives, consumers, usually women, often found it difficult to seek out "approved" items.[21]

In a "proto–citizen consumer" moment, historian Lizabeth Cohen argues, Progressive-era consumption campaigns complemented reformers' political efforts to protect workers, children, mothers, and consumers "from the dangers of an industrial and increasingly urban society." Consumers, then, came to be seen as yet another class of citizens requiring the state's protection. Similarly, Cohen sees in Progressive reforms like the eight-hour day, minimum wage, and even union label campaigns the beginning of organized workers' willingness to accept "the reality of industrialized labor," no longer opposing "wage slavery" and instead "agitat[ing] for 'a living wage' adequate to provide an 'American standard of living.'" In California, consumption operated as another means to broad objectives of restraining industrial capitalism. Rather than seeking to protect consumers from corporate malfeasance, activists placed politically minded consumers on the front lines, encouraging them to wield their voting and buying power for specific political objectives. More than an attempt to get "a fair shake at consumption," as Cohen sees it,[22] these political reforms and the consumer campaigns represented a continuation of efforts to shape a just society. As historian Meg Jacobs has noted, early twentieth-century consumerism and the language of purchasing power represented an ongoing debate about "how to organize, reform, and regulate American capitalism." The struggle over economic citizenship, combined with the simultaneous debates over state-provided social welfare, helped legitimate

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[21] Dana Frank, *Purchasing Power: Consumer Organizing, Gender, and the Seattle Labor Movement, 1919–1929* (New York: Cambridge University Press, 1994); Kathryn Kish Sklar, "The Consumers' White Label Campaign of the National Consumers' League, 1898–1918," 17–35, in *Getting and Spending: European and American Consumer Societies in the Twentieth Century*, eds. Susan Strasser, Charles McGovern, and Matthias Judt (Cambridge and New York: Cambridge University Press, 1998); and Margaret Finnegan, *Selling Suffrage: Consumer Culture & Votes for Women* (New York: Columbia University Press, 1999).

[22] Cohen, *Consumer's Republic*, 21–22.

the rise of an "interventionist" state.[23] In California, Progressive activists, male and female alike, relied on both political and consumption methods in their efforts to achieve a more equitable distribution of social and economic power.

The connection between politics and consumption can be seen in the suffrage campaign nationally, as historian Margaret Finnegan has shown. In the Progressive era, she suggests, the rising consumer culture, coupled with Progressive concerns over industrial capitalism, led to arguments that women needed the ballot to protect women's traditional roles as family purchasers as well as to counter the threat of moral degradation posed by movies, dance halls, racetracks, and other kinds of vice. Women's politically empowered consumption could create a better world. By the 1920s, Finnegan argues, consumption had become a goal rather than a method for suffragists. By acting like consumers — shopping among candidates rather than putting forth their own agendas and representatives — female consumer-voters drained the ballot of its potency.[24] The seductiveness of this new consumer culture, I would argue, was less at fault than the crushing political conservatism of 1920s, which limited both legislation and consumption as means to broader political ends. In California, activist leaders found the state's political climate stultifying, blocking their attempts at reform and fostering a kind of apathy among rank-and-file clubwomen and female trade unionists that was difficult to overcome. Nevertheless, for many California activists, consumption still held potential as a reform tool.

The dissertation consists of five chapters. Chapter One explores middle- and working-class women's use of state boosterism and concerns about civilization's progress in the woman suffrage campaign. In the process, suffragists developed a strategy based on symbols and rhetoric that tied women's enfranchisement to male voters' desires to create a "great state" of California. Although this rhetoric was effective in gaining male support, it ultimately made suffrage about something other than women's rights — which had the potential to undermine women's exercise of political power in the post-suffrage period. Chapter Two examines how middle- and working-class women constructed a vision for the ballot the during the 1911

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[23] Jacobs, *Pocketbook Politics*, 264–65.

[24] Finnegan, *Selling Suffrage*, 31–32, 39–43, 171–74.

campaign and how this vision translated into a post-suffrage critique of the state's political economy. In particular, suffragists used the figure of the wage-earning woman as an accessible trope to discuss the ways in which they believed the excesses of industrial capitalism threatened the republic. Rather than "expedient" arguments, I argue, their construction of the need for justice and class uplift and the dangers of "wage slavery" rested on their understandings of women's productive labor. At bottom, suffragists made women's civic work central to the creation of a more equitable society.

Chapter Three examines the linkage of suffrage, voter registration drives, and protective legislation for women in the immediate post-suffrage period as new women voters attempted to act on their vision of economic reform. The chapter shows that protective legislation, especially the women's eight-hour day, functioned as an important political tool in balancing and appeasing the competing needs and interests of middle- and working-class women, male labor leaders, and large employers. Chapter Four uses the successful mothers' pension and failed old-age pension campaigns as a window into the efforts of female reformers and male trade unionists to attain broad-based social insurance for the working class. This chapter demonstrates that "entering wedge" victories, such as mothers' pensions, were less maternalist reforms aimed at protecting poor women and children than the result of a complex calculus of political factors. Over time, the labor-clubwoman coalition became increasingly focused on the needs of male breadwinners, squeezing out activist working-class women and reflecting a belief in traditional gender roles. Chapter Five explores how progressive-minded women and organized labor turned to consumption strategies, such as "buy California" campaigns, union label efforts, and Consumer's Leagues, to achieve their reform goals during the 1910s and 1920s. The connection between consumer efforts and clear political objectives significantly affected the success of these efforts before and after World War I.

The dissertation begins with a prologue situating the project in the context of California history and ends with an epilogue describing the implications of women's efforts to deal with industrial capitalism for California history.

By widening the lens of inquiry to include reform-minded women and organized labor in the study of political and consumer activism, this study

complicates our understanding of woman suffrage, Progressive reform, and the politics of consumption. It demonstrates that the importance of suffrage lay not simply in women's attainment of voting rights, but in their construction of a vision of society and a plan for reform. California women, allied with organized labor, sought to reshape the state's political economy to achieve a more equitable society — first through the power of their ballots and then through the power of their pocketbooks. In doing so, they challenged received historical wisdom about the maternalist origins of the early welfare state, the ultimate (in)significance of woman suffrage, and the functioning of gender and class in the Progressive era. In short, they demonstrated the centrality of women's activism in California and the West to understanding Progressive reform.

* * *

PROLOGUE

On October 10, 1911, California became the sixth state to enact woman suffrage, joining Wyoming, Idaho, Colorado, Utah, and Washington in enfranchising women. This western trend continued, such that, by 1914, one territory and ten states, all located west of the Mississippi, had given women the ballot.[1]

Although a few historians have attempted to account for this western phenomenon, only a single work explains the spread of suffrage across the west or, more importantly for students of California's past, accounts for the enactment of suffrage in a specific state.[2] In her study, historian Rebecca J. Mead demonstrates that western suffragists in Colorado, Washington, California, and Nevada gained critical urban support by working through trade unions and party organizations.[3] In California's case, the 1911 campaign for woman suffrage found its impetus and success in the state's long history of protest and reform. Since the gold rush, Californians conceived of themselves and their state as free and egalitarian — a place "wide open"

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[1] See Introduction above, note 8.

[2] See Introduction above, note 9.

[3] Rebecca J. Mead, *How the Vote Was Won: Woman Suffrage in the Western United States, 1868–1914* (New York and London: New York University Press, 2004), 1–4, 119–21.

to financial opportunities and political and social freedoms. The protest movements that arose during the nineteenth and early twentieth centuries focused on the contradiction between the state's promise of freedom and prosperity and the constraining reality of economic monopoly. Capitalizing on the momentum of the state's Progressive movement, suffragists in 1911 tapped into the state's tradition of discontent and protest to argue for their right to the vote. As reform-minded state legislators and voters in the 1910s sought once again to expand democracy and to curb the excesses of monopoly — with the Southern Pacific railroad[4] as the most clear and reviled symbol of economic excess — suffragists were able to lay claim to their rights as part of this new reform movement, while simultaneously framing suffrage as part of the state's history of reform and protest.

Anglo-Americans' interest in California began in the late eighteenth century with the development of a lucrative fur trade between New England and Chinese merchants with the help of Yankee, British, and Russian hunters. With the resulting near extermination of the region's population of sea otters and fur seals, California's economy turned to cowhide and tallow trade. Also profitable, the hide-and-tallow trade, more importantly, cemented in the minds of eastern Americans the idea that California was a place of potential economic bounty, if only it were "in the hands of an enterprising people." Determined to be those "enterprising people," early Anglo-American settlers arrived with commerce and profit in mind. American immigrants to northern California focused on trade and

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[4] Although before the mid-1880s, the railroad was known as the Central Pacific railroad, I will refer to it as the Southern Pacific for simplicity's sake. The transcontinental Central Pacific railroad was founded in 1861 by Mark Hopkins, Collis P. Huntington, Theodore Judah, Leland Stanford, and Charles Crocker, known as "the Big Four." To eliminate competition, the Big Four in the late 1860s gained control of the original Southern Pacific, designated to be a western transcontinental route, linking Los Angeles with New Orleans. Although they tried to maintain the fiction that the Central Pacific and the Southern Pacific railroads were under separate control, few were fooled and California newspapers generally referred to the whole system as "the railroads." In 1884, the railroad system officially became called the Southern Pacific, when the Big Four incorporated their company in Kentucky, where incorporation laws were most lax. Thus, from the mid-1880s on, the railroad in California was called the Southern Pacific. See Walton Bean and James J. Rawls, *California: An Interpretive History*, 5th ed. (New York, St. Louis, and San Francisco: McGraw-Hill Book Company, 1988), 155–57, 165–67.

merchandising; in the south, they generally concentrated on establishing large mercantile firms and acquiring land, usually through a series of strategic marriages to wealthy *Californios*. In 1845, a more significant overland migration to California began, but, before the gold rush, American settlers tended to be more attracted to Texas and Oregon, which, unlike Mexican-controlled California, were considered to be part of "the states."[5]

With the discovery of gold, however, attitudes underwent a significant change. Gold proved to be the biggest impetus to westward immigration, and its discovery coincided with the cession of California and other territories to the United States as part of the Treaty of Guadalupe Hildago, which ended the Mexican-American War.[6] American settlers streamed into the state. In 1849, 80,000 "forty-niners" immigrated, and by 1854 approximately 300,000 persons had moved to California.[7] Most were young married men who hoped to make their fortunes in the gold mines and return to their places of origin.[8] In contrast to this rapid immigration in the north, southern California was largely unchanged by the gold rush. Culturally, the region remained a Spanish-Mexican territory, with Spanish as the primary language for both spoken and written communication. Throughout the 1860s and 1870s, Los Angeles remained essentially a small Mexican town, and the surrounding "cow counties," for the most part, lay undeveloped and uninhabited.[9] White Americans' focus stayed to the north and on gold.

Despite this population explosion and the land's legal cession to the United States, California lacked a formal government from 1848 to 1850, although it was nominally under military rule. The region's status as territory

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[5] Walton Bean and James J. Rawls, *California: An Interpretive History*, 5th ed. (New York, St. Louis, and San Francisco: McGraw-Hill Book Company, 1988), 56–58, 61, 65–66. Quote on 57.

[6] Bean and Rawls, *California*, 68, 79.

[7] Malcom Rohrbough, "No Boy's Play: Migration and Settlement in Early Gold Rush California," in *Rooted in Barbarous Soil: People, Culture, and Community in Gold Rush California*, eds. Kevin Starr and Richard J. Orsi (Berkeley, Los Angeles, London: University of California Press, 2000), 25.

[8] Bean and Rawls, *California*, 92–93. According to Bean and Rawls, at the end of 1848, 6,000 miners had extracted $10 million worth of gold. By the end of 1849, 40,000 prospectors worked the mines, and by 1852 100,000 miners lived in the state.

[9] Carey McWilliams, *Southern California Country: An Island on the Land* (New York: Duell, Sloan & Pearce, 1946), 50.

became embroiled in the larger national debate over slavery, when white settlers drafted a constitution banning slavery. As a result, California's entrance into the union was nearly rejected by Congress as southern Senators sought to extend the Missouri Compromise line to divide the territory into slave and free states. After much wrangling in the Senate, California gained its statehood as part of the Compromise of 1850, skipping the territorial phase entirely.[10]

The significance of the gold rush lay not simply in easing California's entrance into the union and fostering rapid immigration, but in developing the cultural foundations for what settlers considered to be "western" ideas of freedom, liberty, and equality. For newcomers, California and the gold rush became symbols of the nation's promise of economic democracy. The gold rush suggested that anyone, regardless of class or status, could strike it rich in the gold fields. Hard work, miners believed, would naturally be rewarded with economic success, the result of one's own daring and labor; wealth, in their view, was available to all.[11] San Francisco residents in particular embraced these ideas, seeing their city — the gateway to the gold country — as the embodiment of unparalleled freedom, equality, and

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[10] Bean and Rawls, *California*, 95, 96, 101; McWilliams, *Southern California Country*, 58. Historian Sucheng Chan provides a succinct description of the problem: California's "admission into the upset the formula that had been established thirty years earlier in the Missouri Compromise — that territories would become states in pairs: one free and one slave, in order to preserve the fragile balance between free and slave states. A problem arose because California was the only state seeking admission in 1850. But its statehood could not wait until another territory was ready because the discovery of gold made Congress eager to incorporate California into the nation. Its entry as a free state was part of the Compromise of 1850, which also made New Mexico a territory and abolished the slave trade in the District of Columbia. To placate the slave-owning states, Congress passed a stringent fugitive slave law." See Sucheng Chan, "A People of Exceptional Character: Ethnic Diversity, Nativism, and Racism in the California Gold Rush," in *Rooted in Barbarous Soil: People, Culture, and Community in Gold Rush California*, eds. Kevin Starr and Richard J. Orsi (Berkeley, Los Angeles, London: University of California Press, 2000), 70. See also Spencer C. Olin, Jr., *California Politics, 1846–1920: The Emerging Corporate State* (San Francisco: Boyd & Fraser Publishing Company, 1981), 1–2, 5, 9, 12. Olin notes that the provision in the state constitution banning slavery was less an humanitarian gesture than an economic one: white miners refused to work alongside Black slaves, fearing both the social degradation of their work and the possibility that slaveholders would have "an unfair advantage" in extracting gold.

[11] Rohrbough, "No Boy's Play," 28.

democracy. Rapid urbanization and industrialization accompanied this sense of egalitarianism and economic opportunity, fostering an entrepreneurial spirit among miners and merchants alike. Many merchants found that the real riches lay in supplying miners with tools, housing, food, and other necessities and equipment.[12] The discoveries of oil and silver in the 1860s continued the economic expansion, attracting new immigrants as well as technological innovation and corporate investment to these capital- and labor-intensive, extractive industries.[13]

In this way, San Francisco, along with other western cities such as Denver and Seattle, became an "instant city," arising almost overnight around mining ventures for gold, silver, and copper. The city's rapid economic development came at a social and cultural cost, however. Instant cities, as historian Gunther Barth notes, were marked by social instability and a culture narrowly focused on the attainment of individual wealth. Inhabitants gave little thought, at least initially, to creating cohesive, stable societies.[14] Moreover, the transience of population and wealth prevented broad-based civic participation in both state and local matters. As a result, in California, the more stable elites, including large farmers, ranchers, merchants, lawyers, and miners, gained unfettered influence over the state legislature and single-mindedly furthered their own political and economic interests. The concerns and needs of laborers — whether small-time miners or farm workers — received little attention.[15]

Nevertheless, San Francisco's population grew quickly, from 56,802 inhabitants in 1860 to 342,782 in 1900, according to the U.S. census.[16] From the beginning, San Franciscans were a diverse lot, and this heterogeneity

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[12] Gunther Barth, *Instant Cities: Urbanization and the Rise of San Francisco and Denver* (New York: Oxford University Press, 1975), 6–7, 38. Despite the sense of disarray and rapid change, San Francisco did create its own urban culture, based on the experiences of the diverse group of people it attracted. Unlike rustic mining towns, urban centers like San Francisco and Los Angeles did search for "social cohesion and cultural identity," often based on a self-conception of freedom and egalitarianism and setting them apart from eastern cities. Moreover, these cities were forced to urbanize and industrialize quickly — and to deal with urban problems common to the late nineteenth century.

[13] Olin, *California Politics*, 15–18.

[14] Barth, *Instant Cities*, 129.

[15] Olin, *California Politics,* 15–18.

[16] Barth, *Instant Cities,* 135.

continued into the twentieth century. Although the vast majority (94 percent) of the inhabitants were white, this "white" population was itself diverse, made up of Irish, German, English, and Italian immigrants, among others. By 1900, foreign-born inhabitants composed 30 percent of the city's population, while 40 percent were first-generation Americans. Chinese and Japanese residents constituted just 5 percent of the city, and African Americans represented only 0.5 percent. This racial and ethnic diversity had important results socially and economically. Beginning in the 1860s, for example, anti-Asian sentiment among white working-class San Franciscans helped galvanize labor organization through "white only" campaigns. These efforts, racist though they were, paid off. By the early twentieth century, San Francisco was the most heavily unionized city on the west coast.[17]

Although non-elites tended to lose out in this system, the small numbers of women and Blacks actually worked to reinforce San Francisco's self-concept as an egalitarian and "wide-open city."[18] African Americans were able to attain economic security — and sometimes amass small fortunes — working at relatively well-paying jobs, even as they experienced blatant discrimination.[19] White women, although still constrained by nineteenth century limits on female employment, were often able to capitalize on a favorable sex ratio to make advantageous marriages and remarriages. Moreover, the demand for female labor as schoolteachers, boardinghouse keepers, and seamstresses in woman-scarce San Francisco meant that single women could often manage to live independently based on their own labor. A few exceptional women, such as Marietta Lois Beers Stow, managed to achieve significant prominence. Stow published and edited a

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[17] Mansel G. Blackford, *The Lost Dream: Businessmen and City Planning on the Pacific Coast, 1890–1920* (Columbus: Ohio State University Press, 1993), 22; Olin, *California Politics,* 23–26; Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley, Los Angeles, and London: University of California Press, 1971, 1995), 262–65.

[18] Barth, *Instant Cities,* 175.

[19] Douglas Henry Daniels, *Pioneer Urbanites: A Social and Cultural History of Black San Francisco* (Berkeley, Los Angeles, and Oxford: University of California Press, 1990), 35–37. Daniels notes that some Black hotel workers at the Palace Hotel did particularly well based on the wise investment of salary and tips. The Palace was eventually forced to fire all its Black employees when white workers unionized.

newspaper aimed at women's industrial education and later ran as an independent candidate for California governor. Women like Stow enabled white women to imagine themselves as free and equal, at the very least, with some arguing that California's political and economic opportunities "presaged a 'golden dawn of a new era for women.' "[20]

Los Angeles, on the other hand, grew more slowly than San Francisco and had a much more homogeneous population. Southern California did not experience its first boom until 1868, driven by the spread of the citrus industry (lemons, navel and Valencia oranges) and the "health rush" to the south. Physicians, newspaper editors, and other boosters encouraged the chronically ill and their families to move to southern California for their health. Although the cure had little basis in medical fact, it did persuade thousands to immigrate.[21] Unlike San Francisco's diverse population, Los Angeles during the nineteenth century attracted primarily native white Americans and western European immigrants, despite its Mexican-Spanish background.[22] Aggressive railroad promotions of southern California as a tourist attraction and retirement locales contributed to the real estate boom that peaked in 1887, as midwesterners, in particular, were enticed west to a supposedly beautiful and bountiful rural land. By the twentieth century, however, southern California became increasingly more urban in character, and immigrants from southern and eastern Europe, Mexico, and Japan began to join the ranks of *Angelenos*.[23] With a population of only 50,395 in 1890, by 1910 the city had 319,198 residents.[24] Still, the city remained largely Anglo, with 96 percent of the city considered "white." Of these white *Angelenos*, 81 percent were native-born Americans. Unlike the prospectors who traveled to San Francisco during the gold rush, Los Angeles was primarily comprised of independent farmers and small-town

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[20] Barth, *Instant Cities*, 175–76. Quote on 176. Even by 1880, the ratio of women to men in San Francisco was still only 5 to 7. Despite the greater economic opportunity in California, wages for female workers in the west were 25 to 50 percent lower than wages for male workers in the 1880s. For more on the sheer variety of Western women's occupations, see Glenda Riley, *Building and Breaking Families in the American West* (Albuquerque: University of New Mexico Press, 1996), 137.

[21] Bean and Rawls, *California*, 189–91.

[22] Blackford, *Lost Dream*, 23.

[23] Bean and Rawls, *California*, 191–92.

[24] McWilliams, *Southern California Country*, 130.

midwesterners who had come to retire. The city, as a result, had a markedly middle-class flavor.[25]

While the discoveries of gold, oil, and silver and the growth of the railroad, tourism, and the citrus industry shaped San Francisco and Los Angeles, early federal land policy profoundly affected the social, economic, and political realities of California's central valley. Beginning in 1860, the federal government began to break up early Spanish and Mexican land grants, selling California land to private individuals. The intention was not to redistribute land to small shareholders and settlers, however, and these land sales tended to concentrate land in the hands of private individuals and corporations. By 1880, wealthy individuals had purchased most of the valuable land, while the federal government gave nearly 11.5 million acres to the railroads. These grants and land sales totaled almost 36 million acres — over one-third of the state's land. By removing the most desirable property from the open market, historian Spencer C. Olin, Jr. notes, these early land transfers worked to undermine the Homestead Act in California. As contemporary critics argued, this land monopoly frustrated small independent farmers and fostered instead large-scale agriculture based on low-paid wage labor.[26]

The development of an early form of agribusiness had important, long-term social consequences for the state. Rural areas suffered from social instability, longstanding labor problems, land monopoly, and a sharply divided social structure made up of absentee corporate owners, corporate farm managers, small farm owners, and poor migratory farm workers. In 1916, the state Commission of Land Colonization and Rural Credits acknowledged the negative consequences of the system, noting that "at one end of the social scale [we have] a few rich men who as a rule do not live on their estates, and at the other end either a body of shifting farm laborers or a farm tenantry made up largely of aliens, who take small interest in the progress of the community." In the view of the Commission, the concentration of land in the hands of a powerful few was detrimental to society as a whole as well as to poor farmers and laborers. Moreover, migrant workers were primarily of Asian or Mexican descent, and thus the majority was

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[25] Blackford, *Lost Dream*, 23.

[26] Spencer C. Olin, Jr., *California's Prodigal Sons: Hiram Johnson and the Progressives, 1911–1917* (Berkeley and Los Angeles: University of California Press, 1968), 27.

disenfranchised. Those who were American citizens frequently did not vote because they could not meet the residency or literacy requirements.[27]

The concentration of wealth and power into the hands of a few individuals and corporations shaped California's political culture in the late nineteenth century. Although other corporations and individuals were also guilty of monopoly, corruption, and power grabs, state politics from 1870 to 1910 centered on the Southern Pacific Railroad and the reform movements its monopolistic tactics generated. The railroads received generous benefits, including land grants and rights-of-way over state land, from both the state and federal government. In addition, the Southern Pacific spent thousands of dollars lobbying legislators and generally controlled the state Senate through much of this period. Not as evil as its critics maintained, the railroad did bring real benefits to the state by "encouraging immigration, stimulating agricultural growth, fostering economic expansion, and promoting land values." In the context of the economic depression of the late 1870s, however, these benefits hurt rather than helped, or so farmers and workers argued. Small farmers protested unfair rail rates, while urban laborers blamed railroad-sponsored immigration for expanding the labor pool, resulting in rising unemployment and declining wages. Moreover, the Southern Pacific's efforts to use its political influence to protect its economic position smacked of corporate privilege and political corruption. In late 1877, small farmers and workers formed the Workingmen's Party to provide a militant political voice to their concerns, targeting both corporate corruption and Chinese workers for the economic downturn.[28]

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[27] Olin, *California's Prodigal Sons*, 27–28.

[28] Olin, *California Politics*, 30–32, 33–36, and William Deverell, *Railroad Crossing: Californians and the Railroad, 1850–1910* (Berkeley, Los Angeles, London: University of California Press, 1994), 131. The Southern Pacific's power became so pervasive that it tried to name and control every politician from the governor on down. In 1884 the Southern Pacific spent $600,000 on influencing legislation. Other reform movements during this period also attempted to address the growing concentration of corporate power. As Olin notes, "Recovering slowly from the wounds earlier inflicted by intense internal debates over slavery, secession, and the Civil War, and from a decimation of its ranks by former Democrats who had gravitated into the Workingmen's Party, Democratic leaders were faced with a major rebuilding task. In this process of reconstruction, antimonopolists took the lead. They assumed control of local Democratic organizations across the state and won the election of 1882. In capturing nearly every state office, all positions on the Railroad Commission, six congressional seats, and a vast majority of

In response to these protests and widespread concern over the depression and increasing corporate control, California voters took very specific action in September 1878: They called a new constitutional convention. Delegates hoped to address the problems of class division, social conflict, economic depression, and growing poverty that had accompanied the state's rapid urbanization, industrialization, and population growth. The convention highlighted Californians' fundamental belief in the importance of ensuring equal opportunity for all individuals as they attempted to address the problems of monopoly. The domination of the Southern Pacific in the state's politics and economy, the concentration of land into the hands of a few wealthy corporate and individual landowners, and political cronyism and corruption all came under fire as betrayals of American ideals. Delegates of the Workingmen's Party in particular sought to mitigate the power of large landowners and urban bankers who, in their view, had "reduced workers and small farmers to a condition of servitude and dependency." The new constitution attempted to exert public control over corporations, stock and bond markets, and rate-manipulating railroads through greater state regulation.[29] Although it provided for equal education and employment opportunities (to enable white women to compete more effectively against male Chinese workers), the new constitution did not enfranchise women. What limited discussion of woman suffrage there was at the convention highlighted the Party's anti-Chinese sentiment, as it centered on the potential advantages of enfranchising white women to counter Chinese-American male voters.[30] Ultimately, the revised constitution failed to achieve its goals. The power of the state railroad commission

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the state legislative seats, the Democratic Party in California demonstrated a vital resurgence as a political force as well as the broad popularity of its antimonopoly stance." See Olin, *California Politics*, 41–44. Historian William Deverell notes that anti-railroad sentiment was central to the creation of the Workingmen's Party. See Deverell, *Railroad Crossing*, 43.

[29] Olin, *California Politics,* 37–39. As Olin notes, "By 1879 the population of California was approaching a million, having dramatically increased 800 percent since statehood and having become ethnically and racially more heterogeneous through continuous immigration. Moreover, 37 percent of the total population now lived in cities, such as San Francisco (with one quarter of the state's residents), Oakland, Sacramento, San Jose, Stockton, and Los Angeles." See also Deverell, *Railroad Crossing*, 60.

[30] Mead, *How the Vote Was Won*, 39–40.

was undermined by the co-optation of the railroad board by the Southern Pacific as well as by pro-railroad decisions of the U.S. Supreme Court. By 1880 the Workingmen's Party had lost steam, unable to attract members from the emerging labor movement and unable to sustain organizational momentum among poor, often unemployed, laborers and farmers. At the party's demise, Workingmen's members moved into the state Democratic Party, bringing with them their anti-monopoly, anti-railroad, and anti-Chinese stances.[31]

In the mid-1880s, California underwent significant economic, demographic, and political change, stemming in large part from the state's recovery from an extended recession. Rapid immigration accompanied economic recovery, as 340,000, primarily midwestern, immigrants streamed into southern "cow counties." This population growth not only helped revive rural economies, but also fundamentally altered the state's political balance, as the demographic shift also marked a shift in political power to the south. Although San Francisco remained the eighth largest city in the country at this time and fielded a powerful, united legislative bloc, southern California gained more seats at the state capitol and thus more power in state politics. In addition, the state Republican Party began to threaten Democratic control over state legislative and executive branches.[32] Ultimately, San Francisco lost its economic preeminence in both the state and the west coast during this period. By the end of the 1890s Seattle and Portland began to rival San Francisco in economic ventures, while by the early 1900s Los Angeles and Oakland had gained significant ground in foreign commerce, manufacturing, and trade with the state's interior valleys.[33] Economic recovery also lessened the anti-railroad rhetoric, as voters began to worry about the effects of government involvement in the economy and encroachment on private property rights. Lower rail rates — due to competition between the

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[31] Olin, *California Politics,* 37–39. As Olin notes, "By 1879 the population of California was approaching a million, having dramatically increased 800 percent since statehood and having become ethnically and racially more heterogeneous through continuous immigration. Moreover, 37 percent of the total population now lived in cities, such as San Francisco (with one quarter of the state's residents), Oakland, Sacramento, San Jose, Stockton, and Los Angeles." See also Deverell, *Railroad Crossing*, 60.

[32] Olin, *California Politics,* 45.

[33] Mansel G. Blackford, *The Politics of Business in California, 1890–1920* (Columbus: Ohio State University Press, 1977), 9.

Southern Pacific and Santa Fe railroads — also decreased animosity toward the railroads, as did the economic boom in southern California due to increased immigration and a rising real estate market.[34]

In the mid-1890s, the return of economic depression and the railroads' continuing monopolistic practices reinvigorated antimonopoly and anti-railroad sentiments.[35] Farmers, urban laborers, and others joined together in the state's Populist movement, targeting the railroad and advocating a variety of direct democracy measures. California Populism grew out of the Nationalist movement and Edward Bellamy's vision of utopian socialism. In his novel *Looking Backward*, Bellamy advocated replacing private ownership of the means of production and the individual pursuit of wealth with a "nationalized, cooperative state" where public control of the economy would provide for the general good. For many Californians, frustrated with the Southern Pacific's control over the economy and state legislators, Bellamy's vision proved enticing. Nationalism clubs spread rapidly, finding particular strength in Los Angeles and San Francisco. By 1890, more than one-third of all Nationalism clubs nationwide could be found in California, with 3,500 members in 62 clubs. Despite this apparent strength, Nationalist candidates failed to win broad public support in the 1890 elections. Yet Nationalism did not disappear. Both ideas and members migrated to the new People's Party of California. In rural, economically depressed regions of southern California, in fact, many Nationalist clubs simply renamed themselves Farmers' Alliance cooperatives.[36]

Initially, Alliance leaders chose to endorse Democratic and Republican legislators who favored their goals, but by late 1891, the growth of the state's Farmers' Alliance — approximately 30,000 members in more than 500 cooperatives — encouraged its leaders to create the People's Party to push their own political agenda. As formulated in its October 1891 platform, the People's Party advocated "government ownership of communication and transportation, woman's suffrage, and the eight-hour day on all public works." Despite its popularity among small farmers and — unlike the movement elsewhere — some urban workers, Populism was unable to garner the broad-based support necessary to win significant numbers of

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[34] Olin, *California Politics,* 44, and Deverell, *Railroad Crossing*, 62–63.

[35] Olin, *California Politics,* 44, 46–47, and Deverell, *Railroad Crossing*, 63–64.

[36] Olin, *California Politics,* 46–47.

public offices and legislative positions. Democratic leadership was able to undercut Populist appeal in rural areas in southern and central California by supporting anti-monopoly and anti-railroad measures, while Republican candidates branded Populists as radical and dangerous. By 1896, Populism in California had largely disintegrated over its leaders' fusionist strategies with the Democratic Party and the rising prominence and popularity of Eugene Debs and his brand of socialism. Nevertheless, the state's Populist movement was important in detailing a critique of the existing political, social, and economic order and in supporting the expansion of democracy. Populist-supported direct democracy measures, such as the initiative, referendum, and recall, as well as woman suffrage, continued on in Progressive reform circles — as did anti-railroad sentiment.[37]

Despite these similarities, California Progressivism was in many ways significantly more conservative than Populism. Rather than attempting to restructure entirely the political economy, most Progressive activists aimed to reform and stabilize the state's economic, social, and political order. Fiery rhetoric about the Southern Pacific railroad coupled with this inherent conservatism in action allowed a wide range of political perspectives to come together under the Progressive umbrella. Progressive businessmen sought to use the state's regulatory power to preserve their competitive advantages by stabilizing a previously turbulent economy. Other Progressive reformers hoped to bring about a more fair and equitable economy by constraining the forces of monopoly and opening politics to the interests and influences of "the people."[38] All these aims could be accommodated in a movement targeting the railroads as symbols of monopoly and corruption.

The heyday of Progressivism in California grew out of ongoing demographic changes and a shift in the balance of power from the north to the southern part of the state. Continuing the trends of the late nineteenth century, Los Angeles, and southern California more generally, made gains in population as well as economic and political power. In the early 1910s, the state's tremendous population growth — from 1,485,053 in 1900 to 2,377,549 in 1910 — was largely attributable to mass immigration to southern California. By 1910, Los Angeles' population had risen to 319,198 — a 212 percent

[37] Olin, *California Politics,* 47–49.

[38] Blackford, *Politics of Business in California,* x.

increase over the decade — and not far behind San Francisco's 416,912 inhabitants. In this same period, the San Joaquin and Sacramento valleys grew quickly, as did the populations of Berkeley and Oakland. Favorable railroad rates, coupled with the chaos following the 1906 San Francisco earthquake, helped Los Angeles merchants control the flow of goods to and from the San Joaquin Valley. San Francisco also lost out to Los Angeles and Oakland in shipping and manufacturing. By the 1920s and 1930s, Los Angeles had surpassed its northern rival in both industry and population.[39]

This tremendous growth in the south not only undermined San Francisco's preeminent position in the state, but it also provided the impetus to the Progressive movement as a response to this rapid economic, political, and social change. Progressivism in California began as a city-based reform effort to root out municipal corruption and smash local political machines through direct legislation measures, but the movement rapidly became a statewide phenomenon.[40] Progressive reform took dramatically different shapes in the state's two major cities. In Los Angeles, a loose coalition of reformers came together to oppose the Southern Pacific's domination of the city's politics. Through the political talents of Dr. John Randolph Haynes, a wealthy physician and real estate mogul, prominent businessmen, lawyers, and journalists, along with socialists, Nationalists, and union labor leaders, joined to clean up government and attempt to create a more equitable society. (Although Los Angeles was ostensibly an open-shop town, labor unions did wield some political power, if limited economic power.) Through a Direct Legislation League, Haynes and his compatriots persuaded voters to include the initiative, referendum, and recall in the new city charter in 1903. Despite ridicule and denunciations from conservative Harrison Gray Otis's *Los Angeles Times*, Haynes and his Good Government League succeeded in throwing out corrupt city councilmen and in sweeping much of the 1906 city election. Most notably in Los Angeles, middle-class political and moral reformers were able to ally fairly successfully with working-class and socialist activists on particular issues.[41] Nevertheless, labor strife

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39 Blackford, *Politics of Business in California,* 9–12.

40 Olin, *California Politics,* 55, and Olin, *California's Prodigal Sons*, 6.

41 Bean and Rawls, *California*, 244–45. On Los Angeles as an open-shop town, see McWilliams, *Southern California Country*, 274–77, and Bean and Rawls, *California*, 230–34.

consumed the city from 1907 to 1910, with union organizers pitted against Harrison's *Times* and the conservative Merchants & Manufacturers Association (the "M&M" in local parlance). With the fateful dynamiting of the *Times* in October 1910 and the McNamara brothers' subsequent confession to the bombing, organized labor and socialists lost much of their political strength and credibility. Not only was the socialist candidate for mayor, who had led in the primaries, soundly defeated by the Republican incumbent, but the labor movement was almost fatally weakened.[42]

In San Francisco, on the other hand, organized labor drove much of the city's politics and reform efforts in the early twentieth century. After limited success in organizing sailors and coastal seamen in the 1880s and 1890s, the city became a union stronghold through the early 1920s after a sometimes violent, but successful, waterfront strike in 1901. Union members formed their own political party, the Union Labor Party, and successfully ran candidates for mayor and city supervisor. Unfortunately for organized labor and the long-term success of the party, the Union Labor Party, under the control of political boss Abraham Ruef, became embroiled in the infamous graft trials beginning in 1906.[43] The graft trials directly manifested the Progressive impulse to end municipal corruption and, to an extent, reflected class tensions between middle-class reformers and working-class Union Labor politicians. Federal prosecutor and San Francisco native, Francis J. Heney, headed up the investigation, ultimately gaining confessions of bribery from the city's mayor and most of its supervisors. When, quite dramatically, Heney was shot in the courtroom by a prospective juror, attorney and future governor Hiram W. Johnson took over the case. Reform-minded, middle-class clubwomen added to the spectacle by attending the trials everyday in order to demonstrate the proceedings' moral legitimacy. In the end, the trials fizzled,

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[42] McWilliams, *Southern California Country*, 279–83.

[43] Bean and Rawls, *California*, 229–30; Michael Kazin, *Barons of Labor: The San Francisco Building Trades and Union Power in the Progressive Era* (Urbana and Chicago: University of Illinois Press, 1987), 113, 128–32, 136–39, 177–201; Lucille Eaves, *A History of California Labor Legislation with an Introductory Sketch of the San Francisco Labor Movement* (Berkeley, 1910); William Issel, "Business Power and Political Culture in San Francisco, 1900–1940," *Journal of Urban History* 16 (November 1989): 65–67, quote on 66; William Issel and Robert W. Cherny, *San Francisco, 1865–1932: Power, Politics, and Urban Development* (Berkeley, CA: University of California Press, 1986), 139–99.

as Heney and Johnson began targeting wealthy San Francisco businessmen. In 1909, voters threw out politicians favoring the prosecution for an administration pledging to end the graft trials. Despite the demonstrated corruption of Union Labor politicians, organized labor remained a potent political force in the city. In the 1911 mayoral race, pro-labor Republican James Rolph won the mayoral race and retained his seat through 1931, in large part, by pledging government support of unions.[44]

California Progressivism grew out of its municipal roots to become a statewide movement largely by attacking the Southern Pacific, as reformers turned their focus from cleansing their cities to cleansing their state of the railroad's political and economic corruption. Anti-railroad activism resonated with voters in all political parties, particularly those in southern California, the San Joaquin valley, and San Francisco — a response in large part to the railroad's continual displays of monopolistic power and its disregard for individual rights and the public good. In Los Angeles, Collis Huntington — one of the Southern Pacific's Big Four — demonstrated the railroad's overreaching power in his attempt to relocate the Los Angeles harbor from San Pedro to Santa Monica, where he had extensive land holdings.[45] In the San Joaquin valley, the Mussel Slough incident dramatized for the public the Southern Pacific's high-handedness and fueled popular resentment. At Mussel Slough, farmers had settled on land that was promised to the Southern Pacific by the federal government. When the railroad finally gained title to the land and offered it to the settlers, the price was set at market value (some claimed as high as $80 per acre) rather than the $2.50 per acre that the Southern Pacific had paid the government. When a small group of militant-minded settlers refused to buy or to vacate the land, U.S. Marshals, at the railroads' behest, attempted to evict forcibly the settlers. The result was the "battle of Mussel Slough," ending with the deaths of seven settlers and the imprisonment of

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[44] Bean and Rawls, *California*, 244; Gayle Gullett, *Becoming Citizens: The Emergence and Development of the California Women's Movement, 1880–1911* (Urbana and Chicago: University of Illinois Press, 2000), 156–57; Olin, *California's Prodigal Sons*, 10–11; and Deverell, *Railroad Crossing*, 154–55.

[45] Olin, *California's Prodigal Sons,* 5, and Deverell, *Railroad Crossing*, 94–95, 121. For a complete discussion of the Los Angeles "Free Harbor Fight," see Deverell, *Railroad Crossing*, 94–122.

five others.[46] In San Francisco, anti-railroad sentiment united, for once, organized labor and business leaders; workers opposed its anti-labor practices and businessmen its monopolistic rates.[47]

This statewide Progressive campaign began as an attack on the railroads, but ended with Progressive control of the governorship and much of the statehouse. In 1907, reform-minded Republicans formed the Lincoln-Roosevelt League, with the aim of wresting control of the state Republican Party from the Southern Pacific. The League called for state regulation of railroads, the direct election of U.S. senators, and direct primaries in state and local elections. By 1908, the Lincoln-Roosevelt League directly challenged the Southern Pacific on a statewide basis and succeeded in electing one-half of Republican legislators.[48] The 1909 legislature went on to enact a direct primary bill, which prevented the Southern Pacific from controlling the nominations of state and local candidates. Candidates could appeal directly to voters,[49] which, in 1910, enabled Hiram W. Johnson to win the Republican nomination for governor.

Johnson won the gubernatorial race largely due to his fiery anti-railroad rhetoric, and his election to governor in 1910 signified for many reformers the triumph of Progressivism in California. Yet, his victory was hardly decisive. Progressive strength remained concentrated in the south. Although he squeaked out a victory in San Francisco, Johnson lost 21 out of 50 counties in the state. It was only his overwhelming victories in southern California, where he won all nine counties, that enabled him to secure the governorship. Despite the narrowness of his victory, Johnson was quick to claim a mandate for reform. In his inaugural address, he argued that " 'the interests' were choking off economic and political opportunities from 'the people' " and pledged to curb the power of special interests and monopolies to ensure an overall public good.[50]

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46 Bean and Rawls, *California*, 171, and Deverell, *Railroad Crossing*, 56–57, 143–44. Although the settlers legal standing and claim to the land was murky at best, public opinion laid the blame for the incident entirely at the feet of the Southern Pacific.

47 Olin, *California's Prodigal Son*, 5.

48 Olin, *California Politics,* 55, 56, 58–59, and Deverell, *Railroad Crossing*, 160–61.

49 Olin, *California's Prodigal Sons*, 13.

50 Olin, *California Politics,* 59–60.

The Progressive reform agenda thus focused on expanding democracy and the regulatory power of the state through "railroad legislation, direct legislation, woman suffrage, labor legislation, and conservation." Johnson's most direct attack on "the interests" came in his aggressive curtailment of the Southern Pacific's political power and economic monopoly. Through the enactment of the Stetson-Eshleman railroad bill, the state gained broad regulatory authority over the railroads, enabling the state railroad commission to establish rates for both freight and passengers. This regulatory authority was later expanded in 1911 to include all public utilities (in the 1911 Public Utilities Act). Although widely billed as a victory for all the people, this regulatory-based reform was largely conservative. State regulation of the Southern Pacific primarily benefited other large capitalists, including large farmers and ranchers, oil producers, and other businessmen. Johnson and his male Progressives sought to foster competition among corporations — not to challenge or overhaul capitalism.[51] Women reformers, as we shall see, had a broader definition of reform and sought more comprehensive change in the economy. Nevertheless, Johnson's regulation of railroads and public utilities represented a significant ideological shift away from laissez-faire attitudes of the nineteenth century and toward a centralized state government with control over business.[52]

During his term in office, Johnson and his Progressive friends pursued legislation that followed a general Progressive framework. They sought to free government of corruption and influence by passing the initiative, referendum, and recall. They expanded democracy by enacting a woman suffrage amendment and the direct election of U.S. senators. They sought to establish a nonpartisan government by making the positions of judges, school officials, and county and township lawmakers nonpartisan. As a result, candidates for nonpolitical offices were elected on a nonpartisan basis. Cross-filing destroyed the party system, seen as corrupt, by allowing the most popular candidate to win a party's nomination, regardless of the candidate's party affiliation. In addition to promoting democracy and curtailing partisanship, California Progressives sought to regulate the economy to ensure the general social welfare, going well beyond the regulation of

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[51] Olin, *California Politics,* 59–62.

[52] Olin, *California's Prodigal Sons,* 172, 173.

railroads and public utilities to assist poor and working-class Californians. Progressive lawmakers passed an eight-hour law for women, workmen's compensation, mandatory periodic payment of wages, child labor laws, and mothers' pensions, as well as creating an Immigration and Housing Commission and a Conservation Commission.[53]

In this context, woman suffrage was part and parcel of broad-based reform. State suffragists could be hopeful for their own victory when they saw other progressive and democratic measures enacted, especially "women's" legislation such as the eight-hour day, workmen's compensation, and child labor laws long supported by Progressive and Socialist women. As we shall see, women suffragists drew on deep roots of California history and protest, as well as on longstanding concerns with monopoly, democracy, egalitarianism, and other western values, to argue for their right to the ballot. Suffragists successfully placed the woman suffrage campaign in the context of California culture by using the state's cultural values and political identity to their advantage. Proponent rhetoric that suffrage was a uniquely Californian and western reform not only resonated with voters but also normalized and deradicalized their call for enfranchisement. Moreover, their critique of California's political economy resonated with businessmen and workingmen alike — both of whom sought to change and free up California's economy, albeit in different ways. Suffragists could appeal to all these currents to make their demand for the franchise appear reasonable, sensible, and Californian.

As we shall see, once enfranchised, reform-minded women used the ballot in the period of progressive reform to lobby for a wide range of legislation aimed at reshaping the state's economy. Seeking to constrain capitalism through both legislative and consumption efforts, female activists hoped to create a more equitable society for all Californians. Their successes and failures depended as much on contemporary political realities as on the power of the ballot. Nevertheless, it was through their belief in the strength of the franchise that women activists developed their broad vision of reform. The 1911 suffrage campaign proved critical to this process, and it is to this movement that we now turn.

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[53] Olin, *California Politics,* 65, 70.

THE CREATIVE SOCIETY:

Environmental Policymaking in California, 1967–1974

ROBERT DENNING*

These selections from Robert Denning's Ph.D. dissertation (History, The Ohio State University, 2011) are presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at http://rave.ohiolink.edu/etdc/view?acc_num=osu1306110418.

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INTRODUCTION

During his campaign for governor of California in 1966, Ronald Reagan called for the establishment of a "creative society" where the people shared in decision-making and the need for a powerful state government would melt away. "There is much to be done in California and much that can be done by a Governor who, instead of turning to Washington for help, turns to the people and leads them in building a creative society in which we rely on their genius, their abilities, and their desires to become active participants instead of merely bystanders, in the building of that society," Reagan wrote during the campaign.[1] Under Reagan's opponent, incumbent Edmund G. "Pat" Brown, Sr., the size and power of state government had increased dramatically, most visibly through the construction of massive highway and water redistribution projects. Reagan argued that the oppressiveness of big government had stifled the creativity of Californians, and he hoped to bring about a revolution in the relationship between the citizen and the state. In this new relationship, legislators and

[1] "The Candidates and the Issues," *San Francisco Examiner*, 4 November 1966, reprinted in Franklyn C. Nofziger, "Press Secretary for Ronald Reagan, 1966," in *Issues and Innovations in the 1966 Republican Gubernatorial Campaign*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1980, 24.

bureaucrats would work with businessmen, academics, students, professionals, and workers to solve the state's problems. Partisanship would give way to best practices. The state's hidebound bureaucracy would be replaced by innovative and dynamic problem-solving. And, once all of these groups were actively participating in this endeavor, the size, scope, and cost of state government would go into permanent decline.

In most areas of state policymaking, Reagan failed to realize his creative society. The divisive social and political issues of the late 1960s and early 1970s, including race relations, antiwar sentiment, student uprisings, welfare reform, tax policies, increased crime, and family planning, affected California as much as they did the nation at large. Reagan was unable to unite Californians over such issues, though he did bring a level of pragmatism to governance that surprised many observers.[2] One realm of policymaking, however, did see the harmonious cooperation that Reagan envisioned, if only for a brief time. The protection of the state's natural environment and resources enjoyed bipartisan support in the state legislature and among the state's citizens during the Reagan years. Between 1967 and 1970, Reagan and the legislature launched sweeping reforms of the state's environmental regulations and invited the participation of concerned citizens, environmental interest groups, academics, businessmen, and industrial groups. In one of the great ironies of the Reagan years, this creative society built the most powerful environmental protection agencies and instituted the strictest regulations in the nation, making government more intrusive in the personal and business lives of all Californians.

This was an exciting time in environmental policymaking. Environmental groups were energized as they had never been before, and hoped for more governmental action. Business and industrial groups began to recognize that environmental protection and increasing regulations would be part of the cost of doing business in California. Soon after Reagan took office in 1967, the legislature created the State Water Resources Control Board, which introduced quality concerns into the water allocation process for the first time. It also merged the state's stationary and vehicular emissions control programs under the Air Resources Board, which quickly became the most

[2] See Lou Cannon, *Governor Reagan: His Rise to Power* (New York: PublicAffairs, 2003) and Jackson K. Putnam, "Governor Reagan: Reappraisal," *California History* 83, no. 4 (2006): 24–45, for excellent introductions to Reagan's performance as governor.

powerful environmental regulatory agency in the country. After years of fits and starts, the state and federal government finally established a Redwood National Park. Governor Reagan halted the expansion of the State Water Project by canceling the construction of Dos Rios Dam on the Eel River out of concern for the destruction of the site's natural beauty. The Porter-Cologne Water Quality Act of 1969 called for fines of $6,000 per day on polluters, the highest such fines in the nation, and forced polluters to pay cleanup costs on an emergency basis instead of waiting for court injunctions.

The state also entered the realm of regional development and land use planning. The legislature gave the San Francisco Bay Conservation and Development Commission jurisdiction over all development within one hundred feet of the bay's shoreline and gave the Tahoe Regional Planning Agency the final say over development on the California side of that lake. The California Environmental Quality Act of 1970 required the creation of environmental impact reports for new development.

The creative society that was responsible for these actions began to fracture during Reagan's second term, however. Conservatives within the Reagan administration began to recoil from the expansion of state government. The argument that environmental protections threatened jobs also gained traction among some conservatives, including Governor Reagan. Conservative interest groups arose to defend property rights against environmental regulators. Even environmentally friendly legislators became concerned with the intrusiveness of some of the state's regulatory agencies, especially the Air Resources Board. In addition, the state and federal governments waged jurisdictional battles over the enforcement of national pollution standards at the state level. These battles delayed the implementation of those standards and dispirited many Californians. The pace of legislation slowed between 1970 and the end of Reagan's second term in early 1975, but the legislature still acted occasionally with the Wild and Scenic Rivers Act (1972) and the Energy Resources Conservation and Development Commission (1974).

As the legislature and the governor backed off from the activist environmental agenda of earlier years, concerned Californians pressed on, using extra-legislative means. The locus of environmental policymaking moved from the state capitol to the courthouse and the ballot box. Environmental activists took advantage of the state's ballot initiative system and the courts

to create new regulatory agencies and to force the state and federal governments to implement existing regulations. The Coastal Initiative, for example, created a powerful new regional planning commission in 1972. That same year, the California Supreme Court broadened the reach of the Environmental Quality Act to include private and public development and a federal court forced the federal Environmental Protection Agency to play a larger role in enforcing air quality standards in California. By going around the state legislature, environmental activists played an important role in the creation and enforcement of regulations during Reagan's second term.

California established its position as a national leader in environmental policymaking during the Reagan years. The state took that lead because of popular anger toward the environmental degradation that came with the state's rapid and uncontrolled expansion after World War II, the election of a governor and legislators who were willing to establish environmental regulations beyond what industry and business believed were necessary or even technically feasible, and an activist citizenry that pursued further regulation through lawsuits and ballot measures when they believed the state government failed. This story is about the political context of environmental legislation. There is a rich historiography on California politics during the 1960s and 1970s, and there have been many studies on individual environmental programs during those years, but there have been few attempts to bring together the politics and the environmental programs. This dissertation does just that.

Much of the analysis of California politics during the 1960s and 1970s has come through biographies of important political figures. Bookshelves buckle under the weight of volumes dedicated to the life and political career of Ronald Reagan, but as Matthew Dallek pointed out a decade ago, "even the biographers rarely spend more than one or two chapters discussing his rise as a politician in the early and mid-1960s."[3] In the years since Dallek lamented this fact, a number of journalists, biographers, and historians have begun to look at Reagan's years as governor, focusing mostly on his role in the rise of the New Right in American politics. Conservative writer Stephen Hayward has called the 1960s and 1970s the "Age of Reagan" because of the

[3] Mathew Dallek, *The Right Moment: Ronald Reagan's First Victory and the Decisive American Politics* (New York: The Free Press, 2000), x.

governor's influence on American politics during those years.[4] Reagan captured the imagination of New Right conservatives in California through his support for Arizona Senator Barry Goldwater's presidential run in 1964, and within two years he became "the new conservative standard-bearer," according to Lisa McGirr.[5] Dallek describes Reagan's victory in the 1966 gubernatorial election as a watershed moment in American politics. "For the first time, the conservatives learned how to push the right buttons on key issues, from race and riots to war and crime," according to Dallek. "Reagan successfully linked the liberal social programs of the '60s with disorder in the streets, and offered an alternative vision of what government should and should not do."[6] These scholars present Reagan as an inflexible conservative ideologue. This reflects the governor's rhetoric and the image he presented at the time, and this image caused great fear and hand-wringing among environmentalists when he won the 1966 campaign.

That image did not always reflect the reality. Although Reagan is best known for leading an ideological political revolt in California in 1966 and nationwide in 1980, some recent writers have noted his pragmatism and flexibility as governor. Reagan was by no means an environmental activist but, as with many issues he dealt with as governor, he employed a pragmatic approach to solving environmental problems. The governor's "environmentalist stance" was "his most significant departure from his commitment to conservatism," according to historian Jackson Putnam. Reagan's support for stronger pollution control programs and his opposition to dam building made him "a consistent, if moderate, environmentalist."[7] Lou Cannon, a journalist who followed Reagan's career from Sacramento to Washington, argues that the governor approached many controversial issues, including taxes, abortion, and the environment, with a willingness to compromise that ran counter to his ideological rhetoric.[8] This dissertation uses Cannon's chapter on Reagan's environmental policies as a starting

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[4] Stephen F. Hayward, *The Age of Reagan, 1964–1980: The Fall of the Old Liberal Order* (Roseville, Calif.: Prima Publishing, 2001).

[5] Lisa McGirr, *Suburban Warriors: The Origins of the New American Right* (Princeton: Princeton University Press, 2001), 192.

[6] Dallek, *The Right Moment*, xi.

[7] Putnam, "Governor Reagan: A Reappraisal," 29.

[8] Cannon, *Governor Reagan*.

point in understanding how those issues gained legislative success during an otherwise conservative governor's watch.

Studies of Reagan's years in Sacramento now fill volumes instead of chapters, but the Reagan administration's environmental agenda rarely fills more than a few pages. With the exception of Cannon's book and Putnam's article none of the above works discuss the Reagan administration's environmental policies. Historians have failed to give the Reagan administration credit for its environmental policies. Stephanie Pincetl's description is typical: "much of the new major California environmental regulatory infrastructure had just been put into place during the last term of the Reagan Administration, a result of the combined forces of a Democratically-dominated Legislature and public concern ignited by the Santa Barbara oil spill of 1969," but "it remained for [Jerry Brown, Reagan's successor] to implement the new legislation."[9] Such a statement downplays the support of Governor Reagan and Republican legislators, many of whom were strong advocates for environmental issues in the state legislature. Bipartisanship was a hallmark of environmental legislation during this era. Pincetl's statement also dismisses all of the legislative activity during Reagan's first term, which was much more productive than during his second term. Such statements could be a reaction to President Reagan's environmental policies during the 1980s, which were in many ways antithetical to those of Governor Reagan in the 1960s.

California never built a "single, statewide, super-environmental agency to handle all problems from pollution to conservation, land use planning and environmental quality" during the Reagan years. "Instead," according to one environmental critic, "California attempts to protect its environment through single-purpose agencies, with clearly defined spheres of responsibility for each element in the resources picture."[10] Scholarly studies of environmental policymaking in California suffer from the same problem. Historians and political scientists have looked at many individual state agencies during the Reagan years but have failed to produce a general synthesis of the implementation of environmental legislation. We have seen

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[9] Stephanie S. Pincetl, "The Environmental Policies and Politics of the Brown Administration, 1975–1983," Ph.D. diss., University of California, Los Angeles, 1985, 26–27.

[10] Ed Salzman, ed., *California Environment and Energy: Text and Readings on Contemporary Issues* (Sacramento: California Journal Press, 1980), 7.

studies of the San Francisco Bay Conservation and Development Commission, the Air Resources Board, the California Coastal Commission, and the Tahoe Regional Planning Agency, for example, but these studies rarely mention or provide comparisons to any of the other agencies or policies.[11]

To rectify this, this project compares the state's experiences in establishing and implementing environmental regulatory policies in three broad areas: water pollution, air pollution, and land-use planning. The comparison between efforts to regulate these three areas demonstrates the complexity of environmental policymaking, even at a time when environmental issues enjoyed bipartisan support. The state legislature, regulatory agency bureaucrats, and environmentalists found water pollution to be the easiest of the three problems to address. Public support for clean water was so high that affected industries and businesses refused to publicly oppose the imposition of new standards. Calls to reform the state's water pollution program gained popularity in the wake of the Santa Barbara Oil Spill in 1969, though the legislature had begun to reform the program two years earlier.

The ease with which Californians found a solution to water pollution did not carry over into the field of air pollution. Public anger over hazy skies and smog that threatened public health prompted the state to create the powerful Air Resources Board in 1967, which had the authority to regulate the exhaust emissions from automobiles and to establish air quality standards that were higher than those of the federal government. Unlike with water pollution, however, industrial groups such as automobile manufacturers and oil companies refused to accept responsibility for contributing to smog and fought the state's attempts to regulate emissions, arguing that it was unfair to have one set of standards in California and another in the rest of the nation.

Land-use planning was the most difficult problem of all. The state's explosive postwar growth was largely unplanned, and many of its environmental problems stemmed from haphazard and inconsistent decisions

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[11] See, for example, Rice Odell, *The Saving of San Francisco Bay: A Report on Citizen Action and Regional Planning* (Washington, D.C.: The Conservation Foundation, 1972), James E. Krier and Edmund Ursin, *Pollution and Policy: A Case Essay on California and Federal Experience with Motor Vehicle Air Pollution, 1940–1975* (Berkeley: University of California Press, 1977), Paul A. Sabatier and Daniel A. Mazmanian, *Can Regulation Work? The Implementation of the 1972 California Coastal Initiative* (New York: Plenum Press, 1983), and Douglas H. Strong, *Tahoe: An Environmental History* (Lincoln: University of Nebraska Press, 1984).

regarding the locations of cities and suburbs, freeway construction, and redistribution of water. Although environmentalists and conservationists consistently urged the adoption of a master plan for further population growth and economic development, most legislators and Governor Reagan refused to get involved in centralized planning because it violated their sense of the proper role of government.

This story allows us to consider a number of broader themes in American western, political and environmental history. First, it demonstrates Western leadership on a national issue. Historians have debated the role of the federal government in the American West for over a century. Frederick Jackson Turner captured the nation's imagination in 1893 by arguing that the western frontier experience had imbued the American character with individualism, independence, and a love for democratic government.[12] The western frontier, as it moved from place to place through time, helped create the American nation. Beginning in the 1980s, a new generation of Western historians turned this vision of Western exceptionalism on its head. A popular thesis among these New Western Historians was the federal government's "conquest" and subordination of the West. Patricia Nelson Limerick rejected the myth of Western individualism and independence and argued that "the two key frontier activities — the control of Indians and the distribution of land — were primarily federal responsibilities." The federal government subsidized the construction of highways, harbors, and railroads, and controlled access to the nation's land and other resources.[13] "The American West," according to Richard White, "is a creation not so much of individual or local efforts, but of federal efforts." As White describes it, "the armies of the federal government conquered the region, agents of the federal government explored it, federal officials administered it, and federal bureaucrats supervised (or at least tried to supervise) the division and development of its resources."[14] Gerald Nash argued that "it was the federal government that

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[12] Frederick Jackson Turner, "The Significance of the Frontier in American History," *Annual Report of the American Historical Association for the Year 1893* (Washington, D.C., 1894), reprinted in John Mack Faragher, ed., *Rereading Frederick Jackson Turner* (New Haven: Yale, 1984), 31–60.

[13] Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York: W. W. Norton, 1987), 82.

[14] Richard White, *"It's Your Misfortune and None of My Own": A History of the American West* (Norman: University of Oklahoma Press, 1991), 57, 58.

determined the pattern of farms in the humid regions, built the major roads and highways, and fostered the growth of the principle cities in the West."[15] Under this new conception, the American state created the West.

The problem with this thesis is that it presents federalism as a one-way street. Westerners and their states lose all agency in the federal-state relationship. And, as Karen Merrill points out, this creates a new myth of western exceptionalism, where the region differs from others not because of its rugged independence but because of its utter dependence on the federal government. It also removes the West from the story of American politics because it locates political power in Washington and presents a simple story of subjugation instead of interaction in the West.[16] As Robert Johnson put it, "the New Western Historians have contributed substantially to the field's evasion of the messy realm of the political."[17] The challenge that Merrill and Johnson present to Western historians is to engage the broader American political historiography and demonstrate that the West has a political history and that it affected Washington and the rest of the nation.

The story of environmental policymaking in California during the Reagan era provides an opportunity to bridge the gap between Western and political history. While this project does not dispute the power of the federal government in directing the settlement and development of the American West, it does provide an example of western activism and leadership on a national issue. Reforms to California's existing air and water pollution control programs went further than those at the national level and provided precedents and examples for similar programs in other states. Even states that did not enact legislation similar to California sometimes felt the influence of its regulations. Automakers, for example, had to choose whether to build different versions of each model to meet local standards in every state or to build one version that conformed to the toughest emissions standards in the nation. In the protection of the environment, Western states, particularly California, led the nation.

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[15] Gerald D. Nash, *The Federal Landscape: An Economic History of the Twentieth-Century West* (Tucson: University of Arizona Press, 1999), x.

[16] Karen R. Merrill, "In Search of the 'Federal Presence' in the American West," *The Western Historical Quarterly* 30, no. 4 (Winter 1999): 451.

[17] Robert D. Johnston, "Beyond 'The West': Regionalism, Liberalism and the Evasion of Politics in the New Western History," *Rethinking History* 2, no. 2 (1998): 240.

The story of environmental policymaking in California during the Reagan years also allows us to analyze the relationship between conservatism and environmentalism, two of the most powerful political movements of the late twentieth century. Most of the scholarly work on this relationship focuses on the divide between the two movements, perhaps because this fits neatly into the present-day partisan framework. There was a time, however, when conservatives in California supported the expansion of government's regulatory powers in environmental matters. Much of this can be traced back to the influence of Progressive Era conservation programs and their Republican sponsors, such as President Theodore Roosevelt and Governor Hiram Johnson. Some early conservative thinkers, including Richard Weaver and Russell Kirk, believed that environmental preservation should occupy a central position within the philosophy of conservatism. As John R. E. Bliese points out, the traditionalist conservatism espoused by Weaver and Kirk rejected materialism, consumerism, and modern industrialism's war on nature. As Bliese puts it, "piety toward nature is, thus, a fundamental attitude of traditionalist conservatism."[18] Other conservatives saw environmental regulation as a states' rights issue and saw local and state pollution control efforts as manifestations of the will of the people. These conservatives supported these efforts as long as they responded to the needs of the people and remained independent of outside (i.e. federal) control.[19] Through the late 1960s, there was very little partisan or ideological tension over environmental issues.

This changed during the early 1970s, when conservatives began to withdraw their support for environmental causes. The conflict between environmentalism and conservatism "came to full flower when environmentalism turned from the effort, championed by Theodore Roosevelt and Gifford Pinchot, to preserve our national heritage to a project aimed at altering the exercise of influence in public policy and well-established American values" in the early 1970s, according to Richard Harris.

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[18] John R. E. Bliese, "Richard M. Weaver, Russell Kirk, and the Environment," *Modern Age* 38, no. 2 (Winter 1996), 148–58.

[19] Marc Allen Eisner, "Environmental Policy from the New Deal to the Great Society: The Lagged Emergence of an Ideological Dividing Line," in Brian J. Glenn and Steven M. Teles, eds., *Conservatism and American Political Development* (New York: Oxford University Press, 2009), 31.

"Conservatives, already alert to perceived socialist tendencies of modern liberalism, found a deeply disturbing confirmation of their fears in environmentalists' vision, rooted in collectivist arguments about the need to subordinate property rights and individual freedom to societal needs and ecological laws."[20] Conservatives who had argued against the expansion of the administrative state since the New Deal joined with business and industrial groups who saw themselves as victims of arbitrary regulations to oppose new laws and possibly roll back existing ones. Conservative opposition to environmental causes also grew out of a general backlash against the liberalism on display in President Lyndon Johnson's Great Society programs.[21]

At the national level, the withdrawal of conservative support for environmental issues began under the Nixon presidency. In 1969 the administration had supported the National Environmental Policy Act, and Nixon created the Environmental Protection Agency and supported the Clean Air Act Amendments the following year. But the president believed the environmental crisis was over by 1973. Environmentalism had been "largely a temporary phenomenon" for Nixon, according to J. Brooks Flippen. "His early efforts had paid little political dividends, destroyed his budget, alienated conservative allies, and hampered economic recovery." Nixon felt justified in turning his back on environmental causes because the economic crises of the 1970s — unemployment, inflation, and energy shortages — took priority among many Americans.[22]

Governor Ronald Reagan's administration followed a similar, though not identical, trajectory in California. During his first term, Reagan supported the establishment of Redwood National Park, the expansion of the air and water pollution control programs, and the creation of regional planning agencies for the San Francisco Bay and Lake Tahoe. During his second term, he opposed the creation of the California Coastal Commission and fired members of the Air Resources Board for overreaching in

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[20] Richard Harris, "Environmental Policy from the Great Society to 1980: A Coalition Comes Unglued," in Brian J. Glenn and Steven M. Teles, eds., *Conservatism and American Political Development* (New York: Oxford University Press, 2009), 122–23.

[21] J. Brooks Flippen, *Conservative Conservationist: Russell E. Train and the Emergence of American Environmentalism* (Baton Rouge: Louisiana State University Press, 2006), 8.

[22] J. Brooks Flippen, *Nixon and the Environment* (Albuquerque: University of New Mexico Press, 2000), 189–91, 221–22. Quote on 221.

their fight against smog. But unlike Nixon, who saw environmentalism solely as a political opportunity, Reagan never completely turned his back on environmental issues. External factors such as high unemployment and the energy crisis in the 1970s made Reagan and other conservatives more wary of environmental regulations, but they never tried to undo earlier achievements.

This political history of the environment also allows us to look at the power of interest groups in California, especially their power to bring environmental problems to the attention of legislators and their power to mobilize public opinion. Pro-environmental interest groups have received plenty of scholarly attention, but anti-environmental interest groups also play a role in this story, especially during Reagan's second term. According to Samuel P. Hays, "one of the most curious features of contemporary environmental analysis is the limited focus on the environmental opposition."[23] A few books have appeared in recent years on the Wise Use movement and the Sagebrush Movement in the late 1970s and early 1980s, but there has been little discussion of anti-environmental groups in the 1960s and early 1970s.[24] This project will not completely fill that historiographical void but it will provide a context for the creation of the Pacific Legal Foundation. This law firm was established in Sacramento in 1973 to defend "the free enterprise system, traditional private property rights, and a balanced approach to weighing economic, social, and environmental concerns," according to one of its founders.[25] This foundation provided the inspiration for the Mountain States Legal Defense Fund, which formed the backbone

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[23] Samuel P. Hays, *A History of Environmental Politics Since 1945* (Pittsburgh: University of Pittsburgh Press, 2000), 109.

[24] For works on Wise Use and the Sagebrush Rebellion, see Jacqueline Vaughn Switzer, *Green Backlash: The History and Politics of Environmental Opposition in the U.S.* (Boulder, Colo.: Lynne Rienner Publishers, 1997); William L. Graf, *Wilderness Preservation and the Sagebrush Rebellions* (Savage, Md.: Rowman & Littlefield Publishers, 1990); and R. McGreggor Cawley, *Federal Land, Western Anger: The Sagebrush Rebellion and Environmental Politics* (Lawrence: University Press of Kansas, 1993).

[25] Ronald A. Zumbrun, "Life, Liberty, and Property Rights," in Lee Edwards, ed., *Bringing Justice to the People: The Story of the Freedom-Based Public Interest Law Movement* (Washington, D.C.: Heritage Books, 2004), 42. Italics in original. For a discussion of the Pacific Legal Foundation's relationship with President Reagan's administration, see Jefferson Decker, "Lawyers for Reagan: The Conservative Litigation Movement and American Government, 1971–87," Ph.D. diss., Columbia University, 2009.

of the Sagebrush Rebellion in other Western states.[26] Not all opposition to environmental causes came from explicitly anti-environmental organizations. The Automobile Club of Southern California, for example, opposed an attempt to divert gas tax revenues away from highway construction and toward air pollution research and mass transit.[27] Anti-environmental organizations and their fellow travelers did not wield much influence over environmental legislation during the Reagan years, but they became much more influential as the 1970s wore on.

This dissertation follows a chronological format. Chapters 2 and 3 summarize the relationship between Californians and the state's natural resources between statehood and the 1960s. California has always been the land of "exceptional opportunities," according to journalist Carey McWilliams, and these chapters describe how Californians have used the state's natural resources to take advantage of those opportunities.[28] Americans first flooded into California during the Gold Rush, but the railroads and other boosters tried to keep them coming throughout the late nineteenth and early twentieth centuries by emphasizing the state's natural beauty. The Progressive Era left two important legacies in California that are relevant to the history of environmentalism. First, the debate over conservation and environmental preservation, as most vividly demonstrated in the Hetch Hetchy dam controversy between 1903 and 1913, drew generations of political leaders into discussions of the state's natural resources. By the 1960s, even the most conservative politicians championed at least some resource conservation. This formed a basis of the bipartisanship that characterized environmental issues through the Reagan era. Second, Progressives such as Governor Hiram Johnson brought the initiative system to California, which allowed citizens to circumvent the legislature. Environmentalists began to use the initiative system in the 1970s to create new programs and regulations. After World War II, the state underwent unprecedented population growth and economic development, much of which was fueled by

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[26] Graf, *Wilderness Preservation and the Sagebrush Rebellions*, 243; Switzer, *Green Backlash*, 164.

[27] "Two Suits Demand Auto Club Cease Fighting Prop. 18," *Los Angeles Times*, 15 October 1970, C1.

[28] Carey McWilliams, *California: The Great Exception* (Santa Barbara: Peregrine Smith, reprint 1976), 63.

state- and federal-funded infrastructure projects. Conservation, the most efficient use of natural resources, was the guiding philosophy in the relationship between mankind and the environment in California during the first half of the twentieth century. Thus, two massive water projects redistributed water from the wet North, where few people lived, to the dry South, where many people lived. The state also underwent a massive highway construction program to facilitate the movement of people and goods. Little regard was made to environmental sustainability with these projects, which contributed to polluted lakes and waterways, infilling in San Francisco Bay, and smog in Los Angeles and other cities.

Chapter 3 analyzes the criticism of such unrestrained development. During the 1960s, many Californians became concerned with the misuse of land, overpopulation, and the health effects of pollution. Alfred Heller and Samuel Wood established California Tomorrow in 1962, an organization devoted to the creation of environmentally sustainable regional and statewide land-use planning. Raymond Dasmann lamented the loss of productive agricultural land to suburbs in *The Destruction of California* (1965). The growth of cities, suburbs, and exurbs resulted from unsustainable population growth, according to Stanford biologist Paul Ehrlich, who predicted a Malthusian nightmare of famine in *The Population Bomb* (1968). All of these arguments influenced California lawmakers and became rallying cries for environmental organizations.

This chapter also looks at the attempts to fight environmental degradation at the local, regional, and state levels between World War II and 1967. These early attempts were largely ineffective for four reasons. First, polluting industries and businesses fought attempts to toughen environmental regulations or participated in the legislative process to weaken new laws. Second, cities and counties inconsistently enforced existing environmental regulations, sometimes avoiding it altogether in order to attract business. Third, the causes of some forms of pollution, especially smog, eluded Californians until the 1950s. Fourth, and most important, environmental regulations hampered economic development, which was the overriding concern for politicians like Governor Edmund G. "Pat" Brown, Sr., who saw massive highway and water redistribution projects as signs of progress. The state and local governments enacted some environmental regulations in spite of these constraints, but these failed to slow the deterioration of the state's natural resources.

Chapter 4 discusses the gubernatorial election of 1966, the environmental philosophy of Governor Reagan, and the people who made up his administration. This election was a pivotal moment in environmental policymaking in California, though few observers noted it at the time. The incumbent, Governor Pat Brown, personified the old conservationist ethic by advocating for the redistribution of water from North to South and the construction of highways to connect every city in the state. His Republican opponent, Ronald Reagan, had no strong environmental agenda, and made a number of gaffes during the campaign that offended environmentalists, but he espoused a philosophy of rolling back government that could include reducing state support for Brown's development projects. After his victory, Reagan and his advisers filled many state offices with men who were sympathetic to the environmental movement. The most influential environmentalist in the administration was Norman Livermore, a former member of the Sierra Club Board of Directors, who Reagan tapped to head the Cabinet-level Resources Agency. Livermore served as an influential proponent of environmental issues throughout Reagan's tenure and his Resources Agency became home to many environmentally minded officials, such as State Parks Director William Penn Mott and San Francisco Bay Conservation and Development Commission Chairman Melvin Lane. Very few Reagan appointees resisted the state's new environmental philosophy. William Gianelli, the Director of the powerful Department of Water Resources, was a conservationist who advocated the wise use of resources, especially rivers. Others, such as State Geologist Wesley Bruer and James Stearns, Director of the Department of Conservation, brought ideological opposition to environmental regulations. But these were among the few exceptions in an otherwise environmentally friendly Reagan administration.

Chapter 5 discusses the state's war against air and water pollution, which peaked between 1967 and 1970. Californians were largely united on the need for action on environmental issues and were optimistic that solutions could be found. During this three-year period, the State Legislature and Governor Reagan reformed the state's water and air pollution programs. Despite his usual deference to local concerns, Reagan supported efforts to establish regional planning agencies around the San Francisco Bay and Lake Tahoe to prevent further degradation in those waterways.

California won its reputation as the national leader on environmental issues because of these reforms.

The most visible attempt to realize Reagan's vision of a Creative Society was the Governor's Conference on California's Changing Environment, the subject of Chapter 6. At this conference, held in Los Angeles in November 1969, government officials, businessmen, experts, academics, and concerned citizens came together to discuss the relationships between people and land, air, water, and urban society. Conference participants argued that the unrestrained economic development that had characterized California since World War II was no longer feasible or desirable, and that the state must create a centralized plan for development that was based on ecological sustainability instead of on population density. The conference did not spark a revolution in mankind's relationship with its environment, but it provided a forum for a wide range of solutions to environmental problems. Californians debated many of these solutions over the following year. 1970 became known as the Year of the Environment and was the high point for environmentalism across the country. President Nixon created the Environmental Protection Agency, Congress passed strong Clean Air Act Amendments, and Americans everywhere celebrated the first Earth Day. In California, Reagan made the environment a centerpiece to his reelection campaign and the State Legislature debated dozens of new environmental bills, including the California Environmental Quality Act, which required public development projects to prepare environmental impact reports. The future looked bright for environmental issues in California.

The Year of the Environment ended on Election Day in November 1970. Governor Reagan's interest in environmental issues declined after his reelection, and many legislators followed suit. Chapter 7 traces the decline of legislative activity on environmental issues during Reagan's second term. California's politicians began to lose interest in environmental issues as the state's regulatory agencies got bogged down in jurisdictional fights and other controversies. As the pace of legislative activity declined, environmental organizations stepped in to enact new policies through lawsuits and ballot initiatives. The California Supreme Court's Friends of Mammoth decision required private development projects to prepare environmental impact reports in addition to public projects. A federal court forced the Environmental Protection Agency to step in when California

failed to meet the Clean Air Act's implementation plan requirements. Two important initiatives appeared in 1972 with mixed results. Proposition 9, the Clean Environment Act, failed, but Proposition 20, the Coastal Initiative, passed and created a new commission that regulated all development within 1,000 yards of the state shoreline. The economic cost and intrusiveness of these measures, and concerns over the energy crisis and unemployment, sparked a backlash among many conservatives. Public interest law firms such as the Pacific Legal Foundation began to challenge environmental regulations. This was the beginning of the end for bipartisan support for environmental issues in California.

The epilogue assesses environmental legislation at the state and national level after Reagan left Sacramento on 6 January 1975. California continued to enact strong environmental legislation and provided inspiration and precedents to other states and the federal government. The state was also home to organizations that supported and opposed environmental regulations, and those groups inspired others across the country. The epilogue also offers some theories on how Governor Reagan, who pursued a mildly progressive environmental agenda, evolved into President Reagan, whose environmental record has been rated among the worst of all modern presidents.

This project is not an attempt to "greenwash" Ronald Reagan. His presidential administration's record on the environment deserves the criticism it has received from historians and environmentalists. But his record as governor was more complicated and pragmatic, and it deserves closer, and objective, scrutiny. He, his administration, legislators, environmental organizations, and concerned citizens built an environmental regulatory state that has met many (though certainly not all) of California's environmental challenges. The creative society that tackled those problems may not have been the one that Reagan had in mind when he campaigned for the governor's office but his support for new regulations and bureaucracies complicates his ideological reputation.

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EPILOGUE

FROM GOVERNOR REAGAN TO PRESIDENT REAGAN

Republican Assemblyman Robert Burke argued in 1974 that the Energy Resources Conservation and Development Act was "a statist-socialist measure that the Governor not only should not have approved but one which would appear to be contrary to all that he has stood for as governor these last 7½ years."[1] Burke must not have been paying attention during those 7½ years. The California Energy Commission was just the latest new centralized government bureaucracy created during the Reagan years. It followed the State Water Resources Control Board, the Air Resources Board, the permanent San Francisco Bay Conservation and Development Commission, the Tahoe Regional Planning Agency, and the Coastal Commission, along with dozens of local commissions and pollution control boards. Governor Reagan did not initiate the legislation that created these agencies, but he obeyed the will of the voters and he supported the efforts of legislators to address environmental problems, even when they pursued "statist-socialist" means.

[1] "How the New Energy Act Should Work," *California Journal* 5 (July 1974): 239.

Every discussion of Ronald Reagan's environmental record as governor seems to end with the same question: what happened? How did Governor Reagan evolve into President Reagan, whose administration launched what Samuel Hays called an "anti-environmental revolution?"[2] Such questions are beyond the scope of this project, and definitive answers to those questions would fill a separate volume, but the evidence suggests a number of hypotheses.

First, the environment ceased to be a bipartisan issue during the 1970s. Democrats across the nation continued to support environmental issues as they had during the 1960s but Republicans outside of the northeast increasingly abandoned the environmental movement. A new generation of conservative leaders, who were more concerned with reducing the size of the federal government, marginalized environmentally friendly Republicans such as former EPA Administrators William Ruckelshaus and Russell Train. During the 1980s and 1990s, the Republican Party actively courted business interests who chafed under environmental regulations, and eventually the GOP "became a major instrument of anti-environmental policy," Samuel Hays has argued. "Republicans with positive environmental views were placed under considerable pressure to conform to a growing official anti-environmental stance by the party as a whole." Over time, the environment became a litmus test for conservatives in the Republican Party, and it "joined taxes and a litany of social concerns such as abortion and gay rights as wedge issues, defining one's partisan allegiance," according to J. Brooks Flippen.[3]

Second, Reagan joined the chorus of critics who believed that environmentalists often went too far. As governor, Reagan respected moderate Californians who feared for the loss of the state's natural treasures, but he placed environmentalists who called for population control or discarding traditional conceptions of property rights in the same category as radical

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[2] Samuel P. Hays, *Beauty, Health, and Permanence: Environmental Politics in the United States, 1955–1985* (Cambridge: Cambridge University Press, 1987), 491.

[3] Samuel P. Hays, *A History of Environmental Politics since 1945* (Pittsburgh: University of Pittsburgh Press, 2000), 118–19; Russell E. Train, *Politics, Pollution, and Pandas: An Environmental Memoir* (Washington: Island Press, 2003), 260–66; J. Brooks Flippen, *Conservative Conservationist: Russell E. Train and the Emergence of American Environmentalism* (Baton Rouge: Louisiana State University Press, 2006), 216.

student protestors and juvenile delinquents. After leaving office, he chastised environmentalists for putting the welfare of trees or animals above the welfare of humans. In one telling example, Reagan ridiculed efforts to save the Tan Riffleshell, a mussel that had once been common in rivers in Alabama, Kentucky, Tennessee, and others but became threatened with extinction because of construction along those rivers. Saving the endangered animal would require limits on development, and Reagan saw an environmental conspiracy. The Tan Riffleshell was "the latest in a string of exotic pets favored by ultra-environmentalists intent on halting construction projects they don't like," according to Reagan.[4]

Third, his conception of federalism allowed for strong regulation at the state level but rejected similarly strong laws and standards at the federal level. In this, Reagan was consistent. As governor, Reagan supported amendments to the federal Air Quality and Clean Air Acts in 1967 and 1970, respectively, to allow California an exemption from national air quality standards, and he railed against the EPA's attempt to impose a draconian implementation plan on the state in 1973. As president, Reagan did not interfere with state environmental programs and tried to shrink or dismantle the federal agencies that could have interfered.

Fourth, Reagan's opinions on environmental issues depended on the people around him. After he left the governor's office, Reagan had little contact with environmentally minded subordinates like Ike Livermore or William Penn Mott, but he had frequent contact with western entrepreneurs like Colorado brewer Joseph Coors, who complained about the costs to their businesses of environmental regulations. When Reagan won the presidency, he again left personnel matters to his campaign managers and supporters. Those advisers recruited people like James Watt of the Mountain States Legal Foundation for Secretary of the Interior, conservative Colorado legislator (and frequent Watt ally) Anne Gorsuch as EPA Administrator, Colorado rancher Robert Burford as director of the Bureau of Land Management, and Exxon Corporation attorney Robert Perry as EPA general counsel. Potential members of President Reagan's environmental policy team were "carefully selected and screened for their ideological

[4] Ronald Reagan, "The Tan Riffle Shell Case," *Sacramento Bee*, 8 October 1977, discussed in Jefferson Decker, "Lawyers for Reagan: The Conservative Litigation Movement and American Government, 1971–87," Ph.D. diss., Columbia University, 2009, 74.

purity and were briefed by the White House, rather than agency professional staff, to ensure that the presidential agenda would be faithfully executed," according to political scientists Michael Kraft and Norman Vig.[5] With advisers like these, Reagan was rarely presented with opinions or policy options that were favorable to the environmental movement.

Finally, advisers like Livermore or Watt were so influential because the environment was not a high priority for Reagan. It is almost unfair to call his first term as governor a "Reagan environmental revolution" or his first years as president a "Reagan antienvironmental revolution." It was the people around him who sparked those revolutions, not the man himself. The only environmental problems that troubled Reagan were those he experienced directly. Thus, as governor he favored cleaning up the smoggy air that prevented him from seeing the mountains, and cleaning up the water that he and his constituents drank. He supported the Tahoe Regional Planning Agency only after spending time there and seeing for himself the fragility of the lake's ecosystem. Problems that he could not see or feel did not trouble him. Endangered species such as the massive redwoods or the tiny Tan Riffleshell played no role in his life so he paid no attention to them, and he never understood why other people cared so much. As president, Reagan had even less firsthand experience with environmental degradation than he did as governor. Looking down on the country from Air Force One, the president saw vast expanses of seemingly unspoiled, uninhabited land, and he found it difficult to imagine that human activity could possibly threaten such empty wilderness. President Reagan's primary experiences with nature came at his idyllic, sheltered ranch in the hills outside Santa Barbara, where he could ride his horse for miles for miles without seeing any other people.[6]

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[5] Lou Cannon, *President Reagan: The Role of a Lifetime* (New York: PublicAffairs, 1991, 2000), 468; Hays, *Beauty, Health, and Permanence*, 494; Mark K. Landy, Marc J. Roberts, and Stephen R. Thomas, *The Environmental Protection Agency: Asking the Wrong Questions From Nixon to Clinton* (New York: Oxford University Press, 1994), 245–78; Michael E. Kraft and Norman J. Vig, "Environmental Policy in the Reagan Presidency," *Political Science Quarterly* 99:3 (Autumn 1984): 427.

[6] Reagan biographer Lou Cannon recalled that "once, on a flight over Colorado in 1979, Reagan turned to me and, with a gesture toward the expanse of mountain wilderness below, remarked that the unspoiled land still available in the United States was much more abundant than the environmental movement realized. He seemed not to

Reagan's advisers knew that the environment was not a pressing concern for Reagan. Resources Secretary Livermore, who was concerned with pollution and the loss of natural beauty or resources, personalized environmental issues for Governor Reagan. He brought Reagan to Tahoe so he could experience the lake's majesty, and he brought representatives of the Yuki tribe to Sacramento to show the governor how the Dos Rios Dam would negatively affect peoples' lives. Interior Secretary Watt, EPA Administrator Gorsuch, and other conservative environmental policymakers, who were concerned with reducing the size and the reach of government, did not follow suit. President Reagan then turned to other matters that concerned him more than did the environment.

CALIFORNIA AFTER REAGAN

Californians, on the other hand, never lost their appetite for environmental laws. Legislators and the voters continued to enact regulations and legislation affecting a wide range of economic activity. The state passed the California Waterfowl Habitat Preservation Act (1987) and the Sacramento–San Joaquin Delta Protection Act (1992) to protect wetlands and other wildlife habitats. To help compensate for drought conditions, legislators passed the Water Recycling Act and amended the Porter-Cologne Water Quality Act in 1991 to bar potable water from nonpotable uses, such as watering plants or use in certain industries. The voters approved Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, in 1986 to protect Californians from chemicals known to cause birth defects or cancer. The Air Toxics "Hot Spots" Information and Assessment Act (1987) and the Atmospheric Acidity Protection Act (1988) broadened the jurisdiction of the Air Resources Board. Other new regulations included the Surface Mining and Reclamation Act (1975), the California Beverage Container Recycling and Litter Reduction Act (1986), the Hazardous Waste Management Act (1986), and the Plempert-Keene-Seastrand Oil Spill Prevention Response Act (1990). Dozens of bond issues during those years provided millions of dollars to park land acquisition and maintenance. In the decades since

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notice that the plane in which we were flying had taken off through a layer of smog in Los Angeles and was landing through another layer of air pollution in Denver." See Cannon, *President Reagan*, 465–71.

Reagan left office, Californians have repeatedly demonstrated a commitment to protecting their state's environment and natural resources.[7]

There were exceptions. As Americans celebrated the twentieth anniversary of Earth Day, environmentalists collected enough signatures to place Proposition 128, the Environmental Protection Act of 1990, on the November ballot. "Big Green," as the proposition was called in the press, was the most ambitious environmental legislation ever proposed in California. Its story echoed that of 1972's Proposition 9, which had previously held the title of most ambitious environmental legislation. Like its predecessor, Big Green was the result of environmentalists' frustration with the slow pace of the state legislature. Also like Proposition 9, Big Green attempted to attack all forms of environmental degradation with one massive, complicated law. Proposition 128 would have banned all pesticides known to cause cancer in laboratory animals, established a $300 million bond to buy ancient stands of redwoods to prohibit logging, banned clear cutting, required a 40 percent reduction in greenhouse gas emissions by 2010, barred the manufacture or sale of ozone destroying chemicals such as those used in air conditioners, required builders to plant one tree for every 500 square feet of any commercial or residential project, banned oil and gas drilling in state waters, required the state to develop an oil spill response plan, required stronger treatment of sewage, and strengthened the coastal commissions' power to stop any project that threatened any coastline, bay, or estuary.[8]

The voters rejected Big Green by a two-to-one margin in 1990 for many of the same reasons the previous generation rejected Proposition 9 in 1972. It tried to do too much, and it sparked opposition from a wide variety of interests. Developers and timber companies claimed that it would cost jobs. Utilities and county officials warned of higher power and sewer bills. Chemical companies and many farmers predicted that the ban on pesticides would reduce agricultural production by 40 percent and food prices

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[7] Owen H. Seiver, "California Environmental Goals and Policy, Part II: Inventory of Major California Environmental Legislation and Accomplishments since 1970," presentation to the Center for California Studies' Faculty Fellows Program, California State University Sacramento, May 1995, available at CSUS University Library.

[8] Larry B. Stammer and Richard C. Paddock, "Big Fight Brews over 'Big Green' Initiative's Scope," *Los Angeles Times*, 25 March 1990.

would rise by up to 50 percent.[9] Supporters of Big Green, like their earlier counterparts, blamed the defeat on big business's deep pockets and a failure to formulate a clear, simple message.

One lasting result of the Proposition 128 debate was the creation of the California Environmental Protection Agency (Cal/EPA). Newly elected Governor Pete Wilson, a Republican who had served on the Assembly committee that proposed the Environmental Bill of Rights and the California Environmental Quality Act in 1970, followed through on his campaign promise to establish the environmental superagency that environmentalists had demanded for decades. He stripped the Air Resources and Water Resources Control Boards from the Resources Agency and combined them with the new Departments of Pesticide Regulation and Toxic Substances Control to form the Cal/EPA.[10] With the creation of this new agency, the state's environmental bureaucracy had two voices in the governor's cabinet: secretary for environmental protection and secretary for natural resources.

In doing so, Wilson and his successors institutionalized the long running split between conservationists and environmentalists. The Resources Agency's mission, "to restore, protect and manage the state's natural, historical and cultural resources for current and future generations using creative approaches and solutions based on science, collaboration and respect for all the communities and interests involved," would have made perfect sense to Progressive Era conservationists. The mission of the Cal/EPA, "to restore, protect, and enhance the environment, to ensure public health, environmental quality and economic vitality," was more in line with the goals of the environmental movement of the 1960s and beyond.[11]

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[9] Stammer and Paddock, "Big Fight Brews over 'Big Green' Initiative's Scope"; Marla Cone, "Prop. 128 Might Double Most Sewer Bills in O.C.," *Los Angeles Times*, 31 October 1990; Rudy Abramson, "Growers Fear Pesticide Controls in 'Big Green,'" *Los Angeles Times*, 11 July 1990.

[10] California Environmental Protection Agency, "The History of the California Environmental Protection Agency: The Long Winding Road to Cal/EPA," available online at https://calepa.ca.gov/wp-content/uploads/sites/6/2016/10/About-History01-Report.pdf, accessed 1 May 2021.

[11] California Natural Resources Agency, "Mission Statement," available online at https://resources.ca.gov/About-Us/Our-Agencys-History; California Environmental Protection Agency, "Cal/EPA Mission," available online at http://www.calepa.ca.gov/about, both accessed 1 May 2021.

The differences are subtle ("manage" vs. "enhance"), but a study of the relationship between the two agencies would likely show that the debate over environmental preservation and conservation is alive and well.

As happened at the national level, bipartisan support for environmental issues in the state legislature decreased over time. Since 1973, the California League of Conservation Voters (CLCV) has tracked the votes of individual legislators and published annual scorecards that help to demonstrate the growing partisan divide. According to those scorecards, Democratic state senators' support of CLCV-backed bills increased from 77 percent in 1975 to 91 percent in 2010. Democratic assemblymen followed a similar pattern, rising from 76 percent to 94 percent. During that same period, Republican state senators' support dropped from 48 percent to 6 percent, and Republican Assemblymen's support dropped from 36 percent to 7 percent. In the 2010 session, the lowest score for a Democratic legislator was 30 percent (and only one other Democrat scored below 50 percent), and the highest for a Republican was 21 percent.[12]

These scores do not provide a perfect method of gauging partisan support for or opposition to environmental issues. The CLCV is an interest group, after all, and it issues grades according to what it believes is the "correct" vote on a bill. This system also does not differentiate between easy, noncontroversial bills such as the use of toxic chemicals in children's toys, and complicated or controversial ones such as the regulation of greenhouse gases. Different legislative sessions also faced different environmental issues and problems, making comparisons between sessions difficult. But, in the absence of a definitive study on the partisan split over environmental issues, these scores help demonstrate the growing divide between conservatism and environmentalism.

In earlier decades, such a dramatic ideological and partisan divide could have changed the trajectory of the state's environmental laws, but it has played almost no role in the success of such legislation in recent years. The state senate and the assembly are so dominated by high scoring Democrats that a unified Republican opposition stands little chance

[12] These statistics are from the California League of Conservation Voters, "California Environmental Scorecard" for 1975, 1980, 1985, 1990, 1995, 2001, 2005, and 2010, all available online at https://www.clcvedfund.org/page/scorecard-archive, accessed 1 May 2021.

of blocking what they see as burdensome or intrusive regulations. AB32, the Global Warming Solutions Act of 2006, provides one example. Democrats easily pushed this act, the first in the nation to address climate change and greenhouse gas emissions, through both houses despite nearly unanimous opposition from Republicans. Ever since Governor Arnold Schwarzenegger (another Republican actor-turned-governor who built a surprisingly strong environmental record) signed the bill, Republicans have tried without success to repeal AB32 through legislation and ballot initiatives. The most recent attempt to overturn AB32, Proposition 23, lost by a two-to-one margin in 2010, and a majority of Californians continued to support AB32 ten years after its passage.[13] In opposing environmental regulations, today's California Republican party seems to be out of step with the voting public.

CALIFORNIA, THE NATION, AND BEYOND

Environmental laws and regulations enacted during the Reagan years influenced legislation in other states and at the national level. "California was often the lead state" on environmental issues, according to historian Samuel P. Hays, by "originating policies in coastal-zone management, environmental-impact analysis, state parks, forest-management practices, open-space planning, energy alternatives, air-pollution control, and hazardous-waste disposal." Environmentalists and legislators across the country tried to replicate California's successes. California's leadership on environmental issues continued after Reagan left office. Congress and President Nixon enacted a Coastal Zone Management Act in 1972, but other states looked to California's Coastal Initiative for guidance on land use planning for their coastlines because the federal law seemed weak by comparison. The California Environmental Quality Act's requirement that privately funded projects submit environmental impact reports went beyond similar laws at the state and national levels, which applied only to public projects. The State Water Resources Control Board was one of only a

[13] Mark Baldassare, "AB32," Public Policy Institute of California, 2015, https://www.ppic.org/blog/tag/ab-32, accessed 1 May 2021.

handful of state agencies across the country that required questions about water quality to enter into decisions about water allocation.[14]

California's lead was most apparent in the fight against air pollution. Reagan's successor, Jerry Brown, revitalized the Air Resources Board (which had been gutted during the nitrogen oxide controversy discussed in the previous chapter), and it has remained a powerful force in California ever since. During the year after Reagan left office, the ARB forced Chrysler to recall 21,000 cars and 700 trucks because they failed emissions tests, levied $328,000 in fines for selling cars that violated air quality standards, and forced the company to repair 70 percent of its cars manufactured in California. The Board forced Chrysler to recall another 23,000 vehicles, Mitsubishi to recall 12,000 vehicles, and Peugeot to recall 5,000 vehicles for failing to meet the state's nitrogen oxide, hydrocarbon, and carbon monoxide standards in 1988. Ten years after that, the ARB forced Toyota to recall 330,000 vehicles for faulty computer emissions control systems.[15]

Automakers continued to grumble about the unfairness of having different standards in California than in the rest of the country, and sympathetic columnists have called the state's ever-stricter standards a "shakedown," but they have failed to convince Congress to revoke California's exemption from the Clean Air Act. Congress went in the opposite direction in 1990 when it amended the Act to allow other states to adopt California's emissions standards. Massachusetts, New York, Texas, Virginia, and a dozen other states adopted California's emissions standards, making almost half of the nation's automobile market subject to policies set in Sacramento rather than Washington, D.C.[16]

In the first decade of the twenty-first century, California was the first to tackle global warming, a much more controversial issue than smog or polluted water. In the late 1990s and early 2000s, scientists warned that the accumulation of greenhouse gases such as carbon dioxide and methane in the

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[14] Hays, *Beauty, Health, and Permanence*, 44, 451, 454, 455, 402. Quote on 44.

[15] Ed Salzman, "A Two-Year Appraisal of Brown as Governor," *California Journal* 7 (November 1976): 366; Carla Lazzareschi, "The Pressure Tactics of Smog Boss Tom Quinn," *California Journal* 8 (July 1977): 225; "California Air-Rule Recall Involves 40,000 Autos," *Automotive News*, 16 May 1988, 26; "California Orders Large Recall for Toyota," *The New York Times*, 3 September 1998, A29.

[16] Matthew L. Wald, "California's Pied Piper of Clean Air," *The New York Times*, 13 September 1992, F1, F6.

atmosphere would cause a rise in temperatures around the world that could melt glaciers, cause flooding, and change vegetation patterns. Alarmed by studies conducted by the National Academy of Sciences and the United Nations' International Panel on Climate Change that predicted global temperatures could rise as much as ten degrees Fahrenheit over the next century, California legislators expanded the ARB's mandate to include the regulation of greenhouse gases in 2002. Two years later the Board announced new greenhouse gas emissions standards for cars, trucks, and sport utility vehicles for model year 2009, with the goal of a 22 percent reduction by 2012 and a 30 percent reduction by 2016.[17] Sixteen other states quickly announced their intention to adopt California's greenhouse gas emissions standards.[18]

California's anti-pollution programs began to cross national boundaries in 2001. Various state agencies cooperated with local, state, and federal governments in Mexico to establish that country's first smog check program, monitor industrial wastewater in three border cities, and research methods for sustainable development along the Sea of Cortez.[19] A year later, the federal EPA and its Mexican counterpart announced a more expansive version of this arrangement, called Border 2012. This program involved ten U.S. and Mexican border states and numerous American and Mexican federal agencies. The goals of Border 2012 include improving environmental health and reducing water contamination, land contamination, and air pollution.[20]

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[17] California Environmental Protection Agency, "AB 1493 (Pavley) Briefing Package: Global Warming and Greenhouse Gas Emissions from Motor Vehicles," undated [probably 2002], formerly available online at http://www.climatechange.ca.gov/publications/legislation/AB1493_PRESENTATION.PDF, accessed 17 December 2009; California Environmental Protection Agency, Air Resources Board, "ARB Approves Greenhouse Gas Rule," 24 September 2004, available online at http://www.arb.ca.gov/newsrel/nr092404.htm, accessed 1 May 2021.

[18] Andrew Clubok, quoted in Chris Bowman, "EPA Panel Gets an Earful," *Sacramento Bee*, 31 May 2007, A3; David Whitney, "Lawsuit Against EPA is Vowed," *Sacramento Bee*, 14 June 2007, A3; John J. Broder and Felicity Barringer, "E.P.A. Says 17 States Can't Set Emission Rules," *New York Times*, 20 December 2007; Environmental Protection Agency, "EPA Grants California GHG Waiver," 30 June 2009, available online at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/5e448236de5fb369852575e500568e1b.html, accessed 1 May 2021.

[19] California Environmental Protection Agency, "The History of the California Environmental Protection Agency."

[20] See United States Environmental Protection Agency, "U.S.–Mexico Border 2012," available online at https://archive.epa.gov/ehwg/web/html/basic_info.html, accessed 1 May 2021.

The San Francisco Bay Conservation and Development Commission has positioned itself as an international leader on climate change. The commission is no longer worried about the Bay shrinking to the size of a river because of infilling and development. In recent years it has focused more on the dangers of rising sea levels as a result of global warming. The danger now, according to the BCDC, is that the Bay may expand and flood low lying areas. In 2009 the BCDC partnered with similar agencies in The Netherlands to share solutions and ideas and sponsored an international competition to find more effective strategies for dealing with rising sea levels. The commission hopes that many of these ideas will help other low-lying coastal communities around the world.[21]

California did not lead the nation in legislation only. Many non-governmental organizations with interests in environmental issues got their start in California, which inspired similar groups across the country during the 1970s and beyond. California Tomorrow was one of the most influential planning organizations in the country, possibly because it followed a moderate approach to the environment. Its members never completely condemned development; instead they wanted to subject it to careful planning and make it sustainable within the context of a fragile and disappearing natural environment. California Tomorrow's goals were to limit the expansion of urban areas; protect lands of ecological, scenic, or historical importance; and conserve agricultural land. These were not radical goals, though the organization proposed some radical methods of achieving those goals.[22]

This approach inspired other organizations across the country, which embraced a broad range of perspectives. State, regional, county, and city governments, chambers of commerce, and activist groups have founded organizations modeled on some aspects of California Tomorrow, including its name. The Colorado Tomorrow Alliance supported an extensive list of "smart growth" principles, including: mix land uses; compact community design; create a range of housing opportunities and choices; create walkable neighborhoods; foster distinctive, attractive communities with a

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[21] San Francisco Bay Conservation and Development Commission, "2009 Annual Report," 9 February 2010, 2–3.

[22] For a full explanation of California Tomorrow's goals and their proposals, see Alfred Heller, ed., "The California Tomorrow Plan: Revised Edition," *Cry California* 7, no. 3 (Summer 1972): 5–111.

strong sense of place; preserve open space, farmland, natural beauty, and environmental areas; conserve water; strengthen and direct development towards existing communities; provide a variety of transportation choices; and make development decisions practicable, fair and cost effective.[23]

Maui Tomorrow's purpose "is to advance the protection of the island of Maui's precious natural areas and prime open space for recreational use and aesthetic value [and] to promote the concept of ecologically sound development." Charlottesville (Virginia) Tomorrow's mission is "to inform and engage the public by providing clear, non-partisan information and research on land use, transportation, and community design issues with the confidence an informed public will make decisions that will protect and build upon the distinctive character of the Charlottesville–Albemarle area." Bluegrass Tomorrow "envisions the Central Kentucky (Bluegrass) Region as a place where our best agricultural land remains secure and productive, and development occurs deliberately, responsibly, and with environmental sensitivity." Sarasota (Florida) Tomorrow, a creation of the local Chamber of Commerce, wants to "revitalize Greater Sarasota's economy, protect the environment and enhance the quality of life for all residents" through support for green businesses. Similar organizations can be found in Tyson's Corner, Virginia; Houston, Texas; Hendersonville, Tennessee; and Manhattan, Kansas.[24] Some of these prioritize environmental preservation, while others focus more on promoting business, but almost all of these mission statements could have come from California Tomorrow's literature.

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[23] See "Smart projects in Colorado," *The Denver Post*, 19 March 2008, available online at https://www.denverpost.com/2008/03/19/smart-projects-in-colorado, accessed 1 May 2021.

[24] See, for example, Maui Tomorrow (http://maui-tomorrow.org/donate), Charlottesville Tomorrow (https://www.cvilletomorrow.org/articles/charlottesville-tomorrow), Bluegrass Tomorrow (http://www.bluegrasstomorrow.org/about), Sarasota Tomorrow (https://www.sarasotamagazine.com/news-and-profiles/2008/09/sarasota-tomorrow), Tyson's Tomorrow (https://www.facebook.com/Tysons-Tomorrow-34358535609), Houston Tomorrow (http://www.houstontomorrow.org), Hendersonville Tomorrow (https://www.hvilletn.org/home/showpublisheddocument/1593/636492137931600000), and Downtown Tomorrow (https://cityofmhk.com/DocumentCenter/View/919/Downtown-Tomorrow-Plan?bidId=), all accessed 1 May 2021.

Organizations opposed to environmental regulations also owe a debt to the Reagan era. As noted in Chapter 7, the Pacific Legal Foundation, which had been established by officials in Reagan's gubernatorial administration, sparked the creation of other "freedom-based" public interest law firms across the country. The most notable offshoot of the PLF was the Mountain States Legal Foundation, established in Colorado in 1977. Bankrolled by wealthy brewer (and Reagan supporter) Joseph Coors, the MSLF's mission was "to fight in the courts those bureaucrats and no-growth advocates who create a challenge to individual liberty and economic freedoms," in the words of founding president James Watt. The MSLF and Watt took on cases involving the right to develop private property as the landowner saw fit and the right for all Americans to use federal lands and resources that environmentalists wanted to "lock up." Coors, Watt, and the MSLF were among the leaders of the so-called Sagebrush Rebellion that engulfed western states during the late 1970s and early 1980s.[25]

Watt's advocacy for private property rights and free enterprise earned him his position as Secretary of the Interior in President Reagan's administration. Watt believed that his job at Interior was to open up federal resources for development as quickly as possible. "We will mine more, drill more, cut more timber to use our resources rather than simply keep them locked up," he promised.[26] Watt was not the only MSLF attorney to join Reagan's team in Washington. Reagan and his advisers appointed some of Watt's former colleagues to the Department of Energy, Department of Justice, and the Equal Employment Opportunity Commission, where they continued to carry on the fight against environmentalists and other liberal groups.[27]

The environmental opposition won a short-term victory with the inclusion of people like Watt and Gorsuch in President Reagan's administration. The federal government issued few new regulations during Reagan's

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[25] For more on the Mountain States Legal Foundation and the Sagebrush Rebellion, see Jacqueline Vaughn Switzer, *Green Backlash: The History and Politics of Environmental Opposition in the U.S.* (Boulder: Lynne Rienner Publishers, 1997), 164–65; and William L. Graf, *Wilderness Preservation and the Sagebrush Rebellions* (Savage, Md.: Rowman & Littlefield Publishers, 1990), 242–43. Watt quote from Lou Cannon, *Reagan* (New York: G. P. Putnam's Sons, 1982), 358.

[26] Watt quote from Cannon, *Reagan*, 359.

[27] Jefferson Decker, "Lawyers for Reagan: The Conservative Litigation Movement and American Government, 1971–87," Ph.D. diss., Columbia University, 2009, 5.

first three years in Washington. The EPA lost 20 percent of its staff through cuts and resignations. Provisions of the federal budget that dealt with natural resources and environmental protection were cut in half. But environmental opponents failed to convert these short-term gains into long-term policy and regulatory changes. Watt, Gorsuch, Burford, and others were high profile members of the administration, but they were relatively few in number and they failed to build political coalitions within their agencies, among members of Congress, or within the voting public. Conservative goals, such as transferring federal land to the states, privatizing some services in the National Parks, and granting generous mining and drilling leases on federal land, angered many Americans. Membership, donations, and the capabilities of environmental organizations grew dramatically during Reagan's first term. Groups like the Sierra Club, National Resources Defense Council, Environmental Defense Fund, National Audubon Society, and Wilderness Society entered electoral politics as they never had before to support candidates who would oppose the Reagan agenda. These organizations, their congressional allies, agency bureaucrats, and the public successfully pressured the administration to replace Watt and Gorsuch in 1983. The Reagan administration did not suddenly embrace the environmental movement after the departure of Watt and Gorsuch, but it scaled back its opposition to new legislation and its calls for privatization.[28]

Californians have not solved all of their environmental problems. They still generate 93 million tons of waste every year. As of 2011, their state is home to 11 of the 25 American cities most polluted by air particulates and 12 of the 25 cities most polluted by ozone. Suburbs continue to expand onto former agricultural land. The state has lost 95 percent of its wetlands and 89 percent of its riparian woodlands. It is also home to more endangered and threatened species than any other state.[29] The Golden State still provides plenty of environmental opportunities and challenges.

But California's environmentalists, and the various state agencies, boards, and commissions that enforce environmental regulations, can also

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[28] Kraft and Vig, "Environmental Policy Under Reagan," 437–39; Hays, *Beauty, Health, and Permanence*, 513–20.

[29] David Carle, *Introduction to Earth, Soil, and Land in California* (Berkeley: University of California Press, 2010), 179; American Lung Association, "State of the Air 2010," 11, 13; David Carle, *Introduction to Water in California* (Berkeley: University of California Press, 2004), 135.

point to numerous success stories. Californians have recycled between 70% and 80% of their beverage containers every year since 1990, reducing the amount of solid waste in landfills. The surface area of the San Francisco Bay has increased by nearly 16,000 acres since 1970 through the efforts of the Bay Conservation and Development Commission (and, possibly, global warming). The state and regional water resources control boards restored salmon fisheries on the Klamath and other rivers. The National Park System administers 8.2 million acres of land in the state, and the National Forest Service controls 20.6 million acres. California's 148 wilderness areas cover nearly 15 million acres, and its 278 state parks cover another 1.5 million acres. The coastal commissions have preserved and expanded public beach access through its permit program. Today's air is the cleanest on record, and the number of smog alerts in the Los Angeles area fell from 200 per year in the early 1970s to less than ten in 2009.[30] Californians managed to accomplish all of this despite doubling in population over the past four decades.

The state owes much of its success to the creative society that developed during the Reagan years to tackle environmental problems. Conservationists, students, organized labor, urban planners, scientists, environmentalists, business leaders, judges, bureaucrats, and politicians from both parties came together in forums such as the Governor's Conference on California's Changing Environment to discuss solutions to air and water pollution, the loss of agricultural land, and human overpopulation. Until the early 1970s, legislators from both parties and the Reagan administration enacted dozens of laws regulating the use of natural resources and the destruction of the state's environment. When legislators' environmental resolve seemed to weaken in the early 1970s, and as new anti-pollution programs got bogged down in controversy or jurisdictional disputes, the

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[30] Grassroots Recycling Network, "California, USA Model Beverage Container Recycling System," 11 September 2001, formerly available online at http://www.grrn.org/beverage/deposits/california.html, accessed 12 April 2011; California Department of Resources Recycling and Recovery, "Beverage Container Recycling," available online at http://www.calrecycle.ca.gov/bevcontainer, accessed 1 May 2021; San Francisco Bay Conservation and Development Commission, "2009 Annual Report," 29 February 2010, 5; Carle, *Introduction to Earth, Soil, and Land in California*, 106, 109, 112; State Water Resources Control Board, "Accomplishments Report 2010," 4, 43; California Air Resources Board, "ARB's 40th Anniversary," undated, available online at http://www.arb.ca.gov/knowzone/history.htm, accessed 1 May 2021.

people stepped in to enact new regulations and programs through ballot propositions or they forced the state to address ongoing problems through lawsuits. The combined efforts of all of these groups made California the national leader on environmental issues.

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STUDENT WRITING COMPETITION

2021 WRITING COMPETITION VIRTUAL ROUNDTABLE

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

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

The following is a lightly edited transcript of the video conference that took place on August 5, 2021.[1] The complete papers appear immediately following in this volume of *California Legal History* (vol. 16, 2021).

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

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

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

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

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

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

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

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

Virtual Roundtable Participants —

top, left to right: Chief Justice Tani Cantil-Sakauye, Justice Kathryn Mickle Werdegar (Ret.), Competition Chair Selma Moidel Smith, and Society President Richard H. Rahm.

bottom, left to right: Winning authors Kayley Berger, Brook Tylka, and Kelly Shea Delvac.

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

[2] Chris Stockton, CSCHS Director of Administration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DELVAC: Thank you.

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

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

RAHM: Very good.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

SURVEYING THE GOLDEN STATE (1850–2020):

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

KAYLEY BERGER*

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

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I. INTRODUCTION

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

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

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

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

[4] Farida Ali, *Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California*, 21 Geo. J. on Poverty L. & Pol'y 197, 198 (2014).

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

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

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

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

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[6] *California Homelessness Statistics*, U.S. Interagency Council on Homelessness (Jan. 2020) https://www.usich.gov/homelessness-statistics/ca.

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

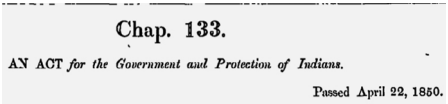
[8] Daniel Flaming et al., *Locked out: Unemployment and Homelessness in the COVID Economy*, Economic Roundtable (Jan. 11, 2021), https://economicrt.org/publication/locked-out/; Rob Hayes, *'Catastrophic:' Chronic Homelessness in LA County expected to skyrocket by 86% in next 4 years*, ABC 7 (Jan. 12,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

[9] Sara Bloomberg, *A Legacy of Criminalizing Transience and Homelessness*, SF Public Press (June 30, 2017), https://www.sfpublicpress.org/a-legacy-of-criminalizing-transience-and-homelessness.

II EARLY VAGRANCY LAWS: "INDIANS," "GREASERS," & "OKIES"

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

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


Chap. 133.

AN ACT *for the Government and Protection of Indians.*

Passed April 22, 1850.

With the Compromise of 1850, California became the thirty-first U.S. state on September 9, 1850.[11] However, California began criminalizing certain individuals' right to exist in public months earlier when on April 22, 1850 the first session of the California State Legislature passed "The Act for the Government Protection of Indians" in Chapter 133.[12] Although the name of this act may lead one to think it advocates for the protection of Indians, the name is a misnomer. The act is more appropriately referred to as "The Indenture Act of 1850" because it functioned to enslave California Indians.[13] Specifically, Section 20 provided for public auctions whereby the indigent Indian would go to the highest bidder who would then use the Indian for labor.[14] Such a practice cannot be explained as anything but the state selling indigent Indians

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

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

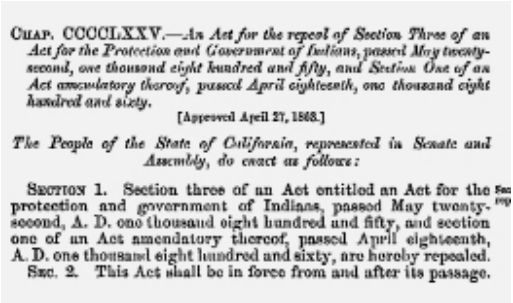
[12] Sections 3, 6, 14 and 20 are particularly demeaning. 1850 Cal. Stat. 408, Ch. 133, *available at* https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.

[13] Robert F. Heizer et al., The Other Californians: Prejudice and Discrimination Under Spain, Mexico, and the United States to 1920, 46 (1977).

[14] 1850 Cal. Stat. 408, Ch. 133.

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

It took lawmakers a tremendous amount of time to repeal this act. After sixteen years in effect, Section 3 was repealed in 1863.[18] Then, it was not until the early 1870s that Section 20 was "indirectly, but effectively, repealed in the Penal Code of California in [S]ections 487 (1870) and 647 (1872), which exempt California Indians from the crime of vagrancy."[19] And it was not until 1937 when the act (Chapter 133) was repealed in its entirety by the Fifty-Second Session of the California Assembly.[20]



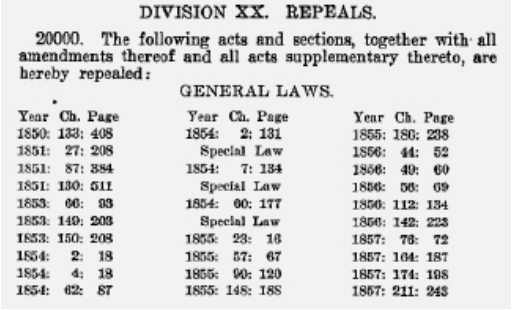
CHAP. CCCCLXXV.—*An Act for the repeal of Section Three of an Act for the Protection and Government of Indians, passed May twenty-second, one thousand eight hundred and fifty, and Section One of an Act amendatory thereof, passed April eighteenth, one thousand eight hundred and sixty.*

[Approved April 27, 1863.]

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

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

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



DIVISION XX. REPEALS.

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

GENERAL LAWS.

Year	Ch.	Page	Year	Ch.	Page	Year	Ch.	Page
1850:	133:	408	1854:	2:	131	1855:	180:	238
1851:	27:	208	Special Law			1856:	44:	52
1851:	87:	384	1854:	7:	134	1856:	49:	60
1851:	130:	511	Special Law			1856:	56:	69
1853:	66:	93	1854:	60:	177	1856:	112:	134
1853:	149:	203	Special Law			1856:	142:	223
1853:	150:	208	1855:	23:	16	1857:	76:	72
1854:	2:	18	1855:	57:	67	1857:	164:	187
1854:	4:	18	1855:	90:	120	1857:	174:	198
1854:	62:	87	1855:	148:	188	1857:	211:	243

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15 *Id.*

16 *Id.*

17 *Id.*

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

19 HEIZER, *supra* note 12, at 48.

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

CHAPTER CLXXV.

AN ACT

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

(Approved April 30, 1855.)

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

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

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

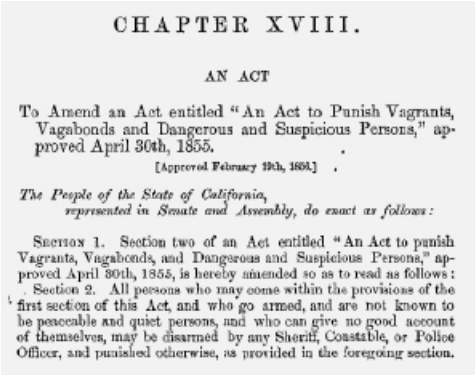
SEC. 3. It shall be the duty of any Justice of the Peace, on knowledge or on written complaint from any creditable person of the State, to issue his warrant to apprehend such person or persons, and upon due conviction to send such person or persons to jail, as prescribed in section first of this Act;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

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

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

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

B. THE GREASER ACT



CHAPTER XVIII.

AN ACT

To Amend an Act entitled "An Act to Punish Vagrants, Vagabonds and Dangerous and Suspicious Persons," approved April 30th, 1855.

[Approved February 19th, 1856.]

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

SECTION 1. Section two of an Act entitled "An Act to punish Vagrants, Vagabonds, and Dangerous and Suspicious Persons," approved April 30th, 1855, is hereby amended so as to read as follows:

Section 2. All persons who may come within the provisions of the first section of this Act, and who go armed, and are not known to be peaceable and quiet persons, and who can give no good account of themselves, may be disarmed by any Sheriff, Constable, or Police Officer, and punished otherwise, as provided in the foregoing section.

Ready for a more general statute that allowed the state to force more vagrants into labor, and wanting to protect "honest people from the excesses of vagabonds," on April 30, 1855 an act "To punish Vagrants, Vagabonds, and Dangerous and Suspicious Persons" was enacted in California (an image of the original publication is pictured on the left).[21] Section 1 of the act provided for the jailing and sentencing to hard labor of all vagrants in the state except "Digger Indians."[22] The vagrants, according to Section 2, were also to be secured "by ball and chain of sufficient weight and strength to prevent escape."[23]

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

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

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Jose Luis Morin, Latinos and Criminal Justice: An Encyclopedia, 49 (Mar. 28, 2016) ("De jure discrimination and the racial profiling of Mexicans and Latinas/os had become the order of the day."); *see* 1937 Cal. Stat. 1102, § 2615, *available at* https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1937/37vol1_Chapters.pdf#page=4.

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

C. THE ANTI-OKIE LAW — 1937

With the Great Depression and Dust Bowl came an Anti-Okie Law in California. "Okie" was a term used by Californians for "refugee farm families from Southern Plains who migrated to California in the 1930s to escape the ruin of the Great Depression and the Dust Bowl."[27] They traveled from a broad range of places including Oklahoma, Texas, Arkansas, Missouri, Kansas, Colorado, and New Mexico.[28] California's Anti-Okie Law was designed to target "people who migrated to California to escape the Dust Bowl. The California Anti-Okie law made it a crime to bring anyone who was indigent into the state. By definition, those escaping the Dust Bowl at the height of the Great Depression were indigent."[29] However, the law was short lived as the U.S. Supreme Court was "of the opinion that Section 2615 [was] not a valid exercise of the police power of California, that it impose[d] an unconstitutional burden upon interstate commerce, and that the conviction under it [could not] be sustained."[30]

Article 5. Bringing Indigent into the State.

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

III. CHINESE RACIAL EXCLUSION LAWS & SUNDOWN TOWNS

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

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[27] David J. Wishart, ed., *Oakies*, Encyclopedia of The Great Plains (last visited June 28, 2021), http://plainshumanities.unl.edu/encyclopedia/doc/egp.ii.044.xml.

[28] Wishart, *supra* note 26.

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

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

[31] Cal. Const. of 1879, art. XIX, *available at* https://www.cpp.edu/~jlkorey/calcon1879.pdf.

A. ANTI-CHINESE RACIAL EXCLUSION

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

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[32] Reft, *supra* note 3.

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

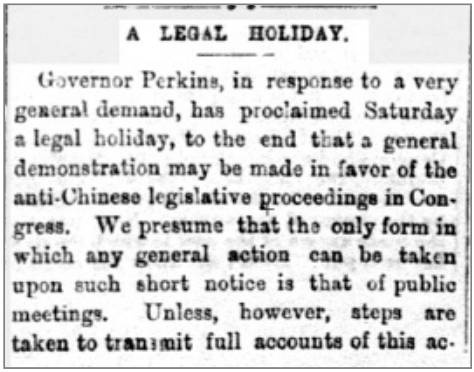
[34] Page Act, ch. 141, 18 Stat. 477, §§ 2–3 (1875) (repealed 1974), *available at* https://loveman.sdsu.edu/docs/1875Immigration%20Act.pdf.

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

[36] *Id.*

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

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



A LEGAL HOLIDAY.

Governor Perkins, in response to a very general demand, has proclaimed Saturday a legal holiday, to the end that a general demonstration may be made in favor of the anti-Chinese legislative proceedings in Congress. We presume that the only form in which any general action can be taken upon such short notice is that of public meetings. Unless, however, steps are taken to transmit full accounts of this ac-

It is clear that any provisions of national legislation or treaty regarding Chinese immigration were motivated by California interests. The 1870 Census records 49,277 Chinese in California, out of 63,199 in the United States and its territories.[40] This majority is even more substantial when territories, which had no legislative voice, are excluded: the total for all U.S. states is just 56,115.[41] California political figures from the lowly Denis Kearney, leader of the Workingmen's Movement, to Leland Stanford, governor, senator, and even an employer of Chinese labor, publicly agitated for excluding Chinese.[42] And so did John Franklin Swift, a California assemblyman and one of the three American delegates to sign the Angell treaty.[43] Also, when the Chinese Exclusion Act was being discussed in Congress, Governor George C. Perkins went so far

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

[39] Geary Act, 27 Stat. 25 (1892).

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

[41] *Id.*

[42] Roger Olmsted, *The Chinese Must Go!*, Cal. Hist. Q. (1971), https://online.ucpress.edu/ch/article-pdf/50/3/285/97466/25157337.pdf.

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

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

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

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

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[44] *A Legal Holiday*, Sac. Daily Union, Vol. 15, No. 9 (Mar. 3, 1882), *available at* https://cdnc.ucr.edu/?a=d&d=SDU18820303.2.7&e=-------en--20--1--txt-txIN--------1.

[45] Cal. Const. of 1879, art. I, § 17, *available at* https://www.cpp.edu/~jlkorey/calcon1879.pdf.

[46] *Id.* at art. II, § 1.

[47] *Id.* at art. XIX.

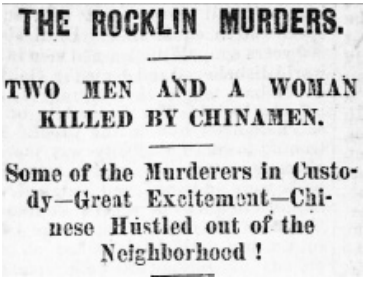
[48] *Id.* at art. XIX, § 1.

[49] *Id.* at art. XIX, §§ 2–3.

[50] *Id.* at art. XIX, § 4.

[51] 1 F. 481 (C.C.D. Cal. 1880).

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


THE ROCKLIN MURDERS.

TWO MEN AND A WOMAN KILLED BY CHINAMEN.

Some of the Murderers in Custody—Great Excitement—Chinese Hustled out of the Neighborhood !


The Last Local Horror.

COUNCILMAN KENDALL IN HIS SHROUD.

The Plague-Spots Wiped Out.

CITIZENS IN COUNCIL.

They Declare that the Chinamen Must "Go."

AND THE CHINAMEN DO "GO."

Chinatown Deserted.—Incidents of the Brief Campaign.

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

[52] *Id.*; U.S. Const. amend. XIV.

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

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

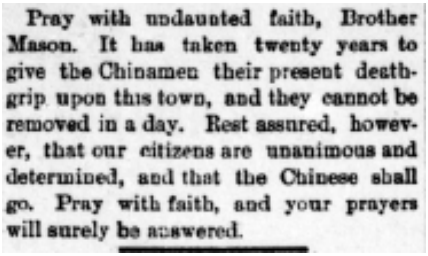
[55] *Rocklin Murders*, *supra* note 53.

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

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

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

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


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

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[56] *Id.*

[57] Lynwood Carranco, *Chinese Expulsion from Humboldt County*, 30 Pac. Hist. Rev. No. 4, 329, 329 (Nov. 1961), *available at* https://www.jstor.org/stable/3636420.

[58] *Carranco*, *supra* note 56.

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

[60] *Carranco*, *supra* note 56, at 336.

and threats of expulsion, although exceptions were made.[61]

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

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

Anti-Chinese Movement at Truckee.

A public meeting was held at Truckee on Saturday evening to consider the Mongolian question, and the tenor of all the speech-making was that "the Chinese must go!" The following preamble and resolutions were then adopted:

WHEREAS, We recognize the Chinese as an unmitigated curse to the Pacific Coast and as a direct menace to the bread and butter of the workingmen; therefore,

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

Resolved, That the Chinese must go.

Another meeting is called for next Saturday evening, when plans are expected to be adopted to carry out the intention of the resolutions. As these resolutions pledge the citizens to "lawful" measures in disposing of the Chinese it is to be hoped that they will abide by this determination. Truckee

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

Both the Humboldt County forcible expulsion and the Nevada County boycott were effective. Between the 1880 and 1890 censuses, the Chinese population in Humboldt County declined from 241 to 19, while the decline in Nevada county was from 3,003 to 1,053.[64]

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

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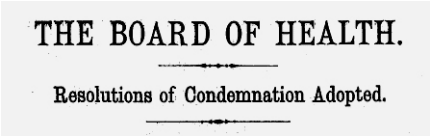
[61] *Id.* at 337.

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

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

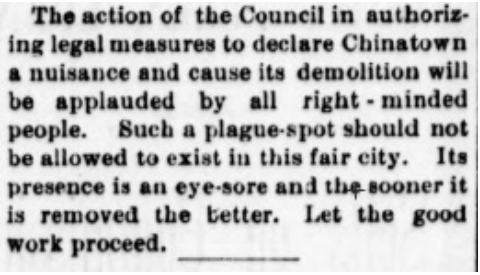
[64] 1890 U.S. Census Tabulation Record, *available at* https://www2.census.gov/prod2/decennial/documents/1890a_v1-13.pdf.


THE BOARD OF HEALTH.

Resolutions of Condemnation Adopted.

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

San Jose convened a similar town meeting on March 8, 1887.[69] Expert reports condemning Chinatown were submitted by a health officer, a city engineer, the commissioner of streets, the chief of police, and the chief engineer.[70] The reports were part of an ongoing strategy by Mayor C. W. Breyfogle to find a pretext to remove Chinatown, an effort that included an attempt to solicit doctors to make a series of home wellness visits to Chinatown and report on unsanitary conditions.[71] This effort exemplifies the use


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

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[65] *Chinatown Declared a Nuisance!*, Workingmen's Committee of Calif. (Mar. 1880), *available at* http://www.sfmuseum.org/hist2/nuisance.html.

[66] *Resolutions of Condemnation Adopted*, Bd. of Health, *available at* http://www.sfmuseum.org/hist2/wpc3.html.

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

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

[69] *Chinatown Condemned by the Council in Committee of the Whole*, San Jose Mercury News, Vol. XXXI, No. 58 (Mar. 9, 1887), *available at* https://cdnc.ucr.edu/?a=d&d=SJMN18870309.2.22&e=-------en--20--1--txt-txIN--------1.

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

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

of prima facie neutral regulations for the purposes of targeted enforcement, for while Mayor Breyfogle makes reference to the leniency that Chinatown received with respect to existing regulations regarding fire safety, sanitation, and crime, he then goes on to propose that his abatement strategy is "that the Chinese be ordered to vacate the premises now occupied by them" and "that proceedings be instituted at the earliest possible moment for the condemnation of Chinatown and for its removal and disinfection."[72] The proceedings mentioned took the form of a court case against the landlords, which alleges that the soil of Chinatown is so polluted that "no adequate means of exposing the soil and surface of said lands to the rays of the sun or healthful draughts of air, or of applying thereto other antiseptic or purifying remedies without the removal of said structures [exists]" and demands that "said structures and all others overshadowing and covering the filth and slime be required to be removed, and the foundations, floors and soil be disinfected and purified . . . ."[73] While health hazard may have been a real concern, the blanket claim made against all structures, the demand that they all be torn down, and the further demand "that defendants be restrained from maintaining said or any nuisance in or upon said lands," all strongly indicate a targeted effort to dislocate the Chinese from Chinatown.[74] Rather than resolve the suit in court, San Jose's Chinatown was entirely destroyed by a fire on May 4, 1887.[75] Some suspected


LAID IN ASHES.

Complete Destruction of Chinatown.

WEDNESDAY'S FIRE.

Its Mysterious Origin, Rapid Progress and Terrible Work.

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

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

[73] *Suits to Condemn Chinatown-Arrangements., Etc.*, San Jose Weekly Mercury, Vol. XXXV, No. 15 (Apr. 9, 1887), *available at* https://cdnc.ucr.edu/?a=d&d=SJWM18870409.2.77&e=-------en--20--1--txt-txIN--------1.

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

[75] *Laid in Ashes: Complete Destruction of Chinatown*, San Jose Weekly Mercury, vol. XXXV, no. 19 (May 7, 1887), *available at* https://cdnc.ucr.edu/?a=d&d=SJWM18870507.2.2&e=-------en--20--1--txt-txIN--------1.

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

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

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

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[76] *Laid in Ashes*, *supra* note 74.

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

[78] *Id.* at 360.

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

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

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

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

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79 *Id.*

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

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

82 *Id.* at 73.

83 *Id.* at 74.

84 *Id.* at 79.

85 *Id.* at 80.

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

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

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

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[86] James W. Loewen, Sundown Towns: A Hidden Dimension of American Racism, 283 (2005).

[87] *Id*. at 220.

[88] *Id*.

[89] *Id*.

[90] Loewen, *supra* note 85, at 219.

[91] *Id*. at 443.

[92] *Id*. at 240.

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

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

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

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93 *Id.*

94 Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America, 80 (2017).

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

96 Rothstein, *supra* note 92, at 80.

97 *Id.* at 81.

98 *Id.* at 82.

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

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


Violence Threat Against Short Must Not Go Unchallenged


O. H. SHORT 4TH FONTANA VICTIM DIES
Lacked Interest In Recovery

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

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

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

100 *Id.* at 19.

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

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

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

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

105 *Id.*

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

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

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

IV. SIT-LIE ORDINANCES

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

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[106] Loewen, *supra* note 85, at 255.

[107] *Id*. at 236.

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

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

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

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

> The law made it a misdemeanor to willfully sit, lie or sleep in or upon any street, sidewalk or other public place in such a manner as to obstruct the free passage or use in the customary manner of such street, sidewalk, or public place. A violation could carry up to a $500 fine and up to a six-month jail sentence. . . . Ultimately, the ACLU challenged the ordinance from a number of angles and the law was repealed by the Board of Supervisors in 1979.[113]

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

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

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

113 Oxsen, *supra* note 80.

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

115 Cassella, *supra* note 82.

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

V. EMERGENCY CURFEW ORDERS IN RESPONSE TO "CIVIL UNREST"

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

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

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

[117] A G Noorani, *Curfew as Tool of Repression*, 19 Econ. & Political Weekly no. 34, 1463 (Aug. 25, 1984), *available at* http://www.jstor.com/stable/41625636.

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

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

[120] *Id.*

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

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

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

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[121] Cal. Gov't Code § 8634 (West); [§ 15] Violation of Curfew., 2 Witkin, Cal. Crim. Law 4th Crimes — Public § 15 (2020).

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

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

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

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

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

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

Recently, across the U.S., city-wide and county-wide curfews have been imposed in an attempt to halt public protests after George Floyd, a forty-six-year old father, was murdered by police officers in Minneapolis, Minnesota on May 25, 2020.[128] In California, on May 31, 2020 Los Angeles County's Board of Supervisors put in place an executive order "following proclamation of existence of a local emergency due to civil unrest."[129] The order placed Los Angeles County residents on notice that they should remain in their homes from 6 p.m. to 6 a.m.; instructed that they should only leave their homes if they need to seek medical care or work at an essential job. Violation of the executive order is a misdemeanor "punishable by a fine not to exceed $1,000 or by imprisonment for a period not to exceed six months, or both."[130] Meanwhile, in San Francisco, Mayor London Breed established a similar curfew that lasted from 8 p.m. to 5 a.m. and said it would "be extended indefinitely."[131] Further, in San Jose, a curfew from 8:30 p.m. to 5:00 a.m. was imposed following the city's proclaiming "a local state of emergency within the City of San Jose resulting from the civil unrest following the death of George Floyd."[132]

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

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

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

[130] *Id.*

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

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

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

VI. CONCLUSION

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

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

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

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

[134] Cain, *supra* note 101.

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

[136] Echavarri, *supra* note 125.

[137] George Santayana et al., The Life of Reason or The Phases of Human Progress (Published 1905–06), *available at* https://muse.jhu.edu/chapter/682206/pdf.

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

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

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GETTING TO *TARASOFF*:

A Gender-Based History of Tort Law Doctrine

BROOK TYLKA*

INTRODUCTION

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

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

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

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

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

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

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[3] Glenn S. Lipson & Mark J. Mills, *Stalking, Erotomania, and the Tarasoff Cases, in* The Psychol. of Stalking: Clinical and Forensic Perspectives 257–73 (1998).

[4] Stephanie M. Wildman, *Review Essay: The Power of Women*, 2 Yale J.L. & Feminism 435, 444 (1990).

[5] *Id.* at 444–45.

[6] Mary McNeill, *Domestic Violence: The Skeleton in Tarasoff's Closet*, *in* Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence 197, 199 (Daniel Jay Sonkin ed., 1987).

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

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

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

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

TORT HISTORY AND FEMINIST TORTS SCHOLARSHIP

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

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

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

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

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[8] Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. of Legal Educ., 3, 20–21 (1988).

[9] *Id.* at 22.

[10] *Id.* at 23.

[11] Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 Cornell L. Rev., 575, 575–96 (1993).

[12] *Id.* at 575.

[13] *Id.* at 577–79.

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

CURRENT GENDER-BASED TORT AND CRIMINAL LAW ISSUES

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

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14 *Id.* at 582.
15 *Id.* at 583.
16 *Id.* at 585.
17 *Id.*
18 *Id.*
19 *Id.* at 586.
20 Jane Doe No. 14 v. Internet Brands, Inc., 824 F.3d 846, 848 (9th Cir. 2016).
21 *Id.* at 849.

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

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

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

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

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[22] *Id.*

[23] *Id.*

[24] *See* Danielle Citron and Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev., 345, 346 (2014).

[25] *Id.* at 347.

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

of domestic violence against women, with the National Organization for Women forming a National Task Force on Battered Women / Household Violence at its eighth annual conference in October 1975.[27] Around this time, other groups had been organizing to provide shelter and crisis services to women who needed assistance fleeing from their abusive partners. In 1972, Women's Advocates, Inc. established a telephone crisis hotline in St. Paul, Minnesota to aid women who were victims of domestic violence.[28] Other groups such as the Rainbow Retreat in Phoenix and the Haven House in Pasadena began in the early 1970s as shelters to help women beaten by alcoholic husbands and later expanded to women suffering from physical abuse in general.[29]

The battered women's movement achieved success in legislation to increase criminal penalties for domestic abuse, as well as strengthening civil protections and making it easier for women to file charges in these circumstances.[30] Additionally, U.S. government agencies have created or extended programs for battered women, and information has expanded on the factors that could place a woman at risk for domestic violence and how such violence can be combated.[31] Writing in 1982, Kathleen Tierney described how "wife beating has been transformed from a subject of private shame and misery to an object of public concern."[32] She examined articles from *The New York Times* and noted that there "was not a single reference to wife beating as a social or community issue from 1970 to 1972," and the only references to violence against wives were present in reports of assaults or murders by assailants who were married to or living with their victims; however, some mentions of domestic violence began in 1973 and more intense coverage started in 1976.[33] This increasing visibility of domestic violence helped to create an understanding of the pervasiveness of the issue and raise discussion about how to end it. Through the new understanding of domestic violence brought from the battered women's

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

[28] *Id.* at 207.

[29] *Id.*

[30] *Id.* at 209.

[31] *Id.*

[32] *Id.* at 210.

[33] *Id.* at 212–13.

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

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

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

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

[35] Susan Schechter, *The Roots of the Battered Women's Movement: Personal and Political*, *in* Applications of Feminist Legal Theory 296, 302 (D. Kelly Weisberg ed., 1999).

[36] *Id.* at 303.

[37] *Id.* at 304.

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

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

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

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[39] *Id.*

[40] Krishna de la Cruz, *Exploring the Conflicts Within Carceral Feminism: A Call to Revocalize the Women Who Continue to Suffer*, St. Mary's L. Rev & Soc. Just. 79, 98 (2017).

[41] Deborah M. Weissman, *The Politicization of Domestic Violence*, *in* The Politicization of Safety: Critical Perspectives on Domestic Violence Responses, 38, 46 (Jane K. Stoever ed., 2019).

[42] Alisa Bierria & Colby Lenz, *Battering Court Syndrome: A Structural Critique of "Failure to Protect," in* The Politicization of Safety: Critical Perspectives on Domestic Violence Responses, 91, 91 (Jane K. Stoever ed., 2019).

[43] *Id.* at 94–95.

[44] *Id.* at 97.

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

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

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

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

[47] *Id.* at 230.

[48] *Id.* at 231.

[49] *Id.*

[50] *Id.* at 232–34.

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

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

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[51] *Id.* at 234–35.
[52] *Id.* at 236–37.
[53] *Id.* at 226.
[54] *Id.* at 227.
[55] *Id.* at 242.
[56] *Id.* at 293.
[57] *Id.*

BREACH OF PROMISE

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

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

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[58] Columbia Law Review Association, Inc., *"Contracts" to Marry*, 25 Colum. L. Rev., 343, 343 (1925) (*citing* Stretch v. Parker, 1 Rolle Abr. 22 (1639)).

[59] *Id.* at 345.

[60] *Id.*

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

[62] *Id.*

[63] *Id.*

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

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

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[64] *Id.* at 208.

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

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

[67] *Id.* at 593–94.

[68] *Id.* at 595.

[69] *Id.*

SIGNIFICANT TORT LAW DEVELOPMENTS IN CALIFORNIA PRIOR TO 1976

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

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

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

[71] *See id.* at 816.

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

[73] *Id.* at 818–19.

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

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

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

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

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

[77] *Id.*

[78] *Id.*

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

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

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

Another similar emotional harm case from 1963, *Amaya v. Home, Ice, Fuel & Supply Co.*, would later be overruled by *Dillon v. Legg* in 1968.[85] In *Amaya*, a mother pursued legal action due to her fright, nervous shock, and bodily injury when she was "compelled to stand helpless and watch her infant son be struck and run over by the defendants' truck."[86] She stated that she became "violently ill and nauseous and was hurt and injured in her health, strength and activity, sustaining injury to her body and shock and injury to her nervous system and person."[87] When the court offered her attorneys an opportunity to state that the fear she suffered was fear for her own safety, they stated that the plaintiff's fright and shock were rather the "result of being compelled to watch her infant child crushed beneath the wheels of an ice truck" and it was the result of her fear for the safety of her child, rather than fear for her own safety.[88] The court held that she

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80 *Kalleg*, 13 P.2d at 764.

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

82 *Id.*

83 *Id.* at 889–90.

84 *Id.* at 890.

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

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

87 *Id.*

88 *Id.*

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

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

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[89] *Id.* at 525.

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

[91] *Id.*

[92] *Id.*

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

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

[95] *Id.*

[96] *Id.* at 82.

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

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

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

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

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97 Finley, *supra* note 82, at 65.

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

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

100 *Id.* at 363.

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

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

103 *Dillon*, 441 P.2d at 914.

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

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

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104 *Id.* at 916.
105 *Id.* at 925.
106 *Id.*
107 *Id.* (Burke, J., dissenting).
108 Hartzler v. City of San Jose, 46 Cal.App.3d 6, 8 (Cal. Ct. App. 1975).
109 *Id.*
110 *Id.*

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

THE *TARASOFF* DECISION

Prosenjit Poddar was born in India as a member of the "untouchable" caste and came to UC Berkeley as a graduate student in September 1967.[112] He met Tatiana Tarasoff at a folk dancing class in the fall of 1968; the two became friends and saw each other weekly.[113] On New Year's Eve, they shared a kiss which Poddar interpreted to be a recognition of a serious relationship.[114] However, Tatiana told him that she was not interested in such a relationship with him.[115] Poddar subsequently suffered an emotional crisis.[116] He continued talking with Tatiana and tape-recorded many of their conversations to listen to later and attempt to figure out why she did not return his love for her.[117]

In the summer of 1969, Tatiana went to South America.[118] At the urging of his friend, Poddar sought psychological assistance that summer, which he stopped in October 1969.[119] His psychologist wrote to campus police saying Poddar was suffering from paranoid schizophrenia and gave his recommendation that Poddar should be civilly committed.[120]

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111 *Id.* at 10.
112 People v. Poddar, 518 P.2d 342, 344 (Cal. 1974).
113 *Id.*
114 *Id*
115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.* at 344–45.
120 *Id.* at 345.

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

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

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121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 Tamonud Modak et al., *The Story of Prosenjit Poddar*, 21 J. of Mental Health and Hum. Behav. 138, 138 (2016).

126 *Id.*

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

128 *Id.* at 557.

129 *Id.* at 561.

130 *Id.*

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

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

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

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[131] *Id.*

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

[133] *Id.* at 11.

[134] *Id.* at 16.

[135] *Id.* at 20.

[136] *Id.* at 22–23.

[137] I*d.* at 31–42.

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

AFTER *TARASOFF*

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

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138 *Tarasoff*, 551 P.2d at 340.

139 *Id.*

140 *Id.* at 216.

141 McNeill, *supra* note 6, at 199.

142 Martha Chamallas & Lucinda M. Finley eds., Feminist Judgments: Rewritten Tort Opinions (2020); *Torts Opinions Rewritten — Authors & Cases*, U.S. Feminist

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

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

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Judgments Project, https://law.unlv.edu/us-feminist-judgments/series-projects/torts-opinions-rewritten/authors-cases.

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

144 *Id.* at 363.

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

146 McNeill, *supra* note 6, at 207.

147 *Id.*

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

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

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148 *Id.*

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

150 *Id.*

151 *Id.*

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

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

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

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

154 *See generally*, Nicholas L. Georgakopoulous, *Judicial Reaction to Change: The California Supreme Court Around the 1986 Elections*, 13:405 Cornell J.L. & Pub. Pol'y, 405–30 (2003).

155 *Id.* at 413, 414.

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

157 *David N. Eagleson*, Cal. Sup. Ct. Hist. Soc'y, https://www.cschs.org/history/california-supreme-court-justices/david-n-eagleson (last visited June 26, 2021).

158 *Id.*

CONCLUSION

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

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

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

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

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

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CALIFORNIA WRONGFUL INCARCERATION COMPENSATION LAW:

A History That is Still Being Written

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I. INTRODUCTION

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

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

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

[1] United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). Judge Hand lived from 1872 to 1961. Gerald Gunther, Learned Hand: The Man and The Judge 1, 585 (2011).

exonerated since 1989.[2] Of these exonerees, fewer than 40 percent have received any type of compensation for the time they spent wrongfully imprisoned.[3] That is because "exoneration guarantees only one thing — release from prison."[4] While the laws in California have been steadily changing to support the people the state has wrongly convicted monetarily, the law still leaves far too many exonerees with nothing.

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

II. HISTORY OF CALIFORNIA WRONGFUL CONVICTIONS

Wrongful convictions are not new to society. The history of wrongful convictions in California is as old as statehood itself. The first recorded wrongful conviction in California occurred in 1851.[5] Sheriff Charles Moore was murdered in Yuba County, and an arrest was made of a man known as

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[2] *Exonerations total by year: California*, Nat'l Reg. Exonerations, (last visited Dec. 18, 2020), https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx ("The National Registry of Exonerations . . . provides detailed information about every known exoneration in the United States since 1989 — cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence. The Registry also maintains a more limited database of known exonerations prior to 1989.").

[3] Anthony Accurso, *California Exonerees Not Quite Innocent Under the Law*, Prison Legal News (April 1, 2020), https://www.prisonlegalnews.org/news/2020/apr/1/california-exonerees-not-quite-innocent-under-law.

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

[5] Anne Pachciarek, *Thomas Berdue*, Nat'l Reg. Exonerations (last visited Dec. 18, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=15.

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

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

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

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[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] "Our Mission" Nat'l Reg. Exonerations, (last visited Dec. 18, 2020), www.law.umich.edu/special/exoneration/Pages/about.aspx.

there have been more than 2,600 exonerations nationally since 1989.[19] Information about exonerations before 1989 is sparse. However, the Registry keeps an anecdotal list of pre-1989 exonerations.[20] There are 431 exonerations on that list, 43 of which happened in California.[21] Of the California cases, all the exonerees were male but one.[22] They were of all different ages and races.[23] All of the crimes were either murder (or attempted murder), bribery, or robbery.[24] Their sentences ranged from one year to death.[25] Twenty-five were given life sentences, four received the death penalty.[26] While most served less than five years, three served over ten.[27]

There is not another recorded exoneration after Berdue's until 1924.[28] There were seven exonerations that decade, six for robbery, and one for murder.[29] The 1930s picked up with eleven exonerations.[30] The subsequent decades only have anecdotes of exonerations as follows: two in the 1940s, five in the 1950s, four in the 1960s, six in the 1970s, and seven in the 1980s.[31]

With the advent of official reporting, the number of exonerations went up exponentially in the subsequent decades. In the 1990s California had forty-four exonerations, followed by ninety-eight from 2000 to 2009, and eighty-one from 2010 to 2019.[32] "It is impossible to fully grasp the

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

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

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

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

magnitude of the injustice and suffering these [exoneration] numbers represent: careers and opportunities that were lost forever; children who grew up[33] and parents who died while the innocent defendants were in prison; marriages that fell apart — or never happened."[34]

A. Impact on the Exoneree

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

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

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

[34] *Milestone: Exonerated Defendants Spent 20,000 Years in Prison*, Nat'l Reg. Exonerations 1 (2018), http://www.law.umich.edu/special/exoneration/Documents/NRE.20000.Years.Report.pdf.

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

[36] *Id.*

[37] *Id.* at 9.

[38] *Id.* at 10.

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

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

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

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

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

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

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

B. Impact on Society

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

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

[44] 4 William Blackstone, Commentaries *352. This has come to be known as the Blackstone ratio. *See Blackstone Ratio*, Oxford Reference (last visited Jan. 26, 2020), https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095510389 ("The ratio of 10:1 expressed in the maxim 'Better that ten guilty persons escape than that one innocent suffer' ").

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

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

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

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

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[47] *See id.*

[48] *See generally* Nuno Garoupa & Matteo Rizzoli, *Wrongful Convictions Do Lower Deterrence*, 168 J. Institutional & Theoretical Econ. 224 (2012).

[49] *Id.*

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

[51] *See generally* Erik Kain, *The High Cost of Wrongful Convictions*, Forbes.com (Jun. 29, 2011), https://www.forbes.com/sites/erikkain/2011/06/29/the-high-cost-of-wrongful-convictions/#1876ee3c72ec (reporting on a study that found from 1989 to 2010 Illinois had eighty-five exonerations that cost Illinois $214 million dollars); Rebecca Silbert, John Hollway, & Darya Larizadch, *Criminal Injustice: a Cost Analysis of Wrongful Convictions, and Failed Prosecutions in California's Criminal Justice System*, Chief Just. Earl Warren Inst. L. & Pub. Pol'y (2015) (finding over twenty-four years California spent $282 million on wrongful convictions, $120 million for incarceration alone).

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

III. EXONERATION COMPENSATION LAWS IN CALIFORNIA

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

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[52] *See* Jaclyn Gioiosa, *The Cost of Wrongful Convictions*, Santa Clara L. Blog (Nov. 8, 2016).

[53] *Id.*

[54] *Claims for Erroneously Convicted Persons (PC4900)*, California Victims Compensation Board (last visited June 19, 2020) [hereafter CalVCB], https://web.archive.org/web/20200627225053/victims.ca.gov/board/pc4900.aspx.

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

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

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

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

The first exoneration law in California was passed and enacted in 1913.[60] This legislation was proof that over the years, minds had changed from the time of Berdue's conviction on who should bear the burden of society's mistake in wrongfully convicting someone. The 1913 statute, later to become Penal Code Section 4900, provided that a person could make a claim for compensation as long as the person: (1) was wrongfully convicted of a felony; (2) was incarcerated in prison; (3) could show the conviction was overturned by a finding that the crime was not committed, or not committed by the one convicted, or by a pardon from the governor; and (4) could show a pecuniary injury.[61] The exoneree was required to submit a statement of facts to the California Victims Compensation Board (CalVCB) within six months of the judgement "and at least four months prior to the next meeting of the legislature of the state."[62] At that point, CalVCB would set a hearing date [63] where it would hear the exoneree's claim, as well as any opposition from the Attorney General.[64] This would essentially become a re-litigation of the underlying case. Except, in this new compensation proceeding, CalVCB was not bound to the exonerating court's decision.[65] If CalVCB was satisfied that the crime was not done by the claimant and the claimant "did not by act or omission, intentionally

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

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

[59] *Id.*

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

[61] *Id.* at § 1.

[62] *Id.* at § 2.

[63] *Id.* at § 3.

[64] *Id.* at § 4.

[65] *Id.* at § 5.

or negligently, contribute to bringing about the conviction," then CalVCB could recommend that the legislature approve compensation for up to the sum of $5,000.[66] Exoneration alone is a massive feat of litigation, and, in turn, this process for compensation should have been easy. In reality, however, that was not the case.

The first known compensation claim was filed for a crime committed in 1928.[67] Mike Garvey, Harvey Lesher, and Phil Rohan were convicted of murder and sentenced to life in prison.[68] They were convicted on the evidence of three witnesses.[69] One witness, who was not at the crime scene, claimed Lesher had confessed to him.[70] Lesher was the only reason his acquaintances Garvey and Rohan were linked to the crime.[71] After the conviction, that witness recanted, explaining he was too drunk to remember the night the confession was made, and that police had threatened to charge him with the murder if he did not testify.[72] The other witnesses were found to be uncredible by the exonerating court.[73] Alibis came forward for the convicted men for the night of the crime, and the fingerprints at the crime scene did not match any of the convicted.[74] The convictions of all three men were overturned in 1930 after they spent two years and eight months in prison.[75] All three men applied for compensation under the 1913 statute; they were the first — on record — ever to apply.[76] CalVCB denied their claims ruling on the basis that the evidence presented at the original trial was not "erroneous."[77] Dissatisfied with the ruling, the men

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[66] *Id.* In 1913 $5000 was equivalent to $129,491.92 in 2020. CPI Inflation Calculator, https://www.in2013dollars.com/us/inflation/1913?amount=5000 (last visited June 17, 2020).

[67] Damon McLean, *Mike Garvey*, Nat'l Reg. Exonerations (last visited June 17, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=111.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

applied for a rehearing.[78] At the rehearing, Lesher and Garvy's claims were denied.[79] CalVCB explained that Lesher and Garvy were "men of such unsavory character" and that CalVCB was not satisfied that the men did not contribute in some way to their conviction by past acts — yet CalVCB gave no other evidence for this finding.[80] Rohan, however, was awarded $1,692[81] — same crime, same evidence, same conviction, same time served, but totally different compensation rulings.[82]

California's compensation statute was amended in 1931.[83] The amendment to section 1 simply provided that a pardon by the governor would be considered for indemnification only when a crime was not committed or not committed by the one convicted.[84] The amendment to section 5 clarified that the board of control was to give recommendations and conclusions to the legislature, as well as a monetary amount under $5,000[85] if approved.[86]

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

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78 *Id.*

79 *Id.*

80 *Id.*

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

82 McLean, *supra* note 67.

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

84 *Id.* at § 1.

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

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

87 Meghan Barrett Cousino, *Miles H. Ledbetter*, Nat'l Reg. Exonerations (last visited June 19, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=189.

88 *Id.*

89 *Id.*

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

The next known claims were not until the 1950s.[93] In 1953, Frank Hamlin was identified by a store clerk in San Francisco as a jewelry thief.[94] Hamlin insisted he was not in San Francisco the day of the robbery.[95] Based on the positive identifications by the store clerk and his assistant, Hamlin was convicted of the crime.[96] He was sentenced to five years to life in prison.[97] A year later, another man was arrested for a string of burglaries in northern California.[98] During his interrogation, the man confessed to the 1953 robbery in San Francisco.[99] In response to this new evidence, the governor gave Hamlin a full and unconditional pardon.[100] Hamlin filed for compensation with the state and received $5,000.[101]

The last person to receive compensation under the amended 1931 statute was John Fry in 1959.[102] Fry's common-law wife, Elvira Hay, was found dead in a bathtub at the Venice Hotel.[103] Fry, who had been seen fighting with her the night before, was blamed for the crime.[104] Stating he was too drunk to remember what happened that night, he confessed to manslaughter for fear

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90 *Id.*

91 *Id.*

92 *Id.*

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

94 Meghan Barrett Cousino, *Franklin Hamlin*, Nat'l Reg. Exonerations (last visited June 19, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=134.

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

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

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

103 *Id.*

104 Meghan Barrett Cousino, *John Fry*, Nat'l Reg. Exonerations (last visited June 21, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=108.

of being charged with a more serious charge.[105] Fry was sentenced to one to ten years in prison.[106] The next year, a janitor at the Venice Hotel turned himself in after killing another person in the exact same way as Hay.[107] He then confessed to killing Hay a year earlier.[108] In light of this new evidence, Fry was pardoned by the governor and released from prison.[109] He was able to receive compensation from the state in the amount of $3,000.[110]

The next amendment was effectuated in 1969.[111] This increased the amount an exoneree could collect from the 1913 maximum of $5,000 to $10,000.[112] There is no recording of a claim under this new statute on the Registry or the CalVCB website until 1997.[113] Although there were not many exonerees making claims for compensation under the statute, civil lawsuits in tort and for civil rights violations were pursued in more cases during this time period.[114] The exonerees sued municipalities, prosecutors, and defense attorneys.[115] They sued under false imprisonment, prosecutorial misconduct, and malpractice.[116] During this time, the California case of *Imbler v. Patchmen* went all the way to the U.S. Supreme Court, cementing prosecutorial immunity into the foundation of the modern Court's immunity doctrines.[117] From 1969 to 1986, the amounts for which exonerees sued were anywhere from $17,000 to $1.4 million.[118]

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105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

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

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

112 *Id.* In 1969, $10,000 was equivalent to $69,862,13 in 2020. CPI Inflation Calculator, (last visited June 19, 2020), https://www.in2013dollars.com/us/inflation/1969?amount=10000.

113 CalVCB, *supra* note 54.

114 *Id.*

115 *Id.*

116 *Id.*

117 424 U.S. 409 (1976).

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

The first and only person documented to claim the $10,000 offered by statute was Kevin Lee Green in 1997.[119] In 1979, Dianna Green, Kevin's pregnant wife, was struck in the head, losing the ability to communicate.[120] When she got to the hospital, the baby's fetal heart tones appeared to be fine, but later that day, they could not be detected.[121] The baby was declared stillborn.[122] A medical exam found spermatozoa in Dianna.[123] Kevin testified that when the attack occurred, he was at a hamburger stand to get food.[124] Dianna was the only witness to the crime and suffered amnesia.[125] Kevin was convicted on Dianna's testimony and the testimony of mutual friends who said Kevin and Dianna had a volatile relationship.[126] He was sentenced in 1980 to fifteen years to life in prison.[127] Sixteen years later, the spermatozoa found on Dianna was run through a DNA database and matched to a felon known as the "Bedroom Basher."[128] The police were able to secure a confession, and Kevin was exonerated and released.[129] In 1997, Kevin filed a claim with CalVCB and collected the maximum $10,000 allowed by statute.[130] The governor awarded Green an additional $620,000 in 1999 for the time he spent wrongly incarcerated.[131]

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

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

[120] *Kevin Green*, Innocence Project (last visited June 19, 2020), https://www.innocenceproject.org/cases/kevin-green.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Kevin Green*, CalVCB, *supra* note 119. In 1997 $10,000 was equivalent to $15,974.70 in 2020. CPI Inflation Calculator, (last visited June 19, 2020), https://www.in2013dollars.com/us/inflation/1997?amount=10000.

[131] *Kevin Green*, Innocence Project, *supra* note 120.

The 2000 legislative session saw another amendment to the compensation statute, Penal Code Section 4900.[132] This amendment raised the amount an exoneree could be granted from a maximum of $10,000 to a time-based approach, granting $100 per day for every day of wrongful incarceration.[133]

The first person to be granted a claim under this new amendment was Frederick Renee Daye.[134] In 1984, a woman was grabbed by two men while walking to her car.[135] She was pushed into the car, beaten, and raped.[136] She was then pushed out of the vehicle as the assailants drove off.[137] Daye was identified by the victim in a photo line-up and subsequently identified in an in-person line-up.[138] At trial, Daye was again identified, and a forensic analyst said the forensic evidence collected was "likely" Daye's.[139] Daye was convicted and sentenced to life in prison.[140] In 1990, his co-defendant made a statement that Daye was not involved.[141] Daye was able to secure DNA testing in 1994.[142] That testing affirmatively excluded Daye from the crime.[143] His conviction was thus overturned.[144] Daye's claim for compensation was approved in 2002 for $386,000:[145] $100 for each of the 3,860 days (over ten years) that he was incarcerated.[146]

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

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

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

135 *Frederick Daye*, Innocence Project (last visited June 19, 2020), https://www.innocenceproject.org/cases/frederick-daye.

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

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

146 *Frederick R. Daye*, Nat'l Reg. Exonerations, (last visited June 19, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3163.

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

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

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

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147 2016 Cal Stat. ch. 31.

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

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

150 *Id.*

151 2016 Cal Stat. ch. 31.

152 *Id.*

153 *Id.*

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

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

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

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

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

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

158 *Id.*

159 CalVCB, *supra* note 54.

160 *Id.*

161 *Id.*

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

163 *Id.*

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

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

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

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165 *Id.*

166 *Id.*

167 *Id.*

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

169 *Id.*

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

171 *Id.*

172 CalVCB, *supra* note 54.

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.*

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

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

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178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.*

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

188 CalVCB, *supra* note 54.

189 *Id.*

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

spray on Hendrix and shot at him before calling the police.[191] When the police got there, they found Hendrix.[192] It was dark, and Hendrix was uncooperative.[193] He was eventually subdued and charged with "attempting by means of threats and violence to deter an officer from performing his duties."[194] The first jury deadlocked, and a mistrial was called.[195] At the second trial, the judge allowed evidence of two prior occasions where Hendrix resisted arrest.[196] After the second trial, Hendrix was convicted and sentenced to six years in prison.[197] Hendrix appealed.[198] The appellate court found an abuse of discretion by allowing evidence of the prior conduct into the trial and overturned the conviction.[199] The District Attorney's office decided to drop the case, and Hendrix was released.[200] Hendrix applied for compensation for his 1,136 days of wrongful incarceration equaling $113,600.[201] CalVCB ruled that Hendrix had not proven by a preponderance of the evidence that he did not unlawfully use force to resist Officer Mosely and denied the claim.[202] Essentially, in this case, CalVCB put themselves in the place of the jury and relied on the evidence the overturning court ruled prejudicial to come to their conclusion.[203] There is a fundamental problem with a ruling such as this in that it is not made to keep society safer, as is the purpose of our normal criminal justice process. This ruling is solely to keep the state from having to pay for what it already acknowledged as a miscarriage of justice. That is, in essence, the picture of injustice.

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

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191 *Id.*
192 *Id.*
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.*

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

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

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

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

205 *Id.*

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

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

208 *Id.*

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

210 *Id.*

211 Maurice Possley, *Timothy Atkins*, Nat'l Reg. Exonerations (last visited June 20, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3001.

212 *Id.*

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

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

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

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

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[214] *Id.*

[215] 2016 Cal Stat. ch. 31 (SB 836).

[216] *Id.* at § 251.

[217] *Id.* at § 252.

[218] *Id.* at § 253.

[219] *See* Robert J. Norris, *Assessing Compensation Statutes for the Wrongly Convicted*, 23 Crim. Just. Pol'y Rev. 352, 359 (2012). *See* Brooks & Simpson, *supra* note 156, at 649.

[220] *Id.*

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

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

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

[224] *See Innocents Who Plead Guilty*, Nat'l Reg. Exonerations (Nov. 24, 2015), www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf (explaining that 15 percent of known exonerees pled guilty).

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

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

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

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

226 *Id.*

227 *Id.*

228 *Id.*

229 *Id.*

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

231 *Id.*

232 *Id.*

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

234 *Id.*

235 *Id.*

236 *Id.*

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

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

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

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237 Cal. Pen. Code 4900 (2016).

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

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

240 Maurice Possley, *Charles Holmes III*, Nat'l Reg. Exonerations (last visited June 20, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4747.

241 *Id.*

242 *Id.*

243 *Id.*

244 *Id.*

245 *Id.*

246 *Id.*

247 *Id.*

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

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

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

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248 *Id.*

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

250 *Id.*

251 *Id.*

252 *Id.*

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

254 *Id.*

255 CalVCB, *supra* note 54.

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

257 *Id.*

258 *Id.*

259 *Id.*

260 *Id.*

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

When Atkins filed his claim in 2007, the attorney general, who was required to file a reply, did not respond until 2009.[266] Shortly after the answer was filed a hearing was held. [267] That claim was denied.[268] CalVCB ruled that Atkins had "not met the statutory requirements to receive compensation."[269] CalVCB held that he did not show by a preponderance of the evidence that he was innocent and that his flight from the police was a contributing factor to his conviction.[270]

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

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261 *Id.*

262 *Id.*

263 *Id.*

264 *Id.*

265 *Id.*

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

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

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

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

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

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

272 *Id.*

273 *Id.*

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

Atkins appealed the decision in superior court and won in 2017.[275] The State appealed.[276] In October 2018, the judgment in favor of Atkins was upheld.[277] However, the courts did not specify whether the pre-2016 rate of $100 per day — which would have applied at the time of both previous compensation hearings and would equal $713,700 — or the current rate of $140 per day — equaling $1,129,660 — would be applied to Atkins's appeal.[278] In 2019, thirty-four years after the murder, thirty-two years after his wrongful conviction, twelve years after being released from prison, five years after being given a ruling of factual innocence, Timothy Atkins was finally given his compensation of $1,129,660 at the $140 per day amount for the 8,069 days he spent wrongfully imprisoned.[279]

The most current amendment to Penal Code Section 4900 went into effect January 1, 2020.[280] This amendment changed the statute of limitations to ten years from the time the conviction is overturned.[281] It further provides that "the factual findings and credibility determinations establishing the court's basis for granting a writ of habeas corpus, a motion for new trial . . . or . . . a certificate of factual innocence . . . shall be binding on the Attorney General, the factfinder, and the board."[282] Lastly, it adds a section stating that if an exoneree knowingly pleads "guilty with the specific intent to protect another from the underlying conviction" they will be denied compensation.[283] In the first quarter of 2020, five people — all with rulings of factual innocence — made claims for compensation, and all five claims were granted.[284]

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

276 *Id.*

277 *Id.*

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

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

280 2020 Cal Stat. ch. 473 (SB 269).

281 *Id.* at § 2.

282 *Id.* at § 3(b).

283 *Id.* at § 3(c).

284 CalVCB, *supra* note 54.

IV. CONCLUSION

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

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

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

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

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

[286] *Id.*

[287] *Id.*

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

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

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

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

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

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

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

[292] John Musgrave, Another Word to the Wise, shewing that the delay of justice, is great injustice 1 (London, 1654). *See* Fred Shapiro, *You can Quote them "Justice Delayed is Justice Denied,"* Yale Alumni Mag. (Sep/Oct 2010), https://yalealumnimagazine.com/articles/2967-you-can-quote-them, for further reading on historic uses of this phrase.

ORAL HISTORY

JUSTICE CARLOS R. MORENO

ASSOCIATE JUSTICE
CALIFORNIA SUPREME COURT
2001–2011

Carlos R. Moreno
Associate Justice, California Supreme Court
2001–2011

Oral History of CARLOS R. MORENO

LAURA MCCREERY

EDITOR'S NOTE:

The oral history of California Supreme Court Associate Justice Carlos R. Moreno was conducted in 2019 by Laura McCreery of the Institute of Governmental Studies at UC Berkeley,[1] with funding from the California Supreme Court Historical Society.

Justice Moreno's oral history is presented here in condensed form, intended to focus on matters directly related to his life and the legal history of California. It has received minor copyediting for publication, including additional footnotes.

— SELMA MOIDEL SMITH

[1] Carlos R. Moreno, "In the mix: forty-five years of advancing legal rights, from the Los Angeles City Attorney's Office and private practice to the California and Federal trial courts and the California Supreme Court / Carlos R. Moreno; interviews conducted in 2019 by Laura McCreery," BANC MSS 2019/217. The oral history is reprinted by courtesy of the copyright holder, the Regents of the University of California, and may not be reproduced without written permission.

McCREERY: This is Laura McCreery speaking. I'm here in Los Angeles with Justice Carlos R. Moreno, formerly of the California Supreme Court and now of JAMS, and we're embarking today on a series of oral history interviews. Good morning, Justice Moreno.

MORENO: Good morning, Laura. It's a pleasure and a delight for you to be here and for us to get together regarding this project.

McCREERY: Likewise. Let me ask you to start us off by stating your date of birth and then talking about where you were born.

MORENO: All right. I was born November 4, 1948, so I just turned seventy. I'm part of that postwar baby boom that is now reaching the age of seventy and above. I never thought that this time in my life would arrive, but here we are.

I was born here in Los Angeles and lived at the time in an area known as Solano Canyon, which is directly adjacent to an area known as Chavez Ravine, where the Los Angeles Dodgers built their stadium and now play Major League Baseball there. I'm very much a central Los Angeles person. I was born in the Boyle Heights community in what was then called General Hospital, now County & USC Medical Center, and spent virtually all of my early life in these environs, the same zip code, 90012.

What's interesting is that a number of my professional jobs have been in the same zip code, whether as a deputy city attorney for the City of Los Angeles or as a Los Angeles Superior Court judge or as a federal district court judge and even my time working with a couple of law firms, literally in the same zip code, or if not the same then one digit removed, 90013.

There are times that I can look out the window — not from this window, which is looking west, but if we were at one of the windows looking north and east I could literally point out where I was born, where I lived, where I went to school and, in large part, where I've worked. So in some ways, I like to tell people, I have not gone very far. [Laughter]

McCREERY: What were the circumstances that had your family living here in central Los Angeles when you were born?

MORENO: It's a long story, but essentially on my mother's side, she followed her oldest brothers to Los Angeles in May of 1925. I've been able to document that through the immigration records of the time.

What precipitated the family moving out from Mexico, a small port city of Guaymas, were two things. One, the Mexican Revolution, which really gained fervor from 1910 into the 1920s; and also the death of her father on Christmas Eve of 1924. Within five months of his death, my mother, her younger sister, and her mother — my grandmother — migrated to Los Angeles, where her oldest siblings had already relocated beginning in around 1918, 1919, and so forth. Those were the last of my mother's side of the family that left Mexico.

On the other hand, on my father's side, which was a large family, they came from an area in Mexico known as Michoacán, which is a state that delivers the largest number of Mexican migrants to California. They left in 1913, when my father was thirteen years old. Family lore has it that they came, again, as a result of the Mexican Revolution, although in their case they were on the side of the government, President Porfirio Diaz, against whom the rebels were challenging. That's family lore, but they came in a boat, I'm told, up the Pacific coast to California and settled in the Anaheim area, Orange County, which was largely agricultural.

On my father's side they were largely farmers and cattle-raising people, tenant farmers. Moving from Anaheim they eventually settled in San Bernardino County near Chino and Norco, these towns that were all dairy towns back then. But they were very fortunate in somehow being able to enter a lease for about 2,300 acres of farmland alongside the Santa Ana River and maintained quite a sprawling community there. The community was known as the Prado.

There's now a dam that was constructed in 1938 as a result of very large floods in Southern California in 1938, reminiscent of climate change now. But that dam is still there at the intersection of Highways 71 and 91. Behind the dam is where the Prado, which is now submerged, was and what was known as Rancho Moreno, where a group of maybe ninety family members lived. My father was one of nine. He was the eldest of the children, and his father, Don Pedro Moreno, was the patriarch of the family.

I did not have any real contact with the historical part of the family. I've only learned that in the last twenty or thirty years because somehow during the 1940s my father met my mother in Los Angeles. My father was what is known as a jobber; that is, the Moreno family in Chino, in response to the flood of milk, excess milk, started producing a Mexican-type

farmer's cheese or hoop cheese, fresh cheese that was used by local Mexican restaurants, bakeries, markets, and mom and pop stores.

They carried on that business for at least forty years, so my brothers later became involved in the distribution aspect of that business, taking it over from my father before he died. So it's interesting that you have this on my father's side, the rural, agricultural side.

As a side note I should also mention the family was involved in the foundation of quarterhorse racing in the state of California. My grandfather, my father, and my uncles were all involved in breeding quarterhorse horses that became quite competitive and really was the foundation of quarterhorse racing at various tracks: Los Alamitos here, Hollywood Park, Santa Anita, Del Mar. So the Moreno label, so to speak, I'm told, was quite well known, and up until, I would say, the early 2000s, one of my half-siblings, Henry Moreno, who is now in his eighties, carried on that tradition and was quite a well-known professional horse trainer in California.

Even there there's a side note in terms of my judicial appointments. I can go into that now if you wish or not.

McCREERY: Why don't you give us a hint?

MORENO: Okay. The hint is that when I became interested in submitting my name for judicial appointment in early 1986, my brother Henry had a very good contact with the then-president of the state Senate, a guy known as Ken Maddy, who was a very moderate Republican married to a chicken dynasty. I'm not sure if it was Perdue or — one of the big chicken producers. But Ken Maddy was a warm-up — I don't know what you would call it — a warm-up, an apprentice, at one of the racetracks, Hollywood Park, and a good friend of my brother's.

When my brother informed Senator Maddy that I was applying, Senator Maddy called me and said, "Any friend or relative of Henry's is a friend of mine. I'll go downstairs and talk to Marvin Baxter," who was then Governor Deukmejian's appointments secretary, to get me a quick look-at if nothing else.

Years later, when I served on the Supreme Court with Marvin Baxter, he actually related to me that personal contact of Senator Maddy, who I've never met. When he came down to talk to him, he said, "Hey, this is

someone you should look at." You just never know where your support is going to come from. That was for the municipal court.

When I applied for the superior court several years later, 1993, 1994, I reached out to his office. I'm not sure if he was still alive then, actually, but I kept the name of his assistant, chief of staff, and she followed up with a nice letter and got that over to — I guess Wilson was the governor then — yes, to Governor Wilson.

Those two appointments from Governor Deukmejian and from Governor Wilson have served me quite well because it shows exactly who I am, and that is a very balanced, reasonable, and non-ideological judge. I know my later mentor, Senator Feinstein, when she advocated for me before the Senate Judiciary Committee in 1997 and I had my Senate confirmation hearing — I remember this distinctly because she told me — she's sitting next to Senator Hatch, who I think was the chair of the committee, and she said that he said, "This looks like one of the good ones."

I think all along it's been very helpful, that those two Republican appointments for a lifelong Democrat have been very helpful. I learned later that Governor Deukmejian also — he wrote me a nice letter when I got the California Supreme Court appointment. He was happy that someone he appointed to the municipal court in Compton was now going to be sitting on the California Supreme Court. So though I didn't know Governor Deukmejian well, or at all, he's also been, before his death, very supportive of my career.

I guess the point of all this is that one never knows — and this is the credo of my life — one never knows where support might come from. If you've been around long enough and you maintain those contacts — you don't burn any bridges — all this will assist in some way when you're going through your address books or your six degrees or less of relationships. For me it's been very helpful.

McCREERY: Thank you. Let me return to some of your background and ask you how much exposure you had yourself to the quarterhorse racing aspect of your family?

MORENO: None, really. Subsequently, 1958, my father — and that's another story — he had opened a business in the produce market area here called Rancho Moreno Cheese and Produce. I started working there at age

nine or ten, usually on Saturdays, for two dollars a day, basically assisting in delivering and carrying boxes of produce to customers.

My brothers took over that business sometime after 1958, and they were much closer to following the ponies, so to speak, and stayed in contact with our half-brother Henry, just generally being on the ground, whereas I think I had my head more on studies and focusing on going away to college and things like that.

I've been to the racetrack with my brother or with my dad probably less than a handful of times, so I don't have much knowledge or connection with the horseracing business. But I know that when I meet someone who has a connection to the business, it becomes a conversation starter.

McCREERY: You mentioned earlier that when your father's family came from Michoacán in 1913 — or when your father himself came — that they had been on the side of the government in the Mexican Revolution. I take it that your mother's family, perhaps, not so? Can you talk more about — ?

MORENO: That's also very interesting on my mother's side. Again, this is also a long thread that's going to go back, actually, to San Francisco. My mother and her siblings all had a German father, Carl Brücklmaier, who we've discovered resided in San Francisco as early as 1883. One of my nephews found a directory — I don't think it would be a telephone directory, but some kind of business directory — where he was located at O'Farrell Street in 1883, so this was long before the San Francisco fire and earthquake.

Later, after my mother died in 1975, I found some papers reflecting that while in San Francisco he was actually a married man, to a woman named Lena Weigle, and obtained a divorce — or Weigle obtained a divorce — in the San Francisco Superior Court. I still have those documents. The divorce was granted on grounds of abandonment, and I'm not sure it says adultery, but abandonment because he went to Mexico.

Sometime after 1891, he met and married his second wife, who would be my grandmother, a woman by the name of Maria Luisa Larrinaga, and produced my first uncle, Joseph or José Brücklmaier, who was born in 1897. He was the first one to come to California, as the oldest son. My mother was born in 1909, also in Guaymas, Mexico.

I've asked people, what would precipitate a — I won't say young — German divorced male to go to Mexico? But the later 1880s, 1890s, was

also a time of great industrial development in Mexico, really in large part at the expense of the Mexicans and to the enrichment of foreign interests. Porfirio Diaz was known for developing the country but also for selling out those interests to the French, the Germans, the English, and so forth.

My grandfather was born in the 1850s. Somewhere when he was in his forties or close to fifty, he decided to move to Mexico. It turns out his profession was as a watch repairman or jeweler. In fact, his business in San Francisco, it indicates just that. My mother always related that in Guaymas that's what he had, a jewelry repair, watchmaker repair-type business.

So this divorced German married a woman maybe in excess of twenty years younger than him and had six kids. What's interesting, though, is that he had the — I don't know if you want to call it foresight or what — but to send his oldest son, José, my uncle, to boarding school in Oakland and to college in Oakland, which was where St. Mary's College was then located.

He also, in the year 1914 — and I verified this by getting documents from St. Mary's College — attended St. Mary's for one year, kind of as a foreign student, but paying $200 tuition and $5 athletic fee. I've got the ledger for that. He was always very proud of the Christian Brothers' ethics, credo, and how they really were strong disciplinarians of young men. Ironically, my son later goes to a Christian Brothers school here in Los Angeles. I'm telling you, it's just fascinating.

My uncle came back to Mexico, I would surmise, somewhere around 1915 at age eighteen, and he worked for an agency then called the Railway Express Agency, which was the UPS of its day. This was before planes and everything else. I actually have a picture of him with his crew in Guaymas working for the Railway Express Agency.

Later, when he came to the United States in around 1919, he applied for and was accepted for a job with the Railway Express Agency, where he later worked for forty-three years here at the train station. [Laughter] So from a job that he had in Mexico as a young man and then transferring to the same agency in Los Angeles, he made that his career during the Depression, the 1930s, during World War II and so on, when train travel and freight and all that was really at its peak.

McCREERY: How much did your mother talk with you about her own growing up in Guaymas, Mexico?

MORENO: Very little. Only that, as with many Mexican immigrants, their life was well-to-do. They had servants, a cook, and I imagine were pretty well off, given the circumstances.

My uncles — this is all apocryphal also — when they decided to leave Mexico it was because of fear of the rebels, Emiliano Zapata and Pancho Villa — because they would come into towns and conscript people, young men in particular. I've seen photographs of their occupation of Guaymas, so I can only imagine that my grandfather said, "You guys have got to get out of here, and one by one you leave to the United States. You don't want to get caught up in this mess that is going on in Mexico."

Later I heard — again, this is all apocryphal but understandable — anyone with a German name during World War I was immediately suspect, so that when they came to the United States — they were fairly light skinned and green eyes, although they spoke perfect Spanish and very little English — they did not really have an easy time because they were suspect.

Anyway, in researching some of this, when my mother came in 1925, the immigration papers show that she was met by my uncle, and it indicated where they were going to live. They were going to live with an aunt who lived somewhere in Boyle Heights. But as with many typical immigrant families, you had nine, ten, eleven people living in a two-bedroom house — and all that can be confirmed — until they got married or left the house.

Luckily my uncle, who actually raised us — that's another sidelight — was always the main provider. He always had a job, actually always had a car, was a staunch union supporter. So I think a lot of the ethics that he had were instilled in me, to be steady and to work hard, the American sort of values that we have. He was exactly that.

He spoke perfect Spanish, perfect English, actually had great penmanship in Spanish and in English. He was actually an educated man for his day, with one year of college in 1914. I don't know how many Americans actually had any college or high school back then, but he did.

MCCREERY: You've filled in nicely about this one brother of your mother's and how much he helped your own family. What about education, formal education, for the other brothers and for your mother herself? What were they allowed?

MORENO: My mother came in 1925, when she was sixteen. I don't know how much English she spoke, but she certainly could play the piano quite well. The number two son, Charles or Carlos Brücklmaier, also could play the piano quite well and during the 1920s and 1930s actually had an orchestra, the Charles Brücklmaier Orchestra. So they played at honkytonks and places around Los Angeles.

My parents were never married to each other. My father was married to someone else on the ranch side of the family — that's why I refer to Henry as a half-brother. But we were known on that side of the family as the city people, like city slickers. I went to a family reunion in 1991 out at the ranch. We call it "the ranch," where they produce cheese and other things. A number of the people were not aware of our side of the family. I was a municipal court judge at the time. "Oh, really? We have a judge in the family. Add him to the family tree," and all this stuff, so it's an interesting relationship.

McCREERY: What do you know of your mother's earlier marriage?

MORENO: Actually, quite a bit because one of my sisters is actually still alive. She's in her eighties. But all I remember, or was told, was that she married a guy named José Hidalgo, who was kind of a — how shall I describe — I don't want to say anything too bad, but more show than real, kind of a salesman type. Of course, it was the Depression, you have to remember. A good dresser, smooth, but who abandoned my mother and her two daughters sometime during the Depression. That's what caused my mother to go live with her brother José for, really, the rest of her life, bringing her two daughters, the kids, and everything else.

McCREERY: How well did you know her brother, your uncle?

MORENO: Oh, quite well. We lived with him, and he taught us about baseball, took us to — we went to the first game ever played at Dodger Stadium, when the Angels first came. Actually, when the Los Angeles Angels were here as a minor league club, we would go to the Wrigley Field, then in existence in South Central L.A. So he was a company baseball player, intramural-type player. I've got pictures of that. So he loved baseball. He played catch with us, would take us to events and stuff, so we were his kids in one sense.

He always at least gave me very positive reinforcement, things like, "You're going to be president of the United States," or that I was famous if I did something. It was very supportive. And in terms of college applications and actually helping me buy my first motorcycle to get to college here locally, he did the things that the father would normally do.

But on the other hand, he was very non-communicative. He drank twice a day — very steady, though. On his days off, on Fridays and Saturdays, he'd have lunch, a cigarette, have a couple of beers, take a nap, get up, repeat the same thing. They say he was an alcoholic. He was not a raging alcoholic, but I would say moody. Moody. So I'm told that people who are raised in that sort of circumstance always walk on eggshells because they don't want to really upset someone. That's one side of him, but on the other hand, very supportive in terms of what we were doing, driving me to school in high school, after he got retired.

McCREERY: He was so wonderful with your mother and all of her family, certainly. Talk a little bit more about your very early years. What kind of kid were you?

MORENO: I like to think that I was well rounded. Growing up in the Solano Canyon/Elysian Park area, it's probably a trope now to say that times were different. Your kids could go out and play for hours on end, into the sunset, in the park and outdoors, riding bikes and hiking and having clubs and forts and all that. I did all of that.

We were very fortunate, before the construction of Dodger Stadium, to live in a canyon that basically ended in a cul-de-sac and ended into the park. We could quite commonly just tell our mothers, "We're going to go riding our bikes," this might be at ten o'clock, and then not come back for several hours because we would just go all over the park. We might take some snacks, go dirt-bike riding and all that stuff.

To me, I think I had a very idyllic childhood in that sense, in terms of the freedom of movement and so forth that all of us had. We stayed out of trouble. We committed some minor infractions, but nothing too serious. I'm talking about playing with the sprinklers at the parks and all that.

But I think I always responded to positive reinforcement. Even as early as elementary school, I would do whatever little homework there was before the end of the day and the teacher would point that out. "Why can't

all of you be like Carlos? This work is not hard." He had me teach fractions to the kids.

One of my older brothers taught me how to do multiple division, three digits. I don't know how we had them in the house, but we had fifth- and sixth-grade math books. I found that stuff to be fun, to see how far I could go and in a sense be self-taught — with his assistance, in some cases.

So I did very well in elementary school. I was the emcee for the graduation. I think they always spotted me as someone who wasn't shy and who could carry the mantle and, if they wanted a student to be on the program, to be able to do that.

I think between a combination of good grades, good at sports in the playground activities — recess, as they call it — and then after-school things that I would do with my friends, and a very nurturing home which was just right there — we lived half a block from the school, and we would play softball at the playground, climbing over the fence. A bunch of kids would get together, and we'd play softball until you couldn't see the ball. In that sense it was, I think, very idyllic.

Then junior high school. I went to a school called Nightingale, which was in a close community but had a terrible reputation. We called it Night-in-jail because there were gangs. No gangs in elementary school. I don't know if this makes any sense to you, but gangs like the Avenues, Clover, Jokers, Alpine. These were all the stuff of the day. Obviously, I stayed away from that. I had two older brothers who could make sure that I didn't get involved, and the community had its own network of people.

MCCREERY: What language did you speak at home?

MORENO: English and Spanish. I'm told that up until, let's say, I was four, I spoke really good Spanish. But as my brothers went to school — and you associate with them and with others, and with them you speak English. With my mother, she always spoke to us in Spanish, although she could speak English quite well. We would respond in English. That's what I remember.

Hence I'm actually bilingual. I can speak Spanish fairly well in terms of basic conversation, more than just ordering food and stuff like that, and my accent is quite good. There are limitations, obviously, but growing up it was, I'd say, bilingual, a mix of English and Spanish.

McCREERY: What sorts of things were important to that community in terms of the larger scene in Los Angeles?

MORENO: It's hard to say because in a lot of ways — and I wasn't an adult then, but the community has always been a hidden gem, isolated even though it's two miles from where we are now.

Before, when you looked over the hill, the communities that later became Dodger Stadium were really isolated in terms of infrastructure and resources. I've seen commentary and pictures that — here you have these three communities, known as Chavez Ravine overall, a stone's throw literally from city hall but decades of years apart in terms of development. That's why there's a lot of controversy even to this day about how the Dodgers were able to acquire over 300 acres as a gift, really, from the city. Some people resent that.

McCREERY: I gather it was quite controversial around the city at the time?

MORENO: Yes and no, because I always defend the Dodgers, and this has been documented. All of that area was slated for redevelopment in the late forties and early fifties. By virtue of eminent domain and so forth, the homes were bought and taken away from the owners and pretty much demolished. So the existing communities by the time the Dodgers came in 1958 — there were just a few residences left, maybe ten.

I always say it's not the Dodgers that are responsible for what happened to these communities. I think it's still debatable whether or not those communities were worth saving, at least in the condition that they were. The plan looks terrible now, but they were going to build tenant housing, like thirteen-story buildings, I don't know how many, and some low-rises and everything to house, I don't know, maybe thirty or forty thousand people in this area that was so close to downtown.

That's a proposal that is still gaining some traction by the former owner of the Dodgers, Frank McCourt, who still owns property surrounding Dodger Stadium. So there's a lot of history there. I guess the final point is that, yes, we felt like what was going on in the city did not really impact us. We were just really happy the way things were.

When the city did come in to do these building inspections, some of which resulted in condemnations, our neighborhood — fortunately, my uncle was able to do the repairs, to pay for the retaining walls and foundation

repairs and everything else. But for a while I think we felt threatened because across the canyon you could see bulldozers knocking down foundations. It was, "What's going on? It's like World War II or something. What's going to happen to us?" But it never really affected us directly.

Now the neighborhood is quite thriving. What's interesting is that certain areas of the neighborhood are now known as an artist's colony. There have been outsiders who have come in, but these "outsiders" have been there for over thirty years now so you can't really call them outsiders anymore.

MCCREERY: A hidden gem, certainly. Tell me about, as you got into high school, what was going on in your life at that time.

MORENO: Okay. When I look back at my student days, so to speak, there must have been something in me that inspired me to do more. Some early recollections are, in the eighth grade I remember meeting with my — we had a college counselor or somebody — Mr. C. I'm trying to remember his name, Caswell or something.

As early as the eighth grade I remember talking to him and saying I wanted to go to the best school. I wanted to be a physicist, so I wanted to go to Caltech. For somebody in my circumstance to say you want to go to Caltech and get a PhD — and that might have been just because we had a field trip to Caltech and I liked it. He said, "That's the best school." I said, "Okay." I set my sights high.

In the ninth grade I ran and won for student body president, got various awards for sportsmanship, American Legion, so I think I was maybe an outgoing person.

For being a Latino, where we had tracking — I don't know if you remember tracking? I would be maybe one of two students in the so-called top classes, English and social studies and all that. The rest were Chinese or Caucasian. The Chinese came from Chinatown, which fed into our school, and they were just perceived as being more industrious and so forth. I don't think they were any smarter, now that I look back. They just worked a lot harder to get where they were.

I had those awards, so by the time I went to the tenth grade, which would have been 1960, I got inspired — I think my mother did, too — by John F. Kennedy because in 1960 the Democratic convention was held here

in Los Angeles. I got interested in that convention and Kennedy. Then my mother — the two icons in most Mexican families at that time were a picture of the pope and a picture of John F. Kennedy. I distinctly remember that. I have to say — it's hard to say, and I don't know with what degree of certainty I can say this, but John F. Kennedy was my model, that I wanted to do well.

So I really did have a real transformation when I went to high school. I said, "I'm just really going to do well." I set a high standard for myself. It wasn't very hard at my high school to do that. I also signed up for speech and drama and extracurricular activities, and track — although I had a groin injury and I quickly stopped that. Football I found too hard, to know the plays. Then you had to train over the summer. I actually worked at the produce market. So I would say I was ambitious.

McCREERY: You've mentioned a few counselors or teachers or other adults, but to what extent were you self-directed?

MORENO: I think a combination. I was really curious about actually going away to a prep school for the summer, but I just didn't have anybody guiding me to do that. I really had a sense of adventure. I wanted to go away.

There weren't the programs then that there are now. Those were self-motivated things. I really wanted to be more challenged and get away and meet other people, so in terms of applying to college and doing the research and all that, totally self-directed. And in those days to get a college catalog and application, there was no online stuff. You had to write, and eventually you'd get something in the mail.

I remember thinking that when I — I did get into nine schools, and I got scholarships. I had already left high school, and I went to see my college counselor and I said, "Look. I got into Yale," and this and that. "Oh, that's marvelous. Blah, blah, blah."

But I can't say that they really assisted with the financial aid application. There wasn't any structure. You basically had to do it all on your own. That's why I tell students now that they have it so easy in terms of accessing information, accessing programs, seeking fee waivers, all these things that really weren't at the top of anyone's mind back in those days. Obviously, I was a very good high school student, active in student government. I was class president for a year and active in the activities that we did.

MCCREERY: Talk about running for class president. I'm just curious about the whole aspect of that, being elected by your peers. What was your approach?

MORENO: I never really gave that much thought. It's like, "Hey, I could win. I could get these people to vote for me." It wasn't a very sophisticated campaign. The same thing in junior high school for president. I think I might have been a representative first and then said, "Okay, I'll run for president."

MCCREERY: But you had no fear of running for office and participating as much as possible?

MORENO: No. Right. None at all. It was just, throw my name in the hat. People knew who I was. But I can't say that I was ever really a very aggressive campaigner, or slapping people on the back, or, "Vote for me." I don't remember any of that stuff.

I will say, though, that when I talk about teachers, I did have some very good mentors who encouraged me, even beginning in elementary school. A teacher named Mr. Leathers, James Leathers, who — after I was at Yale, I went back to see him. He was very proud to see me. There was a Mrs. Jefferson. When she saw me in the third grade and I already knew fractions and whatever and could read, she said, "We're going to kick you up to the fourth grade right away," like after two days.

I don't feel that I was ever ignored in that sense — and not that my mother was there pushing me or them or anything like that, although she later was the president of the PTA and played the piano and all this stuff. But she was not really an aggressive person — a very sweet, nice person who was known to everybody. But I don't know. The teachers recognized me.

The same thing in high school. I had a teacher, Mr. Talley, who was very strict and demanding in terms of your written product and all that. I learned a lot. A lot of that was also just self-imposed. I had self-created my own novel reading list for summers, maybe ten or twelve books.

MCCREERY: What was on that list?

MORENO: Classics. I would make a list of American classics. I'd say, "Okay, I'm going to do American classics." Here in the tenth grade you had American literature, so I would make a list of things that I would have to

read, whether it was *Arrowsmith* or *The Great Gatsby*, the must-reads of American literature.

The same thing for English literature, the Shakespearean plays. We might read *Julius Caesar* and *Romeo and Juliet*, but I would want to read more and include that in my summer reading. I would actually have a list.

My friend who I still see says, "I remember you were kind of a nerd. On the bus you would be studying twenty words a day." I had these little cards, a thousand words, and I'd get twenty of them that I didn't know and while on the bus go over them. [Laughter] Yet I don't think I was compulsive, but that sheds some light into what I was thinking, making good use of my time.

McCREERY: This was Lincoln High School. Say more about the school itself, the makeup of the student body, and what the scene was in that very interesting period.

MORENO: Yes, in the sixties. I was there from, what, 1963 to 1966? The Vietnam War was just kicking up. It was regarded as a low-performing school, I would say 90 percent Mexican-American, 5 percent Asian, and 5 percent African-American and "other," so by far predominantly Mexican-American, mostly lower working class coming from a working-class neighborhood.

But as I look back, teachers were ver!t. [Laughter]

McCREERY: You said you were accepted at multiple schools. How did you choose Yale, and what was the financial arrangement?

MORENO: They actually approached me. There was a program — I don't know if it's called ABC or something like that. I had applied to Harvard, Columbia, Dartmouth. I'm not sure about U Penn, but Pomona and Occidental out here. I don't think I applied to Berkeley or UCLA. Oberlin. Why Oberlin was in there I have no idea. Reed College. One of my teachers, Florence Ogawa: "You're a good writer. You should apply to Reed."

Anyway, they all accepted me. They gave me some financial aid, not always. I was not admitted to Harvard, which was a disappointment, although I later went to the business school there so I'm acknowledged as a Harvard alumnus because I went there for six weeks. I was a Harvard Business School dropout.

In the process of applying to these schools, I got a letter from Yale saying, "We see you're applying to various schools. Why don't you consider applying to Yale? And we'll waive the fee." So I applied, and I got in. Later I found out that — that would have been late 1965, early 1966 — Yale was going through a process, as other Ivy League schools were, of reviewing their admissions processes. As you may know, these Ivy League schools were basically the beneficiaries of feeder schools, mostly prep schools. So Yale and other schools were experiencing a transformation of accepting pretty much prep school boys — all this was before co-ed — and taking a few isolated public school people. My friend was a public school person.

So they were opening up the doors. There are studies now. My class of 1970 at Yale, accepted in 1966, was an experimental class that was directed by President Kingman Brewster to his director of admissions, Inslee Clark, to say Yale could no longer be "a finishing school on Long Island Sound." That's a direct quote. We want to become an "international" national university.

There are a couple of books written about this and how the admissions process over the years had become so skewed in favor of these prep schools, where the director of admissions for Yale would go to Andover or Phillips Exeter and say, "Okay, give me your top twenty. Who do you want accepted?" And that person would say, "These are the people we want." "Okay. They're in."

When you look at the performance and SAT scores of Bush '43, even Al Gore at Harvard — their SAT scores were in the 500s. So privilege really trumped merit in those days, and what Yale was trying to do was, "Let's get a more diverse student body. Let's look at merit." Ideas that are now widely accepted.

I acknowledge that — all of us in the Class of 1970 acknowledge that we were part of an experimental class, where the percentage of public school admittees overcame the prep school admittees. But still, when I was at Yale it was still a coat-and-tie rule for every meal, very much old-school preppies, so I saw that transformation between 1966 and 1968. But I'm very glad, obviously, that I went there. It's been instrumental in my career and opening doors and so forth. I became very active in Yale admissions.

A lot of my peers, if they didn't enroll in the Army — because the draft was active — I got a student deferment, even though I was 1-A when

I turned eighteen. I wanted to postpone that as long as I could. And good for that, because when you look at the roster of young men from my high school who died in the war — I've seen exhibits where they have, I don't know, a couple dozen or thirty portraits of people who died in the war. In fact, my friend, who I still see, was wounded quite severely, and he was drafted right after that time.

So it was a time when you were drafted, you got married at nineteen or twenty, you went to a junior college or you went to a state college, which was Cal State L.A., which was not that far from the high school. Looking back, many of the teachers that we had had gone to Cal State L.A., and they thought that that was the pinnacle for what their students could achieve. I'm sure the teachers would reluctantly admit it, but their limitations of what they thought students could do was certainly part of the deterrence to people being encouraged, "Shoot for the best. Learn about these programs." That infrastructure just wasn't there. To the contrary, it was more the implicit or actual explicit bias as to what these Mexican kids could do.

I fortunately never had anybody tell me — although I've heard from others — I never had anybody say, "Oh, you can't do that." Or laugh. "You want to be a lawyer?" I didn't want to be a lawyer but, "You want to do *that*? You can't do that." But I know people to this day who are lawyers who had their teachers laugh at their stated goals. I don't think that happens too much anymore, I hope. But I believe these people, that they were told that.

On the other hand, I always had positive reinforcement either at home or from teachers saying to me, "You can do it. You can do it."

McCREERY: Before we leave your high school experience, to what extent was the activism among the Mexican-American community taking shape while you were still there?

MORENO: Good point. Okay. I'm going to talk about an icon in the Mexican-American educational community called Sal Castro. That will take us to — actually, in terms of the movement, it's 1965 but I've known him since before 1960.

In the — it might have been the spring of 1965, I along with a few other students from Lincoln High School were invited by Sal Castro, who was then a government teacher at Lincoln High School and who had founded an organization called the Chicano Youth Leadership Program — a

program that was, I think, largely self-funded but also received some kind of assistance from LAUSD and also from the Jewish community. I'm not sure which organization in the Jewish community.

But we were invited to attend a camp retreat at a facility in Malibu called Camp Hess Kramer which, ironically, just burned down in these recent fires here in California, which brought to mind my experiences at the camp. But the purpose of the camp — and this is something that continued for several years, up until almost the present, through the auspices of Sal Castro before he died — was to arouse the level of social and ethnic consciousness among Latinos.

I remember very little about our experiences there, other than that it was nice to get away with your group of friends in a camp setting. But what I'm told is, from Sal Castro and others, it was to say that we as an ethnic group should really strive to do much better than we were doing; first and foremost, that we should go to college; that we should make our voices known about the conditions of our schools, which at the time were considered to be inferior to other schools even within the LAUSD school system.

I say it was more of a consciousness-raising experience so that we would have those aspirations to do better overall and not fall victim to ignorance and indifference. He was very inspirational in that sense. I think 1965 was the first but it may have been the second congregation of the student leaders in certain northeast and East Los Angeles high schools.

But I've learned since that there are many others who are alumni of those programs. Our former mayor, Villaraigosa; former supervisor Gloria Molina; city councilman Cedillo, who currently sits; and many others. I'm sure a roster would show that, in some degree, those programs actually did either pick the right people or help transform those people into doing better. So I was part of one of those early groups.

The second bit of evidence is I know that once I was accepted at Yale and went away to school in 1966, that UCLA had instituted a program — I think it was called Upward Bound — I'm not positive — but they also started to admit as part of the summer program a number of Latino students. Many of the student leaders now, if you would talk to them, also had that experience of meeting and going to a similar-type program at UCLA. For whatever reason in our nation's thinking, people realized that

Carlos R. Moreno, Member of Los Angeles City Attorney Mike Feuer's Commission on School Safety, 2018, addressing the commission.

Los Angeles City Attorney's Office.

we've got to do something about improving the opportunities for these Latino kids.

This all culminated, if you know your California or L.A. history, in March of 1968. There were walkouts here in Los Angeles, LAUSD system, and featured prominently among those schools was my high school and Sal Castro and one of my classmates, Class of 1967, Moctesuma Esparza, and others who were part of both the leadership youth conference but also organized around protesting the conditions at certain East L.A. schools. So that led to massive walkouts in March of 1968.

In fact, they were just celebrating the fiftieth anniversary of those walkouts. There was a movie made about that by Moctesuma Esparza,[2] from Lincoln Class of 1967, and there's currently an exhibit at the Gene Autry Western Museum in Griffith Park that features photographs from that era.

But this also ties in to the greater national antiwar demonstrations, the pro-civil rights demonstrations, the disparity among minorities who were in the military and not going to college versus other groups who were doing much better in those areas.

I've always thought that 1968 was a seminal year for the country, not only the two assassinations of Kennedy and Martin Luther King, but the Democratic convention. People have, if you've paid any attention, really looked at 1968 as kind of a watershed year. It's also the year that Yale abandoned its coat-and-tie rule for all meals. [Laughter] So these Yale young men, young gentlemen, no longer had to put up with the farce of just putting on anything that looked like a coat and tie.

[2] *Walkout* (2006).

So the whole nation was in a transformative mood. I was not here in L.A. to experience some of these things, but certainly a lot of my peers were. To a certain degree, some were very involved with protests at Santa Barbara, UCLA, and so forth. But it's a movement that really has carried on for these many decades. And people did refer to this as a movement, kind of a change in philosophy where universities had to start paying attention to this growing student body.

McCREERY: What are your own memories of Sal Castro, and how he presented himself and his themes?

MORENO: They're good memories because I first met Castro when he was a playground director at my elementary school. Now, in those days schools had after-school programs and summer programs, where idle kids could go and do arts and crafts, participate in field trips and, in his case, founded a Little League team. I was part of that. We played at Echo Park.

So he, too, was also one who always said, "You've got to go to college. You've got to go straight and narrow." I actually had a small tattoo on my wrist somewhere. My brothers and I had found some India ink, and we made little dots. When I was batting, he said, "What is that?" I said, "Oh, it's just a mark." He could tell that it was ink. He made me take it off on the spot by washing it out and putting a little pin and erasing it. So he was concerned that, at least I, didn't fall into a culture of starting to make tattoos or whatever. I must have been, what, ten years old? [Laughter]

But anyway, he was a friend of the family. I mentioned that, growing up, my aunt lived there, and she had kids. We all suspected that he was dating one of my older cousins. So he was well known, even as a playground director. He was a Korean War veteran, and he went to Cathedral High School, which was right near Solano Canyon.

He was always one who said, "You should be proud to be Mexican. Don't let anybody tell you that you can't do something. Go to college." That was his constant message.

It was only later, when he had trouble at one of the local high schools, Belmont High School, as kind of a rabble-rouser, that they moved him to Lincoln High School, where again he went into his leadership mode and organized or revived an organization called The Knights. We wore black sweaters.

It was a group for seniors only, and we were to maintain order at all the assemblies. We would sit in the front two rows — sort of militaristic when you think about it now. But it was to encourage us to be visible leaders in the high school. So we'd wear these black sweaters. I don't know what you would want to call it, but I think he did that with the ladies' or the girls' groups as well because I've seen pictures of them having similar sweaters, where it's called The Ladies.

At Lincoln he was implicated in these walkouts and was indicted by the D.A.'s office. So was Moctesuma Esparza, who was in the class below me but a good friend.

Moctesuma later became a well-known movie director — a producer, I would say. He's done some well-known movies like *Price of Glory*, *The Milagro Beanfield War*, *Selena* with J-Lo before she was J-Lo. Now he has a movie-house construction company. He builds Cineplexes in places like Oxnard and other underserved communities, nice theaters, so he's always been very committed to that. In fact, I was just invited to a presentation he's making on Sunday at the Autry Museum to talk about the walkouts and all that.

McCREERY: What became of the charges against him and Mr. Castro?

MORENO: Interesting. They were all dismissed. It was either the L.A. 13 — that's a whole other area of people charged with conspiracy to commit a misdemeanor, that is, to lead the walkouts and be involved. The truth of the matter is that they were involved in getting students organized and walking out. He was blamed for that.

There was also the Biltmore 5 or the Biltmore 6 when — I think it was Governor Reagan — it was probably Governor Reagan — was speaking at the Biltmore here across the street, that there were some explosive devices that went off or were detected in the elevator shafts. So Moctesuma and others were also indicted.

Eventually all those charges were dismissed for one reason or another, but it was in the days when the city attorney or the D.A. would file charges for unlawful assembly and so forth. So the sixties and the seventies, as you know, were just a time of great social ferment, particularly here in Los Angeles in the Latino community, but also the Southwest, I think.

I was kind of a stranger to that because I was either away at Yale — although I did follow the stuff in the newspaper. Then when I came home, I worked for a couple of years and I went to law school.

But at Yale I became the vice chair of our student organization called MEChA. It never came up in any of my Senate hearings. It has come up in other peoples' hearings. And in law school I was also the vice chair of our SLLSA, the Stanford Latino Law Students Association. Again, basically, in both places our mission was to increase student diversity, faculty diversity, and curriculum. At Yale we were very instrumental in securing funds to work on each of those things.

By 1972 Stanford was pretty much almost up to speed. Our class at Stanford probably had 15 percent or maybe 10 percent Latinos out of a class of 175, which is pretty remarkable for 1972. Women, I think, made even better strides. My class at Stanford was probably around 25 percent women. Now, of course, it's around 50 or 51 percent. But we were seeing the beginning of the waves of diversity of all types in the universities at the time, so I was very happy to be a part of that, to experience that change.

MCCREERY: As an aside, what did your family say upon your decision to attend Yale?

MORENO: Oh, they loved it. They loved it. Yes. Like I said, I've never had any kind of negative reaction. They didn't quite understand — particularly my mother didn't quite understand how long it would take. [Laughter] "When are you going to come home and help your brothers at the produce market?" I said, "No, this is a four-year deal." The same thing when I was in law school. Like, "When are you going to start growing up?"

But my uncle, my mother, and my brothers were very supportive of me at Yale, to the tune of sending me — I don't know if it was every week, or every two weeks, I think — twenty dollars, if you remember money orders. Those twenty dollars came really in handy.

I had a student job — they were called bursars' jobs — in the dining halls, basically a busboy or serving on the hash lines and getting this supplemental money from home — which was nothing compared to what some of the other students had. I had a very generous scholarship and a loan, but still, just in terms of the creature comforts, you wanted a little money in your pocket to be able to spend.

Again, these are issues that I never recall ever being any kind of crisis. Somehow at home there was always rice and beans. At Yale I never really felt that there was more that I needed. We would go out for pizza or what were called tuna grinders, like hero sandwiches.

But I had a full package, basically, of a meal plan and tuition, believe it or not, at Yale was only $2,000. The residential meals and dorm was a thousand, so it was a $3,000 deal and then extras. I could fly home standby for seventy-five dollars, and I think my family did help with that, to come home and go back.

They thought it was a treat, a great thing. When I left on my first trip from home, I took a redeye. There must have been, I don't know, a dozen family members at the airport waving goodbye to me. They're sending me off to war or something, so it was great. Then when I'd come home someone would meet me at the airport — when you could do things like that. I came home every Christmas and spring break, most of the time.

In that sense I didn't really feel any kind of disadvantage. But going to a place like that, where there is a history of — not only just a history, plain and simple, but a history of privilege, and mostly white males, because Yale was all-male then. When you look at the numbers of diversity there, out of a class of one thousand, all males, there are only three Mexican Americans, one of whom became a well-known civil rights attorney. The other became a Supreme Court justice. How well did they do? [Laughter]

There were about twenty-four African Americans out of a class of a thousand. That's only 2.4 percent. Even Asians were underrepresented. So even though Yale purported to get rid of quotas that had been around since the Depression because they didn't want to admit too many Jews, the Jewish population increased during my year. I remember my Jewish roommate said that. "Hey, Yale got rid of its quotas," and starting admitting public-school Jewish graduates, like from the Brooklyn High School of Science, which was a well-regarded magnet-type school, but largely Jewish. I've heard that the counselors at that school largely said, "We're not going to recommend anybody to Yale. No one ever gets in." They knew that there was this unwritten quota, which obviously has been removed since.

Even though I did identify as a Latino, I really thought more of myself as a scholar, English major, and just totally into it, as far as getting to a place like that. I could see these preppy-looking guys. They were obviously

upperclassmen, kibitzing and kidding around and wearing their letterman-type things. I said, "Boy, how am I going to fit in here? This is completely different."

But it had that kind of intimidating quality about it — all this history. Bush '43 was in the Class of '68. He probably was one of those guys down there. And it had this mystique of a lot of famous people, presidents, Supreme Court justices had gone there, and here I was.

I never really sensed any discrimination in that sense, but I thought that I just had to really represent myself as someone who was prepared, who was good with the academics, and so forth. It wasn't until later that when you'd hear an occasional ethnic slur that you'd respond in kind and you'd stick to your guns about something.

For the first two years it was just keeping my head above water, trying to do well, hanging out with my roommates. Yale had what they call a college system, where you lived in and ate your meals at your residential college, kind of like a dorm but much more than that. So I just hung out with people in my little group. The other Mexican American, Joaquin Avila, who just passed away last year — I remember we were in our English class, and we introduced ourselves.

He says, "I'm from Compton, California." So we just met, and we became friends from that very beginning. He later went on to Harvard Law School, became president of MALDEF, and a leading voting rights attorney. He argued before the U.S. Supreme Court, got some really good voting rights legislation in California, and was one of these MacArthur genius awardees. Sadly, he died last year.

Together, I think in our junior year, we decided to discover, "Who else like us is around here?" We knew that there were only three of us in our class. In the next class I think there was only one or two, but in the third year there were maybe seven or eight. So we decided — I guess it would have been our junior year — "Let's see who we all are. Let's knock on doors."

We formed a group called Los Hermanos. The Brothers. Very apolitical. We also found out that there was a Latino sociology professor, Rudy Alvarez, who helped become our sponsor. He was from San Antonio, had been drafted into the Marines, and later got his PhD from, I think, University of Washington and met his wife there. They actually were resident

advisers on one of these residential colleges, so he took our group under its wing.

We formed this group. We later evolved that into a group called UMAS, United Mexican American Students. That was the pervasive group out here in California. We were basically mimicking what was going on, or trying to mimic what was going on, out here. Later, when those groups changed their names to a more militant-sounding name, MEChA, Movimiento Estudiantil Chicano de Aztlán, we did that as well.

So by the time we graduated we had fifteen members. One woman, who — we lobbied with the admissions office to admit this one woman from Sacred Heart High School here in Los Angeles, so we were actively recruiting.

McCREERY: How did you know of her candidacy?

MORENO: We worked very closely with one of the admissions officers, who was assigned to California. I can't remember his first name, Mr. Kim. They shared that information on who was admitted, and they actually wanted us to contact people to accept. They wanted a higher yield rate. That previous winter, in December, they had actually given us funds to fly home and visit local schools. We tried to develop our own support system to help students who were admitted to get to Yale, what courses to take, and things like that.

McCREERY: Let's turn to your academic experience at Yale. At what point did you declare a major, and how did you choose it?

MORENO: It's interesting because initially I thought of myself as an English major, so I took some English. English was mandatory, obviously, and I took American literature and French literature, in English. I tried to focus on literature.

But, and here's what I ascribe my change to, was that the Vietnam War was becoming increasingly in the news, and I didn't quite understand why there was — I didn't know anything about international relations.

One of the great professors at Yale was a guy named Professor Westerfield, who was a great lecturer, and I took another international relations course. And so I gradually migrated to being interested in that, to migrating to becoming interested in political voting behavior. I actually wrote

what's known as a senior essay, like a senior thesis — it's like a master's thesis — on Mexican-American political voting behavior. It's this thick, maybe about an inch thick.

So I got a grant to do some research in the summer of 1969, and I got an adviser, Rudy Alvarez, and I got full course credit for one year to write this paper. I have it somewhere. I've sent it to a couple of people. But it predicted the rise of Mexican-American ethnic voting and being crucial to politics, really, across the nation.

Then I also became interested in sociology. I wrote a paper — oh, my God. Oh, it might have been the precursor to the voting behavior. It might have been more about the Mexican-American movement. That was in my junior year, so that would have been 1968. I wrote a term paper where I did some research on the emerging Mexican-American situation in California. I still have a picture of my girlfriend typing it up for me, and I'm writing and dictating, finishing it up during one of my vacations.

My first year at Yale, I guess I had enough money to subscribe to two theater programs, the Yale Repertory and the Yale Drama School.

MCCREERY: Where did that interest come from, do you know?

MORENO: From high school. I had a teacher, Tom Talley. I took drama. I read Shakespeare, the plays and the sonnets, and I thought, "Here I am at this great school with a great theater tradition." I bought these Saturday matinee subscriptions. What else are you going to do in New Haven on a gloomy Saturday afternoon but go see some great theater? So that's an interest that to this day still is with me. That's the kind of kid I was. I had this artistic cultural side at the same time I was interested in what was going on with me and what was going on with the world.

MCCREERY: Did you pursue any other interest in student government, having done that in high school?

MORENO: Not really. I think about that sometimes. Even intramural sports, which I could have done — I just didn't pursue that. I got caught up in what my friends were doing. Anyway, I was more involved in the Mexican-American little group we had.

MCCREERY: And you were still small numbers.

MORENO: Oh, we were very small, maybe a dozen at most. So I'm sure there's no recording or recollection of this other than in my own mind. We were trying to highlight awareness, basically, on that and other issues.

I, along with another student, a guy named Don Nakanishi, who was Japanese-American but from Boyle Heights but knew as much about the Boyle Heights and East L.A. community as anybody else. We considered him kind of an honorary Mexican American. He later got his PhD in political science from Harvard, taught at UCLA, and became the director of the Asian-American Studies Center at UCLA for twenty-five years, so in the Asian community he's an icon, big-time. He just died two years ago.

He designed, and then I decided to design, a curriculum. His was in Asian-American studies. Mine was in Mexican-American studies. Yale was trying to diversify its curriculum and came up with what are called Hall Seminars — that still exist — where a student can propose a class, a seminar limited to fifteen people. Get someone to teach it, but you design it. You design the curriculum.

This would have been in probably the spring of 1970, I have to think. We applied. We got a grant. We got Professor Alvarez to sponsor it. We got a room, where to teach it. I provided the syllabus, a list of books to buy. I wish I had all that also, because it was quite comprehensive. And at the end we had a paper to write, so it was quite academic actually.

McCREERY: How did the course turn out?

MORENO: It was good. We had, I don't know, a dozen people, not all Mexican Americans. There were Caucasians in there, too. I think it was a success. No grade, but you had to write a paper or make a presentation or something to get through the class.

McCREERY: And your interests were focusing in those areas mainly?

MORENO: Yes. I'd say politics and sociology and why this huge group of people, Mexican Americans, were so depressed economically and in everything else. Sometimes I think — this is just me thinking — that the timing would have been right for me, let's say, twenty years ago, if I had stayed in that field, to become a tenured professor somewhere because all those things came to the fore. The timing would have been exquisite in terms of becoming a professor somewhere.

I'm glad that didn't happen. I say the same thing — I went not to law school but to business school. Again, I didn't know what I wanted to do. But most of the people in my class at Yale either went to business school, law school, or medical school. I'm serious. The academic stuff was just the outliers. I remember going to one of my reunions. Maybe it was the ten-year reunion. "Stand up if you are not a doctor, a lawyer, or a business school graduate." A handful.

I graduated June of 1970. I got into Harvard and to Stanford. I didn't apply to law school. I guess I was motivated by a two-year curriculum. I really wanted to come home, and to this day I think that, had I gone to Stanford Business School I would have stayed in business school. But I think Stanford, which was much smaller — Harvard had 750 per class in the business school, 500 per class in the law school. The Stanford Business School only had, I want to say, under 200 per class, so it was much more nourishing and supportive and so forth.

I remember talking to someone who went to the business school there. He said, "Oh, God, if you had come here you would have been happy." One, it was in California, not that far from home, and not as intimidating as Harvard. So I decided to apply to the law school there some time after I left Harvard Business School.

McCREERY: But your intent in going to business school at all was what?

MORENO: To make money. [Laughter] I felt that I had a business background in my family. Here's one of the things that's ironic, and that is that I always wanted to live abroad for a couple of years. And if you look at my college yearbook, it says something about wanting to go into international business. So I thought that, by speaking Spanish, I could work for Ford or one of the big corporations and be the representative in Latin America. That was really my goal, besides just the two-year curriculum.

But when I went to the business school at Harvard — and I'm not sure if you know the layout there, but the business school is across the Charles River so you don't really feel a part of the university. I made that walk by Soldiers Field, across the river to Baker Hall or whatever it's called. The Baker Library is this big library illuminated at night. I said, "The halls of capitalism. Oh, my God. This is overwhelming for me."

My friend Joaquin, who was my Yale classmate, was at the law school, and he met other Latinos from the Southwest. So I would meet them almost every night and have a fifteen-cent beer at Harvard Square and hang out, went to their dances and everything else. They seemed to have a cadre of supporters, and I didn't have that at all at the business school. I said, "Oh, my God. I'm with all these intense people."

My — the guy wasn't a roommate, but he was maybe in the same suite, a nice guy. But I really felt like a fish out of water. So I said, "You know, I don't really need this too much." After about a number of weeks, I said, "I'm just going to take a leave. I'm going to go home and figure out what I want to do."

I remember I met with one of the deans, and he said, "Anytime you want to come back. We want you to stay." So I came home, in a sense feeling that — I had graduated from Yale. My mother was very happy to see me home. Now I could help my brothers.

But I worked for the county. The funny thing is that Joaquin, who was my Yale classmate and now at Harvard, said, "Contact my supervisor. I worked at the Department of Social Services. Maybe my job is still open." So I went back, talked to a supervisor. She said, "Yes, as a matter of fact. Just take this test." Obviously, I did well on the test and got hired right away, his old job.

McCREERY: Let me ask you to just wrap up your experience at Yale and what effect you think that had on you.

MORENO: Okay. I've always said that my Yale experience opened my mind to, as trite as it may be, that anything is possible. I remember at one of these seminars, in fact the Hall Seminar for Asian-American studies, I remember this lawyer — now a lawyer — Lowell Chun-Hoon, who's in Hawaii, a very prominent civil rights guy there — saying — this is what he said — why would I remember something from fifty years ago? I remember we were talking about Yale and the Asian-American experience.

He said, "Yale is not an experience. It's a way of life." [Laughter] How you interpret that, I guess, is how you want to interpret it. But in a lot of ways it's true. It wasn't just an experience. It really was life-transforming. It would make you think bigger.

I can tell you that, in my career, it has been a nice door opener, whether it's with contacts, or getting your resume read beyond the first-level read, or getting an introduction. I really believe that. I can't prove that empirically, but when people see Yale, Stanford — this is what I tell my son — it's going to create an image in their mind, just of who you are, even if you were a so-so student or whatever.

Leaving Yale, like I said, I didn't know what I was going to do. The next step was to go to business school, but that didn't pan out. But I definitely knew that I was going to go somewhere else. And fortunately for me, I did get involved in Yale activities after that and after law school and so forth. We can talk about that, too. That's Yale-related stuff, but it happened later because I've been for a number of years very involved in Yale-related alumni activities.

MCCREERY: t's still a way of life? [Laughter]

MORENO: A way of life. Believe it or not, since I'm one of the first Latinos, if not the first — certainly of the modern era, let's say — I'm still viewed as the dean, at least in Southern California, of the guy who opened the doors. "Oh, you're our Yale person that we're proud of."

It's a heavy burden, I can tell you. [Laughter] You're not going to believe it, but there is a Yale mafia. We do help each other. So I've always believed in alumni connections, whether it's high school, college, or law school. One of the ways to develop a successful law practice is to develop those relationships. I think it's "Relationships 101." I think Yale has been key, I think Stanford has been key in a lot of this stuff.

MCCREERY: Let me ask you to reflect also on how the Los Angeles area and the current issues might have changed or come along while you had been away at Yale.

MORENO: I think the primary, or a significant, change that I observed in coming back to Los Angeles was to see the rise of the so-called Chicano Movement. I remember that August 29, 1970 was a threshold date for a large antiwar demonstration in East Los Angeles, the primary theme of those protests being that Latinos were disproportionately being drafted and serving in Vietnam and consequently suffering heavy casualties in Vietnam.

I had experienced some of those antiwar sentiments at Yale and, in fact, in May of 1970 had participated in the May Day demonstrations at Yale, which are the subject of various books these days. So coming home in 1970 I was now on the front lines, as opposed to being an observer, and also seeing and reacquainting myself with a number of the people who I knew were involved at protests at UCLA, East Los Angeles, and so forth.

I guess, to get to the basis of your question, in the time that I had left Los Angeles in 1966 to now, 1970, things had changed remarkably in terms of ethnic identity consciousness and so forth. Although I had fostered those notions when I was at Yale by helping to form these groups and classes and so forth, I felt now that at home that there was a lot to do here. I felt more a part of what was happening in Los Angeles.

That, on reflection, may have been part of why I was not a willing member of the Harvard Business School class of 1972. I missed home, and I missed what was going on here. I distinctly remember the night before I was going to fly back, that my heart was not in it, in going back.

I decided nonetheless to go back and made the usual adjustments and so forth. But as I met more of the Latino students who were at the law school, I felt a certain camaraderie that I wasn't getting at the business school. I missed being home, given my experience that previous summer. So I was glad to take advantage of Joaquin Avila's offer to contact his former supervisor, and that went very well.

So in my mind, then, I said, "I'm not ready to apply to graduate school or law school or anywhere," until a one-year cycle had passed. Because if I was going to apply to law school to be admitted in 1971, I'd have to get my paperwork and all my ducks in a row right when I came home, and I just didn't feel like doing that.

I said, "What I'll do is I'll take at least a year off, prepare for possibly going to law school, take the test, prepare, and all that." But I wanted to give myself the leeway of just having some fun time, time off. I remember thinking — this is going to sound funny — three goals: get a car, get an apartment, get a girlfriend, all of which I was able to do by January. [Laughter]

I don't think the girlfriend part was so programmed, but certainly the car and getting the apartment were. By November I bought my first car, and certainly by January, I think, I had the lease for an apartment not that

far from here, right outside of Chinatown. It must have been during that time that I figured I would think about going to law school, definitely on the West Coast. I didn't want to go back to the East Coast anymore.

What was interesting about the job, which started off as an administrative assistant for the department of public social services, which is the welfare department but which had something like fifteen or sixteen thousand employees, a huge department covering maybe thirty districts in L.A. County.

But very quickly I was given different assignments. One was an ethnic survey. The other was administering something called a "bilingual bonus," where employees who used a foreign language on a substantial regular basis were entitled to fifteen dollars a month extra. I had to administer that for the department.

I guess then the department was in the frame of mind that — the personnel department within the department — of trying to administer its services to its districts on a decentralized basis. So they came up with a plan to divide all the work of the personnel section into five districts. They needed someone for the east district, which covered at least 3,000 employees, so they picked me.

I had a staff — an assistant, maybe three or four clerks dealing with paperwork and stuff, payroll and all that, so that the local district directors — and I must have had close to ten that I serviced — they could just call me directly to resolve any kind of paperwork issue. Since I was already doing that with the bilingual bonus, it became just part of my work.

But the good thing about that particular assignment, in terms of my future career as a lawyer, was that one of the functions was to act as a first-level hearing officer for appeals of appraisals of promotions, disciplinary action, and annual reviews. Very quickly I became used to assembling a file and conducting hearings, as the hearing officer, involving employees who were questioning one thing or another about their reviews.

Many times they would have, not necessarily a lawyer, but someone from the union who was skilled in these appeals because these were obviously things of great importance. They'd go in their file and would affect future issues of promotability, so I would either sustain or deny the appeal, and then it would go to another level.

That other level was someone in our department, not necessarily in our section but working for the director of the whole department, who was in charge of making the final determination on discipline. I still remember his name, Lee Rainwater, a crotchety old guy, very disciplined. Any time I had to take certain action, particularly recommending sustaining a dismissal or a suspension or something, I'd have to go through him, and he would question me at length about the basis for my recommendation.

He also introduced me to the legal newspaper, which was the *Daily Journal*. I don't think he was a lawyer, but he certainly was schooled in issues relating to personnel and decisions relating to discipline and so forth. The job, actually, not only did it involve a raise, but it involved some kind of legal training and deciding issues and so forth, so at some point I said, "I'm going to go to law school." That was already in my mind.

So I decided to apply just to two schools, Berkeley and Stanford. I think it was much easier to get into law school in those days, although I had been admitted to the Stanford business school and I believe the UCLA business school. I guess I was quite overconfident because I was what I would call a gentleman B-student at Yale. I did well in my major.

But I'm sure getting into law school became much more competitive later on. I sometimes wonder — and I've shared this with other people of my generation — do you think we would have gotten into law school now, or would anyone hire us based on what we did or what our standing was? Questionable.

I later learned that the Stanford assistant dean of admissions or student affairs, who later became a judge himself, Dean Thelton Henderson — I remember talking to him, perhaps when I was already on the Supreme Court. But when my application went through, the finite number of Latino students at Stanford Law School — and there weren't many, less than a handful — had some say to advocate for students who maybe didn't quite make the mark of getting in. I remember he told me that he told them, "Moreno is in. He doesn't need your assistance." [Laughter] He told me, "You didn't need to benefit from their input. You were going to get in anyway." My LSAT scores were high. My grades were decent. So I was happy that he confided in me with that observation.

One of the things I'm most happy about was that, before going to law school, sometime in June, I took a six-week driving tour of Mexico. To this

day I'm amazed at how I managed to do that, with no reservations and just a general plan to drive in my new Volkswagen all the way down to the Yucatán, which is probably about 3,500 miles away — but visiting where my mother was born in Guaymas and going to the main colonial cities and Mexico City, and just continuing to drive.

My girlfriend accompanied me, and she — let me just think — 1975 — she was a nursing student. Actually, she worked with me. I met her at the job. She didn't work under me, but she worked for another one of the sections. Somehow we were able. I quit my job. I'm not sure if she did. Maybe she did too, but we took six weeks off to go down to Mexico.

My mother joined us at some point for two weeks, and it was a fabulous trip. I've realized since then that I probably would never have the opportunity to have six weeks off to do whatever I wanted to do. So for me it was my version of, what do they call it? My trip to the continent before starting your career.

Later we got married, in 1975, when I got my degree from Stanford and she got her — I guess an M.S. degree in nursing from Cal State L.A.

So law school. It's remarkable to think that I felt like an older student, even though in 1972 when I was going to turn twenty-four, but a lot of the students there were just direct graduates. One of my classmates, who later became a judge, was Fern Smith, and we thought, boy, she's really old. She was in her thirties or something and had two kids.

Mary Cranston, a well-known — maybe the first — female managing partner at Pillsbury, was in my class. There were a number of others who went on to form Silicon Valley law firms because Silicon Valley was just in its beginning then, in the early and mid-seventies. You sensed that there was really just a lot of opportunity and ferment going on.

Law school. I have to say that I enjoyed the freedom. I had a car, so one of the things I really wanted to experience was the Bay Area and Northern California and Napa. When I think about law school and the classes, I don't know if I had any great plan about preparing for what I wanted to do. I took the basic courses. Some I enjoyed more than others. I hated tax, but I felt I had to take tax. Corporations. I didn't think that I was ever going to have to deal with any of that. But I took the basic classes. One of my regrets is I never took a course in advanced civil procedure or federal jurisdiction.

I did take intellectual property or communications, I think it was called, from a great, great professor of evidence.

But my whole idea once I graduated was really to go out on my own. I don't know if you — well, you do remember Ralph Nader. Nader's Raiders. I think he had just come out with his letter or indictment of the president of GM. I forget what that was all about, but I think I had it in my heart to be a consumer lawyer, so I took a course in consumer law from none other than Rose Bird, a wonderful, wonderful woman.

I took a course in poverty law from Marty Glick. He was a very close friend of Governor Brown and of Public Advocates, another consumer advocate law firm in the Bay Area. So my mind was to really go on my own, start a legal practice that would focus on anything that came in the door but I think ultimately would have resulted in me doing a lot of personal injury work, more at a higher level than just auto accidents. At least that's what I imagined.

Rose Bird co-taught a course with — I think his name was Professor Williams, who later became dean of the law school at UCLA. The class was one in which we — it was a clinical program where we would be videotaped in, let's say, negotiating a personal injury case with a lawyer that Rose Bird had brought in, a real lawyer and facts. I remember that about one of the exercises. There must have been others.

She was also well known for baking cookies. I don't know if you know that. But just a very nurturing, almost motherly sort of person who took great interest in her students. I think all of us really loved her. She lived in Palo Alto, I think with her mother. This was all before getting appointed as secretary of the Department of Agriculture and helping to found the ALRB and before her appointment to the California Supreme Court. My thoughts about her were always very pleasant.

I remember she came to Los Angeles to speak to one of the bar associations, and I was in the audience. She remarked that it's always good to see former students. She pointed to me. "It's always interesting when your students begin to have more white hair than you do." I started to have pretty much early gray.

But she was always very friendly and, even while under attack, still maintained a great level of friendliness and care for her former students.

I later saw the other side of Rose Bird, after she was recalled in 1986, when I got on the Court and I learned the backstory there about the difficulties she had in being accepted as the chief justice — not even an associate justice — of the Court, a position that Stanley Mosk felt belonged to him. So he was never a supporter. He was more of an antagonist.

Then I heard stories about her being authoritarian and abrupt in many of her decisions or policy decisions in administering the Court. Then, of course, she was adamantly opposed to the death penalty, so that every one of her opinions took the position that the death penalty was — I don't know if she blatantly said it was unconstitutional, but she found a way around administering the death penalty.

So the view I got when I was on the Court was that it wasn't all hunky-dory, and a lot of the staff attorneys and staff did not welcome her and also did not like the way she administered the Court. That was hard to hear for me because I had this very positive image of her as my law professor.

McCREERY: Thank you. Just to reflect a bit more on law school, I wonder how you went about getting established as a student and studying the law and what kind of study habits you had. Tell me about your daily life when you were first a student.

MORENO: Okay. I've always been one to over-study and to believe in certain study techniques that I have that probably go a bit far. [Laughter] Since I had saved money in those two years, for each textbook that I bought there was usually an accompanying guide that you could buy. There was also Gilbert's outlines.

Between those three things, I would learn about the key cases and the principles, and I would brief each case so that when I had to put everything together for a final exam I basically went from A to Z, from the beginning to the end of what we had covered. So I had an understanding of all the cases and the principles that were covered in the book. Then I would match those to my notes.

McCREERY: You studied alone?

MORENO: Yes. I never really believed in studying in a group. I know some people find that valuable, but even in studying for the bar, since I had my own technique, I often saw that people who were in groups — either they

would do all the work or they were relying on others. To me they just didn't seem as committed to getting it right.

I'm very organized, even to this day, and I study in segments as I go along to make sure I understand the basics. Then I move on and I review the whole, so that in studying for the bar — and I've told this many times to people — I have notes, and then I synthesize the notes.

I gave myself exams from memory so that I knew the time — and I don't know how I got this technique down — but the whole idea of mnemonics and memorization has always been one of my strengths, so that by the end of my study of a particular course I can regurgitate for about forty-five minutes everything I know about that subject. Since time is of the essence, it's really more a matter of regurgitation. I look at the facts and then just start writing. That was my attitude in law school as well. So although I did have fun, my study was quite disciplined.

The thing I liked about law school was the friendships I made. Again, a lot of it was focused on the Latino students. Not only did we have a group, but we played intramural sports. I played football and softball, worked out at the track after class. Sometime during my second year, maybe, in my dorm, which was Crothers Hall — it was my dorm for three years — we formed a singing group, singing Mexican ballads. We had a couple of guitar players, three guitar players. I don't know if we had a drummer or not. But anyway, I was the lead singer, believe it or not.

One of our guitarists was Fred Alvarez, who for sure became the bar president of the San Francisco Bar. I'm not sure if he became state bar president, but he's become a very prominent labor attorney. He was in the Reagan administration, I think, as assistant secretary of labor or something like that; a partner at, what was it, Jones Day; a longtime partner at Wilson Sonsini; a very prominent person in California. But he was part of our singing group, and he generally hosts our five-year class reunions at his house in Atherton.

McCREERY: You made a brief mention of SLLSA. Talk a little bit about that.

MORENO: I was involved in that. I was the vice chair. That also just focused on recruitment of students, recruitment of faculty, and getting the administration to hire Latino faculty. Miguel Méndez, who recently passed

away. Of course, Tino Cuéllar came later. I'm sure I'm missing others who we felt we prompted Stanford to start reaching out to prospective faculty.

We got funds for probably the first Cinco de Mayo celebration, maybe sometime in, I don't know, 1973 or 1974. Now it's a big deal at the law school. I attended one when my son was a student there. What else did we — oh, one of my first jobs in law school, summer of 1973, was a work-study job that — we got funding for a few positions to work at legal aid offices.

I came to Los Angeles and I worked kind of like for a startup law firm that was called Abogados de Aztlán. The idea of these revolutionary Chicano lawyers was to provide low-cost or free legal services to the community. The idea was that about ten lawyers would contribute their time and some money to fund this office. I and another law student from UC Davis really helped open the office in the summer of 1973 here in Los Angeles.

That lawyer, Richard Cruz, who is now deceased, was very prominent in some local demonstrations here against the Catholic Church in 1971 or so. He was part of a group that were either indicted or charged criminally against Católicos por la Raza. Basically, these were Loyola Law School grads, Catholics, who felt that the church was ignoring the Latino congregations. So even to this day there's that sense that the Catholic diocese here is not really responding to its members. This guy had just been, maybe, cleared. In the state bar proceedings against him he had emerged victorious, so he had gotten certified by a well-known radical lawyer here named Art Goldberg.

So it was exciting to be in the midst of that, and if you recall the summer of 1973 was also the beginning of the Watergate hearings. I remember being just fascinated by that, what was going on nationwide, and then in Los Angeles with people I knew. So to this day I know some of the veterans of those early beginnings of the first cadre of Latino lawyers getting out into the community and doing what they were always set out to do.

MCCREERY: What became of that firm or that attempt, do you know?

MORENO: It was not successful, and eventually it simply became his law firm. But I remember working on some cases with him, challenging police brutality and so forth. It was just a time when Latino lawyers were now beginning to take on L.A.P.D. and the sheriff's department and federal agents and all this stuff, so I felt like I was where I wanted to be in a lot of ways.

When we came back in September of 1973, we decided to provide services at a local service center in Mountain View. We would staff that office, I think every Tuesday and Thursday afternoon, for anybody who had legal questions and so forth. That was at a time when Mountain View was not the Mountain View that it is today. We're talking over forty years ago.

I really enjoyed the clinical aspects of the courses I took at Stanford in that regard. Clinical courses were still a new thing. They were very expensive, and very few students could be served. So we were able to benefit from Stanford's commitment to that and, looking back, to give us substantial leeway.

The other thing I did at Stanford was I took a semester off as an extern, for credit, at the Santa Clara County public defender's office. I had to write a paper at the end of the semester, but there I basically carried the briefcases of different lawyers. I acted as a messenger in conveying offers, hanging with the lawyers and going to the judges' chambers, arguing a couple of motions in court. I really could see my future in a lot of ways.

I remember winning a motion. I don't know if it was a motion to suppress? Maybe a motion to suppress a confession of some sort. Because I was supervised by the appellate head of the public defender's office, a guy named Richard Such, who later became a career appellate lawyer for Justice Racanelli, who just died a couple of years ago, maybe. Such took me under his wing and offered my assistance to others in the office, so I saw a number of trials.

McCREERY: You had talked a few minutes ago about how you had some interaction with Thelton Henderson, who was there as an assistant dean at the time. Indeed, I think that Stanford had brought him in to work on minority-related admissions. That leads me to ask, what was the makeup of the student body itself by the time you were there? There certainly were some Latino students and others, but how did the whole thing look, as you recall it now?

MORENO: I think Stanford was quite advanced because in our class of, what, 170 or so, slightly less than 10 percent were Latinos. I think we felt that we were recognized by the law school. We of course wanted more input into the process of admission, but I think that was denied. There were a couple of people in classes ahead of me who were involved in those early

stages of recruitment who felt that that level of participation had been taken away from the group.

I forget what the admissions numbers were in subsequent classes, but I don't think we really had much to complain about. In terms of numbers it wasn't something that took much of our time. We were more concerned about having the school support us in some of the things we wanted to do. I think overall the group felt pretty good about the way Stanford was treating us. Others may feel differently, but at least that's the way I felt.

MCCREERY: May I ask about your financial picture?

MORENO: It was great. [Laughter] I left Stanford with $6,000 in debt. Can you imagine? And I didn't have to work. I forget how much money I saved in the two years, but I saved enough to buy a car, pay off the car.

One of the things I really wanted was to not be in need. When I was at Yale, I did feel somewhat constrained in things I could do on account of lack of money. But evidently I saved enough to not be concerned about having to take a job or to take on more loans than I needed.

So I got pretty much of a full ride, which included the dorm. I forget what that amount was. I had to pay a certain amount, maybe with the loan. But when I look back, it's oh, my God. This could never happen again. My son went to Stanford for eight years. Believe it or not, he doesn't have a lick of a loan. I think he appreciates it, but I told him I wanted him to not be forced into a certain kind of job because he had loans to pay. I'm sure he's one of the few exceptions to law students who have this overburdening debt.

I actually had enough money by the end of my time there to help my brother in 1974 make a down payment on a house in my old neighborhood, where my girlfriend, soon-to-be wife, would rent. I probably put down a thousand dollars. They put in the balance, and after we got married we paid back the $5,000 or so to complete the down payment. To think that then I had at least a thousand dollars. I could say, "I want to buy this place." Pretty good.

MCCREERY: And you were good at thinking ahead about what your needs might be.

MORENO: Oh, yes. Let me tell you about the summer of 1974. I was never really in the — let's see, summer of 1973, 1974 — I never really saw myself

as working for a big firm. Of course, that later changes. But again, in law school I thought that I'd be a solo practitioner doing my thing.

But the opportunity came about — well, sometime in the spring of 1974, the federal public defender sent out a notice that they were looking for externs, paid positions, in Los Angeles. I remember applying. John van de Kamp was the federal public defender, a former — was he the former D.A. then? No, I think he was not yet the D.A., but a very prominent person. I got the job.

You know, van de Kamp became a friend later, and there's a horse connection there, by the way. He was a Stanford Law graduate, so he gets this application from a Latino from L.A., Stanford Law, named Moreno. The only Moreno he knew was the well-known horse trainer Henry Moreno. He says, "Are you related?" I said, "Yes."

"All right." Because van de Kamp himself had a few horses. He later became general counsel of the Santa Anita racetrack, so he knew my brother probably better than I did. And my brother knew van de Kamp for many years. I'm telling you, I really believe in this karma of all these connections being interwoven. You just never know how and when those connections are going to be made. I think it's just so important to have some understanding of that.

McCREERY: How did the summer of 1974 play out in this paid job?

MORENO: Again, I wrote memos. But basically I carried lawyers' briefcases. I interviewed witnesses. The defense is always understaffed, so I have an understanding of that. And worked on a few motions, and a trial with an insanity defense where the defendant was found to be insane and then committed.

That lawyer, Nick Allis, later became a very prominent aviation plaintiffs' lawyer, so I still see him occasionally. I see other people from that office, Gail Title, Tom Pollock, Danilo Becerra. Again, I've always just believed in those contacts because, in my view, the legal community is actually fairly small. You make an impression, you continue to — you don't just disappear. So that was a really good experience.

Then later John van de Kamp became the D.A. I remember seeing him at the Criminal Courts Building. I may have been a lawyer already. He handled the Hillside Strangler cases, who — he said there was insufficient evidence and turned the case over to the A.G.

Ron George was the head of criminal here in L.A. and denied the motion to dismiss, appointed the A.G. He had worked at the A.G.'s office early in his career, and the rest is history. That became a black mark on van de Kamp's legacy. Of course, he went on to be state bar president and just a mentor of mine who helped me become a municipal court judge and so forth, a friend.

McCREERY: Talk about the judges you saw in action in that job.

MORENO: Okay. The federal judiciary in 1974 here in the Central District was quite different than how judges appear now. I'm not sure how many federal judges there were in those days. It was much, much smaller. I think the big changes came with President Carter in 1976, so they really expanded the judiciary.

Literally and figuratively the judges there were kings — or queens, one queen — who ran their courtrooms like — what's the term I want to use? — like dictators. They could basically get their way. These were old-school judges and could say intemperate things, could demean counsel. It was a different time. This was a time of judges like Andy Hauk, Kelleher, Waters, some of whom were still there as old men when I got onto the bench.

But you heard these stories about how it was then, so you always entered those courtrooms with trepidation, never knowing — not that I was ever going to be yelled at because I wasn't standing at the podium. But it was a different world.

McCREERY: What an education. Did you have any attraction to judging in itself?

MORENO: Not then, no. I can honestly say that I didn't think about becoming a judge until after I was in practice for a few years, and I never thought of becoming a federal judge.

McCREERY: You mentioned the influence of Mr. van de Kamp, and I wonder, of all these people you've mentioned or others, who were mentors or were particularly influential to you at the P.D.'s office?

MORENO: Hmmm. I can't think of anyone who I would say, "I want to be like you. I want to do what you're doing," and who took me under their wing. We were just — there were three of us, Mark Beck, who I still see all these many years later, and I forget the name of the woman, Ellen

somebody — Bradford. But I think we were just doing it for the experience and trying to soak in as much as we could.

But I can't say that anybody there took me under their wing. There was one guy, Danilo Becerra, who himself was just a young up-and-coming lawyer. He was the only Latino in the office, and the office had sixteen deputies and then an assistant and then van de Kamp himself. So we were just looked at, I think, as externs. "Help us out on certain cases," and so forth. But no one ever said, "This is what you've got to do."

McCREERY: What did you take away from that summer?

MORENO: That, to me, a lawyer is someone who goes to court. I never thought of being a transactional lawyer or a civil lawyer. I was one who just felt that a lawyer should be in the courtroom arguing cases before judges and juries, so I have never been intimidated by that. Some people are, I guess.

I felt that in law school — we had different sections. I remember we had a moot court session in contracts, and we had to argue an administrative law exhaustion-of-remedies case in a moot court setting. I remember feeling enthused when I argued the case, and I was able to pivot when hostile questions were being asked of me. [Laughter]

I watched my classmates and they were nervous, and they just froze. They told me, "You did a good job."

I said, "You just have to listen and say something."

It may not be the right answer. [Laughter] But I guess people got anxious about, "Am I saying the right thing?" and stuff like that. Not that I was playing fast and loose with the law or the facts, but as I said you just do your best and you argue, and they're going to decide the case. I had that kind of sense.

This carried on to my training as a city attorney, by the way. I just felt that a lawyer's role was to be in the courtroom and argue cases. I had seen that at the federal P.D.'s office. To some extent I had seen that in the first summer job with Richard Cruz because I went to court with him and interviewed witnesses and stuff like that.

I guess the next stage was sometime in October of 1974. There was an ad from the L.A. city attorney's office for hiring a new class of lawyers for that office starting in the fall of 1975, when I would be graduating. So

I think I interviewed with one firm, Kadison Pfaelzer, because there was another Latino lawyer there, Dennis de Leon, who encouraged me to apply. He was a Stanford Law grad.

Kadison Pfaelzer was not a very big firm, but it was a very reputable litigation firm. I think Stuart Kadison had been, again, president of the county bar, maybe state bar president. Pfaelzer was the Pfaelzer of the Central District Court. And John Quinn, a prominent lawyer. So I guess then you would say it was a boutique firm. But I just didn't really feel part of it. They gave me a fly-down, but I don't think they gave me an offer.

Maybe we didn't reach that stage because, with this L.A. city attorney offer I got a fly-down, and that's when I met Burt Pines, who later became a mentor, a supporter, and everything else. I think working for him at that office really opened up a lot of doors for me down the road, including an appointment to the California Supreme Court.

McCREERY: But he was conducting these interviews himself?

MORENO: Yes. We went around the office meeting people, but I think the final interview was with him.

McCREERY: What were your impressions of him and of the office?

MORENO: At that time he was a reformed — believe it or not, the office had had the same city attorney, Roger Arnebergh, who had been reelected, I don't know, seven or eight times. He had been the city attorney for in excess of thirty years, kind of a reserved, retiring man who was totally apolitical. And maybe that's the way city attorneys should be.

But Burt Pines was more in the mode of a new A.G. in New York. I'm trying to remember that A.G.'s name. But it's when consumer protection started to gain a foothold in the law, so we're talking about unfair business practices, unfair competition, 17.200 misrepresentations, prosecuting markets and delis for weights and measures violations, and just the whole gamut of consumer violations that no one had really ever taken seriously that were on the books. So he was viewed as very progressive.

On the issue of criminal law, there was debate about whether or not prostitution was a victimless crime; whether or not the prescribed fixed punishments for multiple offenders — second and third offenses being forty-five and ninety days — was something that was just; taking a stronger

hand in terms of defending the city on police misconduct cases and so forth. So he came in with a whole agenda. I'm not familiar with everything.

I think probably most importantly, that I was the beneficiary of — and others — was that he wanted to establish if not a national then a statewide reputation for the office in terms of recruitment. He was a bit of an elitist in that sense, so he had a national recruitment program to go to the Ivy League schools, Stanford, et cetera. Some of us refer to it as the golden age of the city attorney's office.

He obviously got some grants from somewhere to provide for training, and the most attractive thing about the office was that, even before we passed the bar, we would take a twelve-week — it was about a twelve-week, maybe ten-week — clinical training in actual empty courtrooms, where we were videotaped on voir dire, opening statement, cross-examination, closing argument, and a lot of other exercises to build trust.

Some of it was hokey. We used to call it touchy-feely, new age kind of stuff. The director of the program — I remember his name, and I can picture him — was a civil rights lawyer, a rabbi, Stan Levy, still with one of the big firms, kind of a reformed hippie. [Laughter]

But Burt Pines hired the first openly gay lawyer, Randy — I forget Randy's last name, but he became a judge. I think he became the first openly gay judge, decorated his chambers in pink or purple or something — kind of out there. A great guy. He hired women, hired minorities. Talk about looking into the future of L.A. This is in 1974 or 1975.

McCREERY: That was very early. How large was the office, and was it expanding?

MORENO: Three hundred lawyers. Now it must have about 600 lawyers. It was a big office. We had two classes, A and B, and maybe sixteen, seventeen per class. You still remember which class you were in and where people have gone, et cetera. But all of us were really very good people, strong credentials, and they threw us into the courtroom right away.

McCREERY: Did others from Stanford join you there?

MORENO: The following year, yes. Judge Jim Otero on the federal court was a member. Vicky McBeth. She's UCLA, I think. She's a judge now. A guy named Bernard Shepard, a judge in Sacramento, was part of our class. A number of us became judges.

But the nice thing about that was you got third-party independent analysis of how you were performing. You'd spend two weeks in the mock courtroom doing exercises and then two weeks shadowing one of the regular deputies and doing a trial under supervision. In my first case I was nonsuited by this crotchety old judge who later was, I think, removed from the bench or forced to retire.

It was a default in child support payments, and proof of paternity had to be established. What did I know about bringing in a doctor and so forth? She was living with the guy. Her gestation period was *x*.

"What were you doing a certain number of months before that?"

"Living with him. He's the only person I had sex with. He's the father of the baby. The baby looks like him."

"Insufficient. You need expert testimony. Case dismissed."

"Just like that?"

Yes. It's funny how you remember those early disappointments.

MCCREERY: At the conclusion of the training course, what kind of assignment did you have?

MORENO: You were thrown into the bath, basically, into the pool. I think we got our bar results the Friday before Thanksgiving, something like that. So I think our training probably started late August or September 1 — September, October, late November we get our bar results. The city attorney was able to get those in advance, and I think two-thirds of us passed the first time. They arranged for a swearing-in for our group from some judge.

But as soon as we were certified and paid our dues, you were assigned to a courtroom. If you were lucky, you got someone to come with you. But otherwise, the way they worked was — it was a master calendar system in the Criminal Courts Building, so cases that would come out of, I guess it was Division 40 would be sent to one of the many municipal courtrooms, where people like Ron George, Art Gilbert, Elwood Lui, Frances Rothschild, Diane Wayne — who's here.

Again, not only was it the golden age of the city attorney's office, it was the golden age of the L.A. Municipal Court: young Governor Brown appointees who were out, really, changing the guard, so to speak. It was also a time when the old-school judges were facing retirement, and you had all

these new people come in. I think there was a real sea change in the composition of even just the municipal court then.

The best thing that ever happened to me was to be assigned to different judges. A file would be sent to you and, "The People have announced ready in Division 40. Here are your witnesses. They're on call." You'd call the witnesses. Yes, they were on call. "We're ready to proceed." Anything that came in, you would work on settling the case in a hurry. Otherwise, you were going to just bring in the jury right away.

There was one judge who many of us are eternally grateful to, and that is — I don't even know if she's still alive — Judge Marion Obera, a former D.A., very low-key but very stern, no nonsense, and a hard worker. Unless you settled the case as soon as it came in, "We're calling the jury."

Anybody who went to trial — any defendant who went to trial — knew that if they were convicted they were going to get what we call a bullet. They were going to get the maximum one year in county jail. So that was an incentive.

I remember having two juries deliberating and beginning to pick a third jury, all in one week. You learned to do trial by fire, and you learned her system because she would have the instructions already ready to go when you rested your case.

"Here are the instructions, counsel. See if you have any amendments to make." There were never any amendments."All right. We'll have closing argument."

You'd do your thing, and the jury goes out to deliberate. It was not unusual to do two trials in a week. These were two- or three-day trials. In L.A. downtown, all the DUIs were handled at what they call now Metro and we called Traffic.

So it was just domestic violence, batteries, a lot of petty thefts, believe it or not a lot of nonsufficient funds. I tried actually one of those, hard to believe, prosecuting someone for issuing a series of insufficient funds checks. So we were basically doing the collection work for some of the banks.

McCREERY: The volume must have been tremendous. How do you recall the amount of the things the office had?

MORENO: I think the real work was done in the master calendar, Division 40. They were really the masters of settling the cases that were there, maybe

twenty or thirty cases every day. But once both sides announced ready it would come to your courtroom, so you were basically just a trial court. You could just do one case at a time.

As I said, you could work on trying to settle whatever came in before you brought the jury in, but it was basically, "Let's put twelve in the box. This is the offer." We're not going to undercut the offer that was made down below unless there was some compelling reason. So a lot of us got experienced very, very quickly.

I did that for at least, I would say, a year and a half or so. Then I was spotted by a guy named Max Factor III, who was related to the Max Factor cosmetics company. He's now a mediator. Again, they were expanding their consumer protection unit, and they needed someone who spoke Spanish, who would work with a special unit of the police department dealing with Spanish-speaking fraud cases in Boyle Heights and three who could also work on other kinds of misrepresentation cases, so they hired me.

People thought — I learned later — "How did you get that job so quickly?" It's not a good thing to get some expertise and then move on to something else. I've always wondered about that. Did I move too quickly from one to another? But in retrospect I've spent enough time in the various positions I've had.

McCREERY: How attractive was consumer protection for you?

MORENO: It was fantastic because then I got a lot of press. We would get press on our filings. We would get press on our stipulated settlements. We also had the power to file criminal complaints, so I worked both with the L.A.P.D. special unit and with the city Department of Consumer Affairs. They would get complaints from consumers against plumbing contractors, movers, so I got a chance to be interviewed on TV, particularly about immigration.

Believe it or not, immigration concerns were then in the news with respect to immigration consultants who would make promises that, "Oh, no. You're eligible. We'll get you in," and then take your money. People had no chance of being legally immigrated. We had a couple of very high-profile trials on that, so that was fun.

What else did we do in that office? Oh, by virtue of working the Spanish-language cases, I became the go-to person for the two principal

Spanish-language newspapers in Los Angeles. I would be interviewed, and my picture would be on the front page, and all this stuff.

McCREERY: Describe those papers and their editorial leadership.

MORENO: *La Opinion*, which is still around — a different ownership, but established, I would think, probably a hundred years ago. It's the leading Spanish-language newspaper in L.A. So I worked with their city beat person, a guy named Nick Avila.

Later I become friends with the daughter of the former owner of that newspaper. Her name is Monica Lozano. She was chair of the UC Regents and actually hired me to do the UC Regents investigation. Small world.

The other paper, I forget what it was called, something *Express*. It wasn't around very long, but it was more tabloid style, big on pictures and everything, but very good about promoting the work of our office. So I think that's exactly what our consumer people wanted, was to have that kind of exposure.

And in fact, I organized, I think, two days of hearings at the Mexican consulate office at Olvera Street on immigration-related complaints that made Channel 7, Channel 4 news. They came down.

They interviewed Burt Pines. They interviewed me. Burt had just finished an investigation of nursing homes, so he wanted the same kind of exposure and report from us. So that's what we were able to provide, and some proposed legislation and all that.

But that whole issue of immigration consultants engaging in unauthorized practice of law is still an issue. I think there have been some recent initiatives to address that. The state bar has no jurisdiction, but I think the A.G. and D.A.s have some say as to who can make those representations.

McCREERY: What a fascinating assignment.

MORENO: Yes, I thought so. I did that for, I don't know, a year and a half or so, again. Then Burt Pines wanted me to be one of his special counsel. He had, let's see, there were four of us, really to work more on policy issues.

Judy Ashmann was the head of the unit. She's now on the Court of Appeal. She always says, "I was Carlos' boss at one time." [Laughter]

Vicky was African American. Me. I don't think we had an Asian. I'm trying to think if we had a third person. But we would handle things like — I know I followed up on someone who worked on, what do they call it,

regulation of newspaper vending machines based on time, manner, location, maybe, of where you can put those and what are the free press rights attached to those.

We worked on L.A.P.D. issuance of press passes, and when there were challenges — if they didn't issue a press pass to a new up-and-coming newspaper or reporter — who is to say, even now, in the era of blogs and everything, who represents the media?

MCCREERY: You were having a lot of media-related work and interaction. How did you take to that?

MORENO: I just learned as I went along. Fortunately, there were more experienced people around me.

We also worked on — back in the seventies, and this is now in the news again — the city had authorized the destruction of police personnel records. I forget what it was called, something-gate. But Burt Pines got in a lot of trouble for authorizing that. The claim was that these reports are taking up a lot of space and they're old. There was legislation — I don't know if it was just passed then — but just to retain that sort of stuff for five years, not to keep them on forever.

That's an issue I faced on the Supreme Court. Now the Court has upheld the transparency of those kinds of complaints, and now the police departments are destroying a bunch of them. They don't want to comply. I think I just saw something this morning. What is it they say, the more things change the more they remain the same? [Laughter]

It's interesting. Here, forty years later, you're seeing the same issue. That's because the police have always had a very strong legislative lobby to protect these disciplinary records. They don't want them out there. They don't trust judges or the parties to maintain their confidentiality. That was another issue I've worked on.

MCCREERY: How did you understand the intent of Burt Pines in establishing this unit and having it staffed by such a diverse array of attorneys?

MORENO: I don't know, but I think he wanted some good talent around him. He also wanted people who could go out into the community and speak on these issues, someone who represented that community in a broader sense. So both as a consumer attorney I would make public

presentations on the law to different groups in the community, and even as a special counsel I would make similar types of presentations.

I remember the deputy mayor of L.A. I think her name was Grace Davis. I prepared a paper for her on immigration issues, what I thought were the main issues, and reasonable resolution or reasonable positions on each of those issues. Again, I don't have that memo, but it would mimic much of the same things we're talking about now. I felt very much in the mix with him.

McCREERY: I wonder how you reflect on your entire time in the city attorney's office and what changes it brought to you and your goals?

MORENO: I think that it — well, a couple of things. One, it really made me feel very confident about being in a courtroom, feeling that I could do a good job in the courtroom. And it was around that time that I thought that — appearing in front of so many judges over the years — that I could do just as good if not a better job than they could.

So that's really the first time I ever thought of myself as being a judge, and the idea of being a judge in downtown L.A., whether it's the municipal court or the superior court, I said, "Gee, this is great. You're a judge, a respectable position, usually held in esteem — not always." Convenient to where I was living. And the feeling I have about being close to where I grew up.

And to make decisions based on what I thought was correct under the law, as opposed to being an advocate. It was told to me when I was at a law firm that I was too reasonable, which I think can be a good thing or a bad thing, again, depending.

I think I was a good advocate, and I certainly would go to trial, but I wasn't the kind of person who would take unreasonable positions or take positions just to annoy the other side and be kind of a hard-ass just for the sake of being a hard-ass. Some lawyers think you have to do that. You see that.

I was always more of a moderate advocate, even — without giving up the store, but saying, "Why can't you see it my way?" Or the client's way.

McCREERY: What comes to mind is the word "balance" that you used yesterday. Surely you had had exposure to all levels of not only the city attorney's office but levels of county government, the D.A.'s office, the P.D.'s office, various areas of the judiciary. You had a larger view, in a sense.

MORENO: Yes. One case I should tell you about that I'm very proud of, and that I worked on, and that our office prevailed on, dealing with jury selection — you're probably familiar with the *Batson* case and *Wheeler*. I think *Wheeler* came out first, a California Supreme Court case. It prohibited systematic discrimination in jury selection against certain protected groups. I think in that case it was Blacks.

I was in court shortly after that case had come down, and I usually made a practice of trying to review cases. In the case — I'm trying to remember who the judge was, but I remember who the appellate judge was, Judge John Cole. I'm pretty sure the trial judge was Judge James Nelson, because I was his courtroom deputy city attorney for a while. He's now deceased, but he was married to Dorothy Nelson on the Ninth Circuit.

In this case, I'm picking a jury involving a Latino defendant charged with battery against an African-American victim. The African-American victim was no shrinking violet by any stretch of the imagination, but the defense proceeded to exclude every African American who was coming up for jury selection, so I made what was known as a reverse *Wheeler* motion, basically saying that what is good for the goose is good for the gander, that just as the prosecution cannot engage in systematic exclusion of certain protected classes, well, that should apply to the defense.

It was just so obvious what was going on. The guy practically admitted it. He said, "The victim is black." He had no idea what was coming out of his mouth. [Laughter] He felt that black jurors would unilaterally agree with the victim, and he didn't want them on the jury. The judge said, "I'm familiar with the case, but that seems to only apply to the prosecution." And at that time, it did.

Over lunch, I talked to my appellate people. I forget the guy's name. I can still picture him. He said, "This is a good thing. You made a good record."

"Yes. These are the facts. This is the record I made. Reverse *Wheeler*." Over lunch they got a stay of the trial and later a ruling from the appellate department of the municipal court, finding that counsel had engaged in a prohibited practice and to set the matter again for trial. [Laughter]

Of course, later cases from the U.S. Supreme Court on *Batson* said that it applies not only to both sides, but it also applies in civil cases. I've later raised that. When I was on the municipal court I had a case and, again,

it was obvious what was going on. I told counsel, I said, "Counsel, I'm inclined to make my own motion to find your strikes to be in violation of *Batson* — " and by that time the Edmonson[3] — there was a case that says it applies to civil cases. I said, "So I'm admonishing you."

They had no idea. They thought that was proper to do that. I'm still amazed that I would raise that in the middle of trial — and to get a stay of the trial over lunch. And the judge who we got the stay with was a Judge Cole, a respected judge, one of the old-timers, a Stanford Law graduate who saw the thing for what it was and basically concluded, "What's said in *Wheeler* obviously applied to both sides. It can't be just one-sided." So I was known for raising that issue.

What I did as my first — actually, I did this as a prosecutor, but I later did it as a judge — I developed specific questions, voir dire questions, related to particular types of cases. You could give me a case. I had my general questions, applied to just about anything, and then I had my case-specific ones that I kept for many, many years.

McCREERY: What's an example of those questions, if you can think of one?

MORENO: Let's say domestic violence, another very sensitive issue:

"Do you know anyone who has ever been charged or convicted of domestic violence? I know this is sensitive. Anyone in your family, direct or indirect or personal where you've had some kind of exposure to that kind of offense, either as a victim or as a perpetrator?

"Anything about how long ago, and anything about those incidents that will affect your ability to be a fair and impartial juror in this case?"

"Do you have strong feelings, one way or the other, about the type of case that you're going to be sitting on? There will be photographs, et cetera, testimony where a witness may recant their testimony."

"Do you feel that a case shouldn't proceed if a victim no longer wishes to proceed with the case?"

"Do you feel that, in your opinion, you might be wasting your time? Do you understand how important it is for us to have a rule of law, decide the case on the basis of the facts, as you decide, and on the law that applies?"

Things like that. I had these for hit-and-run cases; later, child molestation cases; everything. I could just pull out my voir dire. Later, obviously,

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[3] Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991).

I did that for civil cases as well. I found that in most instances I was better prepared than the attorneys to ask those questions that will draw out whatever implicit biases there were in jurors.

But I think I learned all that at the city attorney's office, and to really focus on the eye contact, focus on the listening to the answer and not so much on what your next question is going to be. Just be in the moment and develop that relationship with the juror, at least for that moment.

Overall, I think my experience at the city attorney's office — I tried, through jury, maybe seventy cases — that's a lot of cases — and resolved hundreds if not thousands of cases. Talk about being familiar with the court, the court operations, and how to move a calendar along —

I learned also then that the quickest way to resolution was by denying continuances and going to trial. I became a firm believer in "no continuances," even to this day, unless there's a really good cause. Because generally a delay will favor one side or the other, and you want them to understand that once you set a trial, it's a firm trial date.

I think I learned how to be a hands-on sort of prosecutor in terms of preparing my cases and being ready to try them. I followed the techniques of judges who I respected, who would adhere to rules that they had established.

McCREERY: You were putting a lot of systems in place that you found worked. I wonder how your methods compared to your colleagues in the city attorney's office. Was that part of the training in some sense?

MORENO: Certainly the no-continuance thing was because we all, I think — I don't know when trial-delay reduction came in. I'm sure I was a judge when that came in. But I think it was no secret that the key to maintaining control of your calendar was to try cases on the date set for trial. Later I learned things about no sidebars, no motions *in limine*, just to keep them moving along.

McCREERY: You certainly had developed an interest in judging by this time. And yet after four years you made a transition into private practice. That's quite a change. I wonder what your thinking was and how it all came about?

MORENO: All right. In those days, you needed only five years of law practice to get on the municipal court. One of my colleagues, Vicky McBeth,

got appointed to the bench right after five years, and I know other people who got appointed to the muni court bench after five years. I never really felt seasoned enough to do that. I didn't believe in being on the bench when you're only thirty-two or thirty-three, even if you're just trying limited-jurisdiction or misdemeanor cases.

I think my main reason for wanting to leave and go out on my own was that I wanted to give that a try. So I did some research about how much that would cost and how long I would have to sustain myself without any income, again through savings. I was married at that time, so my wife was very supportive of doing that.

I remember going on a vacation to Baja California, where I read this book and I actually prepared a budget for what I would need to get started. I looked at a lease on some law office building called the Bradbury Building on Third and Broadway, which is a historic building, an L.A. institution. I said, "I could see myself here." And who knows? Things could have gone another way.

But I ended up in a courtroom of then-municipal court judge Elwood Lui — again, one of the star roster of judges who were on the municipal court then. I said, "I'm thinking of leaving the office. I'm going to go out on my own, and I want to do *x*, *y*, and *z* and hang my shingle," basically.

He said, "Yes, that's a good idea. But before you do that, let me introduce you to my old firm." I said, "Okay." He set up the appointment. So he takes me to meet his old firm, which was in the One Wilshire Building. This is 1979. We go to lunch, and I stay to meet more people. They wine and dine me into dinner and get me a little buzzed on whatever they were giving me.

It was a firm called Mori & Ota that represented Japanese companies based in California like Honda, Sumitomo Bank, another bank, just a good roster of clients. The firm had been around for a number of years and was doing quite well. It had what is now termed to be a Pacific Rim practice.

At the end of the day they liked me and I liked them, and even though this was going to be a deferral of what I wanted to do, they were giving me more money, free parking, and everything else, so I said why not? They wanted someone who could go to court, basically, who felt comfortable about doing that.

It was a general practice, banking clients, corporate clients who ran franchises or distributed their products all around the United States. I'm talking about big stereo companies, Nissin Foods, a noodle company that is still around, Sumitomo Bank, which morphed into something else, some real estate companies. I had an anti-union case there, Nissin Foods.

MCCREERY: What happened on that one?

MORENO: I got yelled at by the employees' attorney, who said, "How could you do this? These are your people."

"I'm just arguing the case."

I don't think they ever unionized. I may be biased, but I think the company overall was — maybe they were paternalistic, but they were in the Japanese style, trying to take care of their employees in a certain way.

I had some trademark cases, bankruptcy cases, antitrust cases. Franchise-termination cases where, let's say, NCR, National Cash Register, which sold many of its products through one of our clients, Tec America — Tec America would have different franchises.

I actually did a jury trial on my own involving a dealer termination. I tried it up in San Jose as an associate. Lost it, but didn't lose big — later reversed on appeal. Now that I look back, I say, "Oh, my God. Did I know what I was doing?" You know? Was I overconfident in thinking how to present a case, a civil case? But I just felt, civil or criminal, you organize it and put it before the jury.

MCCREERY: Commercial litigation is a different world, I would think, from where you had come.

MORENO: Yes. But I quickly learned it. Employment cases. I did one arbitration case, actually, the arbitration agreement on termination of an executive, an American executive who was basically cheating the company. Defeated on demurrer a claim by another American executive who was taking advantage of our Japanese client in terms of the benefits he thought he was entitled to, like a house, car, a number of other things — and not performing, to boot.

Then I had a termination case out of federal court in San Diego, where the plaintiff had not exhausted the remedies of going through the union grievance process. I got that case dismissed.

It was just a little bit of everything. I never really specialized in much. We were more like general counsel but actually litigating for our clients. So in that sense it was a very diverse experience, and I had a nice caseload.

In terms of banking, not only collections and foreclosures, but also banking operations, where the bank might have screwed up on issuing a credit or how they denied credit or some banking-operation snafu. It was all retail banking. It wasn't the big high-level stuff.

It was during that time also that, carrying on from my city attorney days, I thought, "I'm appearing in court quite a bit," maybe at least once a week, law-and-motion departments and stuff. I thought, "I could be the one up there deciding the case."

McCREERY: What contact did you maintain with Judge Lui?

MORENO: To this day. He called me twice this week on something else. But he's always been a big supporter, and it all goes back to when he met me back in the mid-seventies when I tried cases in his courtroom. Again, you just never know where people you meet, where they're going to go — and he certainly has gone very far — and how in some way they might be of assistance to you in your own career.

McCREERY: But to recruit you into his own old firm — say something about the principals. Were they around much at that point?

MORENO: At the firm? Oh, sure. These were all pretty much survivors of the Japanese internment camps during World War II.

The lead was a guy named Jun Mori. He was the oldest and, really, the rainmaker. During World War II he was in Japan at an elite school, so he actually survived World War II in Japan but spoke perfect English and perfect Japanese. Through his contacts he was able to get these big clients, Honda and Nissan, big clients, so we always had that.

Very easily I could have stayed, but I guess a decision I made when I turned thirty-six, which would have been in 1984 or 1985, was — I also tell this to younger associates — where do you want to be when you're forty? Do you want to still be doing this? Or is there something else that you want to be doing? At that time I started to explore how to become a judge and what contacts I needed. I also had the opportunity to meet many, many judges who went on to really wonderful careers, like Chief Justice Ron George, Presiding Justice Elwood Lui, Art Gilbert — any number of

luminaries who were really stars on the Los Angeles Municipal Court who went on to the appellate courts.

I have to say that, for one who never really aspired to be a judge, it really planted the seed in me to become a judge. One reason for that was that I felt that judges occupied a position of fairness and justice and so forth, and I felt that, although I was an advocate, I would feel much more comfortable deciding issues on the basis of the merits. So I was able to see many judges in action, and that inspired me to, maybe at some point in my career, to do that.

MCCREERY: We talked a lot about the time that you spent in private practice and also, before that, in the city attorney's office early in your career. But I want to ask you talk a little bit about your extracurricular activities in that time span, some of the bar associations and other professional things that you were doing as well as your practice.

MORENO: I had been a member of the Mexican American Bar Association from the time I became a lawyer in 1975. But I decided to run for a board seat and was eventually elected president of the Mexican American Bar Association, I think in 1981. In that position, although many of our functions were strictly social in nature, we did work on different issues related to immigration, workers' compensation, putting on seminars — the MCLE-type programs.

But it allowed me also to network with other entities, both government and non-governmental: radio programs, talking to the press on issues of current interest as a spokesperson for the organization; supporting individuals who were interested in getting appointed to the bench. We had a judicial evaluation committee. So although it was a long time ago, I think it did put me in a leadership position, and I was able to gain more visibility, if you will, among my peers.

MCCREERY: To what extent were you breaking new ground in doing these various outreach activities?

MORENO: I think with the radio programs. I think we were probably at the forefront in doing that. The organization is now much more out there as time has developed, so I really don't know to what extent we broke new territory. Maybe in terms of endorsements of candidates for state and even federal office. I remember getting a telegram again to post-haste send a

telegram to the White House for the appointment of a member, one of our members, to be on the NLRB board. It was things like that we were called into action to move quickly.

I have some difficulty remembering exactly what we did, but it was just a very — basically getting notices out, getting speakers. For one of our dinners we had the United States ambassador to Mexico, Julian Nava, come up and speak to us. So, as with any organization, it was always something to do with getting something on the program for the next meeting. [Laughter] And planning the gala and installation dinner, and getting judges to come for a judges' night. Pretty routine stuff, but stuff that just a small cadre of people do, like the president and the vice president or president-elect.

We didn't do any fundraising at the time. We didn't have, what is it, a 501(c) adjunct to us. It was just basically a professional association that was first created in 1958, so we're talking about maybe twenty-five years later moving the organization forward.

McCREERY: How large was the Mexican American bar at the time, vis-à-vis the larger landscape of lawyers in California?

MORENO: I really don't know. I think our membership was about 300, at best. Now it's over a thousand, a much bigger organization. But we certainly were recognized by the L.A. County Bar, and I believe we had a seat on the Board of Trustees as a minority organization, and that seat still exists to this day.

One notable thing that I think was a sign of the times was that an affiliated organization was formed called the Multicultural Bar Alliance. I'm not sure if it still exists, but the heads of all of the minority bar associations would get together and plan things.

Now there's a plethora of organizations, but then it was basically the Japanese American Bar, the Southern California Chinese Bar, the Langston Bar, the Mexican American Bar. There was no Korean Bar or Filipino Bar or Arab American Bar or Iranian Bar or Cuban American Bar. All these other bars came later, so it was really a nascent time when we felt that we had a common interest in judicial appointments and working together because we all had very similar issues we wanted to raise with the bar.

McCREERY: What about the county bar association itself and your interactions there?

MORENO: As I said, we had a seat on the Board of Trustees. We negotiated a fee reduction that provided that, if you were a member of the Mexican American Bar Association, you paid less of a membership fee to the county bar.

My recollection is that the county bar was still a very strong, vibrant organization and now, forty years later, I know they're having trouble with membership and attendance, as all organizations are having that kind of issue. But then it was the premier bar association, and leadership came from the prominent big law firms in the county. Now that's not so much the case.

There's one other thing I wanted to mention. One thing that was ongoing at that time, and the county bar took the lead, was on helping to integrate a lot of the private clubs in Los Angeles. This is in the mid-seventies, where women were not permitted to be members. Women had to enter through separate doors — things that are unimaginable now. But that issue was definitely percolating in L.A. County in the mid-to-late seventies. So clubs — where I'm having lunch today — like the California Club — would not admit women. The Jonathan Club. The University Club, I think, was open, and so was the L.A. Athletic Club.

But the argument was made then, and it's true, that all of these were social-professional clubs. But this is where deals were made and referrals were made and stuff like that. I remember going to several meetings where our support, the Mexican American Bar Association, was asked to join in on fighting some of those blatant acts of discrimination. So that was something that we worked on back then.

MCCREERY: You certainly had experience running for office, going back to your student days, and taking on leadership roles. What did that bring to you at that stage of your career?

MORENO: I've often asked myself that question. Why have I taken leadership positions? Because believe me, I don't think I'm really terrific at it. [Laughter] Many times I've taken positions only because no one else wants to do it, and I feel I can do a fair-to-middling job at it. So I really admire people who go in with a burst of energy and wanting to — what did Schwarzenegger say? — throw boxes around and mix things up.

I've always been more of a person who, "Let's set the course and let's go forward. Let's do what we're doing, but let's do it better. And let's explore

other things that are feasible." So in that sense, I think, as a leader I've never really been a visionary, but somehow, from junior high into high school and even college and law school, I've always percolated to spots almost by default, I have to say. [Laughter] So I don't know what that says about me. It's like sort of a reluctant leader, perhaps, or one who says, "Okay, let's do this. Let's get things back on track."

One activity that I was involved in, and this came a little bit later, was as president of the Yale Club of Southern California for a couple of years. Again, I was a member of the board and the club had old leadership that got tired and no longer was connecting with younger alums.

I was approached by someone, a lawyer who said, "Look, the club is in dire straits. We don't know how much money we have. The treasurer is not coming to meetings and not filing reports. The club is just going to disintegrate, really." He said, "We need someone like you to be president." I said, "Wait a minute. I do know who the treasurer is. I can probably use my persuasive power to get the records. I'll do it, and I'll do it for two years. But I want a succession plan. I want two other people to commit to two years each so that we have a six-year plan." I don't know how I came up with that idea.

And I said, "I want this person as my treasurer," someone who actually works in this building, "if I can persuade him to do the numbers and get the records, the bank accounts and everything." So I said yes. We did it. We moved the club forward. We, typically, continued some of the programs that the club had traditionally been involved in. We expanded it to include — what did we call them — monthly lunches for anybody who wanted to come at the Jonathan Club, besides having regular meetings and activities and so forth. And it turns out the club was very financially solvent.

So I will take credit for saving the club from oblivion, setting it on course, and now the club is doing just a lot of things. It has expanded in Hollywood, with writers and actors, and it's very, very diverse.

Also at that time — in fact, even when I was at the city attorney's office — I was very involved in alumni interviews of young people, usually from the central area, who were applying to Yale. So that's always — I did that for maybe twenty or twenty-five years, just counseling people on options that they had if they really didn't have a realistic chance of getting into Yale because of grades or some other thing. I did that as a deputy city attorney,

as well as when I was with the law firm. It just occurred to me that I was doing that as well.

MCCREERY: You've made quite a theme of establishing connections with people and, "You never know where they'll lead," and you told a charming story of how there was a connection between horse racing and your becoming a municipal court judge. Let's get you into that role and your decision, really, to leave private practice at the time you did.

MORENO: Yes. Okay. I've always been a — how would I say? — unintentional non-manipulative networker. People might differ with that, but I don't feel that I enter relationships for the purpose of getting something out of it, although I do believe that things will happen as a result of connections. Even to this day, I believe that.

Starting with the city attorney's office, where I met dozens of lawyers, it was a good start to beginning the networking in the legal community in Los Angeles. So even to this day I'll see people who I know from back in those days. I think people who have not had that experience are really at a disadvantage. It's hard. People come from all different stripes, but I feel that that gave me a good start.

Second, because I am a native Angeleno and have pretty much stayed in the same area geographically, it's allowed me to have long-term connections going back even to junior high school and being a known quantity. I often tell individuals that that's something that you should work with. Stay in touch with people because you never know how those contacts might at some point come to the front.

It doesn't mean that you have to network the way people do these days on Facebook or LinkedIn, and all for a business purpose. I think just being around, being interested in what people are doing, I think, is really the key to a successful practice of any kind. Being involved to a certain extent in activities, but just being a known quantity — obviously establishing a good reputation and everything else. Hopefully you do that as well. [Laughter]

So I think that's been a strength that really has helped me all along in my career. I think that's very important. The good thing about it is that I feel that I am in one sense part of this community. I can look around — and I think we talked about this — I can look around and see various landmarks that I can connect with in one way or another.

You mentioned the horse racing connection. There are probably many others that stand out that in some way played a part in terms of, as I aspired to move from private practice after about eleven years to apply for a judgeship. I know that I drew upon a lot of these contacts. I was actually quite systematic about it because in the judicial application you have to list something like ninety references. How many people know ninety lawyers? They don't all have to be lawyers, but most of them are.

One of the things I initiated at MABA was to draw in Latino lawyers who were at the bigger firms in Los Angeles, particularly downtown. We formed kind of a sub-organization to draw them in because MABA historically has been, at least in those days and maybe even to this day, mostly sole practitioners who practice in East Los Angeles and who practiced immigration law, maybe downtown.

So since I was working at a downtown law firm, I drew in about maybe a dozen lawyers who I knew in law firms. And believe me, in around 1980 there were very few minorities in the law firms. I felt that they had a lot to contribute, a new perspective.

I recall a conference I organized in 1974. I was president of the California Chicano Law Students Association, again by default. [Laughter] No one else wanted it. We put on a conference, and you're going to like this title. We called it "Algo Más que Legal Aid." "Something More than Legal Aid."

My perspective was that Latino lawyers — and these were all Mexican-American lawyers — had to do more than the traditional criminal defense and legal aid. I don't know why we called it "Something More Than Legal Aid," but we had something — we put on panels: in-house counsel; we did public service, legal aid; a public defender; a law firm; and I think it was law clerk or judicial-related stuff. We said, "Look, the practice of law is more than what we perceive Mexican-American lawyers are doing. Here are the different options. Here are the different advantages."

Even something like putting on a prosecutor because among minority law students being a prosecutor was like going against your people. So we had someone speak on that and how, as a prosecutor — this is an old trope — you can do more for justice as a prosecutor than you can as a defense lawyer. So something like that.

My thought always was — I guess that's having a vision — later as MABA president to say, "Hey, you guys out there," and I don't think there

were any women in the big law firms, "we have to bring you into the organization. We can use your resources and the things that you're interested in in bringing your perspective to MABA."

McCREERY: I'm sure you've watched with interest over the years to observe how much the effects of that beginning have been felt. Have people branched out much more beyond solo practice?

MORENO: To the point now where there now is an affiliated charitable foundation that provides scholarships to Latino students to the major law schools in the L.A. area. It's called the Mexican American Bar Foundation, and I think I'm on an advisory board or something like that. But they get huge contributions from the law firms and from the corporation sponsors, and so forth. I think they've given out over a million dollars in the years that it's been around. So now that's really just part — that's how the organization has evolved.

There's also now a Latina lawyers association that focuses on Latinas in the profession. I wasn't really involved when that — I don't really want to call it a split, but there was a feeling that the women lawyers wanted their own organization. I don't know what spurred that on, but that's what has happened. They've been around at least twenty or twenty-five years.

McCREERY: Even if you weren't overly political, it was a very interesting time politically for these groups that you're speaking of.

MORENO: Yes, very interesting. Yes, and again, I've been the beneficiary of being around, knowing people in the early beginnings of their political career to where they are now. Any number of them, even our current attorney general, Xavier Becerra. I supported him when he was running for Assembly. And we go way back. Both of us have moved on, of course. But it's things like that that you can say you've known someone for thirty years when they were just getting started in their careers.

McCREERY: It was so interesting to hear your own thoughts about becoming a judge, and you somewhat waxed and waned on the idea a bit from when you first began to be exposed to judges in court. But at some point at Mori & Ota, you began to decide you were ready. How did that come about?

MORENO: I hate to say this about judges, but having appeared in front of dozens of judges I often left the courtroom thinking, "I could do that." I wasn't in awe of the judges. I'm sure they were fine judges, but I said, "This is something I could do, and it's obviously a position of respect."

Although I was made a partner at the firm, not in equity it turns out — they had a policy that if you had been with the firm two years and a total practice of six years you were eligible to become a partner. So I became a partner at the firm. I said, "What is my future? Is this something I want to do and continue?"

Thinking about becoming a judge, I just decided, well, let me put my hat in. There was a partner at the firm, Henry Ota, who was politically involved with Mayor Tom Bradley here in the city of Los Angeles. He knew a number of key people in the Assembly. I think one of his roles was to — I think this was legal [Laughter] — to support different politicians and organizations with money. He would get his clients to contribute money to different causes, so he was very well connected politically, as was the main partner, Jun Mori.

I ran it by them, and they said, "Sure. We'll help you." They had one former lawyer — in fact it was Elwood Lui — who was a judge. I don't know how much they helped him to get appointed, but at least they knew what it took. So I remember flying to Sacramento with Henry Ota to meet with a couple of conservative assemblymen — one very conservative, Nolan — I forget Nolan's first name — a very conservative guy out of Glendale — and talking to him and getting his support.

I'm trying to think who else I met with on that trip, but we had a Republican governor, George Deukmejian, who was very law-and-order. This was during the Rose Bird era, 1986. She was removed from the bench a month after I got appointed.

But I applied in January of 1986, was interviewed by Marvin Baxter, who was the appointments secretary to George Deukmejian, in June and got appointed in October, which by most standards was actually pretty quick. I thought it was a long time waiting to get appointed. I remember Justice Baxter asked me, had I been active in the Democratic Party? Had I contributed? I said, "No, I'm almost a lifelong Democrat by default. I just grew up in that kind of environment."

I worked for a law firm that represented defendants. This was around the time when Rose Bird expanded or merged contract law with tort law into the "breach of the covenant of good faith and fair dealing." So in defending those cases, I obviously said that it was not a tort, it was just a contract.

The death penalty I really had no issues with personally. I had a good interview with him. In fact, I think Marv told me that, well, at one time he was a Democrat and, "They didn't hold that against me."

But what really helped — I may have said something about Senator Ken Maddy. Somehow I mentioned to my brother that I was applying. He says, "I know Senator Maddy." And I think Senator Maddy was the president of the Senate. So he vouched for me, never having met him, and talked to Justice Baxter about me. I had a good interview with Justice Baxter, and since I had been a prosecutor, I was defending employers and companies in a firm, and good educational pedigree, Yale and Stanford — they had to appoint a few Democrats — this is what I was told [Laughter] — so I fit the bill.

Then with the support from a couple of conservative Assembly people; a letter of support from John van de Kamp, who was then attorney general; support from the local Latino police organization, LALEY.[4] I think I got support from — I'm not sure if Sheriff Baca was in office then. I don't think he was — and support from MABA; support from other minority bar associations. It all worked, so I was very fortunate in —

Oh, here's what I was going to say. I was very systematic. I still have my files on this. When you need the ninety references, I said, "Here are the people I know from the city attorney's office. Here are the people I know in private practice, the people I was trying to bring into MABA. And here are the people who I know just generally. I had three lists of people and let them know what I was doing. And then I had a list of a few judges, too. But at least the judges I contacted to remind them that years before I did this trial in their court, in case they didn't remember me.

So I had no trouble coming up with eighty or ninety names and then researching the ten most significant cases, both criminal and civil. That was the other advantage I had. They look for candidates who have a breadth

[4] Latin American Law Enforcement Association.

of experience. So that really was the foundation for all my subsequent applications to the bench.

McCREERY: I don't know what the salary of a muni court judge was at the time, but what was the personal and financial calculation for you?

MORENO: Let me think. Here's what I did. It was a slight decrease in pay. I think I was making somewhere around $80,000 a year in 1979, and I think judges were making about that, close to that. But since I wasn't going to get any bonuses or anything like that and really good raises, I figured — I remember doing this — I remember paying off all my loans. I think I had a car loan, and I paid it off to set the stage so that I would have no loans, just a mortgage.

So I think I made some calculus in my mind that I was going to take — I think it was just a very slight decrease in pay, not that much, a few thousand, but planning for the future that I was going to have to be more scrupulous or judicious about — I knew I wasn't going to get any bonuses, which — in firms there are always quite nice bonuses. I remember I bought a truck for my wife with one of the bonuses. It was nice.

So anyway, that worked out fine. As one of my partners at the firm, Joe Muto, said, "This is good. You're going to have cash flow."

I still remember this. I would always have a paycheck and be steady. It wasn't like in a firm. You just never knew if you were going to be laid off or what the economy would do. In a law firm the bonuses could vary. So you would have security, and I remember his phrase was "cash flow."

With that you could really plan and make investments or whatever. When people would see that you were a judge it would be easy to get credit because you had that kind of stability. I never really thought about that until he pointed it out. So there's some advantage to getting a regular paycheck.

McCREERY: Finance is only one piece, but it was a change of lifestyle.

MORENO: Yes, exactly. And to this day it is regular hours, really no homework — although I was telling someone just the other day that I'm an early riser, and sometimes I go back to sleep after early rising. But getting into a criminal assignment, which I hadn't had since 1979, so for seven years, and the law had changed — that Prop. 8 then changed the law.

So I would get up in the middle of the night and just read the advance sheets on the kinds of cases I was doing, DUIs and preliminary hearings, and very quickly got up to speed. But it was really just by going through the advance sheets and seeing what was being written about issues that I was facing in court every day.

I've recommended that to new judges all along. I say, "If you just educate yourself. It's like teaching yourself. Because here you see the cutting-edge issues and what's troubling the trial courts and how the appellate courts are doing. So it doesn't matter what kind of assignment you have, if it's dependency or delinquency or preliminary hearings, just look for those cases that are being reported. You'll understand the context because you're doing those cases, and you'll see what errors judges are making and how those errors are being ruled upon." I did that for a good part of, I'd say, my first year on the municipal court bench.

McCREERY: How did you find out you'd been selected?

MORENO: You get a phone call from the appointments secretary. It wasn't the governor who called me. It was Justice Baxter who called me. I remember I said, because I hadn't heard from him [Laughter] — and it looked good. He basically said at my interview, "I see you've applied for the Los Angeles Municipal Court and East L.A. Municipal Court. What do you think about Long Beach and Compton?"

I said, very diplomatically, "Wherever I can assist the governor." Smart. [Laughter] "That's fine. My preferences are those because they're close to home and I know the communities and so forth. But wherever I can assist the governor."

I don't know if he told me then or I learned later — I think I learned later that the impetus for appointing a Latino judge in Compton — and they appointed two of us at the same time, a guy named Albert Garcia — was that the Compton judges saw that the constituency in the Compton Judicial District, which included Lynwood, Paramount, and Carson, was changing. There were more Hispanics moving in.

Right before that, a Latino lawyer, probably the only Latino lawyer in Compton, challenged an African-American judge. She had to raise money and so forth. One of his claims was, "Hey, there are no Latino judges." The city might have been 30 percent Latino.

So they wanted to forestall that. There was a guy, a kingmaker down there, called Celeste King, who was a Republican. He was a bail bondsman, and he was the one who, I think, had the connection to the governor's office and said, "You've got to appoint a Latino down here." That's how I got Compton, to fill that need that the judges felt was needed to forestall these challenges. Isn't that interesting? [Laughter]

So yes. I had appeared in Compton once or twice, and I said, "I can do that." So I got the call: Compton Judicial District. I said, "That's fine. I'm happy to serve." I said something to the effect — this was in October, so it's only four months later. I said, "I thought you had forgotten about me. What took you so long?" [Laughter]

Now people wait for years, sometimes. I mean, it's terrible. They don't know what to do with their lives, and they put it on hold. Do they do more lobbying? I didn't do any more lobbying after that. I think I had Henry Ota call the appointments secretary to find out the status, and they responded, "He's still being considered." It's not like they said, "He's not going to get it." So they get around to it when they get around to it.

I learned from that, that's the way it happens. I get so many calls now from people who ask me what should they do? They haven't heard anything. Should they get another letter? Should they update their file? They get so wrapped up in wanting to do something. All I've been able to ascertain is basically the response that I got. "No, they're still being considered." There's nothing more you can do. So it's very, very frustrating to be in that position because you don't know. The uncertainty.

McCREERY: Tell me about starting at Compton, I guess with Mr. Garcia, and being sworn in and all the ceremonials at the outset.

MORENO: Yes, okay. It's interesting. At the firm we had a little investiture, at the firm. I asked my friend, Judge Richard Paez, who was on the municipal court — he might even have been the presiding judge at the time — to come on down. I had a friend who was a police officer who went to my high school, and he was working downtown doing traffic things. He came in. My firm actually bought my robe for me. That's a tradition for a lot of firms, to do that.

So we had a swearing in at the law firm with maybe forty people or so. Judge Paez swore me in. The police officer, in uniform, was the bailiff.

I think he's the one who put the robe on me. My wife was there. This was October of 1986. I was going to turn thirty-eight in November. In fact, I started at Compton on my birthday, and I didn't tell anybody.

They said, "We're going to give you this courtroom." As the newcomer, it meant I would do felony arraignments, which don't start until three o'clock. Compton would have fifty or sixty arraignments a day of people who had come in in the morning, were interviewed by the public defender. They would either plead guilty or, most of the time, just enter a not-guilty plea to give them time to study the case.

In the mornings, I did small claims, and at one-thirty I did the unlawful detainers, the hearings. Later I learned that these are assignments that nobody else wanted. [Laughter]

MCCREERY: "You. The new guy."

MORENO: They gave it to the new guy, which is a typical protocol in the judicial system. I remember doing small claims, and I asked my clerk, "What do I do?" She says, "Just listen and make a ruling, like *People's Court*." [Laughter] She said, "I'll take care of everything. You just listen, and you make the ruling," in terms of the paperwork, the language. I said, "I can do that."

I remember being nervous a few times in the beginning, going out there and calling the cases. There were defaults at first. I'd do all the defaults and, "Okay, you get the judgment, blah, blah, blah." Then some contested matters. Since I had been in court, I knew some of the language, the lingo. You hear both sides, and you make a ruling.

Then I was told — this is before I went to any kind of orientation, but somehow I knew that where people are irate, take it under submission. Don't make a ruling. "I'll take it under submission." You go back and you make the ruling, so that they don't start a fight in the elevator. I remember that.

Then the unlawful detainers. I had done a couple as a lawyer, so I knew that territory. But that's also very interesting. People bring in the habitability defenses. They bring in the little mice and cockroaches, and going back and forth. I had studied some primers on unlawful detainers and stuff like that. So you listen to the case and you make a ruling.

Then at three o'clock I would do the custodies, which would keep me there until four-thirty or five. That's why people didn't want to do those.

But I had the custody courtroom, big, and a huge holding tank in the back, and a huge glass — I don't know what you call that part of the courtroom — what you see on TV, where the arraignees are behind this glass.

I remember thinking, the first time I saw someone who was charged with a murder — I looked at them and I said, gee, you could see this person on the street and you wouldn't know if they were charged with manslaughter or murder or whatever. Not a gang member. It could be like a forty-five-year-old guy who was charged with murder. I said, well, interesting.

So in Compton you got very serious cases at the time. This was during the crack epidemic, so a lot of crack cocaine cases, a lot of gang cases between — the Bloods were started in Compton, on the street called Grape Street, and the Crips started in South Central L.A., but there were any number of sets of both organizations. There were shootings in parks and drive-bys and everything like that.

McCREERY: What sense did you develop of that surrounding community? You mentioned the crack epidemic and the gang presence. What was Compton, as you experienced it?

MORENO: It was in transition, really. I saw that. So the leadership was still probably exclusively African-American. I met with the Latino leaders, mostly business people, and they arranged for me and for Judge Garcia to be in their Christmas — they had a Christmas parade.

The other thing I remember is someone arranged for Justice Arguelles, who was just appointed to the California Supreme Court, after the ouster of Rose Bird and company. He was on the Court of Appeal, and he told me later he didn't aspire to go to the California Supreme Court. I'm sure he probably says this in his memoirs, but he did it as a favor to George Deukmejian. They were in a bind to get people appointed right away.

He was a law-and-order guy. He had practiced in Long Beach as a superior court judge for many years, and then East L.A. for many years. In fact, he's the one who told me, when I was applying for the municipal court and Elwood Lui introduced me to him —

When I told him I was interested in East L.A., he said, "The branch courts are often ignored, but it's a good place to start from and get known in the community to move on up. A lot of times if you're appointed to a big court, like the L.A. muni court, you get lost in the shuffle. But at least in a

small court," like the East L.A. court, where he came from, "you're able to really get to know people and be more visible." That's advice he gave me.

So a lawyer from East L.A. arranged for him to come down to do the ceremonial swearing in. We had a nice dinner organized by the Latino community, actually, $25 a head, I remember. Then we spoke, and he swore us in, and he spoke. Arguelles had an interesting story. He went to UCLA from East Los Angeles. He went by bus. Can you imagine? He took a bus out to UCLA back in, probably, the late fifties or so. Yes.

So we were very honored. I didn't realize how much of an honor it was to have a California Supreme Court justice come down on a Friday to swear us in and make some very nice remarks about us in the little community of Compton. It really was a pretty amazing thing for him to do that for us. And of course, later I would serve on the same court. So you just never know.

McCREERY: You made passing mention of your presiding judge. Say a bit more about the leadership and your colleagues on the Compton court.

MORENO: An interesting group. They all knew each other from practice. They were all, except for one, African-American. There was one Caucasian judge, Tommy Thompson, but he had also practiced in the community. He was a commissioner. He had practiced in the community.

The practice in Compton was to engage the private practitioners to do small claims and traffic court to pay their dues as a pro tem, then to hire them as commissioners, get them visibility, and then get them appointed to the bench. So a number of them had been commissioners, so it was kind of a "clubby" bench.

McCREERY: How were you received by your colleagues?

MORENO: Pretty well. Pretty well. Yes, I think for both us — and we were both very approachable new judges — I don't remember any kind of reluctance to welcome us to the bench. I think they wanted us to defuse this election-challenge issue. And they could give us the kinds of cases they didn't want to do. [Laughter] So yes, it was friendly, but I didn't have that long-standing relationship with the community.

McCREERY: How did the election-challenge issue play out?

MORENO: In order to forestall this, a number of muni court judges, not only in Compton but in other areas, formed a political action committee, I guess, where it was all for one, one for all. We each contributed a certain amount of money, I think, and we got the bar to support us, so we had a defense fund. It wasn't a lot of money, just a few thousand dollars. But we let people know that if anyone challenged one of us, there was this unity, that the other judges would support the incumbent, and we had this money to forestall that.

So it never happened. None of us were ever challenged. I think I went through that cycle twice, maybe in 1988 and maybe in 1990. So now, unlike in 1986 where judges really weren't prepared to mount a defense, everything changed after 1986. You can't just sit idly by and assume that you were either going to be retained or not challenged. But I remember talking to a judge in the South Bay, Sandy Thompson, who just passed away. They did the same thing in the South Bay to form a coalition of unity and getting bar endorsements and all that.

MCCREERY: How much was that message of unity carried to the public as well?

MORENO: I don't remember. We never really got to that stage because no one ever really challenged us. You don't really get into that stage until you have an active challenge. No one decided to challenge us, and I think we just returned the money to the donors.

MCCREERY: Would you reflect on the 1986 election and what happened in our Supreme Court that year?

MORENO: Yes. I think I mentioned that Rose Bird was one of my instructors at Stanford. I really liked her. She remembered me at a bar association meeting. She was happy to see me and I think said something about me having more white hair than she had — a former student.

I forget when she was appointed, but she had withstood one challenge before and was retained. But George Deukmejian, who appointed me, really kept at it. So I felt personally very sad that she was removed, and not only that but Cruz Reynoso also was removed. I had spoken on his behalf — that's what I also did when I was at MABA. When he was appointed one of his court of appeal colleagues who was on the Sacramento — Puglia,

called him the Mexican judge who was deciding cases on the basis of race and stuff.

We went up there. I went up on behalf of MABA and submitted a statement. I don't know if I was able to read the statement. There were dozens of people wanting to testify on his behalf, and they couldn't do all of them so I just said, "I'm a representative of the Mexican American Bar Association," and I submitted my statement to the record. It was accepted and on we went. So I was sorry to see him leave, even though I really didn't know him personally. But I felt that the whole thing was just very reactionary.

I didn't quite really appreciate that — I think she voted to reverse every death penalty case that came before her, which I don't get. There were some, the felony murder issue, intent. I could see that. But it seemed that she was very doctrinaire, but I never really — for me, it was just more personal. She was a nice lady, very energetic.

It was very political, just on the death penalty, it seemed. We know now that it was the private commercial interests that funded that campaign. There was a lot of grandstanding by Deukmejian. It was a very political time.

It was not only that. There were other appointments that were held up that Deukmejian got very involved in. I can't remember now the exact ones, but there were people who didn't get appointed because you had the chief justice, the attorney general, and the senior presiding justice. I think there were others that were held up from being confirmed, which is a pro forma process. So I didn't like that part of judges being challenged for political reasons.

Of course, later I heard, I think I mentioned, from people on the Court that the Chief was a divisive figure on the Court and among court staff, particularly with Justice Mosk, who assumed that he was entitled to be the next chief justice. And maybe he should have been.

McCREERY: As you pointed out, Governor Jerry Brown was the one to make her chief justice, not only bypassing Justice Mosk but bringing in the very first woman and a woman who had not been a judge and who was just a different sort of figure. That's a difficult position.

MORENO: Yes. And of course now, as I said, my feelings for her were personal, and I questioned whether it was the right thing to do. I'm sure Jerry Brown — not appointing the first woman. That should have been done. But

to create that kind of — and to make her chief justice? I think he learned his lesson from that. The position of chief justice is more than just leading the Court. It's leading the judiciary. And it's administering the Judicial Council, and it's maintaining a professional relationship with the legislature. So I think in those aspects she probably was lacking, not the best choice.

McCREERY: Coming back to your time as a judge in Compton, say a little bit about the staff available to you. You talked about your fellow judges. What kind of help did you have dealing with these very large caseloads, essentially?

MORENO: There was a real advantage, as Justice Arguelles said, to being on a small court. We had fifteen or sixteen judicial officers, and we had a court administrator, Tim Aguilar, who really took care of his judges. In those days, the municipal courts were better funded than the superior courts. They were like little fiefdoms, and they had their own revenue sources.

You were known. You were like a big fish in a little pond. If you needed something you went to the court administrator, and they would do it. If you needed to go to a seminar; you needed new furniture. I don't know how well Compton was funded. It wasn't Beverly Hills municipal court, which had a lot of traffic-ticket revenue. But let me just put it this way: they took care of us.

We also had at that time — I'm not sure if it was statewide, but in L.A. County — the court marshals. We had a marshal service, not the sheriff's department, as bailiffs. The marshal was hired by the judges, by the municipal court judges. They, too, took care of us. They knew that we were their boss, so it was a different mentality. I saw this when I went to the superior court, where it was the sheriff who would bailiff the court. So that was nice.

The court staff was very, very competent. They also knew the community. They were local. So I never had any real complaints about the court staff. I kept my courtroom deputy for seven years in Compton and then for four years on the superior court. I brought her over. She had to make — this is before, I think, court consolidation — so she had to get credit because it was basically a different department, so she went through the necessary steps to come with me to downtown. She had been a Compton resident but then lived farther away.

I really enjoyed my time in Compton. I did, I don't know, hundreds of trials. I was the supervising judge of civil.

MCCREERY: How did that come about?

MORENO: Again, because I was the only one with extensive civil experience. Again, no one wanted to do it. Our court commissioner, again, was assigned to civil, but the civil trailing calendar was in disarray, where he would continue things or they would not stipulate to a commissioner. Then what do you do? "We'll have to find someone who can do the trial."

He's probably retired now, but he was not very decisive. His morning motion calendar, I think which was on Fridays, would take forever. He'd have both sides talk and talk and talk and talk. [Laughter]

So I would get the cases the day before, when he was on vacation, and I'd say, "I'm going to do the calendar. I'm going to go up there and do it." I'd be done in an hour, and the clerk said, "Boy, we wish you were here all the time," because this other guy, Tommy Townsend, would just take forever. I said, "What's the big deal?" I forget what they called it. It was at the time when the municipal court converted into form interrogatories, a certain number. Anyway, it was pretty straightforward.

Then I found no one was doing trials. So I said, "Look, the next trial you get, I'm there. Send them to me." So I did about thirty trials, civil. I told my preliminary hearing colleagues, "Look, I will do all the civil. I have a civil background. But on those days I will send you my preliminary hearing cases." They said fine.

Then I took hold of the trial setting. I don't know what it's called now, but when a case was "at issue," you could set a case for trial after forty-five days. So when we got an at-issue case, I took control. I talked to the civil person. "Let's get in action. Just set a trial on the forty-fifth day." [Laughter] The lawyers were shocked. I said, "It can't continue. It's at issue. You're ready." They would have to have a really good reason. I would say, "Okay, we're going to trial."

I remember taking two verdicts in one day because they had a jury deliberate. I think it was only one- or two-day cases, three days at most. It was like what I used to do in the city attorney's office. On simple batteries or stuff, you could do two trials in a week. Just crank them out.

McCREERY: You had also mentioned that there you became a firm believer in no continuances.

MORENO: Yes. Oh, yes, because they're used to coming in. "Oh, your honor. We're not ready," and this and that. I said no.

My standard thing was, "The court is devoting its resources to try this case. If I don't try this case today, this courtroom and what it costs to maintain every day is going to sit idle." I'd say, "We can't. We have resources, and we have to use them." I don't know where I learned that from, but it was like, "This is a resource. If we don't use it, it goes to waste." I'd force them to trial. I did a lot of trials with new lawyers, their first trials. I was patient, but I said, "We're going right into this case."

McCREERY: What was it like for you to sit on the other side of the bench?

MORENO: It was fun. Civil lawyers in particular are very deferential to the trial judge because they never — they're terrified, even if you're a municipal court judge.

In the criminal law practice you know the judge. You staff his court or her court. You might be there for three weeks. You know the judge. You know the staff. Then you go to another court. The same thing. People know you. You're in the same building, and you're a known quantity. You know the judge, and you know their practice and stuff.

The civil lawyers don't get into court that often. You don't know them. They don't know you. They think you're going to yell at them or whatever. I would just say, "It's time. Do you have an offer? Because we're going to bring in the jury. We're going to bring them up right now."

Then they would, in most instances really, settle the case because this judge meant his business. You're going, "Now's the time." So I did a lot of slip-and-falls, fender benders, breach of contract, some minor real estate matters. It was good experience, and of course by then I knew I could pick a jury in half an hour.

McCREERY: What did you look for?

MORENO: In terms of picking a jury? I did all the voir dire myself. The lawyers really didn't know how to do it. I would do a pretty good voir dire, so they would know what their predispositions were in a case. There were fewer peremptories in civil cases. I think it's six or something like that. I

think it's six, so you could do it quite quickly. I'd put eighteen up there, and I remember having a very small courtroom because I was doing preliminary hearings.

In fact, I was talking to a judge the other day who is in my courtroom. She says, "I'm in your old courtroom, Division 6, and the clerks told me, 'Do you know this is where Justice Moreno had his courtroom?'" [Laughter] I told her, "Do a good job. This is a courtroom where you could really move up."

But it was a courtroom that we built while I was there just for preliminary hearings. We had a small jury box where the officers would sit and the witnesses and watch everything. But it was very small. But I'd still put twelve there and six chairs in front.

"What's going on?" I said, "Don't worry. We're going to go right through this." Voir dire the eighteen. Peremptories. *Boom*.

That's something I kept when I was on the federal bench. I'm very hands-on when it comes to doing trials. In fact, even now I tell the lawyers in these arbitrations. One of the most frustrating parts is they don't know just how to get down to business. They nitpick and they do this and that. They really don't see the big picture in terms of their case. They just want to make it difficult for the other side.

Whereas I'm more of a, "Let's just — okay. You think you have a good case? Let's do it." So they're not used to being pushed and being prepared and doing the trial.

I think I learned that not only from my city attorney experience but on the municipal bench and doing the civil cases, which in some sense is a lot easier than doing the criminal cases, less controversial. DUI juries are hard to pick because people have strong feelings one way or the other about drunk drivers. They know someone, a family member who's been charged with that, et cetera, whereas a civil case — it's pretty easy to ferret out any biases through your peremptories. Fewer witnesses, in a lot of cases. Smaller cases.

I kept track of all my cases that were set for trial on a certain day, so I'd have, let's say, three or four cases set for trial when I would do the arraignments and pre-trial conference and trial. I'd set all those dates, so I knew. I kept separate track of all my trial dates, and I wouldn't set more than four or five per day.

I wouldn't say nine times out of ten, but most of the time they would settle. They'd finally talk to their client. This was during the time when the court system was urging no continuances. In fact, they had buttons made with a slash, "No continuances." [Laughter] It's when the court started to get into court management. So I bought into that, and I found that as long as you control your calendar, you can really make less work for yourself.

I remember defense lawyers being startled. "Oh, we're going to trial?"

"Okay, I'll give you one day. I have no other matters. You're set for trial." They'd huddle with their client. Maybe they were talking about a money arrangement. Who knows? But it worked.

I did the same thing when I was on the federal bench. No continuances unless you had a really good — if you made your motion ahead of time, and you stated a good reason for it, and it was in conformity with what I wanted to do. The judge has to take control of the calendar. It's not their calendar. I also say that. "It's not what you two stipulate to. It's how I'm managing this calendar. I have things I have to manage, too, and today is your day."

McCREERY: To what extent did that reputation get out ahead of you and people knew that's what they would encounter when they entered your court?

MORENO: I know for sure. Here's what happened, though. [Laughter] The best-laid plans go awry. I think we had five or six misdemeanor trial courts and five or six preliminary hearing courts. The fact that I took care of business — no rest for the weary because others would have last-day cases. They had two or three, and they'd have to send the case out.

"Oh, you're open. We need an open court."

Just because I did a good job — and other judges who run efficient courts — I know a guy. He said, "Why? I'm doing a good job and taking care of my calendar. This judge doesn't. I'm going to do his cases?"

I was trying other people's cases. Frankly, people were happy to come into my courtroom. They didn't like their judge anyway. So I met a lot of lawyers who weren't assigned to my courtroom, but they got to know me. I really enjoyed trials, and I didn't hammer defendants. They knew that. These are misdemeanors, and you could give someone a year but I gave them the sentence that I thought was appropriate.

Even on a DUI, you could give them — you could punish them for going to trial, which is improper, but that's standard. "Okay, you didn't admit guilt. You contested. No remorse." That was the down side.

There were a couple of judges who were just terrible. Terrible. Terrible. Then I was leadership by default. It went by seniority, okay? My time came up. That's for one year.

And then Al Garcia, my "twin," so to speak, didn't want to do it. He said, "I don't want to do that. It's a pain," blah, blah, blah. He just said, "I'm not going to do it." So the other judges looked to me. "Would you do it another year?"

I said, "Oh, God. Come on." So I did it for two years, again by default. It's a headache because judges call in sick and you have to cover their cases. You have to go down there and call their calendar. The thing that got me upset was a judge goes on vacation and, when you know when you're going on vacation, you shouldn't set any matters. Some judges didn't give a damn. You'd go in, and it would be a regular calendar. They knew they were going to be on vacation, but they have thirty matters on calendar.

Some judges were good. They didn't set matters. But others didn't care. They would just do their regular stuff. How do you manage two courtrooms, two calendars? That's the part I didn't like about being a P.J. Then when judges called in sick, it was ooohhh. All the little problems come to you. So it's mostly that that was the pain about being a presiding judge.

MCCREERY: Let me ask you to summarize your time as a judge on the Compton municipal court.

MORENO: It was a great foundation for everything I was going to do later as a judge in terms of the seriousness of some of the criminal cases, in terms of developing a system of case management, working with other municipal court districts, having a very hands-on court administrator, and meeting a lot of new lawyers.

Compton at the time was the training court for both prosecutors and public defenders, so we dealt with a lot of new lawyers. But it gave me the opportunity to meet them and to see them as they developed their own careers down the line.

It made the transition from municipal to superior court very easy because when I got that appointment from Governor Wilson, I was assigned

to the Criminal Courts Building downtown. I was able to there try felony cases — again, being in downtown Los Angeles, some very serious felony cases. I was well prepared to do that, given my exposure in Compton to serious preliminary hearing cases.

So overall I really, to this day, feel that serving on the municipal court is a valuable experience for any judge. It certainly was for me. It used to be said that the governor — I think Marvin Baxter mentioned this to me, that this gave the governor an opportunity to see how someone performed in a limited jurisdiction court. He assured me, and he has probably assured others, that, "You're qualified to be on the superior court as well, but we just want to test you out."

I think that's a valuable check on making sure that the people who are elevated to the superior court can do the job. There's a distinction now, even to this day, between those who were elevated by virtue of appointment versus those who were elevated by virtue of court consolidation. That little schism, I've heard, still exists. It's not to say that limited jurisdiction — or former municipal court judges who are still doing that — are not qualified, but it's an observation that I think many people hold.

McCREERY: What was the timing, in your case, for moving up and how you thought about that?

MORENO: Yes, an interesting story because I was actually approached by the D.A. deputy in charge in Compton, Steve Sowder, who said, "You should consider applying for superior court. I'm often asked by — " He gets requests for evaluation of potential candidates. I don't know exactly what kind of input he had, but he said, "You should apply." I said, "You know, that's a good idea."

I didn't think I would get an appointment from Pete Wilson. I just felt that he was a little bit more reluctant to appoint a Democrat. But I think with getting the support from the deputy in charge — because he wrote a nice letter for me — and then, of course, I mounted my campaign to get appointed, got more endorsements.

Timing, again. The governor's office was under fire for not appointing enough minorities, particularly Hispanics. The day of my interview with Chuck Poochigian, who is now on the Court of Appeal in the Fifth District, was the day that NPR and maybe other news outlets were airing these

complaints — I don't know if they were protests or not — but, "not enough minority judges on the bench."

[Laughter] I remember sitting with him. I think it was in Sacramento. If you know him, he's a very personable, easygoing guy who was the appointments secretary then. We had a really great interview. I had been appointed by Governor Deukmejian, the fellow Armenian, and I think in some way he took to heart this criticism.

So here he had this guy, me, who had done a good job; supported by the D.A.'s office; appointed by Deukmejian; good educational pedigree. Here's one who could help him rebut this criticism. I think it might have been at the next American Bar Association where they said, "You're not appointing any Hispanics."

Again, timing came into play, and I was the right person at the right time. I later saw Pete Wilson at a couple of events. I remember his wife was with him, and I wanted to thank him for the appointment, notwithstanding that I was a Democrat. He says, "Oh, you must have been one of the good ones." [Laughter]

But I think both Wilson and Deukmejian, I think one out of six or so of their appointees were either Democratic or independent, refused to state or something like that. So I don't know what Jerry Brown's record is on that, but I think the doors weren't completely closed, although people felt that if you weren't a Republican, and a very conservative one at that, you were not going to get appointed.

To this day, when I'm introduced, particularly to a minority group and they say, "Appointed by Pete Wilson," people say, "How did that happen?" I have to say, "He had to appoint a few, so I got in."

But I frankly was a bit surprised. I don't think I had thought of it. I was in Compton for longer than I anticipated. Seven years went by very quickly. But I thought at some point I wanted to be on the superior court and to be on the superior court downtown, just because of the commute and the community and so forth.

When I got that call — here's another interesting thing when you talk to judges — working late, doing a preliminary hearing I get off the bench at four-thirty, and my clerk hands me a slip. "Oh, someone named Poochigian called you." [Laughter]

So I knew it was *the* call. Judges can all tell you about *the* calls that they get. She knew that I was applying. I said, "This is the guy. This is why he's calling me." I called right back. Maybe it was forty-five minutes later, and he still was there and gave me the news. But I said to my clerk, "If this ever happens with me or anybody else, interrupt me. This is the call you don't want to put off."

"Oh, okay." [Laughter] Anyway, that's my superior court appointment call story, not being interrupted.

MCCREERY: Assigned to felony trials downtown, moving up to superior court. Talk about the transition and how you entered into that, in 1993, right?

MORENO: Okay, right. Interesting because I moved all my stuff from Compton. I had a pickup truck then, put all the boxes in, went to work on Monday. I talked to Bob Mallano, who was the presiding judge. He called me and congratulated me.

He said, "Do you have any preference about where you want to be assigned?" I said, "I want to be assigned downtown. I live close to downtown." He said, "Fine. I'm putting you in the Criminal Courts Building."

"Great." I knew Mallano because he's Yale '60, I'm Yale '70. [Laughter] We had that connection, and we knew some people in common so he was happy to assign me to a place where I wanted to be.

I move in that Monday morning, get all the paperwork done. Maybe I did the paperwork before then, I think, the superior court stuff. I move in on a Monday in my jeans, just casually dressed. I've got boxes in my chambers, Department 131. Since it's a Monday, the master calendar has a lot of last-day cases. There was a guy. I forget his name now. He was the aide to Department 100. He comes up to my courtroom before noon and says, "Oh, I see you're not engaged in trial."

I said, "I'm just moving in." He says, "We'd like to send you a case. We'll send you a case. Just swear the jury in. You can start tomorrow." I said, "Uh huh." And that's the way it is.

It was a child molestation, not one of — not to say these aren't serious cases, but it was one of an older man, an adult, giving beer to underage minors and getting them to do different things. I gave him eight years. I remember the defense lawyer — I didn't hammer the guy, maybe gave him mid-term or something and concurrent time, whatever. After that the

defense lawyer really liked me, Steve Schoenfeld. I forget who the prosecutor was. It didn't take very long, maybe three days. I had never done an actual child molestation trial, but it was very uneventful in terms of doing the trial. So it was trial by fire the first week in the courtroom, jury verdict, move on.

McCREERY: Any surprises in that first case?

MORENO: None at all. None. Then I started again to manage my calendar from my Compton experience. Eventually my clerk was able to join me, and we just — it's all direct calendar, but the same thing would happen. I'd get last-day cases from other courts because I was open. They knew, Department 100 knew, almost the moment you sent the jury out to deliberate. They'd say, "Oh, you're open."

I'd say, "What if they have questions? What if there's read-back? Give me a break here."

I didn't complain very much, but the other thing that they initiated you with: they would send pro pers to the newer judges. I had done pro pers before in Compton, but I did a number — I don't know, maybe half a dozen pro pers. You would get those. You know that the trial judge where the case was assigned — because it was all what we called direct calendar. Then when they couldn't do the trial, they would send it to 100, that would then find an available court.

So I got a number of those that I had not worked up. They come to you. You don't know the lawyers, and they try to assess what you're like, et cetera. You make a last effort at trying to settle the case, and then, "Okay, we're going to trial. That's why I'm here."

McCREERY: How did that compare with what you saw other judges doing?

MORENO: Different judges have different techniques. Some present very intimidating facades. There was one judge who had the most jury trials — or, let me say the most trials. Because I later learned that, although his numbers were very high, like maybe mid-thirties for a year, that as soon as you swore in a jury it counted as a jury trial completed. But he would be so mean talking to the defendant on what was going to happen that they would then take the deal. He got credit for doing a trial. I remember that specific technique.

I did twenty-plus trials. I was in high-medium range in terms of trials. But I remember a more experienced judge said, "This is what's happening. They're not really doing the trials. They're settling them after they swear in the jury." [Laughter]

My philosophy was I liked the trials. I told my courtroom clerk, "You're a reflection of me. Don't give the lawyers a hard time. If we get a case, we're going to do the trial."

We tried to get along with everyone, and as I said, the criminal bar was much more collegial than the civil bar because you had to work with them every day. And you meet other public defenders. It's a big courthouse, but the way they had these teams set up — and there must have been eight courtrooms per floor — you'd know the other lawyers who regularly practiced on that floor.

McCREERY: What was the quality of the advocacy you saw on both sides?

MORENO: I'd say it was very good, for the most part. Some personalities that you got used to handling, but overall they're in court all the time and they know the numbers, the codes and all that. A few that you didn't really want to have in your courtroom to deal with, but you'd get over it. It was nice. I really enjoyed doing criminal cases on the fifteenth floor.

McCREERY: You had done a fair number before in other settings, but perhaps you were seeing more, certainly, serious felonies and other kinds of cases?

MORENO: Oh, yes. A lot of homicides, yes. Gang cases going to trial. But one notable thing, and I think this is in the *Daily Journal* profile, is I did a lot of court trials. Court trials happen when — it's like a slow plea. A lawyer does not have complete control over the client. They know that their client is going to lose.

They talk to the D.A., saying, "Let's do a court trial this time, go through the whole thing. We'll do it in front of Moreno." The defense knew that I was not going to hammer them, and the D.A. pretty much knew that I'd find him guilty. They're pleading guilty, but I'm getting all the facts, and they make a record.

McCREERY: But this started fairly early on for you?

MORENO: Fairly early. Oh, yes. Because my reputation preceded me on this. I had good calendar-management skills. I remember telling the *Daily Journal* this, and that's what I said. But I did, I don't know — I don't have a number at hand, but quite a few. In fact, when I was going to leave the superior court to go to the federal court, I had a lineup of court trials to do. That delayed me a little bit. I was very proud of that, that they would feel comfortable.

Part of it is, as I explained, the rationale is they can't control their client. The client wants a trial, so they get their trial. Almost always, the conclusion is pre-ordained, but I did find a number — I don't know how many — a small number not guilty or I found them guilty of lesser included offenses.

I remember the D.A. looked at me when I found someone not guilty. This was on receiving stolen property. I said, "It's not there. I just don't — if the burden is beyond a reasonable doubt, there is something — this is a weak case. Not guilty. Hey. I call it as I see it." [Laughter]

Then you never know what the advocates are — are they just advocating, being advocates and shooting for the result they think they want? But I think they know, most of the time, it's kind of hinky case.

I remember one case, again, a murder case. I remember the D.A. — she's also now a judge — and I forget the defense lawyer. But someone was killed in a bizarre kind of shootout of some sort, and the facts were all over the place. Then the victim's family were in the audience. So I hear the case. It's maybe a two-day case, and I said, "What's your theory? Where did the bullet come from? Who done it?" kind of thing.

They looked at me. "This is the case." Again, they were doing it for the family. But when I said, "I just don't think there's enough evidence here. There's no theory. No proof that this guy was the shooter. It could have been any number of people." The family was very upset, but you have to do that.

Another case I had, *Vega*. It turns out — he was a third-striker, possession of drugs for sale. Supposedly he threw a bag up on a roof, a low-lying roof, when the cops were approaching. The whole neighborhood comes in to urge that, "He's changed. He's not a gang member. Blah, blah, blah." He had a couple of robberies, maybe some others. He wasn't one that —

We had a number of factors we would look at in term of striking a strike. We did have that discretion. I forget the name of the case that Justice

Werdegar wrote,[5] but we had that discretion. I said, "I can't, in principle, reduce it. It's unfortunate. He may have changed." So I give the twenty-five to life, maybe plus something. Later it turns out that the officers involved were part of what later became known as the Rampart scandal here in Los Angeles P.D., planting drugs. It was one of the principals in that. Then his conviction was later set aside or he was commuted or something, but you just don't know those things.

I remember another case where the officer said *x* but contemporaneous reports said *y* in terms of advising Miranda rights and so forth, some important step in the process. You look at the witness. You look at what they wrote. So I excluded the confession. That's all they had, and, snap, out you go. So I did the right thing, but they did find whatever it was that he admitted to doing. But without that the prosecution was unable to proceed.

Some of those — I often say — people say, "Isn't it difficult to hear a case and decide which way it should go?"

I always say, "You know, I don't stress over that because if I see a weak case or I'm having difficulty — if it's proof beyond a reasonable doubt, maybe they did it, maybe they didn't — " So I really believed in that. I had a high standard or a low standard of reasonable doubt, however you want to look at it. The D.A. knew that. I'd say, "I'm not convinced beyond a reasonable doubt." I always hung my hat on that. "There's something not there that satisfies me to that level of certitude that a person is guilty."

McCREERY: Even though you're making a solo decision, you're objectifying it in a way that follows the law?

MORENO: Yes, right. The other thing that I would do is I always explained the rationale for my ruling. I remember — here's another one — they stipulated to me on an attempted murder case. I think the defense thought I would give him an ADW, assault with a deadly weapon. But I looked at the instructions for attempted murder and intent and all that, and I just went down through the instructions, and I explained.

In these cases, you might take a short recess, gather your thoughts and come right out. It's not like you do it the next day. I said, "I'm going to go through the elements of attempted murder and how what I conclude the facts show in this case. Circumstantial evidence to prove intent. But you're

[5] People v. Superior Court (Romero), 13 Cal. 4th 497 (1996).

firing five or six times at a person who's within range. There's some enmity between you, some kind of motive."

Right down the line. The defense probably said, "Oh, my God. What did I agree to?" He probably thought he had a better chance with a jury. But I said, "They've proven each of these elements to me beyond a reasonable doubt."

So you get some really interesting cases, some pro pers as I mentioned earlier, some crazy cases, where you have to be patient and not get into the fray of giving too much advice to the pro per. You have to be very careful.

I'd say, "You pro pers, you know how to file every conceivable motion. You know how to exercise your rights, and that results in a significant delay. But you don't know how to do a trial. What do you know about how to pick a jury, about cross-examination, about preparing jury instructions?" I'd say the whole thing. "You're going to be at sea, and I can't help you."

When it gets to the defense, they rest. They don't know what to do. One of the reasons why they would do it was to get special privileges at the jail. They get a cell by themselves. They get library privileges. They get a runner that they can hire to check the docket, do whatever, subpoena witnesses. But it's all kind of a sham. I hate to say that, but —

So anyway, the diet of cases on the superior court was just pretty amazing. You just never knew who was going to walk into your courtroom.

McCREERY: Say a bit more about your approach to sentencing and how much judicial discretion you had.

MORENO: I guess I'm a rule follower, and I was always good about making a record so that it would be airtight. Of course, if you went midterm you didn't have to really say anything. But if you were going to aggravate or mitigate the sentence, you had to look at the rules and cite those.

I don't know in how many instances I actually aggravated a sentence, maybe a few times. But whatever I was doing, I would always have the rules in front of me and tie the facts to the rule. It's pretty simple to do. But I always tried to — in federal court they had acceptance of responsibility, minus three points on the scale. We might have had something similar on mitigation, acceptance of responsibility. I don't know. They didn't assign any numerical significance to it, but it was something you could take into account. Early disposition.

I would say 90 or 95 percent of the criminal cases are settled by way of the plea. As long as the plea arrangement was within the bounds of conscionability, I'd go along with it. I think most judges would. So they would come up with a sentence, a recommendation, and I'd say, "That sounds fine. Move the case out."

So there was a focus on clearing your calendar in that sense. I never really questioned why a D.A. might be more lenient in one case versus the other. Usually they were more adamant about a stiffer sentence, certainly after trial. But I always felt that they both knew their case better than I did, so as long as they told me about — I could read in the probation report or something, get some facts, then I'd go along with the deal.

One other notable case I should mention. I did a trial involving a shooting at an inhabited dwelling, a third-striker. I gave him, I think, twenty-five to life. A motion for a new trial. The D.A. had not disclosed a prior incident involving the victim making false accusations against the defendant, so that was material.

I still remember the D.A. She was incompetent. She never did any kind of investigation. I remember telling the clerk, "Call this number. Give them this D.R. number[6] and see if you can get the report of the earlier incident." She calls and she gets the information. They present the information, and we get a report that shows there was that enmity between these two people. I said, "That might have made a difference because it was more like a she-said, he-said kind of deal."

That's the only time I've ever granted a new trial. A new trial. They disposed of it somehow. That public defender is now a superior court judge, and he always says, "You got me a new trial." I say, "I remember the case."

Then I also believe that criminality had a strong correlation with age. I would always point that out to them. Especially as they got to be around thirty, I'd give a little standard speech. "You're too old for this. You're no longer eighteen, nineteen, or twenty, hanging out with these guys. You've got to think about how you want to spend the rest of your life because these things, these predicate strikes, are going to really send you to prison for the rest of your life." I'd try to talk to them. "It's not worth it."

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[6] Department Reference number.

There was one other thing. I was one of the few if not the only department that would do in-custody weddings. Hey, I'm just saying. And I would get them from other courts.

MCCREERY: How did it start?

MORENO: I had no objection to it. I felt that it was actually remedial, that, one, they already had a relationship with the spouse. They sometimes already had kids. There's always the prospect, although very slim, of conjugal visits. But this was the only family they had. People had given up on them.

I would get them from other courts. I remember one. This guy Luis Carrillo came to me. He said, "Would you do it?" I said, "Yes, I'll do it. Bring them in."

So they arranged to get the "body" up, the family in the audience. My bailiff was pretty cool about it because I said, "They're ordinary people. I mean, they did something bad, but this is the family." I'd say, "Let them hug, if it's okay with you." My bailiff says, "Okay, that's fine." Let the kids come up, you know? So he was very good. Some bailiffs are by-the-rules. No touching. He was fine.

My little speech to them I gave several times. I said, "Look, everybody has a good side and a bad side. You've done some bad things. You've been to prison, whatever. But here's your family. They see you as a dad, as a husband or partner or whatever, and hopefully they'll be waiting for you when you come out. For them, make the best of this time. Get an education, study, learn a craft, whatever you can do. And stay in touch with them because they're here today supporting you, and I'm willing to put my faith in her and in you that this will show you still have something to look forward to. Your life is not over."

Nice speech. Yes! Yes! You humanize them. I tried to do that, and they always bought into it, because in reality I really did believe that they did have a good side to them, and this was it.

I would do it, and everybody is very happy. I remember my clerk would take pictures of them. I don't know what they'd do with the pictures. They'd bring a camera, take a picture. The guy is in his jail blues, and the kids and everything. That's touching, isn't it? Yes. [Laughter]

MCCREERY: You mentioned the assignment of cases on the superior court, and I wonder what was your own experience of that?

MORENO: It was what we call a direct calendar system, so from the arraignment court — the arraignments were done in the municipal court, or the court of limited jurisdiction — I would have, I think, just pre-trials. If there was no time waiver the cases had to be heard within thirty days or forty-five days, depending if the defendant was in custody. So I think I got cases with both dates assigned already when they came to me for a pre-trial.

So I had no control over that. They would just come from the arraignment court to me, and as far as I could tell it was entirely random. I just did what I had to do in terms of resolving the cases in pre-trial or a trial. But as I mentioned, if I was able to resolve my cases and have fewer cases on my docket, then I'd end up doing trials for other departments if I was open. So it was called direct calendar. I really managed all my cases from pre-trial to trial that were assigned to me and then handled some overflow from other courts.

I remember also during that time there was an initiative statewide to manage our calendars more efficiently and not to grant continuances. The secret to good case management was to not let cases drag on, and I certainly bought on to that. There must have been other initiatives that I can't recall. Three strikes came into effect, I think, in 1994, perhaps?

MCCREERY: That's when the voters passed it.

MORENO: Yes. We all wondered how that was going to impact our dockets, more trials and so forth. I remember all of us being concerned about that, and how were we going to handle what we expected to be a heavier caseload?

But we circulated factors that could be used to reduce or "strike" a strike, so to speak. I think we were doing that even before Justice Werdegar's decision, exercising discretion to do that. The D.A. in Los Angeles, who I think was Steve Cooley at the time, had a very practical approach to that that foreshadowed the reforms that were later made, that the third felony had to be a serious or violent felony, not a — the case that was very famous was the pizza case, where someone got twenty-five to life.

MCCREERY: You said that the California Supreme Court decision then, in 1996 I guess it was, was welcome?

MORENO: It legitimized what we were sort of already doing, with the consent of the D.A., actually.

So anyway, I enjoyed my time on the superior court, even though it was all criminal. But as I mentioned, we got along. My staff was good. The defense lawyers were good. We resolved cases expeditiously, and I think justice was done overall. So it was a very pleasant experience.

One thing that I drew from that that later had an impact on my tenure on the Supreme Court was that I learned a lot about how to handle difficult defendants. I mentioned pro pers. I learned a lot about restraints, and that later came into play on the Supreme Court, where I decided on a case — I can't remember the case, but — that dealt with a sheriff's deputy standing next to the defendant as he was testifying on the witness stand and what impact that would have on the jury [*People v. Hernandez*]. Maybe one person joined me on that, maybe Kennard.

But there were things like that that I was very conscious of on the Supreme Court that — I know my colleagues, with a couple of exceptions, didn't have that kind of experience. Of course, we decided that case right after a judge, I think in Fresno, had been attacked and stabbed by a defendant who was sitting in the witness stand. He reached over and *boom*!

Another case I had on the superior court involved a recalcitrant defendant, represented by counsel, who didn't want to come out of lockup. You can say, "Do it the hard way? Do it the easy way?" Do you have the bailiff communicate with him and then transmit that to the court? Or his lawyer say why he doesn't want to come out? What do you do? Are you just going to put the case over?

What I did in real time was I just walked back to the lockup, brought the reporter with me, and said, "I'm not going to mess around. We're just going to take care of business. We're going to put this on the record." We took the record to him. [Laughter]

When I was on the Supreme Court we had a case very similar. I actually wrote a memo — and I can go into more detail when we talk about the Supreme Court — about granting review. How do you handle that situation? One of the recommendations was, "This doesn't happen that often. We don't have to opine for that."

I said, "No, no. This does happen a lot and particularly in the L.A. Superior Court, where 25 to 30 percent of the people in custody had mental

issues, even if they're pro pers and also represented by counsel. The judge has to be able to make a quick decision on the spot as to what to do."

So many of the cases we handled had a mental health component. Sheriff Baca, at the time, often said that he operates the largest mental facility in the state, if not the country. So I became acutely aware of those kind-of-unique circumstances where people have some real issues in appearing in court.

I think what I took mostly — the thing that I remember now — are more the unique, difficult cases that would come before us on a routine basis. And how do you deal with those unique situations? What kind of guidance do the trial judges need in order to deal with those situations?

The factual basis for a plea. Another case where I wrote an opinion, I think in *People v. Holmes*, the law was unclear as to what kinds of admissions you need from a defendant to accept his plea. He has to admit that he did certain things, committing the elements of an offense.

In federal court it's much more detailed, an extensive taking of a plea. You see that right now in what's going on in the Manafort and Cohen pleas. The feds are very detailed.

California's guidelines are kind of loose. I said, "I want to know whether I was doing it right," and I thought the trial judges should have some guidance from the Supreme Court so when I was on the Court, I said, "It's like, is this a good enough factual basis for the plea? What are our guidelines?"

One of the reasons why I think trial court experience is recommended — I won't say it's essential, but it's recommended for the appellate courts — is that you see these everyday problems, and sometimes it's not quite clear what trial judges should do.

McCREERY: Yes, it's a fascinating arc of real-world experience and how it's of use to the appellate process later on. I wonder, as you think back on your superior court years, which other judges — whether in positions of responsibility or not administratively — which other judges there were influential to you in any way?

MORENO: Yes. One judge from Compton, Morris Jones — we both served in the municipal court — he was a very prominent criminal defense lawyer before he got appointed. But he had a nice calm demeanor and handled

death penalty cases as a lawyer and as a judge, so it was nice just to chat with him. Another judge, Ed Ferns, was much more experienced in criminal law than I was. He was a former D.A. He also had a very practical way about him. It was nice to talk to him.

I trained a number of judges who came directly from civil practice. Elihu Berle, who is now in the complex courts. A couple of my colleagues here. We were just talking the other day. Judge McCoy, who later became presiding judge in L.A., and Carl West, who is also at JAMS. They remember me — hard to believe — as one who knew a lot about criminal law and who had a good practical sense about sentencing and managing a criminal courtroom, one who had the answers to some problems.

The nice thing about that court — and I was talking to someone just the other day about the setup in the civil court here — in the Criminal Courts Building we had — maybe there were, one, two, three, four — six courtrooms and a hallway behind the courtrooms that were shared. So you had a buddy court, by assignment, and Morris Jones was one of my buddy courts and later Elihu Berle in the department next to me. McCoy was down the hall. So it was easy to really just walk into someone else's chambers and chat. I think it's very important for judges to have that facility — have coffee, just chat about what's going on.

But I found out just the other day that in the civil courthouse there isn't that chance for interplay. There's maybe one court, one judge's chambers adjoining, that you can walk over. If you don't like that person or they don't like you [Laughter], you have no one to talk to. Then, to get to see other judges, you have to go through the courtroom, out into the public hallways, and go somewhere. I think whoever designs courtrooms should keep that in mind, that you need that ability just to chat and have that back-door ability to just meet with other judges.

As I look back, I really liked that setup, where I met the other judges. You could just go over there. They could come and ask you a question. I remember a new civil judge, who is now a very prominent judge, ran some kind of criminal procedural issue by me, as to what he did. He said, "Let me ask you about this."

So he ran it by me, and I said, "That's fine. You didn't do anything that was — but next time come to me first." [Laughter] Then I concluded by saying — and I still use this term — I use it with my clerks, my courtroom

deputies. I said, "There's a term we use in the law to correct clerical errors like this one. It's called *nunc pro tunc*.

"So never feel like I'm going to get mad. Maybe your supervisor will get mad at you. I'm not going to get mad at you because, believe me, most of the things that we do are correctable. It's not like somebody is going to be executed or something dire is going to happen. We've done something. We've made an order. But if for some reason it's the wrong order or the language is wrong, don't sweat it. We can always correct it *nunc pro tunc*."

I still use that to this day. It should apply only to minor errors, but what's minor or major is subject to interpretation. So my feeling is you can always correct something, as long as it hasn't been implemented or executed. [Laughter]

McCREERY: I appreciate very much your thoughts about how interaction among judges is important in a job where, really, they're fairly autonomous on a day-to-day basis.

MORENO: Yes. A lot of people say, "Oh, judges. It's an isolating or isolated experience."

I've never really felt that, principally because of that observation, but also because a lot of the interaction that a judge chooses to have or not have is really self-imposed. My sense is that, within limitations, you can associate with lawyers and go to bar associations. They're happy to have you there, and you don't have be this remote Solomon-like figure, an oracle or whatever, that people have to pay homage to or that they feel intimidated by. I've always felt, both with lawyers and other judges, that there's no reason to be isolated.

I even feel that way about being on the Supreme Court. You can be approachable, and it's all a matter of how you present yourself.

McCREERY: How common was it to have media interaction in connection with your superior court judging?

MORENO: I know that was also a subject of discussion, maybe because of the Simpson case, with — I forget the rule, 974 or whatever it is, when they seek permission. I was one who always fostered the media in the courtroom, as long as they adhered to certain reasonable restrictions, like not showing faces of the jurors — being unobtrusive, basically. I don't think I

ever closed the courtroom for anything, and I was very open to having the media in the courtroom.

Of course, I never really got burned by a mistake in an account of what I did or said or anything like that. I don't remember how many times I had the media in my court, but they were always welcome to come in.

MCCREERY: Let me ask you to summarize your superior court years and lead us into the inklings that you were starting to get that there might be a federal appointment.

MORENO: Yes. My recollection is that when I was prompted by Judge Paez to look into a federal appointment, that I moved forward on that. I don't how public that became. At some point it did become public. But I remember having a lineup of court trials, bench trials, to finish up.

I had sensed that, although I enjoyed my overall experience, just in terms of the people and the cases and so forth, that I wanted to go over to civil. I knew I wanted to end up in civil, for various reasons. Having done seven years of criminal in Compton and two or three years in superior court downtown, I felt, well, now I've got to move to civil. And I had a civil background, seven years of practice. I guess I thought, although I was happy, I thought that I was going to move on in some way over to superior court civil.

But then the opportunity to go to the federal court came up. I was encouraged to submit an application, both through Senator Feinstein and Senator Boxer. The way that works is there are vetting committees that each appoints, and you fill out a form. Yes, you do apply, in a sense. At that time, we had two Democratic senators and a Democratic president. I think that changed in terms of — well, no. That didn't change, but the control of the Senate, I think, was in the Republican hands.

So I went forward with that. One comment I remember from a very prominent criminal defense lawyer — it became public that — maybe I had been nominated, I think, and waiting to go through the process. He said one thing that I still quote about being a federal judge.

He approached the bench and said, "We hear you're going over there, and that's great if you become a federal judge. Do you realize that you're the only type of judge, a federal trial court judge, who can order the president to do or not do something?" [Laughter]

It all starts there, and you have the power of issuing an injunction. Again, it all starts there. You make the record, and you move on. So I always tell that to the federal judges, the enormous power that they have to be able to tell the executive what they can do.

McCREERY: What a prospect to be wooed to the federal court, shall we say? What was the view that you took of this opportunity? Any hesitation whatsoever?

MORENO: Oh, none at all. None at all. I think a move from state court to federal court is still seen as an elevation. It's a lifetime appointment, Senate confirmed. The nice thing, though, and here's a little anecdote that you'll appreciate, knowing that I'm kind of an L.A. homeboy, and that is that the federal courthouse was literally diagonally across the street from where I was.

The first floor, when I was growing up, up until about 1965 or so, was the headquarters for the region for the post office, so 90012 always symbolized civic center-downtown L.A. I grew up in 90012, and I practiced most of my life in 90012. We're sitting in 90013 right now, so just a stone's throw away.

So in many ways I felt I'm really coming home here to a lifetime position, beautiful courtrooms. I had practiced there somewhat. Maybe 10 or 20 percent of my civil practice had been in federal court. So to me it was like really achieving a real milestone, for me — someone who had grown up literally within eyesight of where I was born, where I went to high school, where I lived, where I worked at city hall and downtown — to be in the esteemed federal court. So I was excited about that.

Going through the vetting process, having done it twice before — it was very similar but more intense. I remember as soon as my name was released, I got a call from the Department of Justice. "Can we have all the numbers and contact information for all the judges in your building?" I gave them the *Daily Journal* directory, and I said, "Call anybody you want."

I heard from my friend Ed Ferns that a local organization — it was called the California Narcotics Officers' Association — they knew him, and they said, "Who is this Moreno? Senator Feinstein has asked us to look into his background." Because Senator Feinstein is conservative on criminal issues, and so forth. So she had this group vetting me.

Then, of course, I went through the ABA process, and so forth, FBI background search, and all that — a very intense, very intrusive process. I

remember being interviewed by Senator Feinstein's committee. Judge Arthur Alarcón was the chair. I think I did well. In fact, at the conclusion of my interview, her district director approached me and said, "Look, we're going to recommend that you and two others be interviewed by Senator Feinstein."

So I remember — this is kind of [Laughter] — I don't know why I remember this. But I am an opera fan, by the way. I remember driving home from Feinstein's office in West L.A. on the 10 freeway, going east, singing part of the aria from — the "Nessun dorma" aria from Turandot.

MCCREERY: "No one sleeps."

MORENO: Yes, no one sleeps, and victory! Because I felt I had aced the interview, so to speak, so I felt very good about it.

I remember Judge Alarcón — what did he say? Somebody brought up that I had gone to Yale and Stanford. They might have asked something to the effect of, "Were you a beneficiary of affirmative action?" I said, "Sure I was." I knew that Yale had opened its doors to public high school students, Jews, and minorities. Before, there were restrictions, quotas, on Jews in particular.

Then I remember Judge Alarcón saying, "Yes, but what kind of grades did you get? And how were your test scores to get into Yale?" I said, "I had an A average, and I was in the 98th percentile on my SAT score." He said, "So you think that had an impact on you getting in?" I said, "I assume so." [Laughter] Besides being a class officer and all these other things. So he just wanted to point out that I just didn't get in because of minority status.

My interview with Senator Feinstein went quite well.

MCCREERY: Yes. Tell me about what you remember.

MORENO: I'm going to tell you about the cookie judge. I had an appointment with her, along with two others, to see her in her house next to the Presidio in San Francisco, a really nice area of town. I was going to go up there on a Saturday morning, and my wife said, "You should take her something." I said, "I'm going for a job interview, in a sense. I can't really be obsequious." [Laughter] She said, "No. Anytime you're invited to someone's house — "

"I'm not going to take her flowers."

"Take her something local." Eagle Rock, where we lived. Okay. We had a really good Italian bakery, so the day before I bought some cookies and made sure they didn't get stale overnight and everything else and took them. I was the first interview.

She was so delighted to get the cookies! She tells her maid, "Oh, let's bring out the coffee. Isn't that wonderful that Judge Moreno brought some cookies? Now we have something to offer the other people." [Laughter]

Months later, she agrees to swear me in at the federal courthouse, which is rare. I've seen it a couple times. I saw Senator Boxer come down once. She proceeds to say what a wonderful person I am.

When she interviewed me, she wanted to know about, could I handle a direct calendar or the flow of a heavy caseload? I said, "Yes, I've managed calendars when I was on the municipal court so I know how to handle my own calendar. I have no problem with that. I have the civil background. I can do both." I don't think she asked me about the death penalty, but she did say, "I had the California Narcotics Officers' Association check you out, and you were okay with that." I didn't say that I knew that they were asking about me.

She was very enthusiastic. My interview was, I think, on a Saturday, right? The next day is Sunday, and we go out to breakfast. My daughter, who gets up late — we come back from breakfast, and at some point she comes down and says, "Oh, Dad. Senator Feinstein called." [Laughter] Ohhhh, it's like the Chuck Poochigian call. I said, "You know, that could be important."

So I called her back. It was Mother's Day. I remember that. I called her back, and she was having Mother's Day. She said, "I'm going to recommend" — it's a recommendation — "to the president that you be appointed."

I said, "Oh, Senator Feinstein." We had been home a half an hour already, and come on! It's funny, isn't it? Yes.

Anyway, at my swearing in she proceeds to tell the cookie story. She said, "I'll always remember how kind Judge Moreno was. He brought these wonderful cookies from Eagle Rock, and now I had something to serve to the other people who were coming in." [Laughter]

McCREERY: What about the Senate confirmation process?

MORENO: After you're vetted and they set a date for your confirmation hearing, it's just amazing. You get a couple of days' notice that it *may* happen, not that it's *going* to happen. It's a nerve-wracking experience because you don't know whether it's a go or no-go.

I happened to be — was I at the office? Anyway, it was November 11. Maybe I went in to the office on Veterans Day or something, or maybe I got the call at home to say, "You're on for tomorrow." [Laughter] This was, what, 1997. And I think I got some calls in the morning: "Maybe you're on." Finally at eleven o'clock, "You *are* on. Senator Hatch's investigator is completing — and you're going to be on."

I drive down to the office. I call Cheap Tickets or whatever in the Valley. In those days you had to go pick up tickets. There was no internet kind of thing where you could just — at least I didn't have that capability of just getting tickets printed at home, et cetera. We got tickets for everybody in the family. My wife and my two kids were going to the whole thing. We're literally just throwing things in the suitcases to get a three o'clock flight. I've never been in such a hurry. We rushed to the airport, rented a room, and so forth.

Then the next day, you meet with the other people who are on calendar for that afternoon. They go over some of the questions that may be asked. You've already been prepped, by the way. Before that they send you a binder of issues and cases and what's likely to come up in a Senate confirmation. They almost over-prepare you. So you go over that once again, and then you go before the Senate Judiciary Committee, and there are maybe five or six senators up there. Fortunately, Senator Feinstein was up there. Orrin Hatch was up there. This is where I told you that Senator Hatch said, "This is one of the good ones," something to that effect.

But the funny thing about the confirmation hearing itself was I was on the end. Judge Silverman, who was nominated to the Ninth Circuit; someone to the Court of International Trade; and a couple of other district court judges. There were five of us up there, but I was on the end.

The senators would ask these questions, just general things about, "Should federal courts be supervising prisons, in terms of constitutional concerns?" Questions about independence of the judiciary and — anyway, for the first three or four questions, they always started on my end. Then the others would comment and say, "I agree with Judge Moreno. Dah, dah,

dah, dah, dah." Finally, one of the senators said, "I think we ought to start at the other end," because they were always starting with me. I said, okay!

Then, they asked me about three strikes, because I was a three-strike — and I said, "We're moving along, and we're working out the judges' discretion and so forth." The answers were all routine, and the senators don't really — they're not really that prepared, to begin with.

Orrin Hatch says something. "We're going to try to get you — " I forget what they called it, the term, but, " — on calendar for tomorrow." That's unheard of usually. They were going to vote right then and there, send us to the Senate, because I think they were going to go into recess — maybe come back for a little — but otherwise they were going on holiday, so they were going to try to rush us through. I remember calling the administrator in the superior court and saying, "Hey look, I may come back as a federal judge." [Laughter]

It turns out only Silverman — he's now on the Ninth Circuit out of Arizona — and maybe one other person — they squeezed them in, and they actually got a full vote in the Senate the next day. Incredible. The typical thing is you have your hearing. They then have a business meeting, where they actually vote, and then you go to the floor. They accelerated the process for two people.

One of things that held me up was, at the end of the day — I think we were planning on spending the next couple of days in D.C. as a family. At the end of the day, Senator Ashcroft — he of the attorney general fame — who had it for federal judge nominees because he was nominated for a federal district court and was blocked by the Senate Judiciary Committee so he wanted to make it difficult. So he submitted ten or twelve questions that he wanted me to answer, and to answer them by the next day. So I told my handler from the Department of Justice, "Okay." And I told my family, "I've got to answer these questions."

I didn't have a laptop. I said, "I'm going to write out all the answers, and I'll submit them to you. Would you do me the favor of typing them out and sending them in?" And they said okay. I spent that evening, at least a couple of hours, answering those questions. One was about three strikes, but one of them that I still remember to this day was, "What is the worst decision?" "What is your favorite Supreme Court decision?" and, "Who is your favorite justice?"

I think I said something to the effect of *Dred Scott* or *Plessy v. Ferguson*, one of those. *Brown v. Topeka*. I said, "A landmark case." Even though it was a Republican-controlled Senate and this was a Republican asking me the question, "Oh, I'll just tell him the truth."

But the one question that I thought that, in retrospect, might have been looked on with disfavor was, "Who's your favorite justice?" I said, "David Souter," who was kind of a Republican turncoat. But I said because he had been an attorney general; he had been on the New Hampshire state supreme court; and he was non-ideological. He didn't come predisposed to any case. Now, of course, conservatives see him as a turncoat. [Laughter]

But I thought it was a good answer. I said I liked that you can't really predict what these judges are necessarily going to do. But the fact that he had come from the state system I really liked as well. He wasn't an academic, per se. He was someone who worked his way up. Anyway, the questions went through, and then I don't think we got through the business meeting part until January.

MCCREERY: Were Senator Ashcroft's extra questions directed only at you — or were the other candidates — ?

MORENO: I don't know. They were probably directed to all of them, but I know one of them was tailored to me because it dealt with three strikes. But that was the only one that — yes. So I've never really felt good about that because I had a chance of being confirmed the next day without any hassle.

So everything was deferred until January and voted on. Then it was a matter of when am I actually going to get confirmed? That happened pretty quickly, though, then, I think because Hatch was cooperating with Senator Feinstein. I had had the experience of Judge Paez waiting — it was for the Ninth Circuit he waited four years to get confirmed. I don't think he had much trouble for the district court.

But the nice thing that Senator Feinstein did for me — in fact, when she swore me in in April — I had already been sworn in by Judge Terry Hatter, who said, "Isn't it remarkable that — " I think he was the first African-American chief judge swearing in — not the first Latino, but swearing in someone like me, " — who was a sea change in the court," or something to that effect.

But Senator Feinstein — I wonder where this thing is — she had the manual tally of all the votes on the floor. Actually it's in pencil, and it's a sheet like this, and it was ninety-six to nothing. So I can say I was unanimously confirmed, and the reason the other four — they were absent. So there was an actual vote. It wasn't a voice vote, like it was for the ambassadorship, a voice vote. But here they actually recorded their votes in pencil. That's pretty nice.

McCREERY: Congratulations.

MORENO: Thank you. Hey, so I can say I was unanimously confirmed for the district court and confirmed for the ambassadorship by a voice vote.

McCREERY: Justice Moreno, you've just described being brought into the federal trial court system. I wonder, what was the transition part of the process? You mentioned you had some cases to finish up and see through.

MORENO: Yes. The transition was quite smooth. Again, I was just moving across the street, essentially. I had my pick of chambers, which had a full fireplace so it was nice. I just remember doing the basic things: setting up my chambers and arranging my cases.

The way that the federal court distributed cases for a new judge was there was a formula, where the current judges could give a certain number of cases to the new judges, something to the effect of — they were categorized by patent cases, other intellectual property — this is all the civil cases — but it was always rumored that — well, one, you couldn't send a case over that you had completed substantial work on. But it was rumored that the judges would send you their dogs. [Laughter] By "dogs" I mean the difficult cases they didn't want to handle. What was I to know?

So I get boxes of cases that come over, and most of them were fairly routine, not anything difficult. But there were a couple of cases I got that I should not have received. I think they took advantage of me. [Laughter] One case, which eventually became my first trial — I don't know, it had some five or six boxes. The trial judge, who I will not mention, had decided several motions for summary judgment, and the case was very active, big firms, involving six patents, patent infringement and patent invalidity issues, about which — I had never really done any patent loss.

I got another case, another big case — again, many boxes — involving defense contracts and so forth that, again, the judge had done substantial

work on. So I felt this was just part of the initiation ritual, just like on the superior court. And I didn't get a lot of patent cases because you were limited. There's some control over that, but in terms of the discretion as to what cases to send over, I think there was some abuse there. [Laughter]

But I began calling cases. Oh, here's one thing I did, one thing that I did and I've always recommended to new judges in federal court. "Do not continue any case you send to me because you think I need time to get up to speed." In other words, don't put a case over so that I can review it. Just keep your dates. I would rather do the up-front rush of cases and handle them myself rather than deferring the judgment day, so to speak.

I think I sent — maybe I told my clerk, "Do not continue any case." Because that was also routinely done. "The case is being transferred to Judge Moreno. We'll give you a new date." I said "No. Just send them over." So we had a lot of cases in the beginning.

MCCREERY: How did you come to that decision, though, not knowing what all was coming?

MORENO: Just faith. And I'd rather deal with it now rather than later because, again, my philosophy was no continuances. My calendar-management brain said the continuance just leads to something else.

The other thing was that I wouldn't have anything to do if they put it over. I sat around. I think I was sworn in in February. I didn't have my first trial until June. So I said, "When do you work around here? I'm here. I'm reading files." I was used to being in trial and just moving cases along. So that was probably the principal motivation, that I just wanted to start handling cases right away.

I remember bringing the lawyers on this big case, and I said, "Are you going to settle this case?"

"No. No. We're really going to trial." I said, "Really? Okay, here's your date." I gave them a June trial date. I said, "I'm not going to continue this case." [Laughter] They said they were ready. They had a few motions. We decided the motions, and then we just went forward. This was when I learned that there had been other summary judgment motions filed and decided by the trial judge, and I wondered why he sent this case over. [Laughter]

So anyway, I was anxious to get into the mix of things. Then the criminal cases would just come fresh. They would come from the arraignment

court, they were assigned to me, and I would just deal with them. I shadowed a number of judges for a couple of hours to find out how they handled their calendars, and I handled my calendar accordingly.

My sense always was give the lawyers a lot of time to try cases; have a fixed time when you do things; be on time; very structured so that everyone is happy. My staff is happy. They know what to expect, and the lawyers know what to expect.

Because I always feel that predictability of what the judge is going to do should not be an issue. The judge should be very predictable in terms of his schedule, how he treats people, how he treats his staff. Because I learned early on that people have other lives other than being in court, so break at noon, start at one-thirty, and quit at four-thirty. And you start on time at nine o'clock.

I had my civil motions on Mondays at nine o'clock, and those would be done by eleven. I would do all my criminal sentencings at one-thirty, and then I had trial time from Tuesday to Friday. So if you came into my court, you were going to get full days — and lawyers were shocked that they were going to be moving along quite expeditiously.

McCREERY: I wonder how this compared to what other judges there were doing?

MORENO: There are all kinds. [Laughter] We also shared statistics there and also aging. Some judges did not manage their calendars very well. Some did — some really, by hook or by crook or by just being stern or mean or rocket docket — they were able to move their cases quite fast.

I learned quite quickly that I had to resolve thirty cases a month to stay afloat. Because we were getting thirty cases in, I had to get thirty cases out. So it was always my target to settle cases, issue orders to show cause for a dismissal. What's going on in this case? A lot of time the case will be settled, and they don't let you know. It's still on your docket.

I had externs, and I had them manually go through every single case on my docket, along with the assistance of the court deputy. I recommend this to federal judges. It's probably all electronic now, but I like to see the file, and the file had to be up to date. There had to be a future date. If there wasn't a future date, what's the status? I'd send out orders to show cause.

One month — maybe the first month or second month — we resolved fifty cases, which is a lot.

They would come back, and we'd find out it's been dismissed. "Okay. Thank you for not letting us know." Off the docket, off the docket, off the docket.

I also trained my courtroom deputy, who was new but a hard worker. I said, "Don't ever accept anything that a lawyer tells you verbally on the status of a case. Like, 'Oh, we're in the process of settling it.'"

"You're still on for next week." [Laughter] She'd say, "Send me a stipulation that it's been dismissed. And no stipulation to continue. The judge doesn't accept those." [Laughter]

So you put their feet to the fire. "You have a firm trial date." There has to be something extraordinary. That's the attitude I had — in a nice way. I'm not being mean or anything. But I was very hands-on.

Again, I implemented the same system that I had in Compton and in superior court. I knew exactly how many cases I had set for trial. I would have my clerk call — we'd have pre-trial conferences, very extensive — where I deliberately — and this is maybe ten days or a week before trial. They had to put in a lot of work to show me they were ready to go. Instructions, statement to the jury, motions *in limine*, anything that — I can't remember the litany of things I required to have — jury instructions — to make them work to really get ready for trial. Because they were going to trial.

Again, lawyers facing that prospect would then start to see the light with their opposing counsel and say, "We're going to trial. We've got to get ready for trial."

There's a phrase that I use here, actually, about encouraging people to settle and that the best time to settle a case is early in the process. I mean, do some discovery. Ninety-eight percent of the cases settle anyway. The lawyers have to do their thing. But in mediation I say, "Litigation is like Medicare. Ninety percent of the expense is incurred in the last two months of life." [Laughter]

Everybody looks like this! I've seen teams of lawyers work on a case. They're spending a lot of money to get ready for a trial, and they'll even settle at that point. So in order to avoid that — I say that, but I knew, practically speaking, as a district court judge I made them work to be ready at the pre-trial conference to go to trial the following week. I think lawyers,

the real trial lawyers, like that, especially if a case just had to be tried. I had no hesitation about going to trial.

I remember talking to Judge Rafeedie, who is a very stern, no sidebars, no motions *in limine*-type judge, very intimidating. You either loved him or you hated him. But his clerk used to call me "Little Rafeedie," not because — I was more personable than he was by a long shot — but because I had my hands on my cases.

I found that civil lawyers are not used to that, and many of them, I learned then — this is over twenty years ago — they don't get much civil trial experience, even partners in big firms. They just don't have that comfort level of walking around — well, you don't walk around in federal court, but of just being able to lay a foundation for an exhibit. They don't get that kind of experience anymore.

So coming, as I did, from the city attorney's office and from the criminal courts, this was the way I expected lawyers to be prepared and to conduct themselves in court. I was surprised that even the U.S. attorneys did not have that comfort level because they didn't get enough trial experience. One lawyer walked into the well, and I learned that as a city attorney. You don't do that.

I would say, "All right, counsel. You know that you're not supposed to walk into the well." They didn't know. Then I would explain that the reason for that is, in the days of medieval times you couldn't get that close to the judge. You couldn't get within sword's length of the judge. [Laughter] You had to stay back. Things like that.

The other thing is that at the pre-trial conference they would say, "Your honor, in terms of the witnesses do you think we'll get to testimony in the first day?" I said, "Counsel, you're going to be making your opening statement at ten-thirty. I'm going to voir dire the jury."

They would submit questions to me. There is no voir dire by lawyers, and I really did a good job, I think, of covering it. I did the six-pack, the way I used to do it. And within civil cases, I forget how many peremptories, six and three? I mean, hardly any. And you didn't have to have twelve on the jury. You could have less than twelve. I was in heaven, really, that I could have a jury of less than twelve — in a civil case — and be able to pick a jury out of the first eighteen.

I said, "Jury selection will take, at most, forty-five minutes or so. You'll be making your opening statement." Then I remember one lawyer asked my clerk, on another case. We're just moving along, and he says, "Doesn't the judge have anything else to do?" [Laughter] She really picked up on my attitude. She goes, "Counsel, the judge is focusing only on your case. There's nothing else on his mind." [Laughter]

I mean, if they had a good reason and the case was going long and they wanted to finish at three, I said, "Just let me know in advance. But be prepared. We're going to go until four-thirty."

Similarly, if at noon — and this may sound too strict, but I did it for my staff — they would say, "Your honor, we know it's the noon hour, but I just have a few more questions." I'd say, "Counsel, you can take all the time you want — at one-thirty. Because if you ask a question, they're going to want to redirect. Then you're going to want to re-cross, et cetera. Your two minutes is going to be twenty minutes." I said, "My staff has things to do."

The same thing at four-twenty-five or so. And maybe if it was an out-of-state witness. Maybe. But, "Your honor, I just have a few more questions. Can we go beyond four-thirty?"

The same thing with jurors. I'd say, "I know you've been in other courts where you don't start on time." I said, "We start on time." And I would bring the jurors in at nine o'clock, whether they were all there or not, and we'd just wait for the late juror. They were never late again.

All they want — it's almost like managing kids, in a sense. You just want them to know what to expect and to know that the rules are the rules — in a nice way. You don't chew anybody out. But people want to be good jurors. They want to be good lawyers. They want to be on time, generally. So they'll comply as soon as they realize that the trains are starting on time. That was my philosophy. I think that's why I enjoyed the trial court so much.

People ask, "What did you enjoy most?" I say I enjoyed the district court probably the most, just in terms of contact with people, having cases before me where there was some suspense, a little juror misconduct here and there that you had to deal with. [Laughter] So it was fun, and it's like being a director of a play.

But on the Supreme Court I obviously had more impact. But you are just reviewing the record. You're deciding important cases, but in terms of

enjoyment it's the trial court, where in a sense I felt more engaged, in one way, just because everything is happening and you're hands-on in managing your calendar, whereas on the Supreme Court your calendar is managed for you, basically.

McCREERY: Yes, precisely. What did you look for in selecting members of your staff?

MORENO: First and foremost, one, ability just to get along with me and with lawyers. I told my courtroom deputy, who was new — she was a trainee, and this was her first courtroom position — I told her, and most judges will tell their staff this, "You are a reflection of me. Courtroom deputies have a bad reputation for being — " I don't know if I used the word "Nazis," because she was German. [Laughter] — I said, " — of having bad reputations. I don't want you to project that."

I said — this is my quote — I said, "We are a user-friendly court. So don't be standoffish if a lawyer asks a question, unless they're very rude or something. But you try to help them." I said, "They're afraid of you and even more afraid of me. So from that standpoint, you help them and ease them along. They're confused, or they want to know how we do things."

The same thing with the court reporter. We got along great. She was very friendly and didn't need any type of coaching in that respect. I remember one instance — she was very outgoing, and she really bought in to my system. We had a witness on the stand in a trial who couldn't read a document. She said, "Oh, I'm sorry. I didn't bring my glasses." [Laughter]

So my courtroom deputy literally gets up, walks over, takes off her glasses, hands her glasses to the witness. I guess they were reading glasses. The witness says, "Oh, that's much better." As my deputy was walking back to her seat, which was right in front of me, she looks at the jury and says, "We are a user-friendly courtroom." [Laughter]

It was a lot of fun, yes. No, I enjoyed it. I was prepared on the motions. I was not a "chatty" court, although I always made sure I was making a record. I know some judges, believe it or not, cannot make a decision. They need to hem and haw and go back and forth. They go back and talk to their law clerks. They come back out. They hear some more, and they go back and chat some more. They come back.

I would issue a tentative — not a written tentative — and I would always let the losing side know. I would say, "I'm inclined — my tentative is such-and-such. I'll hear from you first," the losing party, and they would try to persuade me otherwise. Then I'd hear from the other side, and I almost always would stick with my tentative, probably 99 percent of the time. I would say, "Let me give it some more thought. You've raised some good issues." But I would try to take care of it right away.

McCREERY: Say a bit more about the range of cases. You mentioned trademark, patents, and other things that you maybe hadn't worked on so much.

MORENO: Yes. You know, the nice thing about the Central District of California caseload is it's very diverse, unlike some other courts like the Southern District, San Diego, which is just overloaded with immigration and criminal cases, very little civil.

We had here a lot of IP cases, patent cases — for which now there's a special — I think two or three federal judges are part of a — it was a pilot program originally. I think it's no longer a pilot program, but they specialize in handling patent cases, along with other cases. They get some credit for doing that.

But patent, trademark, trade secrets, copyright, big defense contract cases, entertainment cases out of Hollywood, the entertainment business, big drug cases, a small diet of immigration cases, but not so it overloads your docket. From my perspective it had a good diversity of cases, really, to make the work more interesting.

When I was there the cases came in pretty fast, and you really had to work on resolving cases and set a target for moving cases along so that you wouldn't be overwhelmed. My caseload always hovered around 300, which was pretty much manageable. But there were some judges who had 500, even 600 cases. These are just civil cases. So you wondered about that. [Laughter]

And there's no ninety-day rule like there is in state court, where once a matter is submitted the court has to decide the case. Federal judges can take whatever time they feel they need to decide a case. That part — I really wanted to know why I had aging cases if I had any and, again, would review those and find out why this was taking — why it's not settling. There had to be a good reason why the case was sitting around.

McCREERY: You mentioned a few minutes ago the U.S. attorney's office, and I wonder if you could talk a little bit about the representation that you were seeing in court.

MORENO: Yes. It varied, the newer lawyers, obviously, were a bit green, and they didn't have that, what I call comfort level, in the courtroom. And also, I think overall the training is to be very formal and deferential to the court. That's just a tradition. It's probably true across the country. Generally, in terms of intellectual capacity, I would say, and knowledge of the law, I think it's better even than the D.A.'s office. It's kind of a higher level of practice.

But in terms of the actual courtroom experience, they just don't get it so they don't have the comfort level that a D.A. would have. And the cases are much more complex, generally, and they take fewer cases to trial. So I tell non-lawyers that anytime the feds get involved and there's an investigation or an indictment, it *really* is being investigated. There's none of this slipshod or inadequate investigation of the case. They go forward with the strongest cases. Very formal.

The federal agents, FBI and others, are just in their fields more skilled. You're not dealing with an ordinary patrolman. You're dealing with someone who has been trained quite extensively in their practice and level of investigation, and so forth, so it has that quality to it.

McCREERY: And I assume the federal resources were such that these longer and more in-depth cases could be supported?

MORENO: Yes, right. Yes. One thing where I think that the state courts have a better system is in terms of judicial education. There is a Federal Judicial Center for education and the opportunity to take refresher courses throughout the country. But overall, the — I think it's called CJER [Center for Judicial Education and Research] — I felt that it was superior. We had judges teaching judges and, at least back when I was on the state court, a very extensive training program.

So I know that, as a state court judge, we never felt any need to go to, what was it? The national judges' college in Reno, Nevada. California, really, I think, took care of the judges in terms of education and programs. I went to a few federal programs, and I just felt the state system was better.

MCCREERY: What about your fellow judges in the federal court? Where did they tend to come from, and what kind of careers had they had, for the most part?

MORENO: I think that has changed, but when I was there it was, I think, in a transition period from what I would call old-school judges and senior judges, many of whom had been assistant U.S. attorneys or U.S. attorneys themselves. They were schooled when the federal bench was very small. Caseloads were smaller, so they were much more formal and demanded much more deference and respect. Some had been superior court judges, but not many.

I came in when there were more superior court judges being elevated to the federal system and who brought a fresh perspective to being a federal judge. So I would say, on the whole, maybe a little bit less formal, more willing to tolerate or change some of the traditions. Collegiality was — it all depended. In some cases there was a vast age difference. So that, like it or not, proved to be an impediment. We had monthly meetings, I think.

Oh, here's a funny story. I went to my first judges' meeting, and it was literally just down the hall. There were maybe fifteen of us, a dozen of us. We'd bring in the U.S. attorney or someone to talk to us or just get an update on what was going on.

I just walked down, out of my chambers, and after we finished lunch one of the senior judges, a nice guy, Bill Rea said, "Oh, I see you forgot to bring your coat." [Laughter] I said, "Oh, yes. Yes, I just walked down the hall and I didn't think about it." But then I knew, even if you're just walking down the hall and you're just having an informal brown-bag lunch, you bring your coat. And you always wore a tie, of course.

MCCREERY: An important detail.

MORENO: A good detail, and it reminds me of my old firm. When it merged with Kelley, Drye & Warren out of New York, I was told that the outside of each office had "Mr. Booker" or "Mr. Smith." If you left your office to go down the hall, you put on a coat. The L.A. office was not that way, but I'm told the New York office was like that. So it just reminded me of some of the formalities in some of the old established firms and, evidently, in federal court.

I doubt now, if I went to a judges' meal — I'm going to ask: "Do you still have judges' meetings," where not everybody attends, "and if you go, do you have to wear a coat?" Now, of course, there are more women on the bench.

McCREERY: I just wanted to ask about women colleagues and how prevalent that was becoming in the federal court?

MORENO: Becoming more prevalent, certainly. Judge Marshall had been on for a while. Judge Phillips. Judge Manella came on board. Margaret Morrow came on board. Judge — I'm skipping her name right now, but others. There weren't that many. There were more men than women on the bench. I don't know what it is now, but it's certainly progressing in that respect.

McCREERY: And then the presence of Latino members, African-American members? How did you see it in your time?

MORENO: Again, very few. I think it was me and Judge Paez. Lourdes Baird, who's Latina, from Ecuador. Then Judge Marshall. Why am I forgetting the chief judge? Terry Hatter. I don't know if there were other African-American judges. Again, I think that has changed somewhat, but still there aren't that many positions, so not that many minorities.

McCREERY: I wonder to what extent constitutional issues would arise for you in the course of this work?

MORENO: I can't remember any right now. But my two notable cases that I remember when people say, "What kind of cases did you decide?" One was an emergency case where L.A. County was going to deport a victim of a sexual molestation by her father, who was in prison, and who had been abandoned by her mother, who was now in Russia. The department of dependency, child welfare, was going to deport her with a social worker back to Russia without any kind of placement in effect.

I remember either the public counsel or a children's rights organization came in, and I issued an injunction that they could not deport her. She was going to be deported the next day on a plane. They had tickets and everything. I said, "No. You have to make an effort to place her."

She had been here I don't know how many years, was the victim of a crime, so maybe under the Violence Against Women Act, she could benefit from that and a number of other things. But I still remember that case.

The other big case I remember was one that made the *L.A. Times*, and the *L.A. Times* called it an astounding decision. The NLRB came in to seek an injunction against a jewelry manufacturer here that employed 200 Latino women. They were organizing, and the owner of the company said, "If you vote for the union, I'm going to close this shop and we're going to move to Mexico," to Tijuana.

Trucks had already started moving their inventory and maybe some of the equipment to Mexico. I issued an injunction: "Stop. Those trucks are ordered back." That made the paper, but it was a clear violation of the NLRA, and it was clearly done as an unfair labor practice to interfere with organizing activities by the union. That's when I really felt the power of a federal judge, that you could stop someone from getting on a plane, you could stop trucks from leaving the country if those actions were either illegal or not in the best interests of the child.

McCREERY: I think you mentioned some differences in the sentencing in the federal courts, and I wonder if you could just talk about that a bit.

MORENO: On the state side, felonies, you have these sentencing rules and you're having to make a choice among three options. In federal court it's a bit more structured, like everything else, and there are sentencing guidelines that take into account, on one axis, the criminal history, and on the other various factors, like the amount involved in terms of drugs or money; breaching trust of the victim; acceptance of responsibility. There are more malleable factors, and it's really just a grid. You have criminal history, there, these factors and mitigation or aggravation, and you end up here. It's pretty straightforward.

There are guidelines, so then you can depart. Acceptance of responsibility was minus three points. Then you come up with a sentencing range, and then within that range you can pick: sixteen months or twenty-four months or whatever little box. [Laughter]

I just found, and I pretty much feel this way, and I tell trial judges this all the time: "Just make a record. Explain why you're doing something. If you have a good reason, they won't reverse you and the prosecution won't appeal you if it's not a real abuse of discretion."

Sentencing is a little more difficult in federal court because of these guidelines, but also because you're dealing, generally, with white-collar

crimes, people who have families, no prior criminal record, mitigating factors that might appeal to your sensibilities. Or you might say, "You more than anyone else should know that you shouldn't have done this." So you had some leeway there.

I think overall I was a pretty moderate to easy sentencer. I did give some life sentences. I didn't believe in mandatory sentences, but I think I did probably give a few of those in the big drug cases. It's like, this is a long time, and in federal court you serve 85 percent. None of this "good time work time" stuff. So anyway, I adapted very well to the federal guidelines.

The other thing that I would do — and there are different practices on this — is a lot of the judges now waive oral argument. They don't have hearings, and that's kind of unfair. My practice was, if I'm going to grant a motion with leave to amend — what's called a 12(b)(6) motion — like a demurrer, a motion to dismiss — I would just take those under submission and not have them come in.

But on any significant or certainly on any dispositive motion, like a summary judgment motion, I would not waive oral argument. I'd say, "I want oral argument." So I would always err on the side of having a hearing — which I think, if you check now, probably more and more judges do not even have hearings on motions, and I think that's essential. I still do. I liked oral argument.

McCREERY: Talk about, in more detail, why it is important, in your view.

MORENO: You want to clarify in your mind that your ruling is correct. The lawyers are often better in explaining something that they haven't explained enough in writing. My law clerks would recommend, "Hey, let's hear from this guy. What does he mean by that?" and would prepare some questions for me on a point that was not entirely clear from the papers. Maybe there was something in the record I don't know.

But I would say maybe 80 percent of the time I would have oral argument. I would have the hearing. I felt it was fair to them and to their clients to actually come in to court.

So it was the Wizard of Oz deciding the case, and, "Here's my ruling." I mean, you would explain the ruling. The rulings in the federal court are very detailed. That's the tradition here, too, several pages in deciding a demurrer or something.

So anyway, at nine o'clock — this was the word from Judge Lew, my colleague — nine o'clock motions, ten o'clock status conferences, pre-trial conferences, where I would say — maybe that's when I would give them — and I would give them a trial date and a pre-trial conference date. They would submit joint statements on time estimate and what motions they anticipated, and just the whole thing. It could be anywhere from a three- to a six-page document.

I would work on those, usually, on a Sunday, the day before. I did all that myself. I didn't have the law clerks do any of that stuff. Just to get a feel for the case and how much time. And I always set a presumptive trial date of within one year of everything.

So that was at ten o'clock. This was on Mondays. Then at one-thirty I'd have my sentencing. I did all the sentencing preparations myself, just like I did the pre-trial stuff.

And then actually, to this day, I still manage my calendar that way. [Laughter] A few days — maybe like on a Wednesday, I look at my next week to make sure. Sometimes I miss things, but overall I want to know what I'm going to be doing next week.

MCCREERY: A while ago you mentioned in passing Proposition 187 and the fact that that was tried in your court — at an earlier time, of course. I wonder if you'd be willing to just reflect on the passage of that proposition and how it played out and how that resonated with you personally?

MORENO: Personally I thought it was overbroad, going too far. I knew the lawyers who were arguing that, from MALDEF, but I would say from a personal standpoint my sympathies were with the petitioners in that case, to set it aside. They drew a very stern liberal judge, Mariana Pfaelzer, who just passed away a couple of years ago. But I can't remember much direct impact on my court. I don't remember any personal thoughts about it other than thinking that it's a good decision that she made and an unfair proposition.

I had just some concern about the propositions generally, particularly on the Supreme Court. I just thought that — whether you're talking about gay marriage or how easy it to amend the state constitution to letting a simple majority decide things like housing issues, immigration issues — it's

not something that I think that the whole reformist-proposition structure was designed, really, to affect or to be involved in these issues.

So I'm very skeptical about propositions generally and particularly how easily the public is manipulated, how misrepresentations are made in getting those signatures, getting the votes to pass those. So there's a whole thing. Issues are not vetted before any kind of legislative committee. No studies.

I think that Hiram Johnson and his followers would be probably rolling over in their graves if they saw how easily our constitution is amended and how the process has been abused. I can decide a proposition question, I think, fairly, but I just don't like the way we do it. And it's too bad because when you submit things to the voters, there's a lot of mud thrown out there and statements and a lot of misinformation, and the public doesn't really know what they're voting on.

McCREERY: Thank you. I appreciate you reflecting on that. What else would you like to say about the Central District Court before we wrap up?

MORENO: I think that's really about it. One, I was very happy to be there. I thought that was going to be my last stop on the train, and I really saw myself growing old and going senior on that court. But I did learn, kind of a year before my actual nomination by Governor Davis, that I was being vetted for the Supreme Court when Justice Mosk — when and if he decided to retire.

I was at an Inns of Court function, and someone introduced me and concluded by saying something to the effect, "possibly our next member of the California Supreme Court." [Laughter] It was a shock to me. Where did they hear that?

Then I started following Justice Mosk and his plans — that he wanted to have — I'm sure he had the most opinions, twelve hundred and something — maybe he wanted to be the longest-serving justice. I think he served thirty-seven years, and he just wanted to eclipse that. There was something that he was waiting for, so it was kind of known that he was going to retire. I found that out.

I later learned, in having lunch with the appointments secretary, Burt Pines, who I had worked for — we would go to lunch occasionally, and he would ask me about different people who were applying for the bench. Later, when I was being considered for the Supreme Court, when he called me

about if I was interested, he said, "You know, when we had those lunches you were talking about other people but I was really checking up to see how you were doing." [Laughter]

"Nice of you to tell me that now. Checking me out." Then I learned from a couple of other people that he had called them. He had called the U.S. attorney, Mayorkas — Ali Mayorkas, Alejandro, yes — called him and asked about me. Because then Mayorkas told me, "Oh, I got a call from Burt Pines. Is that something you're interested in doing?" I said, "Maybe. I don't know."

Then when Mosk died in June of 2001 on a Wednesday — maybe he died on a Tuesday, and I found out in the paper on Wednesday — I said, we'll see now if these rumors are true. I had heard there were rumors that I might be considered, along with others.

So I got prepared and thought, gee, do I really want this or not? Do I want to be one of seven? How am I going to handle commuting to San Francisco? What do I have to do? What about the 1986 prospect of being on the retention ballot?

MCCREERY: "Do I want to give up a lifetime appointment?"

MORENO: Yes. I remember talking to someone at the — it was the U.S. attorney. He says, "That's not a difficult decision. Either way, you're fine."

"But I have to decide." Then, I remember, Burt Pines called me two days later, on a Friday, like around five o'clock. He reaches me and says, "I'm glad to hear there are some federal judges who are still on the bench at five o'clock on a Friday." [Laughter] I said something like, "I'm working on my Monday calendar, and I don't want to come in on Sunday, as I usually do." He says, "Oh, okay, good. Well, the governor wants to consider you."

There had been an article in the paper, maybe that Thursday, and they listed a number of people. I was the last one, like a dark horse. I forget who the names were. Maybe it was Perluss and Mosk and a few others. I said, "Yes, well, Burt, I thought when I saw that my name was mentioned — " He said, "Don't pay attention to any of that stuff. Those are the usual suspects and people who are promoting themselves." He says, "You're where you want to be," like, way at the bottom. "Do you want to be considered or not?"

"Okay."

"Can you get your application in by Monday or Tuesday?" So I had an extern work on it from my previous judicial applications and updated it and got it in. Then I think he called me again and said, "We're going to add a couple more names. I'm just giving you the heads-up." I think Perluss, Perren, and Cornell. He says, "The governor just wants to have some choices."

I said, "Fine." Then I studied that. [Richard] Mosk was going to be a direct appointment, from being a lawyer to the Supreme Court. Perluss was on the superior court, so he would skip the appellate court. But a brilliant guy, a lot of support, but had been a judge only two years and had done barely any felonies.

Then this other judge, kind of an unknown but had been a trial court judge, I think, and was on the appellate court. So ultimately there were four of us who were screened and everything. We went through JNE[7] right away, and the rest is history. [Laughter]

McCREERY: But you had to think about it a little bit, did you?

MORENO: Oh, yes. Oh, yes. I thought about all those factors, about whether I wanted to be one of seven. But then I said — and also leaving the federal bench to the state bench. Judge Lucas had done that, but probably in every state in the country you would move from the state supreme court to the district court or maybe the circuit court, just because it's a lifetime position.

The pay generally was better for federal judges than it was in most state courts. But the pay here, actually — the state Supreme Court was better than the district court at that time. They've since been adjusted. I know the state court system. I confirmed that I would be able to go into the JRS I retirement program, be able to reenter that because that was a very good program and it had changed. I think it was JRS II then. In fact, one of the judges here, George King, I talked to him.

He said, "Carlos," and he's a numbers guy. He says, "If you go back to the state court system, you have eleven years in — seven plus four — you can have your twenty years and be sixty. You can retire at sixty-one from the state Supreme Court. If you stay here, you have to stay here until you're sixty-five. You'll get your federal pension plus your eleven years on JRS I. But it you're able to retire at sixty-one from the Supreme Court, you'll have

[7] Commission on Judicial Nominees Evaluation (JNE) of the State Bar of California.

your twenty years in. You get — " a 75 percent retirement was equal to what a federal judge's retirement was.

He says, "You'll be so marketable. You're still fairly young at sixty-one, and you won't be grouchy waiting until you're sixty-five, like a lot of federal judges. And you can do anything you want." I always tell him, "You're the one who convinced me. From an economic standpoint it was not a loser, or a money loser, to go back to the state system."

Of course, I didn't, at age — what was I, fifty-one or so — I didn't have to stay fourteen more years in federal court. I gained four years of marketability — and to be on what I think is the most prestigious state court in the country.

Then I was very fortunate to be able to serve on that court at a time when, even though I was the only Democrat by party affiliation, we got all these really interesting issues and where the Court was pretty much very moderate, and you could be a swing vote, as played out in the gay marriage cases and some of the arbitration and class-action waiver cases that were 4–3.

McCREERY: And indeed, you emerged as a swing vote fairly early on, did you not?

MORENO: Yes, right. Yes. Me and the Chief. I usually sided with the Chief, so I was part of that coalition, so to speak, of four votes. I guess as, maybe it was Ron George or one of the chief justices said, "No, the swing vote can be anybody as long as you're part of the four." It's not necessarily the Chief. He's got to have someone join him. Yes, so overall, I said, okay. I took the leap. People wondered, "Why would you leave the federal court?" and so forth.

McCREERY: As an aside you mentioned that this vacancy on the state Supreme Court was a result of the death of Justice Stanley Mosk. Did you ever know Justice Mosk?

MORENO: I did not know him personally. I remember seeing him at a CJA conference and the awe and reverence my colleagues had for him. I really had not known much about him or the fact that he was the only Democrat on the Court. I really didn't know much about him.

As I learned more about him later, because his judicial assistant became my judicial assistant, she filled me in on a lot of his history and so forth. And of course I learned, when I was on the Supreme Court, how

incisive and well-written his opinions were and what an icon he was on the Court. But all that came later.

So I have to say that when I was on the Court I was influenced by his decisions. I always looked to them for guidance. One of my staff members had been on his staff, so I got more insight about Justice Mosk that way. And of course I learned a lot about the Rose Bird era and how Mosk felt about that, and so forth. But a remarkable career. He started here in the L.A. Superior Court, to attorney general, to the Supreme Court. Yes.

McCREERY: He was said to have quite a political savvy, too, including at the time of the 1986 election.

MORENO: Yes. In fact, Pat Sheehan, who was his assistant and mine — the way he campaigned was he just said, "I spent some money on a few postage stamps and, in my spare time, visiting newspaper editorial staffs throughout the state." So low budget, but face-to-face contact. That's the way he ran the campaign.

McCREERY: You've spoken a little bit about the vetting process that led you to be a candidate and ultimately selected by Governor Davis. What interaction did you have with the governor himself in all this?

MORENO: Okay, good question, because I did meet with him for about three hours, a pretty extensive interview, with Burt Pines present. He did ask me about the death penalty, so that litmus test was asked. I said I had no philosophical reservation about affirming a jury's decision to impose it in appropriate circumstances. In that sense, I was not going to be a Rose Bird.

We just had a broad-range discussion: personal history, schooling, where I grew up. Just everything, wide-ranging. I think he had interviews with the other candidates as well. I've never talked with him about what was asked of them, but Burt Pines always said I was his choice, his number-one choice.

I don't remember much about the interview, other than I remember the death penalty. Gay marriage was in nobody's mind at that time — civil rights or affirmative action. Maybe he asked me about affirmative action. I don't remember. But he was very happy that I'd been appointed by two Republicans, just like Senator Feinstein, that I had been a prosecutor.

Burt Pines later explained to me that Governor Davis was not a practicing lawyer, so he did rely a lot on Burt Pines for that kind of background,

and that he was just a very law-and-order kind of guy. He was very cautious, and he didn't want to repeat — he was chief of staff to Governor Brown the first term, so he didn't want to repeat — and I think I was his first and only appointment to the Supreme Court.

He told me later that, of all the things he did — maybe he was just telling me — he was most proud that he appointed me and that I had "pitched a perfect game" in the sense that, not only did I get the highest "exceptionally well-qualified" rating, but that it was unanimous. I've seen him a couple of other times, and he's very happy with what I did on the Court in terms of gay marriage and other things.

Oh, I think all appointments secretaries, and maybe him more than others, had a great influence in making recommendations. Justice Baxter told me that he didn't make the recommendation. He would just give Governor Deukmejian three names for all appointments. I questioned that. It would just take too much time. [Laughter]

And with Governor Davis, I think he was cautious in these things, and Burt Pines was a very cautious person himself so I think the vetting process that Burt went through was very thorough, very thorough. I think when he made a recommendation, I think pretty much Davis would go with it.

MCCREERY: I wonder if you could talk a little bit more about the actual confirmation and oath and the official start of your career as a Supreme Court justice?

MORENO: Some of my concerns about saying yes, though, were being a federal judge and being the master of my own courtroom and having that kind of — not completely unilateral power, but it's different when you're a trial court judge, especially a federal judge with a lifetime position, the power to issue injunctive relief, and so forth. I was really entirely happy doing what I was doing, serving in a courthouse within a mile or two from where I spent most of my life and where I was born. I can't emphasize how comfortable I was. [Laughter]

So it was a big decision to decide to be considered for the California Supreme Court, which would involve some commuting to San Francisco, and I really didn't have that all worked out. But primarily serving on a court with six other individuals who I really did not have a personal relationship with.

I knew the chief justice a bit. We had taken a government-sponsored trip to Mexico to explore their judicial system and also to learn more about their concern about Mexican immigrants in the United States. I had a high regard for him. I can't recall if I ever appeared — I think I appeared in front of him once when he was on the municipal court in Los Angeles and I was a deputy city attorney back in the seventies. But I had a high regard for him.

As far as the others, I really didn't know them. So my thinking was, "I'm in a courtroom where I'm basically the boss, and I'm going to be working with six other people trying to forge a majority."

I was a little bit cognizant of what had happened a little over a decade before that, in 1986, when the three justices were removed, and even Justice Mosk was on the ballot that year. So the question was, do I want to sacrifice the security of a lifetime appointment for basically a twelve-year appointment? — which initially, I think, is a two-year appointment in terms of facing the electorate.

I felt fairly good, though, about surviving any kind of retention challenge if one might come about. But I felt that my record — that might be looked at in terms of my superior court and municipal court service, and even my federal service — that I would be fairly secure, having been appointed by two Republicans. I had a strong background in criminal law as a result of my previous state court appointments. I had good civil law experience based on my work with Mori & Ota for seven years doing business litigation and then having a strong record in terms of civil matters in the federal court.

The only thing I lacked was really significant appellate experience, so I thought, well, I might be challenged on that, not by the electorate but by the Commission on Judicial Appointments and the vetting that would be done through JNE. In fact, that was the only criticism that I received, that I didn't have any appellate experience as an advocate.

But I did have some appellate experience in terms of reviewing trial records on federal habeas petitions, particularly death penalty cases, and some bankruptcy appellate experience — both very limited, but still I could say I've done appellate work. I reviewed what trial courts have done and either affirmed, reversed, or remanded those. Looking back on it now, I say I overcame that deficiency.

I said yes. I have not looked back, and I never really looked back. It would be a tremendous honor to serve on the highest court in a state like California, which is the largest state, really, in terms of population and whose opinions I had studied when I was in law school, opinions of Justices Mosk, Traynor, Tobriner, Gibson. I felt, gee, I'm going to be in the role that those justices were, on a leading court in the country. I really didn't have to think very long.

There was a concern that, after Justice Arguelles left in 1988, I believe — following the removal of Justice Cruz Reynoso in 1986 — that there was this void in terms of, particularly, Latino representation on the Court, so I think I had an edge with respect to that.

I was the first call, and then just to round it out these other names were submitted, just so that he had a full vetting of candidates. I've learned this since, that it's always good to be considered, always good to be nominated. I think that was a feather in those other justices' caps, that even if they didn't get the appointment they could always say they were on the short list. I say the same thing about the short list for the U.S. Supreme Court when it comes up. [Laughter]

The vetting process was very intense. I know I was told by my vetting commissioners from JNE — and it was the chair and the vice chair who handled the vetting process — they said that the distribution of the questionnaires was the largest they'd ever done. I'm sure that's been surpassed. But I'm thinking 2,000 or so sent out, and they got a high return, something like 500 returns, which is really unusual. Basically what they did is every place that I had worked, every court that I had appeared in — they sent out thousands of requests and they got back hundreds of responses.

The interview went fairly well. There were no negatives. I think maybe a couple mentioned the lack of appellate experience. I was asked about that. But otherwise, it was very strong.

What I was also lacking — I mentioned appellate experience — was also everyone on the Court at that time had served on the Court of Appeal. But that did not seem to be an overriding concern by the JNE Commission. I was very fortunate, once again, to get an "exceptionally well qualified" rating. I had both EWQs in my municipal court and superior court position. For the federal court, I think their highest is well qualified — almost

unanimous. I think there were two, not dissenting but concurring, saying I'd be "qualified."

Again, they basically looked at my civil experience as a lawyer, not having done — I had done two trials, but nothing of a major situation. I don't really know the reasons, but I did get a "well qualified" almost unanimous for that, so I was very pleased to get that rating.

I think he announced my nomination in late September — I think September 26 stands out. The media was there. I made a statement both in English and in Spanish. The Spanish-language media was there, and I was profiled and questioned by the media after that. So it was definitely one that interested the media, both because I was Latino and from Southern California, I think.

McCREERY: What reception did you get — the announcement, I should say, of your appointment get — in the larger legal community?

MORENO: The media featured my picture in the paper. I still have some of those articles somewhere. I guess it was fairly typical. It wasn't overwhelming or anything like that, just an announcement, and my picture, that I'd been nominated.

In California the actual confirmation process is pretty pro forma. [Laughter] I knew that with Chief Justice Ron George — and if I'm not mistaken I think it was Bill Lockyer who was the attorney general — and with Joan Dempsey Klein as the senior-most administrative presiding — it's not administrative — I think it's just the senior associate justice — I knew that it was going to be very favorable. The questions were all fairly easy to answer.

I do remember Joan Dempsey Klein asking me — that when she was appointed and people made a big deal — maybe they made a big deal about, in terms of diversity, "What does a woman add?" that she went through, and, "What does a Latino add?" I said the stuff about it's good to have a Latino to enhance the credibility of the Court and its acceptance by the public, to have a diverse court. The Court did have an Asian, an African-American, so it was diverse. It's even more diverse now, of course.

But I highlighted my experience with my adopted daughter, who is both African-American and severely disabled, and she was in the audience. We had a caretaker with her because she — at that point we had had

her just for a year, so she was still having different therapies and so forth to treat her disabilities. She did act up in the hearing. She would make a loud sound, like a scream.

So I highlighted that to that question. I said, "We are constantly evolving." Of course, I had my life experience, growing up in Los Angeles in a working-class neighborhood; the experience of going to Yale being life-changing.

But I said, "In the last year I've been introduced to this whole field of disabilities and dealing with how to obtain the best educational and health and medical services for a niece," and I remember saying, "who you already met." [Laughter] I said, "It's constantly evolving, so I'm very sensitive to having that particular experience, which is very draining on parents. When you have someone as disabled as that, it's not a field day. It's just very stressful for everybody in the family."

Then they voted, and I was very happy that Governor Davis, who specifically requested he wanted to be there, swore me in. I acknowledged people in the audience, and so forth. Then I remember talking to Mrs. Mosk, who was in the audience. I remember saying that I hoped to mirror — I remember using that word — the best qualities that Justice Mosk had and brought to the Court in his long service on the Court.

That was in October, and I started service virtually the next week, I think. I know that there was a 3-to-3 case on Fourth Amendment law that I was quickly introduced to. The Chief had written the draft opinion, and initially I had some concerns about the search.

It dealt with whether or not an unlicensed driver who was subject to arrest, whether as an incident to that arrest the police could search the entire car as part of an inventory search, including the glove compartment. I think some contraband was found there or under the seat, and so the question was, is that search appropriate or were they going to just let this guy go? But they decided to arrest him, which was entirely proper.

After some discussion — approached by the Chief, by his law clerks approaching my law clerks — I really was the swing vote there on my first argument session on that case. I forget the name of the case, but you could find out, the November calendar of 2001. So I said, "This is fun. There will be some lobbying by the justices."

I remember at oral argument the public defender was arguing it. One of my concerns was that the record was not very clear as to how the police decided or what findings the trial judge made. So I did have some questions to counsel, just factually, as to how the police came about to finding the contraband because that was not really very clear. I forget what the trial judge did or what the Court of Appeal did, but it was one that was of concern to the Chief and one that they were holding on for the appointment of a new justice.

I've thought about that in terms of other appointments that have come along. Sometimes the Court will hold back on a decision. This wasn't a case that had been deferred. The vacancy, my nomination, and the confirmation were very quick, unlike the appointments of other justices by Governor Brown, who waited forever.

I arranged to have an apartment in San Francisco, which I kept for three months and determined that it wasn't really necessary. I decided to do the commuting part. For maybe the first two years I didn't miss any Wednesday conferences. I wanted to meet with my staff on Tuesdays to go over the petitions for review — any issues they had, any issues I had — to vote on all the matters on Wednesday and to stay either through Wednesday night or until Thursday. That was my arrangement.

I know now that Justice Groban is doing the same thing and probably even spending more time down here. With internet and email and all that, it's much easier to access the confidential filings that the Court has and the memos and so forth. It can be done from here.

But I felt that it was very important to have face time with my San Francisco staff and with the justices and so forth because I know that Justice Brown had the same arrangement from Sacramento, but she was not always at the Wednesday conferences. And her personality was one that was distant from the other justices. It was a strange dynamic.

As Justice Werdegar once said, she had a poison pen in her dissents. If you look at the *Hi-Voltage* case — I don't know if you've seen that, but it's —. I tried. I met with all the justices and particularly her. I wanted to know her situation and how she handled her travel arrangements and so forth. But we never went out to lunch or dinner. I think I saw her at dinner a couple times at a place that I would go to.

McCREERY: Say more about your approach of getting to know your new colleagues. You say you met with them?

MORENO: Oh, yes, each of them, just to see how they handled it and introduce myself. I know I had met, during the period when there were rumors — it probably was when I was being considered — let's see. I went to the September State Bar Convention in 2001, which was in Anaheim, and I had been contacted by Justices Chin and Baxter to meet them for lunch.

McCREERY: What happened at that lunch?

MORENO: They just wanted to meet me. I think people around us who were lawyers — they're looking at why am I — I hadn't been nominated yet. I had been nominated, but maybe I was one of the five being considered. People would probably speculate that I was going to get the nomination. That's maybe what happened because I think it was known that I was being considered. It had to be.

The lunch went fine. It was very cordial. We didn't get into any cases. One thing I remember Justice Baxter saying, and Justice Chin: "Hire Pat Sheehan. She's the best judicial assistant," and, but for the ill feelings it would create with their own judicial assistants, they would hire her. She was topnotch.

I remember I went up to San Francisco even before I got sworn in — again, I'd have to look at my flight records and whatever — to talk about staff. Would that be strange? Yes. I went up because the Chief said I couldn't look at any of the confidential records yet, the cases for the November calendar. But I could start talking to staff. I think it was after my nomination, which was September 26, and before I was sworn in in October.

I flew up at the invitation of Fritz Ohlrich, who wanted me to — he said, "Come on up. Sign some paperwork. Meet everyone. Let's talk about lodging." Preliminary stuff and for people to meet me. I'm not sure if I went around and met all the justices then, but I did interview staff, and the staff who were interested in serving: Dennis Maio, who was brilliant and had served on Justice Mosk's staff for over ten years; a guy named Peter [Belton]; he had been with Justice Mosk for twenty-five years, a long time. Both really great attorneys. He had a great staff, but for one person.

Rob Katz, who the Chief told me — he must have told me when I met with him that time — of the chambers' staffs, he would put him in the top five. Not 5 percent, but top five. I really liked him.

I was approached by Greg Wolff, who was on the Chief's staff, both on the Court of Appeal here in Los Angeles and in San Francisco, and who I knew from the city attorney's office. We were both contemporaries at the city attorney's office, and he was head of the appellate division section of the city attorney's office. He had written me a letter and wanted to be considered for chief of staff position. And I think Michael Nava, who was also a former city attorney, who also approached me.

My dilemma was that in August I had had two federal law clerks who had just started with me, Tal Clement and Alison Markovitz, both Yale Law graduates, really good, strong attorneys. But they were annual clerks with me, and I said "Look, do you want to come up to San Francisco, and I'll extend your clerkship another year so it will be a two-year deal?"

Then I was approached by someone I knew in the D.A.'s office, a twelve-year lawyer, strong criminal background and an excellent writer, who also approached me about a position there. So I was bringing three people with me. That created a little stir because since the seventies, I think, or maybe even early eighties, the Court had switched to all career attorneys at the urging of Bernie Witkin, to have that continuity, institutional memory, and so forth.

I remember talking to a couple of justices, and they said, "What are you going to do about your death penalty cases?" Huge records. One case could really consume a law clerk for a year. That may not be true, but there are also the habeas proceedings that follow that. It turns out they follow it many years later, and it's nice to have the same career lawyer work on the case.

Gerald Uelmen really liked the fact that I was bringing in new blood, so to speak. I went to an appellate conference, the California Academy of Appellate Lawyers, and I think they meet in January. So I went up to Ojai in January of 2002. I was a guest, and I spoke. All the appellate lawyers wanted to meet the new justice. I really said, "I think this is good for the Court, to have younger people, fresh blood, mix it up a little."

McCREERY: Not only did you have individuals in mind to bring in, in that shorter term, but also you believed in the idea?

MORENO: Oh, yes. Yes, because coming from the city attorney's office — and not so much the federal court because only a few judges had career attorneys there — I bought into the annual system. And I liked to have young people around me and so forth.

The ones I kept — those were three, and I hired Greg Wolff, who was a career from the Chief. He said he had the Chief's permission to come over, and I wanted someone with his — he taught legal writing at Hastings, which was nearby. So he was good. Then Rob Katz, at the Chief's recommendation. Particularly Rob Katz was the best decision I made. He was just brilliant on insurance coverage matters and on arbitration matters. Both very liberal. Greg was a bit more moderate. Then I had my three, so it was a wonderful chambers, a good mix. I still believe that you should have a good mix.

What's interesting is that the newer justices — I'm not sure about Kruger, but Cuéllar and Liu really bought into this term clerk. I'm not sure. I think it's one year, which to me is too short. My plan was to have two-year law clerks and stagger them so that every year you'd get someone. I did that for a number of years, up until you find a term clerk that you really like, and that happened with — I think my first one was Victor Rodriguez, who is now a judge in Alameda County. He was just great.

I know Pat Sheehan really liked him. When he started looking for a job, she said, "Gee, it would be nice to keep him. He really likes it here." He was made for that position, so I converted him to a career. After I left he went to Central Staff, I think criminal. Then he went with Justice Corrigan. Then he went with Tino Cuéllar. Wherever he went — he was chief of staff for Cuéllar, so he was really a star.

Who else? Rob Katz, when I left, stayed with my chambers, Justice Liu, and became chief of staff there and supervised the so-called annuals. There might have been another career person in there. And he just retired.

Then Greg Wolff. He stayed with Goodwin Liu for a little while. Then he went with Justice Kruger and became chief of staff there. So I'm proud to say three of my law clerks all became chiefs of staff for the three Brown appointees. They were good people. I think they worked out really well. I liked the mix of having the annuals, or term clerks more accurately. I also believed in externs, not too many, two or three. I believe it was a good experience for them as well.

A couple of my law clerks became law professors, one at the Georgia State University law school, and Sonia Katyal, who was at Santa Clara and now she's at Berkeley. She's the sister of Neal Katyal, who you always see on CNN. [Laughter] But she had clerked for me on the district court, and the law professor, Nirej Sekhon, clerked for me on the district court as well. One of my externs is now a congresswoman. I've sworn her in, and I'm speaking on her behalf on March 9.

So what I've always felt is that — I felt this as a trial judge as well — that the judge has an obligation, really, to train lawyers in how to be good lawyers in the courtroom but also to mentor your law clerks and your externs because when they move on in their career they like having you as a reference, but they also get into cool positions themselves.

Even on my district court position or the ambassador position, my externs worked in the Senate as staff people, and they were able to speak on my behalf, get me information as to where I was in the process, and so forth. So it's nice to have those kinds of contacts. I can't see how judges or justices think that they do it all themselves and they don't believe in creating this network of people out there. What I'm trying to say is it's mutually beneficial, very rewarding, but they also get into positions of influence themselves, so that's really a nice thing to do.

I believe — and I've told Josh Groban this — that it's one thing to be remote and have some staff here, but it's important to have face time with the other justices, the other chambers' court staffs — do they know you? — and meet with them, especially the ones that are down the hall from you. And especially with your own staff. You can do things remotely, but I don't really think that's the way to do it.

I would meet with my staff — and I don't know if the others judges did this — here's the way I would handle the petitions for review. You would get them on Wednesday for the following week, so I would take those home with me, essentially the A list. Actually, I took the B list home too, but usually I could go through the B list very quickly before I left. You know the difference between A list and B list? Okay.

The B list is pro forma and "no worthy issue." But my staff would analyze everything, A and B. I said, "If there's a B-list case you want me to take a look at, let me know. Write a memo on it if you think I should present it to the justices. The A list: again, if you think you disagree with the

recommendation — " and the different recommendations were "grant," "grant with reservations," "deny with reservations," "deny," something on that kind of spectrum. "Anything you're concerned about, let me know and I'll take an extra look at it." But I found both the civil and the criminal memos from Central Staff to be pretty much right on.

I would really go over the A list. I'd go over both lists, but I'd really read all the memos on the A list, take those home with me, and if I saw something I would write to the law clerks, saying, "Hey, what do you think of this? Is this something we should really look at? Should we put it over to write a memo to circulate?"

They would do the same thing. They'd say, "I think we should write a memo, put it over for a week or two weeks and argue in behalf of granting," or rarely denying. If someone is saying, "Grant," I would vote to grant.

McCREERY: In practice, how often did it happen, if at all, that a B-list case would earn your attention enough to move up?

MORENO: Good question. A handful of times. Not very often. But there's one extern, who I can picture but I forget her name, who wrote a memo — I remember one case — wrote a memo — by a "memo," I mean a supplemental memo to the Central Staff memo — to grant. She wrote two of them, and both of them I submitted, and we changed the minds of the judges to grant. So I said, "You're the one who has written two B-list memos that we voted to grant."

One had to do with, I think, 5150 of the Welfare and Institutions Code. This is how you handle someone who's mentally — can't take care of themselves and are sort of out to lunch. This was based on my experience, actually, as a trial court judge. These things can go on forever, and there needs to be some kind of guidance to the trial court. What do you do with these cases that could go on forever? So it was granted, and I think maybe I wrote the opinion. I'm not sure.

But also the practice was if you expressed interest in a case, the Chief, not always, but might grant you that case to be assigned, if ultimately there was a vote to grant, if you got the four votes to grant.

McCREERY: So here you were drawing upon your trial court experience.

MORENO: Right. Yes. Justice Baxter really respected me for that. We were at odds on a lot of the civil matters. On the criminal matters he really — I

was a Deukmejian appointee. I wasn't too far to the left on death penalty cases. I dissented when it was appropriate. Then, in terms of my trial experience, I remember he looked at me a couple times and said, "I agree with Justice Moreno that we should really look at this." He had trial experience as a D.A. but not as a judge, so I can remember really one instance where he was looking at me and nodding when I was saying, "This happens enough so that we need to give trial judges some guidance on it."

One other practice in our conferences — and I don't know if you know how that worked. The Chief would go over pending cases where there was a calendar memo, a draft opinion, already written, and where we were in terms of setting that for oral argument.

The Chief, to put it mildly — I don't know if he says this in his book — was very production-oriented. He was a taskmaster, where he wanted, in his mind, to get at least a hundred opinions out every term. I think our high was, maybe, close to 120. He was so happy to really get them out.

The Court, before I got there, the term would end at the end of the year during the holiday season. Later they switched to a September to August calendar, sometime before — I remember I was told this works much better because you don't want to be suffering through getting opinions out during the holiday period.

So we would have to get opinions from the June calendar out by the end of August and the new term. There was always a push in the May and June calendars, and in May there are two calendars, to where sometimes, literally, we would do thirty cases, almost — a little less than a third of our production was in those two months, if we could get thirty cases, so really pushing them out. So particularly during that time you'd have to look back to March, then, because we would have to give notice.

I think the cutoff to circulate might have been March 31. You'd have to get your draft opinion out by March 31 to be considered for that term because you want to give everyone a chance to read the draft opinions and to submit stuff and then to set them for oral argument. You'd give the lawyers, I don't know, there was maybe a rule of thirty days of notice, something to that effect. So to set for the early May calendar, which would be the first week in May, you'd have to have notices out in April, which means that if the deadline — maybe it was March 15 or so — and get everybody working.

The criminal cases were pretty straightforward overall. There was a very low reversal rate. That's true in the Court of Appeal, low on the Supreme Court. And the death penalty cases we really didn't handle — we might handle three issues, but most were not precedential decisions. We didn't like to create a new rule in a death penalty case, so the predominant issues were penalty phase and jury selection.

McCREERY: Specific to that case?

MORENO: Yes. Rarely did we make new law in a death penalty case.

I would meet with my staff on Tuesday. I don't think the other judges do that. I encouraged Groban, and I'm sure I told Goodwin Liu and Cuéllar what my process was. I did it because I wanted them to have skin in the game, so to speak, and to have face time with me and, really, to go around the room — and I've got a picture somewhere of me with my staff — and that includes externs and even my judicial assistant — to go around where we were on the petitions.

I'd say okay, and then I'd go in knowing that I had talked to my staff and I would make notes on my list of cases as to where we would go or how I should vote. Then on Wednesday, after conference in the morning, I'd assemble my staff again.

I should say that on Tuesday I would get there around ten or so, try to meet with them, and then we'd all go to lunch. Go to lunch and talk about the cases, and just to socialize. Wednesday I would vote, and then after the petitions conference we would meet at ten-thirty or eleven o'clock.

The conferences didn't last that long, and we'd go over administrative matters, too. So it was where we stand on cases where we had already argued; where we stand on cases to set for argument; going over our petitions; and then also administrative matters. We'd probably go over administrative matters first because Fritz Ohlrich would be there — where we had to decide as a court what we were going to do.

The Chief was very good about bringing us in on administrative matters. I heard that Justice Bird was quite the opposite. She would do things without consulting with the Court. So we felt very much a part of it. He'd bring us up to date on legislation and who he met with, and so forth, a lot of gossip just going on. [Laughter]

It was a very enjoyable experience, I think, as a group. Although we didn't socialize a lot outside other than at functions, official functions, it was great to get along, but for Justice Brown, who was very terse in her comments. I don't know what you've heard from other justices, but very terse and not friendly and would just leave. There were some instances where right after conference she would just leave. "Okay. There she goes." And no contact with other people.

McCREERY: Overall, what sort of collegiality existed in the building?

MORENO: With the Chief, very good. We were both from Los Angeles. We knew a lot of the trial judges. We shared a lot of the stories about certain attorneys and cases and so forth.

Justice Kennard also was from Los Angeles. We had a couple mutual friends. But she had moved up to Marin County when she got on the Court. She also was very — hard to say, also. She could have her moments when — very principled, and she took very strong positions when she felt strongly about a case, and not always the — very compassionate — with me, always very nice. But I think with Justice Brown and some of the others, just on policy grounds, I think she really felt strongly.

I've read a couple of opinions recently in connection with work I've done, and once she made up her mind it was *boom*. She had a certain flair for taking very strong positions on how she thought things should go.

I remember the Chief asked me — I think it was on the same-sex marriage cases — if I could approach her to see if she was with that first opinion and on whether or not we should validate those marriages that had been performed during that interim period, that 150-day period.

On that initial part the Chief was very — and the Court was very — certain that the action was not authorized. But the question was, during that period. I think ultimately we said they were valid, and I think he wanted to know — we didn't invalidate any of them, my recollection is — to see where Justice Kennard was on that.

McCREERY: How did you approach that task?

MORENO: I just went over there and told her what the Chief was saying. For some reason the Chief wanted me to be the messenger, and it was okay. My recollection is that — again, I have to look it up because I don't

remember what — maybe the other justices, like Baxter and Chin, Corrigan, thought they shouldn't be validated? I don't remember. You can check.

But that was the issue, that he wanted me to approach her. I was his messenger because he felt I had a better relationship with her, or he didn't want to deal with her.

MCCREERY: Say more about Chief Justice George and how he ran the Wednesday conferences.

MORENO: It was very organized. He was a good, I'd say an excellent, administrator, both with the Court, with the Judicial Council, with the legislature, and with his staff. I don't think, from what I can tell, he was warm and fuzzy with his staff because I knew some people on his staff. He had some very experienced people, Hal [Cohen], who was a career guy. Brilliant. And Jake Dear. He had very strong, strong people. But I know there were a couple of people he got rid of, so he didn't really show any mercy for a couple that weren't performing.

I know he had very strong feelings about his vision for the Court in terms of unification, consolidation, and there was a third part to his vision. I think he achieved all of them ultimately, but not without taking a lot of his time and energy, and I'm sure it created a lot of stress. So I think by the time he decided to leave the Court, I think he was exhausted, dealing with all that.

But he was a great administrator and our conferences, both petition conferences and our post-argument conferences, were just run efficiently, not in any kind of dictatorial way. He was very funny and very gentlemanly, courteous, and never an ill word spoken, at least at the meetings. [Laughter] We took care of business, and then we chatted afterwards, too. But some people would stay, and others wouldn't. Then if he wanted to talk to particular people, we'd stay and chat about something.

MCCREERY: How did he use his power to assign opinions?

MORENO: My thinking is that on major cases — propositions, same-sex marriage — he kept for himself. He was very concerned about his legacy, and he had a good staff to really write very thorough — I think somewhat exhaustive — opinions on the big cases. But again, these are cases where he might have been the swing vote. I don't think that was his motivating factor, because I don't think some of those cases really ended up being 4-to-3. But I think he had a legacy in mind. I've looked at other cases from Chief

Justice Lucas and Bird and even Gibson, big cases where they kept them. Maybe it's entirely appropriate to do that. Certainly it's their prerogative.

Otherwise, he looked at workload, whether or not you had expressed an interest or had written on that line of cases; whether he thought you could get a majority opinion. He didn't want to give it, say, to Justice Brown on a case where she was going to take a position that wouldn't garner a majority. That would be a waste of time. Other than these few select cases that he decided the Court should speak with the imprimatur of the chief justice — hopefully a majority — he would take these other factors into consideration.

I never really approached him: "I want a case." I certainly didn't talk to him about it, but I did write memos on cases, that we should grant. But I felt I had confidence. In looking at the cases that I got, I got some good cases and some 4-to-3 cases. I seem to have gotten a number of cases on arbitration, and it may have been because his staff and the Chief knew that my arbitration cases were — the initial draft was done by Rob Katz, who had an expertise in that and in insurance coverage cases.

It's entirely speculative. Maybe Hal Cohen or Jake Dear knew that on those types of cases we were going to go along with *Armendariz* on arbitrations that the Chief wrote, basically very consumer-oriented. So if I got it, I was going to write a consumer-oriented decision, as opposed to giving it to Justice Baxter or Chin, who were very pro-arbitration, whereas he knew that both myself and Rob Katz were very concerned about unconscionability and jury trial waivers.

I've never asked. I've never probed the reasoning why I got so many cases, but I was happy to get those cases. In my own way when I talk about my legacy, there are a lot of arbitration cases I got. I've never looked at all the arbitration cases, whether I got more than my fair share, but in looking at the list I did get a lot of cases.

McCREERY: But you had enough of a diet of other things, I take it?

MORENO: Oh, yes. I never felt shortchanged on cases. Yes.

I guess I should tell you about the yellow memos. These were on calendars that were circulating. If you had points you wanted to make that you couldn't resolve informally, you'd write a yellow memo. A yellow memo could be, "Hey, I'm doubtful. I think this is the way to go." The yellow

memo might look like a tentative dissent. Or it could be just a one- or two-pager saying, "Hey, if you can change this, I think I can accommodate you." Usually the staff would work out those finer details.

So there was that kind of communication going on between staff. Rarely before conference would there be any kind of — judge goes to the other chambers and says, "Hey, we're going to do this." It was more all in writing between the law clerks and then, perhaps, at conference.

MCCREERY: Judge-to-judge communication? And thereafter?

MORENO: Right. "I read the yellow memo." The presumptive author would say, "I've seen the yellow memo, and I think we can accommodate your concerns, write it this way," and so forth.

MCCREERY: How important was it to this panel, as individuals and as a group, to try to accommodate one another and come to a more clear outcome? It was a rather stable period just in terms of the membership of the Court itself.

MORENO: Right, yes, with six Republican-appointed associate justices and me, appointed by the same Republican governors at the trial court. Then, as a successor to Mosk, I think I was not as liberal as Mosk and, I like to say, not as liberal as Kennard and more aligned with Justice Werdegar. Even on some issues she's probably a little bit more liberal, although I think I really always looked at — if I didn't agree with her, I always looked very closely at her preliminary responses and yellow memos and certainly at her dissents.

MCCREERY: Say more about why you looked so closely.

MORENO: Because I thought, in a lot of ways — I remember, she said, "Hey, I'm a Republican. I'm fiscally conservative, but I'm very progressive on issues, social issues. That's me." I think, I'd look more closely at where she stood. But if you looked at our agreement rates, I'm sure they're very high. My agreement rates were highest with her and with the Chief. We're talking mid-nineties. Rarely were we much different. That might have been a function of just how we got along and how our staffs got along.

MCCREERY: Those have a lot of subtle effects, don't they, those factors?

MORENO: Oh, yes. Yes. Plus I liked her and she liked me, and she knew that she could approach me about anything. Anyway, in terms of the composition

of the Court and the stability and so forth, yes, we had a lot in common. Let me put it that way. In terms of trial experience, me, the Chief, Corrigan, and Ming Chin and Kennard — we had been on the trial court, so we each had that kind of background, which is not the same now on the Court.

McCREERY: There were certainly groupings of people who might tend to vote together more often on criminal matters, let's say, or whatever. How did you think about that?

MORENO: I knew that Chin and Baxter were almost like twins on everything. They were very close. They socialized. They vacationed together. They're both very conservative on criminal matters, Baxter more so than Chin, I would say. But basically, again, a function of their relationship and their staffs and so forth. You could always, almost, predict.

McCREERY: And Justice Brown in that grouping?

MORENO: Conservative. But also, she had the little libertarian streak sometimes, a little skepticism about the police, and so forth. In terms of her minority status, being African-American, I'm sure there are some opinions out there where she's like, "Hey." She knew what was going on in this stop or something. I'm sure you could find some language to that effect. So she wasn't slam-dunk conservative on criminal matters.

And then Corrigan, also a trial judge, a lot of experience, a former D.A., a colleague of Justice Chin. I think they overlapped, probably, in the D.A.'s office for a little while, but they had friends in common from the D.A.'s office. She also had, I think, a healthy skepticism. I remember a search-and-seizure case, or two cases, dealing with passenger searches, where I was on the same side as her. It was whether or not you could really search and detain a passenger in a car. To what level, for officer safety, could you intrude on the privacy of a passenger? So I was pretty close to her on criminal matters.

Then, we got along really well personally. She sat next to me and would hit me every so often when I — in fact I still, when I see her, I say, "Don't hit me! Don't hit me!" [Laughter] But very, if you know her — she's just very engaging, very friendly, very funny, and never would take things personally if you disagreed with her.

McCREERY: What about in the conferences this practice of speaking in order of seniority. What effect did that have on things, if any?

MORENO: The only effect it would have is that if you're at the end of the scale, of the spectrum, you knew that — if there was going to be a grant or deny, you already knew that however you went it didn't make a bit of difference. So if you felt strongly about your position which differed from where the votes were going, you could say, "I want to be noted." Or just that you were going to not grant. But most of us would say, "Just put me down as a grant."

Justice Kennard and Justice Baxter were most principled about that. So if Justice Kennard was a denial and it was going to be granted, she'd say, "I want to be noted." Justice Baxter would do the same thing. "I want to be noted," so that the litigants would know, "Hey, I got two votes to grant." I think this applied more in grants where they wanted to be noted as denials. I think it's more common now that, where it's a grant most people accede to being a grant. But on the denials, I know the Chief just signs off. You might see Kennard or somebody would want to be noted, "I voted to grant."

I know I've talked to lawyers, and they'll say, "Hey, at least I got two to grant." They're very happy that it wasn't just that they were slam-dunked.

McCREERY: It's an important detail to them?

MORENO: Very important, because that might indicate if you're going to do research on the next case and maybe it's a better case or the composition of the Court has changed to a certain extent but those two are still on, you know you have two allies, at least. The ones who watch the Court would probably take notice of that.

McCREERY: Talk a bit about oral argument and how you experienced it at this level and how important it was in your process.

MORENO: To me it was very important, even if I didn't really have much concern or doubts about our tentative opinion. I think it's important for the lawyers and their clients that the judges show an interest in the case and they pay attention, because I think it affects the quality of justice and credibility of the Court, as opposed to just deciding something on the paper, so to speak. This happens in the federal court all the time now, where

the judges take things under submission and you don't know how the decision process is being made.

I think even more so at the Supreme Court. This is their chance, and it's a feather in a lawyer's cap to say, "I argued before the California Supreme Court." We should give them that opportunity. After all, these are cases where we're trying to resolve a conflict or decide a substantial question of law. I'm really in favor of even airing these things, streaming them to the public. I'm glad the Court is doing that now.

But in terms of it making a change in our decision, very rarely. I can remember two instances where it did, where there was an argument or an urging that the factual record really indicated something other than what we believed it said. So we would go back and say, "Hey, if that's the record, let's check that. Then they've got a point." We actually reversed the outcome of the case.

And I think it's important, at least for the justices also — I often would use oral argument, really, to clarify something and make a better argument than I could to a judge down on the bench. "Why do you think this is such-and-such?" Basically, either supporting or countering what someone on the Court was saying in our conferences or in our memo.

And they would elaborate. "Okay. We addressed this in our brief, but dah, dah, dah." Sometimes they do a better job at oral argument. And you can ask a follow-up question.

The other thing is, it gives the other judge an opportunity to say, "But isn't this the case? Dah, dah, dah." So it brings to the surface an issue that really needs to be addressed in one way or another, and maybe we weren't doing a good enough job. So to have that dialog, back and forth, I think, is important.

What I liked about it was that my preparation for oral argument — I had a certain protocol or way I went about it from reading the briefs. But I paid more attention to the Court of Appeal decision because they would go into the facts in much more detail. We're concerned about a rule of law, so the facts themselves were, okay, a page or two.

But I'm the kind of person who — I like to get the whole story, and I don't care if it's not that relevant to the issue we're deciding. I like to frame things in a narrative, so I like to know what went on in the trial court, and personalities, whatever happened. Sometimes I knew the trial judge or I

knew the appellate court. I felt like I would just dig into those things, and then I would look at our opinion, our responses, and so forth, my memo that my staff — to get the big picture so I knew everything.

So I felt very good about actually preparing, whereas before I might have just signed off on things. "Oh, this looks good." Here I felt very conscientious about getting into the details and then preparing my own list of questions and asking my staff, "Give me some questions. What do you think I should be asking?"

MCCREERY: This is the centerpiece of the appellate role, too. I wonder how this change fit you, once you were well into it, from the trial court to the appellate level? In other words, how did you like the new role once you — ?

MORENO: Oh, I liked it. I liked it because I had been there. [Laughter] I had seen the issue or I had been in the position of the trial judge — the evidentiary issue, I would say. That's why I always emphasize to trial judges, "For God's sake, make a record. Just say what you're seeing, the basis for your ruling." A lot of times that's not done.

I also told lawyers. "Make your record." I tell them, "Paint a picture," particularly in *Batson* jury challenges. "Paint a record." Both the judge and the attorney should do that.

By the time oral argument came around, I felt prepared. I had the big picture. Not all cases are complex. I found that I'd spend, I don't know, two or three days going over cases before oral argument. Because, one, you want to look good. You want to look like you know the cases. And I would also highlight if there was a conflict in how the appellate case we're reviewing compares to another case that presents a conflict, and so forth.

MCCREERY: You've described how you might use the oral argument to draw out certain issues and get more detail from the counsel, and so on. How do you characterize your style in oral argument?

MORENO: I didn't feel like I had to — I wanted to appear neutral, whereas I think some judges just state right out how they're going to go.

I'm sure people could predict how I might go, but I wanted to ask an open-ended question so that they could give — they were free not to be too defensive. They're going to be an advocate, of course, but I wanted to say, "I have an open mind about that." I didn't say that. But, "How would you deal

with this concern and face the trial judge?" And, "What should the trial court have done?" "What is the right perspective on this issue?"

Or I'd say, "How often does this come up? How clear is the record?" Particularly on *Batson* things. "How — ?" That's just my nature, I think, not to show my cards too much. So I tried to, I guess, be fair and not — I think that came from being a — one thing I liked about being a judge was that you don't have to be an advocate. [Laughter] You know that there are two sides to a story, and you know that a case wouldn't be in the Supreme Court unless there was a threshold other side that required us to act.

So I always felt very open to that. "Hey, either someone got it wrong, or the law needs to be clarified." I really saw our role as, "Let's clarify the law. Let's clarify the record so that we can speak to the litigants and the trial judges out there as to what we think."

McCREERY: Provide them some guidance.

MORENO: Right. Yes. Other people — I know Corrigan takes a very strong position sometimes. Baxter, you could always tell his questions were going to be favoring the prosecution, kind of a conservative spot. Werdegar would be more open. So would the Chief.

McCREERY: Say a few words about the advocacy that you witnessed in that setting.

MORENO: Overall? I think it was very good overall. There were some people who — one generalization I'd make is that the trial lawyer, unless the record is really essential, should not do the argument. They argue like a trial attorney. They're arguing to a jury or they're talking about the unfairness of the result or the substance of the evidence, and so forth. That's not why we're here. Some people just get it wrong as to why we granted review and what we're looking at.

McCREERY: Let me turn again to your staff of research attorneys and externs and so on. How did you divide up the workload, and what instruction did you give them?

MORENO: Okay. My chief of staff, Greg Wolff, would run the assignments by me, how he felt, who on the staff could do the best job. On complicated sentencing statutes or criminal statutes, we would give those to Steve Levine, who was my term clerk — he actually stayed for three years

— because he had extensive criminal law experience, and he could parse a complicated statute. He had ground experience. He would get those cases.

Rob Katz would get my arbitration and insurance coverage cases, although not always, but he was the expert. Victor Rodriguez, later, would get some of my more affirmative action, racial disparity–type voting cases. Then it was just sort of a mix we gave everybody — oh, the death penalty cases we tried to be fair and give them to everybody. Again, it was on their workload, how quick they could get out the draft opinion, and so forth.

McCREERY: Yes, we will talk about the death cases more. How would you tell them, or how did they work with your chief of staff and with you to know what exactly you wanted? What process did you want them to follow?

MORENO: The direction? I would give them the first crack. If they had any questions, they would come to me. I would look at the Central Staff memo, and if they had questions they would come to me. But they would really just write the first draft. I think that's true for just about everybody there on the Court, so you become more of an editor.

I'd look at it, and I'd say, "This doesn't sound right." And just talk about some of the issues in the case. But I was very confident that they had looked at everything, at least at that stage. We'd throw it out there and get responses from the other chambers, and most of the time it was fine, with some nuances. If there were concerns we'd talk about, can we accommodate those concerns or not? How strongly do we feel about this or that? And so forth. But I really didn't do the total immersion until close to oral argument.

The *Daily Journal* recently published a series of articles on agreement rates between and among the justices on the Court. The article, written by — the author is named Jacobs. I can't remember his first name, but he does appellate law. He's compared the agreement rates I had with my colleagues, how my agreement rates on civil and criminal cases compare with Justice Liu, who is my successor, and how his agreement rates are with his colleagues.

It's kind of interesting, actually, and I did not realize — I knew that my agreement rates were high with Chief Justice George and with Justice Werdegar, lowest with Justice Baxter and Chin. But anyway, all these percentage points, and I don't know how statistically significant these are when

you're talking about a limited population of cases. But anyway, it's very interesting to see how little I differ from Justice Liu. But there are differences that are notable, both on criminal and civil cases. But it also highlights my agreement rates with my colleagues at the time that I was on the Court. So if that's of interest to whoever is reading this, they can have access to those studies because the work has been done.

McCREERY: Let's say a few more words about these special assignments you had. One was on the foster care system — of special interest to you, perhaps?

MORENO: Right, and that's why I think the Chief gave it to me, because I had some personal experience in dealing with issues relating to foster care and guardianships, conservatorships, special ed. and all that.

McCREERY: If you don't mind, would you say a little bit about how you did happen to enter into that foster care arrangement and interest personally?

MORENO: Okay, yes. In 2000, my wife and I intervened in a case in New Jersey involving her brother's daughter — her name was Heather — who was four years old at the time and was in the custody of the mother, who was not married to my brother-in-law. We had met the mom and Heather once, and we could easily see that the mother had some psychiatric issues. We did not know the severity of that with respect to her tending to the needs of the child, and we really couldn't determine if the child was not thriving as a child, I think maybe from age two or so.

But by the time she was four — and my wife had maintained some contact with the department of children's services there, saying, "We're willing to help. We're a resource," et cetera. But when the child was removed by the authorities there from the mother because of severe neglect and malnutrition and everything else, we were ultimately contacted. The mother's immediate relatives were not in a position to do anything and in fact had refused.

My wife's brother, who was also physically — and had suffered traumatic brain injury in an accident — was incapable of doing anything. So we were ultimately called, and we flew out to New Jersey.

Maybe somewhat optimistically we said — we met Heather, and she was literally in a crib that was more like a cage because she could be very self-injurious and violent to herself and was being fed through a — I forget

what kind of tube it is — it has a name — because she never learned how to chew food. Here she was, four, and weighed thirty-three pounds, almost five, and had behavioral issues where — loud screaming and temper tantrums and everything else, rotten teeth from being bottle-fed all her life.

We met with the social worker, with the child's attorney, and went to a hearing. We were approved to take temporary custody, and we flew back from New Jersey with her in August of 2000, with a social worker and two nurse attendants on the plane. The travel back was quite without incident, fortunately.

Oh, and Heather had no voice either. She couldn't — and to this day has never learned how to speak. She mutters and lets you know what she wants. So we took that on as a challenge.

In 2001 when I was nominated, we had experienced just a lot of attempting to secure services for her, including major dental surgery, root canals. We thought she might be deaf or hearing-impaired, so under sedation some kind of hearing tests at Kaiser; physical and occupational therapy so she would not injure herself in her temper tantrums or otherwise slap herself. I mean, just everything. The eating disorder. We had to get her involved in a program at Children's Hospital to learn how to chew food. That took about four months. So intensive therapy.

Fortunately, both my wife and I were able to — she was a college professor, and I was on the federal bench — we could both together take care of a lot of her appointments and stuff. We used a lot of our connections, with a pediatrician who was a personal friend and just using other contacts, and then being very motivated foster parents to get her enrolled in the special ed. program through the school system here. We actually got her into a private facility–type school that catered more to children with her disabilities, and ultimately we were able to continue with that.

We had many reviews of the special ed. programs and her entitlement to them, even hearings with — in California we have something called regional centers that deal with services that are not provided by their Medi-Cal or school district. So we did, I think, a fabulous job in getting all those in place.

I didn't talk a lot about the work we had done, were doing, but the Chief knew that I had that interest. I'm not sure how the project came about, but I was tapped to be the chair of that foster care commission,

which drew upon child welfare workers, judges, and NGOs, people who had direct experience in providing those services and in which the court system was involved but not exclusively.

So we had a series of regional meetings throughout the state, and ultimately we issued a report with, I don't know, something like thirty, thirty-five recommendations that applied mostly to the courts but also to the other agencies involved. Later, through some legislation that was passed with the efforts of — I think she was an Assembly member, Karen Bass — she's now a congresswoman — a partner commission was formed, headed by the secretary of health and human services.

So together we co-chaired it, and again, we did the same thing but we incorporated more of the work of the agencies in getting legislators to support our efforts. Then we also came up with recommendations.

McCREERY: I gather some of these changes came out of your recommendations, but speaking broadly, what were the results of your commission's report?

MORENO: I think they were good. We had follow-up meetings. I'm trying to think offhand. Some of them were aspirational: more resources; no continuances; one child, one attorney. Things like that. More funding. I'd have to go back and review them, but overall it was well received, and my recollection is that a number of the recommendations were actually implemented. The state commission may still exist for all I know. I doubt that, but I don't recall whether or not they issued a report ultimately.

But a few of the things, like I remember one big issue was medical. It was drugs provided to foster care kids and how judges were routinely approving that. One measure that did pass was support for foster kids when they aged out of the system. I think we extended that. Before they aged out at eighteen, but now we said we provided support and services until twenty-one. We got the buy-in by the community colleges to provide some kind of assistance, maybe free tuition and support services. I'm sure there are other issues where the legislature actually enacted stuff.

I can't recall right now what the courts did in terms of more resources and keeping tabs on how the courts were handling cases and stuff. One of the recommendations was more time, no continuances. One issue was how open the hearings should be, and maybe give judges more discretion to

open those up. Because I think the *L.A. Times* had a series of articles about closed courtrooms and the reasons, pros and cons, for that. So I'd really have to look at and get an update on what resulted, but overall it was very good, well received. Our recommendations were not so aspirational they were far-fetched.

McCREERY: I have the passing impression that you did become something of a more public face of this matter, too.

MORENO: For sure.

McCREERY: I ran across one op-ed piece that you wrote for the *L.A. Times*, I think in 2008, focusing I think on the juvenile dependency courts and the things that you had unearthed there that needed work. But how did your role play out?

MORENO: I definitely, every opportunity I had, spoke on the issues relating to foster care and how we treated juveniles and minors in the system. As a result I got awards from different organizations, children's rights organizations throughout the state, from CASA, the court advocates, and so forth.

Then I always spoke about my own personal experiences and spoke about how hard these services were to obtain for the ordinary citizen. If I, as a federal judge, felt I had a hard time and was still having a hard time, really throughout her life — that was my main message, access to justice. I always incorporate that in law school graduation speeches or other speeches where I was honored by a children's rights organization, that this was something where we had to make it easier, not harder, for these parents to be able to get answers.

Because everywhere I went — even to this day you see stuff on TV about getting services for disabled kids, and it's hard, very hard. You have to jump through hoops, and everyone says no. I challenged Medi-Cal. I challenged the school district. I challenged the regional center. I have boxes and boxes of things, and files and files. In one of my speeches I alluded to the fact that I approached these things as a litigator. [Laughter] I had files.[8]

We had to fight with New Jersey to increase the support we were getting from them, and we prevailed. We had to threaten to say, "Hey, we're

[8] See "Ten Unpublished Speeches by Justice Carlos R. Moreno; II. Access to Justice" *California Legal History* 14 (2019): 83–87.

done with this." They finally agreed to provide us with more support and money, like childcare even. It's very difficult to get respite services and just time off and things. It's really a full-time job for a parent. Both my wife and I were professionals. We worked. Our schedules were more flexible than the ordinary parent, but still it cost a lot, both emotionally and just in terms of having someone help with taking care of her.

McCREERY: How did her situation evolve?

MORENO: In terms of her own personal situation, she eventually — I say, she plateaued. She did learn to eat. She did learn rudimentary sign language. Her teeth were all fixed, braces and everything, ultimately. A beautiful child. Temper tantrums subsided almost, like 95 percent. We were very conservative about medication and dealing with that because a lot of those drugs are psychotropic. We experimented, ultimately, with non-active marijuana, but in a spray form. We've been doing that, I don't know, for over ten years. [Laughter] So you learn.

We tried all the different therapies, and eventually you say, "Okay, we've done our best, and this is who she is." She has plateaued. But now she lives, as of November of 2017, in a ranch-setting facility for disabled adults in San Diego. I had to fight social security and SSI. [Laughter]

Whenever I see a friend of mine who has kept track of this, I say, "I'm still fighting." But I think for the last year it has been good. It still costs a lot out of our own pocket, but believe me it's a lifetime experience to go through all that. You talk to anybody who has a severely autistic, disabled child. It's rough. It's rough. But we were able to get pretty much the best for her at all stages.

McCREERY: Yes. You and your wife made an incredible commitment to this young person.

MORENO: Oh, yes. It changed our lives. Yes, besides my wife being the conservator of her brother, the dad, who died three years ago, and her mom, who is ninety-three and lives with us. So it's like you're taking care of somebody besides your own typical kids. It's like there are three extra people there. [Laughter]

McCREERY: What an effect on the family. Thank you. I appreciate you being willing to talk about that. It casts some real context to your assignment

to this foster care commission and the broad look statewide on how to improve access to justice, as you say.

MORENO: Definitely. Yes. And since everything has settled down, I really haven't been that involved in that other than last year's social security.

MCCREERY: What was the overall situation, as you saw it, in terms of interpretive services for the courts?

MORENO: I think that's been implemented, some of the recommendations in terms of — it was, do you provide interpreters in civil cases? I think there may be a law now or policy of providing interpreters, maybe in unlawful detainer and dependencies — they have them there. I think it was really where you're depriving somebody of — maybe foreclosures. I'd have to check, but there are at least two or three areas now where it's mandated that you provide an interpreter.

MCCREERY: How did your trial experience inform your view on this?

MORENO: Very much so because in Los Angeles a good percentage of our cases required the use of an interpreter. In L.A. we were pretty much sufficiently staffed, I think, particularly with Spanish-language interpreters. And Korean interpreters we could get. So because we were a large metropolis, we were able to get those interpreters.

I've heard other stories — and I think maybe they were thinking about this — I think we talked about it — getting an interpreter by phone. If you're off in some county, no interpreters in other than Spanish, there's a clearinghouse. "We need a Tagalog interpreter." Or a more obscure language. There's someone somewhere who speaks that. You just go on the phone, and you have some kind of proceeding before you can maybe get the interpreter to be in court.

My experience was good. I spoke Spanish. This is just an anecdote. There were times when the interpreters who did not speak street Spanish might confuse a trunk with a hood. I would say, "Wait a minute. My understanding was the drugs were under the hood. Can you ask the witness again?"

Then the witness would go, "Yes, they were under the hood, not in the trunk," because the words are very similar. The other one was guns and firecrackers and the sounds they make. One said, "Oh, firecrackers were going off," or something. I said, "Ask him again." The term is *cuete*, which

is slang for gun. I heard the witness say that, but then the interpreter said it was fireworks going off. I said, "Can you ask him, was it a gun, like a *pistola* or something?" He clarifies that yes, it was that.

So there were things like that. My ability to speak and understand Spanish, I think, made me more serviceable, in a way. Then, with respect to defendants — and this was probably improper but I never impacted anybody's substantive rights — was if sometimes the interpreter's not there. You've got a Spanish-speaking person that's going to be a continuance, and you need a time waiver. I would do time waivers but not pleas in Spanish.

I would say, "Have you had time to talk to your attorney? My understanding is your attorney wants to put things over so you can do *x*, *y*, *z*." I'd say all this in Spanish. "Are you agreeing? You have a right to have a trial in a certain number of days, and you agree to the case will go over to this date and go to trial within ten days of that day?"

"Yes." It wasn't something that was going to create error, just as far as I could tell. [Laughter] That would move things along, and again, it showed — this is why diversity is so important — it showed that at least as far as that defendant, that I knew what I was doing and that they saw me, I spoke Spanish, and more credibility in terms of them feeling they had a fair appearance in the courtroom.

Some of the lawyers would tell me, "Go ahead and say something. Do this in Spanish." [Laughter] But only simple things like that.

McCREERY: Talk about your own retention elections for the Supreme Court, the first in 2002.

MORENO: Yes. And then in 2010, I think. Yes. Then I resigned with a twelve-year term. [Laughter] Yes. Those were pretty pro forma. We did what we had to do. There was a public TV channel, a cable channel, California Channel. Those of us who were going to be on the ballot were interviewed and made a statement, but otherwise I didn't really do anything. I don't recall that I did anything.

McCREERY: You hadn't attracted a lot of opposition for any particular reason.

MORENO: Yes, right. And I suppose in 2010 there could have been some opposition based on the same-sex marriage cases. But I don't even remember

anything like that. I didn't form a committee. I think Justice Werdegar did raise some money.

Justice Chin and the Chief, when they were up — I think I was on the district court — whenever they were up a group had indicated they were going to challenge them based on the abortion rights of minors. There's a whole history to that where, when Justice Chin came on the matter [*American Academy of Pediatrics*] was resubmitted, and so of all people he got criticized for that. [Laughter] But that went nowhere. I think he used to joke about it.

So I didn't feel that I really faced any exposure with either of those two retention elections. And I should tell you that, in that 2010 election, running for governor were Jerry Brown and Meg Whitman. I was keeping track of my retirement benefits and when I could retire with the full benefits. It turns out that I met my twenty years to be eligible, I think, sometime in 2008, maybe 2009, where I could retire at age sixty-one-and-a-half, something to that effect, if I wanted to.

So I was thinking of, well, is that something I should think about — and doing something else? I was happy on the Court, but my thinking was that if Jerry Brown won I would have the option of leaving the Court. But if Meg Whitman won, as a party — not that I'm that politically involved, but I would stay on the Court.

When he won — and I've told him this — that gave me the option of analyzing what I want to do. If I continued to want to be on the Court, really being compensated at the 17 percent — if I just stayed home I would be getting paid the same, less 17 percent. I talked it over with my wife, and she said, "Whatever you want to do."

That motivated me to at least have that option to consider. The point is, I really didn't start seriously thinking about leaving the Court until after he was elected. Then the coincidence was I was on the bench, and I got another twelve-year term. I would still be on the Court right now. I remember when I told — and Tani [Cantil-Sakauye] had just got appointed as well, right? Because the Chief was leaving the Court. So there were going to be two vacancies on the Court, really voluntary vacancies.

I remember once I made the decision going — and we had a little swearing-in thing at the Court, and she was sworn in and I was sworn in

and pictures taken. Just a couple of days later, I said, "I want to talk to you. I have to just tell you I've decided I'm going to leave the Court."

She was shocked. Because she wanted to work with me. We would have gotten along great, I know. That was really my biggest regret, not staying on the Court with her as the Chief, because I felt like she would need my support. I would be an ally.

But I was very fond of her. Her speaking ability is phenomenal. I think she is evenly balanced and could really work with my replacement, whoever that was going to be, and so forth.

McCREERY: What chance did you have to know her at all before she joined the Court?

MORENO: We were on a couple of panels together. I was very impressed with her. Just appellate panels. At one I remember speaking with her in the elevator once, and I actually said, "If there's ever a vacancy on the Court, you'd be a great candidate." I don't know if she remembers that or not, but I was very impressed with how she carried herself. I thought it would be good to have her on the Court. My prediction turned out to be correct.

McCREERY: Nicely done. To return to this matter of independence of the judiciary for the moment, you brought up some examples of things that have happened more recently in different counties here in California. What do you think is the public's understanding of the judicial role and this power to vote people in and out?

MORENO: They have no understanding, almost literally. One, when someone is challenged or is up for retention, the public knows nothing. I've been approached so many times about, "Who should I vote for?" All the judges are asked about that.

Then there's nothing, really, to look for. You really need to do a lot of independent research. You can go by the *L.A. Times* or the legal newspapers and stuff. But people just do not have any information about judges, and frankly they would just decide not to vote or vote by "for or against" based on the perceived ethnic identity, the last name. That carries — it so happens that now having a Hispanic name helps a lot, whereas before it was like the death knell. Now it's a positive.

I've even been urged to run for D.A. because of the Trump effect. [Laugher] I said, "You've got to be kidding." You know?

Anyway, I wish there were a different system, like maybe almost like the superior court judges should be just retained and not have any opposition. Because lawyers use that, one, to get their own — do a little publicity stunt for themselves and then to create issues that, for the most part, are not meritorious. But they run against someone because they had a bad experience with them.

Or recently, here, they ran against Malcolm Mackey because of his age. He's in his early eighties, but overall he's not reversed or anything like that. He's just doing his job.

So anyway, there are too many extraneous factors where the public can be manipulated, and it makes the judges look who's behind them when they make decisions, especially that Persky case. One decision cost him his career. He had to spend a lot of money, raise money. That system I don't like.

So maybe retention elections, maybe longer terms, like twelve-year terms. For some, they're moving from a public agency to a judgeship. That's fine. But if you want to encourage people in private practice to really take a significant pay cut or to really just take a chance of — they may not know what it's like being a judge. It's like the next step. But you don't want to add to that the insecurity of being challenged.

I think we have a pretty good vetting process that the people who the governor appoints, by and large, are not going to get in trouble. They're going to be pretty good choices. I have certain concerns, also, about people who run for office, for judgeships. I understand that if you challenge a judge on not so — unless there's good reason, some kind of basis, but not just because of that judge's last name, or you had a bad ruling from them, a vindictive thing.

There were a couple of judges here recently — one of them was a friend of mine — who just a few months after they were appointed, because they're in this certain period, they get challenged by someone, and nobody has a basis to really know what kind of judge they're going to be. But they figure, "Hey, this person is vulnerable."

Anyway, I wish there were more job security for judges and maybe more resources devoted to nonpartisan media groups or other groups giving ratings. The L.A. County Bar does a good job. The L.A. County Bar takes a position on elections, and so does the *L.A. Times*. I don't think the *Daily Journal* endorses, but there's a guy here — the *Met News* is a

secondary paper, and they actually give endorsements. But they don't have a wide circulation.

But if you get the *L.A. Times* endorsement you're in pretty good shape, because people just look at that. "Okay." But otherwise the public is really ill-informed, and there's not enough objective critiquing of judges.

MCCREERY: We thought we might take a look at some of your jurisprudence while you were on the California Supreme Court, perhaps starting in the broad area of gender equality and some of the cases that stood out to you there.

You had mentioned in our very first phone conversation a case called *In re Marriage of LaMusga*, which you authored in 2004, a family law move-away case that had a longer life, perhaps, than you had imagined or came back to your attention later on. Would you mind starting off talking about that one for a few minutes?

MORENO: Okay. First of all, the correct pronunciation of LaMusga is "La Moo-shay." Every time I see a family court judge here in Los Angeles, they are proud of the fact that they know the correct pronunciation. But it's easy to mispronounce it based on how it looks.

But it's a case that really evens the playing field when there's a move-away issue. Previously the cases were stacked in favor of the custody mother, but this adds a balancing of factors really amounting to what is in the best interests of the child. The move-away can consist of moving away to another town, across the country, or out of the country.

The thing that the decision gives to the trial court is something that I'm a strong advocate for, and that is discretion, eliminating presumptions, particularly in a situation as sensitive as custody in family law matters. So this really puts that kind of decision — gives the trial judges a structured setting in which to make decisions.

I remember that after our case was filed, there was a movement by a group that supported mothers' rights, who — the presumption was in their favor. They thought that it was a father-friendly decision, but in fact it does no such thing. It really gives the trial court factors to consider. Every single trial judge I've spoken to really likes the case, and many of them don't realize that I wrote the case. I tell them, "What do you think of the *LaMusga* case?"

"Oh, that's great. It really focuses in on the right thing to do in these move-away cases." So even though I didn't have a family law background, it did build upon a case called *Burgess* and extended the discretion of the trial court judge in that field.

The other cases that I've had more experience with in terms of my legacy, perhaps, are the same-sex marriage cases. You've listed here one of those cases, *Elisa B. v. Superior Court*. That actually was one of three cases, what I call a trilogy of cases, that really promoted the idea of gender equality among same-sex couples. I can go into that in a second.

But I think in my scheme of thinking, there were a number of cases earlier than *Koebke* here that you have in 2005. There was a case before that that dealt with the ratification of same-sex adoptions here in L.A. County. As a result of a breakup between one of those same-sex couples, who had been allowed by the — I think it's Department of Adoptions, it's called — to petition for and be approved for an adoption.

When difficulties broke out between the pair, one of them challenged. The whole process was tainted and unlawful. There was no basis for having — it was "harmful for the child," et cetera, to be raised by a same-sex couple. My recollection, as a result of that challenge there were in excess of 20,000 same-sex adoptions that were basically being challenged here in L.A. County.

I don't think I wrote that opinion. It was one of the other justices. But I certainly concurred in it. We accepted and could find no basis for rejecting or challenging the same-sex — what they called second-parent adoptions, where one parent is actually the biological parent, and then there's another spouse who then — I don't know if they even have to be the spouse, actually — but a second parent is approved, but the second parent is of the same sex. So that kind of showed you how the Court was thinking about these same-sex family relationships.

Then along came *Koebke* in 2005, which dealt with — I believe they were domestic partners. It involved family memberships in a golf club, and the golf club gave certain privileges to spouses but to no one else to eat at the clubhouse restaurant and to have free golfing days on the golf course.

This couple were domestic partners, and we had to look at the co-equal rights of domestic partners to heterosexual husband and wife. We took the language literally from — I think this was the Unruh Act challenge,

discrimination — and we said, "The law says they should have the same rights as — " And this was one of the early iterations of domestic partnership law that later became even more inclusive and clear.

It was an interesting case, and ultimately we found that the club privilege rules for spouses and, it turns out, domestic partners, were one and the same. This was a majority opinion. Let's see. I had George, Kennard, Baxter, and Chin. And Werdegar had a spin on it. Maybe she — I don't recall. Maybe she objected to some of the reasoning or maybe thought we should go further in what we did.

I later had the privilege of meeting the two individuals. They came up to me and thanked me. This was years later. They were a couple of really athletic tennis players and golfers and all this stuff, and it was nice to see the fruits of my labor in real life. That, again, was progress.

Then we got these three cases. One dealt with support payments when one of the spouses had gone onto county aid. Another, the *K.M.* case, was one where you had a birth mother and an egg mother, and there was a non-involved male, a sperm donor, basically. Again, the couple were — I'm not sure if they were domestic partners or married, but anyway, they were in a committed relationship.

The sperm donor provision, I think of the Civil Code or the Family Code, said that you could have these anonymous donors and spoke to them having no liability. Here we had an egg donor that was implanted in the birth mother by her partner, and maybe fertilized by the uninvolved male.

When a dispute arose, the birth mother said, "I am the mother." But the kid that was born was genetically related to the other woman in this partnership. There was another complication. I think the kid was born with some kind of disability. But anyway, there was a half-sibling involved as well. The birth mother challenging the custody issue said, "This sperm donor thinks it's anonymous, and they have no rights." They tried to tack onto that.

We said, "Wait a minute. This is not anonymous." And, more importantly, the relationship had continued for a number of years. It acted as a family unit. The child was put on the egg donor's emergency contact, medical insurance, the whole nine yards. So we basically said, "Look, if you look like a family, you walk like a family, guess what? You are a family, and this person, the egg donor, has rights."

We reversed I think both the — we reversed the Court of Appeal for sure because they thought that the waiver was effective. And there *was* a waiver giving up rights. We said, "That's ineffective." What we said was that it would be against public policy for a couple, male and female, to say, "Let's have sex. Let's have a baby. Don't worry. You're not responsible." But that really could not be the case where they acted — a male could not absolve himself of responsibility so easily, and here less so where the couple acted like a family and called "Mama" and all this stuff.

There was a third case. I'm trying to remember. It might have been a little more complicated. But there was a third case with, again, the same result, that we recognized the rights of these same-sex couples, whether it's an obligation like child support or custody or whatever it was. They were bound by their relationship.

So by the time the, in my view anyway — and I had the Chief and Werdegar, for the most part, and Kennard — so by the time that the same-sex marriage cases came about, I think the die had been cast pretty much in terms of at least several of us, in terms of expanding the rights of theses gender-based family relationships.

What's interesting, though, is that when our current governor, Gavin Newsom, was mayor of San Francisco, he instructed his city clerk to start issuing same-sex marriage licenses. I think it was on Valentine's Day. From the Supreme Court, sitting across the plaza from city hall, we could see all these people who were getting married, and it was quite a spectacle. This happened for days on end until injunctive relief was sought from the Court, and we issued an injunction.

I remember my thinking was that we should really take up the whole issue of not only the relationship of the City of San Francisco vis-à-vis — I think they're state laws, the Family Code and so forth, dealing with marriage, Section 22, I think, and whether or not Gavin Newsom was acting *ultra vires* to state law. My initial thinking was, well, if the law is patently wrong, then a government official has the right to not follow it.

But I remember talking to the Chief, and he said, "I think it's best if we just proceed issue by issue and first just deal with this rather straightforward issue of whether or not the clerk of San Francisco," who was issuing these licenses, "is authorized to do so in contravention of state law."

I ultimately said okay, although I wanted to take the big bite right away. But he was right because we proceeded incrementally. I think the only issue that really arose out of there, when we found that Mayor Newsom acted unilaterally without state authority in contravention of state law, that we had to stop that, issued an injunction.

Also, there was an issue concerning the validity of the marriages that were performed in the interim, I think several thousand that had been issued. I think that's where Justice Kennard and maybe Justice Werdegar thought that those marriages — oh, it was the marriages that occurred after the injunction. That's what it was. I think all of us agreed, up until we issued the injunction, that they were valid. But then there was a secondary window period, and we said, "After that, no dice." But I think Kennard and maybe Werdegar wanted to say all of them until we issue our decision may be valid. I think I got that right.

So the next case — let's see. That was *Lockyer*. The next case was actually the seminal case of recognizing and overturning the Family Code section saying that marriage is between a man and a woman exclusively. I remember Ken Starr actually argued that case. There was an issue as to "only marriage between a man and a woman is valid," something like that.

I remember asking him, "What is the meaning of *is*?" [Laughter] Because I think Bill Clinton had something, "What is the meaning of — ?" Do you remember what? Bill Clinton had raised the same thing in the earlier investigation.[9]

MCCREERY: Into his own activities, yes.

MORENO: Yes. It wasn't, "What is sex?" But it was something. "What is the meaning of this?" I remember Ken Starr chuckled. He was very good-natured about it, but an excellent advocate for his position.

On that case, that's another one where the Chief asked me to approach Justice Kennard. I'm sure the Chief talks about this in his book. It was basically 3–3, and I think he wrote it both ways, he said, the conclusion. I think he was really torn, but I think, from a personal standpoint, I think he wanted to rule in favor of finding that provision of the Family Code to be unconstitutional.

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[9] President Clinton's words in 1998 were reported as: "It depends on what the meaning of the word 'is' is."

He was concerned about Corrigan, I know. I haven't read the sections on if he goes into this detail or not. Probably not. But I know he asked me to get assurances from Kennard that — he, probably like Earl Warren, wanted a solid decision, but it turned out to be 4–3.

MCCREERY: What did you say to Justice Kennard?

MORENO: I said, "This is what the Chief is thinking." I said, "I think that we should go with Plan — " I called it Plan A.

I remember talking to the Chief, too — before, when he asked me to speak with Kennard — about how I felt. He said, "I could go either way." But then I said, "We can all get on the bus and get a ride, but if some of them have to sit in the back of the bus — they get on at the same time, they get off at the same time, but there's a quality about that that is not fair."

That was the thing about the domestic partnership law. Okay, they're equal in all other respects. But hey, you know what? We can't call it marriage? I said, "That's rendering them a second-class citizenship, just like the people having to sit in the back of the bus." I don't think he mentions this in his book.

I said, "That's my position. Equal is equal. And domestic partnership is not enough, especially if you believe in all these other things about right to privacy, right to freedom of association, non-discrimination between the sexes, and all that."

But that decision — I remember — I think my son was at Stanford, and he was living in San Francisco. I remember walking out that night because I was staying in San Francisco, and in order to go to dinner we had to walk by this rally and people celebrating and being ecstatic. I told my son, "No one here really knows me, [Laughter] and that I'm from the Supreme Court that just ruled in their favor." It was an interesting moment to be anonymous in a crowd like that.

MCCREERY: But to be on the street and see the actual reaction.

MORENO: Right. We had seen it from a distance before, but to be out there at this nighttime rally, and music, and people very happy — it was really a great experience.

Then later, we watched the signature gathering for Prop. 8. They got the signatures. I think the Chief had informally said, "While the matter is

pending, we should not participate in any same-sex marriage ceremonies because it might predispose us."

But I went ahead and did about eight of them. I think at least about eight of them. One of my law clerks, Michael Nava, got married. Another law clerk from another chambers. I think Kennard did one or two. The Chief decided not to do any, even though he was asked to do them.

So that was really the only thing that came up in the Court in terms of that interim period. But my feeling was that right now it's legal, and why would I take a position of saying that it's not? That I won't do it because there's a question as to whether or not it's legal? Maybe the Chief was a little bit more restrained, thinking that, "If I had done them I started predicting what my decision would be ultimately."

When November 4, actually, 2008 — yes, that November when Prop. 8 passed by a bare majority — I actually had some gay friends who called me a week before, and they wanted to have a wedding before the Fourth. So I did one, even though we were having a Halloween party. I did a really quick wedding that Saturday night before the Tuesday of the election.

McCREERY: The election, Proposition 8. What about the message that was carried to the electorate about that? What observations can you make there?

MORENO: Oh, God. It was another abuse of the proposition system, although I guess this was really an issue that people can get informed about. But they have really strong emotional feelings about it. I'm trying to remember. I think the African-American community did not buy in to it based on the, generally, religious beliefs. Heavily financed by out-of-state interests. The money was coming from outside of California and, again, showing you how these things can be affected.

I don't think any of us really thought that — we knew it was going to be close, but we thought the Court's decision would prevail. Then the public has to be confused over this. "The Court just overturned this statute — " I don't even think they thought that. They said, " — a law. And then to have the Constitution amended? How does that — ?" And the Constitution in California reads like a statute book. [Laughter]

McCREERY: It's so easy to amend.

MORENO: Yes, and only by a bare majority unless you write in there that it has to be by a supermajority or something. So I don't think the public was well informed. It was just basically decided on the basis of — and I don't know how Hispanics fared. Even to this day, people thought that it was going to be Armageddon.

Then came how we reconcile a judge's obligation to follow the Constitution. That was a thorny issue. I'm trying to think of my dissent. I know it dealt with — because I was bound by the Constitution, too. The chief wrote the opinion. I think he wrote it reluctantly, but everyone said this has to go about it a different way.

I remember talking to my law clerk, Greg Wolff, and saying, "This is what I want to do. You can't deprive — " I read the *Marriage Cases* opinion again and again, and the rationale was that it implicated so many constitutional rights, again privacy, association, discrimination, gender rights, et cetera.

What we came up with — and by the way, usually — we talked about how I assigned cases. But I remember telling my chief of staff, Greg, I said, "I want everybody involved." Michael Nava, who I had done his marriage, and he was on staff. Rob Katz. We had meetings about how best to go about this. [Laughter]

Another area where I had commented on related to the single-subject rule was how to amend the Constitution, and where there is more than just an amendment but a real modification of the Constitution, you actually have to have a constitutional convention, which California has not had, I don't know, probably since the dawn of time. I said, "When you're dealing with each of these constitutional issues, there are too many. It's too embedded. How can you say that's a mere amendment to a provision in the Constitution?"

If you look at my dissent, it really draws upon — I think I called it a "constellation of rights," constitutional rights. "This is really a revision." That's the word I'm looking for, a revision of important constitutional — it implicates too many rights in the Constitution. I considered it a revision.

It was kind of a Hail Mary. I didn't think I was going to get any votes, but I had to really stand out there and say, "This is what should be done." My colleagues were all very respectful. No one said — and I didn't really

try to lobby because I knew that — you see the concurs coming in without much comment. So that was that.

Then, of course, the federal challenges came up. They limited their challenges to the state Constitution because they felt that federal law at the time did not provide — or they thought the Supreme Court would never agree with them. So it just shows you how persistence on an issue — you just keep at it, and people's attitudes evolve.

My sense has always been that there's a generational change of attitude, and there's also an acceptance as people acknowledge that they have gay relatives, and they see that families that have same-sex parents are pretty normal. [Laughter] And that the kids are fine. So it has really been interesting to live in this time and to see how quickly the country has evolved and then different states have joined the bandwagon until the Supreme Court decided in the — is it called *Hodges*? I'm forgetting the name of the case[10] — and how that came about.

McCREERY: When you think about it, the change of public view and the coming forward of all these different cases, it didn't take quite that long, really, once it started rolling.

MORENO: Yes. Really fast. Light speed. Yes. For a generational change to happen, yes, from the earlier — I'm sure it was before 2005, the same-sex adoption cases, and moving up very, very fast. That's really the highlight of my tenure on the Court, to be there during those times. And it turns out there were a number of 4–3 cases on that issue.

I think that it made a difference that I was on the Court because if it were otherwise — and it was 6–1 on the last case, by the way — but you could see how you could feel that all you were was a lonely voice in the universe. But here, when you have 4–3 cases and you are the swing vote or the Chief is the swing vote — any of the four can be the swing vote.

I'm very happy to say that I had great respect for my colleagues who didn't agree with me. They were not radicals. They were not misogynistic or homophobic in any way, so their positions, I think, were very principled and based on how they interpreted the law. Their feeling was, the people should decide, or the legislature should decide. But if there's going to be

[10] Obergefell v. Hodges, 576 U.S. 644 (2015).

this major change, it shouldn't come from the seven of us. It should come from the legislative process.

MCCREERY: What chances have you had personally to observe or even evaluate the judicial systems in other countries?

MORENO: Mostly in Mexico, maybe exclusively in Mexico. And I saw it in Belize, of course. I was telling someone the other day, who is Mexican, that the Mexican judges I met — and these were federal judges and state judges, because they have a similar system — all seemed above-board and honest and well paid, relatively to other professions, and seemed to be corruption-free.

But the stereotype is that police and judges are on the take. You just have to watch a series on Netflix called "Narcos: Mexico" to say, "Oh, my God. Government officials — " and this is based on a true story, " — are paid off, and judges are paid off."

I'm sure that does happen, but my impression is that, although their systems are underfunded and cases move very excruciatingly slow, the people I've met are very diligent and want to do the right thing. But I would bet you dollars to donuts the public doesn't believe that, maybe because of a history of corruption and they don't feel that anything has changed. But usually you're talking to people who have lost maybe a case or two.

So I think our system is respected throughout the world. While on the Supreme Court and on the district court, I had delegations coming from Chile, Peru, Mexico, China, Japan, Thailand, and maybe an eastern European country — coming to look at our ways of doing things.

I remember speaking with a delegation, or maybe it was just a couple of researchers, from China, mainland China, on how we handle the death penalty cases. They did implement one reform. The provinces there, the appeal on a death penalty, which — the trial was very quick — they don't have the resources, investigation — it was pretty slam-dunk — there was an appeal just to, let's say, a province or state appellate court.

But they decided, once they saw how we treated it, the appeal would go to their national supreme court, which was controlled by the Communist Party so I doubt that many death penalty judgments were reversed. But at least they would get a national perspective on how these things were being implemented.

I went to China twice, and one time we met with the president of the national Chinese supreme court and had a session with him. I also judged a couple of moot courts on international law with students in a competition in China. It was very, very impressive.

So we're highly regarded in that respect. What concerns me now — this is getting off the track a little bit — is our public's perception of the U.S. Supreme Court since it's so evenly divided, conservative and liberal. But so many of the cases that go up are these cases that are emotionally driven, and they're issues that really attract heavy public attention. Those are the ones that are publicized. Not every case we decided or the U.S. Supreme Court decides is a monumental case.

There was a case just yesterday, or this week. I was just reading this morning that — because my old firm was on it — whether or not a trial court deadline, I think to file an appeal, was timely or not. The trial court here said, "It's not timely. Sorry." The Ninth Circuit reversed and said, "Oh, no. They were diligent, even after they blew the date."

The U.S. Supreme Court, I think unanimous, Sotomayor writing the opinion — and it was a case that, hey, it had some equities. But hey, a deadline is a deadline. So I was glad to see a routine case like that, noncontroversial, draws everybody in. I know Chief Justice Roberts is inclined to have narrower decisions just to get more of a supermajority and proceed incrementally. I think that's a good thing.

But anyway, the public doesn't know that, especially the way the president spoke the other day about the national emergency, kind of in a joking fashion. "Well, we go here, and then we go to the Ninth Circuit, and then there will be another appeal, and finally it will go to the Supreme Court and we'll win there."

It's like he's already certain of the outcome, without even having any idea as to what the debatable issues are. He's just assuming that the courts do not like what he's doing, for whatever reason, and that now the Supreme Court is in his pocket. What impression does that give to the separation of powers and the judiciary being the ultimate decider of what the law is? It's bad, very bad.

Fortunately, we don't have that in California. I just worked on a matter that's going to be argued in the California Supreme Court. The briefs are good. There are two different views of what the law is. Studying the past

decisions of the Court and how they might approach this case, litigants don't think, "Oh, it's going to go this way." There's an openness and a feeling that, "Hey, we don't know how they're going to call this, but they could go this way, they could go that way." No one thinks that it's predisposed.

MCCREERY: We were talking about some other civil rights-type cases. Maybe I'll just ask you while we're on that theme to say a word or two about this 2010 case, *International Society for Krishna Consciousness v. City of Los Angeles*, on soliciting monetary donations at LAX.

MORENO: Yes. I don't remember much about that case, only that I think I got that case because I wrote a case called *Fashion Valley*, building upon the seminal case, another mall case, that was written by Mosk. It's on the tip of my tongue. The *Pruneyard* case.[11]

There are different factual settings, but *Fashion Valley* built upon the concept that, in today's society, the malls are like the civic centers or a post office, old-fashioned Main Street.

MCCREERY: Public spaces?

MORENO: Public spaces. And now we shop in malls. So my *Fashion Valley* case advanced that. I think it dealt with a boycott and whether students could have space there. We said yes. That was a 4–3 case, as was the earlier case out of San Jose written by Mosk where we said, "That's a public space and therefore there are some First Amendment issues there."

So this case, as I recall, was an easier case. I don't know if you remember the days, and I don't know where you grew up, but when you went to the airport you saw all these Hare Krishnas annoying you or giving you something. You touched it, and they said, "Oh, you owe me a dollar," and getting kind of upset. [Laughter]

In this case we said basically time, place, manner. We said there is crowd control and people's right to be left alone. So I think this one said they have a right to be there, but if they're going to solicit, the airport could designate certain areas where they could be coned off, in a sense, to stay there, which basically defeated their purpose because who's going to go over there?

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[11] Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899 (1979).

We said, in terms of a reasonable restriction on their right to solicit money — yes, limiting solicitation of donations. That was a Ninth Circuit certification, from the Ninth Circuit. That's another issue that came up a number of times.

McCREERY: Yes, let's talk about that.

MORENO: It happens even more now. Back in the day before I was on the Court, Justice Mosk, I'm told, my predecessor, often voted against Ninth Circuit certification questions because, he said, "The Ninth Circuit can figure out what California law is. We are not their law clerks." [Laughter]

So to me, coming from the federal court and knowing that California law was not crystal clear, and that there were so many diversity cases in the federal court that implicated California law — we are full service. If there's really an issue where these cases are being litigated in California — although I think we can take a certification from any circuit court, but it's always the Ninth Circuit — we should take those cases.

It's one way of getting additional cases, and they have to present the question to us in a very narrow, focused manner, and we have to have an assurance that our ruling is not just advisory, that they have to abide by it, that they're giving it to us, we're telling them what the law is, they have to follow it, and — not that it has to be dispositive of the case, but it has to be dispositive of that issue. So I was very open to it.

My other colleagues generally did not have the same feelings that Justice Mosk did. But I'm sensing — I don't know. I haven't done a study of how many cases we would get, but when I was on the Court we'd get maybe three cases out of the hundred or so that we would ultimately decide.

I think now that it would be interesting to see if they're getting more, because I know I've seen a number of them that were Ninth Circuit certifications. Just my subjective belief is that with the academics on the Court, who clerked for federal courts and stuff, that they probably have more deference to these Ninth Circuit questions coming in.

McCREERY: Let's do turn to arbitration, broadly speaking, and have you talk about meeting that topic again at this level.

MORENO: Yes, right, where I'm actually in the business, so to speak. [Laughter]

McCREERY: But looking at your court cases —

MORENO: They are kind of consumer-friendly, a lot of my decisions, and I think that stems from the fact that — well, there are a number of issues. I think that the right to a jury trial is close to being inviolate.

I think that arbitration — and my thoughts on this have developed over the years, and I've said this to people here — that there are so many cases in arbitration that the original Federal Arbitration Act, from 1926 or something, never contemplated, that these consumer-related cases would be going to arbitration. Arbitration was designed to really deal with commercial disputes between equal partners, companies. Once it grew — and I don't know when the sea change started — maybe in the eighties or nineties — that it became a convenient way of eliminating the right to a jury trial, expediting the process, and I think in many cases being one-sided.

The irony, I've learned, is that my colleagues on the Court who took more of a business perspective — and that would be Baxter, Chin, and Corrigan — thought that arbitration was quicker, simpler, less expensive, and the results would be pretty much the same, decisions by a retired judge or justice, and that it was basically less expensive and more convenient for everybody, less formal, as opposed to court litigation.

But I think everybody here who does arbitrations would agree that what's happened is that smaller cases, employment cases in particular, now come here. They're sort of one-sided. Class-actions are waived, where in fact, with some of my cases, you'll see that they're class-action friendly to resolve smaller amounts at issue that aren't otherwise really — you can't really litigate them in a reasonable fashion.

But it turns out that lawyers now are getting their court experience in arbitration, which is different, but they're employing the same procedural tactics — discovery and depositions and objections to evidence — and it becomes, just, the litigation has basically transferred from the courts to here.

So as a result, cases take longer. The expense, I'm sure, is the same. In fact, it could be even more because they're paying the arbitrators a daily rate. [Laughter] And the decisions, although they're reviewed if one of the parties chooses to have the decisions confirmed by the superior court or the federal court — so there's some review, but it's less review. There's no appeal, really. And the standard for review is more — I forget, but it's, "Was there an

abuse?" You don't even have to apply the law fairly and squarely. It's a pretty hard standard to upset an arbitration, to vacate an arbitration award.

Then there are all these little procedural devices that we discuss in some of these cases that demonstrate the unfairness, like the right to appeal or the amount at issue and so forth and so on, that make the agreements one-sided. A lot of that has been eliminated in California because of the *Armendariz* case that the chief justice wrote. So that's the way I approached cases from the beginning, as skeptical of shuffling a lot of these cases into the arbitration system, where they affected consumer rights.

McCREERY: We should get into the recording that when you talk about "here," that's your current role here.

MORENO: JAMS, where I'm a mediator-arbitrator, and where a lot of cases come. I could see how mediation works, or helping the parties to avoid further litigation. And arbitration in certain circumstances does work. Confidentiality is preserved and so forth. So that's a legitimate concern. But my main concern on the Supreme Court was how small individual consumer cases simply could not be resolved unless you had a broader mechanism like class actions to make those workable and to attract lawyers to represent a bigger class.

That was my *Discover Bank* case. That dealt with, I think, a thirty-dollar late fee, and there was a challenge about how that was implemented to the detriment of the consumer. No consumer is going to take a thirty-dollar claim to court or even to arbitration. But if we allowed a class action to proceed, then you can get a lawyer interested. You get hundreds if not thousands to join as a class to make it more equitable. Of course, one issue there is the attorneys' fees, and oftentimes we've split up the pie and the consumer gets very little too, so there are some criticisms there.

I don't know how all this started, but I do know in terms of the court jurisprudence it started with *Armendariz*, that really looked at a number of factors about — if you're going to have a legitimate or valid arbitration provision it had to cover certain factors and, particularly on the appeal part, that it not be just one-sided. I followed *Armendariz* in a number of these cases. *Gentry* dealt with a bigger claim, maybe that involved several hundred dollars, not a really small claim.

I guess the upshot of this has been, particularly with the *Discover Bank* and *Gentry*, I learned — I guess when I was on the Court — there has been a tension between the California Supreme Court and federal law and the U.S. Supreme Court. The U.S. Supreme Court takes a much more pro-arbitration position, and they vacated my decision in *Discover Bank*. I found that out just by reading it in the newspaper. I didn't realize that it was up for being vacated. [Laughter] I said, they can't reverse me, but they can vacate my decision on a petition for certiorari.

And basically they found class-action waivers were valid as long as everything else comported with the law. We had said — not to get into too much detail, but as long as one of our principles of contract interpretation did not focus on arbitration specifically — so it was anti-arbitration if it's just a general provision of contract law — that's a loophole for California law to be valid, even in the arbitration context because it's not directed specifically to arbitration.

But the Supreme Court has taken a very strict view on that by saying, if the provision "frustrates" the arbitration process, then that's contrary to the Federal Arbitration Act, and that's a case called *AT&T v. Concepcion*.

Since then, it's really gone downhill for consumers. The only type of claim that has survived — in fact, there was an opinion two days ago out of San Diego, the Court of Appeal[12] — there's something called PAGA, the Private Attorneys General Act, that basically says that a — and these are what they call representative actions, like class actions. But you get a group of people to be authorized by, say, the labor commissioner to bring an action on wage-and-hour violations. But the money that you recover for restitution, 75 percent goes to the state. So you're like a private attorney general saying, "Hey, they violated the law."

So there's not that much incentive for the individual class members. If they prevail they'll get what they're entitled to, but the attorneys' fees — the judge decides how much the attorneys' fees are for the lawyers, and it's usually a significant amount, maybe not as much as in a strict class action because 75 percent is going to the state to begin with. So what's left, the 25 percent, out of that has to come attorneys' fees and the recovery by the class representatives.

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[12] Correia v. NB Baker Electric, Inc., 32 Cal. App, 5th 602 2019).

Our courts have said — and I don't think this has gone to the U.S. Supreme Court yet — have said that kind of action cannot be waived — we've said that in a case called *Iskanian* — that that's not a class-action waiver, and you cannot waive the rights of the state by this individual agreement.

So if you're an employee, and it says you waive class action and you can only bring an action on your own behalf, that doesn't exclude you bringing an action on behalf of the State of California. That's probably up for grabs still, but it's not unconscionable. The state cannot waive something that you have agreed to waive, and you're not acting as an individual, you're acting on behalf of the state. An interesting issue that's still percolating right now, so we see a lot of those claims here that survive. The plaintiffs are hanging on by a thread on those claims.

So I've seen, in my experience, the arbitration universe swing from California being a leader in terms of consumer rights to being squashed by the U.S. Supreme Court and now, in my current iteration, seeing that arbitration is not the simple inexpensive thing that my colleagues on the Court thought.

In fact, I was telling Justice Chin this at Justice Groban's confirmation hearing. I said, "You know, I'm doing arbitration now and making a lot of money when I do these, and the lawyers are doing all these shenanigans, just like they're in trial. And it's not cheaper." It's not cheaper. They have to pay for the neutrals, where at least if you're in court you're not paying the judge, you're not paying for the courtroom.

McCREERY: It might not be quicker or simpler, either, at this point?

MORENO: Right. Yes. He smiled. "Yes, I know. I know."

Then the judges — one judge told me this. I said, "Why are you sending us so much?" He said, "Our cases are heavy, and if there's any way we can send this to arbitration, we do." It goes back to them, but their work is much less because the lawyers have done all the discovery and they have a preliminary ruling, and so forth.

I just had a big case. I wrote a twenty-six-page ruling, you know? That will go back to the judge. There was an arbitration provision, so it came here. Now it will go back to a court in San Diego. "Look at that. Hey, that looks pretty good. Moreno wrote this. We're going to abide by this." [Laughter]

And it's not an irrational decision. It really goes into everything. So I'm the trier of fact, and this is what I found on this complicated real estate deal. It saves him time. He says, "What's wrong with this?" Given the very lax standard of review, they would have to find that I went beyond the scope of what was tendered to me or that I was biased or whatever to knock it out. And no appeal other than that slight review.

MCCREERY: Perhaps we'll look for just a few minutes at some insurance cases. I know you had a number of those and had a good specialist on your staff.

MORENO: I've been on a couple of insurance panels here, one with Rex Heeseman here, Judge Heeseman, who is one of the authors of the Rutter book on coverage.[13] He said that — this was years ago — that my reputation was one that was actually fairly neutral but that I was the one who advocated the "reasonable expectations of the insured, viewed from an objective perspective." So that puts me pro-consumer, in a sense, but it has to be objective and taking into account who the consumers are, whether they're well-informed or not and so forth.

MCCREERY: What did you think of that characterization?

MORENO: I thought it was great. I spoke to an insurance panel, and he says the insurance industry didn't feel that I was biased in one direction or another, even though I have certain personal feelings about insurance companies, how they amend their contract policies.

There are two cases here, one is *MacKinnon*, that — again, the standard rule is that exclusions are to be strictly construed, and inclusions are to be broadly construed. That's the basic principle, so if the insurance company is trying to limit coverage, saying it's excluded, you have to look at that very narrowly because the consumer expects coverage, overall, for liability. So if there's a provision that implies that it's covered, unless it's excluded it's covered.

That's my view, and this *MacKinnon* case is a prime example of that. That's a tragic case, as I recall, where an elderly woman was, for whatever reason, still in the house when the termite company came in. How does that happen? I have no idea. Maybe they thought they moved everyone out.

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[13] *California Practice Guide, Insurance Litigation*, published by the Rutter Group.

They didn't want to cover it because, "Oh, we're not responsible for a pollution exclusion." I said, "This really isn't a pollutant. This is a negligent act, and the gas was emitted."

It's not your typical pollutant. It's more of a poison in a very confined space, not a pollutant that's drifting through the air and damages a car, okay? That's a little different. Even there, there might be coverage, but probably not. But here it was confined. How do you ignore that type of negligence? To say, "That's not a pollutant." There's a real distinction between a poison in that setting and a pollutant. Is that the way that is typically construed?

MCCREERY: You had unanimity on that one.

MORENO: Judgment affirming. Yes. So they reversed *Truck Insurance*.

The other case, *Julian*, dealt with something called concurrent causes, and that deals in mudslides. There I ruled in favor of — yes, I affirmed the judgment for the insurer because I think it excluded mudslides. Whereas water damage would be covered, mudslides were not. As close as those two are connected, you would think they're inseparable. But water is just water, and mud is slamming against a house. That was excluded. That's not water damage. That was one where the insurance company won.

Then this *TRB Investments* is just common sense. I do recall that case. What is construction? Is it new construction or is it a rehab? Does it include everything? There we all agreed that it should be broadly construed.

So in one sense at this level it's pretty easy to define the rule and come up with a reasonable expectation of what that rule means. To me, even looking at it now, construction — I was just talking to someone here about remodeling their kitchen. That's construction. It doesn't mean you're building a whole new wing of your house or anything like that. So it would be covered.

The thing I liked about insurance cases was that they're really just based on, almost like statutory construction, just interpreting the policy. Sometimes it's gets a little nuanced, like this *EMMI* case. I do remember that. Who joined me on that? Reversing judgment.

That involved what they call a jeweler's policy. You were covered by insurance if you were in the immediate presence of the thing that was stolen. So here's a person, maybe they're getting gas or they're talking to

someone, and the jeweler's bag is in the back seat of the car. He's talking to someone, say, at the trunk, talking and someone runs by, grabs it, and runs. The question was, is that the immediate presence? It's like a robbery case, almost, and I said, "Immediate presence doesn't mean you have to be standing right next to it or having it in your hand."

The insurance company thought, "We'll cover it if you've got it in your hand or it's right next to you, but not if you're a certain distance away." I forget what the language was, "atop" and something. That was a close case. We probably should not have taken it because it doesn't happen that often.

But I was just offended [Laughter] by the fact that your bag is right there, and I'm talking to you. Well, let's say you're the insured, and you're talking, a little bit distracted, and someone runs by and takes it. Wouldn't you think you'd be covered by it? Because maybe you realize and maybe you chase after the person. But to me, that was sufficient to be in your immediate presence.

I think sometimes — getting back to petitions for review — although the Court, I was fond of saying, and maybe I heard it from somewhere, "The Court is not a court of justice, but it's a court of precedent." So it's not so much whether or not the Court of Appeal got it wrong, but whether the law needs to be clarified and/or there's a substantial question of law for Californians that needs to be resolved. Otherwise, folks, the Court of Appeal, like the Ninth Circuit or the circuit courts, are the final arbiter of these cases. We don't have the time or the resources to be deciding or reversing every unjust result.

This was an unjust result, and somehow I persuaded my colleagues. "Look, I'll write the memo." And of course they give it to me.

MCCREERY: Let's turn to see what else there is in the way of civil procedure or other civil cases. There was one that you wrote fairly early on that was a local government case, *Great Western Shows, Inc. v. County of L.A.*

MORENO: That was one of my first cases, and what's interesting about that case is that it's a Ninth Circuit certification, and I think Judge Paez, who's a friend of mine, was the district court judge. This question was whether or not the county could place restrictions on gun shows, and we said yes, they can.

I've followed this issue. In fact, I talked to one of the lawyers on this case not that long ago, and basically when it comes to regulating the sale of firearms, for various safety reasons, the county could basically decide if they could have gun shows in their facilities.

On this *Vargas* case, I'm actually working on a consulting matter on this right now. This is a live issue, and I was retained by the county — I guess I can say this — to consult with them on their role in providing information to the electorate, taxpayer funds to provide information on a proposition.

If you read this opinion, *Vargas*, it affirms an earlier case called *Stanson* that places great limits on any kind of express advocacy. And was it style, tenor, and manner? — of their advocacy is really outdated. It talks about, believe it or not, bumper stickers, prohibiting radio and television messages to inform the public.

My concurring opinion, written in 2009, says, "We may be following precedent, but that precedent probably should no longer apply. Because the way people communicate and advocate in elections now is much more significant. Perhaps we should take another look at how those things are run, particularly in a county as big as — " I guess Salinas is in Monterey County.

But in bigger counties like Los Angeles, a public entity like the county cannot really — and politicians can't — inform the electorate on issues. We get our information now from emails and TV and so forth. It should be fitting and proper that those campaign efforts should not be so restricted as in *Vargas* and in *Stanson*.

But the thing I remember about this opinion: Chief Justice Ron George was very committed to *stare decisis* and very reluctant to make a big change in the law. I don't know how this got by him. He wanted to affirm *Stanson*. Maybe the Court of Appeal opinion was sound, but it's one where I said, "Times have changed, and maybe we ought to re-look at this." So anyway, I was retained by the county to help them espouse that view.

McCREERY: We've been talking about some of the opinions you wrote while sitting on the California Supreme Court. I wonder if I could ask you to just reflect a bit on your philosophy of writing opinions. A majority opinion is one thing, but what would it take, for example, for you to write a dissent?

MORENO: In order to write a dissent I would have to really be compelled or feel strongly about making my position known. It would have to be a principled reason. My general inclination was, if it was just a small point I would not spend the time to write a dissent or even a concurring opinion.

Sometimes my point was, maybe, to pick up on an issue raised in one of the briefs that I thought was meritorious. Maybe it was not essential or dispositive of the majority ruling, but I just wanted to acknowledge that I thought maybe at some future date in another case this issue might be worthy of further consideration.

One was *Martinez v. Combs*, that dealt with a farm labor situation of non-payment and who was responsible for ultimately paying the farm-workers, who were probably fourth down the line in terms of: the actual

Carlos R. Moreno, California Rural Legal Assistance, Los Angeles Reception, June 8, 2011.

Maury Phillips, Getty Images.

property owner, who leased it to a grower, who subcontracted the actual harvesting to another company, who then hired the farmworker.

There were indications or suggestions of alter ego in that case, and from my own general knowledge I knew that the non-payment of actual laborers was an issue and that somewhere some line of responsibility should be connected, if you could show alter ego or some other theory of agency.

I wanted to point that out, even though I concurred in the majority, which was that they were without remedy as to the more solvent parties — I think maybe the lessor or the owner, something like that — the point there was to focus on that issue and have the legislature take a look at it. I know I got some comments, or there were comments made, about my perspective.

So a dissent had to have a purpose, and I wouldn't dissent on a minor point that was not going to go anywhere but on something where I thought the legislature might benefit from taking a look at one of the nuances in the case.

Also, I think I would write a dissent if I directly disagreed with the majority. I would write a dissent and maybe try to get a few votes to join me. But I was not really a big fan of writing dissents or even concurring opinions. It had to be something significant for me to devote the time and resources to that.

McCREERY: How does a justice strategize, not only about the majority or dissent in question but about the longevity of the issue in the future?

MORENO: Right. I should also add that in the *Strauss v. Horton* case, where I was the lone dissenter, there was no question about that I wanted to dissent from the very beginning, and I let my colleagues know, and I gave my reasons for it. So really, from the very beginning when the draft opinion came out, I noted that I would dissent and indicated basically the general reasons but then had to write that up and put it into a dissent.

Again, I was vindicated ultimately, maybe not on the same grounds of my dissent but my position was vindicated. So I think it's a good feeling when you do speak out as a lone voice, and ultimately your position is vindicated.

McCREERY: And because you are alone on that or any other solo dissent, it's communicated to the outside world pretty clearly.

MORENO: Right. Yes. There's a photograph I have at home, and I don't think it's "Photoshopped." It's a demonstration outside of the courthouse when the opinion was issued. One of the posters says, "6–1. We love Justice Moreno." [Laughter] So yes, it's something you're proud of. Again, you want to just send a big signal that you don't think that there's sufficient legal basis for the majority ruling.

Oh, the other thing is that you always ask — at least I asked myself — "Is there something wrong with how I see this?" If you've got six rational votes against you, you have to question yourself. "Am I out to lunch? What am I trying to say here? Why?"

That's why in that dissent, the *Strauss v. Horton* dissent, I basically agree with the principle of the majority opinion. Judges have to follow the Constitution. I came up with a procedural reason as to why that could not be the case, and that was that this really was not an amendment to the Constitution but, really, a revision that called for a different way of making those changes.

MCCREERY: But that's a good point. When you're on one side and everyone else is on the other, you might ask yourself, am I wrong? How could your research staff assist you in that part of the phase, if at all?

MORENO: There, I mentioned, I had virtually my whole staff kicking ideas back and forth. I had addressed this revision-versus-amendment issue in other cases, in maybe two or three cases, so it was on my mind. I think we came up with this particular attack, if you will, on the majority quite early. It was the only way, really, to challenge Proposition 8. I had written on that issue before.

MCCREERY: To what extent would you welcome new ideas or approaches, even rather late in the game, from your excellent staff?

MORENO: All the time. All the time because there were some — I can't recall cases, but there were some situations where I would say, "We've got to find a way to rationalize this."

Then one of my staff attorneys would go into his office and hide and come out hours later, and he'd say, "I think I have a way." [Laughter] But that, for sure, happened in more than one case where we had to just think of a way of — because you want to sound rational and not — like some

opinions are just scathing, and I'm not that way. You want to have a principled way of attacking a majority opinion.

McCREERY: Say more about your own style, as you think about it, or about what you were trying to achieve in the way of style.

MORENO: Legal writing. I don't think I'm a gifted writer like some justices who just write with a flourish and have catchy phrases and so forth. I think my writing was fairly standard stock, if you will. What is the case about in a real summary form? Getting into the facts and then analyzing the law, particularly looking at cases and applying them, distinguishing them, and trying to come out with a result.

Always in my mind, though, was to give clear guidance to the trial court. I wanted my opinions to be clear and succinct so that they would be easy to read and easy to apply by the trial courts. I would think that would be the number one objective.

I never really wanted to use inflammatory words or anything like that. The only time I deliberately did the opposite is where I knew the trial judge. This was in the Richard Ramirez "Night Stalker" appeal, death penalty appeal. I knew the trial judge on the L.A. Superior Court, Michael Tynan. I know that he had a difficult time with the Hernandez brothers' lawyers, who were inexperienced and just were giving him a hard time.

At one point in this lengthy case, he made a ruling — it may have been an evidentiary ruling — and I said something to effect that, "The experienced trial judge made a well-reasoned ruling," on whatever the issue was. So I gave him some props. [Laughter]

Then later, maybe a year or two later, I said, "Mike, take a look at that opinion. I know how difficult that case was for you for however long it lasted," months if not years. I said, "I gave you a prop that's in there because I really wanted to show at least my appreciation for the hard work you did. If anyone could do a really good job on that case as a trial judge, you did."

The same thing happened where I didn't give a prop to the judge, but there was a case that Judge James Otero, who is now on the federal bench — he had a high-profile case in Pomona, a death penalty case involving three defendants, and one was a juvenile. After the special circumstances and death penalty were found by the jury, he reversed the death penalty

judgment against the juvenile. Maybe he was, I don't know, seventeen, eighteen — young.

We affirmed his discretion to do that, and because I knew him — not that I had to recuse myself or anything — but later I told him, "That was a good thing to do. You exercised discretion." He was a conservative guy, but to reverse the death penalty punishment for good reasons stood him well, I think.

Later when he was up for a federal appointment — and I was routinely called as a character reference on some of these background investigations — I said, "This is the kind of guy he is. He calls the shots as he sees them, and even in a high-profile case he'll do what's right."

MCCREERY: Which of your opinions overall, but thinking particularly of dissents — we've mentioned some of them — which of those seem most important to you looking back?

MORENO: I think the *Strauss* case is probably the most important dissent. I think *Vargas*, now in retrospect, was prescient, let's say, in terms of how things have changed since — was it 1976? But they were really few and far between. I didn't dissent just to dissent.

MCCREERY: What other things come to mind, if any, from your trial court years that you saw again as a Supreme Court justice?

MORENO: I mentioned the gang enhancements. Certainly that. The unruly defendants. One other issue that would come — and I'm not sure if I actually wrote about it in an opinion — but actually a fairly common situation dealt with incompetency of counsel, particularly on habeas proceedings. Incompetency or conflict of interest of counsel. That recurred a number of times in my trial experience.

Again there — and another issue too — you would inquire of counsel at sidebar, "Are you doing this for tactical reasons? And there's a point here? Because you are verging on the grounds of, I wouldn't say incompetence but a 'best interests of your client' situation."

MCCREERY: That's a delicate conversation.

MORENO: Yes, but if there was a tactical reason, then I might run that by the defendant. I know that issue of running things by the defendant would come up on habeas matters in particular. One issue that would come up

would be a defendant who on habeas said, "I wanted to testify, and I didn't know I had the right to testify."

So in every criminal case I had — and maybe I learned this somewhere from one of my colleagues — and I just had a discussion with someone recently about this — I would get a waiver from the defendant. If the defense rests with one witness and the defendant doesn't testify, I would excuse the jury and advise the defendant, "We've now come to the end of the trial. Your counsel says he's going to rest. I'd just like to get a waiver from you. You have a right to testify."

Without getting into his discussions with counsel, I'd say, "Have you had an opportunity to talk about your rights, not only against self-incrimination but also your right to put on a defense and to testify in front of a jury to present whatever you want to say?"

McCREERY: You put that right in the record?

MORENO: Oh, yes. To protect my record so it doesn't come up on habeas. I know that that was something I was acutely aware of when those claims would come up on habeas or, "My lawyer never advised me of that right," or, "never advised me of an offer" that the D.A. had made to him. So that's another thing I would do before bringing in the jury or at some point before trial, making sure that the defendant — just covering for myself and, in a sense, for the lawyer.

It's not uncommon for the lawyer — whether it's true or not, who knows? — if the lawyer didn't communicate the last offer extended by the D.A. and they're going to trial. But that's a recurring issue, and I'm sure we saw that on habeas, that, "I would have pled guilty to a lesser offer extended by the D.A." That would come up.

The other area where I had experience in the trial court and it would often come up on appeal was on something called a Marsden motion. That's where, again, a defendant is complaining about the status of communications with his lawyer has broken down, and the lawyer is not acting in his best interests or not communicating offers, a breakdown such that it leads to not having effective, or what the client thinks is effective, counsel.

That came up numerous times on our death penalty appeals. The law is well settled, and it's such a common motion that all criminal trial judges

know the drill as to laying a foundation for that and then either granting or denying the Marsden motion.

Another issue, again, we're getting on defendants, who want to represent themselves, are Faretta advisements. It comes up in every pro per case that would come before the Supreme Court. As surprising as it may seem, they go forward as pro per with advisory counsel, and I had experience with that, in the Faretta admonition, advisory counsel admonition, and so forth.

Those issues that would come up in automatic appeals I had a lot of experience, and I think my colleagues who had been in the criminal courts knew that. The law, again, is very well settled. Not a big issue, but something where you could really relate to that and it's not an abstraction.

MCCREERY: Let's move a bit more into the capital cases. Let me start by asking you to talk about the caseload for Supreme Court justices and how you assigned that work to your staff and what effect it had on your overall caseload.

MORENO: Yes. The death penalty cases consumed about 25 percent of the caseload, and by that I mean the absolute number of cases. Whether they required more intensive work — were they weighted more heavily than others? It depends. After the staff attorneys had worked on a few of them I think it became easier. But still, the records are substantial in those cases.

And as you know, these cases take many years before they get up to the Supreme Court, the record and so forth gets up to the Supreme Court and counsel is appointed. That's a whole other area that we were not involved in directly. But in terms of caseload, it really drew on the resources of the Court.

How I would assign those cases: I would just distribute them, not necessarily on a wheel but on a random basis to my staff so that everyone had to do them. I don't think anyone really relished doing a death penalty because it was just a lot of work.

The issues overall were fairly routine. It's obviously important and critical, but in the number of issues that were raised there might be two dozen or thirty issues that were raised. Most of them involved settled law. We had an unwritten rule that we were not to make new law on these routine issues.

There was only one case that I was involved in where we did expound on the "receiving stolen property versus burglary" issue. Again, I forget what we found, but we did create a new issue there as to whether or not someone who was involved in a burglary could be charged with receiving stolen property. They're distinct defenses, and they're not lesser- related or anything like that.

Again, I forget the nuance we did, but one of the objections was, "We don't create new law." [Laughter] We really focus on the penalty phase and the guilt phase and so forth.

McCREERY: Why was this unwritten rule in place? I could guess, but why do you think?

MORENO: It's because it would get lost in all the many issues in a death penalty case. We could always address it in a case that focused on that particular issue. I think that was the reason. This is an unwritten rule. I think I'm right. And we really focused on the gist of the death penalty, really the penalty phase, and that's where we were developing law or at least following law most of the time.

There were distinct areas where it was strictly death-penalty related, so we tried to do that, more so than dealing with underlying substantive offenses and addressing that, because usually it didn't affect "the murder" or the penalty. That might have been the reason.

I did have one lawyer — and so did Justice Mosk, for that matter — who could really crank out a death penalty appeal. One of my concerns and, I know, a concern of the Court is if you have a term lawyer who is not up to speed on death penalty law generally, it could really consume a new lawyer's time. That lawyer might just work on that exclusively, apart from some petitions for review and so forth, the other part of the assignment, and also commenting on other justices' preliminary responses.

But as far as having to review the record and draft an opinion that would be credited to me, it could take a long time, whereas if I would give that to a more experienced career lawyer, and I have one in mind, they could do it pretty quickly.

I think there were a couple of instances where I did have a term clerk, who shall go unmentioned, who was doing a habeas. And a habeas matter is even more difficult because there you're getting into collateral issues

like competence of counsel and the investigation, what that turned up, and very creative theories coming up.

I remember I had one term clerk who just was taking forever, and finally I think he may have come out with a rough draft, and I said, "Not good enough." So I gave it to my more experienced lawyer, and he cleaned it up and came out with the habeas opinion.

There are two aspects. The chambers only worked on stuff that was going to be published. Some of the habeas work was unpublished and done by — while I was there we created a death penalty habeas unit. Then they also started to work on some appeals to lessen the workload of the chambers' staff.

MCCREERY: A central staff?

MORENO: Yes. If it was a routine death penalty case, it would just go to anybody on my staff, but maybe a more difficult one would go to someone on my staff who could really crank those out.

MCCREERY: How long *would* those take, roughly speaking?

MORENO: From assignment it could take about a year, close to a year, whereas someone more experienced could maybe do it in four months. It depends. If everything is ready to go and the record is not boxes and boxes and boxes. There are some death penalty cases — a felony murder with a prior record merited the death penalty — it can be fairly straightforward.

MCCREERY: Maybe we could touch just briefly on some of the opinions that you authored in death cases and how you might have approached that. What do you recall about your first one? I think it's 2003, and the defendant is Larry Roberts.

MORENO: I don't recall. I do recall my first case, though, and it was a habeas matter, unpublished. This is interesting. When I say unpublished, one of the concerns, I know, of the Ninth Circuit is that the Supreme Court only shares published cases. There's a lot of habeas work that is routine, including some of the death penalty cases, and I'm not sure of the distinction right now as to why some are published and others are not.

But one case I had — I think it's *People v. Collins* or something to that effect — this is unpublished — we got a draft memorandum from Justice Kennard, a lengthy memo, recommending that the penalty be reversed,

maybe even the conviction, where this guy murdered two women in Northern California. The referee, who was a superior court judge, maybe retired, issued a 1,200-page report. The hearing went on forever, and I think he concluded that the penalty should be upheld, denied the habeas.

Justice Kennard reviewed it and proposed to reverse it. So I wrote — this is one of the first things I did, with the help of one of my staff attorneys who had been a D.A. for twelve years. I looked at it, and I said, "There's nothing wrong with this conviction."

The evidence was fairly overwhelming that he had killed these girls and had a prior record and so forth. Again, right now I forget why Justice Kennard thought it should be reversed. I wrote a lengthy memo, submitted it — and this is very unusual, now that I think about it — what did I know? [Laughter] I think I got everybody to agree with me. I would think that Baxter and Brown and Chin would go along, but I got everybody else to say, "Hey, no."

The Chief was very fond of telling — there was a state and federal committee that would work on common issues, and one of them was, "Why doesn't the Supreme Court publish its memorandums when you summarily deny a habeas matter?"

This was a lengthy — I don't know, fifty- or sixty-page memorandum. We wrote one, maybe not as long, but said, "No. We've looked at the 1,200-page findings and so forth, and we think it should be upheld."

So Justice Kennard had to give it up. And what did I know? I got the case, so I had to review, write my own memorandum, to be unpublished and to deny the habeas. I'm sure the matter has gone to the Ninth Circuit. That involved a lot of work on my staff, and I know my lawyer spent a lot of time on finishing up and revising the initial memo after having reviewed all 1,200 pages by the referee.

That probably endeared me to Justice Baxter, that I took a position that, "There's enough here." Because Justice Kennard usually was more on the liberal side in terms of a lot of criminal matters.

But your question was, were there other death penalty cases that come to mind that I wrote? I wrote *People v. Davis*, that dealt with the Santa Rosa killing that led to, was it "Polly's Law"? What was her name?

McCREERY: Yes. Polly Klaas.

MORENO: Polly Klaas. That led to three strikes, right, or something like that. Yes. I wrote that, and that was a high-profile case but in terms of legal issues not significant.

I wrote *People v. Richard Ramirez*. Again, evidence was fairly overwhelming, and I wrote the habeas on that. I think the habeas was published, but I'm not sure.

People v. Sturm — I don't think I've mentioned this case — was a young man about age twenty. He had been fired and, as you see so often now, returned to his place of employment and killed three people. Sentenced to death by Judge McCartin in Orange County Superior Court. This is an opinion worth looking at because I reversed the penalty phase, not so much based on the defendant's age, because the guilt phase was clear, but on judicial misconduct.

If you read that opinion, the trial judge was very demeaning to the lawyers and particularly the defense counsel and to defense experts and did all this in the presence of the jury. Things that come to mind are, "Ladies and gentlemen," — he files his own *sua sponte* objection, tells the jury that, "It looks like the D.A. is asleep, but I'll make the objection on his behalf."

He denies an objection, maybe made by defense counsel. "Ladies and gentlemen, I apologize for the attorneys. They go to law school, but they don't always remember their evidentiary objections. But I'll make them for them." He demeaned defense counsel any number of times. I thought it could raise a sufficient doubt in anybody's mind. Did the defendant get a fair trial, given the attitude?

There are two things that I mentioned about the trial judge. I cited a Spanish aphorism about, "He who enters the bull ring is likely to get gored." [Laughter] Because this was something I was very conscious of, again, as a trial judge. You get someone who's being incompetent, as I referred to earlier, or you have a pro per. To what point do you help them?

I think I was accused once of helping the prosecution by saying something to the effect, "Counsel, do you mean — ?"

The defense counsel objects. "Your honor, you're helping him." A totally incompetent D.A. But I wanted to understand. I wasn't trying to help him. I just wanted to understand what the question was. [Laughter]

The other thing I said about the trial judge was, I cited another aphorism that, "He throws the rock and then turns away and says, 'Oh, what?

I didn't do anything.'" [Laughter] He would deny that he was helping or whatever, but he obviously had done something, made a comment. "Oh, I didn't do that." Or, "I didn't mean that." Something to that effect. I think that was a 4–3 case, very close. Baxter, Chin, and maybe Corrigan, whoever was on the Court, thought — given that the evidence was fairly strong. But I said this was over the top.

A case that I cited that, again, was close to me — I don't know if you're familiar with the Sleepy Lagoon and the Zoot Suit trial here in Los Angeles?

McCREERY: From many years ago. Only vaguely, but please —

MORENO: Yes, from during the war. Maybe it was 1946 when the opinion came out. Judge Charles Fricke was the supervising judge of criminal when he wrote a book on criminal law and, again, demeaned defense counsel, demeaned the defendants. This was the largest prosecution, mass trial, and nineteen or twenty defendants, involving alleged Mexican-American gang members. There's a play called *Zoot Suit* and a movie that's very true to form to the opinion.

I was familiar with not only the play, but I had read the opinion. The trial judge was very demeaning to defense counsel. So I relied on that case. It wasn't reversed on the basis of judicial misconduct, that case, but it was a denial of due process and attorney-client communication because they were kept separate from the lawyers, and everything else.

I was happy to cite *People v. Zamora* — that's the name of the case — in *People v. Sturm*. Later I read commentary by the judge himself, who recently passed away. He seems like a nice guy. He retired. He was known as "Mr. Death Penalty" in Orange County. He was very proud of the fact that he had presided over about a dozen death penalty cases in Orange County, which is a lot.

But he commented on the opinion and said, "That sounds like me," like he would say those things. He was a very plain-spoken guy. I thought that was cool. He took no offense. He said, "You know, it's probably right. That sounds like me." [Laughter]

Afterwards, from thinking that this judge was, "Oh, my God. I can't believe that he would say these things and not think that he was being one-sided and demeaning." To say, "Yes, sounds like me. It's probably right." He had no, really, vested stake in getting this death penalty affirmed.

But I had other reasons. The man was twenty years old, maybe even no prior record. So he shouldn't have gotten the death penalty. When you kill three people, though, in cold blood it's hard to say you don't get the death penalty for that.

I remember the D.A. spokesperson was very upset. "We're going to retry the case," et cetera. I doubt that they did, given everything it takes to do a trial from, I don't know, fifteen years ago or so. The guy's in there for life without parole. That's probably the one death penalty case that really stands out, for me anyway.

I should say that when the death penalty issue was on the ballot, was it 2016, 2014?

MCCREERY: 2012, I think. Yes, about whether or not to repeal it?[14]

MORENO: Yes. I was actually asked to take a position on the reform to abolish it, and I agreed. I thought about it, but I was asked by Gil Garcetti, who used to be the D.A. here, whether or not I'd be able to write or sign on to opposing the death penalty. And I did sign on to it, and the reason was not so much — I said, "I'll do it. I'm not against it so much for moral reasons or that people don't deserve it, religious grounds, whatever. But I think it just takes too long, and it consumes too many resources."

The figure that I had in mind was $1 million, really, to go through the process and to handle everything through habeas, and ultimately the execution. If you have 700 people on death row — and since here we have so few executions to begin with — and the leading cause of death is old age and suicide, and we've executed thirteen people since the late seventies? We really don't have a death penalty.

I signed on to that, and no one ever really commented on that. But I was someone who had firsthand experience with the inherent delay and the cost to the Court and society, so that — I can't say I feel very strongly about the death penalty, and if you asked me to vote one way or the other, I'd say, "Get rid of it." Life without parole, I think, in many situations is worse than the death penalty.

I have an opinion somewhere that says, "Virtually any first-degree murder can qualify for a special circumstance, whether it's in the premeditation, or the heinousness of the offense, or killing a police officer, or for

[14] Proposition 34 of 2012.

money, for financial gain." If you look at the 190-whatever-it-is in the Penal Code, really there are over a dozen things that qualify for the death penalty, and any creative — you didn't have to be that creative. You can say, "Hey, this is a special circumstance."

So you get a D.A. like in San Mateo County or in the Central Valley or Riverside and even Orange County, they can allege a special circumstance or you get the death penalty. Whereas Los Angeles, I was very happy to see, there's a death penalty review committee. Even at the federal level they're going to say it's got to go all the way to Washington. There's review, and lawyers can make a pitch for arguing against filing special circumstances.

Here Cooley and Garcetti, our D.A.s here, they had a senior lawyer's review on whether or not you want the worst of the worst. But that's not true in every other county. So I felt that there's a lot of overcharging in terms of adding that as an enhancement, a special circumstance. I know I wrote about how any first-degree murder, how almost any murder, you can allege premeditation and deliberation when the definition of those elements are just a brief moment to consider and weigh the consequences. That instruction gives the jury a lot of leeway in saying it's premeditated.

I would argue still that the special circumstances should be limited to maybe four or five, maybe financial gain, actual shooter, killing a police officer, just very, very — for the worst of the worst — torture, and leave it at that.

McCREERY: Just thinking about your experience as a whole on the Court, once you had been on for a while, what was it like to be one of seven, which was one of your questions at the outset? That's a big change from where you were.

MORENO: Right, yes. I actually enjoyed it. My initial concern about not liking my colleagues or feeling that I was going to have to duke it out with them and being more contentious — none of that proved to be true. We were a fairly collegial court, almost unanimous in our decisions. I think they were all well reasoned.

I think there was sufficient debate and sufficient assertion of principled positions that nobody was a pushover and no one was a sure vote on anything. Even if it was one of your closer colleagues, it wasn't like that. I think it was a very good experience and, as I also said, for me it was just a good

time to be on the Court, dealing with the gender-equality cases and arbitration and some of the employment cases.

I'm sure it's the same way now. If you talk to someone now they probably say, "Boy, this is interesting. We're getting some good cases." But to be on a Court where we decided the same-sex marriage case was really a big deal, a very big deal. So I enjoyed thoroughly my experience on the Court.

MCCREERY: Let's not forget to talk for a few minutes about 2009, when you were a possible candidate for the U.S. Supreme Court. We've touched on the idea a little bit going along, but let me ask you to talk about how you first got wind of your name being under consideration.

MORENO: The first thing I remember — and there might have been a prelude to that that I don't recall [Laughter] — I remember driving, or being driven, from Sacramento to San Francisco one afternoon, and one of my law clerks, Victor Rodriguez, calling me — he's now a judge in Alameda County — saying, "Hey Judge, *Politico* is reporting that you're being considered for the U.S. Supreme Court."

I thought, "Oh, that's nice. There's no Latino on the Court." I had been a federal judge, and I was on the California Supreme Court, a prominent court. That was the first instance that I got a hint. Hey, what's going on?

Later I found out — I'm pretty sure I found out later, but it was an incident that happened earlier, and that was that the Congressional Hispanic Caucus had met with the White House counsel, Greg Craig, to President Obama.

I had had an extern, a summer extern, who was on some kind of fellowship with the Congressional Hispanic Caucus. This is — remember I said the other day? — you just never know where these people are going to end up. She reports to me that, yes, she was in a meeting with some Hispanic congressional people and that my name was, in fact, being submitted. I said, "Fantastic." Senator Feinstein had vouched for me. She's always been a great supporter.

That was fine and dandy. I said, "Okay, maybe something is happening." I got kind of excited. Then I got a few phone calls from friends. I remember a guy was in the airport in Philadelphia, and on CNN they had potential candidates. He called and said, "Hey, I just saw you on TV." I said, "What?"

"You're being considered." These are all rumors and all that, and I don't know how that information gets out. Maybe there's a leak or something.

But Sotomayor was up there as well, and right away I thought — and there were some other really good — all women, by the way — candidates.

So I knew that they wanted to appoint another woman and a Hispanic, mostly a Hispanic but also a woman, so I thought my chances were decent but not very strong. But then, I had gone to lunch with my staff, as we do on Tuesdays. We come back, and I'm working in my office, and my secretary is checking her voicemail. She runs into my office and says, "We got a call from the White House."

"Oh, my God." I call back, and I talk to Valerie Jarrett, who was Obama's close friend. She says, "Your name is being considered. Is this something that you'd be willing to make the sacrifice to do that?"

"Yes, sure. I'm honored." Blah, blah, blah. But I remember that, "Are you willing to make the sacrifice?" And it would have been a sacrifice to move out there with the whole family or most of the family. She said, "Okay. Someone is going to call you." Maybe she gave me a name. It was a partner in a firm because what they do is they outsource the interviews to law firms.

Then someone called me, and I had to cancel my flight going back home so it must have been a Wednesday. I had been through the federal judge vetting process, but they asked everything. "Nannygate? Marital affairs? Old girlfriends?" I was familiar with some of those questions, but it was a very thorough interview. "How's your health? Any decisions?"

At that time, let's see, I think the nomination of Sotomayor was over Memorial Day if I'm not mistaken, so this might have been a month earlier.

I think gradually I learned that if there was going to be a Hispanic, the Hispanic National Bar Association — which is East Coast–focused and also Puerto Rican–focused, not Mexican-American. Mexican-Americans are 80 percent of Latinos in the United States.

McCREERY: But they're all in the West, for the most part?

MORENO: Right. I learned from another source that the Hispanic congressional delegation had agreed that they were going to support Sotomayor. She was a circuit judge already, so that's the natural evolution — progression. And they only wanted to support one candidate because I think previously they weren't unified, and what they wanted to do, they felt, for this — one, they really wanted a woman and a Latina, and it didn't matter where. And her bona fides are perfect. She has a great story, a great

narrative, Princeton and Yale and an award from Princeton. I think she's even Phi Beta Kappa from Princeton, and Yale Law School, so she had a lot of support, East Coast.

In a way it turned out to be a blessing in disguise, but I was willing to make the sacrifice — and take a cut in pay, by the way. At that time our Supreme Court justices were making more than the chief justice of the United States. I'm sure their pay has gone up.

It was exciting. I had some emails that are in the archives at Stanford. They interviewed me and wanted my papers and some of that related to that, like the phone call. But anyway, it was a great honor, and I can have a feather in my cap saying I was on the short list because, genuinely, I was interviewed, and it was reported in the papers.

Just to wrap it up, I got a call from Greg Craig to tell me that I wasn't going to get it. He told me Sotomayor was going to be nominated later that day. He called me twice, once at night, saying that I didn't get it, and I talked to him in the morning. He said, "Yes, we really admire your work, what you're doing in California."

I said, "You know, I would have had a tough road because of my decision in 2008 to be part of the Marriage Cases here. Actually, we're issuing our Prop. 8 decision the same day, today." I said, "I'm going to be a lone dissenter, saying that this measure to abolish same-sex marriage is unconstitutional." He says, "Yes, that would have been an issue." [Laughter]

At that time, one, the majority opinion would have been not — but being a dissent, being one out of seven? So I knew.

People often comment, when they talk about my dissent. They say, "What courage he had. He must have known before the dissent was issued that he would be standing alone while he was being considered for the U.S. Supreme Court." Chemerinsky said this. I think Chemerinsky said, "He could very easily have just joined the majority and not attracted any attention." But I wasn't about to change my dissent, which was in the works. It was going to be released — I have to check on that. That would be easy to do, when she was nominated and when the dissent — sometime in May. I think it was right around Memorial Day.[15]

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[15] Memorial Day was May 25, 2009. On May 26, 2009, the California Supreme Court announced its Proposition 8 decision and President Obama nominated Judge Sonia Sotomayor to the United States Supreme Court.

McCREERY: You've mentioned the effects on your family had that come to pass. Already you had made some sacrifice to sit on our state Supreme Court, in terms of commuting and all that. How was that working out, the couple of days a week, so that you were in San Francisco every week but not living there?

MORENO: It worked out fine. Given advances in technology I was able, obviously, to stay in close contact with my staff at all times. I don't feel that my role was diminished in any way with my staff or with my colleagues. I was always reachable, and I was always present at least every week and in every petitions conference, when we did meet. My colleagues missed more of those than I did. But at least I was always there.

The advantage also, I know, for the Chief was that I was very visible in L.A. circles. People even joke, the Latino groups, that I'm on a — what do they call it when these musicians go on the road? My tour. The Justice Moreno Tour. They actually made a T-shirt or something. I had been to twenty places in less than a year speaking to groups all over the state. So that's what I tell new justices. "If you want, you're going to be asked to speak everywhere. People will want to meet you and invite you to places and things."

So I did a lot of that. I know the Chief often asked me to do an event down here because he got more invitations than I did, I'm sure. Since he had a place in Northern California but also here in Southern California but started to spend more time up there, frankly — his family, his kids, were down here, but he and his wife Barbara had a place up there. I know I did a couple of weddings for him down here and things like that. Or he was asked to speak, and he said, "I can't do it," but he would get me to do it. I was happy to do it.

It worked out fine. I don't think that would true for everybody. They might want to just have their own time. But he felt, and I agreed, that being a member of the Court also included being accessible to the bar groups and so forth, just so that they learn more about the Court. They see you as a person and not this distant figure in San Francisco.

For me it worked out. Occasionally if the planes were delayed or something, that would be a pain. But otherwise I would be picked up at home by a CHP, an unmarked car, and taken to the airport, and they would meet

me in Oakland. I could make it door to door in three hours, which was, for some, a decent commute if you're going to travel that far.

MCCREERY: You would come back the next day, so it wasn't all on one day?

MORENO: Yes, right. I stayed in a hotel there for a government rate, and that was out of my own pocket so I took a cut in one sense. It cost me maybe a thousand dollars a month or something. But that was okay.

MCCREERY: You also spoke to the fact that being accessible to the larger legal community and the community in general was an antidote to the isolation of being an appellate justice working on cases.

MORENO: Exactly, right. Yes, and of course the stereotype, for judges but more so for appellate judges, is that they're in their ivory tower. That can easily happen, but I've always found, like I just said, that I'm more social and it's important to be out there. I know the Chief really was very glad about it.

Governor Davis was ecstatic about that. He told me a couple of times after he was removed from office, recalled, when he was introduced, he said, "Justice Moreno was the finest thing I did as governor, and I'm so proud." Maybe it was just because I'm there, but he really liked the fact, as I said, that I "pitched a perfect game." But my position on same-sex marriage and all that, he thought, "Yes, that's what I wanted."

I also learned later from Burt Pines that at least Burt and maybe the governor wanted someone in terms of views similar to the chief justice. He liked the chief justice, his views and so forth. That was his measure, and he was very pleased that the Chief and I had a high agreement rate.

Who knew? Because I certainly didn't go in knowing. I didn't know how the Chief voted on things, really. I don't think it was because of his persuasive powers or anything else, but in terms of a position on the law, I think that if you looked at where we disagreed it was in very limited instances. In other words, I came through for him, not knowing that — that certainly was not my objective.

MCCREERY: And as a Southern California person himself, Governor Davis was happy that you could represent Southern California itself?

MORENO: Yes.

McCREERY: Since the Court itself is in San Francisco, there may be an interest on the part of some to have a Southern California representation?

MORENO: I have advocated that in this last appointment, the last several appointments. One, a trial judge. Someone from Southern California because we're one-third of all the judges in the state, and we generate probably one-third of the litigation that goes up to the Court. It's nice to have someone from down here.

McCREERY: Good morning, Justice Moreno. We discussed at some length in our last meeting, on the first of March, the laws in California regarding the death penalty and the California Supreme Court's role in carrying out those laws. Then, as we know, our new governor, Gavin Newsom, declared a moratorium on the death penalty in California since last we met. I wonder if I could ask you to give your thoughts on that development, please?

MORENO: Indeed, it's an extraordinary move by Governor Newsom, who even during the campaign expressed his opposition to the death penalty. I think what is quite surprising, however, as the top executive in the state, is that he would take this measure in contravention of the existing law, which provides for the death penalty. The whole issue of the death penalty and constitutionality has been reviewed by the Supreme Court hundreds if not thousands of times and has been routinely affirmed.

So I don't question his authority as a chief executive to delay or to stall the — as I think he calls it — the machinery of death, referring to the Department of Corrections as the implementing authority to carry out the executions. But it seems to me that that is an odd way of stopping or putting a halt to the death penalty.

The problem that arises is that the appeals and the habeas matters that are pending before the Court — and they're at all stages, from the beginning to — the Court is still calendaring death penalty oral arguments. So I think it presents a real dilemma for the Court and the attorney general. What do you do with the cases that are in process? Because this only impacts cases in which the final judgment on appeal has been affirmed.

I've always had mixed feelings about the death penalty myself, based upon the disproportionality of how defendants are selected. It depends on the color of the — whether there's a mix of races in terms of the victim and the defendant.

The location in California, which county, because there are certain counties that have more of a propensity to seek the death penalty and to have juries convict, whereas in Los Angeles, and other counties, I'm sure, there's an intensive review by a select team of prosecutors. They confer with defense lawyers to go over mitigating circumstances.

And then juries, it seems, are less inclined to find death as the ultimate punishment. I've seen the support for the death penalty gradually diminish over the past decade, for sure. That trend here is really evidenced in many states throughout the country.

I don't think the death penalty is long for "here to stay," and maybe Governor Newsom's extraordinary action is merely the first step, although he's starting at the very end of the process, which seems — that's the part that I just don't really get. It seems like it's *ultra vires* to attack something way on the end where he does have authority.

I think he also believes he has, and he does have, the authority to commute sentences, just to say — and I think other governors have done that statewide — just to commute the sentence and say, in individual circumstances, say that life without parole is the commuted sentence.

I don't know how the justices on the Court feel. They've tried to implement new provisions to speed up the process, and I think they've rejected any kind of mandate to do so. They're just going to do the best they can. But I think some Court of Appeal and trial judges are now doing habeas relief. They're having the initial habeas filed at the superior court. I believe appellate courts are reviewing that. That also helps.

I have to think that there's a good number of judges, though, on the Supreme Court who are probably relieved that the outcome here may be not having to deal with so many death penalty cases because it consumes — and I think the numbers vary, but it's at least a quarter of the resources of the Court. That doesn't mean that the cases are terribly complex in terms of legal issues. But in terms of the factual issues and the attention to detail you have to give to all the issues that are raised, that takes time.

There's also a death penalty unit on the Court that assists the chambers. The chambers are ultimately responsible for issuing the opinions. I don't know what's going to happen with that unit. And there's a habeas unit as well that assists the chambers in writing up the habeas opinions. So

there are some significant resources that are devoted to the death penalty on the Court.

I know I thought the day after Newsom issued his edict, "What's going to happen? Are they just going to stop in mid-field and wait to see?" I imagine there are some memos circulating inside the Court as to, "Do we keep on going full speed, or do we slow down?" Realizing that, at least for the next eight years, and maybe longer — maybe longer — that their work will be for naught.

Although I think they are entitled to have an appellate review. These are judgments coming directly from the trial court, an automatic appeal to the Supreme Court, so at least to that extent. On the guilt-phase issues, the Court has to really review those and have a hearing and an opinion and so forth.

Time will tell what impact it has. The last time that the death penalty issue was before the voters — I think it was 2012, I'm not positive — when I was asked by the former D.A. of L.A. County, Gil Garcetti, to join in an opposition — I think it was a rebuttal position — to those supporting the death penalty.

I signed on to it principally on economic grounds and that it just wasn't worth all the resources that the state was devoting to the death penalty appeals and maintaining housing and this whole bureaucracy, let's say, to handle death penalty appeals. On balance I would have favored some kind of expediting on the process without diminishing constitutional rights. But it's hard to come to a reasonable solution, and that's the difficulty.

McCREERY: It does leave the judiciary in a tricky position, though, on how to cope in the meantime, and it is the executive branch moving over into the area that's under the constitutional and statutory authority of the judiciary.

MORENO: Yes, and also the legislature. The people, as the legislature. So it's an extraordinary move, but from all accounts it is constitutional. He has that authority. I'm sure it's being challenged, and we'll see.

But anyway, my personal feelings on the death penalty are that we would, as Justice Mosk once said when the death penalty, I think, was reinstated — he asked his judicial assistant, who became my judicial assistant, "Pat, do you feel any safer now?" [Laughter] She always answers no.

So I don't think in terms of safety, crime statistics, or anything else, murders and so forth — it's clear the death penalty is not a deterrent, so it's more of a political and for a lot of people just a moral issue to have retribution against those who do heinous acts.

I think I mentioned once before, also, that I think that the number of special circumstances, which is, I don't know, between two dozen and thirty, is just way too many, too many special circumstances where just about any kind of premeditated murder can be a special circumstance. I think they really have to narrow it down to just a half dozen at most.

McCREERY: It will be interesting to see what becomes of the death penalty as time goes on. As you pointed out, the public appetite for it does seem to diminish. The *L.A. Times* is just reporting on that again, that the public attitudes are shifting over time.[16]

MORENO: Yes. I don't see a public outcry as to what Newsom has done. Maybe they're saying, "He's at it again, fulfilling his vision." But again, I just don't think they really care because they know there haven't been any executions since 2006, and while the death penalty was back in effect only thirteen were executed. It's not something that people have a thirst for.

McCREERY: Just as an aside, what were your media experiences while sitting on the California Supreme Court, with that delicate balance of needing to protect a lot of information but to inform the public when given the opportunity?

MORENO: I'll go back even a little further. When I was on the trial court here — and this is before and after the O. J. Simpson trial — I was very open to the media in terms of having them present in the court, taking appropriate measures to protect the jury and witnesses, and so forth. But I never had any problem with being on display, so to speak, whereas some judges, particularly after the Simpson trial, had very strong reservations about having the media in court.

I know some judges said, "You've never been burned by the media." Well, okay. Maybe sometimes they don't have the full picture. But I never had a bad experience, and I don't deny that maybe some judges did. The same thing with meeting with the print media. I was more than happy to

[16] "Assessing the death penalty," *Los Angeles Times*, March 28, 2019, B1.

talk to them about things that I could talk. I wouldn't seek them out, and I think you can go too far.

I think, just one example, Judge Lance Ito, when he agreed to meet with a newscaster, Tritia Toyota, in the course of the O. J. Simpson trial proceedings, that was a real mistake, like, "Get to know the judge." That was the angle.

My recollection is that he thought it was just going to be one interview. It was one interview, but it was played out over five days here in Los Angeles, so it was whatever footage they had they stretched out over five days. After the second day, I think Judge Ito was embarrassed. "Oh, my God. This is what they did?"

He did it for a friend, Tritia Toyota, a very responsible reporter. I've never talked to her about how that worked, but I have to think that once the local management saw the appeal of this, say, half-hour interview, they milked it for all they could. It became a topic of discussion. "Oh, my God. They've learned too much about the judge." It became just part of the whole spectacle.

I was in the building then, and Judge Ito would come down to the lunchroom and tell us what was happening. That's how I learned that he said, "I thought this was just going to be a personal interview," and maybe they would have some footage but not going into his whole approach and, I think, even personal life. A mistake. I think he was caught unawares of what the media would do.

That's the problem I think many judges have is that things are taken out of context. You say something, and they don't get the full story. You can't really respond because then you have to give out more details on an issue.

Every time I see a judge go before the media on a case like this — Judge Ellis, who sentenced Manafort. I think he was interviewed or made a public statement about himself. I think that's a mistake. I think a lot of caution should be exercised by judges in talking to the media.

Then in terms of the Court, obviously Chief Justice Ron George had written *NBC Subsidiary* versus I don't know who the other party was, the real party in interest. But he was very conscious of, on the one hand, preserving the openness of public records and public proceedings in the courtroom and, at the same time, requiring a substantial showing for issuing gag orders, opening public files, the sealing of records, and closing the

courtroom to others. I think he was a very strong proponent of transparency and media access to court matters.

I take that position as well because many judges would just sign off on a request to seal files, close courtrooms. Where judges get in trouble is if they just willy-nilly sign those orders or close courtrooms.

Thank God for lawyers like Kelli Sager — she works for Davis Wright Tremaine — First Amendment lawyers who represent the *L.A. Times* — for exercising the rights of the media to excessive measures taken by the courts in certain types of cases.

It's very hard. I've never had to manage a high-profile case, so I've never been inundated with media. But I know the court, at least in the L.A. Superior Court, they've done it so many times that they can really guide a judge in how to handle those cases and how to respond to media requests and so forth. I think it works in L.A County, and it's the biggest court and they get a lot of high-profile cases, so they do a good job of handling that.

I don't recall any particular media-type cases that we had on the Supreme Court while I was on it.

McCREERY: What about such details as cameras in the courtroom, let's say at the appellate level? How do your views line up there?

MORENO: When I was on the Court we had an arrangement with a public service channel called the California Channel. So on certain kinds of requests to air the oral argument, we would do it live, unlike the U.S. Supreme Court. My understanding now is that the Court now records everything, and it's available to the public just a few weeks later, a video, so to speak, of the oral argument.

I'm in favor of that, and I'm in favor of contemporaneous — well, they do that now. I think it's also open to the public. The public has access. I know the research attorneys can watch oral argument from their offices, and if memory serves me I was able to watch an argument while it was being given. In terms of archiving it, that's what I'm talking about. It's available later. I think there's a lot to be gained and nothing to lose by having that open.

I think the concern had been at the trial level, where as we saw in the Simpson trial the lawyers are playing to the cameras, literally. This was "the trial of the century," and every news station in the country was covering

this trial. So it was tried every day in the press. That has to have an impact on the jurors, to be the focus of attention on what they're being involved in, and so forth.

But I'm in favor of cameras in the courtroom.

McCREERY: I want to give you a chance to reflect a bit more on your nearly ten years on the California Supreme Court and describe the process for deciding, for certain, that you would retire and the timing of it. But how do you sum up the whole experience?

MORENO: The whole experience was, I think, really fantastic. I think I was very fortunate to be on the Court at a time when my colleagues were all — to say this — were within the mainstream.

The only justice who was more ideologically rigid was Justice Brown. But even on certain types of cases, she — she had a certain view, maybe you'd call it a libertarian view. I think if you look at her cases, she was very rule-driven, but many times I think a certain ideology played into it.

Once she was replaced by Justice Corrigan, I really have to say we were all pretty much non-ideological and committed to following the law as we saw it. But still there was a certain predictable bloc of voting. Justices Chin, Baxter, and Corrigan were viewed as more conservative on criminal and on some social issues. Myself, Justice Kennard, and Justice Werdegar were viewed as more plaintiff-oriented and I wouldn't say more criminal-defendant oriented but more conscious of preserving a defendant's rights.

Then you have the chief justice, who really was the swing vote in a sense because he, I think more often than not, sided with the more progressive or liberal side, if you will, but not always, so a very middle-of-the-road guy. We all had high esteem for him because he had served so many years on the trial court and was the leader of the judiciary, had been on the Court of Appeal, excellent relationships with the legislature, and ran the Judicial Council very adeptly.

And his manner. I don't know if you know him, but he's just very tactful. He gave the impression that he really considered your views and was not a bulldozer in any way. At least I never saw him that way. I think I've explained, and he's explained in his book, that particularly on the same-sex marriage case he actually had it written two ways.

Again, I don't know if I said this, but on that case when I talked to him and I was very clear that I was for overruling the Family Code statute limiting marriage to only between a man and a woman and comparing it to the domestic partnership law, he basically said, "They're co-equal. What's the difference?"

I said, "There is a big difference in the name. The name has significance. Second, to me it's like in the 1950s and Rosa Parks. Sure, blacks and whites get on the bus and you do get to the same destination, so in that sense you're equal. But you're telling a certain class of people to sit in the back of the bus." I don't know where I got that metaphor. I'm sure it's not my own. But he took that to heart, that we're making this distinction without any kind of principled reason. I'm glad that he came to join the three that I was with.

I have to say that, particularly on that case and in others, my colleagues were not ideologically driven. They really were sincere about their beliefs, and they had a rational basis. We didn't get any opinions that were just sort of result-oriented. At least it didn't seem that way. They could get to that ultimate decision by following the law, so great colleagues in that sense.

That made it, for me — I always felt that my vote counted because I could be the swing vote, too. On certain criminal issues, having been around the block, I didn't have a knee-jerk reaction on criminal issues, and Justice Baxter knew that. I had been in the state trial court for eleven years, and I had seen some really bad cases and some really bad dudes, so I had a feel for that.

I know that he, who was probably the most conservative on the Court next to Justice Brown, really gave me a lot of credibility. So when I spoke about something in the trial courts, he could see that I had a basis for it and pretty much agreed with what I had to say about that.

I guess my point is that, whereas if you're in a court where your vote is not going to count, if you're overwhelmed by the majority, I could see that that could be very frustrating. And maybe it was frustrating for Justice Brown in some sense. But I felt that my vote counted. I don't know what percentage of our cases were 4–3, but a good number, maybe 10 percent, 12 percent. So at least in those cases, my vote counted.

The second thing is that during that time on the Court there were a lot of cases that came before us on what I call gender-equality issues, whether

it's same-sex adoptions, the rights to attorneys' fees in those cases in the public interest — I think the *Hughes* case — the in vitro fertilization cases, my three cases dealing with that, my case in *LaMusga* giving courts more discretion.

Then also in the field of arbitration and class-action waivers, the tension between the federal courts, particularly the U.S. Supreme Court, and the California court, which was very protective of employee rights in terms of unconscionability, contracts of adhesion, limitation on claims like class-actions waivers, the imbalance in the way arbitration agreements are written and the rights that they bestow on the employer versus the employee.

Those were all really big issues that were just coming through the courts at that time. So I think in those two particular areas I felt that we were at the forefront of a lot of these issues, both on gender equality and on employee-employer rights. So it was a good time to be on the Court.

Maybe the current justices are saying the same thing because they're getting other issues, you know? But I think it was really — a lot of that is attributable to the leadership of Chief Justice Ron George, that we took on these cases, we worked through them, we came out with some really definitive opinions at that time.

He left and I left, so the George Court came to an end. History will tell how they looked at this era, and I was very happy to be part of it. I'm sure people look at the Bird Court and the Lucas Court, the Gibson Court going even farther back, to see.

My sense was that, when I got on the Court, for various reasons California had lost the luster that it had from back in the seventies. When I was in law school, we used to read the Traynor decisions — in law school. It was, wow, California is — and maybe I went to a California law school, but — and the Mosk opinions. These guys had national reputations.

I remember someone — or maybe I was just sensing that, well, maybe the California Supreme Court in the early 2000s was not the same as it was, say, twenty-five years before. But I think by the end of the day — I think we were, what, the second court to affirm gay marriage after — Hawaii did that first, and then the people reversed it. But then the *Goodridge* case in Massachusetts? I think we were the second, and we're certainly the largest state, so I think we were setting a standard, so to speak, taking a leading position on certain key issues.

Certainly in arbitration that was the case, too. A number of my cases that were pro-employee were vacated by the U.S. Supreme Court, *Gentry* and *Discover Bank* and *Little v. Auto Stiegler* — or the reverse. That tension still exists now, with the feds gaining more ground.

But I see that after the *Iskanian* case — I wasn't on that — but subsequent cases you really see California asserting its sovereignty over these arbitration-related and class-action-related cases. The battle goes on, but it was good to be there when it was really on. Now that so many issues have been decided, it's, ah! Are they just howling against the wind?

MCCREERY: Any regrets?

MORENO: You know, I don't think so. Occasionally I think of the fact that when I was retained, beginning in January of 2011 — retained in 2010 — sometimes I think that I had a twelve-year term. I'd be on until January of 2023.

There's something about job security and a way of life. It gets very comfortable. You become a senior person. I would be the second-most senior justice after Justice Chin who, as you know, if you're the chief justice, Chin would be seated there, and I would be right there. You speak in order of your seniority. In one sense that's kind of scary, that I'd move across the table and move down this way.

Sometimes I think about that, what that would be like. But I don't have any real regrets. As you can tell it was an enjoyable time. I felt I made a difference. But I guess I felt I just didn't want to, at this age, seventy and beyond, still be on the Court.

When Jerry Brown defeated Meg Whitman, that opened the door for me to leave in good conscience. So I did, and I didn't know what I would do, but I think I just wanted to establish myself back in L.A. I don't know how this is going to sound, but my thinking then was to emulate one of my mentors, Justice Elwood Lui, who I considered to be a power broker.

I probably haven't told you this. I wanted to be in the mix. I wanted to be an elder statesman: a former Supreme Court justice, a leader of the bar, a leader in the Latino legal community, involved in judicial appointments, maybe being on corporate boards, maybe being asked to serve on commissions, as I did locally. I wanted to be back in Los Angeles and reestablish myself — I never left, but to be more engaged in civic and private society. A new role. That's what I envisioned.

As a base, I wanted to use a law firm. So I did think of that, that I wanted to be engaged with a law firm that would allow me to do those things, which is what Elwood Lui did at Jones Day. That's how I saw myself, not running for office but being — and in a certain way that has come true in a number of ways, maybe not as broad as I would have liked because I'm always trying to figure out, what is my role post–Supreme Court?

I've joked with people that there's life after the Supreme Court. [Laughter] You can be an ambassador. You can do this. You can serve on this commission. So I'm still doing that, still trying to do that.

McCREERY: And the timing itself? As you've mentioned just now, you left right after Chief Justice George did, although he announced quite early on that he was going to do so. What was the timing for you?

MORENO: The timing for me was November of 2010, when Brown got elected. I had thought about it, but as I said I would have stayed on the Court had he not gotten elected. So during that time, in November and December, I started thinking, well, when am I going to cut it off, make the decision?

The other thing that affected the timing was that I had reached my twenty years of service under the retirement plan, JRS I, so that I would get the full benefit of the retirement system by leaving. Technically I could have left maybe a year before that, but I wanted to wait just a little longer. If I left early I would have given the appointment to Schwarzenegger, who did a great job of appointing trial court judges, but who knows who he would have put on the Supreme Court? That probably precluded me from leaving as soon as I reached the twenty-year limit.

McCREERY: What was the immediate transition, then, in February of 2011 when you did step down?

MORENO: I got a lot of inquiries and a few offers from law firms once it got out. I was very reserved about revealing those contacts, but I talked to a number of firms, all very positive. I selected the firm that offered me the best deal and the best opportunities — the firms that had really good standing in the community.

McCREERY: You took a position then with Irell & Manella. Tell me precisely how that came about, if you would.

MORENO: Like so many things, I did not know the powers that be there. I knew, obviously, Nora Manella. But I got a call from the main partner there, Morgan Chu, on a weekend, actually, [Laughter] who got my number from a long-term friend, Don Nakanishi.

MCCREERY: That goes way back.

MORENO: Yes, because he was at Yale with me, and we were lifelong friends. We talked, and once I found out that the firm was in Century City, I said, "I don't know."

I went to lunch, just thinking, "I'm just going to lunch." But then they pursued me and wanted me to meet more people, and so forth, made a really good offer, as did a couple of other firms. But working in Century City was not my ideal situation, but I went with them anyway.

MCCREERY: What sort of a role did you hammer out for yourself in that firm?

MORENO: It was flexible. I was "of counsel," so I worked as a consultant on a number of cases. I worked on some appeals with them, moot courts, giving my knowledge about the process and some of the justices. I analyzed royalty agreements, contracts basically, that were going to be in arbitration.

I brought in a few cases. One was an investigation at UCLA on faculty discrimination, called "The Moreno Report." Right now I'm doing something else for UCLA.

MCCREERY: Say a bit more about that effort, if you would.

MORENO: The report? Yes, well, it's online, and it is called "The Moreno Report." I brought in members of the firm. We did an investigation of complaints by minority faculty, particularly in the med. school, over tenure decisions, assignments, derogatory statements, a general climate of malaise among minority faculty, and how those grievances were handled.

We did a very thorough report that was adopted by the university. As a result, they created new positions to handle and to simplify a Byzantine process of handling these types of grievances. You're talking about faculty. Like so many inbred institutions, it's really difficult for a faculty member to get any kind of relief when they have a certain type of complaint. Some of it dealt with sexual harassment and racist statements and so forth. We

made a series of recommendations at the end of our report that were implemented, to this day.

McCREERY: What did you learn from going through that process?

MORENO: You mean doing that kind of investigation? It was something I enjoyed doing, first of all. I felt that they had selected me as the team leader because obviously they wanted my imprimatur on whatever report. My reputation was one of being very neutral, irreproachable, not taking sides, and so forth. I really saw that as an opening towards doing more work of that type.

Since then you see so many other investigations going on. It has become a lucrative niche practice of so many law firms, whether you're talking about sexual harassment, or now it's college admissions. Whenever a firm gets in trouble — or an institution gets in trouble — they appoint a so-called independent investigatory team to analyze it. Years later, while here at JAMS, I did the same thing for the UC Regents in connection with a state audit, where it was alleged that the Office of the President interfered with a state audit that was being conducted concerning expenditures within that office.

I'd like to do more of that. I'm also now currently on another team that you'll probably read about in the next few weeks. But I like that kind of work, so that opening with that initial UCLA investigation was, I think, something that, given my stature and reputation, lends itself easily to bringing me in on most things.

McCREERY: What was the experience of coming back into private practice after so long on the bench?

MORENO: Unlike a lot of my colleagues on the bench — they had never really worked for a large firm — I had, so I had a really good experience in a law firm setting. Coming back as a senior counsel and being respected and so forth, I could mentor young lawyers and talk about my experiences in the Court. What is the path to success? How can they grow in the law firm or outside the law firm?

For me it was a very smooth transition. I liked it. What can I say? I probably would have stayed there or somewhere else if I didn't get the opportunity to be appointed as an ambassador. It gave me that freedom to do yet another thing.

MCCREERY: Concurrently, early on in your return to the private sector, you were already being asked to do other kinds of roles. I'm thinking of Jerry Brown appointing you to the State Bar Commission on Access to Justice the very first year you were retired from the Court. Say a little bit about that, if you would.

MORENO: Okay. That was a statewide commission. Honestly, I can't recall the kinds of things we talked about. But there was more about the ideas that the commission had on how we can make access to the Court a little easier. That was something that, based on my experience with my disabled daughter, I felt that if I had such a hard time accessing services that she was entitled to, that it was very difficult for the ordinary citizen. I recall that we talked about making it easier for people to access court services.

The commission that I really had more of a part of — I don't know if it's anywhere in my resume — it's resurfacing right now in Los Angeles County, and that is our commission investigating incidents of violence at the county jail here. There we had a very strong team. We brought in different law firms to investigate different areas of inquiry in management of the jail system.

It was just fascinating. I never thought that it would ultimately lead to the U.S. attorney filing criminal charges against, I don't know, a dozen deputies and then including the assistant sheriff and the sheriff himself. I was at Irell at that time, and I brought in an associate. I said, "Look, this might be something you might be interested in."

We were able to question the sheriff and assistant sheriff. There were, I think, six of us, three former federal judges. That is exactly the kind of thing I wanted to do, to be involved in commission-type work — voluntary, of course — to investigate something that I knew everyone recognized as a real problem. That's also a very lengthy report on our work and, again, our recommendations.

I've been asked to be, lately, on the civilian oversight commission on the sheriff. That was one of our recommendations, to have a civilian oversight board. But it has no teeth. So currently we have a new sheriff in town who is at odds with the Board of Supervisors and the Civil Service Commission on reinstating deputies who have been fired for past infractions. That's in the news yesterday. So I'm looking at that with extreme curiosity. I was asked to serve on that commission, and I said no last year to Sheriff

McDonnell here. I said, "I just don't want to get in that mix. I don't need that in my life."

That commission is being criticized by the African-American community for not taking a stronger position against the sheriff's department on these shootings and stuff, to where they've had to curtail meetings because they felt threatened. I said, "Now is not the time for me on that commission."

Now with this new thing, with the conflict between the sheriff and the commission and the Board of Supervisors, I just don't have time for that right now. I can pick and choose things I want to be involved in. When I came back from Belize, I was very careful not to join boards again. I've been saying, "No, no, no." I wasn't sure what I wanted to do, but I didn't want to spend my time doing that.

McCREERY: But you did a fair amount of it, I gather, when you first returned to private practice from the Court?

MORENO: Yes.

McCREERY: Speaking of being in the mix.

MORENO: Yes, right. That was the role, and maybe at some point I'll do more of that. But I've been on a lot of boards, and I'm basically a person who doesn't like meetings, board meetings. I want to just — tell me what's the issue and do it.

Right now I'm serving on the Kaiser Arbitration Oversight Board. That's an interesting board. We had a meeting last week to go over the process by which Kaiser administers all of its arbitrations, which mostly involve medical malpractice but other issues as well. That's on a smaller scale, but it only meets four times a year and they do pay me a modest stipend. So I do that.

I don't know what else. I'm very careful about what I get involved in now because I get asked to do a lot of things. I do mentoring at one of the legal magnets, Wilson High School, which is near my old high school. I'll do that maybe two, maybe three times a year. But I don't want to be responsible for mentoring four kids. I'd rather be a featured speaker, talk about my background and do something else. Tuesday I went to Riverside to talk to barristers about — so I enjoy that, trying to inspire people,

showing them one path to how they can enhance their practice in the profession and so forth.

McCREERY: All right. I don't know if there's more that you'd like to add about your time at the Irell firm? It sounds like it was a good fit for you and allowed you to try out a lot of different things. But in terms of the firm itself and your colleagues, might you have stayed on?

MORENO: I think so, yes. That was my plan. But at the same time, when you have — I was there for, what, two-and-a-half years? I really did not like the commute. I have to tell you that. Going from Eagle Rock to Century City was a bear of a commute, and I would go in just about every day so I'd have to leave very early to get there in forty-five minutes. Coming home was always an hour and fifteen minutes, so it was a drag. I didn't like that.

Had it been downtown I would have been much happier because I can walk around here or in the civic center and usually see someone I know. But out there I felt like a fish out of water in many ways. I didn't like the whole West Side/Century City ambience. That's just me. I'm more of a downtown L.A. person.

McCREERY: And this whole period, the first couple of years after you left the Court, what a huge transition for you and for your family. Maybe you could talk a moment about the effects on your family?

MORENO: Yes. The money was good, so I don't think it really affected them that much. [Laughter] I think my son — I think he was in law school. Yes, so it helped me pay his tuition.

McCREERY: As I think about it, I haven't given you a chance to really talk about your family, so maybe we can do that. Would you say a few words about your wife and how you met?

MORENO: We met in 1982. I was an associate at the firm Kelley, Drye & Warren, and I was assigned a wrongful termination case of the company president. Our firm represented a lot of California corporations that were subsidiaries of Japanese corporations, so they were basically Japanese corporations here.

They had an American president, Oldenkirke, something like that. He took advantage of the company, basically, as an American, saying, "Oh, it's very typical for American companies to provide a house for the president,"

and a car, and a club membership, and all this stuff. I forget exactly what he was doing that upset them, but anyway, they fired him and then he filed a number of claims and I had to handle those claims.

My wife, who is Caucasian but she had a bent towards Japanese culture, so she was working there. She, as one of the few English-speaking people there — it's like the office manager — was the client connection, in one sense, at least the English-speaking. The way these things work in firms is there's a lawyer who's the client contact, the corporate contact. They spoke Japanese, and the litigators — we were not fluent in Japanese, so you had dual tracks there.

So that's how we met. I handled the case and I got the case dismissed, so I guess she was very impressed with that. One thing led to another, and we got married in 1984, about two years later.

McCREERY: I gather she's an artist?

MORENO: An artist and a retired college professor. She was teaching at East L.A. Community College for about fifteen years, a graduate of CalArts, which is called the Disney School for animation, and they have other art schools there. She was a graduate of that program.

McCREERY: What kind of work does she do, in her artistic pursuits?

MORENO: She taught, and she makes short films and she paints and keeps herself busy doing odds and ends. She's responsible for her elderly mother, who is ninety-two, and working with Heather for the last, about, eighteen years has been a real challenge. She was a conservator for her brother, who is disabled, and the person most responsible for another brother who had some issues.

She's been the problem-solver of her family, which in a lot of ways is dysfunctional. In between two brothers, a niece, her mother, and another relative, she's the go-to person, besides taking care of us.

McCREERY: That includes a couple of kids as well?

MORENO: Right, and then the kids. Nick is a graduate of Stanford Law School and an undergrad. He now works at the Court of Appeal — someone who as a music major at Stanford never really seemed inclined towards the law. I never pushed him towards being a lawyer, although he met many lawyers and judges in the course of growing up.

It was fascinating when he decided to go to law school, principally because he couldn't find a job in his field. It was during the recession so he was competing, as he says, with people who had master's degrees for employment.

But he really took a liking to the law and has worked at a couple of law firms for brief periods of time and then is more research oriented and writing and so forth. Since last, maybe, October or November he's been at the Court of Appeal for one of the new judges, Halim Dhanidina, who was one of Governor Brown's last appointments.

Our daughter Keiko is also a graduate of CalArts, so she also is artistically inclined, as is my son, actually, in terms of music. She just recently got married, about a year and a half ago. She's also artistically inclined, started off in stage, a sort of stage crew/stage manager-type person, local theater companies, has always had that inclination since high school.

Now she and her husband have a small company that contracts with other providers for different entities, from theme parks like Universal Studios or Magic Mountain, out here, making props, rides, working on aspects of rides and exhibits. They've done things for commercials, ads — again, prop-making.

They've done things for various state national guards — this is very interesting — setting up villages where the soldiers train, setting off IEDs, rocket-propeller grenades, just fascinating stuff, and just making, fabricating custom-made costumes, like for Game of Thrones, those sorts of outfits.

They have good contacts in, I don't know what you'd call it, the arts and crafts industry for entertainment. They're very busy. It's a very competitive field, but they have a very good reputation. They're independent. They have a warehouse where they keep a lot of stuff. They hire people as they get jobs, contracts.

MCCREERY: What a creative family you have.

MORENO: Yes. What happened to me? I've always wanted to sing. I did sing in four operas here, not the L.A. Opera but for local community opera theater.

MCCREERY: I'm glad you mentioned that because we've touched in passing on your lifelong interest in theater and in opera but haven't really talked about how you got so close to that and your own musical talent.

MORENO: So to speak. In high school I was in a number of theater productions, and we had a singing group. I still see a friend who — we sang together, and we still sing in the car, basically. In college I didn't do much except sing with my roommate who played the piano. We would go to one of the music rooms and sing.

But later I hooked up with a small opera company. In fact, I was at this place called Casa Italiano last night for an Italian-American bar thing, and I said, "I sang on that stage."

"Really?" I still have the four programs on the operas that I sang, kind of bit parts, a couple of speaking lines or singing lines, very short but also mainly in the chorus. I wasn't in the main function. I did that for a little over a year, a year and a half or so. A lot of fun. I still love opera and do as much as I can.

MCCREERY: Favorites?

MORENO: I like Puccini, like everybody does. *La Bohème*, of course, and other Puccini operas that I like. Verdi. I like *Aida*, *Otello*. I try to go to at least two or three operas every year. In San Francisco I really took advantage of San Francisco Opera, because I could get in there pretty easily.

MCCREERY: What is it about the opera that draws you?

MORENO: One, I think it's the music and the voices, in particular, and the passion, and the whole theatrical aspect. I've always felt that opera combines instruments, music, voices, and a lot of times dance and acting. The sets are just out of this world. I've always had that theater bug, even in — I saw my first operas in high school through mentorship of one of our teachers. It's, I would say, a lifelong interest.

I like seeing plays and musicals. I like all the, obviously, the old Rogers and Hammerstein musicals and so forth. I've always said that if I had a disposable $100,000 and I could go back in time, I would pay that much to have a great tenor singing voice.

I sang recently in Veracruz. I traveled there with a group. I know a few Mexican *bolero* songs. This guy who is really an opera *aficionado*, who sings really well and he has all the moves down, he says, "Carlos, you've got a great voice. But when you're asked to sing, you should develop a repertoire of three songs. Practice. Look at yourself on video.

"Really hone those three songs," he says, "because nobody is going to ask you to sing more than that. But they're going to think that if you can sustain it for three songs — okay, sit down — I'm talking about at a dinner or a little function, and you have musical accompaniment," which we had — we did a duet and so forth — he says, "That's all you need, and then people will say, 'Oh, my God. This guy's a star.'"

I said, "You know? You've got a good point there." I have a couple of signature songs. I'm at sea in terms of knowing the lyrics for a lot of them. I know the melodies but forget — unless I have the lyrics in front of me, I get lost.

MCCREERY: In the year 2013, when you were at the private firm Irell & Manella, you became a candidate for nomination — or the choice of President Obama to be nominated as the U.S. Ambassador to Belize. May I ask you to start off by saying how you first learned of that possibility, which I gather was somewhere around the month of May in 2013 or even earlier?

MORENO: Right. It was earlier. It was actually in March of 2013 when I got the call from the White House. To pinpoint the date, it was the same date that Pope Francis's anointment was announced[17] because I was doing an arbitration, a big case, and we took a recess around three o'clock.

I checked my voicemail, and the White House was calling, saying to give this — I forget his name, Ian somebody — a call. I called back during this break, and he told me that the president wanted to appoint me as an ambassador and in particular to the country of Belize. He said, "You'll be getting some forms and paperwork, and we'll be in touch." Et cetera.

I remember just saying at the end of the conversation, I said, "That's great. I'm very pleased to serve the president in Belize." I said, "I've thought about this, and I gladly accept it. I had thought I might be getting assigned to a country like Argentina or to UNESCO." Very abruptly he said, "The president wants you in Belize." [Laughter]

My thinking was, and I said to myself, some people say if you don't ask you don't really get it. But they did a lot of thought, obviously. But I said, I'm going to tell him that I had my eye set on another country. But I didn't have that option. I remember getting advice that, "No matter what country they

[17] March 13, 2013.

appoint you to, just say yes because just being an ambassador in any country is an honor. It's truly a unique experience," and so forth. So, very good.

After the November election, which I think was November 4th because it was my birthday, November 4 of 2012, I had done some research before that because I had been approached in late 2011. Probably in September of 2011, I was at an HNBA conference in Dallas, and a superior court judge had said that her niece by marriage was working in the White House presidential appointments and vetting people and putting candidates together and that I should call her.

So I did call, and I said, "I am interested possibly in serving," I said, "but not now." I had just started at Irell in March of that year, but I would be interested in an appointment after he was reelected in 2012, which I assumed he would. I was willing to take that chance.

This contact also said — I mentioned that I wanted a position abroad. I didn't want a commission. I remember her saying, "You can still keep your job, but this would be a part-time thing." I said, "No, I'd rather have my eye set on something more substantial and serving abroad." I don't to this day recall if I said "an ambassadorship." I wanted to be more general because maybe it would have been a court of international justice or something like that. Just something where I could serve abroad because I had never really lived abroad.

I had that idea from a trip earlier I had taken to Panama and observing Panama. In the old Panama City section there's an old observation tower there, about four or five stories. I said to a friend who was with me, "It would be nice to live in a country like this," I think I said, "and be an ambassador, be a representative."

After that time he started always calling me El Embajador. [Laughter] Truth be told. That's a true story. So I said, "I'll wait." But during that time, between September of 2011 and into March, I researched who was getting appointed to these political positions, and there are only about thirty or so. They're not career appointments. You serve during the term of the president and for that term. Even if there's a second term, you don't serve a second term unless it's really exceptional.

I talked to different people, former ambassadors. I visited Argentina, Vilma Martínez, before she got there, but she arranged for me and my small group to visit the residence. I said, "This is a nice opportunity."

So I did look at the background of different — most were heavy donors. I wasn't going to be in that position, but I was told, "You should at least get known, contribute to the campaign." So I contributed to the Obama-Biden campaign, to a function here, and I met Vice President Biden.

I had a number of people I knew in the administration. I talked with them, and they all encouraged me. I talked to the Hispanic National Bar people. I know how to go about contacting the right people to let them know. But everything was under the radar as I was gathering information.

Then after he was elected, I was free to go forward. Two days later, on the sixth, I was at a MALDEF function and I saw a guy who I knew, maybe from my district court appointment. He's a Washington scene player. I said, "Hey, I'm launching. I'm letting people know." I had sent him something earlier, and he loved it.

He said, "I'm going to talk to Valerie Jarrett and Cecilia Muñoz." He had already talked to them that day, and I'm sure I just sent it to him that morning.

MCCREERY: What did you send?

MORENO: I sent him my resume and my interest in seeking an appointment. He got really excited, and he said, "I've already talked to them, and Valerie is going to be handling the appointments," he said, "and she knows who you are," because of being on the short list.

I got so enthused. Then I was at a meeting on a board I'm on the Friday before Thanksgiving. I got a call from my earlier contact who handles — the niece of a friend of mine. She said, "We've looked at your materials. You're a very impressive candidate. I'm going to refer you to this other person. They will be contacting you."

I said, "Oh, my God, this is like, too fast, too easy!" But then nothing happened, and I figured, well, it's the holidays and they're not paying attention.

In January I'm thinking, "I haven't gotten that call." I didn't really want to do anything else. It wasn't until, I think it's March 13, that I got this call. I had been forewarned by one of my former law clerks who knew that person, who told me, "This is what they're going to ask you." She had vetted ambassador appointments, one of my former law clerks.

It was exactly that, but this call was not to provide me with questions or anything. It was more, "We're going to nominate you." So it's not public. You can't say anything. It took from March until May for the president to get around to making a series of nominations. Maybe they wanted to do it as a group or something? I'm not sure.

But I knew as of March, and I was thinking, gee, I'll probably be in Belize by September of 2013. So I let the firm know in March. "Hey, I'm going to get this appointment. I don't know when." I thought I would be done by, certainly, by the summer.

Then the State Department also contacted me right after my — it must have been before the actual nomination because they knew. They set me up for a training course in July for nominees. I planned a trip to Peru, and so I told the firm, "I'm leaving June 30th." I gave my two months' notice.

There must have been some contact between me and the State Department while my — I hadn't even been nominated yet, but I was going to be nominated. They do the background. That's what happened. Between March and May they do the background, and subject to filling out all the paperwork. They don't want to be embarrassed. That's what it is. Literally the day that I got the call they had investigators talking to all my contacts that night.

Then later I found out that they had eight investigators assigned. "This is President Obama's — " Dah, dah, dah. They talked to people in San Diego and Pasadena, all over. This is very similar to what they do for federal judge nominations.

McCREERY: You had been through it before.

MORENO: Right, so I knew. I was interviewed sometime later in much stronger detail. That's what was going on between March and May.

McCREERY: Why Belize?

MORENO: That's what they decided. But I remember saying, "I've been there. It's great for scuba diving. My wife's a scuba diver, a very accomplished master diver. And they speak English," I said, "but they also speak Spanish, and I do both."

They usually send political appointees to countries that really don't have a lot of problems, unless it's a very high-level thing. They appointed, I forget the senator's name from Montana [Max Baucus]. They appointed

him to China. High profile. They appointed Caroline Kennedy to Japan. Those are important missions, but those embassies really run themselves so you're more like a figurehead. But you do have a contact with the president and the high-level State Department.

But for the other ones, when I researched this, the political appointees went to Western Europe or the Caribbean, and Belize is more of a Caribbean/Central American country. It was within the realm of political appointees. So was Costa Rica. Mexico sometimes.

Most of the Caribbean countries are all political appointees and the high-profile Western European countries, France, Italy, Spain, England, for sure, Denmark, Finland. Those were all easy. They're allies, so they don't need the heavy career people who really know their stuff. [Laughter] I knew I was going to get one of those.

Why Belize? Low profile. If they had done any kind of work, and maybe they did, they knew that Belize was in the so-called Northern Triangle or Quadrangle of Honduras, El Salvador, and Guatemala that had really extreme gang violence and criminal justice problems. The idea of putting a judge there with criminal law experience may have played a part in that.

A small country, easily managed, but still important. They didn't want it to fall within the likes of those other three countries. That's known as the bubble effect. If you put pressure on these other countries, those problems are going to migrate to another country.

That, in one sense — I don't know if that was the reasoning, but certainly I played into it. I worked a lot on criminal justice issues and supporting their judiciary, their police, prosecution, and worked on a lot of humanitarian aid-type cases or projects with the military, that has a very significant presence in these smaller countries, not so much to support the military per se — because we don't provide weapons or anything like that.

But they have what they call INL money, international narcotics and law enforcement money. But also the military has disaster-relief components. The military had three-year plans to build disaster-relief centers. A hospital ship will visit, a Navy ship will visit, the *USNS Comfort*, like the *USNS Mercy*, and provide medical attention. It sets up clinics in a period of a week, big, big, massive operations.

So I was very proud of the military engagement down there, very coordinated. My Western hemispheric commander was actually John Kelly,

Carlos R. Moreno, United States Ambassador to Belize, 2014–2017.

who became President Trump's chief of staff, a great guy. I met him a couple of times on these projects.

I worked on helping to redraft the rules of criminal procedure, which included interrogation, speedy trial techniques, video arraignments, a whole panoply of things I had done. Training police prosecutors on non-indictable offenses.

McCREERY: How usual is this for an ambassador?

MORENO: Very unusual. I was the only judge in my cohort of Western Hemisphere ambassadors. What's interesting is that President Trump has sent a Fifth Circuit retired judge to Argentina, Eduardo Prado.

People were surprised. "You're a judge? What is a judge doing as an ambassador?" I said, "We have very similar skills to bring, especially with respect to helping enhance a judicial system." One of their courtrooms had a significant fire. Under this program we got money to restore it.

We worked with UNICEF on, at least when I was there, getting the plans and getting funding to build a juvenile justice center. I should follow up on that to see what became of that. We were trying to get Belize to contribute some money between us and UNICEF. It was going to cost something like three or four hundred thousand dollars.

McCREERY: Let's back up and have you talk about actually moving down there and getting set up and the environment, and so on. Then I'd like to get into a little more detail on some of these assignments.

MORENO: They make that very easy. They fly you down business class. I remember being on this red-eye with my wife and her two cats. No one knew who I was, obviously, on this flight. But we get off, and then there are these two big SUVs and a staff waiting for me. [Laughter] I'm sure the passengers on the plane said, "Who is this?"

They cleared us and the cats through customs, and you get the A-1 first-class treatment from the get-go. I decided to get down on a Saturday morning so I'd have the weekend to get used to the residence and partially unpacked and all that. That worked out very well, and I really started on Monday.

Actually, you can start but you're not official until you present your credentials. So I had my credentials, which are the presidential appointment that you deliver to the head of state, which in Belize, because it's a

commonwealth country, is the governor-general and not the prime minister. There was a very formal ceremony. You present your credentials, you make a little speech, and he makes a little speech, and you shake hands. You take pictures. [Laughter]

McCREERY: This whole British commonwealth history. How much had you learned about that in advance?

MORENO: Quite a bit because in terms of the confirmation hearing — I'm nominated in May, had my confirmation hearing in October — they send you binders, five or six binders detailing our policies down there. There are articles about Belize and Central America. So you're fully informed about the U.S. mission down there.

Then you go pretty much pro forma for most people. We had a Senate confirmation hearing, Senate Foreign Relations Committee. John McCain was there, and he was very upset with Obama because — was it at my hearing? I think it was afterwards.

He was giving the appointments a hard time. We were political appointees, so for some reason he had it out for us. There was one guy who went to Argentina who didn't speak Spanish. He never had visited there. He picked on him, and he was in my lineup of four ambassadors.

The country in my case, Belize, is split on gender equality. They were going through that, on whether or to what extent are you going to give homosexuals more, recognize them as an oppressed group and protect them and so forth? I remember when I went down, or already before I got down, there were some saying, "Great." Others were saying, "Oh, he's here to foster the Obama agenda of gay liberation," and so forth.

There was actually a protest when I presented my credentials, a protest of about six religious ministers. A couple of them were Americans funded by religious groups in the United States who have a foothold in Central America. That made the paper, too. "Protest as ambassador presents his credentials." Along the roadway going to the governor-general's residence.

The reporters questioned me. I had a very open attitude talking to the reporters. We were schooled at the training course about how to handle interviews. I said, "I'm fine with reporters." I talked to them right away and was very open about what my sense was and advocating for gender equality and gay rights and so forth.

That was an issue in some quarters, but overall Belize has a laissez-faire attitude. They just didn't like gays being "out there," being vociferous. We actually fostered, we supported, a couple of gay organizations down there, giving them opportunities to come to conferences in the U.S. and signaled our support for these people who were, some of them were, being assaulted and cursed at and so forth.

MCCREERY: How did those interactions begin? Were you contacted in your role as ambassador?

MORENO: I'm not sure how they began. They probably worked up through my assistant or something. We had a program on education and cultural affairs that would reach out to them, Caleb Orozco and I forget the other person's name.

There are different State Department programs that bring people out, opportunities to go to the United States to go to training programs and so forth.

Anyway, we got involved. Ultimately, in my last year, we raised the rainbow flag. We brought a rainbow flag from Miami or Atlanta, and we had a little ceremony. We assembled a lot of people in the evening and raised the flag. Meanwhile, there were demonstrators on the other side of the fence, again the same religious cohorts, against us.

MCCREERY: But you say they had been stirred, at least on the earlier occasion, by funding from groups in the U.S.?

MORENO: Oh, yes. Yes. They really thought we were there — also, going through the judicial system, there were a couple of cases. One was in the Caribbean Court of Justice on whether or not under the immigration rules being gay was an excludable offense to keep you out of the country when you're applying for a visa to come in. They ruled, while I was there, that no, that's unconstitutional or whatever.

Then in Belize — gee, I'm forgetting the exact facts, but a similar case on basically whether or not homosexuals are a protected class. They had, I forget, a report that was issued, and there was language in this report — maybe it was about social justice? — again, about whether or not gays were a protected class. Somehow that got to the courts, and they ruled in favor. This was towards the end of my tenure there. They ruled in favor of finding that gays are a protected class. They went very far.

And during this time, the U.S. Supreme Court was coming out with its decisions as well. So it was just part of the huge movement, as we've seen. Belize was right in line. At least the judges in Belize were with that, but still it was controversial because the church is very strong.

We also met with the archbishop of Belize, who I think said something that really wasn't acknowledging gays as a protected class or as an oppressed class. We met with him, but he was senile and he was being manipulated by a couple of people, lay people. We actually should get credit for having him replaced. He was subordinate to what's called a *nuncio*, I think in Guatemala or El Salvador. In Belize he had an assistant bishop who was much more progressive but had to adhere to the bishop. We somehow let the *nuncio* know, and he came down.

Again, I'm forgetting how all this happened, but through the good offices of the assistant bishop we said he's not — and they knew this. At one time, I guess, he was very erudite and articulate, but he just really had lost it. It was really sad. When we talked to him, we said, "Can you even condemn violence?" — that had been committed against a couple of gay people.

"We pray for everyone who suffers." One of these general things like Trump might say. "There are good [people] on both sides." We said, "Can't you acknowledge that they're victims of this violence and humiliation, bullying, and condemn that?" And they wouldn't do it.

McCREERY: What is the relationship of church and state there?

MORENO: Very close. The state ceded the running of the schools, for the most part, to the Catholic Church, so over half the schools are run by the Catholic Church. It's a very heavily Catholic country, and if not Catholic they're very evangelical, so we had a big hill to overcome.

We actually got some former ambassadors to write a letter in support of this. I'm forgetting the issue now, but to urge the supreme court of Belize to rule in favor of gender equality, to recognize the rights of gays. We succeeded in that. That's probably one of my main accomplishments. Besides all the criminal justice reforms and helping with the infrastructure and training, that was also very important.

McCREERY: Some of these gay-rights advances might have happened anyway. They may have been underway, but certainly you were able to play a real role in that.

MORENO: Right. And I could be, call it, the figurehead of the United States. You have to play that very carefully. You don't want to tell them what's the right thing to do. But if there are groups supporting that, you want to foster that.

Then the chief justice, Kenneth Benjamin, a very progressive guy, respected. In Belize, since they don't have a law school they have to go to the — I think the school is in Jamaica. He was actually from Trinidad or something.

Some of the judges are native to Belize, but not all of them. The chief justice wasn't but had been in Belize, I don't know, ten or twelve years, a very respected figure.

MCCREERY: How well did you get to know him?

MORENO: Very well. Very well, and he appreciated the assistance we would give. He appreciated the fact that I was a justice, too, and we could talk about these things, and I would always support him in whatever he was doing.

I got along well with the prime minister [Dean Barrow] as well, who was a very prominent lawyer before rising into politics, so we could talk. Even the foreign minister [Wilfred "Sedi" Elrington]. I met with him the first few days, and we talked about legal stuff. I think they really liked the fact that I brought more to the table than other ambassadors — not that the other ambassadors weren't fantastic, but I could focus on certain issues really well and talk to them as lawyer to lawyer or judge to judge.

MCCREERY: You were more than just the title?

MORENO: Right, and I always acted that. That way I could offer more.

MCCREERY: What access did you have to the prime minister?

MORENO: Whatever I wanted. It wasn't like I just called him up and said, "We've got to meet today." If it was an emergency, we could so we would do that. But we would meet with him regularly to chat and go over issues that we were concerned about. It could have been U.N. issues or Venezuela-related issues. He was with us on gay rights but, as in any place, very cautious.

What's interesting is, we got along better with his wife. I actually danced in the streets with his wife. We had two things we did, one on

gender equality. We did a flash mob. You know, a flash mob where you dance? The press was there. We closed down a street, and we all wore — maybe this was domestic violence. We did two things on domestic violence. We were wearing orange T-shirts, which is, I think, a symbol. Maybe it's the color of "against domestic violence."

We did another one at the market, and maybe that's a flash mob where you freeze. I forget what that's called. You moved and then you stopped. We did a skit like that of someone committing an act of domestic violence, and all of us going like this, acting horror.

McCREERY: When you say "we," who was behind the effort?

MORENO: My staff and volunteers. We organized it. But the prime minister's wife was very helpful. She was outspoken, too, and really liked the support that the embassy was giving to some of her causes.

McCREERY: What had they experienced from other ambassadors before you, as you learned about it? In other words, your predecessor, for example?

MORENO: My predecessors. On the gay marriage issue and domestic violence, I don't think they did anything. All this was still being developed.

On aid, I'm sure they did a lot of that through this INL money and also with the military money. There had already been a series of things that they had done in constructing disaster-relief centers, and so forth.

I was very lucky in that a lot of the programs that were — like so many things, you inherit their good planning because these things go in three-year cycles. I did a lot of ribbon cutting and speeches and different things. I didn't start those, but I benefited because I'm there.

McCREERY: What interaction did you have with your predecessor, if any?

MORENO: Here's an interesting story. My predecessor, Vinai Thummalapally, is an Indian American, the first Indian American appointed as an ambassador. His wife went to school with President Obama at Occidental College here, which is in Eagle Rock.

McCREERY: Ah, old Oxy buddies.

MORENO: Right, and Obama lived with them one summer. I remember one guy, someone, asking me, "Did you room with President Obama or what was your relationship?" I said, "I've never met the guy."

The ambassador before Vinai was George Bush's roommate at Yale. He was now a law school professor at Colorado. People assume, one, that you know the president. You get this plum appointment. The previous one, Carolyn Curiel, was a Clinton appointee, but she was a speechwriter for Clinton, so there's always a — people want to know, "What's *your* deal?" The previous one to that was the campaign chair for, I think, Clinton in New Hampshire. So it's very political.

Why me? I said, maybe because I lived in Eagle Rock, and maybe Eagle Rock is a feeder neighborhood for ambassadors since the last two ambassadors have been from Eagle Rock.

MCCREERY: Did you meet and interact with him at all?

MORENO: Oh, yes. Before I had talked to him, and I don't think I met him. I had talked to him a few times. I bought his private car from him, so they had it waiting for me.

I talked to Carolyn Curiel, and she happens to be the cousin of someone I know who is a federal judge in San Diego, the so-called "Mexican judge." They were cousins.

I also met the law professor, who was a Yale grad so we had that in common, too. I talked to all three of my predecessors. They told me the cast of characters, who to believe, not to believe, and so forth.

We worked on some political corruption cases, and there was not much you could do in terms of interfering in their political scheme, but we investigated a couple of ministers who were corrupt, probably on the take, and by the time I left we had revoked a couple of visas for them to travel to the U.S. on personal business. But we couldn't do it in terms of their diplomatic status.

It's a fine line. The State Department really separates the ambassador involvement in issuance of visas. Visas are the things that Belizeans and politicians want the most. They want to come to the U.S to visit and perhaps to stay. In embassies everywhere, they would tell ambassadors, "Don't get involved because it always leads to favoritism, and you shouldn't be involved in that. That's a separate function." They made that very clear.

MCCREERY: In general, what kind of a rein was the State Department keeping on you and your staff?

MORENO: The only thing they wanted to know was really, "What's going on?" They wanted us to send them what are called cables, which is a formal type of email. But it's a report on something. "Give a status report," but it's to memorialize what we're doing there, our mission there.

That goes into the official record in perpetuity because my predecessor — and there was a gap there when he was gone and there was an interim assistant, is what they call it — she was the deputy chief of mission, and she became a *chargé d'affaires*. You've probably heard that term, and it's a provisional ambassador. She said, "We're too busy to be writing stuff."

But I told my people, "This is what they want. We're going to do it." I had two great people, political and economic. "Okay, that's the thing that interests them the most? Let's do it. Just get them out."

MCCREERY: Say more about your staff.

MORENO: They were all career people who had been with the State Department for a number of years. They move up, so by the time they get to their section head positions they've already been to three or four countries. These are three-year terms all over the world. My deputy chief of mission had been around even longer. They had all this great experience. They would protect me and tell me what to do.

We had weekly meetings, for sure. I forget what we called them, staff meetings, just to report around. Our whole section, the whole area of the building, was classified.

Then we had something called a SCIF.[18] It's like what that secretary of the interior had in his office, a secure phone. We had a room, a steel-lined room, very cold, like a refrigerator. We'd have our meetings there.

Nothing big would go on, but we'd talk about some classified things, investigating drug movements, immigration smuggling, suspected — not al-Qaeda but the group before al-Qaeda — it will come to me. There had been different names, but this was before I came. We had some investigations there, some drug things that were going down, the kinds of things you want contained.

MCCREERY: You inherited a whole menu of things that were standard things and then would report to the State Department in these cables?

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[18] Sensitive Compartmented Information Facility.

MORENO: Yes. There's stuff going on. Right. We had a DEA component, a CIA component, one officer, a military component, outside agencies who have staff in Belize but are based at the embassy. I was in charge of all of them, so I'd get to hear all the stuff that was going on.

I went on a marijuana-eradication mission in a helicopter with the military. Military exercises. It's really a lot of fun.

There was a big border dispute for the last 200 years between Belize and Guatemala because Guatemala still claims two-thirds of Belize going way back. I won't go into all the detail, but there was an agreement back in the day between England and Guatemala about ceding control of that area, and Guatemala claims the British didn't keep their end of the bargain and therefore Belize is still part of Guatemala.

They hate each other. There are border incursions, marijuana growing on the border. If you look at a map — in fact, my son just showed me — you can look at a Google Earth perspective of Belize. Along the border you see one side totally denuded, the forests. On the other side, Belize has forests, national parks. Seventy percent of Belize is protected status. It is so dramatic when you see it from a satellite. Even when you're at a high point in Belize and you look across, "That's Guatemala," because they use the wood for burning and all that.

Besides the border incursions, there were a couple of shootings by the military. In fact, when I was there, there was a very controversial shooting where a young man, a Guatemalan, was killed on the Belize side, so we got involved in that. A couple of Americans were killed, and we'd have to get involved. We'd get the FBI involved.

I was involved in an FBI investigation of an American-on-American murder in Belize. I met with the FBI, actually the U.S. attorney's office. The guy knew me.

He said, "Are you Judge Moreno?" I said, "Yes." [Laughter]

"Tell me what you're doing here." He had a team of investigators. I don't know if it was their honeymoon, but this very attractive Filipina-American had married an older guy. She ends up dead, drowned under suspicious circumstances, so they were investigating that crime.

I met with the FBI on that and on other issues. Belize was a center, or one of the centers, of money-laundering, so the Belizeans conducted a raid on some offices, but it was spearheaded by our Treasury Department and

the FBI, so I had to get involved in that, and the fallout when things went sour because everything ends up with the ambassador. [Laughter]

Health issues with Zika and Ebola. "Never a dull day," I'd say to people. What was it like? It was like being a mayor of a city or a college president where everything is going to end up on your lap, and especially if it involves Americans. A military guy on assignment there, a drunk driving accident, people are hurt? It comes to us.

McCREERY: To what extent could you pursue your own interests and talents in that role? You talked about all the judicial interactions. How much space was there for you to — ?

MORENO: Oh, it was a lot because I always made a point of saying that I was interested in Mayan archeology and had studied that in college — just a class, but I had continued in traveling to Mexico and visiting Mayan and Aztec sites. I said, "I'm looking forward to that." I got very involved with the Department of Anthropology and Cultural Affairs. I visited almost every main archeological site in Belize. We provided funds for them as well, grants.

McCREERY: How many are there?

MORENO: There are 900 total, but maybe a dozen that are open to the public and so forth. I'd go there. The two heads of that department, I got along very well with them. They appreciated my assistance.

There was a UC Santa Barbara professor. I got involved with her on some of her sites, and she discovered another city, a Mayan city next to a site she was working. So I was glad. I did a lot of that stuff. They knew that I was interested in this stuff because we would provide grants to help them resurrect some of these sites, a number of them.

McCREERY: What kind of funding did you have control over that you could provide?

MORENO: A lot. We would urge them and instruct them in how to apply, and we wouldn't always get the project approved but we certainly advocated for it.

One we lost was on domestic violence. My assistant actually wrote it up. She did a great job. We heard that it was the best one submitted. I heard from someone here who knew the people in the State Department. But for

some reason, it was denied. They didn't think we had the capacity to monitor it because while I was there another project to help small businesses — not the whole project but one of our awardees screwed up, and they blamed us for not monitoring it. They had misused the money, but in a good way.

So we had a discussion and I really advocated, "Go easy on this person. This is a good person." They didn't like my position. I remember they thought that I was too soft. I think as a result of that — and we really didn't have a real capacity to do the kind of intensive monitoring of how people spent their money. So that part was legitimate.

I think, we think, that because of that one incident and then dealing with the same section of the State Department — they said, "We don't know if you should do this."

It wasn't a ton of money, but still we didn't get it and that was a big disappointment because we did get involved in domestic violence issues there, a women's organization that we helped. We did outreach. But it was small country. We didn't have huge budgets, so we did what we could with what we had.

MCCREERY: What was the existing social service-type infrastructure?

MORENO: Very minimal, aspirational but not a lot of support. It's a poor country so always underfunded, and they had higher priorities, basically, than some of these things. But we were always a stalwart promoter of certain issues like domestic violence, gender equality, education, and fighting the church to do more.

There was a great program by PWC, Price Waterhouse. I have to hand it to other groups, American groups that went down there. I'd always meet with them to thank them because they really supplemented what we did as government and what Belize couldn't do or wouldn't do. But Price Waterhouse would send down 200 associates every summer to put on a program for elementary and middle school, maybe even high school, on financial literacy and put on competitions on how to start a business and entrepreneurship. I met with them twice, and the third summer was either Zika or Ebola, and they really limited their program because a lot of the young associates, particularly women who were in their thirties, child-bearing age, just said, "We can't take that risk."

Then we had university support in archeology. They would send down teens every summer. Educator groups would come down and adopt a school, provide books and construction funds and everything. And religious groups would come down there and bring fifty or sixty young people to help build housing in Mayan villages, and so forth. So if I heard they were in town I'd always go see them and speak at their luncheon and their medical clinics they would set up.

The volunteer efforts were really outstanding. You were actually really proud to be an American when you'd see what our whole effort was doing there. So many good deeds are happening. So Belizeans love Americans. And the government likes us. They just don't want us to push them around.

One case in point is that in the Obama administration, to fend off some of the criticism of the high-level deportations — Obama deported a lot of people. [Laughter] People don't remember that. But to fend off that criticism and to deal with the migration of children, unaccompanied minors, "Let's find a way of dealing with this asylum issue, but pre-screening people in El Salvador and then having them come to Belize as a waystation for six months." Then asylum is granted, and then they're brought to the United States and sponsored by some NGO.

We asked Belize if they'd be willing to allow a hundred people to come in, pre-screened in El Salvador, and while they're doing all the background and further interviews in Belize. Initially Belize said, "That sounds good." Hesitant, though, and we were getting mixed signals from the minister in charge of that. Ultimately they said, "We can't do it. We won't do it."

We working with the United Nations High Commission for Refugees, UNHCR — they had a posting there — working with that office. They found out that this asylum-review committee in Belize had been defunct, but then they saw the office open and people lining up outside their building, their office.

They said, "Wait a minute. There are already 2,000 petitions pending for years, and we're going to admit a hundred more? How do we know they're not going to stay?" Then they said, in a prescient manner, "What if Trump wins? What's going to happen?"

Australia had the same program going. They had some refugees from Southeast Asia or something. Then he reneged. He said, "We're not going

to admit them." But it was the same concept. I guess they were doing this in different countries.

Ultimately Costa Rica decided to step in. Some kind of deal was cut with Costa Rica. We were willing to give Belize more attention, but they said no. They just didn't want to be in that position anymore because there's a concern, I think, that the country is becoming heavily Hispanicized over the last thirty or forty years.

McCREERY: I'm interested in this point you just made that there was concern in the country that it was becoming too Hispanicized. Say more about that.

MORENO: That started, I think, in the, maybe, early nineties, which was when El Salvador was going through its civil war. Belize agreed to take on probably several thousand Salvadoran refugees. A town was created outside of the capital. I forget. It has a very curious name, something valley, basically a town that was created by Salvadoran refugees.[19] Between that and Guatemalans just crossing the border and saying, "We like it here." "It's easy to find work." And some Hondurans as well, but these are people who spoke Spanish primarily. Even though this has been going on for years, you'll meet Belizeans who have Lopez or Hernandez surnames but don't speak a word of Spanish. But there's more of an influx of that. It's right on the border, so how can you avoid that?

The powers, really, were from the old colonial bureaucracy. The British colonials were the ones in power, and just a few, just a handful, of assimilated Hispanics had made it in there.

But overall it's — you like to say that there's no prejudice, and in terms of skin color Belizeans come in all different — and African, Caribbean. It has more of a Caribbean flavor to it. So to the extent you're losing that Caribbean model and particularly Jamaica, it's, "Yes, we're a big tent, but there are some traditions we must maintain." So there is that tension.

Happily, you don't really see a lot of racial gangs, but there was a fear that Salvadoran — in fact, we monitored graffiti, like 18th Street or MS 13. There was concern that — as I said, the bubble effect — some of those heavier tactics might intrude on Belizean society. But otherwise, it's very laissez-faire. It's when you get people riled up about things.

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[19] Valley of Peace.

McCREERY: You mentioned the chief justice and a few of the legal issues that you could be involved in. Say more about the country's legal system.

MORENO: It's British based, which was a nice thing because on the criminal side, it's proof beyond a reasonable doubt, presumption of innocence, right to a jury trial, right to counsel but not paid. It's more like volunteer stuff. The chief justice calls you and says, "We need counsel." And among the lawyers, there are some very successful lawyers who saw it as their duty. It's a small country, 375,000 people.

But things move along slowly, particularly on the civil side. There's always an air of, is it moving along so slowly because of corruption or someone being paid off? Although I didn't see any of that.

Then in terms of jury trials, it's such a small country. One of the problems was people did not have faith in the judicial system. One of the big problems was people taking the law into their own hands. Even, God forbid, if you were involved in an accident and a family member was killed, your life would be threatened. You'd have to pay some kind of restitution if you could come up with the money. Then the juries would not convict because they always knew somebody who knew somebody. It was, "If it's not going to convict, you may as well take the law into your own hands."

There was some, I'd call it minor, corruption among the police. Some complaints about excessive force or bribes, but compared to other countries fairly mild. But overall, a mistrust of the judicial system, I'd say. Under-resourced. I think it had 1 percent of the budget, which should be 4 percent. Underpaid, and so forth.

McCREERY: Realizing you were there at the diplomatic level, to what extent were you able to get out and see the justice system in action?

MORENO: Quite a bit. They always had, every year, the opening session of the court, very formal. You'd all assemble at a mass, sort of like the Red Mass. The governor-general is there, the prime minister, and the judges are all there in their robes, very formal, as you can imagine. I always went to those.

Then you parade down the street a few blocks to the courthouse, and all the lawyers are there. There are eighty lawyers in the country. The chief justice gives a state of the state, and someone speaks on behalf of the bar.

Someone speaks on behalf of some other entity, and then the chief justice announces the beginning of the term.

He actually reviews — they have the presenting of the colors and the flag — it's very military — and a band, and the national anthem, and the chief justice presiding. I'm up on this balcony with other dignitaries watching all this. The same thing for Independence Day. It's declared at midnight, and you have to be outside. It might be raining or steamy, and there's a party. Very ceremonial.

As the U.S. ambassador, I had to go to all these things, with other ambassadors. Other non-resident ambassadors would come from Central America. There are a lot of ambassadors, say, from Germany and Switzerland and others. They would have ambassadors in Mexico, but they would also cover Belize.

MCCREERY: I see. I wondered how many other foreign ambassadors were there in the country?

MORENO: We had eleven, and of course the U.S. was the big cheese, and of course the U.K. I got along very well with Peter Hughes. We were the two big ones, but Cuba was there, Venezuela was there, Costa Rica was there, Taiwan was there, a couple of others. Honduras was there, Guatemala was there. And Mexico was there. Mexico was another big one. I got along really well with them. So in terms of the diplomats, basically Mexico, the U.K. and us were all really good friends.

MCCREERY: To what extent did you have joint interests that you worked on together?

MORENO: Quite a bit. With us and the U.K., for sure. Mexico, their program, their mission, was mostly cultural because it borders Belize. They did a lot. I still follow them. They do a lot of cultural things. They bring in music groups and educational groups. They sponsor a school in northern Belize. A lot of trade issues, commerce, transportation, buses and trains and stuff, flights. They do a lot of that.

Great guy. His name was also Carlos.[20] I should go back and see him. We cooperated on a number of things. We were always present anyway, but in terms of formal stuff probably not so much. We'd coordinate, for sure.

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[20] Carlos Quesnel Melendez, Mexican ambassador to Belize.

Road-building by the U.K. Joint exercises. I think the military did some joint exercises. We tried to help the military.

The Brits had a facility on the military base that was going unused, and I saw the medical clinic for the Belizean military was so small. I said, "The British are not using the space there." I got them to give that to Belize, that space. Because the British were training down there, too. You'd see British soldiers. And they weren't using this; they built a new clinic. So, "Let's have a clinic."

I worked with the University of Belize. They had an environmental program on the terrestrial and marine environments, so we helped both of them in terms of some kinds of assistance, and grants, and fostering protection of the reef, which is one of their greatest assets.

In terrestrial, we were working with their terrestrial person on issuing of licenses, just protecting the forest because there was a lot of poaching. We worked with the Belize Zoo. Their zoo basically consisted of rescued animals, jaguars and other animals that had been injured. We helped them.

A professor from, was it SUNY? Northern New York. Not Cornell but CUNY? Not City College but Stony Brook, up there in New York. He was interested in resurrecting Mayan ceramics. There was a village of Mayan women. We had supported them in terms of starting a business, and that migrated into, "Let's help these women," who were very entrepreneurial and working with this professor on doing Mayan ceramics. We helped sponsor a show or an exhibit in northern New York state. We flew up four or five Mayan women to present their work at this ceramics show. That was nice.

I was telling people last night about bringing in — the State Department has various musical groups, cultural groups, that they will sponsor all around the world. We had, I think it was the Howard University Gospel Choir, come down, a jazz group come down, a — what's the New Orleans music? What's the dance music? I'm forgetting what the type of music is —

McCREERY: Cajun?

MORENO: Cajun music come down. These women who — a social justice choir, African-American women come down. They travel. The State Department will say, "Okay. You go to Belize and the Caribbean."

We would always put in a bid and have them come. We had to come up with some money, write a proposal. Very detailed-oriented. I never got

involved in the details. I would just welcome, attend their functions. "Fantastic. The ambassador is here!" It was fun. Who could complain? Like I said, you're involved in everything, and you just have to be aggressive in learning what types of programs are available, and apply. It's very competitive to get approved.

That was one of the things I always pushed. "Let's just do it." Fortunately, I had good people, who were pushing things.

McCREERY: We spent quite a bit of time talking about your work as U.S. ambassador to Belize, ending in January 2017. I wonder if you could talk a little bit about the transition, when you knew that appointment would be ending with the Obama administration and you'd be coming back to Los Angeles.

MORENO: Okay. That was foreordained. I knew that I would have to submit my resignation, and I planned to be back in the United States the next day, January 21st.

Obviously, before that time arrived I considered different options as to what I might be doing, and among those was what I actually ended up doing, and that is alternative dispute resolution with one of the organizations that engage in that activity.

But I also was intrigued, perhaps, by going back to one of the larger firms or putting my name forth to serve on a corporate board. I had been encouraged several years ago by my mentor, Elwood Lui, to pursue that avenue. I tried that, and with respect to corporate boards I didn't get any good results or feedback. That may have been because I was venturing out on my own and contacting a few people, but I was advised that most boards already have a lawyer or legal-type person.

I probably gave up too early on that because I think, coming back with my credentials, I would think that they might want someone with my background. But that's still in the back of my mind. I am on a number of non-profit boards and commissions and things like that, but I wanted something that I could really devote more time to and also be compensated.

In looking at the firms, I approached about three firms. We had nice discussions, but they had some difficulty trying to conceptualize how I might fit in. I wanted an "of counsel" role. I wanted a reduced billable-hour requirement, half time, so to speak. Some of them were intrigued, but

ultimately it didn't go anywhere. Again, I think that — in retrospect I was told we should have used some kind of headhunter who could really do a search and advocate for you. I was told it's hard to advocate for oneself. I agree with that.

ADR work was my default. I had been approached by a number of ADR organizations, even before, when I left the Court, because many judges, as you know, do that. They don't transition to a law firm usually. That's the exception.

I talked to three firms, ADR firms, and JAMS suited my personality and could offer me more of what I wanted than the others. Just as an aside, JAMS is a national institution. It's written into many contracts, whereas other ADR firms are not. The cases it has in its wheelhouse are generally the larger cases, commercial cases.

I was told, "It's very corporate. You want something that's smaller and more informal." I said, "I think I like the corporate type of a situation." It has worked out quite well. I was welcomed here. My portfolio here has been a bit diverse, whereas a number of the neutrals here do 90 percent mediations, which are basically one day or one day plus follow-up. That can be very lucrative. You get cases and then there's basically not much homework after that. You either settle or they move on to the court. I do a number, maybe, I don't know, 15 percent of my time is with mediations.

It takes a while, in the first place, really, to be back on the scene as a known quantity. When I came here, I noted that I had not been in a trial court job since 2001. With a difference of sixteen years outside of the trial court mainstream, yes, I knew some of the prominent lawyers in the big firms. But the ones who were actually in court and litigating, I had never had that opportunity. I never served on the civil department in L.A. Superior Court, where the bulk of the cases here come from. But on the other hand, I did have the reputation of being on the Supreme Court and have a sterling reputation for fairness.

So I have developed a niche practice in consulting on appellate matters, being recognized as a go-to person on investigations, leading teams, so to speak, on major matters and being in demand, by stipulation, actually, for a few mediations and some arbitrations where the issue is not so much on the actual merits, that is, at a hearing, but on threshold issues like contract interpretation on insurance coverage or class-action eligibility, and a

couple of other what I call threshold issues that are really just legal issues, where it would be nice for them to have basically an appellate opinion on the viability of going forward on a particular claim.

I've also done quite a number of moot courts and consulting on appellate briefs and arguments. We call that "true neutral analysis." Not being hired as an expert witness, but more vetting some of the arguments as if we're having an actual court session. That's been not only lucrative but very enjoyable for me.

I've handled a couple of matters on behalf of one party before the California Supreme Court, one matter before the Ninth Circuit, I think at least two matters before the Courts of Appeal, where I can work with the lawyers in structuring the best approach to their oral arguments.

McCREERY: How prominent is that tool becoming in the kit?

MORENO: Quite a bit. I think JAMS has promoted that niche practice for the appellate neutrals who are here. We have at least three, maybe four. Justice Panelli has been here for a couple of decades. He does mostly mediations, but I worked with him on an appellate matter.

Where the stakes are quite high, the lawyers have no problem retaining three neutrals to review an appellate brief or to have a moot court on the very large cases. The nice thing about JAMS is we do get these big multimillion-dollar cases. I think more and more now, lawyers are seeking that kind of advice to hone their arguments. A number of us who have decades of experience can, I think, really offer them some pretty good advice.

I've worked on one matter from the petition for review, or the answer to a petition for review, to the opposition brief on the merits, or to a reply brief, and so forth.

McCREERY: What examples can you give of the subject areas of some of these?

MORENO: Some I really can't get into, because one is pending. But one involved an obscure issue in the Central Valley with respect to mineral rights and accommodations by the actual landowners, that is, a conflict between surface owners and mineral owners and county regulations. That was one.

Another matter that I'm working on deals with, actually, a local issue on a homelessness-directed proposition. I'm working with the County of Los Angeles on that matter.

I'm awaiting one case right now because my view, apparently, is contrary to the team's view after oral argument. [Laughter] We'll see if I'm the bearer of bad news or how my analysis comes out as a result of my listening to the oral argument.

McCREERY: I'm wondering if your views of the dispute resolution tools have changed while you're in this setting?

MORENO: Yes. Yes, quite a bit. I don't know if I've mentioned this before, but in my discussion and opinions regarding arbitration when I was on the Supreme Court, generally I think you would characterize my views as, "Giving up the right to a jury trial is quite drastic." But I think it's legitimate in certain circumstances, in most circumstances, actually.

But I remember discussions, and it's in the opinions, but my colleagues, Justice Chin, Baxter, Brown, Corrigan, the more conservative bloc, all viewed arbitration as quick, inexpensive, and not complicated. You talk to any neutral now who does arbitrations, and it's just like they've judicialized the process.

I have a couple of cases now where there's back and forth on discovery disputes and on procedural issues, dispositive motion practice, demurrers. All that has happened is the lawyers, who are not getting trial court time or experience, all that is being shifted to the arbitration forum.

So it's none of the things that my colleagues thought it was, and it's expensive. I think I've had two cases where I've made rulings, and all of a sudden they said, "Let's go back to court because this thing moving too fast," or they didn't like my rulings or maybe I charged too much. I don't quite know.

I don't blame them for going back to court, but I want to move things along. Most cases here settle anyway, so that part is very much like the trial court. But I'm amazed at, as I said, how judicialized the process has become.

Most of us were very experienced trial judges, and there were a number of us who were federal judges. Depending on your personality, you can *be* a federal judge. Maybe one side likes that, and the other side doesn't like it. But in the back of your mind is, well, they're paying for my services. I say, "You're getting concierge service. You can call anytime. We can resolve things over the phone before you file a motion."

I had one case where, after giving them my view on — I think it was a discovery matter — "Your honor, what are your views on — " two or three other issues that were down the road a piece. "What is your philosophy?"

I had both sides on the phone, and I just gave them my thoughts. "Look, give me a call when you get to that point, and we'll just talk about it."

I'm trying to have them not go through the whole formality of filing a letter brief or something more detailed. I'm in favor of that part. It's almost as if they just want to feel out the arbitrator, the neutral, to see how far they can push on something.

My philosophy is, "Look. I'm going to be the trier of fact. Let's bring all these issues to the hearing, as opposed to a dispositive motion."

I had a motion — today's Friday — on Monday, four days ago, probably an inch thick. The other side had not had a chance to respond. I read that, and I said, "Do you want to be heard?" I said, "Unless you have already come up with a resolution, which I think you should [Laughter] — " and it turns out they were working things out. But that takes my time to read something, talk to them. I find that the bane of all the neutrals, every neutral I've talked to, is this pre-trial stuff, that they still go back and forth.

I almost feel like, "Look, I'm willing to have a hearing and decide a case on the merits, but all these other things, just work it out." But you have to put pressure on them, to say, "Work this out. If you don't work it out by Friday, then I want something in writing. I'll have a decision for you on the following Monday." So of course they figure it out by Friday. That's a technique that works.

The other technique I've used is — this is on minor discovery disputes — I say, "You know, I was on the trial court for fifteen years. I did a couple of hundred, three hundred, trials. Never in my experience has an answer to an interrogatory or an answer to a question on a deposition really made much of a difference in terms of the actual trial and the disposition of the trial." I say, "Just keep that in mind."

I'm the trier of fact in the case. I'm basically almost saying, "Don't annoy me with these little petty differences. Figure it out." Of course, I'm acutely aware that one of the principal bases for an arbitration ruling decision being vacated is that you improperly excluded evidence. You didn't give a full hearing.

Another thing arbitrators say is, "In terms of the standard objections, don't make them. They're going to be overruled. Relevance, yes, but most things are going to be found relevant if there's some kind of basis for it."

It's all going to come in, because I don't want a claim to be made that I didn't let something in that someone, the superior court looking at my decision, is going to say, "The arbitrator should have done this or allowed this in."

I don't know what the experience of other neutrals are here. I've heard from others, and lawyers too, that more mediations are not settling. They're either ordered to go to mediation or they use mediation as a discovery tool, feelers to find out where people are, maybe get some offers on the table to see if the other side is really interested in settling the case or not. So it's more sparring. But in terms of a genuine settlement, that's happening less.

In arbitrations, as I said, a lot of these preliminaries happen. But when push comes to shove, they will settle. I tell them, "Look, now is the best time to get certainty, finality, at a good rate basically, a good settlement before you go through all the trauma and expense of litigation." And especially in those last two months. If these lawyers are indeed going to take it to a hearing, they're going to try to be super-prepared, and it's going to cost people a lot of money, and you're not going to be sure if you're going to win.

McCREERY: What other mistakes do you see the parties make?

MORENO: This is more broadly, and it has to do with the game-playing. But it's more the civility and incivility. You still see that. Or people just not being open in terms of trying to reach a settlement.

Posturing, among all types of lawyers but particularly among the younger lawyers, just whether they're doing it for their client or to intimidate the other side. It's stuff like that that I don't think anybody really likes.

In terms of mistakes, I don't think — you hate to say this, but many times they don't have a realistic approach to the value of the case and what's in the best interests of the client. You're just trying to get the best result as early as possible, and then move on to another case.

McCREERY: I'm interested to hear you say fewer things are settling.

MORENO: Yes. I've taken an informal survey of experienced lawyers and neutrals, and they concur. That may be just my outreach in getting opinions, but my first mediation here I settled. "Okay, this is great."

But then my next three were very frustrating. You do get vested in a case, so when you do settle or you learn that it settled later, with or without your input, you feel gratified. It's like a case off your calendar.

We do have a practice here of having a pre-mediation telephone conference separately with each side. The main question I ask is, "How are you getting along with the other side?" [Laughter] "What's the relationship?" Because that, to me, as a trial judge and now, that's the most important thing. Are things civil on that side?

As a trial judge, I know when I would get a case from another judge, another department — and a lot of us thought the same thing — we would say, "Who are the lawyers?" Because in the criminal courts, you knew who the lawyers were, and you'd say, "Okay." Or are they going to send you someone that nobody wants to deal with?

Here, I just want to find out, are these lawyers talking to each other, or does one have a ridiculous demand? Either side. Like, "No money." Or they want the world. Is there something to work on? I'm actually trying to work on my technique. There are as many techniques as there are neutrals, so I'm still developing mine.

I firmly believe that, in all things, whether you're a neutral or a lawyer, you should be yourself. I don't have the overly aggressive personality, more one of reason. I look at the law. I try to find out what is really motivating. What do these people want? More of a softer touch, as opposed to browbeating. But very quickly, I do — and I question whether I should do this — I will not hesitate to tell a side, "Your case is weak."

If I sense that the person, the lawyer, is not a trial lawyer, I'll say, "Put on your case for me. Call your first witness." And this is with the client there. "How is this going to work? How are you going to prove this?" Just put them to the test.

On the other side, I say the same thing, probably less so because they're defending. I try to just pinpoint how much the case is worth to them from a nuisance standpoint or cost, if it's going to cost them.

I know in one case, if new law has just come out, if their exposure is going to be greater or less than what they've advocated for, I try to create uncertainty. [Laughter] Nothing is certain to begin with, but if the law — I see a recent case or something is before the U.S. Supreme Court where it's almost a foregone conclusion in an arbitration/class action setting how it's

going to go, I say, "That case is going to come down." I try to stay abreast of cases from an appellate standpoint.

That's my style. I know at least a couple of settlement judges at the superior court, and a couple of them here. They don't really look at the law. They just say, "Give me the numbers," and they create doubt, but not on the basis of the law. I just can't do that. I'm sure they'll look at the letter briefs, but it's more, "Let's talk turkey," and they approach it that way.

I'm not at that point yet. I get there in a roundabout way, but I try to be more intellectual and practical in terms of what's going to happen at trial. "If you don't settle here, you're going to go back to a certain judge." I find that these lawyers don't really know the judges or how much time they're going to get.

McCREERY: I wonder what approximate percentage of the JAMS cases here overall are appellate cases?

MORENO: I think it's a small percentage but one that's increasing. We're certainly trying to increase the number of neutral-analysis-type cases on appeal.

There are two types of appeals. One would just be more of a consulting-type situation, I guess if they want to do a moot court or they want us to review briefs, talk to the lawyers. That's one type, but another type is where, under this case — there's a California Supreme Court case — I don't know if it's *Coral Construction* maybe?

McCREERY: That was an affirmative-action related — ?

MORENO: Yes. No, there was another one. *Cable Connections* — it's probably in here somewhere — where, ironically, they provide for appellate review of an alternative dispute resolution case. I think Justice Corrigan wrote the opinion, and I was surprised that — they can provide for anything they want.

I've had two of those. I've got one that's pending right now, and we had one before. The one I just mentioned provided for appellate review in the agreement. I've seen that in maybe two other cases, one of them that's pending right now.

One interesting case that's pending right now is the lawyers for two Japanese companies, an automobile manufacturer and an insurance company, have tendered, I think, eight or nine issues to us, to a panel of three.

To me it's very Japanese. They want to go back to their clients and say, "Look, we have three respected appellate justices on these coverage issues."

Very detailed questions. That's in the process of being briefed right now. We're supposed to give them an opinion that's non-binding, a non-binding opinion, so that as they go forth —. Maybe the lawyers have been arguing over what's covered and what's not, et cetera, and they say, "Let's take this to court, but not a real court. Let's take it to some appellate justices and get a non-binding advisory opinion."

We do that. That's very curious. I think certainly JAMS is trying to do more of that. So there are different ways of doing dispute resolution. It's not a lot about mediation or arbitration on the merits. We have one, two, three, four, five appellate justices here, so we offer that as a service, and in various talks that some of us make, we promote that. Some of us have written articles on the utility of having that kind of appellate perspective.

It's good. It fits into my wheelhouse, for sure. Yes. And you normally don't think of appellate review when you're thinking about alternative dispute resolution, but it comes in all forms and stripes.

MCCREERY: How good a fit is it for you here at JAMS?

MORENO: It's a good fit. I really like the people. I like the flexibility. I could be a little bit busier, I think, whether it's doing mediations or — the tendency here for new neutrals and former judges is to really get loaded with arbitrations. They want that judicial-type experience, both the lawyers want it and it's actually easier for us in the sense that it's a skill set that we already have.

Writing the opinions or the rulings involves more work. In two cases I've retained a law clerk, with the consent of the parties and paying for it myself out of my take, and that seems to work out fine. Because writing, putting pen to paper, can be very time consuming.

MCCREERY: But typically you don't have that sort of assistance here?

MORENO: Right. Yes. But you have to let the lawyers know that that's what you're going to do.

But handling the trial, or the hearing, as we call it, is pretty straightforward. My personality, as I did say earlier, is I let everything in, but in terms of my style it's still very formal. Friendly, but formal. I'll rule on objections

if they make it, but I really do think we have a teaching function, even at this level.

I actually tell — in this last case I did in San Diego, at the final status conference, I said, "Look, if you have an associate who's really done all the work on a witness, on a particular issue, let them have a go at it. I'm not going to be mean to them or curt."

I know there's a movement, among federal judges at least, to encourage that so that the associates get a chance to say, hey, they argued a case in front of a judge or they handled a witness. I think that's important, to give them experience, as long as their client agrees. At least in that case, they did.

McCREERY: I suppose you can provide feedback on their performance, if that is sought?

MORENO: If they ask for it, yes.

Oh, the other thing that I'm interested in doing here, and one of the case managers has sought me out, I have done three emergency-relief matters. Since my calendar is not booked like some of the others, I can issue injunctive relief or expedited relief. I might get a case on, let's say, a Wednesday, have a conference the next day, set a briefing schedule, very tight, and have a hearing within a week. Or if it's not really, truly an emergency, say, in two or three weeks.

McCREERY: We've been talking about your time here at JAMS the last couple of years. How do you summarize the experience?

MORENO: I think overall it's been a very good experience for me. I like the flexibility. I like the variety of cases I get. I have an opportunity also to do different types of outreach, whether it's talking to young lawyers or speaking on diversity or just speaking on good mediation and arbitration techniques to different groups.

I like the aspect of promoting myself as a mediator and arbitrator. I still go to a lot of, and am still invited to a lot of, bar functions, and I feel very confident about meeting people and being able to attract business. I think one of the obstacles I had to overcome, as I mentioned earlier, was to let people know that I'm back and that my services are available to be retained. I think that has worked out pretty good.

As long as things keep up their pace and grow — I'm patient — I think I'm still interested in doing things outside of JAMS in terms of being named to commissions and being a consultant to the governor on judicial appointments, serving, as I said, on commissions related to things of concern to, say, local government: homelessness, oversight of our law enforcement agencies.

I've been approached. I've turned down one of those offers. But I like being asked to do things like that.

I was also asked to be a monitor over some of the immigration detention sites along the border for children. I was asked by Judge Dolly Gee to do that, but on reflection I decided not to accept that appointment. Again, it was going to be time consuming, and I wasn't sure how difficult that assignment would be, to be traveling to south Texas along the border to see where minors were being detained for up to twenty-four hours before being moved to a different site.

McCREERY: What a timely issue.

MORENO: Very timely, and I thought it would have been important. In fact, that one I was recommended by the immigrant rights groups. Then she came to me, but I thought about it over the weekend, and I didn't think it was something I wanted to do. It would have been important to do, but it wasn't something I felt I had the time to do.

I was also asked recently to be the — I may have mentioned this — to be in the leadership line ladder for the Chancery Club here in Los Angeles. That's a position of some esteem. Let's put it that way. I liked that.

This past weekend I went to Stanford to participate in a Latino summit, a reunion of Latinos. I was on a panel on how Latinos can better use their numbers to effectuate the political process. I spoke about at-large voting challenges. Our panel was quite unique. We had a politician, a judge, a social activist, and a legislator — well, the legislator was the politician. So it was good.

Then in two weeks I'm going to Yale for the fiftieth anniversary of the founding of a Latino student group there. In fact, I just got an email during the break about that.

Ever since I came back from Belize I've been trying to figure out what makes me happy, how to best, as I say, maximize my utility, both financially

but also in terms of my interests, so it's gradually evolving after two years back. I think I'm very optimistic that opportunities will come my way, but I feel I just have to be very selective about what I do or don't do and how long some of these projects last, because some of them can go on and on. I mentioned that I'm on the Kaiser Arbitration Oversight Board, and I'm on a special committee to work out some language on a rule. I think very gradually I'm busier and busier on things like that that I'm enjoying.

McCREERY: You have a variety of volunteering and mentoring-type roles, I think, that continue as well?

MORENO: Right. Yes. People do still seek me out for things like that.

McCREERY: What else is ahead for you, Justice Moreno?

MORENO: That's a good question. I was telling someone over the weekend, because I'm a mentor to one of my former law clerks who is always exploring with me new options. He's with a firm for the last seven years, and he has a political bug. He ran for Assembly and placed, I think, third.

He's a policy wonk, so he's always thinking outside the box, outside of what he's doing — even though he's happy with what he's doing — but always wonders if there's more. He's actually, at age forty-eight, becoming too settled.

I said, "Look, I'm seventy, and I'm still looking for other things," other opportunities, other ventures, and so forth. It's not going to be just more leisure time and travel, which so many people often see as what they're going to be doing. I said, "The fact that you're at this stage is perfectly normal, and you're going to be this way the rest of your life, I hope."

For me, I don't quite know. I thought that 2019 would be — after being here all of 2018 and most of 2017 — that by 2019, being in this position now, that I'd figure it out. But I still don't know what it's going to be.

As I said yesterday, I want to be in the mix, even more so. So we'll see how things play out. I really like the recognition of being in a position of leading investigations or teams or commissions, something like that.

It may be the time when, at least for the next five or six years, I'll still have the energy and interest of being in the public domain still. That's what I actually see. I don't know what form it's going to take, honestly, but I'm always looking for that sort of opportunity.

MCCREERY: Thank you. We've touched briefly on your two alma mater institutions the last few minutes, Stanford and Yale. Of course, you've been showered with awards and honors, I think a whole handful just from Yale, over the years. Talk a little bit about what that kind of recognition means to you, and if there are particular things that stand out.

MORENO: Okay. With respect to Yale, one always has, I think, a stronger affinity for your undergraduate college. At least that's my view. I'm just really gratified that, being one of the Latino pioneers there and seeing the tremendous growth of the Latino community and the minority community there at Yale, it's very just gratifying to see how things have improved over the years. I'm completely fascinated by what these young people are doing, their aspirations and goals and their attitudes towards change. It is really inspirational for me, so I'm looking forward to going back there.

MCCREERY: They've created the Carlos R. Moreno Prize, I understand?

MORENO: Yes, that's funded by me, with the help of the dean's office. About that, that is a prize for the best senior essay, which is like a thesis, on the immigrant experience. It might even be just the Latino immigrant experience in the United States. We've had that for almost ten years, maybe a little less than ten years.

Yes, bringing that up, it was very gratifying to me to meet a couple of the awardees a couple of years ago. They write nice letters, and I get to meet them and all that.

I think I've had some measure of recognition certainly — being an instrument of change, in part. It's hard for me, going back, to imagine that all this change would have happened, so it's good to go back after, now, fifty years really and to explain or to relate to them the experiences I had then and what I've done since.

MCCREERY: But if asked, what sort of advice would you offer those young people?

MORENO: Here's my philosophy about Yale. I think at bottom, Yale wants to produce or graduate leaders in their fields: scholars, politicians, leaders in their profession, and so forth. I think that's what distinguishes Yale from other colleges. They really instill that in you, or they did instill it when I was there.

There was a saying that's outdated now. "Yale creates one thousand — " I think they said, *men* — "leaders of the future." We certainly viewed ourselves as that.

I'm sure that has changed and the sense that it's elitist, especially with respect to young men, but I still feel that quality is very important. When you leave there, you should feel that you're going to accomplish something and do something with that degree and that education and the opportunities that open up as a result.

Some of that may be a process of selection by Yale of who gets in. They look for that quality. Or it may be something that's imbued in you when you're there. It may be a combination.

For me, I think it was a combination. But it certainly instills in you a feeling that, hey, you could — because I felt this way in high school. I felt that I could do anything and become anything that I wanted to be, which I think —

When I hear these sad stories about people, minorities, who are discouraged in high school. "Oh, you can't be a lawyer." Particularly among women of my generation, who were told that in high school. "You can never be a lawyer. Ha ha ha," you know?

Times have changed. But I think I'd like to tell them that I'm aware of how things were, how I perceived my experience at Yale and thereafter, and how happy it is that things have really changed, really across the board, not only at Yale but across the board. I would try to inspire them to —

And a place like Yale for minorities is still a difficult place, in terms of being accepted and assimilation and being exposed to broader cultures and people. I'm sure that part is still the same, but with time I think those barriers do melt away. That's what I would tell them.

For law school, my message to them is to develop an expertise, develop a practice. It doesn't have to be in law, but don't be satisfied just being a worker bee, being an associate in a firm and just accepting work that's handed down from the firm.

To think bigger, to think about bringing in your own clients. Developing an expertise, developing a practice, a reputation of excellence, and being self-sustaining in the firm, which looks at the bottom dollar, or starting your own firm and looking at your own bottom dollar and being successful.

But also to participate in the greater community, civically, because as a lawyer you really to bring a lot to the table. Believe it or not, the general public still respects lawyers. As much as they're "dissed" by their own professionals, by their own people, and by some elements of society, the average person really says, "Oh, you're a lawyer." They put you in a different category and expect different things from you.

I think anyone going to law school should not be satisfied with just, "I'm doing law school, and I'm going to be a lawyer."

They have to think bigger because, as a profession, it is a so-called noble profession. We do have a lot of civic responsibilities in society. Being a lawyer and being a family member are all-consuming, but there are bigger things to do out there. That's what I generally tell lawyers.

Stanford, I think, has helped, at least in my career. I think it has opened doors. No one has ever questioned me about my educational pedigree. They shouldn't. [Laughter] So it's really been helpful in intangible ways. You just don't really know. I told my son, "You probably should think about staying at Stanford."

With respect to Harvard, Yale, Stanford, whenever they mention someone they say, "Yale educated," or "Stanford educated," and more so Yale and Harvard, by the way. [Laughter] They don't say that for many schools.

I don't think it's necessarily merited. Don't get me wrong. There are a lot of great schools. But for some reason it still has a certain cache among the general public. Journalists will always insert that in. I'm just saying. [Laughter] It's been very helpful, very, very helpful.

I'm very proud of those awards I've gotten, mostly from Yale. I'm trying to think if I've gotten anything from Stanford. I've spoken there a number of times to the law school. I'm invited to go up there by the end of April. I'm not sure if I'm going to go. I've got to see if my schedule will work out for that. If not this year, I can do it next year.

MCCREERY: And then legion awards and honors from local and state bar associations.

MORENO: Yes, right. The state bar. I'm very pleased to have gotten awards for child advocacy and disability rights, gender equality rights from Equality California — a lot of it based upon my work on the Court but also my activism with respect to children's rights and disability rights. I think

those are the three I'm probably most proud of. I'm sure there are others from bar associations, but those really stand out.

I got an award recently from the L.A. County Bar, the Trailblazer. When I get these lifetime or trailblazer awards, I often say, "Is there something I don't know? Have you spoken to my doctor?" When you get a lifetime award, "Is my time coming to an end?" But believe me, it hasn't come to an end yet. And those are very nice awards to get.

McCREERY: Is there anything about your time on the Supreme Court or any other stage of your career that we've talked about that you'd like to say more about? Let me also ask, what else should I have asked you but didn't?

MORENO: I really think we've covered it all, Laura. I've often digressed to get into something, but this has been very informative. I've learned a lot about myself because some of these issues I haven't really explored — just figuring out what I enjoyed, what I didn't enjoy. As I begin my next journey, this has been very helpful in deciding, "What makes Carlos happy?"

I think everybody should be happy, and this has really put a focus on the things that I like to do, so it's been helpful.

McCREERY: It's good to hear it's so timely on your part. It certainly is an enormous gift to the archival record, and I thank you very much for that.

MORENO: Thank you. It's been a pleasure.

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