

VOLUME 17: 2022

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# CALIFORNIA LEGAL HISTORY



JOURNAL OF THE  
CALIFORNIA SUPREME COURT  
HISTORICAL SOCIETY

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Cover Photo: Authors of the “Legal History in the Making” section in this volume (and the California law schools associated with the clinical programs they discuss) — left to right, top to bottom: Jeff Baker (Pepperdine), Lara Bazelon (USF), Kurt Eggert (Chapman), Haley Fagan & Tori Porell (UC Berkeley), Carrie Hempel & Bob Solomon (UC Irvine), Joe Kaatz (USD), Robert Mullaney (UC Davis), Art Neill (California Western), Clare Pastore (USC), Ascanio Piomelli (UC Hastings), Hina Shah (Golden Gate), Lauren van Schilfhaarde & Pat Sekaquaptewa (UCLA).



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# LEGAL HISTORY IN THE MAKING

INNOVATIVE EXPERIENTIAL  
LEARNING PROGRAMS  
IN CALIFORNIA LAW SCHOOLS





# LEGAL HISTORY IN THE MAKING:

## *Innovative Experiential Learning Programs in California Law Schools*

SELMA MOIDEL SMITH

### INTRODUCTION AND CONCLUSION

#### *From the Editor*

My career as a lawyer began almost eighty years ago when I was sworn in by the California Supreme Court, meeting in Los Angeles, on January 5, 1943. Among the many future events unimagined by this young lawyer was that I might have the honor and pleasure of editing *California Legal History*, the Journal of the California Supreme Court Historical Society, these past fourteen years.

As introduction to this special section, “Legal History in the Making: Innovative Experiential Learning Programs in California Law Schools,” I return to a topic that was urgent when I was new in the law — the need for clinical education in law schools. In 1948, I was invited by the International Bar Association to present a paper on legal education at their annual conference at the Hague. My paper was a plea for practical training as a necessary part of legal education.

With the enthusiasm of youth, and the quaintly gendered language of the time, I argued that law schools “have taken the money of the student under the false pretense that they are preparing him to practice law, when in fact, he will

have to learn the *practice* of the law after admission to the bar.” In contrast, I referred to the pathbreaking example of Duke University, which required clinical training of law students at that time, and to the *optional* programs at schools such as Northwestern, Harvard, Cornell, Cincinnati, and Texas.

I made the case for the public benefit to be gained from well-prepared new lawyers at a time when “the vast majority of them have not seen the inside of a courtroom, have never prepared pleadings, have never seen many of the legal documents they pretend to know how to draw, and know absolutely nothing about the orderly presentation of a case.” I urged that the law student should have “as many opportunities as possible to deal with a live flesh-and-blood client. He should learn how to get the facts, how to gain the confidence of his client, and how to recognize when his client is withholding the facts.”

No other presenter addressed the topic of practical training, yet I am gratified to report that the IBA House of Deputies adopted the resolution: “That any system of legal education should provide for an adequate measure of practical training before a student is permitted to practice the profession of the law.”<sup>1</sup> At later IBA conferences, I found that my paper had been reprinted both in English and other languages.

Since that time, I have observed three waves in the move toward wider adoption of practical legal education. Each wave has emphasized the pedagogical value of such training for the student. The differences have come in the intended beneficiaries of the students’ efforts. In the first wave, the most that I or the schools named above dared to hope was that clinical programs should provide pro bono services to individuals in need. This was reflected in the early legal-aid clinics at leading law schools. In the second wave, commencing in the 1970s, the mood of the times broadened the focus to aiding worthy social groups and causes.

For the past decade or so, a third wave has again redefined the beneficiaries of law students’ clinical efforts, in tandem with a broader trend of redirecting aid from charity toward self-reliance (often citing the well-known adage, “Give a man a fish and you feed him for a day. Teach a man to fish and you feed him for a lifetime.”). That is the theme of this special section.

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<sup>1</sup> International Bar Association, Second International Conference of the Legal Profession, August 15–21, 1948, The Hague, “Summary of Proceedings and Resolutions Adopted by the Conference,” Symposium VI: Legal Education and Admission to the Profession (including “Curricula for Legal Education” by Selma Moidel Smith and Resolutions on Legal Education, p. 26).



AT THE FIRST UC BERKELEY SCHOOL OF LAW CONFERENCE ON THE CALIFORNIA SUPREME COURT, NOV. 14, 2008: (L.-R.) CHIEF JUSTICE RONALD M. GEORGE, JUSTICE KATHRYN MICKLE WERDEGAR, CHIEF SUPERVISING ATTORNEY JAKE DEAR, SELMA MOIDEL SMITH, IMMEDIATE PAST PRESIDENT RAY MCDEVITT, AND PRESIDENT DAVID MCFADDEN.

On the following pages, you will find a series of articles “devoted to current law school initiatives that, beyond providing *assistance*, also promote positive *change* in the law and society.” With those words, I invited an article from one experiential learning program at each of the seventeen ABA-accredited law schools in California that offer such programs. To our good fortune, twelve were ultimately able to provide such articles. As you will see, they come from diverse — and at times divergent — social, political, and teaching perspectives, yet they have a shared earnestness of purpose.

My invitation said, “The piece could include some historical background on the creation of the project (how this need came to be felt and put into action), its past accomplishments, current efforts, intellectual content given to the students, and particularly some discussion of current or recent individual students and their outcomes, both personal (growth, awareness, background, motivation) and results in the community.” I hope you will find they have each delivered more than I asked.

And, as you have no doubt surmised, this is also the introduction to my own farewell. Having reached the age of 103 this past April, I feel the time has come to declare my work as editor complete. Two years ago, I reflected on the course of *California Legal History* as both a journal and a field of study,<sup>2</sup> so I shall not repeat myself. Instead, I will say that I chose,

<sup>2</sup> Selma Moidel Smith, “Fifteen Years of *California Legal History*: The Role of a Journal in an Emerging Field,” *California Legal History* 15 (2020): 1–6.

with this return to an early interest, to dedicate my final volume to a forward-looking topic.

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I am grateful to many friends and colleagues:

To founding editor Harry Scheiber, for inviting me to join the Society Board twenty-one years ago, and for his friendship over all the years.

To Kent Richland, who as Society president first welcomed me to the Board.

To the late Gordon Morris Bakken, for proposing that I succeed him as editor.

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To David McFadden and Joyce Cook, who have tirelessly promoted the contents of each volume on the Society's website.

To the Society's director of administration, Chris Stockton, for his cheerful and able administrative support.

To design and production artist Elaine M. Holland, for her caring friendship over the course of fourteen volumes, and for making each page a delight to read.

And to "Chief Tani" — California Chief Justice Tani Cantil-Sakauye — for being herself, and for giving me the privilege of sharing her friendship.

August 2022

# THE COMMUNITY JUSTICE CLINIC:

*Pepperdine Caruso School of Law*

JEFFREY R. BAKER\*

## BUILDING SOMETHING NEW

The Community Justice Clinic had a client with a good idea; the idea created a tricky problem that required a creative solution. The clinic students had never handled such a matter before, so they were reluctant to volunteer. The professor often told the students that a lawyer's process is more important than the lawyer's expertise, and bringing process and judgment to a problem will yield the necessary expertise to serve the client. A brave student raised her hand and said she would try.

The client's idea was to build a hospital ward in an African nation. The client is a U.S. nonprofit who works to advance access to healthcare for women in developing countries and to train doctors to expand local capacity. When the client asked its local partners in Africa what they needed

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This article is part of the special section, "Legal History in the Making: Innovative Experiential Learning Programs in California Law Schools," in *California Legal History*, vol. 17, 2022 (see editor's introduction on page 3).

\* Jeffrey R. Baker is a Clinical Professor of Law, the Associate Dean of Clinical Education and Global Programs, and the founding director of the Community Justice Clinic at Pepperdine Caruso School of Law.

most, they replied that a full ward for the care and treatment of patients would be the next necessary foundation to expand and sustain their work. The good idea created the tricky problem of a U.S. nonprofit executing and financing the transaction to ensure that the ward would rise on the campus of the public hospital in Africa. It would require comparative legal research, cultural competence, trustworthy partners, clear expectations, and speed. The brave student raised her hand and volunteered to try.

This is the heart of clinical education, a courageous, novice student stepping into vital work that will affect the trajectory of a client's life, work, liberty, dreams, rights, and goals. The stakes are high, and the experience transforms law students into lawyers. Under supervision, clinic students move from "thinking like lawyers" to being lawyers in the service of clinic clients.

In this case, the student started researching contract laws and forms that would satisfy state and foreign jurisdictions, developing draft contracts between the nonprofit client, the local partner hospital, and the contractor. The student had never drafted a contract on her own before, and this was a critical challenge. The professor supervised the student's work as she developed the contracts in a cycle of research and preparation, drafting and editing, reviewing and reflecting on the work product. The client had many questions, and when the student completed the draft, she and the professor shared their concerns that they might have missed important details in drafting a contract for use in a distant jurisdiction.

The professor reached out to a former graduate student, then a young lawyer in the other country, to ensure that the contracts would be workable, understandable, and enforceable in the other country. The clinic class discussed how cultural competence, humility, and benevolent assumptions are necessary for excellent lawyering, and being mindful of one's own limitations and blind spots is essential to avoid mistakes and shortcomings. So the professor and the student, with the client's permission, engaged the pro bono services of the foreign lawyer who "translated" it into local form with Commonwealth English, ensuring that it conformed to local practice. The clinic student was gratified and encouraged when the local lawyer did not change any of her substantive work.

Within a few weeks of her raising her hand to volunteer, the parties had signed the contracts. Within eighteen months, the hospital ward was complete, and the parties organized a grand opening. Since then, hundreds of women have received free health care, and young doctors and nurses have expanded and improved their practice. The student grew in confidence and capacity, too. She learned important lessons about drafting contracts, but she learned more about the client, complex sets of interests, cross-cultural and foreign practice, and how to progress from problematic idea to practical solution. Her classmates learned from this process during case rounds in the weekly seminar, and the professor learned from tackling an ambitious new project in the clinic.

## FOUNDING THE COMMUNITY JUSTICE CLINIC AT PEPPERDINE CARUSO SCHOOL OF LAW

In 2013, after a season of discernment and introspection about its clinical programs, the Pepperdine University School of Law, now Caruso School of Law, welcomed a new clinical professor and director of clinical education, this author, onto the law faculty with the rare opportunity to design and launch a clinic from scratch. The faculty considered the existing clinics, curricular gaps, and community needs and decided to develop the Community Justice Clinic.<sup>1</sup>

The Community Justice Clinic expanded the scope and reach of the existing clinics in its practice, clientele, and teaching objectives. Its primary work is serving as general counsel to nonprofits, nongovernmental organizations, community and religious organizations who are serving marginalized and vulnerable neighbors in California, the United States, and around the world. Students learn corporate, transactional, and policy practice while handling matters involving incorporation, governance, tax exemption, transactions, intellectual property, compliance, policy, and human rights.

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<sup>1</sup> Jeffrey R. Baker, *Case Rounds: Lessons from Launching a New Clinic at Pepperdine*, CLINICAL LAW PROF BLOG (Oct. 24, 2014), [https://lawprofessors.typepad.com/clinic\\_prof/2014/10/case-rounds-lessons-from-launching-a-new-clinic-at-pepperdine.html](https://lawprofessors.typepad.com/clinic_prof/2014/10/case-rounds-lessons-from-launching-a-new-clinic-at-pepperdine.html).

In 2014, the Community Justice Clinic joined the law school's five existing clinics: Legal Aid Clinic, Ninth Circuit Appellate Advocacy Clinic, Mediation Clinic, Special Education Advocacy Clinic, and the Refugee and Asylum Clinic. Since then, the school has launched several more clinics: Restoration and Justice Clinic, Low Income Taxpayer Clinic, Startup Law Clinic, Disaster Relief Clinic, Faith and Family Mediation Clinic, and the Religious Liberty Clinic. The Appendix at the end of this article provides a brief history and description of each of these innovative legal clinics.

The faculty decided that the Community Justice Clinic ought to diversify the educational and practice experiences in the clinical program. The existing clinics were and are valuable and effective, but they all represented individuals and provided experiences that were largely variations on litigation practice. This is vital work, but it is not the only work. Recognizing demand for corporate, transactional, and policy practice for organizations, and perceiving great demand among potential clients, the Community Justice Clinic has served scores of clients on hundreds of matters since it launched in 2014. It has developed a practice among nonprofits, nongovernmental organizations, community and religious organizations who are devoted to human rights, social justice, economic development, environmental sustainability, and access to education and healthcare among marginalized and vulnerable communities. Its practice has expanded beyond Southern California to include national, foreign, and international clients around the world.

Every Pepperdine legal clinic serves two major purposes. First, the clinics teach law students how to practice and how to be lawyers in client-centered practices designed for their professional formation, critical reflection, and essential, transferable experiences. Second, they each serve clients in great need with pro bono, public interest practice to advance access to justice in our communities, to instill an ethic of pro bono service and public citizenship in students. Each clinic has a different scope and focus of practice and different styles of lawyering, so that students can explore and learn about the profession, practice, and themselves.

At Pepperdine Caruso School of Law, the clinics are part of a robust experiential learning program. To graduate, all students must complete at least fifteen units of experiential learning courses, and they may fulfill this requirement with custom paths through clinics, field placements, and simulation courses that ensure they are as ready as possible for excellent,



ethical practice when they graduate. The law school adopted this standard when the California State Bar was considering such a requirement for all law schools in the state, but, even when the state bar abandoned those proposals, the law school kept it as a commitment to the students' formation and readiness.

Specifically, the Community Justice Clinic meets these objectives with a practice focused on corporate, transactional, and policy work for organizations devoted to justice, charity, development, and empowerment within and among communities in need. It offers students experience as general counsel to corporations, advancing charitable and corporate purposes, advising on compliance, designing and executing transactions, and empowering clients with analysis and guidance for their own justice work.



EVERY SEMESTER SINCE FOUNDING THE COMMUNITY JUSTICE CLINIC, PROFESSOR BAKER HAS ASKED STUDENTS TO SIGN THIS CALIFORNIA STATE FLAG AS A SYMBOL OF THEIR COMMITMENT TO ITS CLIENTS AND COMMUNITIES AND THEIR CAREERS AS PUBLIC CITIZENS ADVANCING ACCESS TO JUSTICE. THIS FLAG HANGS IN THE CLINICAL OFFICES AT PEPPERDINE CARUSO SCHOOL OF LAW AND BEARS THE SIGNATURE OF ALMOST EVERY STUDENT IN THE CLINIC SINCE 2014.

*Photo: Jeffrey R. Baker*

### *Clinical Pedagogy and Practice*

Throughout the history of clinical legal education in the United States, clinical professors and programs have balanced the twin goals of practice and pedagogy. The earliest clinics were essentially legal aid offices auxiliary to law schools in which students assisted supervising attorneys with traditional practice, learning on the job. In time, drawing from many sources, clinical professors began to develop more specific and critical methods of teaching and supervision. This began to shift the emphasis toward pedagogy. Even now, law school clinics exist across a spectrum of programs that emphasize the legal services they can offer to clients and those that prioritize teaching and student formation. This is not a controversial debate but a fundamental decision at the foundation of a school's programs that informs its approach and development.

At Pepperdine Caruso School of Law, the clinics prioritize pedagogy and design the practice to serve teaching. Good teaching and training requires good lawyering and effective, excellent practice, so the clinical faculty design their practices, select clients, and choose cases that will advance the students' formation while providing competent, ethical service to clients. This necessarily requires some limitation to the scope and complexity of the practice, because the supervising professors aim to give the students as much independence, autonomy, responsibility, and client contact as possible. By establishing clear expectations with clients about work on discrete matters, students can assume central responsibility for their work and the client relationship in the clinic. This serves the clients well and accelerates the students' learning and training.

At the heart of clinical pedagogy are the methods of non-directive supervision and reflective practice. Non-directive supervision is an approach through which a teacher does not give orders that a student must follow but leads a process of questions, analysis, and inquiry that leads a student to make their own assessments and decisions about a matter, issue, or problem. For example, if a client asks a student whether a certain transaction will risk its tax-exempt status, the professor will not tell the student what to say or what to do to find out. Rather, the professor will ask the student how the student plans to approach the question, what the student plans to do to analyze the issue, and determine the answer or advice for the client. The professor will be available for guidance, advice, direction,

and encouragement, but the student will bear principal responsibility for research, analysis, counsel and communication with the client. The professor will review and approve the final product, but the student should bear the weight of obligation, anxiety, responsibility, and duty to the client. This ensures good service to the client while moving the student through emotional, cognitive and professional development.

Alongside non-directive supervision, good clinical pedagogy relies on constant reflective practice.<sup>2</sup> This is a progressive cycle of preparation, performance, and reflection at every phase of a student's experience. The objective is to equip a student with judgment and wisdom sufficient for the critical decisions and challenges they will face in practice. With each new matter or task, the professor will guide the student's preparation, with direct training and persistent inquiry about the student's work. Then, the student will perform the task, largely without direct supervision, so that they must rely on themselves and their own preparation for the moment. When the task is complete, the student returns to the supervisor to reflect on the performance and outcome, with critical questions and observations about what went well or poorly, with clear lessons to implement in the future. With countless variations and context, the students and teacher engage in this cycle in each new context so that the student gains the benefit of the experience, with deepening wisdom, maturing judgment, and cautious confidence that will flourish beyond the clinic course.

## TEACHING THEORIES, METHODS, AND THE THIRD APPRENTICESHIP

At the heart of the Community Justice Clinic is the work of teaching and training students how to be excellent, ethical lawyers through non-directive supervision and reflective pedagogies. In essence, this means that the supervising professor generates opportunities for students to practice with extensive client contact, reflection, and critical, creative independence to help clients solve problems and achieve their goals. The basic role of any lawyer is to meet and know a client, spot their problems and issues,

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<sup>2</sup> See Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLINICAL L. REV. 317 (2014).

identify their goals, map a path forward toward that goal, then accompany the client on that path.

In theoretical terms, this is the “third apprenticeship” of professional education. In 2007, the book, *Educating Lawyers: Preparation for the Practice of Law*, edited by William Sutton and others, commonly known as the Carnegie Report, outlined three critical components of legal education and training. Each of these components are necessary and build on one another toward the preparation of young lawyers. The first is the Cognitive Apprenticeship, composed of doctrinal classes that teach substantive law and how to analyze it. These are usually traditional law school classes that teach students to “think like a lawyer.”

The second is the Practice and Skills Apprenticeship, composed of simulations, legal research and writing, trial advocacy, moot courts and technical skills. These are technical courses that teach students how to do things that lawyers do with craft, skill, and precision.

The third is the Professional Identity and Purpose apprenticeship. These courses and experiences synthesize knowledge of the law with lawyerly technique and craft in the service of a client. This involves actual experience so that students learn how to “be a lawyer,” not merely to think like one. This is the role of law school clinics, to lead students through the process of analyzing the law and practicing their skills in the service of real clients with whom they must communicate and collaborate.

In technical terms, the Community Justice Clinic’s syllabus includes program learning outcomes and student learning outcomes that conform to the university’s curricular assessment systems. From the Spring 2022 syllabus, these are the program learning outcomes for the Community Justice Clinic. Students will demonstrate:

- Knowledge and understanding of substantive law;
- Proficiency in legal analysis and critical reasoning;
- Proficiency in legal research and in written and oral communication;
- Professional lawyering skills;
- A knowledge and understanding of a lawyer’s moral, ethical, and professional responsibilities; and
- Awareness of their responsibility to society, including providing pro bono services.

And these are the student learning outcomes setting out goals for students in the clinic:

- Use their substantive knowledge of the area of law in which they practice, including nonprofit formation, governance and compliance, and the areas of law necessary to advocate and advise clinic clients;
- Practice research, writing and professional communication skills;
- Practice critical lawyering skills, including analysis and case evaluation, interviewing, fact gathering, negotiating, advising, counseling and advocating for clients and causes;
- Demonstrate judgment, wisdom, discipline and legal decision-making practices;
- Operate within the dynamics of practice with real clients, adversaries, courts, lawmakers and related professions and continue students' preparation to join the profession;
- Prepare for their formation as ethical, effective professionals;
- Assess the role of lawyers in our social, political and legal systems;
- Identify and assess issues of justice, morality and ethics in their practice, the law and the communities in which they work;
- Relate toward their own sense of calling, vocation and practical interest in their future work;
- Appraise their role and performance as a professional and engage with discipline and deliberation in self-criticism, lifelong learning and growth; and
- Prepare for practice and progress toward professionalism by sharing lessons, insights and experiences gleaned by other students in other field placements.

In practical terms, the goal of the clinic is for students to be as ready as they can be to serve clients when they graduate with competence and confidence, to learn and adapt with wisdom and sound judgment, to communicate with clarity and compassion, to bring their knowledge and skills to bear in the service of a client who trusts them. This means that students must understand and bear the ethical and moral weight of a client's life, liberty, family, fortune, and dreams, even as they practice clear communication, strategic and tactical decision making, research and analysis, drafting and editing, advocacy and negotiation, advice and counsel.

To these ends, the clinic begins each semester with a front-loaded schedule of substantive law and technical skills, then progresses toward sessions in which students gain more experience, responsibility, and time for reflection and work during class. In the second week of class, students must learn the basics of the laws governing nonprofits in California and the United States. To accelerate their training, however, the students must teach this to each other. The professor assigns pairs of students to prepare presentations on various aspects of nonprofits, corporations, and tax law then present these to each other. The students must study and learn the substance, and they also gain practice in communication, research, and collaboration with each other early in the semester. This exercise combines the first and second apprenticeships in short order to prepare them for contacting their clients together.

In the next early class sessions, students discuss the role of lawyers and relationships with clients, with a specific focus on the steps and ethics of taking on a new client and beginning a new matter. In clinical teaching, students often benefit from observing the discrete component parts of a process and relationship, even if those components are rarely discrete or linear in real life. In these exercises and discussions, the teacher and students are able to examine and discuss the intricate beats of client communication and counsel, so that when they reach out for their first interviews, they have a better sense of the expectations and dynamics necessary for a strong start.

Across all of the early sessions and throughout the course, the professor and students consider and examine the ethics and rules of professional responsibility that govern the practice and guide their work with clients. This begins with a strident discussion of confidentiality and the policies that govern data security and practices in the legal clinics. These conversations continue in their richest depth as issues and situations arise with clients and matters, especially involving conflicts of interests, moral qualms, and truth telling. Students begin to see that ethical issues do not announce themselves but arise in any context and case, requiring vigilance and principle to maintain an ethical practice.

Strong writing is essential to any law practice. In the Community Justice Clinic, virtually all of the students' work product and service to clients is in writing: research memos, opinion letters, articles of incorporation and

bylaws, leases and contracts, and other documents. The professor commits an early class session on good style, form, and advice for effective legal writing, emphasizing accessibility and clarity for readers in multiple contexts. Much of the best teaching and learning happens in the latter phases of the semester when the students submit drafts for review and approval from the professor. Then the professor can offer constructive critiques, suggestions, edits and revisions with detailed explanations of guidance.

Case rounds are the signature pedagogy of clinical legal education in the United States.<sup>3</sup> These are facilitated discussions in which students present their work for clients to the rest of the class, seeking constructive feedback, posing questions, identifying issues, and sharing lessons that they have learned in their work. In rounds, students will learn from each other and accelerate their own experiences by receiving insights from each other. This may be a simple round of updates and questions from students, or it may be a deeper, focused conversation on a specific theme emerging from the students' cases, or a long discussion of a single case. In the Community Justice Clinic, most class sessions include rounds in some form, and many sessions are only extensive case rounds. Once students have covered the basics of the law and skills they will need in the clinic, the greatest teaching and learning in the clinic comes during rounds. In rounds, students must communicate and critique their own work, and they will recognize the vital value of collaboration with their peers.

During the latter half of the semester, the professor assigns the students to choose one of their clients and to tell their stories to the class. This is an exercise in intentional storytelling with multiple functions. To answer certain intentional questions during their presentations, the students must research their clients' origins, missions, purposes, personalities, and contexts. They examine the charitable and justice work that the clients undertake in their communities, then locate the discrete legal matters the clinic is handling within the larger contexts of the clients' histories. This makes an implicit lesson specifically explicit for the students, that knowing the client well will make the discrete legal work more meaningful and valuable

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<sup>3</sup> See Susan Bryant & Elliott Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 CLINICAL L. REV. 195 (2007); Elizabeth Cooper, *The Case for Structured Rounds*, in TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINIC PEDAGOGY (Carolina 2014).



to the client. It emphasizes the need to know a client well. By discussing the clients' work, the stories spark rich and serious discussions about the issues of injustice, inequity, coercion, and struggle that their constituents face, and it deepens the students' understanding of lawyers' work in the world. The students recognize more clearly that their discrete legal tasks contribute to critical work for human dignity and access to justice.

Throughout the semester, the students and professor enter into focused, personal conversations about life as a lawyer, squaring careers with personal values, finding meaning in their vocations and employment, and developing wisdom and resilience. The legal profession has a long history of tendencies toward poor mental health, failing relationships, depression, substance abuse, vicarious trauma, and burnout.<sup>4</sup> The hope of these discussions is to equip students with honest expectations about the realities and pressures of the profession, then to equip them with hope, perspectives, and ideas that may enable them to chart fruitful, vibrant, and healthy paths through meaningful careers.

The Community Justice Clinic uses a formative assessment tool three times during the semester. This is a rubric with a comprehensive list of lawyering skills and virtues based on the work of Shultz and Zedeck.<sup>5</sup> For each skill and attribute, the teacher or students may assess their readiness as “developing,” “competent,” or “exemplary.” This assessment is formative and has no bearing on the students' grades or credit for the course. Rather, the objective is to give students a sense of the scope and expectations for the profession and the work they need to do to be ready for practice after graduation. The professor gives the students the blank form at the beginning of the semester with instruction only to read and consider it so that students can calibrate their own objectives for improvement. At the mid-term, the professor asks the students to evaluate themselves honestly and confidentially, for their own motivation, admonition, and critique, and to

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<sup>4</sup> Brittany Stringfellow Otey, *Buffering Burnout: Preparing the Online Generation for the Occupational Hazards of the Legal Profession*, 24 S. CAL. INTERDISC. L.J. 147 (2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2434766](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2434766).

<sup>5</sup> Marjorie Schultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: A New Assessment for Use in Law School Admission Decisions*, CELS 2009 4th Annual Conference on Empirical Legal Studies Paper (2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1442118](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442118).



help the professor identify areas to cultivate for each student. At the end of the term, the professor evaluates each student based on supervising and observing them all semester. This a parting reflection from the professor, often with a personal note to encourage the student in their next steps toward practice after graduation.

## PRACTICE

The Community Justice Clinic has a client-centered practice, meaning that it supports its clients' visions, goals, and missions. The clinic does not seek to advance specific causes itself, but it pulls alongside its clients who are working in their communities to advance social justice, human rights, economic development, access to resources, and empowerment for people who are often excluded. To strengthen and support its clients, the Community Justice Clinic offers three main practice areas: corporate practice, general transactional and civil practice, and policy research. The clinic does not litigate, but it does advise clients on litigation and represents clients in negotiations and related matters.

### *Corporate Practice*

The daily work of the clinic is incorporation and governance of nonprofit corporations. Clinic students assist clients by guiding them through the steps for launching public benefit corporations in California, from drafting and filing articles of incorporation and crafting and adopting bylaws to filing required forms with the California secretary of state and the attorney general. Once incorporated, students assist clients in their applications for tax exempt status with the Internal Revenue Service and the California Franchise Tax Board. Among many others, the clinic has helped incorporate tax-exempt, public benefit corporations that provide after-school tutoring and mentorship for public school students in under-resourced neighborhoods in Los Angeles; that accelerate access to temporary housing for people vulnerable to eviction; that advance market-based approaches to soil conservation and resilient agriculture; that provide sustainable gardening projects in homeless shelters.

The clinic also advises clients on compliance and good governance. Many clients are small nonprofits whose founders and directors are related

or work closely together, and this can raise issues of loyalty and conflicts of interest. The clinic often advises clients how to structure their boards, officers, and transactions to avoid risk to tax-exempt status and to maintain sound, ethical practices. This is good lawyering for students to identify and navigate ethical and legal issues arising across complex and dynamic relationships. For example, a team of students helped a newly incorporated nonprofit draft a compliant contract between it and an affiliated for-profit real-estate company, where several of the board members overlapped, to provide some housing units specifically for women and teens who had become homeless.

In one particularly challenging case, clinic students advised a church and helped revise its bylaws after extended, vitriolic litigation among its members; several members claimed a right to depose a minister and raised hard questions about who was a member and who could lead the community. The clinic students met with the church leadership after that litigation ended to help the community draft and adopt standards and rules that would bring clarity, fairness, and peace to the community and its hard decisions in the future.

### *General and Transactional Practice*

The second thread of practice in the clinic is advice and representation in general civil and transactional practice. This does not include litigation, but it does include contracts and leases, negotiations with potential opponents, and assisting clients with other matters that are essential to their charitable and justice work in the world.

For example, a client had an idea to develop a mobile app to provide access to medical care and information to indigenous women in Central and South America. The client had a counterpart organization in Central America and leadership from the indigenous communities it sought to serve. Because many of the women were able to communicate best with cell phones, even at great distances from urban centers and traditional hospitals and clinics, the nonprofit began work to develop an app to promote telehealth and connection with doctors and nurses. The clinic researched and advised the client on digital privacy laws in U.S., international, and local jurisdictions where they planned to launch the app. That research

informed the design and deployment of the technology that would potentially help thousands of indigenous women in outlying villages.

In another case, the clinic represented a small, nonprofit farm with missions to advance farmworker rights and opportunities; promote sustainable, organic, small-scale agriculture; and feed its community, which has few resources. The clinic helped negotiate multiple leases for farmland with owners, and a student worked up a sales agreement for a large, refrigerated container when the client relocated its principal farming operations.

As clients mature, the clinic takes on new issues and matters that arise long after incorporation. For some clients, this has meant expanding into areas of intellectual property and more sophisticated business matters. The clinic has developed a reliable, basic practice in applying for trademarks to create new value for nonprofit clients as they advance in their work.

### *Policy and Research Practice*

The Community Justice Clinic is a client-centered practice and does not seek or adopt specific positions or projects on its own. Very often, its clients engage the clinic to research and analyze policies that will advance their work for social justice and human rights. Clinic students have researched constitutional and statutory laws on behalf of a homeless shelter looking to navigate a thicket of issues to ensure safety, public health, and access to its facilities while dignifying the rights of people inside and outside the shelter. For another client, clinic students have evaluated U.S. policies and practices related to asylum-seekers and refugees under international human rights laws and treaties.

Another client works with counterpart organizations and civil-society groups in multiple developing nations. To support its work, the Community Justice Clinic has undertaken multiple projects to research and document civil rights and entitlement laws in various countries with work product that the client then shares with partners in the field to empower people in great need. In collaboration with an international client and several partner clinics in South America, the clinic has undertaken critical research on human trafficking laws in every nation in the Americas, to support the work of law reform and remedies for people in coerced and exploitative labor across borders.

## CONCLUSION

In its first eight years, about one-hundred and fifty law students in the Community Justice Clinic have served about sixty clients on hundreds of matters. Students gain experience, insight, and formation through practice with organizations with diverse needs. The clients improve and expand their capacities for service, charity, and justice among people and communities in great need. This advances the law school's missions of education and service, and it instills competence, confidence, and virtue in young lawyers with commitment to excellent, ethical, generous practice as public citizens.

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## APPENDIX: THE LEGAL CLINICS AT PEPPERDINE CARUSO SCHOOL OF LAW

### THE LEGAL AID CLINIC

The Legal Aid Clinic was Pepperdine's first clinical program, launched through student initiatives in 2001 to serve clients on Skid Row in Downtown Los Angeles. Its director, Professor Brittany Stringfellow Otey, was a third-year law student in the inaugural clinic and returned after a couple of years of practice to lead the clinic for the next two decades of teaching and practice. The Legal Aid Clinic operates at the Union Rescue Mission to serve hundreds of clients each year with a general civil practice to help people break cycles of homelessness and extreme poverty.

### THE NINTH CIRCUIT APPELLATE ADVOCACY CLINIC

The Ninth Circuit Appellate Advocacy Clinic is a collaboration with the firm of Horvitz and Levy in Los Angeles and the Ninth Circuit Court of Appeals. The clinic directors are partners at the firm, first Jeremy Rosen, now Curt Cutting. They work with the appeals court's pro bono referral panel to identify meritorious cases by pro se appellants who need able counsel. Under supervision, students receive the record, write principal and reply briefs, and handle oral argument before the Ninth Circuit. These are typically civil rights cases, often representing prisoners. The clinic has a remarkable record of success while providing rare appellate experience for law students.

### THE MEDIATION CLINIC

The Mediation Clinic, now under the direction of Professor Stephanie Blondell, was the first clinic in the law school's Straus Institute for Dispute Resolution. The Mediation Clinic operates in several courthouses of the Los Angeles Superior Court to mediate small claims between pro se litigants. Students receive intensive mediator training before attending docket calls in small claims court; there they mediate cases, usually under court order or direction, before the parties try their cases. They have a very high settlement rate, assisting parties achieve positive outcomes, relieving the courts' dockets, and providing exceptional experience for future litigators and mediators.

## THE SPECIAL EDUCATION ADVOCACY CLINIC AND THE REFUGEE AND ASYLUM CLINIC

The Special Education Advocacy Clinic and the Refugee and Asylum Clinic both provided important practices and student experience in the early years of the law school's clinical program. The Special Education Advocacy Clinic, under the direction of former Professor Richard Peterson, represented public school students and their families in cases seeking reasonable accommodations for disabilities in public schools. These were often negotiations or administrative proceedings to protect the students' civil rights and assure access to education under the law. The Refugee and Asylum Clinic, under the general direction of former Judge Bruce Einhorn, represented clients in cases for asylum and immigration determinations in immigration courts. For funding and structural concerns, the law school wound up both of these valuable clinics by 2016.

## THE RESTORATION AND JUSTICE CLINIC

In 2015, Professor Tanya Asim Cooper joined the faculty to launch the Restoration and Justice Clinic with a practice serving victims of domestic violence, sexual assault, and human trafficking. Its practice includes civil hearings and trials on behalf of victims of intimate partner abuse and significant work with expungements and vacatur on behalf of liberated victims of human trafficking in Los Angeles.

## THE LOW INCOME TAXPAYER CLINIC

In 2016, with a significant, ongoing grant from the Internal Revenue Service, the law school began the Low Income Taxpayer Clinic under the direction of Professor Isai Cortez; it also practices on Skid Row and provides critical advocacy for poor clients seeking relief from burdensome tax debts or penalties that keep them from rising from poverty and homelessness. This provides students with experience in tax practice and advocacy in administrative law.

## THE STARTUP LAW CLINIC

In 2017, the Palmer Center for Entrepreneurship and the Law founded the Startup Law Clinic under the direction of Professor Sam Wu to provide

expert legal services to new businesses in the technology sector, assisting them with incorporation, finance, and protecting intellectual property. This provides experience for students interested in entrepreneurship, incorporation, and the business matters of new enterprises.

#### THE DISASTER RELIEF CLINIC

Later in 2017, after Hurricane Harvey struck Texas, the law school experimented with a pro bono project to assist clients with remote FEMA appeals. After several wildfires, including the catastrophic Woolsey Fire in Malibu and on the Pepperdine campus, the law school founded the Disaster Relief Clinic under the supervision of this author and Professor Sophia Hamilton, to provide services to clients suffering losses from natural disasters.<sup>6</sup> Students gain experience in client-centered, trauma-informed, triaged practice with FEMA and insurance matters, rental and housing issues, and rebuilding challenges. The clinic continued until 2022, when the law school decided to pause it but to maintain resources, finances, and forms to relaunch it quickly when the next inevitable natural disaster strikes Southern California.

#### THE FAITH AND FAMILY MEDIATION CLINIC

In 2018, with a gift from Chavi Hertz and in collaboration with the Jewish Divorce Assistance Center, the law school started the Faith and Family Mediation Clinic under the direction of Professor Sarah Nissel and Yona Elishis. This is an innovative practice providing mediation services to Orthodox Jewish families in divorce proceedings simultaneously in civil and religious courts, providing students with intense experience in family law, cross-cultural and interreligious practice.

#### THE RELIGIOUS LIBERTY CLINIC

In 2022, the law school founded the Religious Liberty Clinic in the Nootbaar Institute for Law, Religious and Ethics, in collaboration with the Becket Firm and Jones Day, and under the direction of Professors Eric Rassbach and Michael Helfand. The clinic has an amicus brief practice

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<sup>6</sup> Jeffrey R. Baker, Christine Cerniglia, Davida Finger, Luz Hererra & JoNel Newman, *In Times of Chaos: Creating Blueprints for Law School Responses to Natural Disasters*, 80 LA. L. REV. 423 (2020).

for organizations and communities with stakes in First Amendment free exercise and establishment cases. The students gain experience in sophisticated appellate practice and advocacy under the supervision of expert specialists.

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# RACIAL JUSTICE CLINIC:

*University of San Francisco School of Law*

LARA BAZELON\*

## PROVIDING ASSISTANCE AND PROMOTING CHANGE

### I. HISTORY AND MISSION

The University of San Francisco School of Law, which opened its doors in 1912, is a Jesuit institution with a profound commitment to advancing the cause of social justice by helping those who are most oppressed, marginalized, and without access to resources.<sup>1</sup> The law school's clinical programs, which train students to become lawyers by litigating real-life cases, are designed with that mission in mind. The law school has a history

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<sup>1</sup> *Public Interest & Social Justice*, USF SCHOOL OF LAW, <https://www.usfca.edu/law/school-life-careers/public-service-social-justice> (last visited Aug. 8, 2022).

of robust, semester-long clinical education programs including an Immigration and Deportation Defense Clinic, an International Human Rights Clinic, and a Criminal and Juvenile Justice Clinic (CJJC).<sup>2</sup>

In 2016, the law school added the Racial Justice Clinic (RJC). The RJC, which shares staffing and a class with the CJJC, has a focus that is both broader and narrower. It is broader because the RJC exists in large part to take on larger, more complex cases and advocacy both inside and outside of the courtroom; in the latter context, that work can involve policymaking, legislation implementation, and partnerships with other criminal legal system actors, most recently the San Francisco District Attorney's Office. The RJC's focus is narrower because, while the CJJC takes any client who is charged with a misdemeanor,<sup>3</sup> the RJC is focused on defending and advocating for those who have suffered discrimination, marginalization, and oppression based on race. In 2021, the USF RJC received the Davis Vanguard Justice Award for Advocacy in honor of its groundbreaking partnership with the San Francisco District Attorney's Office.<sup>4</sup>

## II. FOUR DISCRETE LITIGATION PROJECTS AND CLASSROOM COMPONENT

### A. INNOCENCE COMMISSION AND POST-CONVICTION SENTENCING REVIEW

Working under the direct supervision of Barnett Chair of Trial Advocacy Professor Lara Bazelon and Assistant Professors and Supervising Attorneys Charlie Nelson Keever and Yohannes Moore, students in the RJC fall into four distinct working groups — although many students will work in

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<sup>2</sup> *Law Clinics*, USF SCHOOL OF LAW, <https://www.usfca.edu/law/engaged-learning/law-clinics> (last visited Aug. 8, 2022).

<sup>3</sup> In the Criminal & Juvenile Justice Clinic (CJJC), students will represent adults and juveniles charged with misdemeanors and delinquency offenses in San Francisco Superior Court. Once students obtain their Practical Training of Law Students (PTLS) certification from the California State Bar, they will handle — under the direct supervision of a professor — all aspects of the client's case, including client and witness interviews, investigations, court appearances, client counseling, motions practice, suppression hearings, and trial.

<sup>4</sup> *Davis Vanguard Justice Award Gala*, DAVIS VANGUARD AWARDS, <https://vanguardgala.com/awards/#law> (last visited Aug. 9, 2022).

more than one group, either within a single semester or over the course of two semesters if they choose to return. The first group of students litigates wrongful conviction cases both in and out of the state of California. In out-of-state cases, the RJC is the legal representative of the wrongfully convicted person seeking to overturn their conviction. In-state, the RJC has a unique partnership with the San Francisco District Attorney's Office (the SFDA) to support the SFDA Innocence Commission, which is chaired by Professor Bazelon and supported by Assistant Professor Nelson Keever, who is the Commission's staff attorney and only paid member.<sup>5</sup> The other Commission members, who, with Professor Bazelon, serve pro bono, review potential wrongful conviction cases referred by the SFDA. At the end of that review, the staff attorney submits to the SFDA the Commission's findings and recommendations, which are given great weight although the DA retains the authority to make the ultimate decision regarding whether the applicant is entitled to relief and what legal course of action to take.<sup>6</sup>

From November 2020 to June 2022, the SFDA-USF RJC partnership also included having law students and a staff attorney work collaboratively with the SFDA Postconviction Review Unit to resentence eligible prisoners, pursuant to relevant sections of the California Penal Code.<sup>7</sup> In 2018, the resentencing statute was amended to allow the county DAs to recommend that a prisoner be resentenced upon a determination that their prison sentence is excessive or no longer serves the interest of justice.<sup>8</sup> Previously, only the court, the Board of Parole Hearings, or California Department of Corrections could make such a recommendation. In 2021, the Legislature enacted Section 1170.03 which stated that the court may resentence a petitioner to any lesser included offense. The court must state its reasons for a resentencing decision on the record, provide notice to the defendant, set a status conference within thirty days of the receipt of the request to recall the sentence, and appoint counsel for the defendant. Section 1170.03 also

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<sup>5</sup> *Press Release: District Attorney Boudin Announces Formation of Post-Conviction Unit and Innocence Commission*, SAN FRANCISCO DISTRICT ATTORNEY, <https://www.sfdistrictattorney.org/archive-press-release/formation-of-post-conviction-unit-and-innocence-commission> (last visited Aug. 10, 2022).

<sup>6</sup> *Id.*

<sup>7</sup> Cal. Penal Code §§ 1170(d) and 1170.03; renumbered as § 1172.1, June 30, 2022.

<sup>8</sup> Then § 1170(d); public safety omnibus, California Assembly Bill (AB) No. 1812, 2017–2018 Regular Session.

authorized the court to grant a resentencing without a hearing, if the parties are in accord. This amendment also created a presumption favoring a defendant's petition for recall and resentencing — although there is no presumption in favor of any particular recommended sentence.<sup>9</sup>

The SFDA–USF RJC Postconviction Review Unit partnership, which ended with the June, 2022 recall of SFDA Chesa Boudin, resulted in the resentencing of more than forty men and women.<sup>10</sup> A USF RJC staff attorney would screen and evaluate Section 1170.03 cases referred by the SFDA to determine whether the applicant met Section 1170.03's criteria. The work involved reviewing and analyzing all documents relevant to a resentencing determination. A donor-funded RJC staff attorney reviewed the original files, reviewed the prison file, assessed reentry plans, contacted victims, and sometimes obtained and prepared experts to testify in support of the DA's motion seeking resentencing.<sup>11</sup> The RJC staff attorney also drafted petitions, appeared in court, and assisted in any briefing sought by the court to conduct a meaningful review of the case.

The service that the RJC staff attorney and students provided the DA's Office in assisting with the review and evaluation of incarcerated people seeking to be resentenced was vital to fulfilling the state legislature's intent in enacting Section 1170.03. In San Francisco alone, an estimated 600 people are potentially eligible for resentencing under the revised statute because their sentences were excessive, no longer served the interests of justice, and/or because the applicant no longer posed any risk to public safety or substantial risk of recidivating. Although the USF RJC no longer maintains this partnership with the San Francisco District Attorney's Office, the clinic is investigating opportunities to recreate that partnership with a different DA's Office assuming that funding can be obtained to hire a third assistant professor/supervising attorney.

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<sup>9</sup> Criminal procedure: resentencing, California Assembly Bill (AB) No. 1540, 2021–2022 Regular Session, amending § 1170(d)(1) and creating new § 1170.03 (subsequently renumbered as § 1172.1, June 30, 2022).

<sup>10</sup> In total, the SFDA under Chesa Boudin resentenced nearly seventy people, far more than any other county in California during that period of time.

<sup>11</sup> The donor-funded staff attorney, Nicole Fuller, worked for the USF RJC from November 2020–June 2022.

## B. IMPLEMENTING THE CALIFORNIA RACIAL JUSTICE ACT

The second group of students, working under the supervision of Professor Bazelon and Assistant Professor Moore with funding from the Justice Catalyst Foundation,<sup>12</sup> are leading on-the-ground efforts to implement California's Racial Justice Act (RJA). As discussed in section IV below, the RJA is a landmark law enacted in 2021 that prohibits bias based on race, ethnicity, or national origin in charges, convictions, and sentences.<sup>13</sup>

The RJC students working with Professors Bazelon and Moore provide case consultation to attorneys to evaluate potential RJA claims, assist with drafting motions, track appeals and share updates, connect attorneys in need of support with experts, and lead RJA trainings across the state.

## C. TITLE IX CASES

Title IX is the federal statute that prohibits discrimination in education on the basis of sex. The U.S. Supreme Court has held that Title IX applies to claims of sexual harassment and sexual discrimination that occur on college and university campuses because gender-based violence deprives students of their equal right to obtain an education.

Unlike criminal defendants, students accused of misconduct under Title IX are not entitled to legal counsel, and the adjudicative system under Title IX lacks many of the hallmarks of due process for the accused that are protected in the criminal legal system. Students of color are more likely to lack the means to afford to hire a lawyer. The lack of representation and resources combined with an adjudication process that until recently was often devoid of basic due process protections led to unfair outcomes.

Beginning in early 2018, the USF RJC began representing college and university students of color who had been accused of violating Title IX by committing acts of sexual harassment or sexual assault. USF took on this

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<sup>12</sup> *Justice Catalyst Fellows*, JUSTICECATALYST.ORG, <https://justicecatalyst.org/fellows> (last visited Aug. 10, 2022).

<sup>13</sup> California Racial Justice Act (RJA), California Assembly Bill (AB) 2542, 2019–2020 Regular Session; *Governor Signs Landmark Legislation Advancing Racial Justice in California*, AMERICAN FRIENDS SERVICE COMMITTEE (Oct. 2, 2020), <https://www.afsc.org/document/governor-signs-landmark-legislation-advancing-racial-justice-california>.

work because of the growing evidence that racial bias can play a significant role in Title IX allegations and adjudications,<sup>14</sup> and because no other clinic in the country was providing legal representation to these students.<sup>15</sup>

#### D. PRETRIAL RELEASE AND BAIL REFORM WORK WITH THE SAN FRANCISCO PUBLIC DEFENDER

The fourth group of students works with veteran public defender Jacque Wilson and other trial attorneys at the San Francisco Public Defender's Office on discrete projects that are designed to confront and address the racialization of the criminal justice system. San Francisco Public Defender-based RJC projects include, but are not limited to, working in the Pretrial Release Unit.

The Pretrial Release Unit was created by the San Francisco Public Defender in October 2017 to facilitate the release of their clients.<sup>16</sup> Pretrial detention can have life-altering outcomes. Although presumed innocent, those held in jail pending trial stand the risk of losing their jobs, their housing, custody of their children and access to benefits, and they often plead guilty simply to get out rather than because they are in fact guilty.<sup>17</sup> In most cases, pretrial detention is not necessary because those detained pose no risk to public safety and will return to court as ordered.<sup>18</sup> The racially disproportionate effect of pretrial detention is well documented. According to a 2015 study conducted by the W. Haywood Burns Institute, while Black adults were more likely to meet the criteria for pretrial release, they were less likely than white adults to be granted pretrial release by

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<sup>14</sup> Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, THE ATLANTIC MAGAZINE (Sept. 11, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361>.

<sup>15</sup> Jeremiah Poff, *This Professor Started a Legal Clinic for Black Students Accused of Rape. She's Getting Threats*, THE COLLEGE FIX (Dec. 17, 2018), <https://www.thecollegefix.com/this-professor-started-a-legal-clinic-for-black-students-accused-of-rape-shes-getting-threats>.

<sup>16</sup> California Association of Pretrial Services (CAPS), PRETRIALSERVICESCA.ORG, <http://pretrialservicesca.org/2018/07/02/public-defender> (last visited Aug. 10, 2022).

<sup>17</sup> ALENA YARMOSKY, THE IMPACT OF EARLY REPRESENTATION: AN ANALYSIS OF THE SAN FRANCISCO PUBLIC DEFENDER'S PRE-TRIAL RELEASE UNIT (UC Berkeley Goldman School of Public Policy, 2018), <http://public.sfpdr.com/wp-content/uploads/sites/2/2018/05/The-Impact-of-Early-Representation-PRU-Evaluation-Final-Report-5.11.18.pdf>.

<sup>18</sup> Tiana Herring, *Releasing people pretrial doesn't harm public safety*, PRISON POLICY INITIATIVE (Nov. 17, 2020), <https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases>.

San Francisco judges.<sup>19</sup> These racial disparities at the earliest stages of the criminal legal process also drive overall racial disparities in criminal case outcomes in San Francisco.<sup>20</sup> Similar findings were recently published in a 2022 *San Francisco Chronicle* article that reviewed data collected under California state law tracking the stopping and frisking of California residents by race.<sup>21</sup> Black people across the state were between 3.7 and 6 times more likely to be stopped than white people, the data showed, and consequently, far more likely to be arrested.

To reduce the number of people who are arrested, denied bail and subjected to direct and collateral consequences as a result, the San Francisco Public Defender has developed a fast-track approach focused on interviewing clients immediately upon arrest and gathering the biographical, financial, and case information necessary to put together a bail application that can be presented at the client's first court appearance.<sup>22</sup> USF RJC students provide vital assistance with that effort by going into the jails, conducting the initial intake interviews, and drafting the memoranda that later serve as the basis for the bail motions made by the San Francisco Public Defender's Office.

## E. INSTRUCTIONAL CONTENT

### 1. *Class Component*

The USF RJC holds a weekly two-hour class together with the CJJC. The class includes a robust trial advocacy component in which a single real-life clinic case is used throughout the semester. Students are assigned prosecutor and defender roles and must give opening statements, conduct direct and cross examinations, and give closing arguments. Two classes are

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<sup>19</sup> Tamara Aparton, *Study: Shocking Racial Disparities in SF Courts*, SAN FRANCISCO PUBLIC DEFENDER (June 23, 2015), <https://sfpublicdefender.org/news/2015/06/study-shocking-racial-disparities-in-sf-courts>; W. HAYWOOD BURNS INSTITUTE, SAN FRANCISCO JUSTICE REINVESTMENT INITIATIVE: RACIAL AND ETHNIC DISPARITIES ANALYSIS FOR THE REENTRY COUNCIL (2015), [https://burnsinstitute.org/wp-content/uploads/2020/09/SF-JRI-\\_compressed.pdf](https://burnsinstitute.org/wp-content/uploads/2020/09/SF-JRI-_compressed.pdf).

<sup>20</sup> YARMOSKY, *supra* note 17.

<sup>21</sup> Dustin Gardiner & Susie Neilson, *'Are the police capable of changing?': Data on racial profiling in California shows the problem is only getting worse*, SAN FRANCISCO CHRONICLE (July 14, 2022, 4:00 AM), <https://www.sfchronicle.com/projects/2022/california-racial-profiling-police-stops>.

<sup>22</sup> YARMOSKY, *supra* note 17, at 16.

focused on case theory and fact development, which allows the students to dive deeply into the facts of the case and determine what themes, theories, and arguments best support their position. Other classes include trainings on postconviction litigation, RJA implementation, and guest presentations. Outside speakers include public defenders, private defense counsel, prosecutors, judges, and community advocates, who share their expertise.

## 2. *Zealous Partnership*

Additionally, beginning in the fall of 2022, the RJC will engage in a new partnership with Zealous, a national nonprofit organization founded by former public defender Scott Hechinger. Zealous works with public defenders, community organizers, advocates, and those directly impacted by the criminal legal system to collaborate, educate, and train law students and young lawyers as well as put together media campaigns to combat misinformation.<sup>23</sup>

The mission of Zealous is to correct the imbalance of power, and gain voice, influence and control over criminal justice media and policy, which has historically been weighted toward police, prosecutors, and a media that is receptive to their traditionally tough-on-crime narrative slant.<sup>24</sup>

This work is extremely important and extremely timely in the RJC's home of San Francisco where the San Francisco Police Department spends vast sums of money to manipulate public perceptions about crime, policing, and public safety.<sup>25</sup> San Francisco is not unique in this, however.<sup>26</sup> According to journalist and former public defender Alec Karakatsanis, this so-called “copaganda” — a portmanteau of “cop” and “propaganda” describing the phenomenon in which news media and other social institutions like film and television promote sympathetic or celebratory portrayals of the police — primarily functions to impact public perceptions about crime and public safety and obstruct meaningful criminal justice reform that would lead to

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<sup>23</sup> ZEALOUS, <https://zealo.us/action/zealous/about> (last visited Aug. 10, 2022).

<sup>24</sup> *Id.*

<sup>25</sup> Tim Redmond, *Exposing ‘copaganda’ as SFPD spends \$1.6 million on ‘strategic communications’*, 48HILLS.ORG (May 5, 2022), <https://48hills.org/2022/05/exposing-copaganda-as-sfpd-spends-1-6-million-on-strategic-communications>; Alec Karakatsanis, *Police Department Spend Vast Sums of Money Creating “Copaganda,”* JACOBIN (July 20, 2022), <https://jacobin.com/2022/07/copaganda-police-propaganda-public-relations-pr-communications>.

<sup>26</sup> Karakatsanis, *supra* note 25.



divesting from police and prisons.<sup>27</sup> Copaganda and traditional crime journalism accomplish this by narrowing the public's understanding of "public safety," focusing attention on the minor crimes committed by the most marginalized people in our society (petty theft, low-level drug offenses, and so-called "quality-of-life" crimes) rather than the crimes that cause the most harm on the largest scale like wage theft by employers (which costs Americans \$50 billion every year) and violations of environmental regulations (which cause hundreds of thousands of deaths every year).<sup>28</sup>

Copaganda and biased journalism also foment public fear by manufacturing "crime surges" that are, to put it bluntly, not based in reality. Though major "index crimes" tracked by the FBI are at nearly forty-year lows and though there has been no significant increase in retail theft, the media coverage tells a different story, and the American public consistently believes that crime rates are higher than they are.<sup>29</sup> A striking illustration of this phenomenon published by Bloomberg in July 2022 demonstrates that media coverage about shootings in New York this year massively outstrips the actual number of shooting incidents, and that the number of times shootings were mentioned in the media over the last two years has had almost no correlation to the number of shooting incidents at any given time.<sup>30</sup> The purpose of these efforts is to convince the public to continue investing in police and prisons, even though the evidence shows that police and prisons do not make us safer.<sup>31</sup>

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<sup>27</sup> Laurena Bernabo, *Copaganda and post-Floyd TVPD: Broadcast television's response to policing in 2020*, 72 J. COMM. 488 (August 2022), <https://doi.org/10.1093/joc/jqac019>; Karakatsanis, *supra* note 25.

<sup>28</sup> Karakatsanis, *supra* note 25; Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 YALE L.J. (Mar. 2019), [https://www.yalelawjournal.org/forum/the-punishment-bureaucracy#\\_ftnref222](https://www.yalelawjournal.org/forum/the-punishment-bureaucracy#_ftnref222).

<sup>29</sup> Maggie Koerth & Amelia Thomson-DeVeaux, *Many Americans Are Convinced Crime Is Rising in The U.S. They're Wrong*, FIVETHIRTYEIGHT.COM (Aug. 3, 2020), <https://fivethirtyeight.com/features/many-americans-are-convinced-crime-is-rising-in-the-u-s-theyre-wrong>.

<sup>30</sup> Fola Akinnibi & Raedah Wahid, *Fear of Rampant Crime is Derailing New York City's Recovery*, BLOOMBERG.COM (Jul. 29, 2022), <https://www.bloomberg.com/graphics/2022-is-nyc-safe-crime-stat-reality>.

<sup>31</sup> Philip Bump, *Over the past 60 years, more spending on police hasn't necessarily meant less crime*, THE WASHINGTON POST (Jun. 7, 2020), <https://www.washingtonpost.com/politics/2020/06/07/over-past-60-years-more-spending-police-hasnt-necessarily-meant-less-crime>; Alec Karakatsanis, *Why "Crime" Isn't the Question and Police Aren't*

Zealous's Hechinger agrees that this kind of "justice" reporting has serious consequences. In his view, journalism — in particular, crime reporting — is "one of the most pressing racial and social justice issues today."<sup>32</sup> "After serving for nearly a decade as a public defender," he wrote in *The Nation* last fall, "I know well that every cruel and irrational policy of the mass incarceration era — policies that I saw devastate predominately Black and brown people in Brooklyn criminal court every day — was propped up by harmful journalistic biases and practices just like the ones on display . . . from some of the most prominent media outlets in our nation."<sup>33</sup> With this in mind, the work of Zealous is deeply aligned with the RJC's mission to address systemic racism within the criminal legal system.

Working with Hechinger and other Zealous attorneys, the USF RJC will host six, two-hour Friday workshops through the fall and spring semesters.

### III. INNOCENCE WORK

Wrongful convictions are a significant problem in the United States. To date, more than 3,200 people have been exonerated according to data gathered by the National Registry of Exonerations, which has tracked every known exoneration that occurred in the United States since 1989.<sup>34</sup> Although there is a national Innocence Project in New York and dozens of innocence project affiliates throughout the country, there are still too many wrongfully convicted people who have no one to represent them because these projects are often small, underfunded, and overwhelmed by requests for help.<sup>35</sup> For that reason, the USF RJC litigates select wrongful conviction cases outside of California, as described below.

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*the Answer*, CURRENT AFFAIRS (Aug. 10, 2020), <https://www.currentaffairs.org/2020/08/why-crime-isnt-the-question-and-police-arent-the-answer>.

<sup>32</sup> Scott Hechinger, *A Massive Fail on Crime Reporting by The New York Times*, NPR, THE NATION (Oct. 6, 2021), <https://www.thenation.com/article/society/crime-reporting-failure>.

<sup>33</sup> *Id.*

<sup>34</sup> THE NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Aug. 10, 2022).

<sup>35</sup> *Op-Ed: Former Innocence Project Attorney Says that System is Overwhelmed with Wrongful Convictions*, INNOCENCE PROJECT (Feb. 3, 2015), <https://innocenceproject.org/op-ed-former-innocence-project-attorney-says-that-system-is-overwhelmed-with-wrongful-convictions>.

The USF RJC is also focused on helping the wrongfully convicted within the state of California, where the law school is located. Since the National Registry of Exonerations began tracking wrongful convictions in 1989, there have been more than 279 known wrongful convictions in California — causing innocent Californians to lose a total of 2,173 years of their lives,<sup>36</sup> and costing California taxpayers over \$221 million (according to a 2016 study).<sup>37</sup> These wrongful convictions occurred as the real perpetrators of crime avoided consequences for their actions and victims were denied justice. Wrongful convictions undermine our criminal legal system and violate fundamental principles of justice and due process.<sup>38</sup>

## A. THE INNOCENCE COMMISSION: SFDA–USF RJC PARTNERSHIP

### 1. *Groundbreaking Model*

The SFDA Innocence Commission model is a first-in-the-nation approach to efficiently and fairly investigating potential wrongful conviction cases and is a cost-effective way to effectuate the DA's duty to prevent and rectify the conviction of innocent persons. Created by SFDA Chesa Boudin in 2020, the Commission is tasked with evaluating cases where an incarcerated person alleges that they have been wrongfully convicted — either because they can establish that they are factually innocent, or because a due process violation renders their incarceration unconstitutional. If the Commission, after evaluating all of the available evidence and conducting any necessary reinvestigation, votes by a majority to vacate the conviction, the Commission prepares a Findings of Fact and Conclusions of Law memorandum that serves as the basis to seek to vacate the conviction or provide

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<sup>36</sup> *Exonerations by State*, NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Aug. 10, 2022).

<sup>37</sup> The \$221 million dollar figure comes from a 2016 study: Rebecca Silbert et al., *Criminal Injustice* (The Chief Justice Earl Warren Institute on Law and Social Policy), [http://static1.squarespace.com/static/55f70367e4b0974cf2b82009/t/56a95c112399a3a5c87c1a7b/1453939730318/WI\\_Criminal\\_InJustice\\_booklet\\_FINAL2.pdf](http://static1.squarespace.com/static/55f70367e4b0974cf2b82009/t/56a95c112399a3a5c87c1a7b/1453939730318/WI_Criminal_InJustice_booklet_FINAL2.pdf). The actual number is millions of dollars higher. For example, in 2019, after the study was published, the San Francisco Board of Supervisors paid out a \$13.1 million judgment to Jamal Trulove, who was wrongfully convicted of murder and spent six years in prison.

<sup>38</sup> *Berger v. United States*, 295 U.S. 78 (1935).

other relief. Although the DA retains the final decision-making power on each case, great weight is afforded to the Commission's determination.

The members of the Innocence Commission — a senior prosecutor within the SFDA,<sup>39</sup> Judge LaDoris Cordell (Ret.), Deputy Public Defender Jacque Wilson, Dr. Michael Meade, and Professor Lara Bazelon (chair) — represent key perspectives in the criminal legal system, and bring to their work a diversity of professional experience as well as diversity across race, ethnicity, and gender.<sup>40</sup> The makeup of the Commission and the collective experience of its current members has been a key part of its success. The Commission is assisted by Assistant Professor/Supervising Attorney Charlie Nelson Keever, who is an employee of USF and whose salary is donor-funded.

## 2. SFDA–USF RJC Partnership

The SFDA Innocence Commission is supported by a unique partnership with USF School of Law Racial Justice Clinic, directed by Professor Bazelon, which provides the staff attorney and funding for that position. The work of undoing wrongful convictions is deeply aligned with the Racial Justice Clinic's mission to serve clients who have been affected by racial discrimination. Wrongful convictions harm communities of color and the Black community in particular. According to the National Registry of Exonerations, Black people constitute approximately 13 percent of the American population, but represent 49 percent of the exonerations in the United States.<sup>41</sup> The NRE's 2017 report revealed that Black people are seven times more likely to be wrongfully convicted of murder, and twelve times more likely to be wrongfully convicted of drug possession than white people.<sup>42</sup>

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<sup>39</sup> Following the recall, the interim DA fired the SFDA liaison Arcelia Hurtado, who had been the chief of the SFDA Conviction Review Unit. The Commission is waiting for the interim DA to appoint a replacement.

<sup>40</sup> *The Innocence Commission*, SAN FRANCISCO DISTRICT ATTORNEY, <https://www.sfdistrictattorney.org/policy/innocence-commission/> (last visited Aug. 10, 2022).

<sup>41</sup> *Race & Wrongful Convictions*, THE NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Race-and-Wrongful-Convictions.aspx> (last visited Aug. 10, 2022).

<sup>42</sup> *Id.*

### 3. *The CRINO Problem*

Although a growing number of prosecutors' offices across the country and in California have formed Conviction Integrity Units ("CIUs") with the intention of reexamining questionable convictions, many of these units have failed to fulfill their stated purpose because they lack resources, flexibility, transparency, and independence in the review process. While some internal units are highly effective, many (if not most) are ineffective, or what the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania calls CRINOS — Conviction Review Units in Name Only.<sup>43</sup> Indeed, the San Francisco District Attorney's Office had such a unit before the formation of the Innocence Commission by DA Boudin in September 2020. That unit — which had been formed under the previous district attorney — had exonerated no one.<sup>44</sup>

The Commission's structure is designed to address the main challenges that prevent so many Conviction Integrity Units from fairly and efficiently reviewing alleged wrongful conviction cases. For instance, the assistant district attorneys assigned to typical CIUs must often undertake the unenviable task of evaluating and passing judgment on the work of colleagues and predecessors in their own offices as well as the police, with whom they must work every day. The Commission's independence from the DA's office and the composition of its membership are key features that alleviate this common problem. This feature, like the Innocence Commission's other practices and policies, is based on best practices gleaned from the innocence community, including Innocence Project cofounder Barry Scheck, and the Quattrone Center for the Fair Administration of Justice. As a result, the Commission has been able to conduct collaborative investigations that are both efficient and thorough.

### 4. *The Exoneration of Joaquin Ciria*

In April 2022, the Innocence Commission's first case resulted in an exoneration — the first collaborative exoneration in San Francisco history.

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<sup>43</sup> JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE (The Quattrone Center for the Fair Administration of Justice at University of Pennsylvania Law School, April 2016), <https://www.law.upenn.edu/live/files/5522-cru-final>.

<sup>44</sup> Lara Bazelon, *My team set an innocent man free under Chesa Boudin's guidance. Let us keep working*, SAN FRANCISCO CHRONICLE (June 4, 2022), <https://www.sfchronicle.com/opinion/openforum/article/chesa-boudin-recall-17216520.php>.

The petitioner, Joaquin Ciria, had been convicted in 1991 of the first-degree murder of his friend Felix Bastarrica. Despite his protestations of innocence, Ciria remained incarcerated for more than three decades.<sup>45</sup>

Although no physical or forensic evidence linked Ciria to the crime, San Francisco police inspectors zeroed in on Ciria as the shooter based on rumors on the streets and the statements of the apparent getaway driver. At trial, the jury heard three eyewitnesses identify Ciria as the shooter; two were cross-racial identifications by strangers. Most crucial was the identification by George Varela, the getaway driver, who knew Ciria and testified that he drove Ciria to and from the scene. What the jury did *not* hear was evidence of the extreme pressure put on Varela by police to identify Ciria as the shooter. The jury heard no evidence of an alternate suspect, and no evidence that Ciria had an alibi, though two alibi witnesses were available and willing to testify.<sup>46</sup>

The RJC reviewed and vetted all the evidence presented by Ciria and his counsel and presented that evidence to the Innocence Commission. The investigation revealed that, if Ciria's case were tried today, a jury would hear from an additional eyewitness, Roberto Socorro, who was the victim's best friend and an eyewitness to the murder. Socorro has also named another person, Candido Diaz, as the real shooter. Importantly, Socorro knew both Diaz and Ciria. Other witnesses confirm details that corroborate Socorro's account, including that Diaz's hairstyle and manner of dress at the time of the shooting more closely matched the descriptions of the shooter provided by the other eyewitnesses at trial. Today, the jury would also hear from two alibi witnesses who could account for Ciria's whereabouts at the time of the crime and have maintained his innocence for thirty years. Finally, two witnesses close to George Varela (a sister and family friend with no apparent motive to help Ciria) would testify that Varela has since admitted to them that Ciria is not the shooter, and that he testified falsely at trial due to pressure from police. As part of the investigation, the Commission also retained an

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<sup>45</sup> *Id.*

<sup>46</sup> Joshua Sharpe, 'We made it': S.F. man walks free three decades after wrongful murder conviction, *SAN FRANCISCO CHRONICLE* (April 20, 2022, 5:52 PM), <https://www.sfchronicle.com/sf/article/We-made-it-S-F-man-walks-free-three-17110780.php>; Joaquin Ciria, *THE NATIONAL REGISTRY OF EXONERATIONS*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6225> (last visited Aug. 9, 2022).

eyewitness identification expert to evaluate the identification procedures used in this case and to opine as to the reliability of the cross-racial, stranger identifications of Ciria.<sup>47</sup>

Apart from the conviction in this case, Ciria had no history of violent crimes as a juvenile or adult and was a model inmate during his lengthy prison term. Though he was eligible for parole beginning in May 2010, he was repeatedly denied, in part, because he continued to maintain his innocence.

Following the four-month investigation of the RJC and the Innocence Commission, the Commission provided its first recommendation to San Francisco District Attorney Chesa Boudin. Based on the Commission's recommendation and the DA's independent review of the case, the District Attorney's Office filed a concession in Ciria's case, agreeing that the cumulative weight of his newly discovered evidence undermined the entire prosecution case and pointed unerringly to his innocence. In April 2022, Ciria's conviction was overturned and he was released from custody.<sup>48</sup>

With the assistance of the RJC, the Innocence Commission completed a review and investigation of its second case and provided a recommendation to the DA in December 2021. Following the Commission's recommendation, the DA moved to resentence the applicant in that case under Penal Code Section 1172.2 (formerly 1170.03). A third case is currently under review at the time of this publication.

## B. WRONGFUL CONVICTION ADVOCACY OUTSIDE OF CALIFORNIA

### 1. *Yutico Briley*

In 2019, the USF RJC took on the case of Yutico Briley, a Louisiana prisoner. In 2013, Briley was convicted of armed robbery and sentenced to serve sixty years with no possibility of parole. He was nineteen. The robbery occurred just after 2 a.m. in 2012 on a poorly lit street in New Orleans and lasted less than ninety seconds. The victim was white; Briley is Black. The victim made a cross-racial stranger identification of Briley in a show-up

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<sup>47</sup> *Joaquin Ciria*, *supra* note 46.

<sup>48</sup> Annie Rosenthal, *Even the District Attorney Believed Joaquin Ciria Was Innocent. Why Did It Take So Long to Set Him Free?*, POLITICO (Aug. 8, 2022), <https://www.politico.com/news/magazine/2022/08/07/california-innocence-commission-joaquin-ciria-00037546>.



identification process that is widely condemned for its suggestiveness — there was no one else to choose from — and in this case was wholly unnecessary because there was no exigency justifying it.<sup>49</sup>

For eighteen months, the USF RJC battled the Orleans Parish DA (OPDA) for discovery, filing motions and engaging in extensive protracted communication to enforce Briley's rights. In November 2020, a reform-minded prosecutor, Jason Williams, was elected OPDA.<sup>50</sup> Williams immediately created a Civil Rights Division headed up by Emily Maw, the former director of Innocence Project New Orleans (IPNO).<sup>51</sup>

In February 2021, the OPDA conceded that Briley had been wrongfully convicted after the USF RJC filed a lengthy petition documenting the flaws in the prosecution's case and the abysmal representation by Briley's counsel. The prosecution's case was flawed because it relied almost entirely on a cross-racial stranger show-up identification. No physical or forensic evidence tied Briley to the crime and the gun found on Briley's person could not be conclusively matched to the gun used in the robbery — both were generic pistols. Moreover, from listening to Briley's jailhouse calls, including calls with his attorneys, the prosecution was aware that Briley was insisting he had an alibi. The prosecutors did nothing to investigate that alibi.<sup>52</sup>

The ineffective assistance of counsel Briley received was extreme. Briley told his lawyers that he was eight miles away when the robbery occurred at a hotel in Metairie with a woman named Erin. He told him that surveillance footage would prove it and so would his cell phone records. His attorneys ordered the surveillance footage for the wrong time and by the time they realized the mistake the footage from the correct time had been taped over. They never got his cell phone records. At trial, they presented no alibi defense or any defense at all. The cross examination of the victim did not probe the inherently suggestive nature of the show-up

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<sup>49</sup> *Yutico Briley*, NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5942> (last visited Aug. 10, 2022).

<sup>50</sup> Matt Sledge, *A man serving 60 years for armed robbery is free after Jason Williams clears the way for release*, NOLA.COM (Mar. 19, 2021), [https://www.nola.com/news/courts/article\\_7b6b0fbe-8902-11eb-abf1-c3da328e2fce.html](https://www.nola.com/news/courts/article_7b6b0fbe-8902-11eb-abf1-c3da328e2fce.html).

<sup>51</sup> *Id.*

<sup>52</sup> Emily Bazelon, *I Write About the Law. But Could I Really Help Free a Prisoner?*, THE NEW YORK TIMES MAGAZINE (June 30, 2021), <https://www.nytimes.com/2021/06/30/magazine/yutico-briley.html>.



identification or point out the empirical evidence documenting the inherent unreliability of cross-racial stranger identifications.<sup>53</sup>

In March 2021, Orleans Parish Judge Angel Harris vacated Briley's armed robbery conviction and his underlying convictions for being a felon in possession of a firearm and resisting arrest. He was released from prison several days later after more than eight years of incarceration. The chronicling of Yutico Briley's exoneration was the front-page story in the *New York Times Magazine* in July 2021.<sup>54</sup>

## 2. *Leon Benson*

In September of 2021, the USF RJC took on the representation of Leon Benson, an Indiana prisoner convicted in Indianapolis in 1999 of first-degree murder. Benson, who has always maintained his innocence, has been in prison for nearly a quarter of a century. Beginning in fall 2021, the USF RJC entered into a collaboration with the newly created Conviction Integrity Unit in the Marion County Prosecutor's Office, overseen by Assistant District Attorney Kelly Bauder. For the next year, the USF RJC and the MCPO worked together to investigate Benson's claim that he had been wrongfully convicted.

The crime occurred on August 8, 1998 at approximately 3:30 a.m. The victim, Kasey Schoen, was shot five times with a .380 handgun while sitting in his truck which was parked on the 1300 block of Pennsylvania Avenue in Indianapolis, Indiana.

The crime was highly unusual, according to lead investigating detective Alan Jones. Schoen was white and lived in Plainfield — a middle-class, low-crime suburb of Indianapolis. He worked as a manager for National Car Rental at the Indianapolis Airport. Schoen was gay but closeted. The shooter was Black and the crime occurred in a neighborhood that was mostly Black, low-income, and known for high rates of crime. It was also known at the time for having a number of gay bars, including The Varsity, which Schoen visited. Schoen had no criminal record and no history of using drugs. Significantly, nearly every other murder Detective Jones investigated was an intra-racial crime in which one Black person killed another. Detective Jones, who investigated more than fifty murders, could count on one hand the number involving a white victim.

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<sup>53</sup> *Id.*

<sup>54</sup> Bazelon, *supra* note 52.

Substantial evidence pointed to another man — a seventeen-year-old drug dealer nicknamed “Looney” for his erratic and impulsive behavior — as the shooter. That evidence included an eyewitness identification by another witness, Dakarai Fulton, who recognized Looney from the neighborhood. Both Fulton and Looney were Black (that is, the same race), knew each other, and Fulton was standing directly across the street when the shooting occurred. Another witness, Donald Brooks, also placed Looney by Schoen’s truck immediately after hearing shots fired. There was also word on the street that Looney was the shooter and had bragged about it afterward and also induced people with that information not to tell the police. But after initial efforts to investigate Looney, Indianapolis Metropolitan Police Department (“IMPD”) detectives switched course when a white woman named Christy Schmitt identified Leon Benson as the shooter. Schmitt, who did not know Benson, saw the crime occur at a distance of 150 feet as she stood petrified on a poorly lit street on a misty evening.

Schmitt’s identification changed everything. IMPD investigators, led by Detective Alan Jones, zeroed in on Leon Benson as a suspect. They never let up or looked back even when Fulton came forward voluntarily and other evidence surfaced that did not corroborate Schmitt and instead implicated Looney. Instead, the IMPD buried that evidence deep in their files, never turning it over to the prosecution or to Benson. It remained buried for decades.

Unlike Looney, who was advised by counsel not to speak to police,<sup>55</sup> Benson (who was not yet represented by counsel and did not know that he was a suspect in a homicide investigation) agreed to speak to IMPD detectives. Benson told police that he had been in the nearby Priscilla Apartments (known as “Little Vietnam”) at the time of the shooting. But Schmitt had already identified Leon Benson from a six-pack photo array and Jones was determined to charge him.

The case against Benson was weak. No physical or forensic evidence tied Benson to the murder. The murder weapon was never recovered. Benson’s conviction turned on: (1) the cross-racial stranger identification of Christy Schmitt; (2) another alleged eyewitness, Donald Brooks, who approached police and stated that he saw “Detroit” (Benson) standing near Kasey Schoen’s truck just before and just after the shooting from the second floor of an

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<sup>55</sup> When Looney was brought in to speak to the police he was in court on another criminal charge and represented by counsel.

apartment building across the street;<sup>56</sup> and (3) Benson's statement to police putting himself in the Priscilla Apartments near the time of the shooting.

Benson's first trial (which took place over two days from May 24 to 25, 1999) ended in a hung jury and a mistrial.<sup>57</sup> A second trial took place from July 6 to 8, 1999. At the retrial, prosecution witness Donald Brooks attempted to recant his statement to police, and claimed that he could not remember the statement he made to Detective Jones implicating Benson. Without any objection by the defense, the prosecution was allowed to read Brooks's entire out-of-court statement into the record. Defense counsel asked if he could "take a nap" while the statement was read.

In addition, IMPD lead detective Jones and other law enforcement officials failed to investigate and follow up on powerful leads pointing to Looney's guilt and buried that information in their files in violation of their constitutional obligation under *Brady v. Maryland* to disclose it to the defense.

Exacerbating matters was trial counsel's deficient representation, which prejudiced Benson. Among other failings, Benson's trial counsel failed to present key evidence available at the time of trial that tended to exculpate Leon Benson and tended to implicate Looney as the shooter, including: (1) that Fulton identified Looney as the shooter and picked him out of a photo lineup; and (2) that IMPD received two Crime Stoppers reports stating that Kasey Schoen was killed by Looney with a .380 handgun.

After nearly a year of cooperative investigation that unearthed evidence proving *Brady* violations by the state, the USF RJC and MCPO also uncovered new evidence undermining Benson's conviction and pointing to his innocence. Three witnesses signed sworn affidavits stating that they had additional information implicating Looney as the shooter, but they had not come forward with that information because Looney bribed, threatened, or intimidated them.

The exculpatory *Brady* material along with the new evidence uncovered through this investigation completely undermines the State's case against Leon Benson — a case devoid of physical evidence and so thin it resulted in a hung jury the first time it was tried. There can be no question that, had Benson had the opportunity to present this evidence at trial, he would not

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<sup>56</sup> Donald Brooks attempted to recant his statement at both trials. On appeal, the court characterized his testimony as "relatively unimportant" in comparison to Schmitt's testimony. *Benson v. State* (2002) 762 N.E.2d 748, 753.

<sup>57</sup> Jury vote: 6 NG, 5 G, 1 undecided (Jury Note, dated May 25, 1999).

have been convicted. The USF RJC and MCPO are in the final stages of their investigation. The USF RJC is hoping to file a pleading in state court seeking to overturn Benson's conviction when the investigation is finished.

#### IV. CALIFORNIA RACIAL JUSTICE ACT

The California Racial Justice Act (RJA) is a landmark law enacted in 2021 that prohibits bias based on race, ethnicity, or national origin in charges, convictions, and sentences.<sup>58</sup> Under the RJA, a criminal defendant can challenge their charge, conviction, or sentence by demonstrating:

- An attorney, judge, law enforcement officer, expert witness, or juror involved in their case exhibited racial bias or animus towards them; or
- During trial, whether or not purposeful or directed at a defendant, there was use of racially discriminatory language; or
- There is statistical evidence that people of one race are disproportionately charged or convicted of a specific crime or enhancement; or
- There is statistical evidence that people of one race receive longer or more severe sentences, including the death penalty or life without the possibility of parole.<sup>59</sup>

Critically, the RJA circumvents the precedent set by the U.S. Supreme Court, which held that statistical data showing evidence of systemic racial discrimination was not a sufficient basis to overturn a death sentence, effectively insulating racial disparities in charging and sentencing from judicial review.<sup>60</sup> In *McCleskey v. Kemp*, the Court held that only specific evidence of racist *motivation* or *intent* on the part of the prosecution in a defendant's individual case could be used as a basis to challenge a conviction or sentence based on racial discrimination. As Governor Newsom observed when signing the RJA into law, the *McCleskey* standard was "almost

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<sup>58</sup> California Racial Justice Act (RJA), *supra* note 13; *Governor Signs Landmark Legislation*, *supra* note 13.

<sup>59</sup> California Racial Justice Act (RJA), *supra* note 13.

<sup>60</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987); *California Legislature Confronts Racial Discrimination in New Criminal Justice Reform Package*, AMERICAN BAR ASSOCIATION (Oct. 28, 2020), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2020/fall-2020/california-criminal-justice-reform-package](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/fall-2020/california-criminal-justice-reform-package).

impossible to meet without direct proof that the racially discriminatory behavior was conscious, deliberate and targeted.”<sup>61</sup>

Importantly, the intent of the RJA is also to allow criminal defendants to access via discovery information in the prosecutor’s control that may prove that racial bias has impacted their case. To access such discovery, they need only show “good cause,” which is considered a very low evidentiary standard. That standard as applied to the RJA, however, has already been tested. In *Young v. Superior Court of Solano County*, defendant Clemon Young Jr. argued that the practice of racial profiling in traffic stops led to his arrest for possession of Ecstasy with intent to sell.<sup>62</sup> Young pointed to publicly available statistics showing that, statewide, Black people are more likely to be searched during the course of traffic stops than other people.<sup>63</sup> Using the RJA, he filed a motion seeking discovery to help him support his claim that the State had violated the RJA. In particular, Young requested the “names and case numbers of others who were charged with or could have been charged with possession of Ecstasy for sale; the same information for a broad range of related drug offenses; the police reports relating to the suspects involved and their criminal histories; and the disposition in all of these cases.”<sup>64</sup> The trial court denied Young’s motion; its “only articulated reason for the denial” was that Young’s good cause showing “appeared to rest on nothing more than his race.” In other words, Young failed to establish good cause for the discovery request.

The Court of Appeal sided with Young. The Court emphasized the Legislature’s intent in enacting the discovery provision in the Racial Justice Act was to “ensure that defendants claiming a violation [under the act] have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions.”<sup>65</sup> As the Court observed, “Preventing a defendant from obtaining information about charging decisions without first presenting that same evidence in a discovery motion is the type of Catch-22 the [Racial Justice] Act was designed to eliminate.” Instead, the Court went on, “[t]he Legislature was focused . . . on

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<sup>61</sup> *Governor Signs Landmark Legislation*, *supra* note 13.

<sup>62</sup> *Young v. Superior Court of Solano County*, 79 Cal. App. 5th 138, 143 (2022).

<sup>63</sup> *Young*, 79 Cal. App. 5th at 143–44.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (internal quotations omitted); California Racial Justice Act (RJA), *supra* note 13.

creating a discovery-triggering standard that is low enough to facilitate potentially substantial claims even if it came at some cost to prosecutorial time and resources.” This first appellate decision interpreting the discovery provision of the RJA signals a promising start for criminal and defendants seeking discovery to support RJA claims.

To date, only a small number of RJA claims have been filed, but each case demonstrates the importance of the RJA and the need to eradicate racial bias from the criminal legal system in California. For example, this year, a Contra Costa County judge held the first evidentiary hearings considering a claim under the RJA — specifically, to determine “whether prosecutors exhibited racial bias or prejudice towards [defendant] Gary Bryant Jr., a Black man and prolific musician, by using Bryant’s rap lyrics and rap videos as evidence during his trial for the murder of 23-year-old Kenneth Cooper.”<sup>66</sup>

Though Bryant testified at trial that he had no gang affiliation, and though no evidence was put forward proving the victim was a member of a rival gang, the prosecution proffered a so-called “gang expert” who opined that Bryant’s rap lyrics demonstrated that he was involved in “gang activity.” That “expert’s” opinions included testimony concluding, among other things, that the phrase “lay a demo”—commonly understood to refer to recording a demo of one’s music — meant “make a shooting.” Based in part on this evidence, Bryant was found guilty of murder with enhancements for gang activity, and was sentenced to life in prison.<sup>67</sup>

Bryant challenged his conviction under the RJA, arguing that the use and interpretation of his rap lyrics tainted his trial with racial bias. In a series of hearings beginning in fall 2021 and continuing through the spring of 2022, Bryant’s attorney, Public Defender Evan Kuluk, presented distinguished academics to assist the court in evaluating Bryant’s RJA claim. Bryant’s expert witnesses proffered testimony explaining the inherent racial bias that arises from the use of rap lyrics as evidence, the history of the use of rap lyrics as evidence, as well as the concept of implicit bias itself. At the conclusion of the hearings on Mr. Bryant’s RJA motion, an independent court expert was appointed to review the case and to advise the Court. A hearing is set for late September.

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<sup>66</sup> Chessie Thacher, *Prosecutors Used Rap Lyrics as Evidence in a Murder Trial; that’s Racial Bias*, ACLU NORCAL (Sept. 28, 2021), <https://www.aclunc.org/blog/prosecutors-used-rap-lyrics-evidence-murder-trial-s-racial-bias>.

<sup>67</sup> *Id.*

Thus far, implementation of the law has been led by an ad hoc group of attorneys and advocates: no one is funded specifically to work on RJA implementation and there are no attorneys or advocates in the state who are able to devote 100 percent of their time to implementation of the law. A pending state assembly bill seeks to make the RJA retroactive so that incarcerated people with judgments rendered before January 1, 2021 can also seek reconsideration of their conviction or sentence if they can establish that racial bias played a role in obtaining the judgment against them or in imposing an excessive sentence.<sup>68</sup> If retroactivity is secured for the RJA, the need for outreach and advocacy to support incarcerated people and their families will increase dramatically.

Beginning in 2021, the USF RJC became part of that ad hoc group, which meets twice a month to strategize, share information, and support attorneys with promising RJA claims. In late 2021, the USF RJC was awarded a Justice Catalyst Fellowship to help implement the law and in June 2022, the USF RJC hired Assistant Professor and Supervising Attorney Yohannes Moore to be the Justice Catalyst Fellow and work full time on RJA matters. The USF RJC plans to play a key role in “The Pipeline to Freedom Strategy” conceived by leaders of the ad hoc group to work closely with partner organizations to make sure that the RJA is as widely and robustly implemented, and expertly litigated, as possible.

Part of this partnership involves working with the organization Access to Justice to identify incarcerated people who may be eligible for relief through the RJA and connect them with law students and new attorneys (including students and staff within the USF RJC) who can help them file their first petition making a formal RJA claim. The RJA provides for appointment of counsel *if* the first petition establishes a “*prima facie* showing.” Thus, by supporting individuals in filing their first petition, we can increase the number of people appointed an attorney.

The USF RJC’s work to implement the RJA will also include:

- Case consultation with trial and appellate attorneys evaluating potential RJA claims.
- Assistance in drafting novel motions and claims.

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<sup>68</sup> *Racial Justice Act for All (AB 256)*, ACLU CALIFORNIA ACTION, <https://aclucalaction.org/bill/ab-256> (last visited Aug. 10, 2022).



- Tracking appeals and legal developments and sharing updates with attorneys.
- Connecting attorneys in need of support with experts and pro bono assistance.
- Organizing trainings on the RJA for students, advocates, and experts.

## V. TITLE IX

As noted above, Title IX is the federal statute that prohibits discrimination in education on the basis of sex. A long line of United States Supreme Court precedents makes clear that sexual harassment and sexual assault interfere with a student's right of equal access to education and because these harms are "on the basis of sex" schools have an affirmative obligation to ferret out and discipline these violations under Title IX.

In 2011, the Department of Civil Rights, which is a division within the federal Department of Education (DOE), issued a Dear Colleague Letter (DCL) setting out guidelines for schools to follow when adjudicating Title IX cases. While the letter, issued under the Obama Administration, had no binding legal authority, it nonetheless had the force of law because the DOE prosecuted violations of the DCL guidelines by initiating federal investigations and threatening to withhold federal funds.

Among other rules, the DCL required schools to use a preponderance of the evidence standard — meaning that if the factfinder was 50.01 percent convinced that a violation occurred, the student must be found responsible. The DCL also allowed for schools to use single-investigator systems. Under this model, a single person — often hired on a contract basis by the school with no particular training — was assigned the role of factfinder and decisionmaker. This investigator, therefore, is expected to serve multiple roles that in the criminal legal system are played by different people to ensure fairness. Schools that used the single-investigator model, including the California State University system which serves nearly half-a-million students, provide no hearing, no neutral decisionmaker, and no means of cross examination. The DCL also barred mediation to resolve Title IX cases and most schools interpreted this prohibition to apply to the use of restorative justice as well.

The DCL remained in place until January, 2020, when the Trump Administration rescinded it and replaced it with federal regulations. These



regulations abolished the single-investigator system, which had also been found to be unconstitutional by some state and federal courts. It allowed schools to choose a clear and convincing evidence standard and required a live hearing, cross examination, and a decision by a neutral third party.

In June 2022, the Biden Administration announced plans to rescind the Trump regulations and replace them with regulations similar to those enumerated in the DCL. Under the newly proposed standards, accused students would not have the right to a hearing where a representative can cross-examine their accuser on their behalf to probe the allegations against them. Accused students are also not guaranteed access to the evidence against them, substantially undermining their ability to prove their side of the story.<sup>69</sup> The change would also mean a return to the single-investigator system.<sup>70</sup> Together, these changes deprive the accused of due process under Title IX — a deeply troubling outcome, considering that allegations of misconduct can have many of the same serious, life-altering consequences as criminal charges.

While the Title IX legal landscape is constantly shifting in significant ways that cause confusion and disruption, one thing has remained consistent: evidence that Title IX accusations, findings of responsibility, and significant punishments including suspension and expulsion fall disproportionately upon Black students. While the Office of Civil Rights does not collect data on race in Title IX adjudications at the college and university level, a growing body of evidence — ranging from data collected from specific schools, trends that have emerged from deeply reported journalism, and anecdotes from experienced Title IX advocates — suggests that implicit and explicit bias play a role in who is accused and how they are investigated and punished.

An analysis of assault accusations at Colgate University, for example, found that while only 4.2 percent of the college's students were Black in the 2012–13 school year, 50 percent of the sexual-violation accusations reported

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<sup>69</sup> Robby Soave, *5 Ways Biden's New Title IX Rules Will Eviscerate Due Process on Campus*, REASON.COM (June 23, 2022), <https://reason.com/2022/06/23/title-ix-rules-cardona-biden-sexual-misconduct-campus>.

<sup>70</sup> The “single-investigator” model was briefly retired after Education Secretary Betsy DeVos put forward new regulations in 2018 that reformed Title IX and expanded due process protections for the accused. Lara Bazelon, *I'm a Democrat and a Feminist. And I Support Betsy DeVos's Title IX Reforms*, THE NEW YORK TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/opinion/-title-ix-devos-democrat-feminist.html>.

to the school were against Black students, and Blacks made up 40 percent of the students who went through the formal disciplinary process.<sup>71</sup> Anecdotally, advocates involved with Title IX investigative and adjudicative processes notice the disparity and see how accusations of sexual misconduct often play out along racial lines. As Harvard law professor Janet Halley observed, “Case after . . . case that has come to my attention, including several in which I have played some advocacy or adjudication role, has involved black male respondents.”

Halley also suggested that interracial assault allegations are a category warranting particular scrutiny. In her 2015 *Harvard Law Review* article, “Trading the Megaphone for the Gavel in Title IX Enforcement,” she noted: “American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women,” followed eventually by the revelation “that the accused men were not wrongdoers at all.” She writes that “morning-after remorse can make sex that seemed like a good idea at the time look really alarming in retrospect; and the general social disadvantage that black men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them.”<sup>72</sup>

This has also been reflected in the experience of the USF RJC since the clinic began defending students accused of Title IX violations in 2018.

Consider this situation: A young Black student — “John” — attending university on a full athletic scholarship, had been found responsible for violating Title IX by raping another student at his off-campus apartment. The underlying facts were these: John’s teammate’s white ex-girlfriend — “Jane” — matched with John on Tinder. She came over to his apartment, had sex with him and, they both agree, returned three days later to have consensual sex. Weeks later, Jane, who had by then reconciled with her boyfriend, claimed that John raped her during the first sexual encounter. John adamantly denied her account. Jane’s boyfriend said she was lying. In a string of text messages between the two, Jane went back and forth about what had actually happened with John. When her boyfriend asked pointblank if John raped her, she texted back: “I wouldn’t say rape.” There was no hearing, no chance for John — the accused — to ask Jane questions or probe her allegations (which he vehemently denied).

The investigator believed Jane, concluding that John committed sexual assault by finding her more credible than John under the

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<sup>71</sup> Yoffe, *supra* note 14.

<sup>72</sup> *Id.*

preponderance-of-the-evidence standard, under which the accuser must prove there is a greater than 50 percent chance her claim is true. John was found responsible for rape. He was facing almost certain expulsion with just days to appeal. John — who was the first in his family to go to college, and had spent some of his childhood homeless and sleeping in cars — had no money and no lawyer.

When Jane’s accusation became public, a group of students made posters with John’s name and face and the word “RAPIST” printed underneath in block letters. They plastered them all over campus — a campus that was less than 3 percent Black in a town that was less than 2 percent Black. John hid in his apartment for three weeks. In an email to the Title IX investigator, he pleaded with her to investigate, writing, “people die be[cause of] things like this.” She responded that investigating what happened to him was “not [her] job.” John was afraid to set foot on campus — he was failing his classes. Then another student had come forward with a rape accusation against him, and the school, without investigating this new allegation, suspended him indefinitely.

In early 2018, the RJC agreed to represent John — our first Title IX client. We were able to get the first finding reversed and remanded for reinvestigation. Ultimately the case was resolved with no finding of responsibility against John. The single investigator found that the second accusation was not supported by the evidence. He left school as a student in good standing.

Our representation is the difference between a fair and an unfair process. Students like John are not entitled to a lawyer or to legal advice. Having a lawyer is the difference between being found not responsible and being found responsible and expelled. John’s case is just one example among many. Like John, students of color accused of Title IX violations have also faced race-based retaliation on their campuses, particularly in cases involving a non-Black female accusing a Black male. In these cases, having access to trained lawyers and law students to prepare a defense has spared these students some of the unfairness that has been visited upon others.

Since John’s case, the RJC students have taken on a number of other Title IX cases. Under the supervision of Professor Bazelon and outside counsel, RJC students have represented high school and university students accused of violating Title IX. In every single one of them the clinic’s client was Black or Latino and facing a cross-racial accusation.

The USF RJC has also taken on a public role in the Title IX legislation process. The Clinic has twice submitted detailed letters — the second time in collaboration with professors at Harvard Law School — during the notice and comment period for the federal regulations. Assuming that the regulations are rescinded or overhauled, the USF RJC plans once again to weigh in on how the new regulations are worded.

## VI. CONCLUSION

The USF RJC is unique among law school clinics in the nation in the scope and breadth of the work it does to attack racial discrimination within the criminal legal system. It operates a small internal innocence project, plays a vital role in the SFDA's Innocence Commission, is one of the key players implementing the California Racial Justice Act, is the only clinic that defends students accused of Title IX violations, and partners with the San Francisco Public Defender's Office to ensure the pretrial release of as many eligible people as possible. From fall 2020 to spring 2022, the clinic also partnered with the SFDA to successfully resentence more than forty people.

The clinic is proud to welcome a vibrant and varied group of students to undertake this work every semester. In particular, the RJC celebrates the diversity of its students in terms of their perspectives on and experience with the criminal legal system. Though many students join the clinic because they wish to become criminal defense-oriented attorneys, others dream of being criminal prosecutors or working at large civil firms but wish to have the opportunity to learn about and work within the criminal legal system. Because of the unique and varied projects that students work on in the clinic, our students leave their clinic experience not only with the practical skills and experience to excel in their chosen field (whatever that may be), but also with a richer perspective on the criminal legal system as a whole and a deeper understanding of the role that race and implicit bias play within that system.

Since 2016, the RJC has grown from a staff of one — Professor Bazelon — to a staff of three due to fundraising efforts by Professor Bazelon. Moving forward, the USF RJC is committed to continuing its fundraising efforts to ensure that these vital projects continue.

# ELDER LAW CLINIC:

*Chapman University Fowler School of Law  
Alona Cortese Elder Law Center*

KURT EGGERT\*

## THE REWARDS AND ETHICAL CHALLENGES OF REPRESENTING ELDERS

### *Introduction*

An elderly woman had to flee her home during the pandemic because her son had physically mistreated her and threatened to kill her and then himself. She moved into a shelter designed to protect people from domestic violence. When social workers at the shelter connected her with Chapman's Alona Cortese Elder Law Center, we had greater challenges than usual in obtaining an Elder Abuse Restraining Order to help her stop this horrific abuse. In years past, we could meet with our clients either in our office or, if need be, in their homes. We could interview them at length in person, look at their photos or documents, go through their history, and prepare them for the hearing on the restraining order. We could easily

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call them with follow-up questions and talk with them almost daily, if we needed to. Because of the pandemic, we could not meet with our client in person and, because she was in a shelter, it was sometimes a challenge even to schedule Zoom meetings or phone calls. We even had difficulty meeting with her on Zoom, video technology that many of our senior clients are unfamiliar with and have difficulty using. Then, once we prepared her for her hearing, we had to work with shelter staff to make sure that she could make her court appearances on the court's video system despite the technological challenges. In the end, she was able to make her court appearances and we were able to obtain a permanent restraining order.

Another elder wanted us to draft a will and advance health care directive, deciding to whom she would bequeath her possessions and who she wanted to make her health care decisions for her when she was no longer able to. Normally, to discover and understand her true wishes and ensure that she was not subject to undue influence, we would meet with such a client separately, with no family member present. During the pandemic, however, we could not meet with her in person but instead would do so on Zoom. She needed her daughter to help her join the Zoom meeting and be nearby and instantly accessible in case of Zoom problems. Just looking at the Zoom screen, we could not be absolutely certain that her daughter was not just off-screen, listening in. We had to determine that we did not think that the daughter was unduly influencing the mother and coaching her from off-screen.

A daughter brought in her ninety-plus-year-old mother to our office before the pandemic and said that another daughter was taking advantage of her. This immediately raised the question of which one of the two of them, mother or daughter, would be our client. If the mother were not competent to make decisions, we could represent the daughter to gain a conservatorship over her mother to protect the mother's interests. If the mother were competent, we could represent the mother in obtaining a restraining order against the other daughter. However, it would be a potential conflict of interest to represent both, since we could not simultaneously represent the mother while representing the daughter in obtaining a conservatorship over the mother. And so, we had to decide which person was our client, and we had to do so almost immediately, before the other could develop the reasonable expectation that we were representing her as

well. We determined that the elderly mother was competent to retain us and therefore we represented her and not her daughter, and were clear with both of them which one we were representing.

Another client wanted us to draft a will and health care directive. She could not come to our office, but she did not want us to meet with her in her own apartment, because of her COVID concerns, among other reasons. And so, we met with her in the lobby of her apartment building. This forced us to halt conversation every time someone else entered the room, in order to preserve client confidentiality. We had to stop completely when a third party came into the room and sat down to read, and she did not want to ask that person to leave.

These brief vignettes illustrate recurring ethical issues we face in the Elder Law Clinic. Although the universe of such issues is potentially vast, four ethical challenges recur in a huge percent of our cases. These are (1) determining who is the client and the role of other family members; (2) determining whether the client is competent enough to hire us and, if so, working through any cognitive or memory issues the client might have; (3) being on the alert for any undue influence by others; and (4) keeping the client's confidences as best we can while obtaining the client's consent to work with and through family members or others who are not clients, when appropriate.

The practice of elder law has more difficult, complicated, and immediately urgent ethical issues than most other areas of the law. These ethical quandaries often arise in the first minutes of the initial client meeting. Many elderly clients are dependent on their family to help them meet with attorneys and often to explain their experiences and legal problems to the attorneys. Sometimes, the client needs a family member to translate for them. However, elder law attorneys also have to preserve client confidentiality and ensure that the family member who is "helping" the client is not also taking advantage of or unduly influencing them. Elder law attorneys regularly have several members of a family come in for a consultation, and the attorney must almost immediately establish who is the client, in order to determine to whom the attorney's duty of loyalty and other duties are owed, then immediately communicate that to the family or friends who accompanied the client to the meeting. We have to tell family members that we do not represent them, that our duties run to our client and not to them, and that we may need to tell our client anything the family members

tell us, even if they do not want us to. We cannot keep important secrets from our client, however painful that might be for those family members.

## THE ALONA CORTESE ELDER LAW CENTER AND ITS HISTORY

Chapman Law School hired me in 1999 to create an elder law clinic during its first years of existence. I had worked for almost a decade at Bet Tzedek Legal Services in Los Angeles, representing elders and indigent clients in a variety of issues, including home equity fraud and mortgage foreclosure cases and eviction defense. For two years, I was also simultaneously an adjunct professor at Loyola Law School, teaching Elder Law.

When I joined Chapman, I was told I would have a secretary/paralegal and they would find space for the clinic in the new law school building, which was then under construction. My first day of work was also the first day the building was open. The clinic opened in 2000. Initially, our clinic office was in two small rooms not much larger than broom closets tucked away on the third floor of the law school. Clients sometimes had trouble finding the office, especially when they came at the wrong time or unannounced, and our goal was to find better and more accessible offices for the clinic. That goal was met when Heidi Cortese, an Orange County philanthropist and Alona Cortese's daughter, met with me and then a day or two later informed me that the Alona Cortese Trust was going to donate a building for the elder law clinic, to be named after her mother.

Alona Cortese is an appropriate namesake for an elder law clinic, because she and her husband, Ross Cortese, were co-founders of the company that developed the Leisure World communities across the country. Leisure World was designed around the concept of "active retirement," fostering "better lifestyles at every age," and giving seniors a place where they could live and enjoy recreational and social activities in a safe environment. In her young adulthood and before the creation of Leisure World, Alona Cortese had been a Hollywood starlet. Under the name Alona Marlowe, she had appeared in movies with actors such as Zasu Pitts, Douglas Fairbanks Jr., and Joan Crawford. She also worked with the Gilmore Oil Company, making appearances with their mascot, the Gilmore Lion.



I worked with Heidi Cortese to select the appropriate building for an elder law center, and she decided on the perfect building, a two-bedroom house a half-block from the law school. Built in 1917, the house had been used for shops for years. The bedrooms became attorneys' offices. The kitchen became a meeting room for clients. The living room turned into a student workspace that could double as a large conference room, and we have space for a secretary/paralegal. The building has a comfortable, homey feel, is easily accessible by public transportation, has parking in the back for clients with a ramp to the back door, and is a short stroll from the law school for law students to attend client meetings. In the clinic, we have photos of Alona Cortese at various stages of her life, one from her Hollywood days, another of her driving a convertible with a Gilmore Lion in the back seat, and a third taken when she was in her nineties, about the time I met her. I tell students that these photos are a wonderful photographic example of healthy aging.

The Elder Law Clinic grew in size for a time. First, I was able to hire an adjunct professor to work with me both in teaching and in supervising students with cases. Then, Chapman hired a Chapman law graduate as a professor and full-time attorney in the clinic. I think it was inspirational to students to have a Chapman Law grad as a professor. Recently, the clinic has reverted to a smaller size, and again I am working with just an adjunct professor.

## THE DESIGN OF THE ELDER LAW CENTER

I designed the Elder Law Center to accomplish several goals. Among them:

- To provide free high-quality legal services to the needy elderly of Orange County;
- To teach students how to be great practical lawyers, able successfully to take on challenging cases for clients often in great stress and be empathetic counselors for their elderly clients;
- To give students doctrinal instruction about elder law and such topics as Medicare, Medicaid, Social Security, elder abuse, and end-of-life planning; and
- To teach students the joys and benefits of pro bono legal representation. I encourage my students to provide pro bono representation after

they graduate by showing them how representing needy clients is not only fulfilling, but also allows young attorneys to learn new skills and areas of law and to jump-start their legal careers.

To accomplish these goals, my clinic has typically handled more than one hundred cases each semester, so that each student works on about five cases at a time, gaining new cases as they resolve existing ones. Students are given a mix of cases centered on the typical legal problems of the elderly. A student may be drafting a will and health care directive for one client, working on an elder abuse restraining order for another, and handling a debt collection case for a third, while completing a conservatorship case for a fourth. My students often work in teams on bigger cases, such as elder abuse restraining orders, meeting together with the clients, dividing up the work, and talking with each other about the cases. I tell my students that more and more legal work is being done by teams of attorneys and non-attorneys, so that learning to work well and cooperate with others will likely be crucial to their careers.

The clinic is offered for up to four credit hours per semester, and the students can take the clinic twice, once in Spring Semester and once in Fall Semester, in any order, as we cover different doctrinal subjects in the two semesters. While some of our clients call the clinics directly, we receive referrals from courts and a variety of different agencies in Orange County, including senior centers, legal aid organizations, and domestic violence organizations. I start giving the students cases in the second week of class, so that they can begin going through the files and preparing to work on them. We do not have a rigid income screening for our clients unless we receive a grant that requires one, but generally only represent clients who could not afford to hire private attorneys.

## STUDENT TRAINING

At the beginning of the semester, I train students how to do initial interviews of clients, where many of the ethical issues in the representation of elders pop up. I do this by teaching the practical skills of interviewing elderly clients, how to talk with clients of questionable memory or capacity, and how to handle an initial interview where the client is accompanied by one or more family members or friends. And then the class spends two

weeks on mock interviews, with students switching off portraying either an attorney or a client. They start with simpler situations with a single client with a straightforward legal issue, and then face more and more difficult and complex situations. They interview a mock client with memory loss, for example, or an elder brought in by a non-family member who does not seem to have the client's best interests at heart. A student may be directed to portray a mock client who is highly suspicious and distrusting of attorneys, and so the student playing the attorney must work to gain the mock client's trust. A final interview scenario is of an elderly parent coming in with two adult children who argue with each other vociferously, each son or daughter accusing the other of wrongdoing. Plus, the elderly client secretly wants to leave her estate to a third child who is currently in jail, but does not want to disclose this plan to the children with her at the interview. Students must learn how to control the interview despite the loud and incessant wrangling, and how to figure out the facts when the two adult children make contradictory accusations. And they learn to insist that the adult children leave the room, so that they can talk with the elderly client without the children's interference or knowledge of what is being said.

During the mock interviews, I pass notes to the students playing the clients on what to say to the student-attorneys to make the interview more challenging. For example, I may tell them to stop talking and just stare at the student-attorney for a minute, or to accuse the student-attorney of working with the client's children, just to see how the student-attorney reacts. Students need to learn how to deal with curveballs that clients throw at them. Then after the mock interview, we talk about what worked, what did not, and how the students could better have addressed the challenges of the interview. Students learn a lot from these mock interviews, not only about how to conduct such interviews, but also about how it feels to be interviewed. I think students gain empathy for their clients by playing clients and having a student playing an attorney ask them extremely personal and sometimes even painful questions. Students have often told me that when they were doing the mock interviews, they thought I had designed impossibly difficult interviews that could not happen in real life, and then later found themselves in an interview with a real client that was surprisingly similar.

One of my goals in the mock interviews is getting students used to talking with clients about some of the deepest and most troubling aspects of the clients' lives. Clinic students and elder law attorneys need to be able to talk with clients about planning for the clients' own deaths or possible incompetence. They need to be able to ask clients calmly and sympathetically about what the client would want to happen when they die or if they were in a coma and unlikely to regain consciousness. Students are often nervous or even frightened to discuss such issues with clients, and I let them know that clients often have little reservation about talking about them. The clients have often thought through what they want done and have talked with their friends and families about what to do. Students are often amazed when clients calmly discuss or even joke about their end-of-life decisions.

Students also need to be able to ask clients probing questions about conflicts or abuse in their family, about the son who has become increasingly controlling and even violent, or about the daughter who is threatening never to let the client see her grandchildren again. Our students have to be able to go deep into some of the most distressing and important aspects of our clients' lives, often talking with clients in crisis and in times of greatest need. Sometimes, our clients cry and need to be comforted, and I teach students how to treat a frightened, sad, or grieving client with dignity and empathy. I devote one whole class to the importance of empathy for attorneys and how students can practice and develop empathy while still maintaining a professional relationship with their clients.

I also give the students a crash course in legal ethics as focused on elder law, especially elders subject to duress or with questionable competence, and then follow up with additional discussions on ethics in an elder law practice throughout the semester. The rules of professional ethics often provide too little guidance regarding the professional responsibilities of elder law attorneys, and especially attorneys representing persons with diminished capacities, whether due to age, disability, or other condition. We talk about the various ethical responsibilities attorneys have, such as the duties of confidentiality, loyalty, competence, and avoiding conflicts of interest, and how all of these duties require the attorney quickly to determine the central question often facing elder law attorneys: who is the client? Normally it is the elder, but if the elder is of questionable competence

or lacks competence, the client may have to be a family member. If several members of a family come in for an initial interview, it may be a challenge to determine whom to represent and do so quickly enough that the other family members do not develop a reasonable expectation that the attorney will be representing them. If an attorney makes the wrong choices about who the client is, they may find themselves conflicted out of the case when they discover they picked the wrong person to represent.

In addition to teaching students how to handle cases, the class covers the significant substantive issues in elder law, including government benefit programs such as Social Security, Supplemental Security Income (SSI), Medicare, and Medicaid, as well as housing programs and methods to aid aging in place for the elderly. Students learn about end-of-life decision-making for the elderly, both the elders' own decisions and also rules and best practices for substituted decision-making by conservators or health care directive agents for elders who are no longer able to make decisions for themselves. We discuss laws protecting or restricting the right to die. We also discuss laws governing physical and financial elder abuse and fraud against the elderly.

## TYPES OF CASES

The Elder Law Center represents clients in a wide-ranging set of cases. Many of our cases are typical of the legal issues of the elderly, such as drafting wills and health care directives. We draft wills only for those with limited assets and we do not draft trusts. We refer out clients with significant assets or who should have trusts, so that they can find attorneys with expertise in more complicated estate planning. We handle government benefits cases, such as SSI overpayment cases, senior housing issues, and others, and regularly appear before Administrative Law Judges (ALJs) on these cases. In one case, we represented a senior on Medicare after Medicare decided that it would not pay the tens of thousands of dollars in costs when she was airlifted to a hospital with a health crisis, claiming that she did not need to be airlifted. We successfully convinced the ALJ that the airlift was necessary and was essentially decided upon by her treating doctors for her, and so she should not have to pay the massive bill that she was being charged. These appearances in front of ALJs are great experiences for our students,

as each hearing is a mini trial, with the drafting of a brief, the examination of witnesses and cross-examination of the government's experts, and oral argument. ALJs seem typically relieved to have a student representing the petitioners rather than facing unrepresented petitioners, so that the ALJ has a well-organized case presented to them. ALJs, like judges in general, also appreciate that the students are accomplishing an important part of their legal education, and ALJs and judges have often complimented my students from the bench for their work and professionalism.

We also handle conservatorships, sometimes representing a family member of the proposed ward/conservatee. People who try to obtain a conservatorship without an attorney often find themselves facing a bewildering set of forms to fill out and legal hoops to jump through, and legal representation may be crucial to their being able to protect their family members. We also at times have represented proposed conservatees, either to oppose a conservatorship, seek a different conservator, terminate a no-longer-necessary conservatorship, or simply to protect their interests in the conservatorship process.

We also represent grandparents or other elders who want to become guardians for their grandchildren or adopt them. In our clinic, we have seen the effects of the opioid crisis and other drug issues, where parents of children are no longer able to raise them, and grandparents have to step in and take over the role of parents. The grandparents need the legal authority to make school and medical decisions for the children. Sometimes more than one generation is unable to care for the children. We represented a great-great aunt who was caring for a five-year-old boy, doing an admirable job even though she was in her eighties. We have handled adoptions of grandchildren who have lost their parents. One of happiest days I have had in court was representing grandparents in such an adoption. They told the judge they were having a party afterward to celebrate with the child and her friends and family, and it was clear how attached to and loved by the grandparents the child was. Even the judge was beaming.

We also handle a wide variety of cases that are not peculiar to the elderly but involve our elderly clients. We have helped force the transfer of stock to our client's name after a spouse's death when the company inexplicably refused to do so. We work on debt collection cases, where collectors hound our clients to repay debts that either they should not — or are

completely unable to — repay. We have represented homeless clients to obtain government benefits. In one case, a city refused to give a housing subsidy to a homeless elder, stating that she could not prove she lived in the city since she did not have a fixed address. We collected evidence that she lived in the city from her church, her library usage, and from neighbors.

We handle a significant number of elder abuse cases. A typical case may involve an elderly client living with her adult son who has drug or alcohol problems and has grown more controlling or abusive since his father passed away. Our clients have had their adult child push or hit them, take their walker from them to make them immobile, or take away their phone to cut off communication with the outside world. We have had several clients faced with adult children who have moved into their garages and refused to leave, haranguing and abusing their parents and making their lives miserable. The elders often feel unable to have friends over, never certain when their adult child will barge into the house and create problems. After we obtained an elder abuse restraining order evicting an adult child and her boyfriend from our client's garage, our client told me that she felt like we had given her life back to her.

## STUDENT SELECTION, SUPERVISION, AND FEEDBACK

Our clinic is open to all Chapman law students, so long as they are eligible to become a certified law student under the rules of the State Bar of California. Becoming certified allows students to conduct trials under the direct supervision of a professor-attorney and otherwise practice law under my watchful eyes. I do not select the law students, in part because I want even students who are not planning a career in elder law to be able to take the clinic and perhaps discover that they are more interested in elder law than they had anticipated. Also, students can benefit from an understanding of elder law and elder issues in a wide variety of legal careers. Prosecutors often need to understand elder abuse, for example. Personal injury attorneys should recognize that an injury award may affect their clients' government benefits. Even non-elder law attorneys may often find themselves with some elderly clients and should understand what potential issues and challenges that might bring.

Our compact and cozy Elder Law Center building makes supervision of students easier than it might otherwise be. Although I also have an office in the law school building, my primary office is in the clinic. Students can come into my office individually or in teams for a brief or long talk about cases they are working on, and it is easy to have an informal meeting with a student or team of students about cases or other aspects of elder law. I tell the students that the clinic should be their home away from home and a place to escape to from the sometimes pressure-packed confines of the law school. When the pandemic does not prevent it, students regularly sit and have lunch in the clinic and socialize with each other.

One of the goals of the clinic is to teach students how to learn the law. When I assign cases to students, I do not spoon-feed to them how to do a conservatorship or how to draft a will. Instead, I teach them the fundamental principles, purposes, and pitfalls of conservatorships and wills and how to use the practice guides for each area of law. The student takes the first shot at drafting the appropriate documents, and then we go through the documents and talk about them. I want to make sure that the final product is as good as possible, but I also want the students to take responsibility for their cases and try to get the work right on their own before they bring it to me.

The feedback I get from students is uniformly positive. Students enjoy working with the elderly clients, even those who want to talk at great length about their legal issues or other aspects of their lives. I tell my students that for some of their clients, the student may be the only person they have a long conversation with that day. Especially during the pandemic, many seniors feel isolated in their homes with too little social contact. I have had students have two-hour conversations with clients, and I teach students how to end conversations with clients when appropriate. Students often comment that we throw them into the deep end of the pool, but teach them how to swim. Especially during the first weeks of the semester, many students are hesitant to call clients, unsure how to talk with them. That is the reason that we have so many mock interview sessions at the beginning of the semester, as it gives students confidence in their ability to talk with clients.

Some students are nervous about making court appearances and only want to take cases where they are just working with clients, but not appearing in court. However, I assure them that before each court appearance, I



will make certain that they are thoroughly prepared, likely more prepared than a typical attorney they might face. For hearings on elder abuse restraining orders or in front of an ALJ, we do an entire mock hearing with our client present, where I play the judge and the student conducts the questioning of the client. I had one student who said she was terrified of being in court and was not comfortable doing public speaking. I worked with her extensively to prepare for a court appearance, and she so enjoyed it and was energized by it that she took another case with a court hearing and said that she was considering becoming a litigator, since she loved appearing in court.

I tell my students that, for many areas of law, learning how to talk with clients, gain their trust, and really listen to them can be crucial for their careers and building their practices. I tell them that in my first job as an attorney, I was nervous about talking with clients, as I had not worked in a clinic in law school, and I remember my hands almost shaking when I called my first client, wondering what to say. Our students talk with numerous clients, often at length, during the course of the semester, and so gain confidence and skill in talking and working with clients.

## PARTNERING WITH OTHER ORGANIZATIONS

The Alona Cortese Elder Law Center has succeeded in part by partnering with other organizations that provide aid to seniors in Orange County. From the beginning, we have worked with the Public Law Center (PLC), a nonprofit that provides free legal services in part by matching pro bono attorneys with indigent clients who need services. PLC not only matches attorneys with clients, it also trains attorneys how to handle certain types of cases. We regularly take cases from PLC, especially wills and conservatorship cases, and it is helpful to have a steady source of clients and be able to take specific cases that would be especially useful or interesting for our students. Sometimes, we take cases from PLC in areas of law that are new to us, and PLC is very helpful in providing advice and sample briefs as needed.

We have also worked with the Legal Aid Society of Orange County (now called Community Legal Aid SoCal). In the early years of our clinic, Bill Wise, an elder law attorney with Legal Aid, was an adjunct professor

with Chapman and co-taught our clinic. This allowed an easy collaboration between the two organizations, and the clinic could take referrals of Legal Aid cases, or we could work together with them on Legal Aid cases. Since then, Bill has co-founded the Elder Law and Disability Rights Center (ELDRC), a nonprofit that provides free and low-cost legal services to seniors, people with disabilities and also people experiencing homelessness. Starting last spring, Bill rejoined Chapman and our clinic as an adjunct professor, and our clinic and the ELDRC will be partnering with the Elder Law Center to provide legal services to the needy.

Another important collaborator has been Human Options, an organization that counsels, protects, and shelters those threatened by domestic or family abuse in Orange County. Human Options has regularly referred to us clients who are seeking Elder Abuse Restraining Orders, often after they have counseled the potential clients. As attorneys, we recognize that while we can provide legal counseling, our clients facing elder abuse also often need emotional counseling. It may take years for someone in an abusive situation to work up the resolve to end it, especially when the abuser is their own son or daughter. Parents often feel protective of their children even when the children are a physical or financial threat to the parent. Seeking a protective order and evicting a son or daughter from the family home can often be an agonizing decision, and the clients need emotional as well as legal support.

## TEACHING IN THE CLINIC

I came to Chapman after nearly a decade as a legal aid lawyer, and some time ago came to realize that this is likely the last and certainly the perfect job for me. I love having the regular interaction with my elderly clients, helping them in their times of greatest need, and developing close relationships with them. We work with some of our clients for years. I have one client in her nineties with whom I meet in her house. She enjoys making home-made guacamole for my visit and I have come to know her extended family. At the same time, I appreciate the opportunity to teach a new generation of lawyers. I also teach podium classes, typically Remedies and Client Interviewing and Counseling, and while I find teaching those classes fulfilling, there is nothing like working with a student on an

actual case with an actual client to feel like I am really teaching them how to practice law.

I also appreciate the close relationships with students in the clinic that are more difficult to obtain otherwise. I recently served as a reference for a former student applying for a legal aid job doing eviction defense. I remember telling him when he was a student that he would make a great legal aid lawyer, that he had the passion and the skills to be an effective advocate for the needy. That student had done an excellent job in my clinic representing a client in front of an ALJ, and in my recommendation I could talk in great detail about how the student had grabbed the bull by the horns in a difficult case, figured out the complex regulations that governed, wrote a convincing brief, and did so well in the hearing that the ALJ complimented his witness examination and professionalism. Better yet, he got the job.

I am glad that part of my job is being a legal scholar. My scholarship includes but is not limited to elder law issues. I have given talks and presented papers on a variety of issues, including elder abuse, foreclosure and mortgage securitization, and even gambling law. I recently published an article on Originalism and the Nondelegation Doctrine,<sup>1</sup> enjoying working on an entirely new area of law. My work at Chapman led to my being appointed to a committee advising the Federal Reserve Board on consumer issues in the financial industry, and I have testified to congressional committees on numerous occasions on mortgage issues and on consumer protection in the gambling industry. I feel that doing legal scholarship has made me a better clinical professor, in that it has forced me to step back and view the larger picture. Speaking at conferences on elder law lets me talk with other experts in the field and gain new understanding. I feel fortunate that my scholarship and actual practice reinforce each other and allow me to continue to enjoy and model actual client representation, the heart of an attorney's work.

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<sup>1</sup> Kurt Eggert, *Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary*, 24 CHAP. L. REV. 707 (2021).



# FOSTER EDUCATION PROGRAM:

*UC Berkeley School of Law*

HALEY FAGAN\* & TORI PORELL\*\*

## FOSTERING EDUCATIONAL SUCCESS AND PUBLIC INTEREST CAREERS

### *What's the problem?*

*BB is a nine-year-old African American girl. She and her younger siblings were recently removed from their parents' care after years of physical abuse and witnessing significant intimate partner violence in the home. BB is now living in a foster home and has been enrolled*

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This article is part of the special section, "Legal History in the Making: Innovative Experiential Learning Programs in California Law Schools," in *California Legal History*, vol. 17, 2022 (see editor's introduction on page 3).

\* Haley Fagan is Director of the Education Advocacy Program at East Bay Children's Law Offices, a non-profit law firm providing court appointed, holistic legal representation to children in Alameda County's juvenile dependency system. More information is available at <https://www.ebclo.org>.

\*\* Tori Porell is a Youth Justice Attorney at Bay Area Legal Aid, where the Youth Justice Team engages in civil legal representation, social work, community collaborations, and systematic advocacy, in partnership with the young people they serve. They provide civil legal services to young people from the ages 13 to 26 to prevent entry or re-entry to the criminal legal system. More information is available at <https://baylegal.org/what-we-do/our-clients/youth-justice>.

*in school for the first time in her life. School has not been going well. BB is not accustomed to being separated from her younger siblings, for whom she feels a sense of responsibility. She is routinely leaving her classroom in search of her siblings to make sure they are safe. In addition, the years of complex trauma BB has endured are translating into aggressive behaviors with adults and her school peers as well as extreme difficulty in regulating her emotions on campus. Concerned about BB's propensity to leave school grounds and the aggression with which she responds to staff attempts at intervention, school administrators have now resorted to calling in armed, uniformed police officers to chase BB through her elementary school campus in an attempt to contain her.*<sup>1</sup>

Unfortunately, BB is not alone. For myriad reasons, youth in foster care have exceedingly poor educational outcomes. A 2013 report sponsored by the Stuart Foundation confirmed what foster youth advocates have witnessed for years — that California's foster youth are a uniquely at-risk student subgroup in California schools.<sup>2</sup> Foster youth change schools far more often than their peers; are twice as likely as their peers to test below grade level in English and math; are twice as likely to be identified as having a disability and five times more likely to be classified as having an “emotional disturbance”; and are consistently suspended at several times the statewide suspension rate.<sup>3</sup> It should come as no surprise, then, that although the statewide high school graduation rate has hovered at around 84 percent for the last several years, California's foster youth have been graduating at the far lower rate of around 56 percent each year.<sup>4</sup>

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<sup>1</sup> While the stories are true, all initials and identifying information of foster youth referenced in this article have been changed or omitted to maintain confidentiality.

<sup>2</sup> V. X. Barrat & B. Berliner, *The Invisible Achievement Gap, Part 1: Education Outcomes of Students in Foster Care in California's Public Schools* (San Francisco: WestEd, 2013), available at <https://www.wested.org/resources/the-invisible-achievement-gap-education-outcomes-of-students-in-foster-care-in-californias-public-schools-part-1>.

<sup>3</sup> For example, during the 2020–21 pandemic school year, the statewide suspension rate was 0.2 percent, while the foster youth suspension rate for that year was 1.2 percent. The statewide suspension rate in 2019–20 was 2.5 percent, while the foster youth suspension rate for that year was 11.9 percent. Data available at <https://dq.cde.ca.gov/dataquest>.

<sup>4</sup> Data available at <https://dq.cde.ca.gov/dataquest>.

Growing awareness of this problem has resulted in targeted legislation at both the state and federal levels. In 2003, California passed AB 490, declaring an intent that foster youth receive access to a meaningful education and laying a foundation for that success with a key set of student rights and school responsibilities. For example, AB 490 gave California foster youth the right to remain in their school of origin when facing a change in foster home placement, as well as a right to receive partial credits for courses begun but unable to be completed due to placement changes. It also created timelines for transfer of school records and reduced the burden of school enrollment requirements for youth in foster care. Similarly, in 2009, AB 167 introduced an option for qualifying foster youth to earn their high school diplomas by fulfilling California's basic state graduation requirements rather than the increased high school credit requirements of most local educational agencies.<sup>5</sup>

Despite these legislative efforts, real change in the life of any foster youth requires an adult who is paying attention and empowered to enforce the youth's educational rights. Many foster youth simply do not have an adult willing or able to take on that role. This is particularly true of youth with higher mental or behavioral health needs living in congregate care settings or facing placement instability. For these foster youth, the lack of a consistent educational rights holder can result in repeating coursework at each new school placement, spending months in the wrong grade level before anyone notices, or effectively losing a year of school due to repeated school placement changes.

## THE "FOSTER ED" FIX

The Foster Education program, or "Foster Ed," began in 2004 as an Equal Justice Works fellowship project of an alumna of UC Berkeley School of Law (Berkeley Law). Working alongside Protection & Advocacy, Inc. (since renamed Disability Rights California), and with support from The Morrison & Foerster Foundation, this Equal Justice Works Fellow and a group of Berkeley Law students developed a model for training up and pairing Berkeley Law students with foster youth in need of educational rights

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<sup>5</sup> For more information on the educational rights of California's foster youth, visit the California Foster Youth Education Task Force at <http://www.cfyetf.org>.

holders. In the years since the initial fellowship project, the Foster Ed program has been sustained through the efforts of law student leaders with supervision and training support from advocates at East Bay Children's Law Offices, National Center for Youth Law, Disability Rights Education & Defense Fund, Bay Area Legal Aid, and The Morrison & Foerster Foundation.

Every fall, a group of Foster Ed student leaders screens and selects a new class of prospective educational rights holders from the entering first year Berkeley Law class as a part of the Student-Initiated Legal Services Projects program.<sup>6</sup> Participants are chosen based on their level of interest and prior experience working with youth. Past participants have included former teachers, Court Appointed Special Advocates (CASAs), coaches and camp counselors in addition to students with lived experience in the foster care system.

Once the new group has formed, attorneys and advocates from partnering organizations provide initial training. While the format of the training has varied over the years, it has always included an introduction to the juvenile dependency system and the rights and responsibilities of educational rights holders, as well as a primer on special education and school discipline law. Education laws specific to the foster youth population are covered in the initial training phase, including the school stability and high school graduation rights conferred by AB 490 and AB 167. Additional training offerings have covered topics like childhood trauma and mental health, maintaining professional boundaries, and working with transition aged youth. Participants have also heard directly from advocates with lived experience in the foster care system. Each Foster Ed participant signs a confidentiality agreement and is given a collection of written materials to assist in their advocacy during the course of the year. These materials include relevant legal reference documents, research and practical tools like checklists and sample school advocacy letters.

Following initial training, a supervising attorney from East Bay Children's Law Offices matches each of the Berkeley Law students with a foster youth in need of an educational rights holder. These are foster youth for whom there are no other adults previously known to the youth who are willing or able to take on the responsibility of holding educational rights.

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<sup>6</sup> <https://www.law.berkeley.edu/experiential/pro-bono-program/slps>.



Often, these are youth living in congregate care settings called Short Term Residential Treatment Programs (STRTPs) or with a history of unstable foster home placements for whom the foster care system has added trauma to pre-existing mental health concerns. A pairing may be made to address unmet special education needs on behalf of the youth, to provide trauma-informed advocacy around exclusionary school discipline practices, or to support a youth in efforts toward high school graduation, for example. Each participating Berkeley Law student is then formally appointed by the dependency court to serve as the educational rights holder for the foster youth with whom they are paired. Foster Ed participants are required to hold these educational rights for a minimum of one year, though many continue in this role throughout their law school careers.

As educational rights holders, Foster Ed students are charged with investigating the foster youth's educational needs, ensuring that their educational rights are being met, and that the foster youth's voice is heard in all education-related matters. Educational rights holders can meet with the youth and their teachers, observe in the classroom, and review student records. They are entitled to notification of school disciplinary matters and are vested with decision-making authority regarding all special education services and evaluations. In addition, educational rights holders can play a key role in the dependency court proceedings by providing critical updates on the status of the foster youth's educational needs. Educational rights holders are statutorily recognized as members of the youth's dependency "Child and Family Team" and therefore invited to all team meetings regarding possible changes in foster home placement.

The Foster Ed participants and supervisors convene on a monthly basis throughout the school year for additional training and case round discussions. East Bay Children's Law Offices attorneys regularly advocate alongside participants at key school meetings and strategize with participants in how best to promote a foster youth's educational success during their time in foster care. Participants also get the experience of collaborating with non-legal advocates, including social workers, education professionals, therapists and caregivers in working toward the foster youth's best interest. Most importantly, Foster Ed participants have the opportunity to give some measure of power back to the youth in foster care by amplifying their voices in school meetings and offering them support in reaching their goals.

## A COMMUNITY OF MENTORS

Mentorship is a core feature of the structure, the goal, and the impact of the Foster Ed program. From its genesis, Foster Ed has been a student-led program receiving professional mentorship and supervision from legal practitioners for the purpose of providing educational mentorship and advocacy to youth in foster care. The lawyers mentor the law students on how to be effective public interest advocates in an imperfect system; the law student leaders mentor the first-year participants on how to be law students and educational rights holders; and the law student participants mentor foster youth on how to be successful students and self-advocates.

The student-led structure of the Foster Ed program as well as the role that participants play as educational rights holders promotes a unique form of mentoring partnership between participant and supervising attorney. In their role as an educational rights holder, it is the Foster Ed participant who holds decision-making authority while the supervising attorney's role is primarily advisory. Once the initial training phase is concluded, the participant and supervising attorney function as a team advocating together on behalf of the foster youth in educational matters.

As educational rights holders, Foster Ed participants get a front row seat to the structural barriers and system flaws facing the foster youth with whom they are paired. They have the opportunity to see how the basic building blocks of the legal system, which they spend much of their first-year law courses discussing, often fall short of the needs they were designed to meet. They also experience how impactful the role of the advocate can be in making the legal system work. Much of the professional mentoring focuses on how to navigate as an advocate in a broken system. Case round discussions among the group are frequently about how to find or create some good for the client under circumstances in which the system offers no good options.

*Amelia was appointed to hold educational rights for foster youth JJ. JJ was an elementary school student receiving special education and mental health services at school. JJ's trauma history and resultant mental health needs had caused frequent disruptions to his home placement, in turn leading to a pattern of school changes. When yet another foster home placement fell through in the middle of the school year, JJ was moved to a home thirty-five miles away in a different*

*county and school district. While AB 490 clearly allowed for JJ to remain enrolled in his school of origin, it did not provide easy solutions for how JJ could be transported to and from that school every day. As a result, JJ's county child welfare worker advised his new caregiver to enroll him in yet another new school for the remainder of the school year. It was only through the efforts of Amelia, who had spent much of the school year building positive relationships with JJ's existing special education team, that JJ's school of origin agreed to transport him across county lines every day to maintain his school placement. Because of Amelia's advocacy, JJ was able to finish an entire school year in the same school for the first time in his elementary school career.*

Foster Ed participants paired with older foster youth often play a critical mentorship role in the road toward that foster youth's high school graduation and persistence to higher education. Foster Ed participants have worked toward getting students into the high school classes they'll need to graduate or into the trauma-informed school environments in which they'll have the necessary support to meet their goals. They have advocated for appropriate special education assessment and services for foster youth in juvenile hall and ensured that foster youth had the necessary technology to participate in distance learning during the COVID-19 pandemic. Foster Ed participants have given college tours and even arranged for an interested foster youth to sit in on a Berkeley Law class.

*Leila was appointed to hold educational rights for CC. CC had experienced significant trauma growing up and was homeless and without consistent adult support when she entered foster care. Despite these challenges, CC was on track to graduate and excelling in her coursework when COVID-19 hit. Amid all the changes brought about by distance learning, CC stopped receiving some of her special education accommodations in one of her classes. CC was fearful of causing trouble with her teacher, but the lack of accommodations was causing her increased anxiety as her grade was slipping. This was particularly troubling to CC as she had a goal of attending college. Because CC had already spent so much time talking with Leila about her goals and learning about Leila's own college experience, CC felt comfortable asking Leila to advocate on her behalf with the teacher to resolve the issue.*

*Not only was Leila able to successfully advocate for change at a contentious IEP meeting, but she utilized her prior experience working in her undergraduate school's admissions office to help CC through the college application process. CC successfully graduated from high school and received scholarships to her chosen four-year university.*

The mentorship Foster Ed participants are able to offer often expands beyond assistance in gaining success in the classroom. In the spring of 2022, Foster Ed participants worked to create a “Know Your Rights” training specifically designed for youth in congregate care STRTPs. The presentation was meant to empower this population of foster youth who often have higher levels of mental and behavioral health needs but fewer permanent adult supports. The training covered a variety of rights including school discipline, cyber safety, interacting with police on the school campus, and options after high school. These Foster Ed participants then accompanied East Bay Children’s Law Offices staff to several STRTPs where they engaged the foster youth residents in discussion of these topics over donuts, pizza, and lots of laughter. This type of engagement can, and often does, lead to meaningful mentorship relationships that outlast the Foster Ed participant’s tenure as educational rights holder.

*Nazeerah was appointed to hold educational rights for DD. DD entered the foster care system in her teenage years, after an early childhood full of caregiver disruptions and parental substance abuse. The complex trauma she had experienced in her home left her vulnerable to violent exploitation and self-medication through substance use. DD was also very smart, determined to get her high school diploma, and willing to reach out to Nazeerah when she needed help. Nazeerah became an ongoing support for DD, not just in ensuring her access to appropriate school supports, but also as DD worked to make positive changes in her life. DD continued to include Nazeerah as an important part of her support network even after DD turned 18 and became her own educational rights holder.*

The impact of the work done in the Foster Ed program expands beyond the lives of the foster youth it was designed to serve. In the past, the entire Berkeley Law community has become involved as Foster Education leaders have held holiday gift drives collecting books and toys from the larger

Berkeley Law community for foster youth. One Foster Ed participant's recounting of his own experience in foster care as well as the work he was able to do as an educational rights holder inspired a Berkeley Law professor to volunteer as an educational rights holder. She now holds educational rights for an elementary school student with extreme mental health needs. In addition, many Foster Ed participants have continued their work on behalf of youth or in the public interest. Foster Ed participants have worked in Berkeley's Education Law Clinic with East Bay Community Law Center during their second and third years and pursued careers in education policy, youth law, disability rights advocacy and civil rights.

## CREATING A CAREER FROM FOSTER ED

*Tori was appointed to hold educational rights for GG. GG was only preschool aged, but his early childhood trauma had already made emotional regulation very difficult for him. Tori successfully advocated for GG to receive appropriate special education supports in his earliest school years. During this time, Tori was the most consistent adult figure in GG's life as his family struggled in the juvenile dependency system. She and her husband even prepared a Ninja Turtle themed bedroom in their home for GG in case he needed them to become his caregivers. During Tori's third year of law school, she and several of her Foster Education peers assisted East Bay Children's Law Offices in completing an informal audit of early intervention and developmental service provision to Alameda County foster youth ages zero to five. Assisted by the data collected in the audit, Tori designed an Equal Justice Works project to provide specialized legal representation to Alameda County's youngest foster youth as a Fellow at East Bay Children's Law Offices. She is now an attorney with Bay Area Legal Aid's Youth Justice Team and has rejoined the Foster Education group, this time as a supervising attorney.*

Another aim of the Foster Ed project is to inspire and train the next generation of education and youth justice attorneys. Many students do not come into law school with an awareness of Youth Law, Education, or Dependency as avenues for their legal careers, making exposure to these fields a vital way to recruit new attorneys. Outside of formal internships and

summer employment, pro bono programs like Foster Ed allow students to dive deeply into an area of the law and build connections with attorneys and organizations in these fields.

Many law schools do not offer significant academic coursework in the substantive areas most relevant to students who will be pursuing careers in direct legal services, especially Youth Law and Dependency. Outside of clinical programs and externships, programs like Foster Ed provide a vital learning opportunity for students to gain the practical legal skills that they will use in their jobs representing low-income clients. Through not only their own work on a single case, but also the exposure to many similar cases through training and case rounds, students gain a strong conceptual and practical foundation in their desired field of law.

Students who have access to training and practice opportunities like Foster Ed, not only receive robust preparation for careers in public interest law and applicable practical skills, but through exposure to the realities of the profession, are better prepared to persist once they enter the workforce. Throughout the year in Foster Ed, students are not only practicing their written and oral advocacy skills and receiving training in substantive updates to the rights of foster youth, but they have the opportunity to engage in meaningful discussions about complex topics like vicarious trauma, compassion fatigue, and the racial disparities permeating the education and child welfare systems. Supervising attorneys, as well as student project leaders, are available to students to help navigate tricky questions related to boundaries, professional ethics, and the limitations of legal advocacy. It is much more difficult to learn these lessons in a classroom, yet these are some of the most vital things new attorneys must learn in order to do their jobs effectively and sustainably.

## TORI'S EXPERIENCE

*For me, the attraction to Foster Ed came from a previous career as an early childhood educator. I had no idea that working with youth as an attorney was an option and came to law school with my sights set on other fields. After trying out those other fields through summer jobs, however, I continued to gravitate more and more to working with Foster Ed, agreeing to be the group's student leader as a 2L. It was experience in Foster Ed that inspired me to pursue*

*additional experience in education law, and I supplemented what I had learned through my work with the student I was paired with in Berkeley Law's Education, Defense and Justice for Youth (EDJY) Clinic at the East Bay Community Law Center.*

*As law school drew to a close for me, it was clear that the original field of law I intended to pursue was not for me, and I was fully committed to youth law, having participated in Foster Ed for three years and externed at many Bay Area youth-serving legal organizations. In applying for a fellowship project, I leveraged my experience both in Foster Ed and in the EDJY Clinic, to fill a critical gap observed through both encounters. After defending high school students from expulsion and realizing that they had unmet special education needs that stretched back to elementary school, as well as struggling to advocate for a preschool-aged foster student to get badly needed services to begin his school career on an equal footing, the project I developed advocated a model of early intervention legal representation for foster youth ages zero to five with complex educational, mental health, and developmental needs.<sup>7</sup>*

*After beginning the Equal Justice Works Project at the East Bay Children's Law Offices, I was able to hit the ground running, due to my significant exposure to dependency and experience with special education advocacy. I quickly developed an expertise in the needs of young foster children and the strategies that lawyers could use to meet them. My work was published by the American Bar Association's Children's Rights Litigation Committee<sup>8</sup> and presented at the National Association of Counsel for Children's annual conference.<sup>9</sup> This work was tremendously valuable in elevating East Bay Children's Law Office's practice in meeting the needs of their youngest clients, but also in my continued work in the field of youth law, now representing older youth at Bay Area Legal Aid.*

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<sup>7</sup> <https://www.equaljusticeworks.org/fellows/tori-porell>.

<sup>8</sup> <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/legal-representation-for-the-youngest-clients-a-holistic-approach>.

<sup>9</sup> [https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/2020\\_conference/nacc\\_virtucon2020\\_program.pdf](https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/2020_conference/nacc_virtucon2020_program.pdf).





# COMMUNITY & ECONOMIC DEVELOPMENT CLINIC:

*UC Irvine School of Law*

CARRIE HEMPEL & ROBERT SOLOMON\*

## TEACHING TRANSACTIONAL LAW BY PRESERVING AFFORDABLE HOUSING

Over the past fifty years, law schools have moved, somewhat begrudgingly, from a pedagogy featuring doctrinal lectures and the Socratic method to a greater inclusion of experiential learning. Experiential learning is a broad concept. Definitions include the notion of “learning through doing,” with reflection afterward, but there is little consensus beyond that. As

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students demanded increased real-world experience, a push supported by the American Bar Association and the organized bar, law schools began and expanded clinical programs, in which students moved from theory to practice and, in many cases, from the classroom to the courtroom. Clinical courses, in which students practice law supervised by faculty who are also practicing lawyers, became a common offering in many U.S. law school curricula in the latter part of the twentieth century. At many schools, however, such courses still are available only to a small percentage of students. The University of California, Irvine School of Law (“UCI Law”), which opened its doors to students in 2009, has a vibrant legal clinic environment, not surprising for a school founded with clinical legal education as a core function. In this article, we provide two case studies that include student comments about their experiences. We believe these descriptions exemplify UCI Law’s approach.

## I. THE CREATION OF A LAW SCHOOL THAT PRIORITIZES TEACHING THROUGH PRACTICE AS WELL AS ANALYTICAL EXPERTISE

The structure and substance of UCI Law’s Community & Economic Development Clinic (“CED”) is a byproduct of a University of California Regents 2007 decision to create a new law school at the University of California, Irvine. UCI faculty and prominent members of the Orange County professional community put together a successful proposal for a new law school that articulated four broad goals. Two of those goals facilitated the creation of UCI Law’s vibrant clinical program: (1) a stated dedication to “public access and public education”; and (2) clinical education as a central focus, so as to encourage students “to explore the social, intellectual and professional benefits of a career in poverty law, civil rights, and public interest law.”<sup>1</sup>

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<sup>1</sup> The other two were an explicit focus on disciplinary and interdisciplinary work of the kind seen at great universities and a greater degree of faculty collaboration with colleagues across the UCI campus than the norm at many other law schools. As discussed below, the fourth goal mirrors one of the clinical program goals, to involve UCI students from other disciplines, as appropriate, in clinical courses. See Proposal for a School of Law at the University of California, Irvine (Jan. 4, 2001). After six years of effort by administrators, faculty, and others dedicated to the goal of a public law school in Orange County, the University of California Board of Regents approved the proposal in July 2007.

UCI Law commenced in July 2008 with fourteen founding faculty and one year to devise a curriculum, before the first class of sixty students arrived in August 2009.<sup>2</sup> Our founding dean, Erwin Chemerinsky, articulated his central vision for the curriculum as “to do the best possible job of preparing students for the practice of law at the highest levels of the profession.” During that initial year, the founding faculty met once a week to discuss and determine the content of their vision of an ideal law school curriculum. They initially decided the courses to include in the first year, and then voted to require that each student complete a substantial clinical course taught by one or more full-time faculty as a requirement for graduation (“core clinic”).<sup>3</sup> Each core clinic would be taught for six units, with a minimum of 220 practice hours and a maximum of eight students per faculty. This decision created the foundation for UCI Law’s plan to hire at least ten full-time clinical faculty, and the creation of the current ten core clinic courses, including CED.<sup>4</sup>

As the founding dean for the clinical education program, Carrie articulated a combination of requirements and goals for core clinic courses.<sup>5</sup> She advised that UCI Law should create a variety of types of core clinics to provide students with enough options to allow them to select a course that would assist them in developing competencies they anticipate they will use in their career. Carrie suggested UCI Law strive to create core clinic

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<sup>2</sup> The founding faculty were Erwin Chemerinsky (Dean), Dan Burk, Linda Cohen, Joseph Dimento, Catherine Fisk, Carrie Hempel, Trina Jones, Elizabeth Loftus, Rachel Moran, Carrie Menkel-Meadow, Beatrice Tice, Grace Tonner, Kerry Vandell, and Henry Weinstein.

<sup>3</sup> For a description of the first-year curriculum courses, see Carrie L. Hempel & Carroll Seron, *An Innovative Approach to Legal Education and the Founding of the University of California, Irvine School of Law*, IN *THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE* 169 (Scott L. Cummings ed., 2011) (UC Irvine School of Law Research Paper No. 2011-20, <https://ssrn.com/abstract=1851702>).

<sup>4</sup> The other nine core clinic courses are the Civil Rights Litigation Clinic, Criminal Justice Clinic, Domestic Violence Clinic, Environmental Law Clinic, Immigrants’ Rights Clinic, Intellectual Property, Arts, and Technology Clinic, International Justice Clinic, Ninth Circuit Appellate Litigation Clinic, and Worker’s Law and Organizing Clinic. UCI Law has previously had two iterations of a core clinic in Consumer Law, although this course will not be offered in the upcoming year.

<sup>5</sup> UCI Law also has several elective clinics that are most often taught by part-time faculty with expertise in specific subject matter areas such as employment, international human rights litigation, reproductive rights, and tax.

courses that would complement areas of non-clinical faculty expertise, to provide opportunities for faculty collaboration and offer students additional courses to complement their clinical education. She also advised that all core clinics: (1) structure their courses so that students, with close supervision, serve as the primary advocates for clinic clients, rather than faculty; (2) maintain caseloads that provide students with various intellectual challenges, in working through complicated substantive issues and in practicing sophisticated legal skills; (3) include some projects or cases that have the potential of an impact greater than addressing an individual client's needs; (4) provide their services pro bono to clients who otherwise would not be able to obtain legal representation; and finally, to the extent possible (5) design courses that provide opportunities for students to collaborate with professionals and/or graduate students in other disciplines.<sup>6</sup> Beginning in fall semester 2011, UCI Law offered its first class of sixty students four core clinics to choose from, including CED.<sup>7</sup> CED initially was the only core clinic with two faculty.

Fourteen years into its existence, UCI Law has, for the most part, succeeded in creating a variety of core clinics that accommodate students' preferences. We say "for the most part" for two reasons. First, students do not always get their first choice of clinical course, but more than 90 percent end up in a clinic of their first or second choice. Second, the current set of core clinics does not yet provide a proportionate opportunity for non-litigation experiences when compared to the number of students interested pursuing a non-litigation practice.<sup>8</sup> This past year, students could select among core clinic courses in appellate litigation, civil rights litigation, community and economic development, consumer law, criminal justice, domestic violence, environmental law, immigrants' rights, intellectual property, arts, and technology, international justice, and workers' law and organizing. Many of these core clinics involve subject matter areas that can

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<sup>6</sup> See Carrie Hempel, *Writing on a Blank Slate: Drafting a Blueprint for Experiential Learning at the University of California, Irvine School of Law*, 1 U.C. IRVINE L. REV. 147, 154–155 (2011), <https://scholarship.law.uci.edu/ucilr/vol1/iss1/10>.

<sup>7</sup> The three other original core clinics were Ninth Circuit Appellate Litigation, Environmental Law, and Immigrants' Rights.

<sup>8</sup> Three of the current ten clinics provide primarily non-litigation experiences: CED; Intellectual Property, Arts, and Technology; and International Justice.

be complemented by enrollment in non-clinical courses in the same area. Clinic faculty have autonomy in their choice of clients, cases, types of services offered, and limitations on their services. Nonetheless, all core clinics have adopted the four goals articulated above, except for the International Justice Clinic, which generally does not represent clients, as is common for clinics working in international law.<sup>9</sup>

UCI Law is one of a handful of law schools, if not the only U.S. law school, to require and guarantee an in-house clinical course for each student prior to graduation. This dedication of substantial school resources to clinical education is possible only because of UCI Law's foundational commitment to provide such a course for every student. The founding faculty took to heart the repeated conclusions of several important studies on the strengths and weaknesses of U.S. legal education: that most law school curricula do well at teaching analytical thinking, also termed technical expertise, but generally do not do well at providing students the means to acquire the hands-on skills necessary to successfully practice law.<sup>10</sup> In the pages that follow, we share two stories about the extent to which hands-on learning has had a positive impact on the lives of our clients, as well as on the education and careers of our students.

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<sup>9</sup> Examples of UCI Law core clinic efforts that have resulted in positive changes in law and society include: (1) the Criminal Justice Clinic's success in expanding the legal grounds for the compassionate release of federal prisoners to include consideration of whether the prisoner, if sentenced today, would receive a shorter sentence for the exact same offense. *See United States v. Poulcott*, 510 F. Supp. 3d 1137 (N.D. Ga. 2020); (2) the Domestic Violence Clinic's successful legislative advocacy for the enactment of SB 374, which made California the first state to have a law concerning reproductive coercion; and (3) the Immigrant Rights Clinic's litigation of a class action suit to uphold local community members' Fourth Amendment rights during encounters with immigration agents at or near their homes. *See First Amended Complaint, Kidd v. Wolf*, No. 2:20-cv-03512-ODW-JPR (Oct. 27, 2020).

<sup>10</sup> *See, e.g.*, AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (the MACCRATE REPORT); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (The Carnegie Foundation for the Advancement of Teaching, 2007); ROY T. STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (Clinical Legal Education Association, 2007).

## II. A SHORT HISTORY OF CED'S DEVELOPMENT AND LEARNING OBJECTIVES

We first taught CED in the fall of 2011.<sup>11</sup> While we were both experienced clinicians, with Carrie's fifteen years at the University of Southern California Gould School of Law and Bob's twenty-six years at Yale Law School, we faced several unknowns. UCI was a new law school with no prior clinical program, and Orange County was a blank slate, where we had few contacts. Worse, as the school year approached, we had no clients.

We did have a set of principles, most of which conformed to our experience. We would represent community-based groups and meet with clients in their communities. Students would be involved in client selection, following a process in which they would conduct an intake interview with the client and make a presentation to the class, with a recommendation as to whether to accept the request for representation. We then would ask the students as a group to answer two questions: should we as a clinic accept this client and, if yes, who is willing to do the work? We would advise the students that the discussions can be lengthy, and include considerations of priorities, allocation of resources, conflicts of interest, pedagogical value, competency, and long-term decision-making that may affect future generations of CED students. Finally, we would emphasize a problem-solving approach that includes both transactional and litigation strategies, offering clients the full range of services they would find in a law firm.

This type of practice is unusual for clinics focused on community economic development work. At a national conference of clinical law professors that we attended a few years ago, the consensus view was that UCI was the *only* CED clinic offering litigation services. While our policy was made easier by the fact that we both had litigation experience, it was also informed by our belief that a commitment to problem-solving would take us down unexpected paths and we would need to have multiple tools to help clients negotiate those paths.

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<sup>11</sup> In this article, the terms "we," "our," and "us" refer to the authors, rather than the CED clinic as a whole.

### *A. Clinic Learning Objectives*

As the CED syllabus explains, our learning objectives for our students include improving their: (1) listening, interviewing, negotiation, and legal drafting skills; (2) understanding of the dynamics of and work within groups; (3) ability to apply doctrine to real-world cases; (4) problem identification and problem-solving abilities; (5) writing skills in the context of emails, internal memoranda, memoranda to clients, demands to opposing counsel, and other written work product; and (6) oral skills through discussion of projects in weekly team meetings and formal presentations to clients, other students, opposing counsel, and possibly courts. In the classroom component, students learn about differing theories of community and community development, organizational development, and effective group work. Students also learn some real estate, housing, business organization, nonprofit corporation, tax, and employment law, and explore the impact of historical and current racial and other forms of discrimination in the communities we serve.

In addition to the more tangible skills outlined in our syllabus, we structure our course and the way we work with our students in an effort to teach them to take initiative and be creative in their approach to problem-solving, learn when and how to exercise judgment in evaluating client goals and cases, communicate effectively with their clients, and reflect on how the work they are doing does or does not match their own conceptions of professional identity. Finally, because virtually all of the clinic's clients are formally and informally defined groups rather than individual clients, we ask our students to consider and reconsider two questions: who is the client we represent, and what does the client want?

### *B. Initial Development of CED Clients, Including CED's First Two Mobile Home Park Resident Groups*

On the last day of orientation, the day before our first class, CED had its first client, a community development group in Santa Ana challenging California's Redevelopment Act. Then that client referred us to a Santa Ana business group. A colleague referred us to a scholar seeking to preserve the intellectual property of former slaves. When Pitzer College and the City of Ontario sought to form a new organization to develop a community garden on city land, the project director sought advice from her mother,

a clinical law professor in New York, who said, “You know, there’s this new law school in Orange County . . .,” and CED had another client. CED added other clients during that first year, but it was not until late spring 2012 that the clinic first became involved in representing resident groups at mobile home parks. CED’s mobile home park practice originated from two separate events, each of which was to have a major effect on its work and the cumulative effect of which was to define the clinic in ways we could not have predicted.

The first of these events began with a simple request. One of our first students, Sam Lam (2012),<sup>12</sup> now a senior counsel at Skybound Entertainment in Los Angeles, wanted to reach out to Orange County’s Vietnamese community, many of whom lived in mobile home parks in Westminster. Sam arranged a Saturday morning meeting with former state Senator Joseph Dunn, who was instrumental in drafting California’s Mobilehome Residency Law (MRL). Those who attended the meeting were: CED students and faculty; Senator Dunn; Henry Heater, a lawyer representing several mobile home park residents; and Maurice Priest, a former lobbyist for Golden State Manufactured-Homes Owners League (“GSMOL”) and the president of a nonprofit tax-exempt corporation named Resident Owned Properties (“ROP”). Our three guests trained the CED group in California Mobilehome Law and suggested types of services for which mobile home resident groups needed pro bono representation. Not long after the meeting, in the best tradition of our profession, Henry Heater referred to CED a San Bernardino rent increase case and Maurice Priest asked CED to help a group of San Juan Capistrano mobile home park residents form a nonprofit tax-exempt organization to purchase their park.<sup>13</sup>

The second event occurred shortly before spring semester 2012 final exams. UCI Law’s Environmental Law Clinic sponsored a talk by a California Rural Legal Assistance (“CRLA”) lawyer on the oppressive environmental conditions and management practices at a small mobile home park in Riverside County’s Coachella Valley. Several Environmental Law Clinic students wanted to help CRLA, so we accompanied those students and

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<sup>12</sup> The date in parentheses next to each former student’s name denotes their year of graduation.

<sup>13</sup> The San Juan Capistrano mobile home park referral is the subject of one of the two case histories we discuss below.



a few more CED students on a two-day field trip to talk to residents and county officials. We left knowing that CED would continue to be involved, but also that CRLA would be lead counsel. We did not have a plan, and we did not yet know where this project would lead us. We did not know that the Capistrano Terrace and Shady Lane projects, described in the pages that follow, would substantially influence the course of CED's work. In the next two sections, we describe CED's work over the next seven to ten years on these two projects, including the work of our students, the decisions made, the results achieved, and the effects of these experiences on our students and their careers as attorneys.

### III. SHADY LANE

Shady Lane Mobilehome Park is located in the Coachella Valley unincorporated town of Thermal, California. Thermal is well-named, as during the time CED represented its clients, the average high temperature for June through August was 106 degrees, and temperatures of 115 degrees or higher were not unusual. Many of the residents were Latino farmworkers living in unpermitted mobile home parks with ongoing water, sewage, electrical, and air-conditioning problems. In midday in the summer, it was not unusual for the electricity in Shady Lane Park to fail, resulting in residents not having air conditioning in their mobile home units. Consequently, temperatures in the units sometimes reached 120 degrees.

In many ways, Shady Lane Park was a typical residence for California farmworkers. The property became a mobile home park when a farmworker asked his coworker, Mr. Garcia, if he could park his mobile home on Garcia's land. Garcia agreed — and started a business — eventually laying fifty-six pads on which to place homes and building a four-apartment structure for his family. The electricity was inadequate, the sewage consisted of open septic fields dug by residents, and the water came from a contaminated well. Eventually, Garcia contracted with his neighbor, who ran a mirror-image park adjacent to Garcia's, to share use and maintenance of a better well on the neighbor's property. On the day he died in 1998, Garcia transferred the property to six of his seven children. Although the elder Garcia never secured a conditional use permit ("CUP"), his children started the

process, only to abandon it when they learned the projected costs of necessary upgrades.<sup>14</sup>

In 2011, Riverside County issued the Garcias a notice of noncompliance with health and safety regulations. The Garcias responded by serving the residents and County a notice that they intended to close the park in one year.

In Spring 2012, CED began working with our co-counsel, CRLA. We filed a complaint and a motion seeking a temporary restraining order in Riverside County Superior Court to prevent the park's closure. The complaint alleged several habitability claims, based on deplorable conditions in the park, and that the owners failed to follow MRL requirements for proper notice of a landowner's intent to close a park.

Although CRLA was lead counsel, the lawyers agreed that Meg Tanaka (2013), then a UCI Law second-year student in the CED clinic, and now an attorney at the Orange County Office of County Counsel, would argue the TRO. Meg reports:

I had the opportunity to argue a temporary restraining order request to enjoin the owners from improperly closing the mobile home park. My classmates and supervisors spent time mooting and posing various questions to test our legal arguments. I learned strategies from our supervisors about how to prepare notes for oral argument. They emphasized the importance of truly listening to the question asked while not losing sight of the goal of preventing the park's imminent closure. On the morning of the court hearing, I remember all of us waiting on the benches in the courthouse. When the case was called, I barely started my argument before the judge began asking questions about the timeline of our request. I quickly had to pivot away from my notes to directly respond to the court's questions. I was thankful for all the team preparation and relied on our collective research to argue about the catastrophic impact of the mobile home park closing and residents losing their homes.

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<sup>14</sup> Municipal and regional planning commissions grant conditional use permits to allow a landowner to legally use their land in a way not permitted by zoning regulations. These permits are often subject to conditions imposed at the time of granting that require movement toward eventual compliance with applicable regulations, and the ability to revoke the permit if the landowner does not meet certain milestones.



SHADY LANE MOBILEHOME PARK RESIDENTS PHOTO COLLAGE.

*Courtesy UCI Community Economic Development Clinic.*

During oral argument on the motion, the Garcias' legal counsel agreed to the residents' demand to keep the park open, eliminating the court's need to grant a TRO. This was the first victory in this case for our clients, who told us their most important goal of the litigation was to keep the park open to maintain their community. The other goals the residents articulated, in order of importance, were stabilizing rents, securing reliable access to air-conditioning in summer months, and improving wastewater system management to eliminate sewage overflows and ensure the ability to operate washing machines.

Several semesters of CED students represented the clients in the discovery phase of the litigation, which lasted for approximately two years. Students propounded written discovery, answered defendants' discovery requests, and defended depositions of several park residents. Alex Ackel (2016), also a second-year law student when he began working on the Shady Lane project, and now a senior associate trial attorney litigating plaintiffs' medical malpractice, civil rights, products liability, and personal injury claims at the Seattle law firm Friedman Rubin, observed this about his experiences representing the residents:

When I first started working on the Shady Lane Mobile Home Park project, the case was in active litigation. From the outset, the lawsuit faced a major challenge: how do you on one hand allege that the owners must keep the park open, and then also allege that the park is completely uninhabitable? Perhaps even more

challenging was the fact that no matter how successful we were in litigating the case, the owners would never be able to afford the needed repairs.

In Spring 2014, the court ordered the parties to mediate and assigned an attorney the court described as “one of his best mediators” to the task. After two rounds of mediation, the parties in November 2014 negotiated and agreed to principal terms of a conditional settlement. The settlement agreement provided Shady Lane Park residents twelve months to identify and approve a buyer to purchase the property from the defendants for \$225,000.<sup>15</sup> In the interim, the owners agreed to make certain repairs to the park’s electrical system.

CED’s next big hurdle in the case was to find an appropriate buyer. The residents informed CED that they wanted a nonprofit corporation to own the park but did not want resident control. The task was made more difficult because the park did not have a conditional use permit, which meant that an owner could not legally require the residents to pay rent.<sup>16</sup>

Starting in early 2015, our students embarked on a series of efforts to find a buyer and begin renovation of the park. Alex recalls the challenges we faced in looking for a new owner by the deadline and his work on a contingency plan in the event we could not:

Finding a new buyer who had both the experience and resources to operate the park in the right way proved to be difficult. As a stop-gap, we came up with a creative solution; we created a nonprofit to act as a transitional owner that could begin the development planning process while we searched for a permanent owner.

In February 2015, CED students filed the paperwork to incorporate Shady Lane Mobilehome Park Inc. (“SLMP”). Three Coachella community

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<sup>15</sup> \$225,000 was \$75,000 less than the amount CED believed the park was worth, based on the calculation of the cash flow of a fully permitted park reduced by an estimate of the expenditures necessary to bring the park up to permitted standards. The settlement agreement did not become final until September 2015, which allowed the residents an additional six months after the principal terms were set to find a purchaser.

<sup>16</sup> Amazingly, throughout the course of the litigation and during the period after settlement before the new owner obtained a CUP, Shady Lane Park residents voluntarily paid their rent each month, presumably understanding the importance of those continued payments to their goal of the continued existence of their residential community.

members, one of them a park resident and leader of the informal resident organization, agreed to sit on the initial board of directors, along with the two of us. Despite the potential for future conflict of interest issues with park residents, we agreed to serve as directors and counsel for SLMP after obtaining the consent of residents and with the knowledge that CRLA would still serve as counsel for residents and their informal organization. The potential for conflicts between the residents and the corporation led to a formal split between CRLA and CED. We each represented separate interests, and everyone was concerned that the residents not lose the value of independent counsel. We were all aware of another mobile home park in Coachella Valley where the new nonprofit owner raised rents to improve the park and the actual conflicts that arose. In our case, as we moved toward selling the park to a new owner, questions did arise, but they never erupted into actual conflict. CRLA's continuing role as the residents' attorney helped resolve issues at an early stage.

Also in spring semester 2015, students began what would turn out to be over three years of effort to obtain a CUP to end the park's many years of illegal operation. Several teams of students worked continuously on the various tasks Riverside County required an applicant to complete before it would issue this permit, including meeting with various county officials involved in the CUP process, vetting, retaining, and working with experts to complete numerous reports, making presentations to other local officials and commissions, and exercising judgment about when and whom to push harder to move the process forward.

In addition three students took the initiative to conduct online research for sources of funding for the park. They came up with two possibilities: a pre-construction grant from the California Department of Water Resources for pre-construction work to bring a water and sewage system to the park, and a second state grant to provide for emergency drinking water. These students drafted applications for both, and both were approved. The emergency water grant provided \$69,000 to the park and was subsequently renewed. The grant to design a new water and sewage system presented a serious time crunch, and the students submitted the application electronically at 11:50 pm, barely meeting a midnight deadline, the day before their law school graduation ceremony.

Nahal Hamidi (2016), currently a real estate attorney at Tesla, was one of those graduating students. She worked on the Shady Lane project for at least two semesters. She recalls the following about her work to provide her clients better living conditions:

I gained invaluable firsthand legal experience including negotiating a settlement agreement, drafting a purchase and sale agreement, forming a nonprofit corporation, and applying for a conditional use permit to legally operate the park. Most importantly, I learned about creative lawyering to make sure my client's needs were being met. During our representation of the park and its residents, one ongoing habitability issue the residents were facing was the inadequate water and sewer systems. The water supplied to the park was contaminated with chromium 6, which poses a risk of cancer when ingested. Although we were simultaneously working on settlement efforts, we realized that the water and sewage issues needed to be solved as soon as possible, and the residents would potentially not have sufficient resources to solve this issue even after settlement was reached. We quickly became experts in assessing the costs and feasibility of different sewage and septic systems; researched potential methods to treat chromium 6; and researched potential grants which could help address these issues. We applied for and successfully obtained \$250,000 in grant funding from the California Department of Water Resources (DWR) Proposition 84 grant program to provide park residents access to clean drinking water and to install a functioning sewer system.

In spring 2016, CED started to reach out to potential buyers and potential lenders in the event SLMP became the purchaser. We met with Clearinghouse CDFI to see if it would be willing to lend money for the park's purchase.<sup>17</sup> After a few meetings, despite the relatively small loan amount, Clearinghouse determined that it would not finance the acquisition of Shady Lane Park because of the uncertain amount of expenses the county would eventually require to bring the property into compliance with state

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<sup>17</sup> Clearinghouse CDFI is a Benefit Corporation that "addresses unmet credit needs throughout the U.S. and in Indian Country through direct lending, equity investments, and financial assistance. <https://www.clearinghousecdfi.com>.

and local regulations. We had funding to design a water and sewer system, but it was impossible to determine what the ultimate cost of that and other improvements would be, as well as whether we would need to temporarily relocate residents during the renovation and what that would cost the park.

Also, during spring 2016, CED identified a very promising potential buyer, the Caritas Corporation (“Caritas”). Caritas is a faith-based tax-exempt nonprofit corporation dedicated to providing affordable housing in California, specifically through ownership and management of mobile home parks. Initial conversations went well, and CED worked with Caritas staff to draft a joint-venture LLC to buy, renovate, and manage the park.

A few weeks prior to the September 2016 deadline for purchase pursuant to the settlement agreement, however, Caritas informed CED that its board of directors was not willing to approve the purchase for a park without a CUP. Caritas suggested an alternative: it would lend SLMP the money needed to purchase, and in return, SLMP would give Caritas the option to purchase the park once it obtained a CUP. If Caritas decided to exercise its option to purchase, the outstanding balance of Caritas’ loan to SLMP would be forgiven in return for the transfer of ownership of the property.<sup>18</sup> SLMP and the park residents accepted the offer and shortly after, SLMP became what we hoped would be the short-term, interim park owner.

This turn of events put even greater pressure on CED to get a CUP for SLMP as soon as possible. As we painfully learned, getting this permit ended up taking quite a while longer and quite a lot more work. Christopher Valentino (2018), now a real estate associate in the San Francisco office of Gibson, Dunn & Crutcher, remembers his efforts to get the CUP application approved:

When I joined the Shady Lane project in Fall 2017, the project had been going for at least six years by that point, and my team’s job was to oversee the final approval of the conditional use permit by the County Planning Board, a task that three or four previous groups of students had worked on for years. On paper, this was a project that everyone could get behind, but the challenge was two-fold: (1) getting the county to pay attention to our project long enough

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<sup>18</sup> The Purchase and Sale Agreement, Option Agreement, and Loan Agreement are all available on request.



to gain momentum, and (2) organizing our third-party partners and getting them to deliver their specific pieces of the project (be that a survey, capital funding, or a management plan) while we had the county's attention.

I remember that getting the CUP across the finish line required: (1) sheer unrelenting force of will, and (2) coordination. Getting responses from the county on even the most basic of items took constant follow-up (emails, phone calls, voicemails) and was a serious impediment to moving our application forward to the commission hearing. We utilized a dual track method of both constantly following up with the Planning Department (in the nicest way possible) and engaging with local elected officials to help put pressure on the Planning Department to respond to us. This strategy worked, and we got the Planning Department's attention, but then we had to deliver all the outstanding items necessary for a commission hearing, which meant we had to coordinate with a series of third-party partners to provide the necessary technical and managerial expertise to convince the planning commission that the project would be successful (i.e., be able to satisfy the conditions of approval and bring the park up to certain code requirements).

This experience operationalized the term "zealous advocacy" for me. It showed me that successful transactional lawyering is about moving forward, no matter how "stuck" the case may be, and trying alternative means of advocacy when the formal procedures are indifferent to your client's cause. Procedural, or substantive, laws are only as useful as the organizations designed to implement them.

In June 2018 the Riverside County Board of Supervisors approved the conditional use permit. At a July 2018 meeting between Caritas and CED, Caritas exercised its option to become the owner. In April 2019, SLMP formally transferred its ownership to Caritas and CED's work to transform the park into an affordable housing community was finally complete.

In sum, although many clinical programs have litigated habitability issues and others have closed on real estate purchases, in the Shady Lane project, CED did both, as well as serving as the de facto developer to bridge the litigation and the purchase. We believe this is the only time a law school



clinic has filled all three roles, and it exemplifies our view of what we mean by problem-solving. The problem took us down an unexpected path, and we responded with determination, finding creative solutions to achieve our clients' goals.

#### IV. CAPISTRANO TERRACE

Capistrano Terrace Mobilehome Park is a 150-unit residential park built in the mid-1950s on a steep slope overlooking Interstate 5 in San Juan Capistrano, California. By 2000, the park was in poor condition. In 2007, residents filed a failure-to-maintain lawsuit against the owner that resulted in a substantial judgment, leading the owner to seek bankruptcy protection. In the U.S. Bankruptcy Court, the Creditors Committee approved a resolution in 2012 whereby Resident Owned Parks Capistrano Terrace ("ROPCT") would purchase the property for the amount of the debt, including attorney's fees. ROP, the Priests' nonprofit mentioned above, would manage the park for the benefit of the residents and ROPCT would resell it to the residents for the purchase price, earning no equity. Maurice Priest was the president of both organizations and his wife, Diane Priest, was the vice-president.

Also, in 2012, Mr. Priest, as ROP's president, negotiated a purchase and sale agreement ("PSA") between ROPCT and the park's resident association, Capistrano Terrace Mobilehome Owners Association ("CTMOA"). The agreement provided that the park would be sold within three years to a tax-exempt entity who would own it on behalf of the residents. Mr. Priest asked CED if it would be willing to work with the residents to form such an organization to purchase. CED agreed and was retained by CTMOA, after which the clinic learned of two additional agreements: a management agreement in which ROP stated all funds would be used for the benefit of the park, and a separate agreement in which CTMOA retained ROP to be its exclusive agent in securing financing for the purchase of the park, with a broker's fee. In addition, CED determined that rather than using excess capital for the benefit of the park, the manager (ROP) was retaining the funds with the intention of keeping them when the park was sold to another entity, even though the purchase and sale agreement stated that

all funds were to be used for the benefit of the park.<sup>19</sup> CED's work to form a tax-exempt entity and draft bylaws suddenly looked more complicated.

To further confuse matters, when Maurice Priest met with the residents, he told them that once he got financing, the residents would own their property, when, in fact, the PSA provided that the property would be owned by a nonprofit organization, controlled by the residents. Although on several different occasions, CED corrected Mr. Priest at resident board meetings, the residents had already heard Priest's incorrect assertion on many occasions. Unfortunately, several residents believed the property would be subdivided and they would own the land underneath their homes, without understanding that this would mean they would need to find money to pay what would amount to a \$66,000 prorated cost per unit to pay off the mortgage and liens — money we believed most residents did not have. Our belief was confirmed at meetings with residents and through a review of income statements required by funders.

Nevertheless, Capistrano Terrace residents had suffered for years under difficult conditions and the opportunity to purchase their community generated a great deal of enthusiasm among them, along with the conflicting visions of the park's future ownership structure and fears that ROP was not acting in their best interest. Residents learned that ROP had taken ownership of several other parks with the stated goal of creating resident-owned parks but had not yet transferred any of those parks to other ownership. Many residents expressed concern that ROP would use this opportunity to add their park to its growing, seemingly permanent, portfolio.

Lindsay Anderson (2018), a second-year student at the time, and now a community association counsel at Epsten in San Diego, reflected on what it was like as a law student to work on the project during this time:

Working in the Community and Economic Development Clinic is what made law come alive for me. Reading cases and attending classes were a necessary evil of school, but the CED Clinic is where I found my passion. During my time in the clinic, I was privileged to work with a wonderful group of mobile home park residents who

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<sup>19</sup> The PSA states that ROPCT “shall use the remaining portion of monthly space rents . . . to pay for the proper operation, maintenance, management, and reserve payments to assure that the subject property is well maintained.”

were trying to purchase their mobile home park. Working with a homeowners' association is like nothing else. It is a crash course in handling client emotions and expectations. *Everything* is personal because the board members live there. The board members' passion is contagious. They are so invested in their community that you cannot help but become invested as well. Every up of the association is your up and every down is your down, but if you are lucky like me, every triumph of the association is your triumph.

We formed Capistrano Terrace Organization (“CTO”) as a 501(c)(3) tax-exempt organization. As with many of our clients, the residents at Capistrano Terrace had a wide variety of skills, but managing a corporation was a new experience. Like many volunteer boards, there was frequent turnover, magnified by the fact that CTO had yearly elections, with one-half of the board seats open. Residents were highly invested in the elections for board positions that were work intensive, as the board coped with purchasing and operating a 150-unit housing complex.

Parth Jani (2020), currently a labor relations attorney in the Irvine office of Jackson Lewis, also reflected on his experience representing the CTO board:

By fall 2018, the newly elected board needed to be advised of its bylaws and proper procedures to run both a board and community meeting. This required CED students to focus on taking the bylaws of the park and training board members in the proper procedures. The challenge was taking a legal concept, such as the importance of a quorum, and explaining it to individuals who did not have a legal or sophisticated background. Students put together PowerPoints, met with one another to prepare presentations, and presented certain topics to board members by using interactive styles, such as fill-in-the-blank sheets. These training meetings with the new board allowed students to tap into their own creativity and think about how to explain any concept without relying on too much “legalese.”

This interactive approach and training sessions we held for the new board members of CTO proved to be working because when we would go to their meetings, we could see new members making

sure there was a valid quorum to run a meeting. They would rely on the Robert's Rules of Order cheat sheet another student made for them when an issue came up on how to conduct a vote. I was privileged enough to be on this project for four semesters. Over that time, I got to see a newly minted board learn new terms, understand their bylaws, and run meetings with minimal supervision.

ROP's efforts at refinancing, which depended on HUD-insured and state loans and which continued for several years, were all unsuccessful, and the residents feared that ROP would own the park in perpetuity. The financing was made more difficult by the fact that the park property needed substantial slope remediation to meet current safety standards, a process that increased the loan amount by several million dollars. CED also was concerned that as ROP continued to remove funds from the park's reserves, it had little incentive to sell to CTO. In addition, ROP spent over \$500,000 on engineers, architects, and other experts to complete the loan package, and treated these costs as a loan to be repaid by CTO, even though ROP had used rental income to pay these costs. CED believed that such costs were implicitly covered under the PSA's terms as a cost for the benefit of the park.

Mark Stamper (2016), a second-year student working on the CTO project, and now a deputy public defender in the Kern County California Public Defender's Office, stated:

My first clinic project initially involved helping mobile home park residents form a nonprofit and purchase their park. The project evolved as other students and I identified major misrepresentations by the residents' agent along with what we believed were significant misappropriations of funds. Our professors encouraged us to further investigate and research these issues. We identified several causes of action, including breach of contract, breach of fiduciary duty, and fraud. We met frequently as student-attorneys to discuss how to present our findings to the client and what strategies to recommend. Our professors offered advice and guidance as necessary, but generally allowed us to make our own decisions on how to proceed. We presented our findings and advised our client at weekly meetings. We learned to answer questions confidently and help

resolve disputes that arose along the way. The project also provided my first opportunity to interact with opposing counsel. This began with somewhat friendly questions that evolved into formal demands and ended in mediation when those demands fell through.

With all these issues pending, CED brought suit on CTO's behalf against ROP, ROPCT, Maurice Priest and Diane Priest. The litigation posed difficult real-world questions of professional responsibility. The ROP president, a member of the California bar, had drafted the PSA and presented it to CTMOA, which was unrepresented at the time. We were confident that a court would interpret ambiguous provisions against ROP. If we were correct, CTO would prevail in litigation and recover a substantial judgment. On the other hand, CTO's main objective was to purchase the park on behalf of the residents, and litigation would delay that process. Furthermore, any recovery would be used to reduce the purchase price, which meant that it would be effectively amortized over the length of the loan and each resident would receive a small benefit.

As noted above, we try to teach the students to consistently focus on the client and the client's needs and this was a perfect example of a case where a strong legal argument did not serve the clients well, the legal equivalent of a successful operation in which the patient died. With the CTO board's approval, CED negotiated a settlement that resulted in a new PSA with a defined purchase price, less than the price to which ROP claimed it was entitled, but greater than what we felt CTO could attain through litigation. The settlement process was difficult for clients, students, and attorneys. Lindsay Anderson (first quoted above) reflected on her role:

I was a student in the clinic right at a pivotal moment for CTO. The clinic had filed a lawsuit on behalf of CTO against the owner of the park — this owner had purchased the park with the promise of selling the park to the homeowners once they had organized and were ready for ownership but just kept moving the goal posts — and CTO needed to decide whether to settle or to take the lawsuit all the way. It was difficult to advise on because we were confident in our case, our client was righteously angry, and the terms for settlement kept changing.

We did not know if settlement was even possible, so we continued down two paths simultaneously for as long as we could. On the one hand, we were pushing hard for settlement. I attended negotiation calls with the owner and their attorney. I assisted with drafting settlement agreements and with loan applications, as CTO had no funds and was looking to purchase a multi-million-dollar mobile home park. I led calls with structural and civil engineers to discuss the issues with the slope that would need to be addressed after the purchase. On the other hand, we were moving forward with the lawsuit. I appeared in court for a case management conference (and immediately realized that I wanted to be a transactional attorney rather than a litigator!).

So many pieces were moving at once! At a time when I think other supervisors would tighten the reins or become micromanagers, Bob and Carrie encouraged us to think creatively. Throughout the entire experience, I felt empowered to experiment and safe in the knowledge that I was being shepherded by two brilliant legal minds.

Eventually we came to the point where the settlement would fall apart if CTO did not dismiss the lawsuit. Would scorching the earth in an epic lawsuit be satisfying? Duh. But was that truly what was in the best interest of the client? I remember struggling to know what to advise. There were so many hurdles — an unhelpful current owner, a strong willed and difficult to sway president, an ever-changing board, private financing and potential state sponsored financing, disenchanted community members — and so many ways for everything to blow up and go horribly wrong.

Watching Bob and Carrie struggle with this as well made me realize that this was not a situation with a definite answer. Bob's optimism and Carrie's pragmatism are a wonderful match. Advising in a situation like this, when there is no clear right path, takes courage and watching it modeled in Clinic helped to shape the attorney that I am today: one who keeps my client's best interests at heart and never stops fighting for them.

Unlike Shady Lane, Capistrano Terrace was fully permitted, with a strong cash flow, and a purchase price of \$10 million for a park with an appraised value of \$21 million. However, CTO had no cash and no assets. ROP, as CTO's

broker, based its financing plan on federal and state grants, but MPRROP, the state funder, rejected ROP's application and without state funds, the federal HUD grant was insufficient.<sup>20</sup> CED restructured and resubmitted the MPRROP grant, but MPRROP's restrictive interpretation of income disregarded the rent of any resident who refused to complete an income verification form, resulting in MPRROP's rejection of the second application.

At that point, CED returned to Clearinghouse CDFI, even though as noted above, it had rejected Shady Lane's application for financing because CED was unable to provide a specific dollar amount for bringing the park up to code. This time, however, Clearinghouse came through and financed the full purchase price of \$9,985,000. In April 2018, CTO closed on the property and became the owner of Capistrano Terrace. Two years later CTO was able to take advantage of low interest rates and refinance, which enabled it to build a substantial reserve, improve the property, and ensure that the units will remain affordable. Throughout the process, CED students represented CTO in closing the refinancing loan, securing a new manager, negotiating easements, and advising the board as issues arose.



CAPISTRANO TERRACE ORGANIZATION (CTO) BOARD MEMBERS (SEATED, WITH ONE CHILD OF THE BOARD PRESIDENT), LAW STUDENTS, AND AUTHORS CARRIE HEMPEL AND BOB SOLOMON (TOP RIGHT).

*Courtesy UCI Community Economic Development Clinic.*

## V. CODA: FORMER STUDENTS' REFLECTIONS ON CED'S IMPACT ON THEIR CAREERS

The CED clinic is not structured, as are many clinical courses, on consistently teaching a set of legal skills to every class of students, such as learning how to file and argue a temporary restraining order, create and provide legal support to a nonprofit corporation, or defend a criminal case. Clinics

<sup>20</sup> MPRROP is the commonly used acronym for California's Mobilehome Park Rehabilitation and Resident Ownership Program, a grant and loan program managed by the California Department of Housing and Community Development.



structured in this manner can perhaps articulate more readily tangible skill development goals for every student. Instead, as noted at the beginning of this paper, we structure the work of the CED clinic around meeting our organizational clients' goals, which leads to our clinic students' practicing different skills depending on their project assignments and when they are enrolled in the clinic. Also, as noted above, many of our students enroll in subsequent semesters, to continue to work with clients and on projects to which they become passionately attached. Many of our projects are complicated, messy, and some are still not completed after the ten years the CED clinic has served as the clients' legal counsel. Our students graduate with a variety of experiences, but it is our goal that in every case, they leave UCI Law better prepared to tackle their entry into and continued experience in practicing law. In this last section of the paper, we share some of our students' reflections as to how their CED experience has contributed to their still relatively new legal careers.

Alex Ackel (first quoted above) reflects that:

Since graduating six years ago, I have come to appreciate the value of the experiential learning I received in the Community & Economic Development Clinic. I learned the important lesson that as legal professionals, you cannot always avoid risk. In fact, by taking risks you force yourself to find creative solutions for your clients, which ultimately leads to continued learning and growth.

Nahal Hamidi (first quoted above) notes:

The skills I gained in the clinic are skills I directly applied post-law school. After law school, I worked at two different law firms specializing in low-income housing — and one of the main reasons I chose those firms and succeeded at them was because of my experiences and knowledge gained through the CED Clinic.

Christopher Valentino (first quoted above) shares this:

Coordination may be a corporate buzzword that is thrown around all too often, but the concept of coordination is essential for the practice of law. I first learned that in Shady Lane because we had to coordinate with several third-party partners whose technical knowledge was essential to convincing the county to approve the



CUP. But my subsequent practice has reinforced this. No single lawyer, no matter how skilled, can answer all of a client's questions; but a skilled lawyer can be the person who assembles a team that can answer all of a client's questions and that can get the job done. More broadly, my time in clinic showed me how important humility is in the practice of law. Attorneys have a reputation of being brash, arrogant, and full of themselves. This reputation is not without a grain of truth. However, clinic showed me that the best attorneys are those who approach their work with humility, listen to their clients, and empower their colleagues.

AJ Talt (2017), a corporate transactional associate in the Silicon Valley office of O'Melveny, states:

One of the focuses of the CED clinic was always asking ourselves 'What are the client's goals and how can we achieve them?' I have found this to be a particularly helpful question I continue to ask myself on a daily basis during my practice, as it can be tempting to focus on things that I may feel "right" about but do not ultimately matter to the client. For example, when I am negotiating a transaction, I may think that a term should be written a certain way because it is done that way for 95 percent of people in my client's position, but if that term ultimately does not matter in achieving my client's goals, I have to remind myself that it should not be a priority. I do not think I would be as successful in understanding clients in my current practice and customizing my communication style to their specific needs without the experience I had at the CED clinic.

Parth Jani (first quoted above), who worked on the Capistrano Terrace project, finds:

The benefit of working with the CTO board of directors was that it allowed me to practice how to explain complicated concepts to people who do not have a legal background. This is a skill that I use in my career today as a young associate advising businesses on the implications of a lawsuit and the potential defenses we will use. For example, when drafting a client email, there are times where my first draft contains legal terms without any explanations. However,

one thing I learned in CED was to take a step back and think how someone with no legal training would understand what I was trying to communicate. I do this when drafting client emails, which has proven to be helpful in my career.

And finally, Mark Stamper (first quoted above) reflects:

I participated in UCI's Community and Economic Development Clinic for three semesters in law school. Six years into practicing law, I believe I learned more from the clinic than the rest of law school combined. The clinic gave me practical experience and taught me lessons far more valuable than most of the reading and lectures from the rest of law school. I have received compliments from colleagues and judges regarding my poise and demeanor handling difficult situations in court. I acquired those skills from my experiences in UCI's clinic and from the guidance of the clinic's professors.

## CONCLUSION

In the two case studies discussed above, although CED was able to achieve its clients' goals of nonprofit ownership of their mobile home parks, not all the clinic's efforts on behalf of its clients have ended as well. Still, both projects exemplify our pedagogy, in which we place strong emphasis on student responsibility, community service, team collaboration, developing professional judgment, and creative problem solving. We have attended enough clinical law professor conferences to know that our clinic is an outlier in terms of both the breadth of legal tools we are willing to help our students employ, and the variety of substantive areas of law CED students learn in order to assist their clients. This type of practice means that our students will not all have the opportunity to learn the same set of skills. And although CED may not always achieve its clients' goals, this approach puts the community at the center of the clinic's work and gives students the mandate to listen to a client's problem. That's the starting point and we are open to using whatever legal tools the solutions to those problems may require.

# ENERGY LAW AND POLICY CLINIC:

*University of San Diego School of Law*

JOSEPH KAATZ\*

## TRAINING FUTURE CLIMATE AND ENERGY ATTORNEYS THROUGH COLLABORATION AND PARTNERSHIP

The purpose of the Energy Law and Policy Clinic (Clinic) instructional content is to develop in students a fundamental understanding of the complexity of energy and climate issues in California by performing legal work for state regulatory agencies or local government. Students are challenged to gain an understanding of complex areas of laws that form the legal structure of regulatory action in the state and to come to terms with the difficult tradeoffs between reducing greenhouse gas emissions, supplying reliable and affordable energy, and balancing environmental justice with economic, technical, and political limits. Students come away with an understanding of what this work entails and how to successfully practice in

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\* Joseph Kaatz serves as the staff attorney at the Energy Policy Initiatives Center (EPIC) at the University of San Diego School of Law and also supervises the Energy Law and Policy Clinic.

these areas, both in terms of the challenges and opportunities that exist. This Clinic is unique in that, by partnering with a state agency or local government, students are in a position to inform regulatory and policy decisions that may impact the entire state, a region, or a city.

The outcomes from this Clinic are twofold: first, to produce a high-quality work product on a topical issue for our client in a way that better informs the client and the students; and second, to train law students through a professional experience in an applied experiential setting that improves each student's legal research, reasoning, drafting, and editing skills while further developing their competence in client management, ethics, oral presentation, time management, and working collaboratively. The work product that is completed represents countless hours of effort, discussion, and thought. For students, the work outcome is an opportunity to impact issues that affect millions of Californians.

Often, the completed work serves as the underlying research and drafting for future regulations, court briefs, legislation, or other policy decisions. The Clinic's work has included, but is not limited to, the following areas: cap-and-trade, greenhouse gas reduction and removal, Clean Air Act regulation, environmental enforcement authority, community choice aggregation, energy data privacy, energy efficiency implementation, renewable energy mandates, statutory implementation of agency mandates, power plant siting, transmission interconnection regulations for renewable energy, increases in vehicle-related emissions caused by statutory land-use changes, and fee versus tax issues.

The following will discuss the Clinic's background, teaching objectives, outcomes, and conclude with alumni reflections.

## BACKGROUND AND HISTORY

The Energy Law and Policy Clinic was created in 2008 to further the Energy Policy Initiatives Center's (EPIC) mission to train law students and to provide objective information and analysis to policy makers. Because of EPIC's mission, the Clinic structure does not include engaging in litigation or advocacy. Instead, the Clinic seeks to partner directly with regulatory agencies to perform legal research and produce requested work product.

EPIC sponsors the Energy Law and Policy Clinic (Clinic) every spring semester. The Energy Law and Policy Clinic is one of three course offerings sponsored by EPIC, with the Clinic being the only offering that combines EPIC's mission to both train law students in climate and energy law and provide objective information to policy makers. The Clinic matches a small group of students each year who have taken the Energy Law and Policy course or Climate Law course, have energy or climate experience, or share an interest in these areas, with an energy- or climate-related local government or state agency to conduct legal research on topical issues. It is unique in that the client is a sophisticated government entity working on complex legal issues in the climate or energy field that sets the stage for students to gain experience as outside counsel while working with and learning from agency attorneys and staff. The Clinic is designed to serve client needs while aiding students in successfully entering the job market by building upon and sharpening the skills developed and the knowledge gained during each student's time in law school.

The diversity of California regulatory agencies offers a broad range of opportunities in terms of subject matter, work culture, and purposes that benefit the student experience. It also allows the Clinic students to engage in the ever-changing work of these agencies as statutory mandates, policy, and the world evolve over time. The Clinic has worked with the California Energy Commission (CEC), California Air Resources Board (CARB), California Public Utilities Commission (CPUC), the Governor's Office of Planning and Research (OPR), and local governments such as the City of San Diego. Rarely has the Clinic worked on the same issue twice, unless the legal landscape has changed and the issues are new. This is both challenging and exciting. It is challenging for a supervising attorney to prepare students and for the students to gain an expertise in a short period of time on complicated issues. It is exciting because the issues are topical, timely, and highly motivating.

## CLINIC WORK SUBJECTS LEAD TO JOB OPPORTUNITIES

Part of the benefit of working with a local or state agency on a topical subject is that the expertise and experience gained by students can open job

opportunities upon graduation. Over the years, these opportunities may be either specific to a particular area in which that a student gained expertise during the Clinic or in an area where the general experience of the Clinic lends an advantage over other candidates for that position.

One project where the specific topic led to a job in a directly relevant practice area focused on aiding the Office of the City Attorney, City of San Diego, with the creation of a community choice aggregator (CCA) to implement its climate action plan as part of its greenhouse gas mitigation plan. The subject area of our research focused on the legal requirements of CCA governance structures, implementation plans, and financial separation from the city general fund. Students analyzed the statutory authorization for creating a CCA, as well as all existing and proposed CCA governance structures and implementation plans in existence at that time in California. The students applied their analysis to a wide range of issues, including forming a CCA joint powers authority that would meet regional concerns over how to weight board member voting rights given the significant disparity in size between the City of San Diego and all other potential local government members in the region. The students also vetted issues over startup financing, reserve allocations, withdrawal rights, the power charge indifference adjustment proceeding at the CPUC, and ultimate decertification and shutdown of the CCA. The final products included a draft governance structure, implementation plan, and related legal memoranda on various other topics. From this work, two students were ultimately hired by the law firm that became outside regulatory counsel to the now fully operational local CCA, San Diego Community Power (SDCP).

During another Clinic, we performed work for the CEC on how to parse the legislative requirements of Senate Bill 350 (2015) for implementation across several regulatory agencies. Students learned firsthand the difficulty faced by agency attorneys in implementing major amendments and additions to state code that change policy direction while not necessarily granting new authority, nor clearly expressing how to implement or resolve conflicts with existing mandates. The students learned many practical lessons as they struggled to understand the legislative intent of SB 350 and the possible ways for it to be implemented. The students gained experience analyzing existing statutory mandates and resolving the identified conflicts and shortcomings created by the newly mandated statutory changes.

It was the first time that many of the students realized how unclear statutes can be and the difficulty in providing legal counsel in the regulatory world. Several students were able to take this experience and apply it to positions at the CPUC, the Federal Energy Regulatory Commission, and in the private sector. This experience and the lessons learned allowed these students to stand out from their peers and pursue career paths that reflected their interests from the moment of graduating.

The following will discuss the Clinic's core teaching objectives and outcomes.

## DEVELOPING COLLABORATIVE STUDENT LEADERSHIP

One of the Clinic's primary objectives is ensuring the time and space for student collaborative leadership. This facilitates the ultimate goals of producing high quality work for the client while developing student skills through a real-world experience — ensuring each student leaves the Clinic with the ability and confidence to be successful when they graduate.

The operation of the Clinic continues to move toward greater student leadership. Over time, the Clinic has transitioned from being led by the supervising attorney to being led by the students themselves through collaboration. This is a lesson learned from observing a former student exercise collaborative leadership where she used her natural leadership style to work with her peers to meet deadlines, explain complex issues, and resolve issues constructively. Student leadership grounds the investment in and responsiveness to the work and client. Her leadership style was so effective in terms of management and outcome that it began the transition to this type of organizational structure. Ultimately, students come away with the experience of running a complex legal project where they manage deadlines and workflow to produce the ultimate work product. It also frees the supervising attorney to work collaboratively by guiding students through the research of complex legal issues and drafting of work product while focusing on developing core legal skills.

To encourage this outcome, students are invited to exercise collaborative leadership in deciding what research to perform, setting timelines to complete drafting, managing the client relationship, and deciding how to

present complex legal conclusions to a varied audience. Such freedom and responsibility sometimes overwhelm students. Many can attest to feeling uncomfortable with the weight on their shoulders, given the complexity of the subject matter and frustration with the process at various times. But it is in these moments that students collectively come together to think through how to approach complex issues and assign tasks to meet deadlines, build confidence, and analyze old problems with new eyes. It is also where the supervising attorney provides better training through guiding, suggesting, and encouraging instead of defining, assigning, and concluding. The space granted for struggle and creativity may be one of the best outcomes of the Clinic because students rise to the challenge when no one is telling them how or why the work should occur in a particular way. Ultimately, they learn what it means to timely and competently address their client's needs.

Through this process, students learn to lead and to collaborate to produce a wide range of work products that include objective legal memoranda, databases, and policies. It is flexible enough to allow students to respond to an unexpected change in client need at any point during the semester. Students learn to package their work products as requested by the client, but without losing the hard-earned work and creativity that can influence sophisticated clients. They also gain the confidence to disagree with the client when needed, respectfully of course.

## IMPROVING THE CORE LEGAL SKILLS OF LEGAL RESEARCH, ANALYSIS, WRITING, AND EDITING

As important as leadership skills are, developing each student's core legal drafting and research skills remains the primary focus of the Clinic. Each semester, students submit writing samples as part of their application. It is a first look at where their research and writing skills are presently, which reflects a range of abilities. Over the course of the Clinic, students will teach and learn from each other as they research, draft, and edit each other's works.

Every semester, students begin with either no, or a basic, understanding of the issue. By the end of the semester, they have gained an expertise that is rivaled by only a handful of other experts in the state. The instructional



content regarding research takes the form of: (1) providing initial research and teaching enough background material to bring students up to speed within the first weeks of the semester; and (2) leading the development of a research plan to approach the subject area. This may also include assigning drafting of internal legal memoranda to form the basis of the overall project or developing a framework to piece various research areas together. Once enough research is complete, we collectively draft an outline and assign sections with clear deadlines. We also discuss how the editing process will evolve and the time crunches that will inevitably emerge throughout the semester. Once drafting deadlines are met, the editing process begins. Students are assigned to edit the work of their peers in a process that allows each student to review and edit the entire work product. We discuss the minimum types of editing that are necessary, time permitting, to produce the highest quality work product possible. We also dive into how editing processes may evolve over time and ways to streamline both the drafting and editing processes to work more efficiently.

Over the many years of running the Clinic, there has not been a single student who did not improve one or more of these skills over the course of the semester. Learning to evaluate and plan out research on complex issues, as well as how to draft and edit the resulting work, are invaluable skills the students hone through the Clinic. It builds confidence and competence. It often marks a significant achievement in law school because it may be the only opportunity to lead and learn while performing impactful energy and climate work. Students often reflect on how they found the expertise gained and work performed rewarding and beneficial, which is illustrated by the reflections of a couple of students herein.

## BUILDING AND MAINTAINING THE CLIENT RELATIONS

At the beginning of every Clinic, most students are shy about interacting with the client. They often need to be prodded to ask questions and lead discussions, particularly over the phone or in a digital conference. This remains one of the more difficult skills to develop in students over a short semester. In some semesters, there may be one or two students who are comfortable with leading client communications and interactions, and often the rest are happy

to leave this area to those who volunteer (though allowing such would be a disservice to the students and the opportunity this Clinic offers).

Developing the skill of effectively managing client relationships remains a core teaching objective. It is another example where the use of student collaborative leadership serves as one of the best means of students' becoming comfortable and competent at interacting and managing a client. It also may be one of the first experiences a student has providing legal advice to a client and being confronted with a client who challenges or disregards their advice, which is not surprising given that the Clinic works directly with agency attorneys and staff, some of whom have decades of experience.

Being disregarded after a semester of work is a frustrating but necessary lesson for the students. Students need to learn to respectfully disagree with a client where their legal analysis supports a different action or multiple options. This situation occurs often enough in the Clinic to make this lesson a major focus of internal discussion during the semester. Students are prepared and guided in how to manage a hard or contentious conversation with a client as they approach an issue from the outside and as they are made aware of the highly ingrained institutional culture that is a characteristic of many regulatory agencies. It is also a central skill when working on issues that are on uncertain legal ground or deal with new technologies or challenging tradeoffs that may not fit neatly into existing statutes and regulations, which is often the case in the energy and climate practice areas.

Learning to navigate client relationships through the Clinic, the students emerge as better prepared lawyers with the ability to manage both their own expectations and their client's, to advise, objectively analyze, and to accept and learn from the client's own appetite for risk or political limits.

## LEGAL ETHICS, CONFIDENTIALITY, AND ATTORNEY-CLIENT PRIVILEGE

Most students join the Clinic either currently enrolled in or yet to take a professional responsibility course. They are familiar with the ideas of confidentiality, privilege, and other basic ethical requirements, but they have never read the duties required of licensed attorneys. The Clinic introduces the requirements imposed on licensed attorneys and focuses on how to practice under our duty to protect both client confidences and

the deliberative process that is entailed in working for regulatory agencies. Students are trained in confidentiality to competently communicate via emails or orally when performing factfinding for their work. They are trained in preserving privileges and learn to practice in a way that always protects client privileges. Finally, the students learn to perform conflict checks and understand that their future work may require a conflict check and, if required, may limit who they represent or what they work on unless they receive client consent in accordance with the governing rules of their respective jurisdiction.

In learning to practice ethically, students benefit from their role in the Clinic because it allows them to make mistakes and learn from agency attorneys about how to approach certain types of communications and ethically carry out their duties. One simple example of this in practice is remembering to include the word “Confidential” in an email subject line and body. By the end of the Clinic, students know when this is required and that they need to be thoughtful about who the recipient of the email is, the content of the email, and whether confidentiality, privilege, or another ethical duty is involved. The fact that students are now thinking about every communication they make and their duties to their clients means that they are prepared to begin their practice of law.

## ORAL PRESENTATION: KNOWING THE AUDIENCE AND SUCCINCTLY VOICING COMPLEX CONCLUSIONS

As we reach the end of each semester, the students are tasked with deciding how they wish to present their work to the client. Students must complete a draft of their presentation and perform at least one dry run before presenting to a client. In years past, we would fly our students to Sacramento or San Francisco to present in person. This offered the added benefit of setting up networking opportunities the day of the trip. In the COVID-19 era, presentations have become exclusively digital, which offers many pros and cons. The pros include that our students are now so familiar with platforms like Zoom that they already have the necessary skills to practice in any number of the work situations of today. Technology offers other key advantages about how to present content, how to present professionally, and

how to use time efficiently. It can also allow students the ability to connect to more people in their chosen practice area, because that person is only a phone or Zoom call away.

When thinking through how to present, students are guided by several questions about the content of what they present: What is the most efficient way to present the content given our time constraints? Who is the audience and what is their understanding of the subject matter? How much content should be in a PowerPoint presentation versus spoken orally? What is a good speaking pace? How do we continue if there are technical difficulties? How should you respond to difficult questions that challenge what you said?

Without exception, I am always impressed by the professionalism that the students exhibit when presenting their work. The content is always presented efficiently and with creativity. There are also always new thoughts that come forth, leading to valuable discussions, largely because complex legal analysis must be distilled for the presentation and audience. Students also benefit from responding to hard questions that challenge their positions, an experience that is much like appearing before a judge or negotiating a contract. Even after a tough oral presentation, students come away with the reward of knowing they presented their work in front of people who make or help inform decisions that affect every person in California. There are few other opportunities in law school akin to this experience.

At the end of the Clinic, students are better trained and better prepared to enter the job market. They are confident in their skills and competent in the subject matter given their experience. It is always the goal of this Clinic to offer the best experience and training each semester so that students can progress and succeed in this profession, whether they go on to practice energy law or pursue another area of law.

## ALUMNI REFLECTIONS ON THE ENERGY LAW AND POLICY CLINIC

*Lauren Perkins, 2018*

*Associate, Duncan Weinberg Genzer Pembroke (Sacramento)*

Through the learning and experiential objectives discussed at length above, the Energy Law and Policy Clinic (Clinic) prepared me for a career as an

energy attorney. In the classroom, I grappled with learning how to work in a team to accomplish a large project in a short timeframe; this is the reality of working as an attorney, especially when working in a small firm in an evolving field like the energy regulatory realm. A valuable lesson I learned from the Clinic was that every team member is different in terms of their bandwidth and priorities, but every person working on the project plays a crucial role. This is not something you can learn in the typical law school classroom where you have two tests to focus on in a semester and only your own schedule to manage to tackle those tests. Communication, ability to understand and work with differing perspectives to approaching a problem, and confidence to acknowledge and speak up when you need assistance are all skills students hone through the Clinic that are crucial to a successful law practice.

Speaking separately to the learning objective above of practicing with client confidences in front of mind, one smaller though invaluable lesson I learned from the outset of the Clinic is to cautiously consider platforms on the Internet when you are uploading your work product and communicating with clients. What might seem a basic lesson of scrutinizing a user agreement before utilizing a platform turned out to be a fundamental step that cannot be overlooked; in the Internet age, it is easy to succumb to the temptation of using an apparently efficient platform, but lacking security features, which can pose devastating consequences to the client. It is these practical details the Clinic involved that speak to its success in preparing students for a career path as a mindful attorney.

And of course, the moment from the Clinic that is most rewarding to reflect on is the moment immediately following your presentation to the regulatory agency. For my Clinic class, we had the privilege of presenting at the CEC in Sacramento — I remember we were all tired from the hours and nerves we expended on preparation. Having the regulatory agency's staff engage following our presentation with questions facilitated a dialogue that is a unique reward at the end of law school — it is not rewarded through an A on a paper, but rather through the ability to communicate confidently to a client on a topic you poured your semester into.

*Ian Kearney, 2018*

*Associate, Western Energy and Water (Sacramento)*

The Energy Law and Policy Clinic was instrumental in my decision to pursue energy law upon graduating law school, and it provided me with valuable experience that allowed me to smoothly transition into the practice of energy law as I began my career.

In general, students seek out clinics because they offer the ability to have a hands-on experience, moving beyond classrooms and textbooks to real-world legal issues and client interactions. This is especially true of the Energy Law and Policy Clinic — the Clinic’s mixed focus on administrative law, regulatory practice, and energy and climate matters allows students to have practical insights into a legal practice space that is usually difficult for interested students to enter.

I was immediately attracted to the subject matter of energy law when taking related law school courses. However, beginning down this career path always seemed like a challenge and I had some concern pursuing it. After participating in the Clinic as a 2L, I gained confidence in my understanding of some of the fundamental legal concerns relevant to California energy matters, as well as important experience that led me to a summer position with CPUC’s Administrative Law Judge Division. I enjoyed my Clinic experience enough that I participated again as a 3L. These experiences then resulted in my being hired out of law school by a firm that specializes in California energy matters, and my interest and experience in the energy space played a significant role in setting me apart from other applicants.

Beyond the knowledge I gained about this highly technical subject matter, the Clinic taught me some foundational lessons of client management that are necessary to learn as a young lawyer but not easy to come by in the pursuit of energy and climate policy experience. During one Clinic, we had a disagreement with the client over the extent of their authority provided in statute. The Clinic was reassured by our supervising attorney to stand by what we believed to be a reasonable interpretation of statute. And we learned how, in working with an organizational client, it can be useful to first bring a potentially disagreeable opinion to a smaller group via a phone conversation before ultimately building to a larger final written product where the disagreement may be embedded. Despite any eventual

disagreement, the final product was still valuable and delivered what the client desired.

Clients in this space are often making policy judgments in addition to balancing other considerations. Energy lawyers are often sought after for advice that ends up being much different than, say, a criminal matter with clearer rights and boundaries. Client disagreements can occur and with different and varying stakes. Often a conversation is needed to strategize a workable solution for a client to meet their end business or regulatory objective. The Clinic provided an excellent introduction to all of these lessons.

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# AOKI WATER JUSTICE CLINIC:

*UC Davis School of Law*

ROBERT D. MULLANEY\*

## THE HUMAN RIGHT TO WATER: MOVING FROM ASPIRATION TO REALITY

After years of organizing, community groups and water rights activists had good reason to celebrate when Governor Jerry Brown signed AB 685 (Eng) into law in September 2012.<sup>1</sup> With the passage of this bill, California became the first state in the U.S. to legislatively recognize a human right to water, declaring that “every human being has the right to safe,

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\* Robert D. Mullaney is the current Director of the Aoki Water Justice Clinic at UC Davis School of Law (“King Hall”). I want to thank Professor of Law Emerita Angela Harris and Professor of Law Emerita Mary Louise Frampton at King Hall, and Laurel Firestone, now a member of the State Water Resources Control Board, for their vision and continued support of the Clinic’s work. I also want to thank Pearl Kan, King Hall class of 2013, and Vanessa Lim, King Hall class of 2015, for their invaluable contributions to the Clinic’s foundation and my understanding of it, and Isabel Johnson, King Hall class of 2022, for her editorial assistance with this article.

<sup>1</sup> ENVIRONMENTAL JUSTICE COALITION FOR WATER, THIRSTY FOR JUSTICE: THE STRUGGLE FOR THE HUMAN RIGHT TO WATER, <https://ejcw.org/thirsty>.

clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.”<sup>2</sup>

The bill declared a new state policy that state agencies must consider when adopting or establishing policies, regulations, and grant criteria pertinent to water uses.<sup>3</sup> However, the bill was not a panacea; it neither expanded the state’s obligation to provide water, nor did it require the state or water companies to spend additional resources to develop water infrastructure.<sup>4</sup> Rather than mandate any specific action, the bill instead provided a broad policy statement, setting an aspirational goal for the state to meet.<sup>5</sup>

The need is undeniably great in our state. According to the California Legislature, one million Californians lack access to water that is reliably safe for drinking.<sup>6</sup> As Tulare County supervisor Eddie Valero remarked about the town of East Orosi’s drinking water: “Imagine youth growing up only knowing water comes from a bottle and not the kitchen tap.”<sup>7</sup>

In fact, drinking water in California remains the tale of two states. In one snapshot, 400 of the state’s largest water systems — those serving more than 3,000 customers — provide more than 90 percent of the state’s residents with safe drinking water.<sup>8</sup> In the other, as experienced by disadvantaged communities in the San Joaquin Valley, a majority of community water systems are small, serving fewer than 200 customers.<sup>9</sup> Almost

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<sup>2</sup> CAL. WATER CODE § 106.3 (2013). Two states, Massachusetts and Pennsylvania, have recognized the public’s right to clean or pure water in their state constitutions. See MASS. CONST. art. 97; PA. CONST. art. 1, § 27.

<sup>3</sup> CAL. WATER CODE § 106.3(b) (2013).

<sup>4</sup> CAL. WATER CODE § 106.3(c) (2013).

<sup>5</sup> DARCY BOSTIC ET AL., SUSTAINABLE FOR WHOM? THE IMPACT OF GROUNDWATER SUSTAINABILITY PLANS ON DOMESTIC WELLS 6 (UC Davis Center for Regional Change 2020).

<sup>6</sup> CAL. HEALTH & SAFETY CODE § 116765 (2021).

<sup>7</sup> Joshua Yeager, *East Orosi One Step Closer to Clean Water as Tulare County Moves to Become Administrator*, VISALIA TIMES-DELTA, June 23, 2021, <https://www.visaliatimesdelta.com/story/news/2021/06/23/east-orosi-one-step-closer-clean-water-tulare-county-moves-become-administrator/7718274002>.

<sup>8</sup> See [California] State Water Resources Control Board, *Frequently Asked Questions: Safe and Affordable Funding for Equity and Resilience Program*, [https://www.waterboards.ca.gov/publications\\_forms/publications/factsheets/docs/faq\\_safe\\_drinking\\_water\\_program\\_overview\\_factsheet.pdf](https://www.waterboards.ca.gov/publications_forms/publications/factsheets/docs/faq_safe_drinking_water_program_overview_factsheet.pdf).

<sup>9</sup> JONATHAN LONDON ET AL., THE STRUGGLE FOR WATER JUSTICE IN CALIFORNIA’S SAN JOAQUIN VALLEY: A FOCUS ON DISADVANTAGED UNINCORPORATED COMMUNITIES

one-quarter of these small systems do not comply with health-based drinking water standards known as the Maximum Contaminant Levels (“MCLs”) set under the Safe Drinking Water Act.<sup>10</sup> Thus, residents of these disadvantaged communities continue to face a triple penalty: (1) the health impacts of unsafe drinking water; (2) the high cost of the water service provided to them; and (3) the added financial burden of purchasing bottled water for their families.<sup>11</sup> “As a result, some impoverished residents pay upwards of 20 percent of their income for water utility fees, bottled water, and related transportation costs, whereas, ‘[i]n the United States, combined water and sewer bills average only about 0.5 percent of household income.’”<sup>12</sup>

California faces a great challenge to ensure that all of its communities have access to safe and affordable drinking water but has taken strides in the past decade to address this urgent need. Regarding the enormity of a similar human rights struggle, Dr. Martin Luther King Jr. struck the right tone when he stated: “We shall overcome ‘because the arc of the moral universe is long, but it bends toward justice.’”<sup>13</sup>

In this article, Section I outlines California’s legislative and administrative response to the moral imperative of a human right to water. Section II recounts the foundation of the Aoki Water Justice Clinic (“Clinic”) at UC Davis School of Law (“King Hall”). In Section III, the article provides several case studies as well as reflections by participating law students to illustrate ways in which the Clinic’s students helped to effect meaningful change for disadvantaged communities in our state.

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13 (UC Davis Center for Regional Change 2018), <https://regionalchange.ucdavis.edu/sites/g/files/dgvnsk986/files/inline-files/The%20Struggle%20for%20Water%20Justice%20FULL%20REPORT.pdf>. A “disadvantaged community” is defined as “a community with an annual median household income that is less than 80 percent of the statewide annual median household income.” CAL. WATER CODE § 79505.5.

<sup>10</sup> LONDON ET AL., *supra* note 9, at 14.

<sup>11</sup> *Id.* at 8.

<sup>12</sup> SAFE WATER ALLIANCE ET AL., BARRIERS TO ACCESS TO SAFE AND AFFORDABLE WATER FOR DISADVANTAGED COMMUNITIES IN CALIFORNIA 6 (2015), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Shadow-Report-on-Right-to-Water-JS25-150511-1.pdf>.

<sup>13</sup> Martin Luther King Jr., *Address at the National Cathedral: Remaining Awake Through a Great Revolution* (March 31, 1968); see <https://www.youtube.com/watch?v=EinMxyjSDwo>.

## I. CALIFORNIA'S STEPS TO ADVANCE THE HUMAN RIGHT TO WATER

The State of California typically finances public infrastructure such as water projects with general obligation bonds, which require approval by 50 percent of the voters.<sup>14</sup> In 2014, the Legislature placed Proposition 1, a water bond, on the November ballot to increase the supply of clean, safe, and reliable water.<sup>15</sup> Proposition 1 specifically targeted its drinking water funding to assist disadvantaged communities and required the State Water Resources Control Board (“Water Board”) to implement a technical assistance program for these communities.<sup>16</sup> In the election, California’s voters overwhelmingly approved Proposition 1, authorizing \$241.8 million for drinking water projects.<sup>17</sup>

In March 2015, the Legislature again focused on assistance to disadvantaged communities by establishing the Office of Sustainable Water Solutions, now a part of the Water Board’s Division of Financial Assurance.<sup>18</sup> The Office is intended to provide financial and technical assistance to disadvantaged communities and small drinking water systems to ensure the effective and efficient provision of clean and affordable drinking water.<sup>19</sup>

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<sup>14</sup> Alf Brandt, *Water Infrastructure Funding in California: Who Should Pay to Keep the Tap Running?*, 46 MCGEORGE L. REV. 165, 175 (2014), <https://scholarlycommons.pacific.edu/mlr/vol46/iss1/10>; see <https://lao.ca.gov/ballotanalysis/bonds>.

<sup>15</sup> LEGISLATIVE ANALYST’S OFFICE, *THE 2015–16 BUDGET: EFFECTIVELY IMPLEMENTING THE 2014 WATER BOND 3* (2015), <https://lao.ca.gov/reports/2015/budget/water-bond/water-bond-021115.pdf>.

<sup>16</sup> PAC. INSTIT., *INSIGHTS INTO PROPOSITION 1: THE 2014 CALIFORNIA WATER BOND 12* (2014), <https://pacinst.org/wp-content/uploads/2014/10/Insights-into-Prop-1-full-report.pdf>; CAL. WATER CODE § 79725(c); STATE WATER RESOURCES CONTROL BOARD, *TECHNICAL ASSISTANCE FUNDING PROGRAM PROCEDURE MANUAL 5* (2020), [https://www.waterboards.ca.gov/water\\_issues/programs/grants\\_loans/proposition1/docs/tech\\_asst/tafp\\_procedure\\_manual.pdf](https://www.waterboards.ca.gov/water_issues/programs/grants_loans/proposition1/docs/tech_asst/tafp_procedure_manual.pdf).

<sup>17</sup> Brandt, *supra* note 14, at 165; State Water Resources Control Board, *Proposition 1* (2022), [https://www.waterboards.ca.gov/water\\_issues/programs/grants\\_loans/proposition1](https://www.waterboards.ca.gov/water_issues/programs/grants_loans/proposition1). The Water Board administers Proposition 1 funds for drinking water projects. *Id.*

<sup>18</sup> CAL. WATER CODE § 189 (2015).

<sup>19</sup> CAL. WATER CODE § 189(b)(5) (2015); see State Water Resources Control Board, *Office of Sustainable Water Solutions* (2022), [https://www.waterboards.ca.gov/water\\_issues/programs/grants\\_loans/sustainable\\_water\\_solutions](https://www.waterboards.ca.gov/water_issues/programs/grants_loans/sustainable_water_solutions).

In February 2016, the Water Board approved Resolution No. 2016-0010, adopting the human right to water as a core value and declaring its implementation to be a top priority in the Water Board's programs and activities.<sup>20</sup> In particular, the Water Board directed the Office of Sustainable Water Solutions to provide technical and compliance assistance to disadvantaged communities to evaluate solutions and select a sustainable approach that supports the human right to water.<sup>21</sup>

In its Human Right to Water List, the Water Board currently identifies 416 public water systems, serving more than 1 million residents, as either out of compliance or consistently failing to meet health-based drinking water standards.<sup>22</sup> Recognizing the magnitude of this problem, the Legislature has repeatedly increased the Water Board's authority and capacity to address failures in these water systems. For example, the Water Board received additional authority to order a mandatory consolidation when a public water system, serving a disadvantaged community, consistently fails to provide an adequate supply of safe drinking water.<sup>23</sup> In addition, the Water Board may appoint an administrator to perform the administrative, technical, operational, legal, or managerial services for a failing water company.<sup>24</sup> The Legislature also increased funding for these efforts by passing SB 200 in July 2019, which provides \$130 million per year for 10 years for the Safe and Affordable Drinking Water Fund.<sup>25</sup> To effectively administer this fund, the Water Board established the Safe and Affordable Funding for Equity and Resilience ("SAFER") program, which strives to "bring true environmental justice to California and address the continuing

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<sup>20</sup> See STATE WATER RESOURCES CONTROL BOARD, ADOPTING THE HUMAN RIGHT TO WATER AS A CORE VALUE AND DIRECTING ITS IMPLEMENTATION IN WATER BOARD PROGRAMS AND ACTIVITIES 5 (2016), [https://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2016/rs2016\\_0010.pdf](https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2016/rs2016_0010.pdf).

<sup>21</sup> *Id.* at 6.

<sup>22</sup> STATE WATER RESOURCES CONTROL BOARD, 2022 DRINKING WATER NEEDS ASSESSMENT 34 (2022), [https://www.waterboards.ca.gov/drinking\\_water/certlic/drinkingwater/documents/needs/2022needsassessment.pdf](https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/documents/needs/2022needsassessment.pdf).

<sup>23</sup> CAL. HEALTH & SAFETY CODE § 116681 (2022); CAL. HEALTH & SAFETY CODE § 116682 (2022).

<sup>24</sup> CAL. HEALTH & SAFETY CODE § 116275 (2019); CAL. HEALTH & SAFETY CODE § 116686 (2019).

<sup>25</sup> CAL. HEALTH & SAFETY CODE § 116766 (2022).

disproportionate environmental burdens in the state by assisting with providing safe drinking water in every California community.”<sup>26</sup>

## II. THE FOUNDATION OF THE AOKI WATER JUSTICE CLINIC

According to the Water Board, more than a million people in California were exposed to unsafe drinking water from the tap in their homes and schools last year.<sup>27</sup> This problem can be found in nearly every part of the state, but areas like the San Joaquin Valley and Salinas Valley are disproportionately impacted due to reliance on groundwater contaminated by the overuse of fertilizer in irrigated agriculture.<sup>28</sup> Arsenic and nitrate, two of the primary drinking water contaminants in the state, disproportionately affect low-income and Latino communities.<sup>29</sup> Moreover, in the midst of California’s historic drought in 2014–15, many families and communities found themselves without water at all.<sup>30</sup>

California’s water governance is a patchwork of legal structures composed of both public and private entities, small and large.<sup>31</sup> Many rural communities in the San Joaquin Valley rely on small groundwater systems for their potable water supply.<sup>32</sup> In addition, “state small water systems,”

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<sup>26</sup> State Water Resources Control Board, *SAFER Program: Frequently Asked Questions*, [https://www.waterboards.ca.gov/drinking\\_water/programs/safer\\_drinking\\_water/docs/20200416\\_safer\\_faq.pdf](https://www.waterboards.ca.gov/drinking_water/programs/safer_drinking_water/docs/20200416_safer_faq.pdf).

<sup>27</sup> STATE WATER RESOURCES CONTROL BOARD, *supra* note 22, at 34; CAL. HEALTH & SAFETY CODE § 116765 (2020).

<sup>28</sup> UC DAVIS CENTER FOR WATERSHED SCIENCES, *ADDRESSING NITRATE IN CALIFORNIA’S DRINKING WATER: WITH A FOCUS ON TULARE LAKE BASIN AND SALINAS VALLEY GROUNDWATER 3* (2012), <http://groundwaternitrate.ucdavis.edu/files/138956.pdf>; see *Monterey Coastkeeper v. State Water Resources Control Bd.*, 28 Cal. App. 5th 342, 346 (2018).

<sup>29</sup> LEGISLATIVE ANALYST’S OFFICE, *EXPANDING ACCESS TO SAFE AND AFFORDABLE DRINKING WATER IN CALIFORNIA, A STATUS UPDATE 6–7* (2020).

<sup>30</sup> Between 2012 and 2016, more than 2,500 domestic wells failed, primarily in low-income communities of color in the San Joaquin Valley. BOSTIC ET AL., *supra* note 5, at 6.

<sup>31</sup> Camille Pannu, *Drinking Water and Exclusion: A Case Study from California’s Central Valley*, 100 CAL. L. REV. 223, 256 (2012) (listing examples of public and quasi-public governance districts). According to the Water Board, California has over 7,000 public water systems. STATE WATER RESOURCES CONTROL BOARD, *supra* note 22, at 28.

<sup>32</sup> LONDON ET AL., *supra* note 9, at 13.

which serve between 5 and 14 connections, are not regulated by the Water Board but are overseen by county health officers.<sup>33</sup> Although these small systems may maintain independence and autonomy over their water systems, they are also vulnerable to water contamination through human sources, such as nitrate contamination from fertilizer.<sup>34</sup> Finally, between 1.5 and 2.5 million California residents rely on domestic wells, which are not regularly monitored by the federal or state government.<sup>35</sup>

Because of California's patchwork water management system, there is no uniform solution for California's water needs. Finding solutions — including solutions for the poorest communities — is a crucial issue, however, especially given California's recurring droughts and the increasing impact of climate change on the state.

In 2013, Professor Angela Harris became the inaugural director of the Aoki Center for Critical Race and Nation Studies (“Aoki Center”) at King Hall.<sup>36</sup> Under her direction, the Aoki Center sought to develop a clinical component to foster its work, which would allow students to understand and apply critical race theory ideas in a real-world context, while contributing to the quality of life of underserved communities. The clinical projects would create opportunities for law students to provide effective representation for these communities.

The 2014 passage of Proposition 1, which authorized the Water Board to fund technical assistance programs under the state's drinking water program, provided a potential pathway for change.<sup>37</sup> In public comments submitted to the Water Board, Professor Harris advocated that this new technical assistance program should include funding for legal assistance for community water solutions for small disadvantaged communities.

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<sup>33</sup> LEGISLATIVE ANALYST'S OFFICE, *supra* note 29, at 4.

<sup>34</sup> UC DAVIS CENTER FOR WATERSHED SCIENCES, *supra* note 28, at 3 (in study area, cropland contributed 96 percent of nitrate contamination to groundwater).

<sup>35</sup> LEGISLATIVE ANALYST'S OFFICE, *supra* note 29, at 4.

<sup>36</sup> The Aoki Center was established to honor the life and work of Keith Aoki, a faculty member at King Hall who died an untimely death in 2011. Professor Aoki was an accomplished and respected scholar who used words, art, music, and engagement to create a significant body of work in civil rights, critical race theory, intellectual property, and local government law.

<sup>37</sup> LEGISLATIVE ANALYST'S OFFICE, *supra* note 15.

In 2014, Professor Harris met with Laurel Firestone, the co-executive director at Community Water Center (“CWC”), to discuss potential collaboration on projects. The CWC is a well-established nonprofit organization with the mission to act as a “catalyst for community-driven water solutions through organizing, education, and advocacy in California.”<sup>38</sup> Professor Harris also met with Pearl Kan, King Hall class of 2013. With funding from Equal Justice Works, Ms. Kan had joined California Rural Legal Assistance, Inc. (“CRLA”) in 2013 to work on issues of nitrate contamination in the Salinas Valley. Under the supervision of Professor Harris, King Hall students began working on a number of projects with CWC and CRLA.

In one of these projects, Vanessa Lim, King Hall class of 2015, conducted a needs assessment, involving both legal research and interviews with local advocates. Ms. Lim drafted a working paper outlining the legal problems facing Californians served by small water systems, compiling the resources available to them, and recommending further projects. This study served as a foundation for the potential development of a legal services clinic for these small systems.<sup>39</sup>

In 2016, Professor Harris, collaborating closely with Laurel Firestone of CWC, submitted a grant proposal to the Water Board to fund the establishment of a new King Hall environmental justice clinic. The proposal built upon Vanessa Lim’s needs assessment in which Ms. Lim observed:

- The lack of available legal information imposed barriers to compliance with water quality standards and legal requirements of local governance structures;
- A lack of compliance with water quality standards and legal requirements of local governance structures increased costs for disadvantaged communities by exposing them to fines for failure to comply with rules;
- These communities were also denied access to potential state funding due to a failure to comply with corporate formalities and a lack of information about the requirements for applications;

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<sup>38</sup> See Community Water Center, *Mission + History* (2022), <http://www.communitywatercenter.org/history>.

<sup>39</sup> Vanessa Lim, *Minding the Gap: Increasing the Accessibility of Legal Information and Assistance to Empower Communities and Implement California Water Law and Policy to Increase Clean Water Access For Disadvantaged Communities*, WILLAMETTE ENVTL. L.J. 35 (Fall 2015).



- The lack of legal information hindered public participation, accountability, and the community's ability to effectively manage its water resources;
- Information about legal duties of local governing agencies is important because it enables communities to meaningfully participate in making important decisions about water resource management that impact them;
- The lack of legal information inhibited the ability of communities to exercise local control over water resource management and increased the financial barriers to clean water solutions;
- Even when legal information was available, it was either not easy to obtain or overly complicated and technical;
- Finally, relevant information was often available only in English or online in a state where more than 43 percent of residents spoke a language other than English at home and where many rural communities did not have access to high speed Internet.<sup>40</sup>

In light of these myriad barriers, Professor Harris emphasized in the grant proposal to the Water Board that communities needed legal assistance and advocates to achieve long-term drinking water solutions. This approach takes into account that “[i]n the long run, true *water justice* requires sustainability, and this necessitates that impacted residents become empowered to assert themselves in the water policymaking arena and to influence decisions about water resources and water services that impact their community.”<sup>41</sup> After review, the Water Board awarded a grant to UC Davis in November 2016, agreeing to fund the Clinic’s work to provide legal technical assistance to small disadvantaged communities to develop and implement their capital improvement projects. Subsequently, King Hall established the Clinic and hired Camille Pannu as the inaugural director for the Fall 2017 term.

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<sup>40</sup> *Id.* at 54–56.

<sup>41</sup> Rose Francis & Laurel Firestone, *Implementing the Human Right to Water in California’s Central Valley: Building a Democratic Voice through Community Engagement in Water Policy Decision Making*, 47 WILLAMETTE L. REV. 495, 519 (2011) (italics in original).

### III. THE AOKI WATER JUSTICE CLINIC'S WORK

The Clinic combines transactional law, policy advocacy, and strategic research to ensure that low-income California communities receive clean, safe, and affordable drinking water. It is the first law school clinic of its kind in the country.<sup>42</sup> This Section will briefly describe the seminar component of the Clinic and then address the Clinic's practice. The Section will conclude with some observations by Clinic students about their experiences.

#### A. THE SEMINAR

The Clinic is designed as a one-semester course for second- or third-year law students; students can register for a second semester to continue to work on assigned matters. The Clinic's work spans the intersection of environmental and transactional law, but some students have not taken any survey courses in those areas when they register for the Clinic. Consequently, the seminar component necessarily covers a broad range of topics to provide the students with a framework to recognize and analyze the problems that our Clinic's projects will present. Because our work focuses on disadvantaged communities, we introduce concepts of community lawyering and the environmental justice movement.<sup>43</sup> To understand the current, inequitable water delivery system in California, we discuss the historical roots of discrimination in our state such as redlining, exclusionary zoning, racially restrictive covenants, and

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<sup>42</sup> In applying transactional lawyering to address the effects of poverty and discrimination, the Aoki Water Justice Clinic follows the path of Professor Susan R. Jones who recognized that law schools can serve as centers of "action research," probing "solutions to poverty through active exploration of social problems." Gregory E. Louis, *Bridging the Two Cultures: Toward Transactional Poverty Lawyering*, 28 *CLINICAL L. REV.* 411, 420–21 (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4106798](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4106798); Susan R. Jones, *Alleviating Poverty: What Lawyers Can Do Now*, *HUM. RTS.* 11 (August 2014), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/2014\\_vol\\_40/vol\\_40\\_no\\_3\\_poverty/alleviating\\_poverty](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_3_poverty/alleviating_poverty).

<sup>43</sup> Paul R. Tremblay, *Counseling Community Groups*, 12 *CLINICAL L. REV.* 389 (2010), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1289&context=lsfp>; Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 *VA. ENVTL. L.J.* 688 (1995); *The Mother Earth Podcast: Dr. Robert Bullard* (June 11, 2020), <https://www.motherearthpod.com/drbullard>.

discriminatory county planning and spending policies.<sup>44</sup> Turning to the substantive law, the seminar reviews the requirements of the federal Safe Drinking Water Act and California's efforts to implement it.<sup>45</sup> In a state served by over 7,000 water systems, we examine state laws governing special districts, the taxation authority of public agencies, and public meeting laws.<sup>46</sup> Because so many rural communities rely on groundwater as their sole source of drinking water, we address the passage and implementation of the Sustainable Groundwater Management Act.<sup>47</sup> Finally, the seminar seeks to demystify the drafting of corporate documents, contracts, and easements so that the students can move beyond a tentative grasp of first year doctrinal law classes to the practical application of these legal concepts.<sup>48</sup>

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<sup>44</sup> Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095 (2008), <https://www.uclalawreview.org/cities-inside-out-race-poverty-and-exclusion-at-the-urban-fringe>; Camille Pannu, *Bridging the Safe Drinking Water Gap for California's Rural Poor*, 24 HASTINGS ENVTL. L.J. 253 (2018), [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1419&context=hastings\\_environmental\\_law\\_journal](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1419&context=hastings_environmental_law_journal); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

<sup>45</sup> James E. Salzman, *The Past, Present and Future of the Safe Drinking Water Act*, UCLA SCHOOL OF LAW, PUBLIC LAW RESEARCH PAPER No. 19-37 (2019), <https://ssrn.com/abstract=3463976>; California State Water Resources Control Board, *Safe and Affordable Funding for Equity and Resilience* (2022), <https://www.waterboards.ca.gov/safer>.

<sup>46</sup> SENATE LOCAL GOVERNMENT COMMITTEE, *WHAT'S SO SPECIAL ABOUT SPECIAL DISTRICTS?: A CITIZEN'S GUIDE TO SPECIAL DISTRICTS IN CALIFORNIA* (2010); LEAGUE OF CALIFORNIA CITIES, *PROPOSITIONS 26 AND 218 IMPLEMENTATION GUIDE* (2021); LEAGUE OF CALIFORNIA CITIES, *OPEN & PUBLIC V, A GUIDE TO THE RALPH M. BROWN ACT* (2016).

<sup>47</sup> WATER FOUNDATION, *GROUNDWATER MANAGEMENT AND SAFE DRINKING WATER IN THE SAN JOAQUIN VALLEY: ANALYSIS OF CRITICALLY OVER-DRAFTED BASINS' GROUNDWATER SUSTAINABILITY PLANS* (2020); Kristin B. Dobbin, "Good Luck Fixing the Problem": *Small Low-Income Community Participation in Collaborative Groundwater Governance and Implications for Drinking Water Source Protection*, 33 SOC'Y & NAT. RESOURCES 1468 (2020); BOSTIC ET AL., *supra* note 5.

<sup>48</sup> TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2d ed. 2013); KENNETH A. ADAMS, *A MANUAL OF STYLE FOR CONTRACT DRAFTING* (4th ed. 2018); CONTINUING EDUCATION OF THE BAR, *ADVISING CALIFORNIA NONPROFITS* (3d ed. 2021).

## B. THE CLINIC'S PRACTICE

Under the supervision of the Clinic director and a staff attorney, law students deliver direct legal assistance to clients, working with these communities to navigate funding opportunities, form new management entities, merge water systems, draft agreements, bring systems into compliance, and strengthen governance. The Clinic also offers community trainings, and develops templates and guides for community advocates. Pursuant to the Water Board's 2016 grant, the Clinic performs a broad range of tasks, including the following:

- **COUNSELING AND LEGAL ADVICE TO WATER SYSTEMS IN DISADVANTAGED COMMUNITIES:** about federal, state, and local statutes, regulations, and policies concerning topics such as drinking water, land use, groundwater, the corporate form, tax obligations, ethics laws, and the human right to water.
- **TRANSACTIONAL WORK:** to make a community eligible for grant funding for water system improvements. These tasks include, but are not limited to, consolidating with a nearby system, establishing an intertie connection, establishing a corporation (e.g., drafting articles of incorporation and bylaws), drafting and reviewing planning and construction contracts, submitting applications for tax-exempt status, developing an option contract to help a community drill a test well, and drafting and reviewing contracts to buy water or property rights.
- **NEGOTIATIONS:** on behalf of small water systems (e.g., to consolidate into a nearby system, buy water, and purchase land or an easement).
- **LOCAL AGENCY WORK:** to advise local agencies on compliance with relevant agency law (such as the Brown Act, Proposition 218, Local Agency Formation Commission procedures, ethics laws, or the Safe Drinking Water Act).
- **LOCAL POLICY WORK:** to help water systems establish local rate policies, shut-off policies, or well drilling policies or ordinances.
- **PREPARE LEGAL DOCUMENTS:** required to submit Drinking Water and Clean Water State Revolving Fund funding applications for the planning and construction of capital improvement projects.

The following four matters illustrate the types of issues handled by the Clinic.

LAKE COUNTY INTERTIE AGREEMENT — California has faced an increased danger from wildfires in the past decade. In Lake County, three wildfires caused widespread devastation in 2015 and then the Clayton Fire forced residents to evacuate in the towns of Clearlake and Lower Lake in August 2016.<sup>49</sup> In the aftermath of these emergencies, the Clinic assisted three small water companies in Lake County to negotiate and draft an Intertie Agreement among the companies. The proposed interties will allow each water system to take delivery of treated water from one of the other companies in an emergency. This construction will enhance each system's operating flexibility and protect against water supply shortages within their service areas. In the process of reviewing the companies' water rights, however, the Clinic discovered an obstacle — two of the water systems had existing water sales agreements with a Yolo County water agency that did not allow out-of-district water transfers by the water companies. To resolve this issue for the two companies, the Clinic negotiated an amendment to the water sales agreements to permit a water transfer in an emergency.

SAN JOAQUIN COUNTY CONSOLIDATION — Some mobile home park owners operate their own wells to provide drinking water to their tenants within the park. In San Joaquin County, two mobile home parks relied on wells contaminated with arsenic. The County Health Department issued a compliance order to these companies, directing them to comply with the MCL for arsenic. For these small water systems, a treatment system to remove arsenic would be too expensive and complicated to build and operate. In general, small public water systems often struggle to pay for infrastructure or its maintenance due to poor economies of scale (i.e., a small ratepayer base) and a lack of technical staff. As a result, the Water Board supports consolidations when it is feasible.<sup>50</sup> In this instance, the Clinic assisted a nearby city that was willing to extend its water service

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<sup>49</sup> See Guy Kovner & Christi Warren, *Lower Lake Burns as Clayton Fire Forces Evacuation of Clearlake Residents*, THE [SANTA ROSA] PRESS DEMOCRAT, August 14, 2016, <https://www.pressdemocrat.com/article/news/lower-lake-burns-as-clayton-fire-forces-evacuation-of-clearlake-residents>.

<sup>50</sup> See State Water Resources Control Board, *Drinking Water Partnerships and Consolidation* (2022), [https://www.waterboards.ca.gov/drinking\\_water/certlic/drinkingwater/waterpartnership.html](https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/waterpartnership.html).

to these mobile home parks, which are located outside the city's limits in the unincorporated county. This project required the Clinic to draft and negotiate an annexation agreement between the city and the mobile home park owners, and to assist the city in its application to the Water Board to pay for installation of the water mains to extend the city's drinking water service to the mobile home park residents.

**TULARE COUNTY APPLICATION FOR TAX EXEMPTION** — Small water companies are often beset by managerial and technical difficulties as well as water quality issues. A small water company in Tulare County relied on a single well contaminated by nitrates. An adjacent city indicated its willingness to annex the water company's existing service area if the company would upgrade its existing distribution system. Before it could qualify for a Water Board construction grant to improve its distribution system, the company first needed to apply for state and federal tax exemptions. When it applied for the exemptions, the company found that its corporate status had been suspended due to a company officer's failure to file tax returns. In addition, the secretary of state notified the company that it did not qualify as tax exempt because it was organized as a for-profit corporation. The Clinic assisted the company to amend its articles of incorporation to qualify as a nonprofit mutual water company and submitted the restated articles to the secretary of state for approval. After the Clinic advised the company on the amendment of its bylaws, we submitted the amended corporate documents and delinquent tax returns to the Franchise Tax Board and the IRS, which then approved tax-exempt status for the company. The restoration of its corporate and tax-exempt status will allow the water company to qualify for a Water Board grant under the SAFER Program to upgrade its infrastructure. As a result of these system improvements, the neighboring city will agree to annex the small water company's service area and serve these residents with potable water.

**TULARE COUNTY EASEMENT** — Small water companies in the San Joaquin Valley often need extensive upgrades to their water treatment and distribution systems to comply with state and federal drinking water requirements but are not able to pay for the cost of these upgrades due to both their small ratepayer base and the predominantly low-income residents of the community. One small Tulare County water company had

applied to the Water Board for construction funding to improve its distribution system and install a larger water storage tank to provide additional resiliency for the system in drought conditions. In order to obtain grant funding from the Water Board, the water company had to qualify as tax exempt to avoid a tax penalty. With the Clinic's assistance, the company obtained state and federal tax exemptions. In conferring with the system's operator, we confirmed that construction of the new tank would also require the company to obtain additional storage area and road access to the storage area for maintenance of the tank. The Clinic met with the owners of an adjacent parcel to discuss the proposed project. The project was delayed due to a misunderstanding of the terms of an existing easement and the proposed easement. After meeting with the company's operator, the Clinic explained the terms of the scope of the existing easement to the adjacent landowners, and then negotiated the terms of a new easement and a quitclaim deed to extinguish the existing easement.

In each of these matters, the Clinic students worked on teams and interacted frequently with the company representatives, who often run these small water companies as volunteers. The students learned to persist under adverse conditions, advising their clients to manage unexpected twists in the course of the cases. As Professor Louis remarked in a similar context, "if law students contribute simply by being community navigators — that is, going out into communities and helping small business owners navigate bureaucracy — then they will have advanced the struggle for equity."<sup>51</sup>

### C. STUDENT EXPERIENCES

In the *Secret of Happiness*, Joel ben Izzy recounts a tale about Nasrudin, a teacher and scholar "known as much for his wisdom as his foolishness."<sup>52</sup> Nasrudin explained to a student that "the secret of happiness is good judgment." "But," the student asked, "how do we attain good judgment?" "From experience." "Yes," said the student. "But how do we attain experience?" "Bad judgment."<sup>53</sup>

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<sup>51</sup> Louis, *supra* note 42, at 444.

<sup>52</sup> JOEL BEN IZZY, *THE BEGGAR KING AND THE SECRET OF HAPPINESS* 206 (2003).

<sup>53</sup> *Id.* at 206–7; see also <https://www.storypage.com>.

As Professor Mlyniec stated, “clinical teaching is personal and designed to accept students where they begin and to maximize their potential to learn.”<sup>54</sup> In this context, supervisors “must be intentional and transparent about their intervention . . . to make the student aware that the collaborative nature of clinic writing gives both the supervisor and student some degree of ownership of the final product.”<sup>55</sup> While supervision remains the key to clinical education, the basic tenets of clinical education require the *students* to assume the role of a lawyer and to perform those tasks in the context of real projects.<sup>56</sup> In short, we all must have the opportunity to err, to reflect, and to learn from our mistakes.<sup>57</sup>

In this section, three students, each of whom participated in the Clinic for two semesters, provide a synopsis of their experiences. As the students explain, they worked in the Clinic with a team of other law students and a supervising attorney, learning to handle novel and complex legal issues. The Clinic affords the students the opportunity to draft clear and concise legal documents, to communicate with busy and distracted clients, to negotiate and mediate between opposing parties, and to overcome communication gaps. Through the Clinic’s work, they learn to be nimble and to provide competent representation to underserved communities as ethical attorneys.<sup>58</sup>

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<sup>54</sup> Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLINICAL L. REV. 505, 511 (2012), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1773&context=facpub>.

<sup>55</sup> *Id.* at 524.

<sup>56</sup> *Id.* at 517, 536.

<sup>57</sup> In his “Lessons for Action,” Professor Isao Fujimoto advised his students: “Reflect on what you do: Experience is not what you did or what happened to you. Experience is what you do with what you did or what happened to you.” DANIEL J. O’CONNELL & SCOTT J. PETERS, *IN THE STRUGGLE: SCHOLARS AND THE FIGHT AGAINST INDUSTRIAL AGRIBUSINESS IN CALIFORNIA* 230 (2021).

<sup>58</sup> The ABA’s McCrate Report established four values that lawyers should possess when they enter the practice of law: (1) Provision of competent representation; (2) Promotion of justice, fairness, and morality; (3) Improvement of the profession; and (4) Professional self-development. Mlyniec, *supra* note 54, at 538. As Professor Mlyniec reminded us, “The privilege and responsibility of an academic is to use the case or project to explore the larger questions about the role of a lawyer, the process of lawyering, lifetime learning, personal development and growth, and the values that support the profession.” *Id.* at 571.



1. *“The Clinic taught me to be persistent to help those in need of assistance, while remaining compassionate and pragmatic.”*

Working with the Clinic has been the most challenging, yet rewarding experience I have undergone in law school so far. I have been passionate about climate change and the protection of our natural resources from a young age. Because of this, I was drawn to the Clinic for its commitment to helping low-income communities throughout California receive access to clean and safe drinking water. I was also eager to get hands-on experience on transactional projects, and observe the dynamics between different water companies.

During the past two semesters, I had the opportunity to collaborate with team members on a variety of cases, while learning about water law, disadvantaged communities, and the intersection between the two. In one of the cases, I helped a small water company in Southern California with non-drinkable, contaminated water merge with a neighboring system in order to comply with the state’s drinking water standards. In the fall semester, I collaborated with another student to draft a merger agreement for the two water companies. By doing so, I was able to bridge the knowledge I acquired through my coursework with practical experience. Although I had studied mergers in my Business Associations class, I did not learn how they apply to water companies. Furthermore, drafting a legal document differs greatly from the theoretical study of the subject matter.

Having witnessed the struggles faced by small water companies in rural areas that have been overlooked by the system, I chose to extend my time with the Clinic once the semester was over, to contribute some sort of stability to already precarious situations. The second semester presented new challenges that further highlighted how simple things such as the lack of effective communication can impact people’s ability to access drinkable water. The Clinic taught me to be persistent to help those in need of assistance, while remaining compassionate and pragmatic. This time has been instrumental in preparing me for success in my future law career, by giving me the tools to develop practical skills I would not have acquired otherwise.

— *Chiara Veronesi, Class of 2023*

2. *“The Clinic has also taught me to embrace uncertainty and to systematically wade through difficult issues to develop competence.”*

My work in the Clinic for two semesters was one of my law school highlights. I had the opportunity to interact with impactful environmental justice groups and to work on a variety of cutting-edge issues. My Clinic experience made me a more determined and versatile problem solver and shaped my professional identity.

During my first semester, I contributed to a near final draft of an Intertie Agreement, which was designed to establish emergency connections for three water systems in Lake County. Once built, the intertie system will strengthen Lake County’s resiliency regarding wildfires and droughts. It was satisfying to work at the forefront of a project that will create a lasting benefit by helping vulnerable communities adapt to the challenges of climate change.

I worked on two interesting cases in the second semester. In the first matter, we examined the technical, managerial, and financial capacity of a small, rural water company as it applied for Water Board funding. In a second project, we assisted a water system administrator assume her duties in managing a small rural water company during a consolidation with a nearby city. Because this is one of the first public administrator cases, we literally got to see the law develop.

At the Clinic, I connected with dedicated public interest groups. For example, we worked with a grassroots organization that has transformed community life in farmworker communities in the Eastern Coachella Valley. I also assisted a community group to evaluate legislative proposals regarding equitable repayment plans to increase water affordability during the Covid-19 pandemic. Again, thanks to being part of the Clinic, I gained insight into key legal and equitable issues of our time.

Overall, I enjoyed the collaborative aspect of the clinical work and the experience of working with fellow students, the Director, and our clients as a team. The traditional law school environment is more individually focused, which does not accurately reflect most attorneys’ legal practices. The Clinic has also taught me to embrace uncertainty and to systematically wade through difficult issues to develop competence. Generally, the Clinic provides legal assistance to communities on specialized and technical issues to push projects forward. Tackling difficult and unfamiliar tasks

is a common theme of the Clinic. This problem-solving aspect of clinical work greatly strengthened my lawyering skills and was one of the most rewarding aspects of my law school experience.

— *Christian Smit, Class of 2022*

3. *“The Clinic reinvigorated my passion to study law and made me realize the true value of my legal education.”*

The Clinic has sharpened my legal skills, given me practical work experience, and solidified my love of water law. One of my cases involved a community services district and a Native American Tribe working to address the various issues that plague the water system. In that case, I researched and drafted memoranda involving access methods to tribal land, participated in negotiations among the parties, and strategized with my peers on ways to effectively tackle the project’s issues. I’ve also worked on other projects that involve entirely different concerns and skillsets. For example, the Clinic recently took on a unique case that requires us to provide legal assistance for a water system administrator. This new project included drafting a technical assistance work plan that lays out the Clinic’s tasks, analyzing the Water Board’s evolving standards for water system administrators, and clarifying the necessary steps for dissolution of a California nonprofit corporation. The Clinic has also allowed me to draft consolidation agreements, assist with filing easements with a county recorder’s office, and act as a liaison with the Bureau of Indian Affairs, among other things.

While improving legal skills and obtaining practical work experience are the most obvious benefits of working in the Clinic, there are other subliminal advantages as well. Not only does the Clinic allow students to experience the unique obstacles faced in water law, but it also gives them the opportunity to provide legal assistance to those in poor, disadvantaged communities across California. Whether it be assisting a Native American tribe with providing water to its community, or consolidating two dilapidated water systems into a single, working system, the Clinic provides a way to cultivate these experiences. In sum, the Clinic has reinvigorated my passion to study law and made me realize the true value of my legal education.

— *Matthew Navarrette, Class of 2022*

## IV. CONCLUSION

Safe drinking water should be a human right equally available to all communities. Yet lack of access to safe and affordable drinking water continues to severely impact low-income and Latinx communities in California, particularly in the San Joaquin Valley.<sup>59</sup> California has taken an important step to address this human rights problem by funding the Safe and Affordable Drinking Water Fund and establishing the SAFER program. However, realization of the human right to water is not simply a question of infrastructure that a benevolent government can dole out to its communities and then record as another “mission accomplished” on a webpage.<sup>60</sup> “Rather, it is an ongoing process”<sup>61</sup> in which lawyers and law students can serve as a “tool for communities to strengthen their own voice and strengthen their own power around these issues.”<sup>62</sup> As the Honorable Cruz Reynoso stated: “Overcoming California’s water challenges will undoubtedly require a change in how water policies are made and who is making them. As Latinos, we will have to take our place at the table.”<sup>63</sup> Through the work of the Aoki Water Justice Clinic, we seek to train future California water attorneys to listen, learn from, and respond to these communities in order to build their capacity to address their pressing needs.

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<sup>59</sup> LEGISLATIVE ANALYST’S OFFICE, *supra* note 29, at 6–7.

<sup>60</sup> Rose & Firestone, *supra* note 41, at 512, 521.

<sup>61</sup> *Id.* at 521.

<sup>62</sup> Symposium, *Environmental Justice: Access to Clean Drinking Water*, 57 HASTINGS L.J. 1367, 1379 (2006), [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3636&context=hastings\\_law\\_journal](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3636&context=hastings_law_journal).

<sup>63</sup> Rose & Firestone, *supra* note 41, at 521 n.102, *quoting* The Honorable Cruz Reynoso, *Foreword* to Paola Ramos, *Latino Issues Forum, Promoting Quality, Equity, and Latino Leadership in California Water Policy: An Introduction to Water Issues Impacting Latino Communities in California* 6 (June 2003). The Honorable Cruz Reynoso served as the first Latino justice on the California Supreme Court from 1982–86. He also taught as a professor at the University of New Mexico (1972–76), UCLA (1991–2001), and King Hall (2001–06). As a professor and professor emeritus at King Hall, Justice Reynoso remained an active faculty member at the Aoki Center and the law school until shortly before his death at age 90 in 2021. See <https://www.ucdavis.edu/news/cruz-reynoso-uc-davis-and-california-icon-dies-90>.

# NEW MEDIA RIGHTS' INTERNET & MEDIA LAW CLINIC:

*California Western School of Law*

ART NEILL\*

Consider the following client situations:

- A documentarian making a film about LGBTQ history needs to incorporate archival photos and video into their film.
- A small business that created an educational website and app for K–12 students needs to understand how to comply with state and national privacy laws.
- An individual writing their first graphic novel needs a collaboration agreement with an illustrator.
- A pop culture media critic challenging gender stereotypes on YouTube needs assistance responding to an overreaching copyright DMCA takedown notice from a large movie studio.

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\* Art Neill, Associate Clinical Professor of Law and clinic director at California Western School of Law, is the founder and executive director of New Media Rights, a member-supported nonprofit that provides legal services, educational resources, and policy advocacy for creatives and entrepreneurs. The author would like to thank Erika Lee, the current assistant director of New Media Rights, for providing edits to this article, as well as shaping the clinic. Also, thank you to Shaun Spalding, former assistant director, for his many years helping to shape the clinic.

Each of these clients needs intellectual property (IP), privacy, and technology-related legal assistance, yet they cannot afford legal services. The documentarian went on to a successful release of their film at film festivals and on public television. The small business added schools and school districts as clients and grew their business. The graphic novelist received a publishing deal. The pop culture critic successfully fought back and saw their video restored. These are examples of the types of cases addressed by New Media Rights' Internet & Media Law Clinic at California Western School of Law (New Media Rights) in San Diego.

This article will discuss New Media Rights in four parts:

1. Why do we have IP, arts, and technology clinics like New Media Rights?
2. What is New Media Rights, and how do we benefit the students and the community?
3. What is the structure and pedagogy of the clinic?
4. What are our hopes looking forward?

## 1. WHY DO WE HAVE IP, ARTS, AND TECHNOLOGY LAW CLINICS LIKE NEW MEDIA RIGHTS?

In the last twenty-five years, the internet has become the central crossroads for cultural, political, and social interaction. IP, privacy and media law services are expensive, and they are not typically addressed by direct legal services organizations. Indeed, a visit to the Legal Services Corporation that supports local legal aid organizations only describes the legal needs of low-income individuals within the categories of family, housing, employment, consumer, military, and disaster-related legal issues. However, the use of the internet for sharing goods, services, and ideas naturally leads to an increased need for specialized legal services. Intellectual property and technology-related clinics were one of the fastest-growing types of legal clinics in the United States over the last decade. Yet there is still a need for intellectual property and technology-related legal services and educational resources regardless of a client's ability to pay.

The work of IP, arts, and technology clinics serves a variety of important public interest goals. First, the services cultivate and encourage freedom of speech. When a pop culture critic on YouTube receives a fair use

analysis and assistance writing a DMCA counternotice from our clinic to fight back against efforts to silence their otherwise legal speech online, the clinic directly impacts the overall cultural dialogue. These clinics can provide an opportunity to push back against online harassment and marginalization, and relatively obscure areas of copyright law and platform terms of service can become integral to freedom of speech and civil discourse in our democracy.

In addition to the legal services gap this type of clinic fills, it also provides an opportunity to expose students to the public interest values in tech law. After being in the clinic they can “see” the public interest values where they couldn’t before. We equip them to consider the public interest as they go into practice as lawyers.

Also, areas such as intellectual property, privacy, and technology-related law are some of the fastest growing areas for employment opportunities for law graduates.<sup>1</sup> Incoming students are interested in and even demand this type of subject matter clinic. Being located in California, a center for culture and technology production, makes such a clinic an obvious addition to a law school curriculum. So, in this way, we are meeting the demands of our current and prospective students.

## 2. WHAT IS NEW MEDIA RIGHTS, AND HOW DO WE BENEFIT THE STUDENTS AND THE COMMUNITY?

Now that we’ve talked about the big picture need for intellectual property, privacy, and technology law clinics, let’s take a deeper look at New Media Rights in particular. New Media Rights is a program of the nonprofit law school California Western School of Law, based in San Diego. We offer legal services, education, and policy advocacy to underserved creators, entrepreneurs, organizations, and internet users in the areas of intellectual property, media, free speech and internet law.

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<sup>1</sup> See, e.g., <https://lawschooltoolbox.com/how-to-develop-a-career-in-technology-law-and-policy>; <https://www.alanet.org/career-center/career-resources-and-articles/articles-from-robert-half/2022-forecast-in-demand-practice-areas-and-jobs>; <https://www.clio.com/blog/emerging-areas-law>.

Our clients include journalists, freelance writers, photographers, artists, filmmakers, nonprofits, researchers, and technology businesses, among others. These clients represent free speech, nonprofit services, and business ideas that may die on the vine or be the victims of improper censorship without access to these services. Over the years we've provided services on thousands of matters to our clients.

New Media Rights has been a program of California Western School of Law in San Diego since 2012, but began in 2007 as part of San Diego-based Utility Consumers' Action Network. The program started as a confluence of my own interests that developed in law school in the early 2000s, as social media, blogging, and podcasting were just beginning. Through my practice as a consumer rights' attorney and background with music and technology, I saw a growing demand at the point where creativity and technology intersected with the law: specifically, the need for public interest legal services related to the internet and new media.

The program has raised funds from foundations (including the California Consumer Protection Foundation, Rose Foundation, Mozilla Foundation, Prebys Foundation), government (City of San Diego), and individual donors.

Each semester, eight to ten students participate in the program. Six are new clinic students, and the rest are returning student fellows who get a chance to work on new and more advanced types of client matters, as well as on educational and policy projects. The clinic is engaged in teaching students to practice transactional law, more specifically internet and media law.

Our staff consists of an executive director, assistant director, and staff attorney. All three are attorneys licensed in the state of California. This allows us to work on California state matters, but also United States federal matters, including copyright and trademark law.

Our services can be divided into three parts: direct legal services, legal education, and public policy advocacy. Students are involved in all three of these aspects of the services we provide.

#### A. DIRECT LEGAL SERVICES

We offer full-service legal assistance within our areas of expertise rather than serving solely as a referral organization. Clients receive legal services



regardless of ability to pay or any other criteria, with a particular focus on clients who:

1. Are in financial need;
2. Provide a public interest benefit to the San Diego region or California;
3. Would not have access to legal assistance otherwise;
4. Provide a significant community or public benefit, rather than a simple profit motive (examples of public benefit include qualities like providing (a) better access to public information, (b) more business and government accountability, or (c) new perspectives to the cultural landscape); and
5. Use the internet to fill unmet needs in media, arts, information and culture.

As discussed, our clients include a broad variety of creative and technology-focused clients. Here are a few historical client examples of the nearly 3,000 client matters we've worked on over the years:

■ Anita Sarkeesian, the founder of the *Feminist Frequency* website, is now one of the most well-known cultural commentators in the world, including being named among *Time* magazine's most influential women. Anita started out with a YouTube channel, and her effort to launch a series discussing gender stereotyping in gaming received vicious, misogynistic harassment in the form of takedowns of YouTube content, death threats, vandalism of her Wikipedia page, and efforts to flag her successful Kickstarter as terrorism. New Media Rights successfully supported some of Anita's efforts to defend her rights online, specifically related to YouTube harassment.

■ Nanome, Inc., created virtual reality software that allows users to build and interact with molecules such as carbon, oxygen, nitrogen and hydrogen by reaching out and grabbing the component atoms. Originally educational-focused software, today Nanome's VR tools aid in drug discovery, molecular modeling, rational protein design, VR learning experiences, COVID-19 spike protein exploration, and more. In their early stages, Nanome sought services from New Media Rights.

■ *Painted Nails*, a film by Erica Jordan and Diane Griffin, is about a Vietnamese nail salon worker, Van Hoag, whose health deteriorates after being exposed to various chemicals at her job. The film follows Hoag's family, but also the broader effort to pass legislation at the California Legislature

to protect cosmetic workers from toxic chemicals. New Media Rights provided legal services, and *Painted Nails* later screened at film festivals and on PBS all over the country.

■ *Adios Amor*, a film by Lori Coyle and Jane Greenberg, tells the story of farmworker advocate Maria Moreno, a predecessor of Cesar Chavez. After working with New Media Rights, the film was distributed through *Voces* on PBS and many film festivals, including the San Diego Latino Film festival.

## B. LEGAL EDUCATION

Demand for our types of specialized legal services vastly outpaces supply. To reach additional individuals the program can't take on as clients, New Media Rights has created a vast array of innovative educational resources. We distribute video, text, and software guides we create through our website, on YouTube, in-person as workshops, and through media outlets. We aim to expand the public availability of easy-to-understand legal resources regarding intellectual property, media, free speech, and internet law.

These materials are intended to help creators, entrepreneurs, organizations, and internet users (1) understand their rights, (2) engage in self-help, and (3) empower themselves to be more discerning consumers of legal services.

Content development is based on our actual experience serving creators, entrepreneurs, organizations, and internet users.

We openly license many of our educational resources. In cases where we do not openly license resources, there must be some nexus to other organizational goals such as sustainability (for example, we charge a reasonable price for our book to ensure there is money to keep it updated with new editions). Additionally, the resources we develop sometimes incorporate existing openly-licensed content with the goal of adding value to that existing work.

Examples of our educational work include the following:

### *Website*

The New Media Rights website welcomes hundreds of thousands of visitors each year, now totaling millions of users who have accessed our website and educational resources.

## *Fair Use App*

We spend a lot of time at New Media Rights advising filmmakers, creators, and technology startups about copyright, fair use, and when they can and can't reuse content. We find that education about fair use prevents unnecessary legal disputes, helping creative projects and new businesses flourish. But what if there were an interactive way to teach even more filmmakers, creators, and technology startups about fair use?

Enter the *Fair Use App*. To create this app, New Media Rights filtered down many years of experience to create an app that can help video creators better understand:

- When they can reuse content;
- How their choices affect a fair use argument; and
- When it's time to talk to a lawyer.

Work on the app began in 2012, and it launched in 2015. Today, some law schools have courses or clinics that produce apps, but New Media Rights was an early pioneer in this space.

While the app isn't intended to provide automated answers on specific fair use questions, it is helpful as a tool for individuals to make better decisions about when and how to reuse content.

The app can be accessed freely at <http://newmediarights.org/fairuse>.

New Media Rights also licensed the app to the University of California, which adapted it for use internally to help train UC faculty and staff on copyright and fair use matters.

The Fair Use App was years in the making and is the result of work by dozens of individuals. I led the project, which involved many team members working directly with local San Diego design firm FYC Labs to develop the app. The team also included Staff Attorney Teri Karobonik; Advisory Board members and former legal interns Shaun Spalding '11, Lauren Brady '14, and Kyle Welch '14; Advisory Board members Hani Anani, Jonathan McIntosh, Phelan Riessen and Cy Kuckenbaker; alumni Alex Johnson and Ashley Gray as well as current New Media Rights Assistant Director Erika Lee.

## *Don't Panic Book*

Our book, *Don't Panic: A Legal Guide (in plain english) for Small Businesses and Creative Professionals* covers the legal issues a creator or entrepreneur

may encounter and when to reach out to a lawyer. The book has been adopted in over twelve undergraduate and graduate courses (at Berklee College of Music, San Diego State University, San Diego City College, Seattle University and more) to teach legal concepts to students.

*Don't Panic* covers a range of legal situations that may arise, from the inception of a business, or the creation of a work, to that dreaded moment (that hopefully doesn't happen) when one receives a demand letter from an attorney for the first time. The book serves as a valuable guide to preventing and resolving legal issues. The book is organized to help readers quickly jump to specific information that will help them understand legal issues associated with a particular stage of work/production.

### *Community Presentations and Collaboration*

We also frequently:

1. Organize and participate in community engagement events, panels and legal advice nights with local arts and technology education groups; and
2. Speak to classes at local universities, community colleges, and even high schools on intellectual property and privacy related issues.

We have collaborated with local groups and institutions like San Diego Media Pros, the San Diego Press Club, the San Diego Film Consortium, KPBS, San Diego State University, San Diego City College, and Arts for Learning San Diego. We are also connected with and/or have collaborated with state and national organizations, including the Alliance for Community Media, American Society of Journalists and Authors, the Investigative News Network, the Digital Media Law Project at Harvard University's Berkman Center for the Internet and Society, the Organization for Transformative Works, the Media Law Resource Center, the Electronic Frontier Foundation, California Lawyers for the Arts, and many other legal clinics and organizations that work in this area of law.

### *YouTube Channel*

We have produced dozens of YouTube videos on legal topics that have been viewed over 650,000 times. Law students participated in the creation of the videos, from writing scripts to appearing on camera.

### C. PUBLIC POLICY ADVOCACY

To help regulators and legislators understand the practical implications of policy decisions, we engage in public policy advocacy in our areas of expertise. We've filed comments, testified, and participated in regulatory proceedings at the U.S. Copyright Office, the Federal Communications Commission, the California Public Utilities Commission, the Department of Commerce, and the Office of Technology and Science Policy. Topics have included Net Neutrality, DMCA Anti-Circumvention Proceedings, copyright reform, technology policy, and the copyright small claims court proceedings. I also served three terms on the Federal Communications Commission's Consumer Advisory Committee, where I co-chaired the Broadband Committee.

We collaborate and coordinate our advocacy efforts with other groups where possible. As an example, we consulted with a coalition of writers and journalism organizations working to shape state legislation that affected the employment status of freelance writers.

Since 2009, the clinic has been part of DMCA Anti-Circumvention Proceedings at the Copyright Office. Through this process, we've helped achieve exemptions to the copyright laws that apply to filmmakers and video creators nationwide. These exemptions allow them to break encryption on DVDs, Blu-ray, and online media in order to make a fair use. Fair use is a doctrine that allows content reuse without permission for narrow purposes, such as commentary and criticism. However, most digital content is encrypted in today's media ecosystem, and since federal law prohibits breaking encryption, it is difficult for content creators to engage in fair use without the ability to also break this encryption. Although one has every right to make a fair use of third-party content under the law, without access to the content, that right is meaningless.

Recently the clinic made multiple filings regarding the Copyright Small Claims Board, which is the new federal copyright small claims forum. Many of the clinic's clients will be drawn into this new small-claims-court-like process, and we made a number of recommendations to help achieve a fair process for all parties.

We've even contributed to various amicus briefs over the years that have helped ensure a balance in copyright law that works for independent creators who use the internet to distribute their work.

Whether it's ensuring freedom of speech for video creators, advocating for net neutrality, or helping to shape a fair copyright small claims board, our advocacy is informed by what we learn through the provision of direct legal services. It is also a meaningful way for students to understand the role of the lawyer in shaping the law and informing policy makers about how policy is working (or not working) on the ground.

### *Policy Work Examples*

Here is a list of our policy and amicus briefs over the years:

- *Comments of Technology and Intellectual Property Clinical Law Professors*, Docket No 2021-9 (filed February 3, 2022).<sup>2</sup>
- *Copyright Claims Board: Initiation of Proceedings and Related Procedures*, Docket No 2021-6, Comments of New Media Rights (filed November 30, 2021).<sup>3</sup>
- *Petitions for renewal of DMCA exemption classes for computer programs (digital jailbreaking)*,<sup>4</sup> noncommercial video,<sup>5</sup> and documentary films<sup>6</sup> (July 2020).
- *In the Matter of Registration Modernization*, Docket No 2018-9, Comments of New Media Rights (filed January 15, 2019).<sup>7</sup>
- *SB 822 NMR Letter of Support for California Net Neutrality Law* (April 11, 2018).<sup>8</sup>

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<sup>2</sup> <https://tlpc.colorado.edu/wp-content/uploads/2022/02/2022.02.03-Tech-and-IP-Clinical-Law-Professors-Comment-on-CCB-Law-Student-Attorney-Participation-NPRM-final.pdf>.

<sup>3</sup> <https://www.regulations.gov/comment/COLC-2021-0004-0127>.

<sup>4</sup> <https://www.copyright.gov/1201/2021/petitions/renewal/Renewal%20Pet.%20-%20Jailbreaking%20-%20New%20Media%20Rights.pdf>.

<sup>5</sup> <https://www.copyright.gov/1201/2021/petitions/renewal/Renewal%20Pet.%20-%20Noncom.%20Videos%20-%20New%20Media%20Rights.pdf>.

<sup>6</sup> <https://www.copyright.gov/1201/2021/petitions/renewal/Renewal%20Pet.%20-%20Documentary%20Films%20-%20New%20Media%20Rights.pdf>.

<sup>7</sup> <https://www.newmediarights.org/sites/newmediarights.org/files/New%20Media%20Rights%20Registration%20Modernization%20FINAL.pdf>.

<sup>8</sup> <https://www.newmediarights.org/sites/newmediarights.org/files/SB%20822%20NMR%20Letter%20of%20Support.pdf>.

- *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, FCC 17-60, Comments of New Media Rights July 17, 2017.<sup>9</sup>
- *Petitions for renewal of DMCA exemption classes for computer programs*,<sup>10</sup> noncommercial video,<sup>11</sup> and documentary films<sup>12</sup> Docket No. 2017-10 (July 2017).
- *Press Freedom Groups Letter to Federal Communications Commission in support of Title II Net Neutrality* (2017).<sup>13</sup>
- *In the matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Docket No. RM 2014-07, Comments of New Media Rights (Filed February 6, 2015).
- *In the Matter of Protecting and Promoting the Open Internet*, Comments of New Media Rights, GN Docket No. 14-28 (Filed July 15, 2014).
- *Guide to Intellectual Property & Fiscal Sponsorship Agreements for Scientific, Research, and Archival Projects*. (September 3, 2014) (with Marko Radisavljevic).<sup>14</sup>
- *Garcia v. Google*, No. 12-57302 (9th Cir. 2014) *Brief of Amici Curiae Electronic Frontier Foundation, American Civil Liberties Union, Public Knowledge, Center for Democracy and Technology, New Media Rights, American Library Association, Association of College and Research Libraries, and Association of Research Libraries in Support of Defendants-Appellees* (Corynne McSherry, Nathan Cardozo, Lee Rowland, Brian Hauss, Michael Weinberg, Teri Karobonik, David Sohn, Jonathan Band).<sup>15</sup>
- *In the Matter of the Public Comment on Intentional Interruption of Wireless Services*, GN Docket No. 12-52, Comments of New Media Rights (Filed April 30, 2012).

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<sup>9</sup> <https://www.newmediarights.org/sites/newmediarights.org/files/New%20Media%20Rights%20Open%20Internet%20Comments%20FINAL%2007.17.2017.pdf>.

<sup>10</sup> <https://www.copyright.gov/1201/2018/petitions-073117/Renewal%20Pet.%20-%20Jailbreaking%20-%20New%20Media%20Rights.pdf>.

<sup>11</sup> <https://www.copyright.gov/1201/2018/petitions-073117/Renewal%20Pet.%20-%20Noncom.%20Videos%20-%20New%20Media%20Rights.pdf>.

<sup>12</sup> <https://www.copyright.gov/1201/2018/petitions-073117/Renewal%20Pet.%20-%20Documentary%20Films%20-%20New%20Media%20Rights.pdf>.

<sup>13</sup> [https://www.newmediarights.org/sites/newmediarights.org/files/press\\_freedom\\_net\\_neutrality\\_letter.pdf](https://www.newmediarights.org/sites/newmediarights.org/files/press_freedom_net_neutrality_letter.pdf).

<sup>14</sup> [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2567848](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567848).

<sup>15</sup> <https://lca.x0x8kvd0-liquidwebsites.com/wp-content/uploads/2018/04/lca-amicus-garcia-v-google-17apr14.pdf>.

- *Remedies for Small Copyright Claims*, Docket Number RM 2011-10, Comments of New Media Rights (Filed January 17, 2012).<sup>16</sup>
- *The matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Docket No. RM. 2011-7, Comments of New Media Rights (Filed February 10, 2012).
- *In the Matter of Applications of AT&T, Inc. and Deutsche Telekom A For Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Petition to Deny of New Media Rights, Utility Consumers' Action Network, and Privacy Rights Clearinghouse. (Filed May 11, 2011).
- Additional publications.<sup>17</sup>

## STUDENT BENEFITS

Student results are how this clinic measures success. Having a well-established program brings candidates interested in this field to our school. We train students to be ready to hit the ground running when they start working as an attorney. Their experience with cutting-edge legal issues from artificial intelligence, to virtual reality, to drones, to NFTs, prepares them for practice in an ever-evolving technological landscape. New Media Rights' graduates have held positions at entertainment companies like Netflix, Lionsgate, and William Morris, global nonprofits like Wikimedia Foundation and the Free Software Foundation, as well as law firms large and small.

## COMMUNITY BENEFITS

New Media Rights takes pride in having a significant impact locally in its home city of San Diego, California. The program has deep roots and significant impact in both the technology and arts communities.

In the technology community, we are a resource for legal services, free clinics, and educational presentations. We collaborate with community events like TechCon San Diego, Startup San Diego, March Mingle, and partner with local tech organizations like the Miramar College REC Innovation Lab. While we've worked with startups across San Diego, this

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<sup>16</sup> [https://www.copyright.gov/docs/smallclaims/comments/noi\\_10112012/new\\_media\\_rights.pdf](https://www.copyright.gov/docs/smallclaims/comments/noi_10112012/new_media_rights.pdf).

<sup>17</sup> <http://ssrn.com/author=1346806>.



particular relationship with Miramar College offers law students access to a more diverse array of tech startups, as the incubator is located at a local community college.

In the creative community, New Media Rights partners with our local PBS affiliate, KPBS, on their Explore Local Content Project. Each year, we provide a Law 101 presentation for local producers in the KPBS Explore program. Many local television shows, radio shows, and podcasts have worked with our clinic from the pre-production stage to distribution.

We also partner with San Diego City College, San Diego State University, San Diego Film Consortium, and many more community groups.

### 3. WHAT IS THE STRUCTURE AND PEDAGOGY OF THE CLINIC?

Our purpose is to train future lawyers. The clinic course consists of our learning outcomes, learning experiences, and assessment of both students and the course itself. This is how we provide value for our students. New Media Rights instructors know that it's extremely important to approach teaching with intentionality — and to build on the huge amount of scholarship from the clinical community regarding how to teach in a clinic.

The general philosophy in our program is that students learn well by doing. We aim to give students legal frameworks that they can then apply to real-life factual scenarios. So, while we do directly teach more traditional lectures that establish legal frameworks for students, we're looking for as many chances as possible during the semester where the student can actually be the lawyer.

#### A. LEARNING OUTCOMES

Learning outcomes begin with alignment with the relevant ABA standards. New Media Rights' outcomes align with ABA Standard 302 which establishes the goals of developing law students' legal knowledge, ability to communicate legal concepts, and ethical understanding, among others.

The clinic also is aligned with the larger mission and institutional goals of our law school, California Western School of Law. In addition, our clinic design is informed by clinical best practices as published by CLEA, and by many years of attending AALS national, entrepreneurial, and tech clinic

gatherings, where we have also spoken and helped shape the field (particularly in the area of working with students on public policy advocacy and building legal technology, such as our fair use app).

Our big picture goal for the clinic is to familiarize and help students become proficient in internet and media law practice for creative and technology clients, with an emphasis on intellectual property, privacy, and media law.

The key learning objectives for students are to gain skills, knowledge and values through their work with creative and technology clients. The experiences we provide to reach these learning objectives are critical to the clinic experience.

### *Skills*

During their time in the clinic, students will be able to provide practical, actionable legal services and deliverables, including writing communications, conducting real-time client interviews, and drafting memos and contracts. This means that students need to perform legal analysis and produce deliverables (contracts, memos, etc.). In addition, students need to be able to communicate to clients the business implications of their legal advice. How does a filmmaker need to change their film based on your analysis? How does a business owner need to change their business practices? It can also often be critical that the client actually knows how to use the deliverable. For a contract, the student needs to explain to the client both what the agreement does, and what the client needs to do to make it effective. This may mean explaining which fields of the document the client will need to fill in, and how to figure out who the authorized signer is for the other party.

We also aim to develop less visible lawyering skills. The clinic is an ideal setting for students to identify big picture and more immediate goals in the representation, to prioritize tasks, plan, and consistently review progress and revise their approach as necessary in shifting factual scenarios.

By learning these skills, we want students to come away more confident in being someone's lawyer. They will be practicing soon enough, so this is an opportunity for them to get the feel for the multi-dimensional aspects of real-life client representation. We work to foster an environment to develop problem-solving, creative lawyers.

### *Knowledge*

As far as legal knowledge, we want students to gain a deeper understanding of internet, media, and intellectual property law issues, and apply this knowledge to client representations. We focus particularly on the application of copyright law and contract drafting to new technologies and creative industries.

### *Values*

Students will also develop values that can guide them in any area of law practice. The values relate to their responsibilities to themselves, others, and the larger legal system. We want students to develop integrity, as well as respect for themselves, their clients, and other parties. Students should learn the level of competence it takes to represent an individual client, which they can use as a reference for competence in their practice. They should also commit to unbiased behavior. We want to develop empathy, hard work, and commitment. In addition, students learn about zealous advocacy in the transactional world, which is often not so much a zero-sum game, or nearly as adversarial, as in litigation. Lastly, we want students to develop values that relate to creating a just legal system and ensuring access to legal information and services through pro bono work.

## B. LEARNING EXPERIENCES

The basic components of clinics are classroom work and supervision. But first, a few practical notes about how the clinic functions:

Before we ever get to class or start work with a client, we are transparent with the students about what is expected.

Students receive a syllabus, detailing the learning objectives, course readings, and other expectations for the course. They also receive a clinic handbook that covers everything from how to check in with their supervisor and teammate each day, to file naming conventions, to how and when to track changes. Clinic documentation is extensive and includes guides on memo and email drafting, as well as how to approach a new assignment. We've deconstructed the lawyering process so that students can start to see lawyering as a process, helping them develop their own style and approach.

Students meet with supervisors and with their partners before the first class and before they receive their first case, and during those initial meetings we discuss expectations as far as teamwork, communication, taking ownership of cases, and how they will be assessed.

Students typically work with two or three clients on a total of three to five matters during the semester. Clients are usually in a creative or technology industry, and could be an individual, small company, or nonprofit, usually with a nexus to the internet. Students work in teams of two, and they have a classroom component as well as clinical hours where they do the work for their clients.

### *Classroom work*

The classroom experience consists of four elements: interactive lectures, case rounds, simulations, and final presentations:

#### *Interactive Lectures*

At the first class we provide an introduction to the clinical experience as well as the classroom seminar. We identify our expectations, explain how students will be assessed, and highlight important resources available to students during their time in the clinic.

We then move to our substantive interactive lectures, which are front-loaded in the first half of the semester. These center around specific copyright and contract drafting topics. While these are lectures, they are highly interactive and relate directly to the work the students are doing. Typically, we follow the pattern of establishing a legal framework, such as copyright analysis or contract drafting, and then have students immediately apply that framework through problems developed based on actual clinical client situations.

Throughout the semester, we connect these interactive lectures with their actual cases again and again, scheduling case rounds for groups working on casework to discuss elements of their cases that are directly relevant to that class's interactive lecture.

#### *Case Rounds*

Here, facilitated by supervisor questions, students reveal how well they understand a client's case (who is the client, what is their industry/tech,

what legal services they need, what are the paths available to the client), discuss key lawyering decisions they are making, and explain how the legal knowledge they've learned in lectures is applying to their casework. Students reveal their assumptions, beliefs and other learning about the process of lawyering. Rounds often touch on reflection and discussion about case planning, including analysis of the client's goals, identification of the decision-makers who affect the clients, different alternatives that clients have to achieving their goals (there are often multiple paths), and the consequences that follow from certain decisions.

Case rounds provide the other students in the class the opportunity to learn vicariously about other types of clients, industries, and aspects of different representations, and sometimes provide input on how to proceed. Rounds not only enrich students' experience at the clinic, but also provide the students who aren't in the group on call with an opportunity to participate in decision making on cases for which they are not directly responsible.

Overall, case rounds are a chance for students to step away from the actual representations and reflect on their work as lawyers facilitated by a professor. It is a unique and productive part of a clinic as a moment for reflection and learning.

### *Simulations*

Toward the end of the semester, students have finished substantive lectures and represented clients on multiple matters.

To help them put it all together, we present them with real-life past clinic cases, where students read all the background facts. Then, in class over the course of a few hours, we work through a case from start to finish. Students must elicit and analyze facts, do the legal analysis, and figure out how we're going to advise and help the client.

This is a chance to put all their knowledge and skills to use in real-life scenarios, and again, assume the role of the lawyer.

### *Final Presentations*

During the last class, students give a 35-minute presentation for the class where they summarize their casework. The students must distill many hours of client representations and class into one presentation. The best

presentations go beyond a summary of case work, reflecting on the challenges, and even failures experienced during the semester, and sharing practical takeaways the students will take into their legal careers.

### *Supervision*

Clinical work is all about learning by doing. This is a chance to work with real clients — but to be students while doing the work — and have a supervisor there to facilitate. Supervision is where we guide students who are engaged in the two-pronged efforts of representing clients and learning to be lawyers. In preparation for working with actual clients, students are presented with client cases, basic facts, resources, and some guidance.

Then, week in, week out, students are expected to represent the client. The aim is really to cultivate the students' confidence in representing clients, as well as their understanding of why they are doing what they're doing. To this end, more thorough guidance is given on the first assignment, while later assignments are given to students in a more raw form. These later, more "raw" assignments, allow them to participate in the earliest stages of considering the potential client, case planning, etc.

During the supervision, supervisors are there every step of the way, but encouraging the students to find the answers for themselves. If students draft an email, the supervisor will discuss the tone and content, and work with students on ways they can improve their communications with the client. When students put together client interview questions, they must be able to explain why they are asking the questions and how each relates to the representation. When drafting a contract, students must review and learn about the industry, relevant areas of law, gather examples of relevant contracts and put together an outline of what goes into such a contract. Then they must explain why they've chosen this language, what the default rule is without the language, how the language affects their client and relates to client goals, and how the language relates to industry norms.

So, for work throughout the semester, the supervisor provides real-time feedback and is consistently requiring that the students be able to explain why they made a certain choice.

### C. ASSESSMENT

This clinic is graded. We have a structured rubric, and students are graded at midpoint and end of semester on professionalism, class participation, responsiveness to feedback, learning in substantive areas of law, learning in business and technology, teamwork, and demonstrated ethical understanding.

Students can demonstrate achievement on these criteria in class and in work with clients throughout the semester.

Mid-semester and final exit interviews allow us to touch base with students, get the most out of the student's time in the clinic, and help the student think about their future path.

At the end of each semester, clinic professors revisit the semester, talk about what we could do better, and then make adjustments to the next semester's clinic. In this way, the clinic is always evolving.

## 4. WHAT ARE OUR HOPES LOOKING FORWARD?

In the future, our clinic looks to continue to distinguish ourselves and grow our law school's reputation even further in this field. We are known for our work on fair use defense of online speech, content clearance work, and advocacy at the Copyright Office. We want to be the first stop for pro bono legal services and cutting-edge issues, provide enriching client experiences for students, and excellent services to our clients. Right now, we're working with clients on issues related to new web monetization technologies, NFTs, artificial intelligence, virtual reality, and drones. As new frontiers arise, our clinic will be there, with our students, to meet the challenge.

Our law school has many courses on intellectual property, entertainment, and privacy law, and we plan to continue being part of the rich set of offerings available to California Western students.

Our clinic has created a positive loop, where students participate in the clinic, they gather skills and knowledge, they are successful in practice, and then many go on to hire more recent graduates from our program. Along the way, clients from cutting edge fields, who often would go without legal services, have access to high quality legal services.





# ACCESS TO JUSTICE PRACTICUM:

*University of Southern California Gould School of Law*

CLARE PASTORE\*

## OFFERING HANDS-ON EXPERIENCE ON IMPACT TEAMS

Like most law schools today, USC Gould School of Law offers a robust clinical program, with seven full-year clinics covering a variety of different subject areas. Each is taught and directed by at least one full-time attorney professor. We also offer a number of “practicum” courses, including the Access to Justice Practicum (“ATJ Practicum” or “ATJP”), which I created and direct. This brief article describes the ATJ Practicum and what sets it apart from our clinics and other experiential courses, and discusses some of the projects we have undertaken since the Practicum’s inception in 2008. Finally, I offer some reflections on teaching and learning in the Practicum.

The two most distinctive features of the ATJ Practicum are that it is focused on impact advocacy rather than direct services to individual

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\*Clare Pastore is Professor of the Practice of Law and founding director of the Access to Justice Practicum at the USC Gould School of Law.

clients and that we always work in conjunction with co-counsel from the nonprofit arena. These two features combine to give students an experience not always readily available in law school: the chance to work as part of an (often large) team on an issue selected for its impact on many people or the justice system itself, and to see how litigation or other advocacy is developed from first awareness of a problem through formulation of legal and other strategies, assembly of a team, selection of forum and claims, through litigation, attorneys fees wrangling, post-litigation monitoring, and sometimes concurrent efforts such as legislative advocacy.

## USC GOULD'S CLINICAL AND PRACTICUM COURSES

USC's seven clinics include five with public-sector focus — immigration, housing, international human rights, post-conviction, and mediation. Two (small business and intellectual property) have a private-sector focus.

Other than the mediation clinic, which trains students and then places them in courthouses as mediators, our clinics are typically organized around the “student as lawyer” model. With some exceptions, this generally means the student handles the client's matter from start to finish and makes the decisions (with faculty attorney supervision, of course). For a student, having primary responsibility for a case or matter from beginning to end and being the primary contact with the client(s) are invaluable. Each clinic is directed by at least one full-time professor who is also a licensed attorney.

In addition to our clinics, USC Gould offers a variety of “practicum” courses. The use of this term at USC signals two important things: our practicums are one semester, as opposed to our yearlong clinics; and they are typically three-credit courses instead of the five credits per semester offered by clinics. This latter difference of course means that the number of hours expected of students is considerably less in a practicum. While our clinical instructors usually advise students to plan on committing approximately twenty hours per week to their clinics, the expectation in my three-credit ATJ Practicum is twelve. (Of course, clinical and practicum instructors alike caution students that real-world work in either setting is not guaranteed to fall neatly within these parameters, and that neither clinics nor practicums are a good “bargain” for the credit hours.)

Our practicum courses include a Veteran's Legal Practicum in which students help ex-servicemembers with discharge upgrades, access to benefits, and other issues; a Medical-Legal Partnership, which is a collaboration among USC's law, medical, and public policy schools on access to medical care, medical debt, income and food insecurity, and other issues in which health is affected by legal problems; a Legislative Policy Practicum focused on criminal justice reform; and a Children's Legal Issues Practicum in which students assist families in finalizing adoptions of children exiting foster care. All but one of these Practicum courses were started by adjunct faculty working with community legal services providers.<sup>1</sup>

## THE ACCESS TO JUSTICE PRACTICUM

The Access to Justice Practicum, which I started in 2008, partakes of elements of both our clinical and our practicum models. Like our clinics but unlike most of our other practicums, the ATJP is taught by a full-time faculty member rather than a part-time faculty member whose primary work is in an advocacy or other organization. Unlike our very subject-specific clinics and our other practicums, the ATJP reflects my background as a generalist anti-poverty and civil rights lawyer, and thus our docket is quite varied. Most importantly, the ATJ Practicum does not strive to give students the chance to direct their own case to the extent possible. Instead, it provides an experience mirroring those of impact litigators like myself: being part of a (sometimes large) team litigating an issue that generally transcends the interests of a single client. We always work as co-counsel with at least one nonprofit agency, typically in Los Angeles, but often elsewhere in California or the country, and sometimes also work with pro bono counsel or (in the case of occasional legislative advocacy) with government or elected officials.

Both experiences (student as lead on a single-client or smaller case and student as part of an impact team) are valuable and many students try both during their law school careers. Both experiences typically offer intensive

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<sup>1</sup> The exception is the Legislative Policy Practicum, which was created by Professor Heidi Rummel as an outgrowth of the Post-Conviction clinic she co-directs. Also, the Veterans Legal Issues Practicum's creator and co-director, Laura Riley, has since joined the Gould faculty.

feedback on writing, opportunities to research and draft pleadings and other legal documents, and the chance to see in the wild issues they have only encountered in textbooks, such as discovery, motions to dismiss, ethical questions, and strategic planning. It is my sense however that while the ATJ Practicum is not unique in offering impact experience to students, such opportunities are somewhat rare. Being a small part of a big team allows students to experience collaboration with lawyers of many experience levels, to see a variety of kinds of advocacy on a problem (often including advocacy for individual clients, class action litigation, and legislative and administrative advocacy). Perhaps most importantly, students can get a feel for how advocates move from discovering and analyzing a problem to framing a legal issue to deciding on strategy to filing a case or legislative proposal, and eventually to litigation, settlement, and often post-judgment monitoring or enforcement. Of course, no student sees all of these stages play out in real time during a single semester. But they see important parts, and they must get up to speed on the whole in order to participate effectively. They also get the chance to forge connections with organizations and advocates and get a glimpse into the different cultures and missions of our partner agencies.

While I as the professor am certainly supervising the students' work, I also stress to them that we are working as co-counsel, much as I worked with senior lawyers when I was a novice lawyer at Western Center on Law and Poverty, and much as I have worked with lawyers at all levels throughout my career. This aspect of the Practicum can be challenging for students, who sometimes expect professors to have all the answers and are not accustomed to hearing "I don't know, let's try to figure it out together" from us. (They also sometimes balk at my insistence that we all operate on a first-name basis). This collegial relationship also offers an opportunity to mentor students about practical aspects of being a junior member of a team, such as how to maximize the usefulness of their work to the decisionmakers (senior colleagues or judges), email and communication etiquette, and how to appropriately take initiative while respecting consensus. The best of my Practicum students have thrived in this somewhat non-traditional professor-student relationship, bringing ideas to their teams, taking the initiative to research new possibilities or suggest strategies for

the team, and availing themselves of opportunities to forge connections in the advocacy world.

The Practicum generally enrolls four students each spring, who work on two teams. Each team works on a different matter with one or more partner organizations. I work as co-counsel with both teams. Key to what we are offering our partners is my services as co-counsel to them and supervisor of the students. This is in sharp contrast to my experience as a full-time non-profit lawyer over many years, especially at the high-profile ACLU, where offers of help from students would frequently flood my desk. Although we were often overworked, like most nonprofit lawyers, supervision takes time and it is often difficult or impossible to integrate students if the nonprofit lawyer has to educate them about the issues and the organization, bring them up to speed, and supervise their work, all while carrying the advocate's own caseload and moving the matters along. In the Practicum, by contrast, I stress to our advocate partners that I am not "farming out" my students for them to keep busy, but will come onto the case or matter myself as co-counsel, while supervising the students personally. Also, of course, I remain on the matter until resolution, which is often long after the students' departure. Under these conditions, finding partners is certainly not a hard sell. (When I began the Practicum in 2008, I generally spent a fair amount of time each fall wooing partners and seeking projects; as we have become established, I frequently now receive more requests for co-counsel than I can meet.)

I meet weekly with each student team. They turn in written work twenty-four hours before each meeting, often memos on discrete issues, tables analyzing data, summaries of interviews, or drafts of parts of a brief, complaint, or other document. I give them detailed written feedback at or before our weekly meeting. As with clinics, this intensive feedback on their writing is one of the things students regularly report finding most valuable about the ATJ Practicum.

## ATJP PROJECTS

During the Practicum's thirteen years so far (2008–2022, with hiatuses in 2014 and 2018), we have partnered with a veritable Who's Who of Los Angeles nonprofits, as well as groups outside our city or state. These include

the Alliance for Children's Rights, the ACLU, the Wage Justice Center, Western Center on Law and Poverty, National Health Law Program, Legal Aid Foundation of Los Angeles, Neighborhood Legal Services of Los Angeles County, Bet Tzedek Legal Services, Bay Area Legal Aid, Inner City Law Center, Restaurant Opportunities Center, Public Counsel, and Disability Rights Legal Center.

The most ambitious ATJ Practicum projects to date have been those relating to the struggle to end unjust drivers license suspensions in California. Advocates for low-income people had been aware for years of the burden on low-income residents of a toxic mix of California policies: fines for traffic offenses that are among the highest in the nation; over-policing for small infractions, especially in low-income communities and communities of color; automatic imposition of \$300 penalty assessments on infractors who fail to pay on time or show up for their court appearances; and suspension of drivers licenses for those who cannot pay the exorbitant fees and penalties.

After a coalition of California civil rights and anti-poverty groups published the influential 2015 report entitled "Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California," advocates set out to file strategic court challenges to end license suspension. Students and I joined a statewide coalition including the Lawyers' Committee for Civil Rights, the ACLU, the Western Center on Law and Poverty, the East Bay Community Law Center, Bay Area Legal Aid, as well as the Pillsbury Winthrop Shaw Pittman firm. We all worked for several years in a variety of fora to document and challenge suspensions. Northern California advocates sued and quickly settled with one local Superior Court which agreed to end automatic license suspension for failures to pay. Southern California advocates, including us, sued Los Angeles Superior Court and eventually settled for dramatically improved procedures for judges to follow in assessing ability to pay before imposing fees and referring drivers to the Department of Motor Vehicles for suspension. Together the statewide coalition sued the DMV for failing to follow state law requiring that failure to appear or pay be willful before a license could be suspended.

That case, *Hernandez v. Department of Motor Vehicles*, became hotly contested and led to a published appellate opinion, establishing that the DMV could no suspend licenses upon mere notice of a missed court

appearance, but only upon notice of a violation of a statutory violation (which requires willfulness).<sup>2</sup> The coalition's advocacy also included spearheading a legislative initiative which ultimately led to the end of statutory authority for suspending licenses for failure to pay. This constellation of issues led to four years of student work in the ATJ Practicum. Students were involved in every facet of the multi-year advocacy effort, conducting research and analysis, interviewing clients, observing court procedures to document the experiences of clients, drafting discovery and pleadings, evaluating proposed statutory language, and more. In the end, this extensive, multi-pronged effort by some of California's best advocates led to the restoration of over 750,000 suspended driver's licenses and an end to suspensions for failure to pay.

The Practicum has also been involved in repeat partnerships in foster care reform with the Alliance for Children's Rights. The Alliance represents foster children and their caregivers, not on the dependency court proceedings themselves, but on all the issues that can arise after placement. Often these cases involve securing appropriate educational, mental health, and other services for foster children, especially those with disabilities. The ATJ Practicum has filed three cases with the Alliance and succeeded in all of them in removing barriers to resources that foster children and their caregivers need.

In *Gofas v. California Department of Social Services* (2010), we forced the state to restore the administrative rehearing process it had unlawfully suspended for budgetary reasons. Without rehearings, a foster caregiver had no choice but to file a lawsuit in court if the administrative law judge made a mistake. Filing suits is all but impossible without counsel, and counsel who can bring such cases for free is almost nonexistent, even when the case is a virtually certain winner. Our lawsuit reinstated rehearings and thus restored the ability of caregivers (and everyone else using the health and welfare administrative hearings system) to have a chance to correct erroneous decisions simply and expeditiously. Some of the affected clients received thousands of dollars in back benefits as a result, but more importantly, no caregiver will now be without a simple remedy in this situation.

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<sup>2</sup> 49 Cal. App. 5th 928 (2020).

In *Harris v. California Department of Social Services* (2012), we established that relatives seeking to become foster parents were entitled to an administrative hearing if they were rejected on the basis of old (sometimes decades-old) criminal convictions. Before our suit, if a county denied foster care certification on the basis of a conviction, even a very old one irrelevant to the relative's current suitability, the would-be caretaker had no recourse other than a lawsuit. We established that these denials were within the scope of administrative decisions on which state law requires a hearing, thus once again providing an expeditious and relatively simple way for caregivers to correct errors in the system.

In *Compton v. California Department of Social Services* (2015), we forced the state to eliminate an unlawful requirement that had kept the most vulnerable of all foster children (those with significant intellectual disabilities as well as a history of abuse or neglect) out of a program designed for precisely their situation. Our client received significant financial benefits which had been unlawfully withheld, but equally importantly, the state was forced to drop the unlawful requirement which kept out thousands of such children.

Each of these cases arose because the Alliance had seen the problem firsthand in individual cases and recognized that there was a systemic issue that needed attention. Without the resources of the Practicum, however, the Alliance was hard-pressed to undertake the additional work of filing a suit to challenge the policies rather than negotiate or administratively resolve the individual cases as they came up.

Practicum students played essential roles in each of these cases. They interviewed the clients and drafted the complaints, the briefs, and untold numbers of research memos, data analysis summaries, discovery plans, and the like. Moreover, through our continuing partnership with the Alliance, some students became exposed to an entirely new area of law (foster care) and to the Alliance's robust pro bono program. Indeed, one of the first students who worked on an Alliance case during her 2L spring called me over that summer from her law firm job to ask if she could continue working on the case and whether she could ask the firm if they would be interested in coming on board. The Alliance and I decided that was a wonderful idea, and one of Los Angeles' leading firms ended up co-counseling with us through the remainder of the case. The student, now in private



practice, has become a regular Alliance pro bono volunteer and has told me on several occasions that she feels the Practicum was one of the most valuable experiences in her entire law school career.

The ATJ Practicum has also undertaken two pieces of legislative activity (in addition to assisting on the license suspension legislation discussed above). In 2019, as an outgrowth of the license suspension work, students and I worked with staff to a Riverside County legislator who had become aware of inequities in the traffic school system. The issue was that state law required payment of fines in full before a driver could access traffic school, which meant that many low-income drivers were being shut out from this opportunity to avoid increases in their insurance costs. In collaboration with legislative staff (and the legislator herself, a USC alumna), we interviewed affected drivers, analyzed data, and drafted language for the bill. We ghostwrote analyses for the legislative committees and students traveled to Sacramento to testify in support of the bill. (Fortunately for the bill, but frustratingly for the students, the bill passed out of committee on unanimous consent, so no testimony was needed.)

We also worked on a bill and white paper in 2011 with the Wage Justice Center supporting adoption of a wage lien law. The proposal would allow workers victimized by wage theft to file and foreclose liens against employers' property, similar to the lien long available to construction workers who work on real property. Although the bill did not progress in California, the students' work was widely distributed to advocates around the nation working on similar lien proposals.

We have also written a number of amicus briefs, including two in recent years for the ACLU of New Orleans' Justice Lab Project,<sup>3</sup> a national effort to shed light on police brutality in Louisiana via a coordinated effort to file dozens of lawsuits against police. In the wake of renewed attention to racialized inequities in police treatment of citizens, I believe it has been particularly rewarding for students to learn about this very long-term strategic initiative and its myriad of law firm and law school partners around the country, see the how amicus strategy fits into the overall goal, gain exposure to the national and local levels of an important nonprofit organization, and refine their thinking about what is persuasive to judges,

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<sup>3</sup> See <https://aclujusticelab.org>.

legislators, and the public. In our most recent amicus brief with Justice Lab, we represent the Law Enforcement Action Partnership (LEAP), an organization of current and former law enforcement professionals seeking criminal justice reform, and the very existence of that organization was enlightening to some students.

Other amicus briefs have included one on behalf of nationally known ethics lawyers urging the Ninth Circuit to uphold sanctions imposed on government lawyers who had filed false declarations in a civil rights case stemming from the war on terror, one in a California appellate case involving protecting farmworkers from extreme heat, and one on behalf of the Coalition of Immigrant Low-Wage Workers in a California Supreme Court wage and hour case. In the last case, we also wrote a report, “Voices from the Underground Economy,” collecting worker stories, which has been cited by advocates in other jurisdictions.

Not all of the projects have been shining successes. Although we have won or favorably settled each of the cases on which we have worked, not all of the amicus work led to favorable results. And once (but only once out of twenty-six projects total) we had a project that simply did not offer the experiences I had sought for the students. Our partner organization had tasked students and me with researching and writing a white paper on an important and complex healthcare issue with the potential for statewide impact. The students did a wonderful job interviewing health providers, researching the law, and drafting what I thought was a powerful white paper. But the project proved highly frustrating for both me and them because our partner seemed to become less committed to it as the semester wore on and other items took priority on the organization’s agenda. Our drafts of the report went unreviewed by our partner and ultimately the project was shelved. Our partner agency was apologetic and assured us the problem was not related in any way to the quality of our work, but it was nonetheless frustrating for all of us to feel that our work was not contributing as it could have to an important issue.

That experience forced me to become more concrete in negotiating roles and projects with organizational partners and especially to insist that each potential project have a specific advocate assigned at our partner agency, with a set schedule of meetings and check-ins with us. It can be challenging to navigate the pedagogical needs of the Practicum with

the realities of advocate workloads, and the challenge has proven greater in non-litigation projects which can sometimes slip to an advocate's back burner. In general, however, I feel our work has been well integrated and well received by our partners and their ultimate clients or audiences.

## REFLECTIONS ON TEACHING AND LEARNING IN THE ATJ PRACTICUM

### *Student selection*

When the Practicum began, I had detailed discussions with colleagues about whether it was better for me to interview and select students, or simply to allow students to sign up according to their registration priority. At USC we have both models among our clinics and practicum classes, and it is up to the professors to choose which they prefer.

I decided to allow students entry through registration priority, without selection by me, for a few reasons. One is that I was simply uncomfortable choosing among eager, capable students, many of whom I knew from other courses. I was also uncomfortable with the idea that my perceptions of which students were most "dedicated" or truly interested, even if based in large part on their demonstrated commitment to issues of justice and equality, might be incorrect or unconsciously unfair. In my experience, it is difficult to avoid the knowledge that sometimes a resume demonstrating extensive commitment to public service is also one that demonstrates the presence of family resources allowing a student to rack up unpaid or low-paid internships. Giving these students priority over others who might be equally interested or committed but who do not come from families with the means to enable this kind of work seemed unfair to me. This is especially a concern for first-generation law students, who make up a significant share of our class.

Also supporting my decision to allow registration priority to govern entry was my desire to expose students who do *not* plan a public interest career to some of the inequities and flaws in our justice and social welfare systems and make real to them the need for lawyers to help. It is my experience that students who are oriented toward a public-interest career tend to find their way to me if they so desire, since I teach many classes attractive

to that cohort (including Poverty Law, Civil Rights, and Suing the Government) and I advise the Public Interest Law Foundation. But I have often felt that I have perhaps more influence on students *not* oriented this way, as for example when I introduce concepts like the lack of a right to counsel in civil cases in “standard” classes like Civil Procedure or Professional Responsibility. These students might otherwise go through a law school career without much exposure to some of the realities of the system and its effects on the poor or marginalized. And finally, many private sector lawyers will of course be pro bono leaders in their communities, and encountering some of the advocates and issues active in that world can help boost both their pro bono impulses and their ability to fulfill them.

Looking back over the nearly decade and a half of the ATJ Practicum, I feel satisfied that my objectives with regard to student selection have by and large been met. The students who have taken the course are approximately 60 percent public interest-oriented students and 40 percent private sector-oriented students, and some of those headed for private practice have been among my best students, sometimes bringing key knowledge whose utility I might not have foreseen. For example, just this past semester, two students worked with me, Public Counsel advocates, and a private law firm on a case challenging Los Angeles County’s administration of the fraud-ridden PACE (“Property Assessment and Clean Energy”) program which has left thousands of low-income homeowners owing unpayable assessments to the county and at risk of losing their homes. One of the students, who has now graduated and will be working in a firm that counsels municipalities and affordable housing developers, brought a wealth of highly useful knowledge about municipal funding, bonds, and contracting. Similarly, when we worked on the wage lien legislation described above, one student’s background (from courses and a prior summer’s work) in bankruptcy was tremendously useful.

Although I don’t select students for the ATJ Practicum, I do require that they meet with me prior to the finalization of their enrollment. This is because I want to make sure that each student understands the commitment before the semester begins, and especially that they understand that like clinics, the Practicum is not a good “bargain” for the credits — there are far easier ways to earn 3 credits. At times I also gently explore with students whether they may be overcommitted for a particular semester if

they have a heavy courseload, perhaps a job, or perhaps a demanding law review role or leadership obligations in student organizations. Students have excelled in the Practicum despite these other demands, but I always want to make sure they understand that the Practicum hours are substantial and that they cannot simply let work slide in a busy week or month as they might in a standard “podium” class. Although I once had a student drop out because of serious illness, I have never had a student fail to meet Practicum expectations or seriously let their partner down.

### *Student feedback*

Student feedback on the Practicum experience has been overwhelmingly positive. I often continue to hear from Practicum “alums” even after they have graduated and begun practicing. Some are now colleagues in the non-profit world; others are in law firms or government offices. One told me that his work on the farmworker safety amicus brief led directly to his interest in healthcare policy and decision to enroll in a Masters in Public Health program. Many have told me over the years that they enrolled in the Practicum simply to get some hands-on experience with litigation or practice (rather than out of deep interest in the subject matter), but found themselves compelled by the client stories or the systemic injustices they uncovered. Others have expressed how much they appreciated the opportunity to interact with advocates and see strategy develop from problem to theory to case to litigation to resolution. Still others have been daunted by some of the realities of the advocacy world: government defendants who lose a case and then seek to have the underlying law changed; victories that can be hollowed out by noncomplying defendants who hope advocates or judges will simply tire of endless enforcement proceedings; state budget ups and downs that can drastically affect programs. For many, the Practicum experience, like clinics, summer jobs, and other experiential education, can help clarify which parts of lawyers’ work appeals to them: research, writing, interviewing, strategizing, drafting, negotiating. They come to understand many of the different roles, missions, and strategies of advocacy organizations, as well as develop their own views about which kinds of roles, issues, and partners appeal to them. It is gratifying to see students come to understand all the steps involved between detecting a problem and celebrating victory in an impact case or matter.

I do not generally allow students to select which fellow student will be their team partner; instead, this choice is usually a factor of scheduling (who is free at the same time for our weekly meetings; whose workload allows for completion of work early in the week versus later). This too I think is valuable training; it is fairly rare for junior lawyers to have much choice regarding the composition of a team, and they must be flexible enough to accommodate a variety of work and personality styles. In all the years of the Practicum, I have yet to experience a team that could not find a way to work effectively together, and many students have thanked me for (as one put it) “throwing me in with someone I would never have chosen to work with but ended up really appreciating.”

### *Teaching in the Practicum*

Finally, a few reflections on teaching in the ATJ Practicum. Before starting the Practicum, I had over a decade of experience with classroom teaching as an adjunct instructor at USC. I had developed and taught a Poverty Law seminar many times, and regularly taught Professional Responsibility and Civil Procedure as a visiting professor while still in practice at Western Center on Law and Poverty and later at the ACLU of Southern California. The Practicum, however, is quite different from these classroom courses. It took some experimentation to reach what I hope is an optimum balance between guiding students and allowing them the space to experiment, make mistakes, and grow as lawyers, just as young lawyers must do in practice.

I am quite sure that I could not have created a course like the Practicum earlier in my own career, without the contacts in the community developed over two decades of practice and the experience working with lawyers at all levels of seniority. Cultivating and maintaining these ties is both a pleasure and a source of renewal and inspiration for me. As a long-ago Skadden Fellow, I remain active in that circle of advocates and make a point to try to meet the new Los Angeles fellows each year if possible. I attend events at partner organizations and keep tabs on their new projects and initiatives. I also keep up contacts by offering free consultation on ethical issues to nonprofit attorneys — and this latter service has also often benefited me by providing Professional Responsibility exam hypotheticals.

I also try to replicate for students some of my own formative experiences as a novice lawyer in groups of experts at Western Center. In that setting, I quickly recognized one of the things I cherish most about the vibrant nonprofit world: the relative lack of hierarchy and the welcoming attitude toward good ideas and willingness to work, regardless of the quarter from which they come. I try to impart this to my students, the awareness that we are all engaged together on a path in which none of us can yet foresee all the twists and turns, and where everyone's ideas are worthy of consideration. I likewise stress to the students that I have never in my entire career litigated a case or worked on a piece of advocacy as solo counsel and I hope never to do so. Working in collaboration with skilled, creative, committed colleagues has been the most rewarding part of my career as an advocate, and sharing those experiences with students has been the highlight of my career as a teacher.

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# COMMUNITY GROUP ADVOCACY AND SOCIAL-CHANGE LAWYERING CLINIC:

*UC Hastings College of the Law*

ASCANIO PIOMELLI\*

## TOWARD A BROADER VISION OF LAWYERING

We lawyers tend to think highly of ourselves. Very highly. That's part of what makes us so popular with the public. Our high self-regard is instilled early in law school in the United States.<sup>1</sup> From the outset, we are told — explicitly, tacitly, insidiously — that we are learning a new, superior way to think that will transcend the less rigorous mode of thinking that got us to law school and, it follows, that dooms the rest of society to an inferior state of wisdom and understanding. We are taught that who

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<sup>1</sup> My discussion of the legal profession, law school, and the societal and historic context in which the Clinic operates is always limited to the United States. Consequently, I will only occasionally insert this geographic and national qualifier, which is always implied.

we were before law school — our experiences, attachments, values, even sometimes our sense of right and wrong — is irrelevant, even possibly detrimental, to our success as lawyers. We must be molded anew. From Alexis de Tocqueville forward, we have been assured that our professional training prepares lawyers to play an essential leadership role in our society.<sup>2</sup> What a flattering and enticing prospect of a new, wiser, more powerful, professional self. It's hard not to be seduced.

Many have critiqued the narrowness of what law school portrays as “thinking like a lawyer,” but it nonetheless persists. The self-satisfied conviction that lawyers are smarter, wiser, more sober-minded than non-lawyers is a feature, not a bug, of our legal education and profession.

Social justice lawyers are not immune to high self-regard. Indeed, many of us are especially prone to it, viewing ourselves and our tiny sector of the profession as preeminent guardians of marginalized people and as irreplaceable engineers of social change. Law school teaches us, both explicitly and tacitly, that social change stems from brilliant lawyers who strategically craft, sequence, and litigate cases that enable courageous judges to issue groundbreaking decisions. Legal reform and the recognition of new legal rights *is* social change, law school asserts with little rebuttal or qualification. Litigators and appellate judges are presented as expert heroes who change the law and with it our society.<sup>3</sup>

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<sup>2</sup> De Tocqueville asserted that American lawyers were “the most powerful existing security against the excesses of democracy” given their “instinctive love of order and formalities” and that “they entertain the same repugnance [as the aristocracy] to the actions of the multitude, and the same secret contempt of the government of the people.” 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, ch. XVI (Henry Reeve, trans.) (1835), available at <https://www.gutenberg.org/files/815/815-h/815-h.htm#link2HCH0038>. Even before Christopher Langdell recreated American legal education, de Tocqueville observed:

The special information that lawyers derive from their studies ensures them a separate rank in society, and they constitute a sort of privileged body in the scale of intellect. This notion of their superiority perpetually recurs to them in the practice of their profession: they are the masters of a science which is necessary, but which is not very generally known; they serve as arbiters between the citizens; and the habit of directing to their purpose the blind passions of parties in litigation inspires them with a certain contempt for the judgment of the multitude.

*Id.*

<sup>3</sup> See Ascanio Piomelli, *Rebellious Heroes*, 23 CLINICAL L. REV. 283 (2016).

At UC Hastings, my colleague Shauna Marshall and I created the Community Group Advocacy and Social-Change Lawyering Clinic (“the Clinic”) to expose students to — and encourage them to develop their own version of — a different, broader, more inclusive vision of social-change lawyering. The Clinic aims to highlight non-litigation-centered approaches to making social change that entail partnership with activists and other non-lawyers. It positions students to explore how to work collaboratively *with* community groups, activists, and coalitions to jointly press for social change in multiple arenas, rather than working primarily in the judicial system *on behalf of* marginalized clients and communities.

The intent is not to denigrate impact litigation nor to understate the significance of appellate courts’ recognition of new rights or duties. As readers of this journal know, the California Supreme Court has been a national trailblazer in this realm. But many law school classes cover litigation, and almost none cover the sorts of extra-judicial collective efforts that the Clinic explores. Often, those collective efforts play a vital role in creating the social conditions and cultural narratives that enable appellate courts to act boldly. And concerted action is often necessary to try to ensure that judicially created rights are acted on and preserved against backlash.

Nor does the Clinic denigrate the value of lawyers’ specialized knowledge. A central aim of the Clinic is to frame social change as fundamentally about persuasion and to highlight the persuasive power that informed, organized, mobilized publics and communities have exercised in U.S. history. The Clinic encourages students to view lawyering broadly to include any persuasive activity (including collective action) that seeks to convince a target audience to respond as desired. Rather than acting alone to pursue social change, the Clinic encourages partnering with others — especially with those most directly impacted by the systems we aim to change. Our knowledge of the law is one of the valuable additions we bring as lawyers to our partnerships. But we must act as humble, life-sized partners, not demigods or saviors. We must be open to learning from and with those we seek to serve.

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Parts I and II below discuss the Clinic's genesis, aims, curriculum, structure, and projects. Student voices predominate in Parts III and IV, recounting what they learned or appreciated and sharing their visions of ideal social-change practices. Part V on students' career trajectories profiles a Clinic alum who articulates and has embodied the Clinic's teachings.

## I. GENESIS OF THE CLINIC

### *A. The Backdrop of Mainstream Law Clinic Practice*

Law school clinics in the United States began to proliferate in the 1970s, as influential funders (the Ford Foundation and the Council on Legal Education for Professional Responsibility) economically incentivized law schools to create them.<sup>4</sup> Students too pressed for "relevant" classes where they could learn hands-on how to work with clients and serve low-income communities and social movements of the day (such as the Black Freedom movement, student/anti-war movement, the women's movement, etc.). Initially, many law students worked at outside legal aid offices in precursors to what we now call out-placement or field-placement programs. As the 1970s and 1980s progressed, most law schools across the country began to create what we now call "in-house clinics": on-campus law offices where students earn academic credit to represent clients under the supervision of attorneys. Over time (in some places it took decades), supervising attorneys in clinics became full-fledged members of law school faculties and published articles and books on lawyering skills, lawyers' roles, and approaches to lawyering. Clinics became the place where students and faculty integrated theory and practice as they served lower-income clients and communities.

At the outset, litigation clinics predominated. In those clinics, students represented criminal defendants, tenants, low-wage workers, consumers, youth, survivors of domestic violence, immigrants, all in court cases or administrative hearings. Some handled "small" cases on behalf of individuals, and some handled "large" litigation matters. In the mid-to-late 1980s and 1990s, many schools started mediation clinics where students

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<sup>4</sup> See J. P. "Sandy" Ogilvy, *Celebrating CLEPR's 40th Anniversary: The Early Development of the Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 CLINICAL L. REV. 1 (2009).

serve as mediators of civil (and occasionally criminal) disputes. In the past two decades, a critical mass of transactional clinics has developed, in which students represent business entities, community development corporations, or social enterprises to structure deals and advise on corporate governance and compliance issues. In the same time span, policy advocacy clinics have also proliferated, where students represent organizations seeking legislative change or pursue their own policy agendas in legislatures or administrative agencies.

For at least the past three decades, almost all law school clinics have taught an approach called “client-centered lawyering.” The concept was developed by Professor David Binder and his colleagues at UCLA<sup>5</sup> to distinguish it from a traditional, lawyer-centered practice in which lawyers make decisions or firmly steer clients toward what the lawyer knows to be the correct, emotionally detached, rational decision on how best to proceed. As initially formulated and typically taught, individual client autonomy is at the heart of client-centeredness. The approach seeks to ensure that clients, not lawyers, make key decisions about what their attorney does or doesn’t do for them — because clients have superior knowledge of their own non-legal needs and interests, are generally competent to make sound decisions when given sufficient information, and must live with the consequences of those decisions. Even if each clinic has its own take on what it means, almost all clinics teach client-centeredness as the approach to lawyering they encourage students to adopt.

### *B. The Space the Community Group Advocacy Clinic Aims to Fill*

Client-centered lawyering has much to commend. It is founded on respect for clients and their decision-making capacity. It urges lawyers to listen carefully to clients and to attend to the emotional aspects of problems, not only the rational ones. It pushes lawyers to understand clients’ full range of aims and interests, both legal and non-legal. In all those ways, it is a step forward from the traditional, lawyer-centered model that remains implicit

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<sup>5</sup> See DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); DAVID A. BINDER, PAUL BERGMAN & SUSAN PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991); DAVID A. BINDER, PAUL BERGMAN, SUSAN PRICE & PAUL R. TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004).

in most doctrinal classes in law school and persists among many judges, most explicitly when they push attorneys to exert “client control.”

But client-centered lawyering is a generic approach that seeks to perfect the principal-agent relationship between individual client and lawyer in all practice settings; it isn’t focused on how best to pursue social change. It treats each client as a solitary, unconnected individual. It tacitly confines lawyers’ work to the legal realm. And it typically assumes rather than critiques the adequacy of existing legal processes and remedies. It draws a rigid, nonpermeable divide between the legal realm of courts, adjudicative bodies, laws, and regulations, where lawyers apply our expertise, and the non-legal realm of communities, politics, media, popular culture, etc., which lawyers are neither urged to explore nor expected to navigate.

We created the Community Group Advocacy Clinic for students who aim to become social-change lawyers to introduce them to a broad array of strategies and tactics that lawyers and community activists use — most effectively in concert — to press for change. The Clinic invites students to go beyond client-centered lawyering toward an explicitly political vision of activist lawyering that we explore in depth in the clinic seminar and students put into practice in their field placements. Instead of viewing clients only as autonomous individuals, the Clinic encourages students to treat and interact with clients and constituents as connected (or connectable) *members of communities* with shared experiences and interests. It emphasizes too communities’ capacity to act collectively to challenge and change their conditions and to resist their subordination — that is, to resist relationships and material conditions in which those with power, status, and presumed expertise govern or instruct them, expecting obedience, acquiescence, or even gratitude.

The Clinic, which is offered every spring semester, places students at organizations that work — or, at the very least, that will allow students to work — side-by-side as equal partners with community activists in collective action in the social, legal, and political realms. Students refine their abilities to collaborate as they engage in or connect with community organizing or mobilizing, community outreach and education, grassroots lobbying, coalition work, and media advocacy. Rather than speaking *for* clients and communities, students learn to partner *with* them and with allies from other disciplines to press for social change.

Instead of seeing themselves as preeminent engineers of social change, the Clinic seeks to foster students' humility. It encourages them to reconsider legal education's narrow conception of expertise (as bestowed exclusively by professional credentials) and to appreciate the insights, skills, and energy of communities, activists, and other allies. Broadening students' view of lawyering to include community partners opens possibilities for creative collaboration.

## II. THE STRUCTURE OF THE CLINIC AND ITS SEMINAR

### *A. Student Learning Objectives*

As the syllabus lays out, the Clinic strives to prepare students, through the seminar and fieldwork, to:

- demonstrate critical understanding of the broad range of approaches to social-change lawyering and the primary persuasive strategies in which lawyers and activists ethically engage;
- articulate a detailed personal vision of the social-change practice they aspire one day to implement;
- demonstrate the ability to collaborate effectively — with student partners, field supervisors, coalition partners, and community members — on fieldwork projects implementing one or more persuasive strategies;
- demonstrate the ability to richly describe, critically observe, and introspectively reflect upon their interactions and initiatives in their fieldwork; and
- demonstrate the ability to facilitate a group discussion, to contribute to classroom discussions and classmates' fieldwork projects, and to give and receive effective feedback.

### *B. Academic Component*

The course seminar, which meets in two-hour sessions twice a week, is structured into three segments. It opens with a three-week introduction to several models and examples of activist approaches to social-change lawyering and to organizing/mobilizing collective action. The course's long middle segment explores key persuasive strategies and activities with

which activists and attorneys must be familiar. And the seminar closes by returning to reconsider the models of social-change lawyering and activism in light of students' fieldwork experience and has each student formulate their own vision of an ideal social justice practice.

The first segment explores Jerry López's vision of "rebellious lawyering," Arthur Kinoy's approach to "movement lawyering," the "law and organizing" practice of the Workplace Project in Hempstead, Long Island, founded by Jennifer Gordon, and the "base-building" efforts of environmental justice and Black Lives Matter organizers.

Jerry López, the preeminent social justice lawyering theorist of the past three decades, is the central influence on my thinking about lawyering — and thus the Clinic's. In his seminal book,<sup>6</sup> he uses vivid descriptions of fictionalized lawyers and law offices to sketch his vision of "rebellious lawyering," an approach that prioritizes learning from and partnering with clients, community activists, organizations, and other allies to jointly frame issues and to jointly plan, implement, and assess the success of multi-pronged, collective efforts to resist communities' subordination. He contrasts rebellious practice from what he labels a "regnant" (i.e., reigning) approach, in which self-described public interest lawyers work primarily alone to frame and address issues within the confines of the legal system, disconnected from the clients and communities that they see themselves championing but don't treat as essential partners in their work.<sup>7</sup>

Arthur Kinoy, an unsung American giant, recounts in his autobiography<sup>8</sup> his work as a "people's lawyer" in the 1940s and '50s (working with militant unions and activists to resist the Red Scare) and the 1960s and '70s (working with Black Freedom Movement and student anti-war activists). Like today's self-labeled "movement lawyers," Kinoy sees the lawyer's role as using the legal system to make room for people to organize themselves, to take or retake the initiative, and to use their collective power to press

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<sup>6</sup> GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1991).

<sup>7</sup> As we discuss, and López elaborates in later works, it is hard to avoid the pull of the regnant approach. No one does so perfectly or at all times, for even as we try to resist systems and practices, we often wind up inadvertently re-creating them.

<sup>8</sup> ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER* (1993).



for social change. Tim Phillips,<sup>9</sup> who took the Clinic in 2007, encapsulated Kinoy’s vision: “a people’s lawyer does her work not to win legal victories, but to help organizers and activists win their own victories.”

Jennifer Gordon, a MacArthur Foundation “genius award” winner, describes in her book<sup>10</sup> the founding, activities, evolution, successes, and limitations of the center for immigrant workers that she founded — and left, once it successfully transitioned to a fully worker-led-and-run organization. She thoughtfully explores the synergies and tensions between law and organizing, and how an organization and its campaigns become and remain member-run. Although she does not call herself a rebellious lawyer, the Workplace Project provides a real-life example of the iterative, continually reassessing and retooling work of putting rebellious ideas into practice. Ariel Test,<sup>11</sup> who took the Clinic in 2008, articulated one of my aims in assigning Gordon’s book when she admitted: “I didn’t think that rebellious lawyering existed outside fictional portrayals. The Workplace Project really demonstrated how wrong I was.” And Adriana Barajas,<sup>12</sup> who took the Clinic in 2021, shared that the Workplace Project gave her “faith and hope in what is possible” and “perspective on what success can look like and what it can mean.”

The middle segment of the course begins by introducing students to the Powell Memorandum,<sup>13</sup> to George Lakoff’s ideas about the power and

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<sup>9</sup> Tim went on to open a solo civil rights practice in Minnesota representing protesters and activists.

<sup>10</sup> JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2007).

<sup>11</sup> Ariel went on to work as a public defender and youth law attorney in Louisiana.

<sup>12</sup> Adriana, a 2022 graduate, is headed to a position as an eviction defense attorney in San Francisco.

<sup>13</sup> The Memo to the national Chamber of Commerce was a strategically brilliant blueprint crafted by (soon-to-be-Justice) Lewis Powell in 1971 for a multidimensional campaign to be funded by U.S. corporations to re-establish and cement the hegemony of “free enterprise” over American politics, education, media, and society in the face of what he saw as the disconcerting influence that ascendant social movements and left-leaning intellectuals were exercising over politicians and the public at the close of the 1960s and outset of the 1970s. When Clinic students read and discuss the memo, they are incredulous that the Left could ever have been perceived as a serious threat to capitalism, and they are struck by how successfully Powell’s aims were achieved; the nation he sought to create is the one in which they’ve grown up.

necessity of “framing” issues effectively,<sup>14</sup> and to a conceptual framework for recognizing the stages through which disputes develop and how they can be transformed in ways that sharpen or diffuse them.<sup>15</sup> We then explore community legal education, examining more traditional “know-your-rights” trainings (where a trainer instructs an audience on “what the law provides”) and the participatory, popular education approach of the Workplace Project (where a group first discusses its experiences and needs, then hears and questions available legal remedies, and together reflects, if the system doesn’t meet its needs, why it doesn’t and how they might change it). Next, we take a deep dive look at four different models of community organizing or mobilizing: the ACORN model, post-Alinsky faith-based organizing, the Los Angeles Bus Riders Union, and the Occupy, Black Lives Matter, and prison abolition movements. Again, we see that organizers too can be regnant or rebellious. We then explore coalition work and the challenges of working across divides of race and class. Next, we explore lobbying — as traditionally practiced and then, again, the participatory, grassroots approach of the Workplace Project. And finally, we look at litigation, examining the ethical challenges of class action litigation, as well as efforts to connect litigation with other advocacy strategies.

The final segment explores my characterization of participatory democracy as a key connecting thread running through many of the models the course explores,<sup>16</sup> and it introduces students to the work of Ella Baker, an unsung giant of the Black Freedom Movement, whose work exemplifies the idea of democracy as a way of interacting with others. We also conclude our examination of the Workplace Project and the three different iterations of its evolving sense of the proper balance between law and organizing. The course ends with students’ formulation and discussion of

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<sup>14</sup> See GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE (2d ed. 2014).

<sup>15</sup> See William Felstiner, Richard Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC. REV. 631 (1980–81). We pair it with a case study of my work in East Palo Alto that illustrates the framework’s utility. See Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000).

<sup>16</sup> See Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541 (2006); Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383 (2009).

their own visions of an ideal social-change practice they hope one day to found or join.

In the second and third segments of the course, every third class is devoted to “rounds” sessions, where students learn about their peers’ fieldwork and give each other feedback and suggestions. Each student also leads one class discussion to give them experience facilitating discussion — a key skill for working with groups.

### *C. Fieldwork Projects*

Several months before the start of the semester, I simultaneously recruit potential field placement projects and students for the class, looking for projects that mesh with students’ interests and backgrounds. I share with potential placements that the Clinic aims to expose students to non-litigation-based approaches to making social change that will enable them to work closely with community members and activists. And I tend to look for projects that involve issues of racial justice.

I explain that unlike a traditional externship, in which students work on a multiplicity of shorter assignments, I seek a single, clearly defined, discrete, three-month-long project on which a pair of students can work together, not separately, for about fifteen hours a week. Projects need not involve any traditional legal research or writing. Instead, I seek projects where students can take responsibility and initiative (of course, within parameters and priorities that the placement supervisor and community partners set), where they can also receive regular feedback and guidance at least once a week, and where they can interact with community members and groups on one or more of the following activities: community outreach or education, community mobilizing or organizing, grassroots lobbying, coalition advocacy, and/or media campaigns.

I share that, if there is a substantive area of law that students will navigate, it must be straightforward enough to learn in only two to three weeks, otherwise the semester will be too short for students to accomplish meaningful work for the organization. I also share that I’m looking for a project that students can take on for thirteen weeks, take as far as they can, and then hand back to the organization. Often ideas for work that have been on a back burner for lack of resources make good projects for student teams.

I have the Clinic formally co-counsel with the placement, so I can be inside the ambit of confidentiality. This enables me to have students write detailed weekly fieldnotes, which they share with me alone, describing and reflecting on their work. And it enables the class to have rounds sessions in which students discuss their projects with each other, sometimes roleplaying interactions, mooted presentations they will give or materials they will produce, and giving each other ideas and feedback. (In a typical field placement program, client confidentiality prevents students from sharing information about their work with their professor or peers.)

I meet with each student team weekly to discuss their fieldnotes and working relationships. To ensure that the placement supervisor, student team, and I all share the same expectations, at the outset of the semester we each sign a written Supervision Agreement laying out our responsibilities. The agreement includes a paragraph-length summary of the anticipated project and a checklist identifying the types of activities in which students will likely engage. Three or four weeks into the semester, students prepare a written memo to their placement, which they first run by me, containing a detailed description of the project and their expected deliverables, a timetable for implementation of each phase of the project, and a section on challenges they anticipate.

#### *D. Examples of Fieldwork Projects*

In 2022, a team of students worked in an urban Central Valley school district with a coalition of community groups seeking to reduce police presence in schools and remove police from protocols for dealing with students' mental health crises. Another team helped a coalition of parents, who had (or are threatened with having) their custody of children terminated by the state, to distill their experiences and policy aspirations into a Family Bill of Rights. A third team worked with a statewide coalition of organizations to advocate for legislation to prevent jails and prisons from transferring people, once they have served their sentences, to Immigration and Customs Enforcement (ICE) detention. And the final team of students mobilized citizens to press their cities and counties to declare support for the Racial Justice for All Act, which would allow anyone convicted of a crime to challenge racial bias in their case.

In 2021, a student team began working with the same education advocacy coalition in an urban Central Valley school district that the team in 2022 continued. A second team met with residents and teachers in a rural Central Valley school district to update a complaint to the Department of Education's Office of Civil Rights brought by African American students and families. Another team worked with a statewide coalition to advocate for budget proposals to shift funds from incarceration to reentry and other community-based programs serving immigrant, LGBTQIA, and communities of color. The final team worked with a legal services organization and other youth-serving groups to design and present workshops for middle- and high-school students on how their school district responds to sexual harm and to encourage students to envision how it might do so more effectively and equitably.

In previous years, teams have worked with a nurses' union to develop and deliver community education presentations on how proposals for universal health care coverage would impact racial disparities in health care access and outcomes and, in another project, helped support nurses' leadership, presentation skills, and engagement in public campaigns to publicize a "Robin Hood Tax" proposal on securities transactions to dramatically increase funding for human services. Another team worked with a local collaborative of East Bay immigration service providers to implement best practices for conducting large group-processing events to help legal, permanent residents complete applications to become naturalized citizens. A Clinic team also reached out to impacted communities and potential expert witnesses to design, and recruit broad public participation at, a hearing before the San Francisco Human Rights Commission on "The Human Rights Impact of the War on Drugs."

In a project that I still use as a model of the energy, creativity, and initiative I hope students will exercise in their fieldwork, in 2013 a Clinic team worked with a coalition of prisoners, advocates, and prisoners' family members to publicize the prisoners' hunger strike and seek to end California's extensive use of long-term, often indefinite, isolation in solitary confinement cells in prisons that are already maximum-security facilities. To launch the campaign, the students drove, assembled, and reassembled a full-size replica of a SHU ("Secure Housing Unit") at events across the state to enable people to visualize and enter a solitary confinement cell. They joined with families to participate in a state legislative hearing and

to protest outside it. They created a social media campaign and designed t-shirts publicizing the campaign to end torture. They even spent their spring break on a visit to Pelican Bay state prison to meet prisoners, whose voices they amplified through social media.

### III. WHAT STUDENTS REPORT LEARNING OR APPRECIATING

The next two parts share the experiences, voices, and visions of Clinic students from reflection papers they submitted for the course.

#### *A. The Classroom Community*

Spending four hours a week with classmates committed to social justice work, sharing each other's experiences, values, reactions, and dreams, often builds a powerful, supportive sense of community that is, sadly, rare in law school classes. As Alysyn Martinez, who will graduate in 2023, wrote in 2022:

Being able to share space with like-minded people who care deeply about the same values and core goals that I do, allowed me to really find my voice again . . . I have appreciated so much their ability to listen and learn, while also providing their own insights in a respectful and affirming way. It is a completely different environment from any I have ever seen. There is something incredibly inspiring about being able to sit with people that you know care just as deeply as you do about the issues presented and hear them present new ideas that I had never considered or heard of. It was such an honor to hear their thoughts, and it gives me confidence to know that I can share space with them. It's also very comforting to know that people like them exist in law school and in the world in general.

In 2019, Taylor Boutelle<sup>17</sup> shared: "The ability to discuss the readings, our projects, and our personal experiences thoughtfully, with people who had such different life trajectories than me, really pushed my understanding and views." In 2021, Nicole Tashovski<sup>18</sup> added: "Listening to my

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<sup>17</sup> Taylor, a 2020 graduate, went on to join the East Bay Community Law Center on its health law team.

<sup>18</sup> Nicole, a 2022 graduate, is headed to a judicial clerkship with the North Carolina Supreme Court.

classmate’s ideas and the passion they spoke with helped renew my passion for the work each week. Being surrounded by like-minded individuals you can share ideas with and learn from is my favorite way to expand my thinking.”

### *B. Personal Growth*

Students in all clinics often learn not only important lessons about lawyering, but also come to see and understand themselves differently. María D. Dominguez<sup>19</sup> wrote in 2013: “Sometimes what matters more is not the work we do, but who we become in the process. I leave the Clinic more confident about who I am and what I want to do. Sustainable social change requires continual renewal and reflection. This Clinic provided a safe, nurturing space” for that reflection.

Courtney Oxsen<sup>20</sup> wrote, also in 2013, that the Clinic gave her and her clinic partner

an expanded sense of our individual capacity as change agents and advocates. The placement forced us to take initiative, be creative thinkers, collaborate, and creatively problem-solve. Because of how busy things were, we were constantly reassessing our needs and learning how to prioritize our time and the tasks that needed to get done. The limits on our time compared with our expansive goals also forced us to learn lessons in boundary-setting with a supervisor . . . . We also learned how to navigate advocacy within a community that is impacted by an issue we are not connected to personally. We feel confident that the connections we made . . . were genuine, and they respected our presence and participation in the movement as legitimate.

### *C. Exposure to Activities and Models to Emulate or Avoid*

Sometimes, students are placed to work with attorneys they consider embodiments of the sensibilities and practices we discuss in class. Megan

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<sup>19</sup> Since graduating, María has worked as a community organizer, a dependency attorney working to keep families together, and a county health equity policy planner.

<sup>20</sup> Courtney began her career as a public defender and now is a habeas corpus attorney.

Armstrong,<sup>21</sup> for example, wrote the following paean in 2021 about her supervisor, Linnea Nelson of the ACLU of Northern California's Racial and Economic Justice team:

Linnea is a wonderful model of a community lawyer. She does not act as though she knows what is best for [the community], or that it's her way or the highway. She has absolutely no air of being high and mighty. She does not believe that as a lawyer she is somehow more knowledgeable than the community members she is working with. Instead, she collaborates with members of [the coalition]; she works *with* them on their goals of educational equity and serves them through her work. During meetings, she speaks as a collaborator and sometimes as a facilitator, rather than as a leader. She does not dominate discussions. The main leaders of the conversations at [coalition] meetings are members of the [local] community. Linnea will often ask clarifying questions about what their goals and wants are, will inform them of certain legal information or legal proceedings, and will participate in idea-generation, but she would never tell them what would be best for them. Linnea also does not act as though she is too good for certain jobs; she is happy to be the note-taker at almost every meeting, for example. In these ways, Linnea rebels against the idea that communities are not the experts of their own issues and the idea that she is the most prestigious expert in the (Zoom) room. Seeing Linnea in action taught me that it is possible to be a lawyer who doesn't suck. It is possible to be a lawyer who collaborates directly with communities.

And other times, students see a stark contrast between the ideas and approaches we discuss in class and the practice of their placement. Andrea Banks,<sup>22</sup> for example, wrote in 2008 that her experience at her placement was “mostly about learning or solidifying already held beliefs about what kind of lawyer I did *not* want to be . . . rebellious lawyering does not mean just working with people, it's about *how* you work with people.”

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<sup>21</sup> Megan, who graduated in 2021, completed a post-graduate fellowship at the ACLU of Northern California and is now a legal aid attorney in San Francisco.

<sup>22</sup> Andrea worked for many years as a staff attorney at Bay Area Legal Aid before recently taking a position as a government attorney.



Many students report the Clinic was their first exposure to organizing, to understanding what organizers do, and the different models of organizing. As Sarah Fielding<sup>23</sup> wrote in 2013, before the class she “was not entirely sure what a community organizer does.” She learned “just how useful” an organizer can be to “increase the leverage of the group they are working with.” Although she was not interested in doing it full-time, she gained respect for organizing and hoped to learn how to effectively collaborate with organizers. For others, like Michael Astanehe,<sup>24</sup> the Clinic provided a first exposure to coalition work. As he wrote in 2015, “I had never witnessed a coalition before, so [at first] I found the readings hard to conceptualize . . . . But now I see the benefits and dangers of working in a coalition.”

A few students enter with an organizing background. Cecily Vix<sup>25</sup> wrote in 2004, that before the Clinic, she “hadn’t connected how to be both a lawyer and an organizer. The progressive lawyering models we learned in class taught me that a symbiosis of tactics can be a very useful tool when trying to make social change.” In 2013, María D. Dominguez wrote that she was particularly interested “in reconciling the role of community organizer with the lawyer role,” because she was “somewhere in between and feeling like the lawyer role would eventually be more dominant in my life.” In the end, she determined she could view her “community organizer-lawyer role as a continuum which could take different colors and shapes at any given time, depending on the circumstance. I didn’t have to choose one or the other; there was a way to be in both worlds.”

#### *D. Transformation of Their Vision of Lawyering and Sense of Possibilities*

Brian Lambert<sup>26</sup> wrote in 2004: “The Clinic helped me better understand and envision the kind of role I can serve as an attorney and the kind of

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<sup>23</sup> Sarah went on to become a legal services attorney in rural Northern California. In 2022, after giving permission to include her quote, she added: “I wish pretty much every day that I had more organizers up here . . . so many more folks stand up for their rights when they are standing with others. I take the lessons from the Clinic with me daily . . . .”

<sup>24</sup> Michael, who graduated in 2015, opened a solo private practice representing workers, tenants, and small investors.

<sup>25</sup> Cecily went on to work as an attorney for the National Labor Relations Board.

<sup>26</sup> After a fellowship with the ACLU of Northern California Racial Justice Project, Brian has long worked for the Office of Civil Rights of the federal Department of Education.

organization I want to work with. It helped me understand that I do not have to be a lawyer serving in a traditional and limited role, but I can really be creative and find ways to be the best and most effective advocate possible.” Mike Russell<sup>27</sup> wrote in 2007: “what I’ve learned at the Clinic has transformed not only my career’s trajectory, but what kind of lawyer I want to be.” Another student wrote in 2008: “My definition of a public interest or social justice lawyer has shifted, been twisted inside out, washed in the river, and hung up to dry. I am not sure that it is even recognizable anymore. But that is a good thing. I could not have asked for a better introduction to the complexities of public interest law.”

Students of color and from working-class backgrounds have shared that the Clinic helped them see space for themselves in the profession. Vasmer Vang<sup>28</sup> shared in 2021: “I cannot express how formative this past semester has been for me . . . It is the one rare space in law school I have felt safe, uplifted, and recognized in my power.” Holly Miller<sup>29</sup> wrote in 2008:

When I began to seriously consider becoming a lawyer, and began working in a law office, I came face to face with my worst fear, the socialization process I would be expected to endure and ultimately accept to move from my working-class self into the world of the professional upper middle class. This process would surely steal my identity, it would strip from me any attachment I had to the community I came from and those I sought to work with. In the end, I would be an imposter in two worlds, a member of neither the community from which I came nor the community

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<sup>27</sup> Mike has worked as a legal aid attorney in Alaska, the Texas Rio Grande Valley, and in Cleveland, Ohio. In 2022, after giving permission to be quoted, he shared: “In every job I’ve had, I’ve kept the syllabus and reading materials from the Clinic on my office bookshelf. It’s there right now. It’s there when I need a reminder of what inspired me to do this work in the first place, or how I can do it better.” He added, “Fifteen years into my career, I focus on group advocacy at the Legal Aid Society of Cleveland. What I learned at the Clinic has not only guided me to this point in my practice, it informs what I do every day working with clients fighting for a different future.”

<sup>28</sup> Vasmer, a 2022 graduate, is headed to a position as a legal services attorney in Central California.

<sup>29</sup> After graduation, Holly went to work at California Nurses Association/National Nurses United, serving briefly in its legal department, then primarily as policy director, and now as chief of staff.

to which I was now conscripted . . . . But taking the language I learned in the Clinic and making it my own has changed all that. I don't actually have to change myself; I don't have to make myself less. I can expand my understanding of myself as a social change lawyer. The affirmative roadmap I envision for myself now as a collaborative lawyer is fuller and more rewarding, more in line with my values and instincts, than I could ever have imagined. It allows me to strip away constraints I thought I had no other choice than to accept.

She continued, the Clinic gave her “the language to express my concerns, the courage to grapple with them, and the will not to fall victim to the same failings as many lawyers.” She concluded, “lawyering is not just *what* you do or *why* you do it, but *how* you do it. It's not about working *for* but working *with*.”

In 2021, Leena Sabagh<sup>30</sup> wrote that the Clinic “completely transformed my perception of the legal field and my role as an attorney in bringing social change. It provided me a new framework, theories, and language for viewing the legal and social justice field and with training on how to implement these into my future practice.” She added: “Law school had stripped from me the ability to think creatively, but this clinic allowed me to dream beyond a strict legal lens and understand that other strategies are possible. It has made me a more radically hopeful person that freedom and liberation is attainable in our lifetime.”

Megan Armstrong shared in 2021 that the Clinic “has been pivotal to my journey to become a lawyer. It helped me to align my lawyering style to my values and will enable to me to be an effective advocate for justice.” She added that “the idea of *dreaming bigger*” continually recurred to her: “The law is limiting, formal, slow-changing, and archaic. By pulling on other methods and working with many different types of people, we can instead act with creativity . . . and attack an issue on multiple fronts. We *can* think and dream bigger.”

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<sup>30</sup> Leena, a 2021 graduate, completed a postgraduate fellowship at the San Francisco Bay Area office of the Council on American Islamic Relations (CAIR) and is now a fellow with CAIR's Los Angeles office.

Vasmer Vang in 2021 wrote that the Clinic helped him see that lawyering “can be so much more than just going to court and relying on judicial remedies to solve community issues, so much more than the neat little box that law school and other attorneys make it out to be. It is what you make of it. You can create your own form of lawyering.”

#### IV. STUDENT VISIONS OF THEIR IDEAL PRACTICE

One of the final written assignments asks students to describe the ideal social-change practice they hope one day to start or join. The assignment invites them to pull together what they’ve learned over the semester and use it to envision how they hope to put into practice the lessons they’ve learned from our readings and discussions, from their fieldwork projects, and from their other professional and life experiences and values.

Students read their peers’ descriptions, and in our last class we discuss each one for fifteen minutes. With only minimal initial modeling by me, our discussions become powerful affirmation experiences, as student after student points out what they appreciate about each peer’s vision.

Nicole Tashovski noted in 2021 that the act of describing her ideal practice in writing helped her see that “it *is* possible to achieve my goals.” And Alysyn Martinez observed in 2022 that the assignment showed her that “all our practices are what we make of them. We all go into the profession with ideals and values that we hope to embody, but actions speak much louder than intentions. We can be blind to the negative impacts of our actions, if we are not diligent and self-reflective.” Paulina Santana<sup>31</sup> shared that the discussion of everyone’s ideal practice made clear that “there is no *one* type of social movement lawyer. It’s not about the work you do or the job you have. It’s about how you live and how you engage with others . . . . How you enter each space not just as a lawyer but as a human being.”

Below are three lightly edited examples of students’ ideal practices. They illustrate the breadth and diversity of students’ visions and also reveal shared themes.

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<sup>31</sup> Paulina, a 2022 graduate, intends to begin her career as a public defender.

### *A. Andrea Banks' Ideal Practice*<sup>32</sup>

ANDREA BANKS: If I am going to practice law, I envision it being in a very holistic setting, somewhere that is welcoming to the people it serves and useful in a variety of ways. Because there's so much to starting a practice that I don't know, I envision my ideal practice to be joining an existing but possibly newer organization.

The organization that I would want to join would be a small neighborhood organization located in the neighborhood I live in or close by, so that I can bike to work. It would be new enough that there was still excitement and momentum to change for the better, but established enough that some of the necessary, day-to-day functions had been worked out and there was a sense of trust built within the community. Somewhere between three to seven years would be ideal. The space would be in an old house or building with a porch or a good stoop. There would be more than one floor. It would get decent light, and the windows would open. There would be an outside area in the back or on the side that could be a community vegetable garden which the kids living in the house would participate in maintaining.

The organization would have started as a woman's community organization and small, long-term (roughly one-year) shelter for immigrant women and children. The woman who started the organization would have done so after long being part of the community and seeing the need for these services. Over time, the organization would have evolved and hired a lawyer (also a woman), after realizing that many of the women accessing their services had a variety of legal issues and it was difficult for them to access help, particularly with immigration and domestic violence issues. All staff would be bilingual, as most of the clients speak only Spanish.

The organization would have a focus on self-sustainability. All the women who live in the house are active members of the organization. Many of the program ideas came from the women and their real needs while living in the house. The organization originally ran a variety of classes the women had requested, including English language classes, job training skills, financial skills, parenting, and nutrition. The classes changed and expanded over time, and some became open to the larger community. In

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<sup>32</sup> Andrea, who as noted above worked as a staff attorney for many years at Bay Area Legal Aid, described her ideal practice in 2008.

exchange for staying there, the women maintain the house and alternate cooking meals. The head of the organization felt it important to have these requirements to give structure to everyone's day and make everyone feel invested in the house. There would be a job board and education information posted in the house, and the focus of the organization would be to provide housing as well as life skills training to get the women back on their feet and supporting their family. The women would rotate childcare based on a self-made schedule so others could attend school or jobs during the day or evening. There are weekly house meetings where grievances are discussed and solved and new schedules for childcare and cooking are made to best accommodate each woman's needs.

The lawyer was originally hired to deal with the legal issues facing the residents. Almost all had immigration issues, some had minor legal issues, and many were relying on public benefits for health care. All were looking for permanent housing. Instead of having to go to several different lawyers to get help with a variety of legal problems, the head of the organization thought it better to have one lawyer in-house, who could work with the women with all their interrelated legal issues. Slowly, other people in the neighborhood began coming in with legal problems. The lawyer had too much work, and so another lawyer was hired. This would be me.

The organization would still be very small at this point, only employing the director, the original lawyer, me (the new lawyer), a receptionist/ secretary, and an office manager. Both the secretary and the office manager are women who formerly lived in the house, because the organization feels that a strong policy of hiring from within helps both the organization and the women. As the new lawyer, my job is to add legal education classes to the classes women take in the house and to help with the drop-in clinic that has spontaneously formed. After speaking with the women in the house individually and hearing their stories and problems, I set out to create classes that will be useful.

The classes would be structured loosely as know-your-rights courses to establish a basic knowledge of how the law does and does not protect rights and how it can be used for the women's benefit. The classes would change and evolve as needed to be useful for the women. Over time, the classes would be opened to the public and the community members who have been coming in requesting legal help. New topics and formats would be added to suit the growing need.

The legal clinic would be the other part of my job and would focus more on typical direct services. We would have drop-in hours in the morning Tuesday to Saturday for any legal issue we deal with. If we don't deal with an issue, then we offer referrals to other local agencies that might be able to help. There would not be separate days for separate issues, because many times people's legal problems overlap. And if a person takes time off work to come to the clinic, we don't want them turned away simply because we didn't designate that day for that specific issue.

The clinic would be on the first floor of the house, and the reception area would be welcoming and friendly. It would be painted a cheerful color (but not garish), and there would be plants in the windows. The receptionist would be bilingual in Spanish and English, and she would be *very* nice and cheerful. She would give each client an estimated wait time and explain that sometimes it takes longer. There would be plenty of seating and a water cooler or pitcher with cups. The seating would be arranged in an informal fashion, not in rows like an airport. There would be toys and games for children and magazines in English and Spanish. There would be lots of literature concerning services in the area, services that we provide at the house, and different fact sheets about issues of importance. The waiting room is very important, because first impressions matter, and coming to a legal services agency is often intimidating and scary. The waiting room should try its best to feel welcoming and homey with amusements to occupy people and their children while they wait.

As the organization grew and services expanded or changed, there might be room for a policy position or someone with litigation experience who could do class-actions. But for the most part, that work would be shipped out to other organizations, so that the focus of the organization could remain on providing quality services for the women who live in the house and those who come to the legal clinic.

### *B. Leena Sabagh's Ideal Practice*<sup>33</sup>

LEENA SABAGH: My ideal social-change practice would be in a mid-size-to-large city in a neighborhood centrally located and easily accessible to

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<sup>33</sup> Leena, who as noted above has been a post-graduate fellow at the Council on American Islamic Relations, described her ideal practice in 2021.

the community it serves. Ideally, it would be near public transportation to ensure members can access it even without cars. The building itself should have a few private offices or rooms, larger spaces for collaboration, an outdoor space with a garden, community pantry, playroom for children, and a kitchen. It would be a space the community comes to not only to organize, but to build interpersonal relationships and a sense of belonging based on shared principles and identity. It would be a clean but homey space with comfortable couches, and posters, photos, and quotes showcasing the history of the organization and prominent struggles and movements for social change and human rights across the world. These posters and inspirational messages would be in Arabic and various other languages spoken by the membership. It would also have computers, white boards, and comfortable seating to facilitate collaboration and democratic participation. In the lobby, there would be job postings, fliers from other organizations regarding their campaigns, and schedules for workshops, clinics, and classes.

I would ideally work for an organization in which I was not an outsider. The organization would thus focus on the Middle Eastern and North African (MENA) and Muslim community. I would join the organization a few years in, after some membership, programs and short- and long-term goals have been established based directly on the decisions of the members and community. The organization would focus on building leadership and self-reliance, a strong sense of community, and putting the communities' struggles in context with other international and domestic fights for social change. The language used to conceptualize this would be the language of human rights, liberation, and freedom. We would not focus on one tactic or strategy for bringing social change but instead experiment and use multiple tactics to achieve our goals and constantly assess their effectiveness and be flexible to changes over time.

Membership of the organization would be comprised of community members who have gone through educational and leadership training. There would be four to five trainings spread over five months for potential members to join. One training would focus on the theories and history of movements across the U.S., to conceptualize the MENA and Muslim struggles and fight for social change as part of a larger history in this country. Another training would focus on connecting the problems MENA and Muslim communities face in the U.S. to larger issues



of imperialism, racism, and state repression. This will allow members to understand their daily lives and struggles as interconnected to those they faced in their home countries and around the globe and as stemming from many of the same structures and powers. The third and fourth sessions would analyze strategies and tools used in democratic social-change campaigns, as well as leadership skills. It would cover coalition-building, policy work, lobbying, direct action, use of media, etc., much like we have done in this class. The last session would give the soon-to-be members a hypothetical campaign or issue to work on where they would develop their own strategy and tactics and then present to the membership committee. This would be followed by a “graduation” celebrating their new skills and knowledge.

The organization would consist of a community organizer, an administrative assistant, operations manager, two attorneys, and members. The administrative assistant and organizer would come from the membership once the organization was established. The rest of the positions would also ideally reflect the community. One of the attorneys would focus on legal clinics and educational workshops. These workshops would be established based on trends and issues presented in clinics, raised by membership, or recent events or changes in the larger community. A few workshops would be more regularly offered to deal with the consistent legal issues the community faces, such as immigration and interactions with the FBI and other law enforcement. Legal clinics would have weekly drop-in hours for non-members to speak to an attorney. These non-members would also meet with the lead organizer and attorney to incorporate less traditional legal and non-legal strategies, like collective action or self-help. They would also be encouraged to become a member and complete the training. At first, this lawyer’s main source of understanding of the local MENA and Muslim community would come through the legal clinics. This attorney would also work with the community organizer in outreach to mosques, churches, local restaurants, cafes, and stores frequented by the community to recruit members and hear directly from the community.

The second attorney would focus on litigation and keeping a pulse on regional, national, and international issues, and on building relationships with relevant organizations across the country. This attorney would report this information back to the staff and membership to keep them informed

on larger political and economic forces and issues that may affect members at the local level. This attorney would also be responsible for maintaining contact with policy makers and lobbyists and update them on what is happening at the grassroots level. But this attorney would have no decision-making power without a vote from the membership. Once voted upon, the membership would also be actively involved with the attorney in this task, and eventually completely maintain it.

Litigation would only be pursued upon a consensus from the membership and as a last resort — to remove barriers to the community organizing itself. If litigation were voted for, it would be pursued in tandem with other tactics and strategies for maintaining pressure; it would be accompanied by campaigns, coalition-building, protesting, and other strategies.

The benefits of membership would include access to the legal clinic and direct representation if needed. The larger community would still have access to legal clinics through drop-in hours. Members would also have access to the amenities of the property, like the kitchen, community garden, workshops by other community members, a community pantry, and possibly even some childcare. Most importantly, the membership would make the strategic decisions of the organization and carry out those decisions through a membership committee. The agenda would be open to whatever the membership feels necessary to discuss, making them the key decision makers.

The organization would not just provide services and be a place of organizing, it would also provide a space for the community to grow and flourish. It would be a place where community members would become empowered to lead their own social change, provide support for one another, and develop interpersonal relations that carry on beyond the walls of the organization. It would be like a second home for the community to learn new skills, support one another, and raise their family around.

The end goal would be to eventually have the organization completely self-reliant on the membership and for all positions to be filled by community members. There would possibly be one lawyer working part-time with the organization who continues to assist with the legal clinic and workshops and the rare possibility of litigation. The hope would be to work myself and others out of our jobs.

### C. Paulina Santana's Ideal Practice<sup>34</sup>

PAULINA SANTANA: My ideal social-change practice would be a decentralized abolitionist organization with different chapters across the nation. While the organization would center its focus on criminal justice work, we would also offer several related legal and social services and be involved in various campaigns, projects, and practice areas.

*Anti-policing/Anti-prison.* At its core, the organization's mission would be to abolish all carceral systems and reinvest resources into our communities. It would work in coalition with other abolitionist organizations on anti-policing/anti-prison projects and campaigns, including policy advocacy, protests, and impact litigation.

*Individual Representation.* In addition to these larger-scale projects and campaigns, we would also have a direct legal services branch, where criminal defense lawyers would assist in the defense of those who have been charged with crimes. Like public defenders and other attorneys working pro-bono, these attorneys would provide legal assistance for zero cost. However, these lawyers would all be trained in client-centered, trauma-informed lawyering. They would work *with* clients, not just *on behalf of* them, to determine the best legal strategy together.

*Housing and Social Services.* Because so many individuals targeted by our criminal punishment system have housing and mental health needs, we would also have trained professionals in the organization who would work in tandem with interested community members to provide resources and assistance.

*Inside-Outside Mail Program.* I would want to coordinate a mail program where we contact folks on the inside. In addition to responding to legal mail, we would establish some type of pen-pal program for more general emotional support. We would open this up to all interested community members so that they may also engage and communicate with people on the inside.

*Re-entry Services.* For those who have been released from jail or prison, we would also offer a variety of re-entry services, or at the very least connect people to the best organizations that may be better able to offer support.

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<sup>34</sup> Paulina, a 2022 graduate, who as noted above intends to begin her career as a public defender, wrote this description in 2022.

*Educational/Legal Clinics.* The organization would also prioritize community engagement and education. This could include a course where people from the community come in, learn some of the specifics of the law from lawyers, but then go on to lead the course themselves for other community members.

We would also offer a course on how to represent yourself in a criminal proceeding. While we will have criminal defense lawyers to offer guidance and support for the more technical legal specifics, I would want people to feel like they can access this information on their own. I would seek to create an environment where folks feel they can confront the legal system with the help of their communities, not just lawyers.

Finally, we would offer each of these courses in different languages. We would also hold weekly, social language-exchange events. We would provide food and drinks and give people a space to enjoy themselves and interact with other people in the community. This would not only promote community relationship-building, it would also allow people to practice speaking other languages.

*The Structure.* It would be cool if the people who worked in the organization didn't just stick to one area but rotated between these different practice areas and projects. Not only would this hopefully prevent burn-out, but it would allow them to integrate lessons and values from one sector to another.

*Location.* I don't envision just one location or one headquarters. I would want the organization to have many chapters across the nation, each capable of running itself and accountable to the community it serves. There will be no hierarchical structure.

The location I would want to work out of would probably be in the Bay Area. Ideally, I would want the center to have an open floor plan to encourage collaboration amongst all the different people in the organization. It will have high ceilings and get tons of natural lighting. There will be plants and colorful art everywhere. We will have smaller rooms where we hold our legal clinics and courses.

*The People.* While some of the details of the day-to-day operations are still fuzzy, I know that my social change practice will be comprised of kind, compassionate, and deeply caring individuals. At the end of the day, the bonds and relationships we form through our work and our passions is more important to me than the small operational details.

Above all, I would want my practice to truly prioritize self-care and community-care.

I hope to create an environment where we all feel safe, supported, comfortable, and content. I would want the work to be energizing for people, and when it's not, I want people to know that's okay too. This work is hard and taking care of yourself while doing this work is hard. Burnout is real. Having moments of doubt/frustration or moments where you feel like you're drowning won't be viewed as a personal issue or a personal failing. I hope people in the organization will feel this is something that can be problem-solved together and not be afraid to be honest about needing extra support. This is all to say: I hope the organization is truly a community that prioritizes not just work, but people.

## V. PATHS CLINIC ALUMS HAVE TAKEN

As reflected in the footnotes identifying former students' post-Clinic work, the vast majority do become social justice lawyers. A few, less than ten percent, decide not to become lawyers. Most who have become lawyers launched their careers doing direct services, often in legal aid offices, and sometimes proceed to work in policy advocacy. A few have started their own solo firms. Several have worked for unions. Later in their careers, some have taken government positions. Although rare, a handful of students have joined the organization at which they did their Clinic fieldwork.

The career path of one former student, Sheena Wadhawan, who took the Clinic in 2006, has encompassed many of those paths and embodied the Clinic's teachings. Sheena began her career as an attorney in the Neighborhood Law Corps of the Oakland City Attorney, where she collaborated with city agencies, nonprofits, and community organizers to bring City resources to support community efforts to preserve affordable housing and to combat the harms of the foreclosure crisis on low-income tenants. Three years later, she launched a solo firm representing tenants in Oakland, which she did for two years.

She then moved across the country to work with CASA de Maryland, a large, activist, grassroots, immigrants' rights organization. Serving first as a staff attorney and then as Legal Program Manager, she engaged in the full range of approaches covered in the Clinic: organizing, mobilizing,

grassroots lobbying, coalition-building, media work. After five years at CASA, she became the Advocacy Director of the D.C. Employment Justice Center, working with a team of organizers, staff, and low-wage workers in grassroots campaigns, coalition-building, lobbying, and communications. She then briefly took a position with the federal Office of Civil Rights of the Department of Education.

Moving with her family a year later to Los Angeles, she left the law, becoming deputy director of Everyday Feminism, an intersectional feminist media site, where she supported staff and executives to create a diverse, inclusive, non-hierarchical organizational culture. Having experienced countless micro- and macro-aggressions as a woman of color in social justice campaigns and workplaces, in 2017 Sheena launched and continues to operate a solo organizational consulting firm, where she coaches legal and other nonprofits' management teams (and sometimes entire staffs) to help them live up to their professed values.

In 2016, for a clinical conference recognizing Jerry López on the twenty-fifth anniversary of the publication of *Rebellious Lawyering*, Sheena recorded a video describing the impact López and the Clinic had on her. She shared:

I came to law school with a clear goal of wanting to work for social justice, for a more just and equitable world. I always wanted to serve low-income folks, folks of color, immigrants, because that's the community I come from.

When I came to law school, I had no idea what to expect. I had never known any lawyers. I didn't have mentors in my life at that time. By about halfway through law school, I had met a lot of lawyers — guest speakers in classes, professors, people like that — and I didn't really see myself in any of them. By halfway through, I thought, "Oh, I'm not going to practice law. I'm not going to be a lawyer. I'm not like these people, and I can't do this work this way." I didn't really understand what about it repelled me, but I knew it didn't fit with my sense of how the work should be done.

At that point, I entered the Community Group Advocacy Clinic and we read *Rebellious Lawyering* and other works. The teaching and mentorship of my clinical professors led me for the first time to think and feel: "Oh wow, maybe I can do this. These are the type of

lawyers, this is the concept of lawyering that can work, that really fits with my sense of what works in communities and the kind of work I want to do.” It gave me a framework and the words to use to really understand the kind of lawyer I wanted to be. And that I wasn’t out there alone, that there were others out there thinking about how we do this work and insistent that communities and clients are in the best position to lead the work.

Now, out doing social justice work, I feel so grateful for being able to work alongside communities. I’ve experienced plenty of defeats, but also a fair number of successes, which absolutely came about because they were client-led and community-driven and because I was able to stay true to that guiding principle. I have returned to what I learned in the Clinic again and again to check myself, to be self-aware, and to try to stay true to the meaning of rebellious lawyering: recognizing our privilege and responsibility to do this work *alongside* communities, not *for* them.

In all the settings in which she has worked, Sheena has exemplified values and practices the Clinic aspires to nurture: creativity, tactical and strategic flexibility, humility, a broad vision of lawyering, faith in collective action and the wisdom of impacted people, and commitments to collective liberation and to fighting against subordination everywhere, including in our relations with clients and communities and in our workplaces.

## CONCLUSION

It is an honor to have the Community Group Advocacy and Social-Change Lawyering Clinic included in this issue on “legal history in the making” and deemed to be “promoting positive change in the law and society.” In preparing this article, I had the pleasure to reread two decades of students’ reflections, reminding me once again how much I have learned from and with them. I am delighted to convey their thoughts and grateful to have played a role in encouraging them to think expansively about lawyering and working in partnership with communities — and to see so many of them go on to do just that.





# WOMEN'S EMPLOYMENT RIGHTS CLINIC:

*Golden Gate University School of Law*

HINA B. SHAH\*

Established in 1901 as an evening law school, Golden Gate University School of Law (GGULaw) is a pioneer in making legal education accessible to many communities traditionally shut out of professional education. It continues that trailblazing history today, being one of the most diverse law schools in the nation: 62 percent of our students identify as people of color, 64 percent as women, 11 percent identify as LGBTQ and 48 percent as first-generation college or graduate students.

The Women's Employment Rights Clinic ("WERC"), established in 1993 by GGULaw, serves the dual purpose of advocating for the most vulnerable workers and providing a training ground for its diverse law students to become competent, ethical professionals. The Clinic's mission is centered on ensuring that every worker has the right to economic fairness, equal opportunity, and dignity in the workplace. Our advocacy is informed by and coordinated in partnership with broader community campaigns for economic and social justice. WERC

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This article is part of the special section, "Legal History in the Making: Innovative Experiential Learning Programs in California Law Schools," in *California Legal History*, vol. 17, 2022 (see editor's introduction on page 3).

\* Hina B. Shah is Professor of Law and Director of the Women's Employment Rights Clinic at Golden Gate University School of Law.

is one of a handful of legal clinics in the nation engaged in multi-pronged advocacy, focusing on workplace problems that impact low-wage women workers, many of whom are immigrants and non-English speakers. Through an innovative combination of litigation, and legislative and educational strategies, WERC's mission is to collaborate with grassroots, community-based organizations and worker centers to enhance their capacity for systemic change and to "put law in the service of building the movement's power."<sup>1</sup>

Within this community lawyering framework, students acquire essential and transferable lawyering skills, such as interviewing, fact investigation, counseling, negotiation, and trial skills, and they sharpen their oral and written advocacy. The Clinic also provides a unique opportunity for students to learn to be effective social justice advocates by having a focused, strategic vision for change. By combining law and organizing with sector reform, students are able to conceptualize a multifaceted advocacy agenda when they can simultaneously work on litigation and policy reform that are linked. Students have the opportunity to collaborate with non-lawyers, such as organizers and worker leaders, and understand the multifaceted roles that lawyers can play in social movements.

## CLINIC DESIGN AND PEDAGOGICAL FRAMEWORK

The Clinic's dual mission to serve low-wage women workers while providing a rigorous learning experience has remained steadfast. The Clinic utilizes a three-pronged community lawyering model, combining litigation and policy advocacy with community education. This model teaches students how to use legal knowledge and expertise to support community organizations and worker centers that are at the forefront of the struggle for economic and social justice. Working closely with these organizations, the Clinic blends individual representation cases with larger impact matters.

What is unique, however, is that rather than diffusing its resources across sectors or without focus, the Clinic engages in industry-specific reform. It borrows this model from union-led organizing campaigns. Very

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<sup>1</sup> Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PENN. J. LAB. & EMPLOY. L. 1, 71 (2005), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1232&context=jbl>.

few lawyers, especially legal clinics, combine community-lawyering with sector reform. By using this multi-pronged approach, the Clinic has tackled the dismal working conditions of garment workers, domestic workers, and caregivers and has reshaped the legal landscape for all workers.

Students enroll in the clinic and the companion seminar class for one semester, and can get permission to enroll as advanced students for a second semester. In the seminar and clinic, students gain substantive knowledge, skills, and professional values. These classes work in conjunction to help students acquire and strengthen the core competencies necessary for the practice of law, as follows:

**EFFECTIVE CLIENT-CENTERED LAWYERING:**

- Communicate clearly and effectively with clients
- Interview clients effectively to elicit relevant facts
- Demonstrate good listening skills, including empathetic, non-judgmental, and reflective listening
- Treat clients with respect
- Establish rapport with clients
- Counsel clients to understand all of their options so they can make an informed decision
- Demonstrate cross-cultural competency (the ability to work effectively with clients from a wide variety of ethnic and cultural backgrounds)
- Engage in zealous oral and written advocacy on behalf of your client
- Understand the broader context of your client's problem and the systems that create the problem
- Explore non-legal forms of advocacy that might help your client's matter

**PROFESSIONAL AND ETHICAL CONDUCT:**

- Be responsive, responsible, and reliable
- Take ownership of case, take initiative, and engage in problem-solving
- Be thorough and detail-oriented and produce the best final work product
- Effectively manage time to meet deadlines
- Commit to critical self-reflection and be open to constructive feedback
- Work diligently and thoroughly; demonstrate strong work ethic
- Understand your professional responsibility to increase access to justice and critical awareness of systemic issues impacting access to justice (race/class/gender)
- Ability to recognize and resolve ethical issues
- Develop positive working relationships and communicate effectively with Clinic faculty, staff, team members and clinic students

**ORAL AND WRITTEN COMMUNICATION:**

- Understand the goal of the communication
- Use tone that is appropriate for your intended audience (clients, clinic colleagues, faculty, judges, opposing parties, etc.)
- Effectively organize your oral or written work product
- Speak and write clearly and persuasively
- Use proper grammar and citations
- Effectively use exemplars
- Address feedback and critique and integrate changes throughout the work product

**LEGAL ANALYSIS AND REASONING:**

- Clearly identify and develop legal issues
- Include the most significant, relevant facts and use them effectively in the analysis
- Clearly explain legal concepts
- Examine and assess the strengths of alternative theories/arguments
- Identify relevant statutes, regulations, and cases
- Synthesize research
- Analogize/distinguish legal authority to your set of facts
- Demonstrate creativity, flexibility, innovation in developing case/project strategy
- Recognize weaknesses in case theory and anticipate adversary's position

Faculty are constantly evaluating the effectiveness of the program to achieve these learning objectives, and, through frequent experimentation in its design, the program has remained flexible to meet the evolving needs of our students and community.

### *The Clinic*

Students enroll in the Clinic for 2 or 3 units with corresponding minimum hours requirements.<sup>2</sup> The Clinic also accepts Honors Lawyering Program (HLP) full-time externship placements.<sup>3</sup> Each semester, WERC accepts up to 12 students in the Clinic including 1–2 HLP full-time placements in the

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<sup>2</sup> ABA Standard 310 requires 45 hours of in-person class for every credit unit. WERC requirements far exceed the minimum hours requirement (162.5 hours for 2 units and 195 hours for 3 units) but during the COVID-19 pandemic when the Clinic operated remotely, we reduced the clinic requirements to the ABA minimum standard.

<sup>3</sup> The Honors Lawyering Program provides select, highly qualified students with an integrated practice-based program that combines intensive course work with full-time apprenticeships. The Clinic is an approved HLP placement.

fall. The Clinic regularly has maximum enrollment, with waitlists. It is staffed by two faculty members — a director and staff attorney — who supervise the students. The director is also responsible for the operations of the Clinic and fundraising.

Students are assigned a primary supervisor. In the first week, students submit a self-assessment of their skills and answer a series of questions about their work experience and professional development goals. They meet one-on-one with their supervisor to review the self-assessment and finalize the student's goals. In addition, the students are encouraged to start thinking about looking for their next internship/externship and, for those graduating, discuss their post-bar job search and bar study plans.

Each student is paired with another student (primarily based on the coordination of their clinic hours). Faculty assign students an exercise in collaboration, where they reflect on the challenges and strengths of working in a group, and the student teams then meet to discuss their reflections and steps they will take to ensure effective group dynamics. Each team is assigned cases and policy projects based on their strengths, identification of skills they seek to acquire, their interests, and the Clinic's docket. Law students staff an intake hotline providing advice and counseling to workers on a variety of employment-related matters including wage and hour violations, discrimination, workplace harassment, unemployment benefits, pregnancy, and family/medical leave. In addition, during COVID, students staffed two evening clinics each semester in partnership with community-based organizations. WERC will continue collaborating with additional community organizations to host the evening clinic.

A student will do any or all of the following, based on their hotline/legal clinic intake(s): legal research, investigating the matter, including client and witness interviews, brief advice and counseling, and brief service (e.g., writing a letter, legal research). The Clinic also selects cases from the intake hotline/legal clinics for full representation. For full representation cases, students will engage in any or all of the following: preparing and explaining client retainer agreements, client counseling, document review, drafting administrative or court complaints, representing the client in an administrative hearing, witness and client preparation, drafting pleadings for court cases, drafting and responding to civil discovery, negotiating settlements, etc.

The policy work is more fluid and ranges from researching legislative history, drafting bill language, and drafting comments on proposed regulations, to attending community meetings and lobby days in Sacramento. Students also develop and conduct Know Your Rights training and other presentations to community groups, workers and worker centers.

Faculty supervisors meet weekly with each student team. Prior to the meeting, the team submits a detailed weekly agenda. At the meeting, the students and the professor discuss the assigned cases, projects, and tasks, and identify any problems, including ethical issues. The students are asked to lead these discussions, making initial suggestions on how to proceed on a case or problem area. Throughout the semester, students engage in self-assessment and are provided formative assessments after completing each task (e.g., interviewing, writing a memo) to provide meaningful feedback so that students can improve in real time and gain a better understanding of their performance.

In addition, we conduct two summative assessments of the students' skills and performance in the clinic. At the mid-semester, the students complete a self-assessment, as follows:

**REVISIT THE LEARNING OBJECTIVES SECTION OF THE SYLLABUS AND YOUR INITIAL SKILLS ASSESSMENT + PROFESSIONAL DEVELOPMENT PLAN.**

For each of the four categories (Effective Client-Centered Lawyering; Legal Analysis and Reasoning; Oral and Written Communication; Professional and Ethical Conduct) write a brief paragraph reflecting on what you have done well and what you hope to improve on. Indicate if you have not had the opportunity to work on certain skills. Based on this reflection, would you modify the initial rankings you provided in your Initial Skills Assessment + Professional Development Plan? If so, how?

**REVISIT THE GOALS YOU SET IN YOUR INITIAL SKILLS ASSESSMENT + PROFESSIONAL DEVELOPMENT PLAN.**

Which ones have you made progress on? Have your goals changed? How? What are your goals for the remainder of the semester?

**ASSESS YOUR SEMINAR PARTICIPATION.**

Have you regularly attended class? Have you effectively read the assignments for class and regularly participated in class and shared your opinions? Have you thoroughly prepared for in-class exercises and thoughtfully worked on your reflective writing essays? Include any ways you hope to improve your Seminar participation.

The student and the supervisor then meet to discuss the student's self-assessment and the supervisor provides a summative evaluation. The student and supervisor also review the student's initial goals and either modify them or add additional goals.

At the end of the semester, the students complete a final self-assessment, as follows:

**REVISIT YOUR INITIAL PROFESSIONAL DEVELOPMENT PLAN, MID-SEMESTER EVALUATION, AND THE LEARNING OBJECTIVES IN THE COURSE SYLLABUS. ANSWER THE FOLLOWING QUESTIONS:**

1. Which areas/skills do you believe you made the most progress on?
2. What in particular did you improve?
3. How were you able to make progress in these areas?
4. Which areas/skills are still a challenge for you?
5. How do you intend to improve these areas/skills in your future endeavors?
6. Did you incorporate feedback that you got from your team partner and your supervisor effectively? What challenges did you have in receiving feedback?

In addition, we solicit feedback on the clinic/seminar, which they can submit anonymously, about what they found most valuable and what can be improved. Again, the student and supervisor meet for the final evaluation, where the self-assessment is reviewed and the supervisor provides a summative assessment of the student's performance, based on the same learning objectives rubric. Faculty supervisors also discuss the students' plans for their next internship/externship and additional coursework to continue to build their skills.

### *The Seminar*

Students enrolled in the Clinic must take the companion 2-unit seminar class. It meets twice a week for 80 minutes each time. In the first week of the semester, the seminar has an intensive boot camp training. It is a five-hour, mandatory training on the first Friday of the semester. The boot camp allows the Clinic to onboard students immediately to start handling ongoing cases and to familiarize them with Clinic procedures. Depending on the immediate pending needs of the Clinic, the boot camp will address substantive employment law, intensive interview training, trial skills, and/or policy work. The bootcamp also focuses on professional and ethical skills

and, during COVID, the nuts and bolts of remote representation. WERC invites two Clinic alumni (usually at least 5–6 years out) during lunch to discuss their journey from law student to practicing attorney.<sup>4</sup> The alumni speak also about what they gained from the Clinic and how it fit into their legal experience. The alumni lunch is always a highlight, both for the alumni and the clinic students, allowing Clinic students to build their legal network. Finally, at the beginning of the semester, students write a definition of what justice means to them. They then revisit this definition during the final class and discuss whether they still agree with their definition of justice and whether they achieved justice in their cases/projects.

The substantive classes are taught with the same method as podium doctrinal classes. Students have case readings, the Socratic method is used for case discussion, and then hypotheticals are integrated during class discussion. Certain classes designate “case experts” where several students are assigned to lead the discussion, which allows for a deeper and more nuanced understanding of the cases.

Legal skills classes are a combination of the theory of the underlying skill, a simulated hypothetical, and a skills exercise. Students have several opportunities for mock interviewing and counseling clients, including a video-taped review. The mock interview is then used as the basis for the Case Theory class, where students develop a case theory on their “mock case” along with a legal elements chart. In a subsequent class, the students use these materials to create a fact investigation plan. The Fact Investigation Class integrates the fundamentals of case planning and fact investigation but also incorporates memory recollection and bias. Recognizing that students need more repeated exposure to fundamental skills, the Clinic professors designed a writing component to the seminar in conjunction with the IL legal writing professors and the director of academic development. The students are given a closed universe of legal research and a discrete legal problem for which they write a motion arguing why their client is entitled to a penalty under applicable law. The students write a detailed outline, then attend class to discuss legal analysis and structure of the brief, and then submit a draft. Their supervisor provides written and oral feedback, and the student submits a final brief.

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<sup>4</sup> The alumni lunch was suspended during the time the Clinic operated remotely because of COVID-19.



The supervisor also provides written and oral feedback on the final brief. In addition, students submit several written reflective exercises, including a reflection on identity, power and privilege, and client-centered counseling. The seminar also has case rounds — which the professors are constantly experimenting to make them more dynamic — scheduled at times when students are at a critical juncture in their case/policy work.

Depending on the Clinic's docket, the seminar will focus on the skill acquisitions necessary for the Clinic's case and policy work. When the Clinic has upcoming hearings, students are taught trial skills and they practice direct and cross examination in mock sessions, introducing and admitting evidence and making objections. When there is a large policy project, an additional class, Social Justice Lawyering: The Role of Lawyers as Problem-Solvers, is added to the syllabus. This class widens the students' lens on the varied ways that lawyers are problem-solvers.

## THE CLINIC'S SUBSTANTIVE WORK

California is home to the largest low-income population of any state. One in three California workers earns low wages.<sup>5</sup> Nearly one in six Californians does not have enough resources to meet basic needs.<sup>6</sup> Immigrants and people of color are overrepresented in the ranks of the poor. Almost 36 percent of undocumented immigrants live in poverty.<sup>7</sup> Latinos make up 51.6 percent of the poor in California.<sup>8</sup> Increasingly, workers are joining the ranks of the poor, as roughly 80 percent of poor Californians live in families with one working adult.<sup>9</sup>

While low-wage workers are represented in each industry, the highest concentration of low-wage workers is found in retail, restaurant, and home health and domestic service work.<sup>10</sup> Women, especially immigrants

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<sup>5</sup> UC Berkeley Labor Center, *Low-Wage Work in California Data Explorer*, UC BERKELEY LABOR CENTER (May 12, 2022), <https://laborcenter.berkeley.edu/low-wage-work-in-california-data-explorer>.

<sup>6</sup> Sarah Bohn et al., *Poverty in California Fact Sheet*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (July 2021), <https://www.ppic.org/publication/poverty-in-california>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

and women of color, are concentrated in these jobs.<sup>11</sup> Low-wage industries also have rampant wage violations. Nearly 20 percent of low-wage workers were not paid the minimum wage.<sup>12</sup> Much of the Clinic's docket has focused on helping low-wage workers recover their earned wages. Since 2000, the Clinic has recovered over \$10 million dollars for workers. Besides the significant monetary recoveries, the Clinic has significantly expanded workplace rights for all California workers.

### *Garment Worker Advocacy*

California has long held the distinction of being the garment sweatshop capital of the nation. Garment manufacturers, who sell and distribute finished garments, contract out their in-house production work to sewing contractors. These contractors staff their factories with unskilled and cheap labor, often immigrant, non-English-speaking women. WERC and other legal and community organizations in the 1990s and 2000s worked tirelessly to broaden liability to reach manufacturers, who have historically been shielded from liability for noncompliance with wage and hour laws. For several years, WERC was part of a coalition working on a legislative solution that resulted in the passage of AB 633, the garment accountability bill that imposed liability on manufacturers. The Clinic was a key player in the implementation of AB 633, drafting and commenting on regulations and, in collaboration with other community groups, published a comprehensive report on the implementation of AB 633. Thanks to the Clinic and the statewide coalition's advocacy, California has one of the toughest and broadest joint liability laws in the garment industry.

The Clinic was at the forefront of litigation in Northern California on behalf of garment workers. In the spring of 2001, the Wins garment factories, the largest in the Bay Area, declared bankruptcy and closed their doors. Approximately three hundred garment workers, all monolingual Chinese immigrants, found themselves out of work. They were owed nearly \$1 million dollars in unpaid wages. It was the most egregious case of

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<sup>11</sup> Kaitlyn Henderson, *The Crisis of Low Wages in the U.S.: Who Makes Less than \$15 in 2022?*, OXFAM (Mar. 21, 2022), at <https://www.oxfamamerica.org/explore/research-publications/the-crisis-of-low-wages-in-the-us>.

<sup>12</sup> David Cooper & Teresa Kroeger, *Employers steal billions from workers' paychecks each year*, ECONOMIC POLICY INSTITUTE (May 10, 2017).

sweatshop abuse in Northern California. The Clinic represented the workers and, first and foremost, the Clinic recognized that the garment workers needed immediate relief. California has a state fund set up for garment workers who have unpaid wage claims, but the fund did not have enough money to satisfy these workers' claims. So, with the help of community and other legal organizations, the Clinic successfully lobbied the California Legislature to earmark additional funds to satisfy the workers' claims.

The Clinic also intervened in the California Labor Commissioner's lawsuit against the Wins garment companies and the individual owners. The litigation lasted more than seven years and involved complex legal theories, competing federal and state regulatory agencies, and monolingual clients. The litigation culminated in a four-month bench trial in San Francisco Superior Court, with the Clinic and the students playing a central role in preparing the workers to testify. The law students got first-hand experience in cross-cultural lawyering, spending many weekend hours with interpreters and workers as they overcame their fear of facing their former employer. The workers' testimony was crucial in securing a tentative decision in their favor. The trial court found the owners of the factory personally liable to the workers for \$1.4 million in unpaid wages and penalties. Unfortunately, the victory was short-lived, as the California Supreme Court issued a decision in a similar case that drastically limited personal corporate liability.<sup>13</sup> That decision denied the workers a judgment in their favor. The Clinic appealed the decision but ultimately did not prevail against the employers. Fortunately, the workers recovered most of their wages through the state garment fund. Today, thanks to low-wage worker advocates, personal corporate liability is enshrined in the Labor Code,<sup>14</sup> precisely to avoid the type of injustice faced by the Wins workers.

The Clinic also cooperated with the U.S. Department of Justice in pursuing criminal charges against the owners of the factories, which led to convictions and to the sentencing of the owners on federal criminal charges. Throughout this period, the students met with the workers to keep them informed of the litigation and joined the workers in solidarity when they engaged in community action to raise awareness of their issue. While

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<sup>13</sup> Reynolds v. Bement, 36 Cal. 4th 1075 (2005).

<sup>14</sup> Cal. Lab. Code § 558.1 (Jan. 1, 2016).

the state court refused to hold the owners civilly liable, the federal criminal indictments validated the workers' struggle to bring justice to their case. "During the *Wins* trial, a marriage fell apart, a member of our trial team was diagnosed with cancer, and another member found out she was pregnant. But despite it all, the Clinic never lost its focus on the workers' struggles," said Attorney Pam Kong, Clinic student ('02) and 2003–2004 WERC graduate fellow and member of the *Wins* trial team.

### *Domestic Worker Advocacy*

With the move of most of the garment industry out of the Bay Area, the Clinic redirected its resources to assist another group of vulnerable workers — domestic workers.

Domestic workers play a vital role in our society, caring for our homes and loved ones and freeing us to participate in the workforce. In California, more than 300,000 domestic workers serve as housecleaners, nannies, and caregivers in private homes.<sup>15</sup> The majority of domestic workers are immigrant women who work to support their own families as primary breadwinners. Nearly two million households in California rely on domestic workers.<sup>16</sup> Domestic workers historically have toiled in obscurity. Until recently, they were categorically exempted from most employment laws and fundamental wage and hour protections.<sup>17</sup> Domestic workers have built a national, grassroots, worker-led movement for dignity and justice by addressing the systemic exclusion of domestic workers from basic wage and hour laws.

Domestic workers face unique challenges. Domestic work remains a low-wage and largely under-regulated industry. Domestic workers usually work alone, behind closed doors, and out of the public eye, leaving them isolated, vulnerable to abuse and exploitation and unable to advocate

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<sup>15</sup> UCLA LABOR CENTER, PROFILE OF DOMESTIC WORKERS IN CALIFORNIA 3 (2020), <https://www.labor.ucla.edu/wp-content/uploads/2020/12/Profile-of-Domestic-Workers-in-California.pdf>.

<sup>16</sup> UCLA LABOR CENTER, PROFILE, PRACTICES AND NEEDS OF CALIFORNIA'S DOMESTIC WORK EMPLOYERS 3 (May 2016), [https://www.labor.ucla.edu/wp-content/uploads/2018/06/UCLA\\_domesticworkers\\_report\\_final.pdf](https://www.labor.ucla.edu/wp-content/uploads/2018/06/UCLA_domesticworkers_report_final.pdf).

<sup>17</sup> Hina Shah & Marci Seville, *Domestic Worker Organizing: Building a Contemporary Movement for Dignity and Power*, 75 ALBANY L. REV. 413, 424 (2012), <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1481&context=pubs>.

collectively for better working conditions. Four in ten employers pay low wages, defined as two-thirds of the median full-time wage in California. One in six domestic-work employers fail to pay minimum wage.

For over a decade, the Clinic has played a critical and significant role in the fight to expand and enforce legal rights for domestic workers in California. The Clinic represents domestic workers in individual and group cases before the California wage and hour enforcement agency, the Division of Labor Standards Enforcement (referred as the “Labor Commissioner”) and in court litigation. The cases are either referred to the Clinic by grassroots, community organizations such as *Mujeres Unidas y Activas* and *Filipino Advocates for Justice* or through the Clinic’s hotline. The Clinic supports the community organizing campaigns, in conjunction with the legal cases. Through this direct representation, the Clinic identifies critical gaps in legal protection as well as areas that need further legal advocacy.

Because the Clinic had built an expertise in litigating domestic worker cases, the California Domestic Workers Coalition (“Coalition”) asked the Clinic to serve as its legal counsel for its legislative advocacy campaign. The Coalition is a statewide umbrella organization of grassroots immigrant-rights organizations. They mounted a nearly six-year battle to expand overtime protections to certain domestic workers who were excluded from this basic protection. The Clinic played a critical role as legal counsel to the Coalition in its efforts to remove the exclusion. The Clinic faculty and students helped decipher the existing complex regulatory coverage for domestic workers, dug into the history of why a large majority of domestic workers were excluded from basic labor laws, and translated the wishes of the Coalition into legislative language. Throughout the campaigns, the Clinic provided guidance and counseling as the Coalition made strategic decisions. WERC students and faculty helped train and educate the members of the Coalition (many of them worker leaders) to understand the law and the impact of legislative compromises on existing rights so that they could make informed decisions.

In 2013, after several failed attempts, the Coalition succeeded in passing the greatest expansion of overtime protection in California since the 1970s. The bill extended overtime to nannies and caregivers who spent a significant amount of time caring for children, older adults and people with disabilities. The bill was set to sunset in three years and in 2016, the

Coalition, with the Clinic's legal support, made the overtime protections permanent through SB 1016.

After these legislative victories, the Clinic collaborated with the Coalition in developing Know Your Rights materials, which are critical to outreach and to educate domestic workers. The Clinic also supported domestic worker employers in understanding their obligations under the new law. Finally, the Clinic met with regulators at the Labor Commissioner to make sure the new overtime bill was properly enforced.

Another critical aspect of the Clinic's domestic worker advocacy was weighing in on a significant case before the California Supreme Court that would directly impact domestic workers. Home care agencies had for years been shortchanging domestic workers who worked 24-hour shifts by not paying for up to 8 hours of work time because the employees could theoretically sleep during that time. On behalf of low-wage worker advocates, the Clinic submitted a friend-of-the-court brief in *Mendiola v. CPS Security Solutions, Inc.*,<sup>18</sup> a case that concerned sleep time for security guards. The brief focused on the legislative history of California's wage protections as well the realities of low-wage workers on 24-hour shifts. The Clinic argued before the California Supreme Court on this important issue and the Court unanimously agreed that workers must be paid at least the minimum wage for all hours worked, including so-called sleep time.

After the *Mendiola* decision, on three occasions, home care agencies introduced bills to exempt domestic workers from sleep-time compensation. Each time, the Clinic director testified before the Legislature about the dangers of the bill and helped prepare worker leaders to testify before the Legislature.

The Clinic is an ongoing resource for worker centers and legal service providers in making sense of the complex California regulatory scheme governing domestic workers so that they can effectively organize and represent domestic workers..

### *Residential Care Advocacy*

Concurrently with domestic worker advocacy, the Clinic focuses on caregivers who work in small residential care facilities. Despite doing work

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<sup>18</sup> 60 Cal. 4th 833 (2015).

similar to domestic workers, caregivers in facilities are governed by a completely different set of legal rules. While these caregivers are protected under labor laws, compliance remains elusive for them. There are rampant wage and hour violations, including paying flat rates that do not meet minimum wage and overtime obligations. This is particularly concerning given the industry will experience unprecedented growth as Americans live longer and cope with chronic health conditions.

In collaboration with community-based campaigns to reform residential care facilities, the Clinic represents workers before the Labor Commissioner and in court. In some cases, the Clinic represents the entire workforce at a facility. These cases often arise out of organizing campaigns spearheaded by community groups, especially Filipino Advocates for Justice in Oakland and the Filipino Community Center in San Francisco.

Recognizing that the problems were intractable to solve one case at a time, the Clinic brought together a statewide coalition of legal service providers, worker centers, unions, community-based nonprofit organizations and consumer advocates — the Coalition for a Fair and Equitable Caregiving Industry. The first task of the coalition was to create a comprehensive policy paper, documenting the extent of wage and hour problems in the residential care facility sector. The Clinic took on the researching and writing of the report. Law students spearheaded the research, which resulted in the report, “Understaffed and Overworked: Poor Working Conditions and Quality of Care in Residential Care Facilities for the Elderly” (June 2017).<sup>19</sup> The report explores how the structural and exploitative nature of working conditions in Residential Care Facilities for the Elderly (“RCFE”) in California contributes to poor quality of care and life outcomes for residents. The report found that abuse, neglect and overall poor quality of care and life for residents in RCFEs are results of structural systemic problems. The report also led to a three-part investigative series by Reveal, the Center for Investigative Reporting, that was featured in the *New York Times*, *Washington Post* and *PBS News Hour*. The Labor Commissioner invited the Clinic director to train its investigators on issues in residential care facilities. The training was part of the strategic enforcement efforts in the residential care industry.

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<sup>19</sup> <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1789&context=pubs>.



### *Gender Discrimination and Harassment*

The Clinic has also been at the forefront of challenging gender discrimination and harassment. Women workers face myriad forms of discriminatory and harassing conduct at the workplace. Forty-two percent of women workers have faced gender discrimination in the workplace, including earning less than their male counterparts doing the same job, not getting the same opportunities, and rude or dismissive remarks based on their gender.<sup>20</sup> Sexual harassment, a form of discrimination, is even more rampant, with one in five women experiencing it at work.<sup>21</sup> The Clinic represents both cisgender and transgender women workers in their discrimination/harassment claims.

The Clinic was part of one of the first large sexual harassment cases in the agricultural industry, joining California Rural Legal Assistance in representing an immigrant farm worker. The client was subjected to quid pro quo sexual harassment (required sexual favors as a condition of employment and the receipt of job benefits). The Equal Employment Opportunity Commission, after investigating the client's matter, sued the largest lettuce grower/distributor in the United States. The case resulted in a \$1.85 million settlement and substantial injunctive relief.

Recognizing the entrenched discrimination that still exists for women who work in nontraditional occupations such as electrical and construction work, the Clinic along with Equal Rights Advocates represented six female electricians, most of whom are women of color, in a lawsuit against an East Bay electrical contractor. The women were all laid off on the same day from the same job, while less-experienced male employees were retained. After successfully defeating the defendants' motion for summary judgment, the Clinic negotiated a successful settlement with monetary relief and training to address discrimination and harassment issues.

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<sup>20</sup> Kim Parker & Cary Funk, *Gender Discrimination comes in many forms for today's working women*, PEW RESEARCH CENTER (Dec. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women>.

<sup>21</sup> Hailey Lee, *One-fifth of American adults have experienced sexual harassment at work*, CNBC survey says, CNBC (Dec. 19, 2017), <https://www.cnbc.com/2017/12/19/one-fifth-of-american-adults-have-been-sexually-harassed-at-work.html>.



Over the years, the Clinic has recovered millions of dollars in discrimination and sexual harassment lawsuits on behalf of vulnerable women workers, including factory workers, entry-level sales clerk and domestic workers. These cases were often the first of their kind to expose the abuse in these industries.

## TRANSFORMATIVE LEARNING

The Clinic has made a difference in each student's life and, in some cases, has changed the very trajectory of that student's career. Clinic students learn first-hand the tools that will make them excellent and thoughtful practitioners. Because of their experience representing low-wage women workers, clinic students have gone on to pursue public interest careers especially in labor and employment law. Edna Garcia Earley ('98), currently assistant chief counsel at the Labor Commissioner, credits her success as a trial and appellate attorney to the "practical skills training [she] received as a student and Graduate Law Fellow at WERC under the direction of the clinic professors and supervising attorneys." This is echoed by many other Clinic alumni. Yaromil Velez Ralph ('07), a native Spanish speaker who grew up in Puerto Rico, is a field attorney with the National Labor Relations Board. She says, "Without a doubt, the most enriching experience of my legal education was the year and a half I spent as a clinic student and then a teaching assistant with the Women's Employment Rights Clinic. The breadth of cases and the interaction with clients equipped me with tools I use everyday in my job. My clinic experience was one of the primary reasons my employer hired me for my position." Julie Cummings ('16), a veteran of the U.S. Army, credits her experience at the Clinic for "helping [her] become a better version of [herself] in the legal profession."

In addition to gaining practical legal skills, the Clinic's community lawyering model has shaped the careers of many of our alumni. Chriselle Raguero ('15) was born in the Philippines and immigrated to the United States when she was in high school. In law school, she interned at various legal non-profits serving the Asian-American community, was a Clinic student, and was incredibly engaged in the school and local community. After law school, she went overseas to work for international human rights organizations in Thailand focusing on asylum, refugee and trafficking issues. She currently

is the executive director of the Filipino Community Development Center in San Francisco, an organization focused on preventing the displacement of the Filipino community in San Francisco neighborhoods through affordable housing advocacy. Chriselle reflected on her time at the Clinic:

While I am not in a traditional “lawyer” role, my work is rooted in movement and community lawyering, which I first experienced through the Clinic. The Clinic taught me how to have a collaborative relationship with my clients and the community. One memory that stands out for me was when a client, who reminded me of my uncle, asked me to decide how to proceed with his case. My professor advised me that our role as attorneys is not to make the decision for the clients, but to help them understand their options so that they are empowered to make the best decision for themselves. I’ve carried that advice with me throughout my legal career.

Rocío Alejandra Ávila (’04) was born and raised in San Francisco’s Mission District. Her parents immigrated from Zacatecas, Mexico. Drawing on a rich legacy of activism and resistance from her community, Rocío became a community organizer and eventually an immigrant and workers’ rights leader due in part to seeing first-hand her parents’ struggles as low-wage workers. At the Clinic, Rocío brought an understanding of how to integrate community organizing with legal strategies. Rocío was not only a Clinic student but came back twice to work as a graduate fellow and was integral to the Clinic’s domestic worker advocacy. Rocío equally credits WERC for the training and mentorship she received. She says:

There are not enough words to describe how WERC shaped both my personal and professional life. The opportunity to be trained, mentored and inspired by lawyers/professors who were committed to both social justice issues and the law, as well as invested in cultivating my vocation and professional skills was life changing. This was and continues to be especially important in my life since I am a first-generation child of immigrants and woman of color who, before being a clinical student at WERC, had no access to lawyers or mentors in the law.

She is currently the policy director at the National Domestic Workers Alliance, where she advances and raises standards for domestic workers

nationwide. Rocío's close work with the Clinic's clients using a community-lawyering model has led to transformative change for her. She reflected, "While for the workers and for me, the Movement has been a profound life changing experience nourished by our commitment to social and economic justice. From the 'Mujeres' (Women), I've learned that community-centered organizing is an act of love for humanity and with it we can achieve the unthinkable."<sup>22</sup>

Katherine Smith ('12) is a trailblazing employment lawyer at Levy Vinick Burrell Hyams LLP, the women-owned plaintiffs' employment firm in Oakland. The Clinic helped connect Katherine to her firm. She said:

WERC was instrumental in my trajectory. I enrolled in the clinic because I was considering pursuing employment law. By the end of the semester, I was committed to the field. From both the clinical work and course work, I came to see employment law as a way to work toward meaningful change in individual lives, but also combat some systemic societal problems.

Katherine did outstanding work in the clinic and, upon the Clinic faculty's recommendation, she became Levy Vinick's first fellow, a distinction awarded to talented new lawyers committed to representing workers. Katherine's deep commitment to social justice and her zealous advocacy representing workers in harassment, discrimination, retaliation, wage theft, and whistleblower lawsuits has landed her repeatedly on the *Northern California Super Lawyers* list.

Dana Oviedo ('21), a recent graduate, has started his own practice focusing on representing individuals impacted by the War on Drugs, focusing on civil rights, criminal law, family law, small business, and cannabis law. He was motivated to create a different type of law firm, based on the community lawyering model of the Clinic. Dana reflected:

The Women's Employment Clinic opened my eyes to activist lawyering and the idea that you can work for change on the macro level on state and federal policy down to the individual level of

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<sup>22</sup> Rocío Alejandra Avila (posted by Chaumtoli Huq, ed.), *Domestic Workers Movement: "Transformational Social Change" One Worker at a Time*, LAW @ THE MARGINS (Sept. 3, 2014), <https://lawatthemargins.com/perspectives-domestic-workers-movement-transformational-social-change-one-worker-at-a-time>.

helping a person solve their legal issue. In my practice, I follow this same ethos of policy reform at the state capital and helping real people who are impacted daily by War on Drugs and the criminal justice system. I know that my experience at WERC showed me that I could make a difference even if it was just one client at a time.

Students also found personal transformation at the Clinic. They forged close bonds with their fellow clinical law students and got individualized mentoring from the clinical faculty. For many first-generation law students, having a trusted person who helped them navigate the intricacies of the legal profession was invaluable. The Clinic helped Schyler Cothias ('19), currently an attorney in New York, find “the courage and confidence to stand up for others and fight against the odds.” Josue R. Aparicio ('17), an associate at Hanson Bridgett LLP, similarly credits the Clinic for giving him the confidence “to walk into any courtroom knowing that I am capable of competing against any attorney regardless of experience level. Any litigator, no matter how inexperienced, is capable of obtaining positive results through preparation, due diligence and hard work.”

The Clinic's supportive community, especially for many first-generation law students, gave them a safe space to be themselves. Rocío found law school “extremely challenging and isolating” but found in the Clinic “an invaluable community” that supported her. She acknowledged that the Clinic experience “helped my self-esteem and allowed me to feel empowered and better prepared to take the bar exam.”

Finally, the Clinic reaffirmed for many students of color the importance of joining the legal profession. Josue, a first-generation American and native Spanish speaker, whose parents immigrated from Nicaragua, pursued a legal education because his family encouraged him to become a role model for the Latinx community. He said, “The Clinic showed the importance of working toward diversifying the legal profession. Many of our clients at the Clinic were immigrants that spoke little to no English. They needed lawyers/law students like us that spoke Spanish, came from immigrant or low-income backgrounds and/or empathized with their situation.”

# TRIBAL LEGAL DEVELOPMENT CLINIC:

*UCLA School of Law*

LAUREN VAN SCHILFGAARDE\* & PATRICIA SEKAQUAPTEWA\*\*

Tribes possess inherent sovereignty, which includes the authority to self-govern through distinct tribal legal systems.<sup>1</sup> They are extra-constitutional, in which the U.S. Constitution's provisions, including the Bill of Rights, have no force over tribes.<sup>2</sup> Yet the federal government can

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\*\* Patricia Sekaquaptewa, former instructor at the Tribal Legal Development Clinic, is Affiliated Assistant Professor in the Department of Native Studies and Rural Development at the University of Alaska, Fairbanks, and Associate Justice of the Hopi Appellate Court in Arizona.

<sup>1</sup> See *Worcester v. Georgia*, 31 U.S. (6. Pet.) 515, 559 (1832) (recognizing tribes as "distinct, independent political communities") and *United States v. Wheeler*, 435 U.S. 313, 323–324 (1978) (upholding tribal powers of self-governance as the exercise of inherent sovereign powers, as opposed to delegated powers).

<sup>2</sup> Jordan Gross, *Incorporation By Any Other Name? Comparing Congress' Federalization of Tribal Court Criminal Procedure with the Supreme Court's Regulation of State Courts*, 109 KENTUCKY L.J. 299, 301 (2021), [https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1201&context=faculty\\_lawreviews](https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1201&context=faculty_lawreviews).

exert plenary authority over tribes, which has produced a variety of both harmful and supportive policies toward tribal self-government.<sup>3</sup> Federal Indian law, the body of federal law regarding tribal-U.S. relations, is a core component of U.S. law and as old as the country itself. Yet, federal Indian law is a marginalized, if not completely neglected component of legal education.<sup>4</sup> Tribal law, the bodies of law developed by any of the 574 federally recognized tribes, fares even worse.<sup>5</sup>

As tribes resiliently continue to self-govern, including through efforts aimed at the forced assimilation and destruction of tribes, their legal needs have grown exponentially. But because the legal academy has failed to sufficiently recognize and incorporate both federal Indian law and tribal law into the mainstream curriculum, there is a dearth of legal competency to serve these needs. The complexity and growing proliferation of Indian law cases across tribal, state, and federal dockets demand an elevated competency threshold for the entirety of the legal profession.<sup>6</sup> Legal curriculum regarding Indian law can and must include exposure to actual tribes, their legal systems, and the diverse ways in which tribes interact with the law. The experiential education model offers a unique opportunity to facilitate these competency obligations to and about tribes and federal Indian law, while also enhancing law students' lawyering and comparative analytical skills.

The UCLA School of Law's Tribal Legal Development Clinic is designed to introduce students to the complexities of tribal law, federal Indian law, and the considerations of group, government, and cross-cultural representation. The Tribal Legal Development Clinic connects law students with tribal governments and organizations to engage in non-litigation, legal

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<sup>3</sup> See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01 (Nell Jessup Newton, et al., eds., 2012).

<sup>4</sup> Gloria Valencia-Weber, *Indian Law on State Bar Exams: A Situational Report*, THE FEDERAL LAWYER 26 (March/April 2007), <https://www.fedbar.org/wp-content/uploads/2007/03/focuson-valenciaweber-0307-pdf-1.pdf>.

<sup>5</sup> Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555 (2021), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2021/03/Reese-73-Stan.-L.-Rev.-555.pdf>.

<sup>6</sup> See, e.g., *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 12 (June 29, 2022) (Gorsuch, J., dissenting) ("Today the Court rules for Oklahoma . . . without any sense of this history recounted above and unattached to any colorable legal authority. Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom."), [https://www.supremecourt.gov/opinions/21pdf/21-429\\_8o6a.pdf](https://www.supremecourt.gov/opinions/21pdf/21-429_8o6a.pdf).

development projects on behalf of the tribal client, using both classroom teaching and experiential learning methods. Law students work with law faculty on campus and travel to tribal communities and reservations. The Clinic engages in policy research and legislative drafting on a broad spectrum of subjects. Clinic clients have come from all parts of Indian country. Though, in part because UCLA is a public university in a state with a shameful history of tribal justice, the Clinic has a special responsibility to tribes in California.<sup>7</sup> The Tribal Legal Development Clinic has additionally worked with non-federally recognized tribes and nonprofit organizations affiliated with either tribes or tribal issues. This article overviews the history, approach, and impact of the Tribal Legal Development Clinic.

## HISTORICAL BACKGROUND

In 1996, California voters approved Proposition 209, which amended the state constitution to effectively ban the consideration of race or ethnicity in admissions decisions to the University of California.<sup>8</sup> American Indian enrollment in the nine campuses of the University of California plummeted dramatically.<sup>9</sup> Until 2008, when the UC Board of Admissions and Relations with Schools issued a policy clarification that political membership in a federally recognized tribe could be considered in admissions decisions,<sup>10</sup> the UCLA School of Law and the UCLA American Indian

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<sup>7</sup> See, e.g., BENJAMIN MADLEY, *AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE, 1846–1873*, Yale University Press (2017).

<sup>8</sup> CAL. CONST. art. 1, § 31(a) (“The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”).

<sup>9</sup> Cruz Reynoso & William C. Kidder, *Tribal Membership and State Law Affirmative Action Bans: Can Membership in a Federally Recognized American Indian Tribe Be a Plus Factor in Admissions at Public Universities in California and Washington?*, 1 CHICANA/O LATINA/O L. REV. 27, 30 (2008) (noting that, between 1995 and 2005, American Indian freshman enrollment at UC Berkeley, UCLA, and UC Davis declined by 74 percent), <https://escholarship.org/uc/item/9461z6cr>.

<sup>10</sup> “Position Statement on Admissions Selection Criterion 13 and Membership in a Federally Recognized American Indian Tribe” (Board of Admissions and Relations with Schools — University of California, February 8, 2013), [https://senate.universityofcalifornia.edu/\\_files/reports/MTB2Sakaki\\_Tribal\\_Affiliation\\_final.pdf](https://senate.universityofcalifornia.edu/_files/reports/MTB2Sakaki_Tribal_Affiliation_final.pdf).

Studies Center were the only programs within the UC system to recognize tribal membership as an admissions factor.<sup>11</sup> Still, the wake of Prop 209 caused robust and complex harms.<sup>12</sup>

In response, Professor Carole E. Goldberg, founder and then director of the UCLA School of Law's Native Nations Law and Policy Center and celebrated legal scholar in federal Indian law,<sup>13</sup> established the Tribal Legal Development Clinic. Professor Goldberg reflected that, particularly in the wake of Prop 209, it was essential for students to have direct experience working with a tribal community. From the beginning, she hoped the Clinic would help develop skills in two areas that continue to be underrepresented in legal education — cross-cultural representation and legislative drafting. The latter is not really taught in any major law school, and Professor Goldberg was hard pressed to find any published teaching materials on the subject.<sup>14</sup> There is also very little written about representing tribal clients.<sup>15</sup> The Tribal Legal Development Clinic is one of the first law school clinics to center on federal Indian law and tribal law and remains one of the few Indian law clinics in the country.<sup>16</sup>

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<sup>11</sup> Reynoso & Kidder, *supra* note 9 at 32.

<sup>12</sup> Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209*, 137 Q.J. ECON. 115 (2022), <https://zacharybleemer.com/wp-content/uploads/Papers/QJE%20Affirmative%20Action.pdf>.

<sup>13</sup> See, e.g., Joshua Rich, *Seeds of success: Through her students, law professor sows change in Indian country*, UCLA NEWSROOM (Nov. 18, 2018) (noting she was one of the first female faculty members at the UCLA School of Law in 1972 and her receipt of the 2013 Lawrence R. Baca Lifetime Achieve Award, the highest honor bestowed by the Indian law section of the Federal Bar Association, among her many accolades), <https://newsroom.ucla.edu/stories/seeds-of-success-through-her-students-goldberg-sows-change-in-indian-country>.

<sup>14</sup> *But see* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES, 3D ED. (Rowman & Littlefield, 2015) (which now serves as the primary textbook of the Tribal Legal Development Clinic).

<sup>15</sup> Since then, some notable exceptions now include Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437 (2002) and Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085 (2013), <https://scholar.law.colorado.edu/articles/95>.

<sup>16</sup> A list (though not exhaustive) of notable Indian law clinics includes the Tribal Justice Clinic at the University of Arizona James E. Rogers College of Law, the Indian Legal Clinic at Arizona State University Sandra Day O'Connor College of Law, the American Indian Law Clinic at the University of Colorado Law School, the Tribal Judicial Support Clinic at Kansas University School of Law, the Indian Law Clinic at Michigan



In 2001, Professor Goldberg recruited Pat Sekaquaptewa (Hopi) and her Hopi Tribal Court Project from the University of California Berkeley School of Law. Professor Sekaquaptewa, a 1995 Berkeley Law graduate, started the Hopi Appellate Court Clerkship in 1993 following a summer visit home from law school — and a summer clerkship with the Hopi Tribal Courts — to the Hopi Reservation in Arizona. Like many tribes, the Hopi Courts lacked the personnel and the legal resources to consistently manage appeals from the Hopi Trial Court. At the end of the summer, Hopi Appellate Court Chief Justice Emory Sekaquaptewa (her uncle), suggested that she return to Berkeley Law and recruit her fellow students to assist in resolving the backlog of appeals. According to Professor Sekaquaptewa,

After spending the summer with those files, I realized the significance and magnitude of the many questions of first impression bearing on the shaping of the Hopi tribal government. I also recognized a need to find a way to balance the recognition of, and the integration of, custom and tradition with contemporary Hopi and Tewa peoples' growing expectations of individual rights and other western norms and values.

After six years of running the clerkship at Berkeley Law, Professor Sekaquaptewa moved the project to the UCLA School of Law and incorporated it within the broader Tribal Legal Development Clinic. The Tribal Legal Development Clinic has since oscillated between incorporating tribal appellate clerking within its docket and offering a Tribal Appellate Court Clinic as a stand-alone course.

The Tribal Legal Development Clinic is housed within the UCLA School of Law's experiential program, which features a comprehensive selection of clinics, practicums, simulation courses, and externships. Since the foundational work of Professor Goldberg and Professor Sekaquaptewa, the Tribal Legal Development Clinic has functioned under the leadership of an array of instrumental adjunct faculty, including Clifford Lyle

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State University College of Law, the Indian Child Welfare Clinic at the University of Minnesota Law School, the Margery Hunter Brown Indian Law Clinic at the University of Montana Alexander Blewett III School of Law, the Southwest Indian Law Clinic at the University of New Mexico School of Law, the Tribal Environmental Law Project at the University of North Dakota School of Law, and the Tribal Court Clinic: Criminal Defense and Family Advocacy at the University of Washington School of Law.



CLINIC STUDENTS SERVED AS JUDICIAL CLERKS AT THE HO-CHUNK NATION SUPREME COURT, BLACK RIVER FALLS, WISC., 2019 (L.-R.): BEN RATHELON (THEN LL.M.); SIMONE CHUNG (THEN 2L); ASSOCIATE JUSTICE DAVID J. W. KLAUSER, CHIEF JUSTICE TODD R. MATHA, AND ASSOCIATE JUSTICE TRICIA A. ZUNKER (UCLA LAW 2006); LAUREN VAN SCHILFGAARDE, SAN MANUEL BAND OF MISSION INDIANS DIRECTOR, TRIBAL LEGAL DEVELOPMENT CLINIC, UCLA SCHOOL OF LAW; HOLLIE CHE (THEN 2L); ALEX BOOKOUT (THEN 3L).

*Photo courtesy UCLA Tribal Legal Development Clinic.*

Marshall, former chairman of the Hoopa Valley Tribe; William Wood, associate professor of law at Southwestern Law School; and James Kawahara of Kawahara Law. In 2019, the San Manuel Band of Mission Indians significantly impacted the trajectory of the Tribal Legal Development Clinic through a five-year \$1.3 million gift that facilitated the hiring of a full-time director. With this gift, the Tribal Legal Development Clinic was transformed from being offered once a year into a full-time clinic, offered both fall and spring semesters, as well as during the summer, in which law clerks are hired full-time. Lauren van Schilfgaarde was hired as the Clinic's first full-time director and served from 2019–2022.

## THE CURRICULUM

Like most clinics, the Tribal Legal Development Clinic curriculum is multi-faceted. The seminar portion of the Clinic is designed to impart

substantive law, predominately tribal law and federal Indian law. Students are expected to recognize and understand that there is a third sovereign in the U.S. system — tribal governments with sovereign powers that pre-exist the formation of the United States and that persist today, with over 570 tribes formally recognized by the U.S. government. Students must recognize and understand the legal foundations and limitations of tribal sovereignty under U.S. law, particularly as they inform the subject matter of their project. Today, tribes are engaged in nation-building from the bottom up, in response to a historical federally controlled top-down construction of tribal government and its laws. As a consequence, tribal legal system development can mirror the early states' legal system development but must also respond to contemporary demands. Tribal law can include variations of a tribal constitution, code, case law, resolutions, and unwritten custom and tradition. Crafting substantive tribal law requires keen appreciation for the binding nature of existing tribal law, the historical context of the tribe, the contemporary state and federal legal frameworks impacting the tribe, and the extent to which other tribal, state, federal, and/or international laws are persuasive influences on the tribe. Students must recognize and understand that the foundations of tribal law stem from each tribe's unwritten customs and traditions as modified by their contemporary tribal constitutions, statutes, and common law.

The Clinic additionally strives to teach students how to work with tribes, including the complexity of interactions with tribal leaders, judges, agencies, and communities. The Clinic is designed to build specific legal skills that include legal research, memo drafting, client interviewing, crafting legislation, and clerking on appeals. Particularly with tribes as clients, students must navigate a group as a client. Do they represent the in-house counsel, tribal leadership, the tribal government, or the tribe itself? The student must develop skills in working with these various entities, including soliciting input for the (re)drafting of legislation. Critically, in conducting this work, the Clinic seeks to build the student's professional self-awareness — as a non-tribal member and also as a legal professional working in Native communities that are engaged in nation-building efforts within a different culture, with different world views and languages, and with different colonial histories and experiences. What type of lawyer does the student strive to be? What duties are encompassed in that role? How do they define success?

## CLINIC PROJECTS

Over the course of the Clinic's two decades of work, hundreds of tribes and tribal organizations from across the country have worked with the Tribal Legal Development Clinic. Tribes submit requests for assistance on various nation-building projects that, once accepted, are assigned to law students. Clinic projects have included reformed constitutions, new statutes, rules, and protocols, the development of tribal courts and alternative dispute resolution processes, and the development of the tribal common law. The Clinic works closely with tribal attorneys, administrators, and leadership to carry out legal projects. UCLA faculty supervise the work on these projects and provide instruction in tribal law, federal Indian law, and in other areas of law implicated in a specific project.

Many tribes lack law-trained judges, law clerks, or in-house counsel. For tribes that do have staff attorneys, the in-house counsel tends to be under-resourced and over-worked. Few tribes have resources dedicated to drafting law. The Tribal Legal Development Clinic is designed to facilitate the organic nation-building efforts of tribal clients in a productive way that serves both the tribe and the students. The breadth of projects is just shy of remarkable. But so too is the work in which tribes are engaged every day. Lawyering in Indian country has always required malleability and eagerness, and so the Clinic strives to approach potential projects with the same zeal that will be demanded of these future attorneys. Purely as an illustration, and with the confidentiality of Clinic clients in mind, we offer this bullet list of example projects:

### *Child Welfare*

- Establish tribal social services and foster care departments
- Research the interaction of state child welfare laws and the Indian Child Welfare Act
- Draft rules of court regarding Tribal Customary Adoption
- Research the inadvertent impacts of artificial reproductive technology and tribal membership provisions
- Research the impact of federal funding pressures on tribal child welfare laws

### *Cultural Resource Protection*

- Draft cultural resource protection code
- Establish tribal institutional review boards for human subjects and cultural property protections
- Assist in the negotiation and drafting of inter-governmental agreement protecting sacred sites
- Publish *The Need for Confidentiality within Tribal Cultural Resource Protection*<sup>17</sup>
- Prepare template comments comparing the National Native American Graves Protection and Repatriation Act with state law
- Research state cultural resource protection laws
- Research the potential for cultural harvesting and access off tribal lands
- Publish, in partnership with the Pueblo Action Alliance, *Sacred Place Protections, Limitations, and Re-Imagination for Chaco Canyon*<sup>18</sup>

### *Economic Development*

- Draft tribal trademark code
- Draft tribal corporations code

### *Environmental Protection*

- Draft environmental code
- Research tribal authority to enforce environmental regulations on groundwater
- Draft cultural and endangered species code

### *Gender-Based Violence*

- Draft domestic violence protection orders, stalking, and elder protection codes
- Implement the Violence Against Women Act's special domestic violence criminal jurisdiction into tribal code

### *Government-to-Government Interaction*

- Draft sample consultation protocols
- Research the history of law enforcement relations in Public Law 280 jurisdictions in which there is concurrent state jurisdiction

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<sup>17</sup> <https://law.ucla.edu/academics/centers/native-nations-law-policy-center/native-nations-publications>.

<sup>18</sup> [https://drive.google.com/file/d/1a7o5rVAI6v0nSiEJKc3prlxxxCD\\_BrkU/view](https://drive.google.com/file/d/1a7o5rVAI6v0nSiEJKc3prlxxxCD_BrkU/view).

### *International Law*

- Publish, in partnership with the Native American Rights Fund and the University of Colorado Law School, *Project to Implement the United Nations Declaration on the Rights of Indigenous Peoples Tribal Implementation Toolkit*<sup>19</sup>
- Compare federal intellectual property protections for traditional knowledge with international protections under the World Intellectual Property Organization

### *Land Use*

- Assist tribes in acquiring a trust-protected land base
- Research options for a tribal land conservancy
- Research comparing traditional land tenure principles with western property concepts and laws
- Research comparing traditional village burial practices with mainstream property rights

### *Taxation*

- Research examining dual taxation in Indian country
- Draft taxation enforcement criteria

### *Tribal Code*

- Integrate custom and tradition, recognition of duties and privileges of traditional authorities, and use of traditional processes in drafting/ revising tribal laws
- Conduct comprehensive review of a tribal code for internal consistency

### *Tribal Court and Dispute Resolution*

- Research to establish tribal courts and subject-matter dockets, including its subject matter and personal jurisdiction, the selection of judges, and other core components
- Research to establish a tribal nonprofit offering alternative dispute resolution services (mediation and arbitration) for family and property disputes
- Research to establish a Family Healing to Wellness Court (a tribal drug court for dependency cases)

### *Voting*

- Research voting protections for Native communities under state law

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<sup>19</sup> <https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf>.

## OBSERVED OUTCOMES OF STUDENTS

Law students have stated that it was an eye-opening privilege to be a part of the founding and the development of tribal governments within the Tribal Legal Development Clinic. The experience, they said, helped them to better understand how their own state and federal governments evolved. They also expressed an appreciation for the insights and sensitivities that they developed as part of the cross-cultural experience. After having completed a term within the Tribal Legal Development Clinic, whether a semester or summer clerkship, students have developed or enhanced their professional legal skills. Critically, however, students have also expanded their cross-cultural capacity and appreciation, and thereby dramatically altered their approach to the law and their future clients. A student reflected, “This class demonstrates the best of all the areas it covers: critical race theory, applied legal work, and cross-area legal theory.”<sup>20</sup> Former student (now attorney) Simone Chung described her appreciation for the comparative legal perspective in noting:

I’ve never read anything like the court opinions written by the Supreme Court of the Navajo Nation, which explore pre-constitutional law and custom through implicit concepts in the Navajo language. In *Navajo Nation v. Rodriguez*,<sup>21</sup> the Navajo Nation adopted Miranda rights, not because the U.S. Supreme Court precedent was persuasive, but because the Fundamental Law or Diné dictates that police officers should treat all tribe members with dignity and respect.<sup>22</sup>

The Tribal Legal Development Clinic is part of the UCLA School of Law’s Native Nations Law and Policy Center, which aims to prepare the next generation of lawyers serving Indian country. And numerous former students of the Tribal Legal Development Clinic have done just that. After taking the Tribal Legal Development Clinic, former student (now attorney) Ethan Elkind worked with Professor Pat Sekaquaptewa to responded to the observed

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<sup>20</sup> Anonymous Student Evaluation of the Tribal Legal Development Clinic, Fall 2021 (on file with author).

<sup>21</sup> 5 AM. TRIBAL LAW 473 (2004).

<sup>22</sup> Simone Chung, *First Gen in Focus: Students Share their Stories of Success*, 42 UCLA LAW MAGAZINE 12 (Fall 2019), <https://law.ucla.edu/news/first-gen-focus-students-share-their-stories-success>. Chung, class of 2021, is an associate at Skadden, Los Angeles.



burden that the poor and the elderly were disproportionately expected to inform the Hopi Tribe's customary law within Hopi Tribal Court without any institutional support. Ethan Elkind, with the Hopi judges, designed a formal community-based mediation program to work with Hopi and Tewa families in conflict to transform their disputes into working relationships outside of court. These families were able to talk through their valued customs and ways and how they mattered in their families, internalizing traditional values and ways, instead of being court-ordered to follow them.<sup>23</sup>

A small sampling of former students includes:

*Adam P. Bailey*, partner at Hobbs, Straus, Dean & Walker (Sacramento)

*R. Daniel Carter*, partner at Conner & Winters, LLP (Tulsa)

*Carson R. Cooper*, acting general counsel at Seneca Nation of Indians (Buffalo)

*Kori Cordero*, associate general counsel, Yurok Tribe (Medford-Grants Pass)

*Michele Fahley*, deputy general counsel of the Pechanga Indian Reservation (Temecula)

*Richard J. Frye*, associate at Hobbs, Straus, Dean & Walker (Sacramento)

*Madeline Soboleff Levy*, general counsel for the Central Council of Tlingit & Haida Indian Tribes of Alaska (Juneau)

*Caroline P. Mayhew*, partner at Hobbs, Straus, Dean & Walker (Washington, D.C.)

*Padraic McCoy* of Ocotillo Law & Policy (Boulder)

*Melody Meyers*, Office of the Tribal Attorney, Yurok Tribe (Arcata)

*Nicole Sieminski*, executive director at the Tulalip Foundation (Marysville)

*Christina Snider*, tribal affairs secretary, Office of California Governor Gavin Newsom (Sacramento)

*Geneva E. B. Thompson*, assistant secretary for tribal affairs, California Natural Resources Agency (Sacramento)

*Heather Torres*, program director, Tribal Law and Policy Institute (Los Angeles)

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<sup>23</sup> Elkind, class of 2006, is director of the Climate Program at the Center for Law, Energy and the Environment at UC Berkeley Law and leads the Climate Change and Business Research Initiative on behalf of the UC Berkeley and UCLA Schools of Law.



## CONCLUSION

The Tribal Legal Development Clinic is just one example of the possibility of leveraging the needs of Indian country, the needs of legal education, and the ever dynamic and stimulating nature of Indian law. The Clinic seeks to uplift federal Indian law and tribal law as core components of the legal academy and profession. It seeks to meaningfully connect with tribes and the Native community. It seeks to ensure that law students receive substantive training in legislative drafting, client engagement, comparative legal research, and professional responsibility. Yet, with 574 federally recognized tribes, and increasingly hostile attacks on tribal sovereignty, there is simply too much need for just one Clinic. Our hope is that all law schools recognize and incorporate Indian law into all classrooms, as well as stand-alone courses. Tribes have immense wisdom to offer the law, and it is incumbent upon us to ready our capacity to receive it.

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# ARTICLES



## *PEREZ V. SHARP:*

### *A California Landmark Case that Overturned a Century-Old Ban on Interracial Marriage*

JOHN S. CARAGOZIAN\*

#### EDITOR'S NOTE

The mission of the California Supreme Court Historical Society includes producing educational programs that benefit both the legal profession and the general public. The following is a preview of a program to be offered online by the Society in fall 2022.

— SELMA MOIDEL SMITH

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## WELCOME:

Throughout its history, California has been ethnically and racially diverse. As historian Daniel Walker Howe wrote, “California was the first state to be settled by peoples from all over the world [and] it remains the most ethnically cosmopolitan society in existence today.”<sup>1</sup>

Unfortunately, this diversity has not always meant tolerance. California’s history has included tragic injustices.

This evening’s program involves California’s laws that, for a majority of our state’s history, barred a person of the white race from marrying a person of another race. Lest we think of these laws as ancient history, perhaps some who are alive today were unable to marry someone they loved because of California’s race laws.

In 1948, these laws were invalidated in California. As the Reverend Martin Luther King Jr. said decades later, “[T]he arc of the moral universe is long but it bends toward justice.” To be sure, the arc here bent toward justice, but it was not inevitable. It needed individuals, most notably bride Andrea Perez and groom Sylvester Davis, their lawyer Daniel Marshall, and four California Supreme Court justices.

## FIRST NARRATOR:

As we have heard, California’s history includes both diversity and intolerance.

Before statehood, white miners refused to allow Native Americans to claim mining rights, despite many of the mining districts’ being on traditional Native American grounds; instead, Native Americans were forced to perform manual labor on whites’ claims. Likewise, Chinese immigrants were excluded from many mining districts. People born in what was then Mexican California — people known as Californios, whose equal rights were written into the 1848 Treaty of Guadalupe Hidalgo ending the U.S.–Mexico War — were subject to violence and discrimination in the mines.

After California was admitted as a state in 1850, racist violence and discrimination continued. Even the ending of the Civil War and the adoption of the Fourteenth Amendment to the U.S. Constitution guaranteeing

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<sup>1</sup> DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, 821 (2007).

equal rights to all failed to end the violence and discrimination. The state sanctioned murder of Native Americans, adopted a new Constitution in 1879 to prohibit corporations from hiring Asian employees, barred Asian immigrants from owning agricultural land, authorized public schools segregated by race, and on and on. During World War II, just a few years before California's interracial marriage ban was invalidated, state and local officials successfully urged the federal government to summarily imprison all Californians of Japanese ancestry.

Tonight, we will focus on California's statutes barring people of color and whites from marrying each other.

Laws that require segregation of people of different races, also known as "Jim Crow" laws, were critical for institutionalizing racism in the United States after the Civil War. However, as sociologists have long noted, a system of racial segregation breaks down with mixed-race people. Therefore, fundamental components of racial segregation are prohibitions on interracial marriage — sometimes called anti-miscegenation laws — that seek to prevent mixed-race children from being born. In other words, mixed-marriage bans are a foundation for maintaining segregation.

California was not unique in outlawing marriages between whites and people of color. Laws barring interracial marriages existed in America even before nationhood. In 1664, Maryland barred marriages between whites and Native Americans. In 1691, Virginia enacted a law providing that a marriage between a white person and a "Negro, mulatto, or Indian" was an "abomination." By the early 1700s, most British and French colonies in North America barred marriages between whites and African Americans. After the Revolutionary War, most states enacted similar laws.

California became part of this pattern. Indeed, the very first state legislature in 1850 outlawed marriages between whites and "negroes or mulattoes" and further provided criminal penalties for persons who entered into or solemnized such marriages.

In 1872, the California Legislature eliminated the criminal penalties, but re-enacted the prohibitions. Civil Code Section 60 provided, "All marriages of white persons with negroes or mulattoes are illegal and void." Civil Code Section 69 barred county clerks from issuing licenses for such marriages.

These bars to mixed-race marriages were overwhelmingly popular. A 1958 Gallup Poll showed that 92 percent — *92 percent (!)* — of whites in the western states opposed mixed-race marriages. Even after the civil rights era, a 1968 Gallup Poll revealed that, nationwide, 72 percent of the populace disapproved of mixed-race marriages. This public opinion, in turn, was also important in maintaining the anti-miscegenation structure: statutes prohibited interracial marriages, and the cultural habits reinforced the formal prohibitions.

While California's laws were typical of those in the U.S., it is important to note that the U.S. was nearly alone in this regard. Among the world's nations in the twentieth century, only Nazi Germany and South Africa also barred whites from marrying non-whites.

## SECOND NARRATOR:

California's diversity complicated the 1850 marriage prohibitions. Californians were not just Blacks and whites, but also Native Americans and increasing numbers of Asians, Hispanics, Pacific Islanders, and other people of color.

The Legislature in those years was unconcerned about whom non-whites married, so long as it was not whites. Given these racial and ethnic prejudices, the fundamental question was: who should be barred from marrying whom, or, more particularly, whom may whites marry or not marry, and who may marry whites? The original laws quoted above answered: African Americans and "mulattoes."

In 1880 and 1905, the Legislature further answered this question by amending Sections 69 and 60 to add "Mongolians" to the list of persons whites could not marry.

However, California's diversity was still more complex than this amendment. For example, in 1930s Los Angeles, a man of Filipino ancestry, Salvador Roldan, applied for a license to marry a Caucasian woman. The county clerk refused to issue the license on the ground that Mr. Roldan was "Mongolian," but the L.A. Superior Court ruled that Filipinos were not Mongolian. The county appealed.



In 1933, a California Court of Appeal unanimously ruled in favor of this couple in *Roldan v. Los Angeles County*.<sup>2</sup> The Court of Appeal affirmed that Filipinos were “Malays,” not “Mongolians.” The court cited ethnographers and lexicographers as showing that, when the Legislature added “Mongolians” to California’s laws, Malays were not classified as Mongolians. The court also reviewed California’s anti-Chinese political history and concluded that “Mongolian” meant “Chinese.” With no law barring Filipinos and whites from marrying, the Court of Appeal ordered the license issued. Three California Supreme Court justices voted to accept the county’s further appeal, but lacked the necessary fourth vote.

The state legislature reacted quickly to *Roldan*. The same year, the Legislature amended Sections 60 and 69 to add Malays to the persons whites could not marry. As a result, the laws read, “All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void.”

So matters stood until World War II. During the war, California became a major manufacturing center, especially of ships, planes, and vehicles. Some employers bowed to the heavy demands of wartime production and relaxed their prior practices of racially segregating workforces. As these workplaces became somewhat more integrated during the war, so did employees’ social lives.

One of California’s major wartime employers was Lockheed Aircraft’s Burbank plant, which included what is now Burbank airport. During the war, the plant eventually employed 90,000, including women and persons of color, working around the clock.

Two Lockheed employees, Mexican American Andrea Perez and African American Sylvester Davis met during the war. Let’s learn a bit about Ms. Perez and Mr. Davis.

Andrea Perez grew up in a Los Angeles neighborhood then named Dogtown. Dogtown was north of downtown and along the Los Angeles River. It was predominantly working class and Mexican American. Ms. Perez lived with her parents and they all attended a racially mixed Roman Catholic church, St. Patrick’s. Ms. Perez worked as a babysitter for another St. Patrick’s Catholic family.

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<sup>2</sup> 129 Cal. App. 267, 18 P.2d 706 (1933). The case is in the MCLE materials.

Sylvester Davis also grew up in Los Angeles, near Central Avenue. This neighborhood was one of the few in L.A. where African Americans were allowed to live. He, too, was Roman Catholic.

In 1941, Mr. Davis got a job with Lockheed in Burbank. A year later, after the U.S. went to war, Lockheed began hiring women, and Ms. Perez got a Rosie-the-Riveter job, also at Lockheed's Burbank factory. Mr. Davis helped to orient her, and soon began to drive her to and from the factory. Mr. Davis was drafted into the U.S. Army, served in France, and then returned to Los Angeles.

Ms. Perez and Mr. Davis resumed their friendship, which turned into a romance, and, in 1946, they decided to marry. However, the couple faced two major obstacles to marriage. First, Ms. Perez's parents opposed the marriage on racial grounds; indeed, they refused to speak to her after she and Mr. Davis announced their engagement.

The second major obstacle was California's statutes prohibiting whites from marrying African Americans. It is important to note here that, during this period and dating back to the 1848 treaty ending the U.S.–Mexico war, Hispanics were legally classified as white. Accordingly, the prospective Perez–Davis marriage was squarely barred by Civil Code Sections 60 and 69. This problem was especially acute in Los Angeles, where the head of the county's marriage license bureau bragged of her "sixth sense" in knowing whether each marriage applicant had accurately described his or her "race" on the application form.<sup>3</sup>

Ms. Perez and Mr. Davis could have followed in the footsteps of other mixed-race couples from California: drive two hours south into Mexico, get married there, and return to California, where the marriage would be recognized as valid. Alternatively, if they wanted to marry in the U.S., they could travel to New Mexico — a state without California's prohibitions — and return to California, where, again, the marriage would be recognized.

However, Ms. Perez wanted to be married at St. Patrick's Catholic Church, which she had attended since childhood, so the couple ruled out the Mexico or New Mexico end-runs.

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<sup>3</sup> *Marriage Recorder Uses "Sixth Sense" to Determine Race*, LOS ANGELES SENTINEL 2 (Dec. 23, 1948).

Fortunately, the parents of the children for whom Ms. Perez had babysat years earlier were Daniel and Dorothy Marshall. Daniel Marshall had earned undergraduate and law degrees from Loyola and was a lawyer committed to racial justice. He chaired the small but dedicated Los Angeles Catholic Interracial Council, which met at the same St. Patrick's Catholic Church. By this time, Mr. Marshall had brought cases challenging racial covenants in real property deeds (which contractually barred current and future owners from selling or renting to non-whites). He had also challenged California's laws restricting Asian immigrants' land ownership. In 1947, he was one of the few California lawyers with some experience trying civil rights cases in California courts.

While Mr. Marshall was willing to represent the couple, he faced daunting odds. Courts had long rejected Fourteenth Amendment equal protection challenges to marriage bars, such as California's law. To be sure, the Fourteenth Amendment provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." However, the United States Supreme Court, in a case titled *Pace v. Alabama*,<sup>4</sup> decided in 1883, had unanimously upheld a state law outlawing — indeed, criminalizing as a felony — marriage or adultery between African Americans and whites.

Moreover, no other civil rights groups — neither the NAACP, ACLU, nor anyone else — would support Mr. Marshall's challenge to California's statutes. Perhaps they believed that any effort to overturn the statutes would be futile, given the unbroken precedents approving the laws. They may also have been worried that challenging the interracial marriage bars (which, as we noted, were very popular) would ignite a firestorm of counterattacks and set back overall progress on civil rights. Indeed, Ms. Perez and Mr. Davis endured volumes of hate mail once their challenge became public.

Likewise, the L.A. Catholic Diocese's leadership refused to get involved in the matter, even though interracial marriage was permitted by church doctrine.

The bottom line was that Mr. Marshall and his five-lawyer law firm were on their own in a case that would be legally difficult and would cause enormous public controversy.

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<sup>4</sup> 106 U.S. 583.

## FIRST NARRATOR:

Mr. Marshall made three strategic decisions before Ms. Perez and Mr. Davis applied for a marriage license and filed the challenge to California's statutes. First, he decided to refrain from questioning whether persons of Mexican ancestry — such as Ms. Perez — were properly classified as white under Sections 60 and 69. He wanted to overturn the statutes altogether, not just argue that they were improperly applied to a particular marriage license applicant.

Second, when, as expected, the county clerk's marriage license bureau rejected the Perez–Davis application, Mr. Marshall decided to ask the state Supreme Court to exercise its original jurisdiction over the mandamus petition (which petition was a procedure for challenging such a decision by a public official), skipping the typical Superior Court and intermediate Court of Appeal stages.

Third, in support of the mandamus petition, Mr. Marshall would argue that Ms. Perez and Mr. Davis were being denied their freedom of religion, namely their right to marry within the Catholic Church. This argument, Mr. Marshall hoped, would avoid the numerous, prior judicial decisions rejecting equal protection challenges.

On August 1, 1947, Ms. Perez and Mr. Davis applied for a marriage license. Per the planned strategy, Ms. Perez correctly wrote on the license application that her race was “white,” and Mr. Davis wrote that his race was “Negro.” As expected, the Los Angeles County Clerk's marriage license bureau rejected the application as violating California law.

One week later, on August 8, 1947, Mr. Marshall filed with the California Supreme Court a petition for writ of mandamus, along with points and authorities and other paperwork, seeking an order that the county clerk issue a marriage license to Ms. Perez and Mr. Davis.

The mandamus petition alleged that petitioners Ms. Perez and Mr. Davis were over twenty-one years old, had valid health certificates, and met all of the other marriage requirements under California law, save that they were of different races and one of them was white. The petition then alleged that the county clerk had refused a license on the basis of the racial differences.

In keeping with Mr. Marshall's strategy, the petition argued that the clerk's refusal violated the petitioners' freedom of religion, in that the

Catholic Church had no rule against interracial marriage and, therefore, Ms. Perez and Mr. Davis qualified for Catholic marriage. The petition further requested that the Supreme Court exercise its original jurisdiction (a) because of the issue's importance and (b) to avoid delay, whether to petitioners or to other mixed-race couples who wished to marry now.

Five days later, on August 13, the Los Angeles County Counsel, on behalf of the respondent county clerk, filed an opposition to the petition. It noted that, as recently as 1941, a District Court of Appeal had upheld California's mixed-marriage ban, and recited a long line of federal and out-of-state decisions that had upheld such bans throughout the U.S.

The county's response to the freedom-of-religion argument was that while Ms. Perez and Mr. Davis may have had the *right* to marry each other in the Catholic Church, Church doctrine did not require them to do so. Therefore, because they had no *duty* to marry outside of their race, a state bar to the marriage therefore did not restrict Ms. Perez and Mr. Davis' freedom of religion. The county cited prior court precedents that upheld state bans on polygamy, ruling that such bans did not violate the freedom of religion of an adherent to the Mormon Church, which at one time permitted its members to have more than one spouse. In sum, the County argued that states have a fundamental authority to regulate marriage and may punish acts that "have a tendency . . . to corrupt the public morals," notwithstanding religious views regarding such acts.

About two months after this initial exchange of pleadings, the California Supreme Court held oral argument in Los Angeles. Based on a transcript of the October 6 oral argument, it appears that Justice Roger Traynor took the lead in questioning the county's counsel. Justice Traynor also wrote the majority opinion in the case.

We will hear more about oral argument and the majority opinion later. But let's pause to learn a little about Justice Traynor, who played a pivotal role in this case, and later earned national renown as chief justice of California.

Roger Traynor was born in Utah in 1900 and, encouraged by a high school teacher, began college at the University of California at Berkeley. He eventually earned bachelor's and master's degrees, and then, in 1927, simultaneously earned a Ph.D. in political science and a law degree. His focus was illustrated by a comment from a law school friend, "You could

see Roger, but you'd have to look at him through his pipe, and he would keep writing or reading at the same time you talked to him."<sup>5</sup>

A few months after graduation, he joined the Berkeley law faculty as a professor, primarily teaching tax law. After taking a leave of absence to help the U.S. Treasury Department draft tax legislation, Professor Traynor returned to UC Berkeley and became acting dean of the law school. In 1940, Professor Traynor, while still at the law school, also worked as a part-time deputy to then California Attorney General Earl Warren.

Later that same year, Professor Traynor was appointed as an associate justice of the California Supreme Court. How he got on the Court was a bit of an accident. The governor wanted to appoint someone else, but when it became clear that his chosen candidate was not going to be approved, he appointed Professor Traynor, who, as a tax expert, was considered uncontroversial. Professor Traynor was promptly approved. In 1964, he became chief justice.

Justice Traynor's work on the Court reflected policy concepts such as equality and fairness, and made enormous advancements in products liability, family law, criminal law, and corporation law. After Chief Justice Traynor retired in 1970, one prominent legal commentator said, "The justice of Traynor will far outlive Traynor, the Justice."<sup>6</sup> He was called "the ablest judge of his generation,"<sup>7</sup> and, after his death, a major news periodical called him "one of the greatest judges who never sat on the U.S. Supreme Court."<sup>8</sup>

## SECOND NARRATOR:

During the oral argument in 1947, Justice Traynor asked the county's counsel if the California statutes violated equal protection under the U.S.

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<sup>5</sup> John R. Wierzbicki, *A Lawyer by Accident: Bernie Witkin's Early Life and Career, Part 1*, CALIFORNIA SUPREME COURT HISTORICAL SOCIETY REVIEW 30 (Fall/Winter 2020) (quoting Bernard Witkin).

<sup>6</sup> Bernard E. Witkin, *Through Bernie's Binoculars*, CALIFORNIA SUPREME COURT HISTORICAL SOCIETY NEWSLETTER 2, 4 (Spring/Summer 2007).

<sup>7</sup> Henry J. Friendly, *Ablest Judge of His Generation*, 71 CALIF. L. REV. 1039, 1039–40 (1983).

<sup>8</sup> *The Law: A Pioneer Retires*, TIME (Jan. 19, 1970), at <https://content.time.com/time/subscriber/article/0,33009,878687-2,00.html>.

Constitution's Fourteenth Amendment. Counsel replied that the United States Supreme Court had already answered that question in *Pace v. Alabama*.

Justice Traynor then asked questions that had not been briefed by either side. For example, he asked the county's counsel to tell him who is supposed to be considered a "Negro" and who a "mulatto" under the statute? Counsel eventually admitted that he did not know because neither the California Legislature nor California courts had defined the terms. Justice Traynor then pressed him on what percentage African American ancestry would be needed to be considered a mulatto under the statute: One-sixteenth? One thirty-second? One sixty-fourth? Counsel acknowledged that it would have been better if the Legislature had defined the term, but argued that the statute should still not be declared unconstitutional on this ground.

The county's counsel then began to argue in terms that can only be considered racist, even by the standards of the day, based on the same cultural stereotypes that lay behind the ban's enactment. The counsel claimed that the white race is "superior physically and mentally" and that mixed racial offspring have lessened physical and mental vitality." Justice Traynor asked, "Are there medical men in this country who say such a thing?" The answer by the county's counsel referenced African Americans' likelihood of having sickle-cell anemia.

Perhaps the strongest legal argument of the county's counsel was that, even if experts disagreed on these racist theories, enough evidence — in our modern vocabulary, a "rational basis" — existed for the Legislature to have discretion to make political decisions that courts should not second-guess.

Justice Traynor next asked if the resulting California legislation was a "carfare statute," in that couples could avoid the statute — and its purported bases such as social harmony and single-race children — by simply travelling a few hours to another jurisdiction. The county's counsel acknowledged the point.

On the same day as the oral argument, the county submitted a 121-page supplemental brief that elaborated on its oral arguments. The county reargued its racist biological theories. It claimed that eliminating the ban would further "racial intermingling," which would create "antagonisms and hatreds" between the races. According to the county, these problems would be exacerbated with the increased numbers of African Americans in

California, whose population had doubled since 1940. In light of the threat of racial conflict, according to the county, separation enforced through the marriage ban was vital to maintain social harmony.

Petitioners' counsel Mr. Marshall replied to this 121-page brief the following month with a brief half as long. This reply largely abandoned the freedom-of-religion argument and instead focused on the equal protection issues that Justice Traynor had raised in oral argument. In short, Mr. Marshall did what good trial lawyers do: he paid close attention during the oral argument to the areas in which the judge was interested and was flexible enough to shift his later arguments to focus on those considerations.

Mr. Marshall replied to the county's biological and sociological theories by noting that the California statutes are arbitrary in that they bar only some mixed-race marriages — that is marriages between whites and certain other races — but allow Native Americans to marry anyone (including whites) and allow all other races to marry each other. As for the county's concern about increased numbers of African Americans in California, Mr. Marshall's reply brief explained the positive reason for the increase: African Americans had been recruited into California to work in war industries.

Still, Mr. Marshall's reply brief had to address some difficult legal issues. As for the county's argument that valid bans on polygamy were analogous to bans on mixed marriages, Mr. Marshall wrote that polygamy is outlawed by the "universal judgment of civilized mankind," while anti-miscegenation laws at that time existed only in the U.S.

As for the numerous precedents upholding mixed-marriage bans, Mr. Marshall argued that they were based on outdated and discredited views. He questioned how a California public servant, such as the County Counsel, could possibly espouse white supremacy. When the *Los Angeles Sentinel*, a local African-American newspaper, saw the County Counsel's brief embracing the notion that whites were superior to all others, it was outraged and demanded that the County Board of Supervisors investigate the County Counsel. The board tabled the matter, and no action was ever taken.

Finally, Mr. Marshall addressed the "rational basis" argument made by the county's counsel, that the Legislature has discretion to make policy decisions and could, even if evidence is conflicting, rationally choose to enact a racial ban. He argued that the ban was not rational: that race is a



“hallucination” and that “potentially” weak offspring of mixed marriages and racial “tensions” are insufficient biological and sociological considerations, respectively, to deny the fundamental right of marriage.

#### FIRST NARRATOR:

For nearly a year after oral argument, no word was heard from the Court. Then, on October 1, 1948, the California Supreme Court ruled four-to-three to invalidate Civil Code Sections 60 and 69. The racial marriage ban was no more.<sup>9</sup> Justice Traynor wrote the majority opinion that the statutes violated equal protection under the U.S. Constitution’s Fourteenth Amendment. In so doing, he ignored the county’s argument that, traditionally, states had been accorded primacy in regulating marriage. Justice Traynor also largely ignored Ms. Perez and Mr. Sylvester’s position that California law infringed on their religion.

Instead, Justice Traynor began by questioning whether a state may restrict individuals “on the basis of race alone” without violating the Fourteenth Amendment’s guarantee of equal protection. He then noted that the right to marry someone of one’s own choice is “fundamental” and one of the “basic rights of man.” Only a “clear and present peril” and the “most exceptional circumstances” should allow race to affect fundamental rights.

Justice Traynor next began an implicit assault on separate but equal, which was still the law of the land. Under his modern view, equal protection applied to individuals, not racial groups. Equal protection is not achieved “through indiscriminate imposition of inequalities,” and any racial classifications “must be viewed with great suspicion.”

With this new framework, Justice Traynor opined that the Legislature’s only purpose in enacting the marriage bans was to prevent “contamination” of the white race. His majority opinion rejected this purpose. The majority opinion added that the laws led to absurdities, especially as applied to persons of mixed ancestry. Did race depend on “physical appearance” or “genealogical research”? The statues did not say, and the opinion continued:

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<sup>9</sup> 32 Cal. 2d 711. The complete case with the majority, concurring, and dissenting opinions is in the MCLE materials.

If the physical appearance . . . is to be the test, the statute would have to be applied on the basis of subjective impressions . . . . Persons having the same parents and consequently the same hereditary background could be classified differently. On the other hand, if the application of the statute to persons of mixed ancestry is to be based on genealogical research, the question immediately arises what proportions of . . . ancestors govern the applicability of the statute.

Justice Traynor's majority opinion continued by emphasizing some of the statute's "absurd results" in a multi-racial state:

[A] person with three-sixteenths Malay ancestry might have many so-called Malay characteristics and yet be considered a white person in terms of his preponderantly white ancestry. Such a person might easily find himself in a dilemma, for if he were regarded as a white person under Section 60 he would be forbidden to marry a Malay, and yet his Malay characteristics might effectively preclude his marriage to another white person.

Indeed, Justice Traynor's opinion implicitly questioned the validity of any racial classifications:

[T]he Legislature has adopted one of the many systems classifying persons on the basis of race. Racial classifications that have been made in the past vary as to the number of divisions and the features regarded as distinguishing . . . each division. The number of races distinguished by systems of classification "varies from three or four to thirty-four."

But what about the United States Supreme Court decision in *Pace v. Alabama*? After all, that decision said, as the county's counsel argued, that such interracial marriage bans did not violate equal protection. How could the California Supreme Court now say that a ban did violate equal protection? Justice Traynor's opinion tried to find a way around it. In *Pace*, while the relevant statute barred interracial marriage and sexual relations, the actual conduct for which the parties were convicted was not marriage, but only "adultery and non-marital intercourse" between people of different races. Because *Pace* did not directly involve marriage, its holding regarding

a marriage ban was dictum, meaning that it did not have to be followed by the California Supreme Court.

Two justices wrote separate concurrences. Justice Jesse Carter quoted the Declaration of Independence, federal Constitution, and then-recent United Nations Charter to the effect that “the matter of race equality should be a settled issue.” He also noted that men had died fighting the Civil War to bring about racial equality. Justice Carter then expressly raised World War II’s lessons. He quoted Adolf Hitler’s book, *Mein Kampf*, which formed a basis for Nazi ideology and warned Germans of the dangers of “blood-mixing” and of the importance of racial purity. Carter then wrote that such views were from “a madman, a rabble-rouser, a mass-murderer . . . . Let us not forget that this was the man who plunged the world into a war in which, for the third time, Americans fought, bled, and died for the truth of the proposition that all men are created equal.” Justice Carter’s concurrence also included an acute analysis of the U.S. Supreme Court’s infamous 1896 *Plessy v. Ferguson* decision, which was the legal foundation for separate-but-equal Jim Crow laws. Justice Carter noted that *Plessy*, even accepting it at face value, required that the laws be “reasonable,” and reasonableness may change over time.

Justice Douglas Edmonds’ separate concurrence emphasized the original petition’s freedom-of-religion argument.

The dissent stated that (a) traditionally, states had primacy in regulating marriage, (b) 30 of the then 48 states had laws barring whites from marrying people of color, and (c) all such laws had been upheld by an “unbroken line” of federal and state courts. The dissent added that racial “amalgamation” proponents should seek redress from the Legislature, rather than from the courts.

Two weeks after the decision, the county petitioned the California Supreme Court for a rehearing. The petition by the County Counsel reprised his earlier arguments, but added two new ones. First, it argued that the statutes’ imprecise language — such as how does a clerk determine who is “Mongolian?” — did not invalidate the statutes. Its application in this case was straightforward: on the original marriage license application, Ms. Perez identified herself as “white,” and Mr. Davis identified himself as “Negro.” The only thing required of the clerk was to apply the law.

Second, the county’s petition downplayed the majority opinion’s criticism of the arbitrariness of Civil Code Sections 60 and 69. According to

the county's counsel, California was "predominantly white," and therefore the Legislature could rationally choose to allow whites to protect themselves as the "numerically prevailing race."

Mr. Marshall opposed the petition for rehearing. His opposition included a reference to the new U.S. Supreme Court decision in *Shelley v. Kraemer*,<sup>10</sup> which barred states from enforcing racial covenants in real property deeds. Mr. Marshall argued in favor of extending *Shelley v. Kraemer* by suggesting that any racial classifications are unconstitutional per se.

On October 28, 1948, the California Supreme Court denied the petition for rehearing by the same four-to-three vote as in the original decision. The Los Angeles County Board of Supervisors considered asking the U.S. Supreme Court to hear the case, but failed to do so. Thus, the California Supreme Court's *Perez v. Sharp* decision became final.

## SECOND NARRATOR:

By this decision, California became the first state to strike down interracial marriage restrictions as violating the federal constitutional right to equal protection. Although a few states had repealed their restrictions by legislation, these could be reenacted at any time. The California case was important because it declared that such bans violated a fundamental right and therefore a new ban could not be enacted.

Newspapers gave the decision prominent coverage. The next day, the *Los Angeles Times* ran a story headlined, "State High Court Rules Out Race as Barrier to Marriage," with a sub-headline that the decision was "close." State-wide coverage was similar. The October 1, 1948 *Oakland Tribune* had a page-1 headline, "Interracial Marriages Ruled Legal." The *Bakersfield Californian's* banner headline was "MIXED MARRIAGE BAN HELD ILLEGAL." National newspapers, such as the *New York Times*, and foreign newspapers, such as Australia's *Sydney Daily Telegraph*, reported on the decision.

Legal scholars across America also noted the decision. The *Harvard Law Review's* December 1948 issue reported on *Perez v. Sharp*. The inaugural issue of the *Stanford Law Review* also reported on it. In 1950, the *Yale*

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<sup>10</sup> 334 U.S. 1 (1948).

*Law Journal* speculated whether, under *Perez v. Sharp*, states would be able to continue their long-standing practice of requiring that adoptive parents be of the same race as their adopted children.

It is worth thinking about *Perez v. Sharp*'s broad importance, especially for its time. In 1948, separate-but-equal was still the law of the land; *Brown v. Board of Education* would be decided six years later and could hardly be imagined in 1948. Even after Nazi theories of racial superiority rose and fell in Germany during World War II, postwar California still had segregated public schools, still enforced racial covenants in property deeds, still barred Asian immigrants from owning agricultural land and having commercial fishing permits, and on and on. The *Perez v. Sharp* majority's willingness during this era to question the very notion of racial classifications and to invalidate the foundation of segregation — namely mixed-marriage bans — deserves our respect and thanks 74 years later.

In sum, *Perez v. Sharp* was an early foundation of our modern theory of civil rights.

The immediate real-life impact of the decision, however, was simultaneously uplifting, disheartening, and uneven. The L.A. County Clerk's marriage license bureau refused to issue licenses to mixed-race couples even after *Perez v. Sharp*, until the county counsel stepped in and ordered the bureau to do so. Even then, the bureau continued for a time to require couples' races on the applications.

Across the nation, U.S. Army and Navy veterans returned after their World War II or Korean War service with Asian fiancées or wives. Eventually, over 10,000 veterans — three-quarters of them white — married foreign-born Asian women.

On the international stage, the United Nations' Economic and Social Council in Switzerland, a month before the 1948 California Supreme Court ruling, had condemned racial restrictions on marriage.

Some civil rights advocates hoped that these demographic and social trends, along with some early civil rights case law, would result in the U.S. Supreme Court following *Perez v. Sharp* and invalidating mixed-marriage bans across the nation. The Court, however, repeatedly ducked mixed-marriage cases. Now-opened U.S. Supreme Court archives suggest that the Court was unwilling to take the political heat from a nationwide invalidation.

GROOM FULL NAME <i>Sylvester Scott Davis, Jr.</i>		STATE INDEX NO _____ REGISTER # <i>10007</i>	
RESIDENCE <i>5831 Helena Ave. Los Angeles</i>		BRIDE FULL NAME <i>Andrea D. Perez</i>	
COLOR OR RACE <i>Negro</i> AGE AT LAST BIRTHDAY <i>35</i>		RESIDENCE <i>6172 Lamar St. Los Angeles</i>	
SINGLE UNMARRIED OR DIVORCED <i>single</i> NUMBER OF MARRIAGE <i>1st</i>		COLOR OR RACE <i>White</i> AGE AT LAST BIRTHDAY <i>36</i>	
BIRTHPLACE <i>Mississippi</i> (State or country)		SINGLE UNMARRIED OR DIVORCED <i>single</i> NUMBER OF MARRIAGE <i>1st</i>	
OCCUPATION <i>aircraft</i>		BIRTHPLACE <i>Calif</i> (State or country)	
NAME OF FATHER <i>Sylvester S. Davis, Jr.</i>		OCCUPATION <i>none</i>	
BIRTHPLACE OF FATHER <i>Mississippi</i> (State or country)		NAME OF FATHER <i>Germin V. Perez</i>	
MAIDEN NAME OF BRIDE, IF SHE WAS PREVIOUSLY MARRIED _____		BIRTHPLACE OF FATHER <i>Mexico</i> (State or country)	
COUNTY OF MARRIAGE LICENSE <b>LOS ANGELES</b> DATE ISSUED <b>DEC 13 1948</b>		NAME OF MOTHER <i>Aracina Dena</i>	
DATE PERFORMED <b>MAY 7 1949</b>		BIRTHPLACE OF MOTHER <i>Mexico</i> (State or country)	

W. I. the groom and bride named in this Certificate, hereby certify that the information given therein is correct, to the best of our knowledge and belief.

*Sylvester S. Davis, Jr.* Groom *Andrea D. Perez* Bride

**CERTIFICATE OF PERSON PERFORMING CEREMONY**

I HEREBY CERTIFY that *Sylvester Scott Davis, Jr.* and *Andrea Dena Perez* were joined in marriage by me in accordance with the laws of the State of California, at *St. Patrick's Church, Los Angeles, Calif.* this *7th* day of *May*, 1949.

Signature of Person Performing the Ceremony *Rev. T. C. Perez, S. D. B.*  
 Residence *Los Angeles, California* Official position *Catholic Priest*

MAY 1 1949  
 STATE OF CALIFORNIA  
 DEPARTMENT OF PUBLIC HEALTH

MAME B. BEATTY  
 Deputy Registrar  
 1046 E. 34th St. Los Angeles-11 California

Filed and in the presence of \_\_\_\_\_

MARRIAGE CERTIFICATE OF ANDREA PEREZ AND SYLVESTER DAVIS, MARRIED MAY 7, 1949, IN LOS ANGELES.

Certified copy, Los Angeles County Registrar-Recorder/Clerk.

Similarly, the U.S. Department of Justice refused to file amicus briefs in any federal courts regarding mixed-marriage bans during this time. Even the NAACP as late as 1955 avoided involvement, stating that it took “no position” on race-based marriage restrictions.

It took nearly two decades for the U.S. Supreme Court to invalidate all bans against interracial marriage, which it did in its 1967 decision, *Loving v. Virginia*.<sup>11</sup>

But *Perez v. Sharp*'s legacy did not end there. In 2008, nearly 60 years after Justice Traynor wrote his farsighted opinion, the California Supreme Court repeatedly cited it to strike down California's statutory ban on same-sex marriage in *In re Marriage Cases*.<sup>12</sup> There, *Perez v. Sharp* was cited not so much for its legal reasoning, but for its general historical lesson: long-standing marriage prohibitions — whether interracial or same-sex — may be overturned without catastrophic results. As the *Marriage Cases* held,

<sup>11</sup> 388 U.S. 1.

<sup>12</sup> 43 Cal. 4th 757.

“[H]istory alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee [of marriage]. The decision in *Perez*, although rendered by a deeply divided Court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized.” It is a tribute to Justice Traynor’s pioneering majority opinion in *Perez v. Sharp* that, today, we find it hard to imagine racial restrictions on marriage. Indeed, a 2021 Gallup Poll found that 97 percent of Americans in western states now approve of interracial marriage.

### FIRST NARRATOR:

As for our story’s individual heroes, Andrea Perez and Sylvester Davis finally received their L.A. County marriage license in December 1948. They were married at Ms. Perez’s childhood Catholic church on May 7, 1949. Ms. Perez’s parents refused to attend, but later reconciled to the couple when their children were born. Mr. Davis used his G.I. Bill benefits to buy a house in the segregated Joe Louis housing tract in Pacoima, California, in L.A.’s San Fernando Valley, where they raised their family. Their marriage lasted for over fifty years, until Ms. Perez’s death in 2000. The couple never sought to publicize their legal journey; instead, they viewed their marriage as private and lived quietly.

Justice Roger Traynor was elevated to chief justice in 1964 and served with national distinction until his retirement in 1970. He died in 1983, in Berkeley, California where he lived most of his life.

Our final hero, lawyer Daniel Marshall, continued his civil rights work and civil liberties work, and the Southern California ACLU honored him for his *Perez v. Sharp* advocacy in 1948. However, Mr. Marshall suffered during the McCarthy era. The Roman Catholic Diocese dissolved the Los Angeles Catholic Interracial Council that Mr. Marshall had chaired. His representation of alleged Communists, including teachers who were fired or threatened with firing for communist affiliations, led to his being accused of communist associations. His firm expelled him, and he struggled to earn a living. He died largely forgotten in 1966. Let us remember him now.

We now invite questions from our audience.





# THE CALIFORNIA SUPREME COURT'S FIRST MISTAKE:

## Von Schmidt v. Huntington — *and the Rise, Fall, and Ultimate Rise of Alternative Dispute Resolution*

BARRY GOODE\*

*“Where community ended, law began.”*<sup>1</sup>

Some maps of the California–Nevada border still display the “Von Schmidt line.”<sup>2</sup> In 1872, Alexey Von Schmidt was hired by the United States to survey the two states’ common boundary. Using nineteenth-century technology, he came close but erred slightly.<sup>3</sup> His line was redrawn in part by other surveyors, beginning in 1893.<sup>4</sup>

Coincidentally, Von Schmidt and his family were involved in the California Supreme Court’s first consequential mistake. It is found in volume one of

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\* Barry Goode is a retired Superior Court Judge. He serves on the board of the California Supreme Court Historical Society.

<sup>1</sup> Jerold S. Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1983), 53.

<sup>2</sup> It is found alongside the segment from Lake Tahoe to the Colorado River. See, e.g., U.S. Geological Survey, *California–Nevada: Woodfords Quadrangle*. 1979. 7.5-minute series (topographic), 1:24,000 scale.

<sup>3</sup> Donald Abbe, “1872 California–Nevada State Boundary Markers,” *National Register of Historic Places Inventory — Nomination Form*, January 23, 1980, [https://npgallery.nps.gov/NRHP/GetAsset/NRHP/81000387\\_text](https://npgallery.nps.gov/NRHP/GetAsset/NRHP/81000387_text); David Carle, *Putting California on the Map: Von Schmidt’s Lines* (Lee Vining: Phalarope Press, 2018), 127–51.

<sup>4</sup> *California v. Nevada*, 447 U.S. 125, 129–30 (1980).

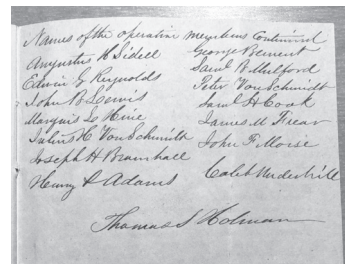
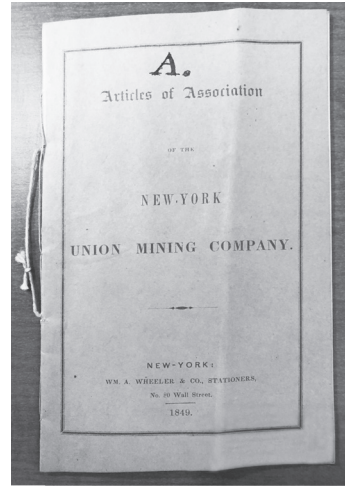
*California Reports* — on just page 55. However, the court’s mistake, unlike Von Schmidt’s, has taken more than one hundred and fifty years to correct.

The case — only the thirteenth decided by the founding justices — was a relatively simple commercial dispute involving twenty-nine New Yorkers who came to San Francisco in 1849, hoping to find gold.

## THE NEW YORK UNION MINING COMPANY

While still in New York, the men had formed the New York Union Mining Company. They raised capital and pledged to work together in the goldfields for more than four years. The company’s Articles of Association stipulated that the twenty-nine “operative shareholders” would “devote their entire time and energies to promote the common interest in such manner as the company shall direct.”<sup>5</sup>

The men created two classes of stock. “Labor stock” was awarded to the operative shareholders, *i.e.*, those who would travel to California and work in the goldfields. For that sweat equity, each was given eight labor shares and was expected to work hard. The articles specified that “any operative shareholder who shall be found gambling or intoxicated, shall be admonished . . . for the first offense, and for a repetition thereof, may be expelled . . . and forfeit his . . . labor stock.”<sup>6</sup>



### ARTICLES OF ASSOCIATION AND NAMES OF OPERATIVE MEMBERS, NEW YORK UNION MINING COMPANY.

*Courtesy California State Archives, photos Barry Goode.*

<sup>5</sup> Transcript from Records of Court of First Instance, California Supreme Court Case No. 26, filed April 15, 1850, California State Archive, Sacramento, California, Exhibit A (Articles of Association of the New York Union Mining Company), 4; Von Schmidt v. Huntington, 1 Cal. 55, 57 (1850).

<sup>6</sup> Transcript from Records of Court of First Instance, Exhibit A, Article XXIII.

The “money stock” cost \$250 a share. Each operative shareholder was required to purchase two shares. Another forty-eight shares were sold, some to passive investors.<sup>7</sup>

The mining company’s total capital was \$26,500. At least \$16,000 was used to pay the miners’ passage to California and to purchase food and tools for their use.<sup>8</sup>

Twenty-eight of the men were to have sailed from New York on the barque *Bogota* on February 22, 1849. The *New York Herald*, dated February 23, 1849, reports the departure of only twenty-six men grouped under the heading “New York Union Mining Company.”<sup>9</sup> Their destination was Chagres on the Atlantic coast of the Isthmus of Panama.

## STRANDED IN PANAMA

They arrived in Chagres and made the difficult land crossing to Panama City, only to discover thousands of would-be California miners waiting for a ship to take them to San Francisco. Few vessels were making a round trip because crews deserted upon arrival in the Bay Area and headed for the gold country. “[W]hat man would be a fireman on a voyage to the tropics when his two hands could gather gold . . . ?”<sup>10</sup>

Among the thousands stranded in Panama City with the New York Union Mining Company were Jessie Benton Frémont, the wife of the great explorer John C. Frémont, and Collis P. Huntington, the future railroad magnate.<sup>11</sup> Jessie Benton Frémont described how the Americans flooded the small city:

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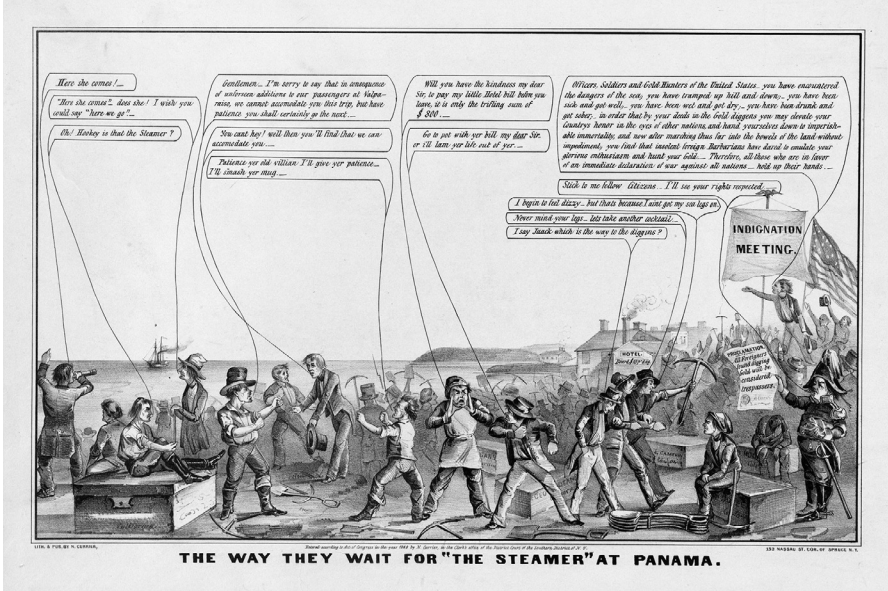
<sup>7</sup> Some were bought by the operative shareholders. At least \$4,000 worth of money shares were sold to passive investors. Transcript from Records of Court of First Instance, 4.

<sup>8</sup> *Von Schmidt v. Huntington*, 1 Cal. at 75; Transcript from Records of Court of First Instance, 2.

<sup>9</sup> “The Emigration to California: Movements in New York,” *New York Herald*, February 23, 1849, 2 (“sailed yesterday”). There is no record of the other two operative shareholders. The mining company was accompanied by a “steward” and a “servant,” neither of whom was a shareholder. *Ibid.*

<sup>10</sup> Jessie Benton Frémont, *Souvenirs of My Time* (Boston: D. Lothrop and Company, 1887), 180–81, <https://archive.org/details/souvenirsofmytim00fr/page/180/mode/2up>.

<sup>11</sup> Steve Inskeep, *Imperfect Union* (New York: Penguin Books, 2021), 211.



THE WAY THEY WAIT FOR "THE STEAMER" AT PANAMA.

ILLUSTRATION: THE way they wait for “THE STEAMER” at PANAMA.

Lith. & Pub. by N. Currier, Courtesy Library of Congress.

The madness of the gold fever was upon everybody up there, so we were detained in Panama seven weeks before the relief came . . . . Another monthly steamer, and sailing vessels from all our ports, brought in accessions, until there were several thousand Americans banked up in Panama, and none of them prepared for this detention . . . .<sup>12</sup>

[T]he Americans . . . felt, like ship-wrecked people, that there was no escape from there . . . .<sup>13</sup>

Another woman who was in Panama at the same time described the scene in a letter dated May 12, 1849:

Dear Daughter: Here we are yet in this miserable old town with about 2,000 Americans all anxiously waiting for a passage to the gold regions. [L]arge vessels . . . are coming in now every day, and

<sup>12</sup> Jessie Benton Frémont, *A Year of American Travel* (New York: Harper and Brothers, 1878), 66; <http://www.loc.gov/resource/calbk.188>.

<sup>13</sup> *Ibid.*, 87.

taking the passengers off, but they continue to pour in from the states so there does not seem to be any less here.<sup>14</sup>

She finally left Panama after spending more than two months on the isthmus.

Whenever a ship from California landed at Panama City, the forty-niners were excited by those debarking men who had reached the placers early. As Jessie Benton Frémont reports,

All the passengers were landing, but the interest concentrated on those from California. Straightway men forgot all the trials connected with the crossing and the waiting, for there was the stream of returning gold-diggers, bringing with them the evidence that in the new country was more than justification for all the trials they were going through with to reach there.<sup>15</sup>

Another adventurer wrote home on May 11, 1849, to tell his mother, "The passengers from the *Oregon* bring glowing accounts from the diggings [sic]. I had the pleasure of lifting forty pounds of the precious metal that one of the men had dug in three months and a half which is pretty good wages."<sup>16</sup>

There was enormous eagerness to reach the gold country, but there were far fewer places on the ships than men vying for a berth. One historian says that those with "through tickets" were given priority. For the rest: "By a combination of priority, lottery, bribery, trickery and ticket scalping, prefaced by mass meetings and committees of protest, the Americans on shore were screened and . . . [the] lucky persons were selected."<sup>17</sup>

Several members of the New York Union Mining Company, including Julius Von Schmidt, Thomas S. Holman, and Lewis F. Newman succeeded

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<sup>14</sup> Polly Welts Kaufman, ed., *Apron Full of Gold, The Letters of Mary Jane Megquier from San Francisco 1849–1856*, 2nd ed. (Albuquerque: University of New Mexico Press, 1994), 24. She landed at Chagres on or about March 13, 1849. *Ibid.*, 10. She left on or about May 22, 1849. *Ibid.*, 32.

<sup>15</sup> Frémont, *A Year of American Travel*, 86–87.

<sup>16</sup> Augustus Campbell and Colin D. Campbell, "Crossing the Isthmus of Panama, 1849: the Letters of Dr. Augustus Campbell, *California History* 78, no. 4 (Winter 1999/2000): 236.

<sup>17</sup> John Walton Caughy, *The California Gold Rush* (Berkeley and Los Angeles: University of California Press, 1975), 65–66.

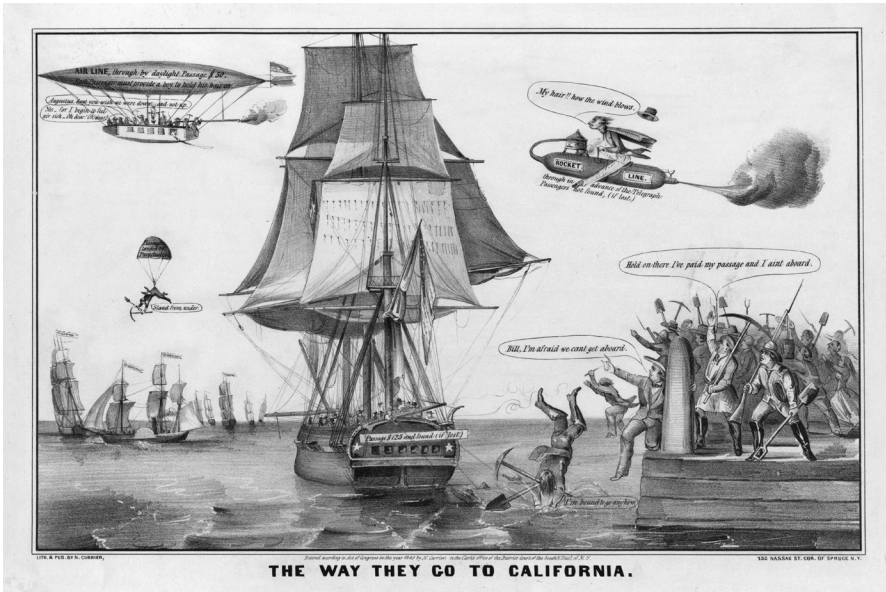


ILLUSTRATION: THE WAY THEY GO TO CALIFORNIA.

Lith. & Pub. by N. Currier, Courtesy Library of Congress.

in obtaining relatively early passage on one of the few ships leaving Panama City. They arrived in San Francisco in June 1849.<sup>18</sup>

## THE MINING COMPANY'S DISCORD

The majority of the New York Union Mining Company remained stranded in Panama City for more than two months.<sup>19</sup> They finally succeeded in boarding a ship and landed in San Francisco around September 1, 1849.<sup>20</sup> There, they discovered that three of the men who left Panama City on the earlier ship (Julius Von Schmidt, Holman and Newman) did not wait for

<sup>18</sup> Both the complaint and the answer in the *Von Schmidt* case allege that “several” members obtained early passage, including Von Schmidt, Holman, Newman, and unnamed others and arrived about three months before September 1, 1849. Transcript from Records of Court of First Instance, 2, 10. One historian says they sailed on the *Maunsel White* and arrived in San Francisco on June 9, 1849. Carle, *Putting California on the Map*, 19.

<sup>19</sup> Transcript from Records of Court of First Instance, 11.

<sup>20</sup> *Von Schmidt v. Huntington*, 1 Cal. at 58.



the rest of the company but headed for the goldfields.<sup>21</sup> Reportedly, they “returned to San Francisco, where they engaged in business on their individual account, for the profits of which they refused to render any account to the company . . . .”<sup>22</sup>

The first week of September 1849 must have been tumultuous for the New York Union Mining Company. The newly arrived majority called meetings which the three early arrivals refused to attend. Worse, the three tried to persuade some of the majority to join them in their existing business. They “exerted their efforts to break up and disorganize [the company] . . . and openly declared that they no longer considered themselves members of the association.”<sup>23</sup>

The majority, “upon due notice,” invoked article 22 of the Articles of Association: “any operative shareholder who shall, within three months after the arrival of the company in California, desert the company without leave, shall, in addition to his labor stock, forfeit his two shares of money stock.”<sup>24</sup> They found the three to be deserters, expelled them from the company and declared both their labor stock and money stock forfeited.

One member of the association, Peter Von Schmidt, lagged the rest. (He was the father of Julius Von Schmidt, one of the handful of men who arrived on the West Coast before the others.) Peter arrived in San Francisco ten days after the second batch of miners.

It is not clear why he was delayed. According to the court, he had stayed in New York to finish building three “gold washing machines” on behalf of the company.<sup>25</sup> Another account says he too came across the Isthmus of Panama, having previously sent the machines around the Horn with another son, Allexy, who arrived in San Francisco *before* all the others.<sup>26</sup>

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<sup>21</sup> Transcript from Records of Court of First Instance, 2. It would make sense that the others who arrived in June also went to the gold fields and defendants’ answer to the bill of complaint suggests they did. *Ibid.*, 10. But there is no other record of what they did during the summer of 1849.

<sup>22</sup> *Von Schmidt v. Huntington*, 1 Cal. at 70.

<sup>23</sup> *Id.*

<sup>24</sup> *Von Schmidt v. Huntington*, 1 Cal. at 70–71.

<sup>25</sup> *Id.* at 58 and 72.

<sup>26</sup> Carle, *Putting California on the Map*, 10. According to Carle, Allexy brought the gold washing machines around the Horn and arrived in San Francisco on May 24, 1849. *Ibid.*, 11–16. Carle also says that Peter arrived in San Francisco on August 22, 1849,

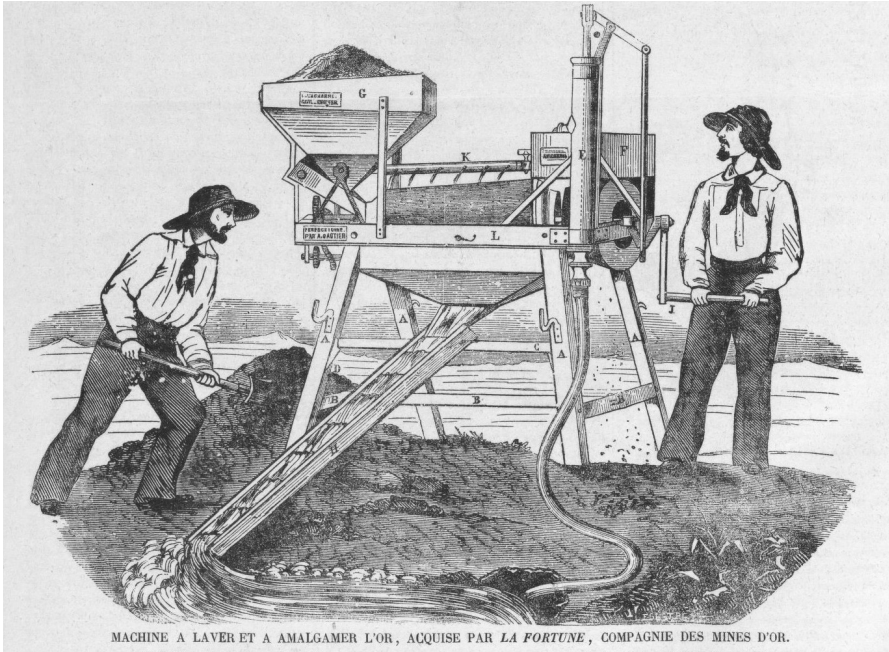


ILLUSTRATION OF A GOLD WASHING MACHINE IN CALIFORNIA.

*Le Charivari magazine, Paris, June 25, 1850.*

The majority were unhappy with Peter Von Schmidt. They had heard reports that he had denounced the New York Union Mining Company and had joined two other groups of forty-niners. They likely considered him to be as obstreperous as his son, Julius, who was one of the three “deserters.”

The majority could not give Peter “due notice” because he was still aboard a ship bound for San Francisco. Nonetheless, they determined that he, too, was a deserter and stripped him of his labor stock and money stock. In the alternative, they found he had violated another clause of article 22, in that he was “absent without leave.” The penalty for that was loss of his labor stock.

Ironically, the majority abandoned its plan of staying together. It voted to sell the company’s property. (The court noted that this was understandable: “The successful prosecution of gold mining at the present time, under

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on the *Panama*. That is contrary to the facts stated in the pleadings of the parties and the opinion of the court.



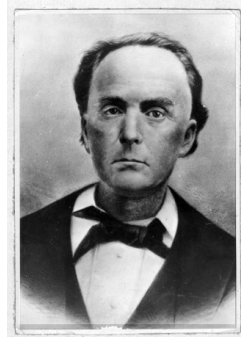
such an organization as is prescribed by these articles of association, appears to us to be an impracticability and a delusion . . . .”<sup>27</sup>)

The company’s property was to be auctioned on November 26, 1849, at 10:00 a.m.<sup>28</sup> On that same morning, the four who had been stripped of their stock filed a “Bill of Complaint” in the Court of First Instance of the District of San Francisco against Carlos T. Huntington, John F. Morse, Henry W. Havens, “officers and members of the New York Union Mining Company.” Plaintiffs sought to enjoin the auction. They also asked the court to restore to them their forfeited stock, and to decree that any assets of the mining company be distributed only to holders of the money stock; not to the labor shareholders.<sup>29</sup>

## JUDGE WILLIAM B. ALMOND

The case came before Judge William B. Almond, who had arrived in California only a few months earlier. He was a notable character.

Almond was born into an affluent family in Virginia on October 25, 1808, and graduated from Hampden–Sydney College in 1829. However, he was restless and moved to western Missouri in 1832. Still restless, he headed west with a group of fur-trapping mountain men the following year. Surviving a battle with Native Americans and a harsh winter at Fort William, North Dakota (during which he is reported to have read Blackstone’s *Commentaries*) he returned to Missouri and became an attorney. By 1837 he was serving as a justice of the peace. In 1839 he moved farther west to Platte City, Missouri, where he practiced law. In 1844 he ran a losing campaign, on the Democratic ticket, for lieutenant governor of Missouri and settled back into the practice of law. From time to time, he served as county attorney.<sup>30</sup>



JUDGE WILLIAM B.  
ALMOND

*San José Public Library,  
California Room.*

<sup>27</sup> *Von Schmidt v. Huntington*, 1 Cal. at 73–74.

<sup>28</sup> Transcript from Records of Court of First Instance, 6.

<sup>29</sup> In addition, they petitioned for the appointment of a receiver. *Von Schmidt v. Huntington*, 1 Cal. at 58.

<sup>30</sup> William McClung Paxton, *Annals of Platte County, Missouri: From Its Exploration Down to June 1, 1897; With Genealogies of its Noted Families, and Sketches of Its Pioneers and Distinguished People* (Kansas City, Mo.: Hudson–Kimberly Publishing

On February 3, 1849, having learned of the discovery of gold in California, he formed a company of forty men to travel overland to the placers. They arrived at Sutter's Fort on July 29, 1849.<sup>31</sup>

When he reached San Francisco, he found a Missouri acquaintance, Peter Burnett.<sup>32</sup> Destined to become the state's first governor, Burnett was then serving on the city's "legislative assembly" and was an influential voice in the debates over the form of government that ought to prevail in what was still a region under military occupation.

Although only a recent arrival, Almond was a striking man who inspired confidence. A close associate later described him this way:

His classical education, Western adventures, social temperament, and varied experience supplied him with a fund of useful information and anecdote that made him a charming companion. He possessed genius, rather than talent. He was a brilliant orator, understood mankind, was quick to discover the weak and strong points of his adversary, and ready to take advantage of every opportunity.<sup>33</sup>

Through Burnett's influence, Almond was appointed to the Court of First Instance in San Francisco, effective October 15, 1849.<sup>34</sup> He had been in town little more than three months.

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Company, 1897), 289–90, [https://www.google.com/books/edition/Annals\\_of\\_Platte\\_County\\_Missouri/xz8VAAAAYAAJ?hl=en&gbpv=1&dq=Annals+of+Platte+County+Missouri&printsec=frontcover](https://www.google.com/books/edition/Annals_of_Platte_County_Missouri/xz8VAAAAYAAJ?hl=en&gbpv=1&dq=Annals+of+Platte+County+Missouri&printsec=frontcover); Charles Clark, "William B. Almond," [http://kansas-boguslegislature.org/mo/almond\\_w\\_b.html](http://kansas-boguslegislature.org/mo/almond_w_b.html).

<sup>31</sup> Paxton, *Annals of Platte County, Missouri*, 110.

<sup>32</sup> Burnett and Almond undoubtedly met not later than March 25, 1839, when they were two of the twelve men enrolled as attorneys in the First Circuit Court for Platte, Missouri. Paxton, *Annals of Platte County, Missouri*, 26–27.

<sup>33</sup> *Ibid.*, 289–90.

<sup>34</sup> By the time of Almond's appointment, the "legislative assembly" had dissolved, and the "town council" had been formed. Burnett was not a member of the town council, but was, no doubt, influential in Almond's appointment. *Ibid.*, 290. One historian says Almond was appointed by the then–military governor of California, Bennet Riley. Henry H. Reid, "Historical View of the Judiciary System of California," in *History of the Bench and Bar of California*, ed. Oscar T. Shuck (Los Angeles: The Commercial Printing House, 1901), xvii.

One source says that Almond presided over cases “dressed in his trail clothes, chewed tobacco in the courtroom and occasionally announced a recess for all to adjourn to the nearest bar.”<sup>35</sup> Another says:

He would often sit in his court on an old chair tilted back, with his feet perched, higher than his head, on a small mantel over the fireplace; and in that position, with a red shirt on and sometimes employed in scraping the dirt from under his nails or paring his corns, he would dispense justice.<sup>36</sup>

But he was a workhorse. It was said, “His court did an immense business, and his name was on all lips.”<sup>37</sup> He kept his court in session from eight in the morning until ten or eleven at night; “the result being that he had difficulty in keeping clerks. One clerk, stating that he was killing himself at the pace demanded of him by the court, resigned after a month’s work.”<sup>38</sup>

Peter Burnett described how justice was served in Almond’s court:

Judge Almond . . . well comprehended the situation of California. Perhaps substantial justice was never so promptly administered anywhere as it was by him in San Francisco. His Court was thronged with cases, and he knew that delay would be ruin to the parties, and a complete practical denial of justice.

He saw that more than one half the witnesses were fresh arrivals, on their way to the mines, and that they were too eager to see the regions of gold to be detained more than two or three days. Besides, the ordinary wages of common laborers were twelve dollars a day, and parties could not afford to pay their witnesses enough to induce them to remain; and, once in the mines, no depositions could be taken, and no witness induced to return.

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<sup>35</sup> KansasBogusLegislature.org.

<sup>36</sup> Theodore Henry Hittell, *History of California*, vol. II, book VII (San Francisco: Pacific Press Publishing House and Occidental Publishing Co.: 1885), 778, <https://books.google.com/books?hl=en&lr=&id=oWADAAAAYAAJ&oi=fnd&pg=PA43&dq=Hittell+History+of+California&ots=b9ZMYXPP2U&sig=QAD0xOMPzwGMLeFsMq1lP83IAg#v=onepage&q&f=false>.

<sup>37</sup> *Ibid.*

<sup>38</sup> Theodore Grivas, *Military Governments in California, 1846–1850* (Glendale: The Arthur H. Clark Company 1963), 181.

He accordingly allowed each lawyer appearing before him to speak five minutes, and no more. If a lawyer insisted upon further time, the Judge would good-humoredly say that he would allow the additional time upon condition that the Court should decide the case against his client. Of course, the attorney submitted the case upon his speech of five minutes.

At first the members of the bar were much displeased with this concise and summary administration of justice; but in due time they saw it was the only sensible, practical, and just mode of conducting judicial proceedings under the then extraordinary condition of society in California. They found that, while Judge Almond made mistakes of law as well as other judges, his decisions were generally correct and always prompt; and that their clients had, at least, no reason to complain of ‘the law’s most villainous delay.’ Parties litigant obtained decisions at once, and were let go on their way to the mines.<sup>39</sup>

But that is not to say that he disdained juries. Stephen J. Field, who was to become a justice of the California Supreme Court and later the United States Supreme Court, recalled that on his first day in San Francisco, December 29, 1849, he noticed a crowd gathered around what turned out to be a courthouse. Inside, Judge Almond was conducting a jury trial. Since jurors were paid eight dollars for their service (and Field was down to his last dollar) he hung around the courtroom, hoping to be selected for the next jury.<sup>40</sup> (He was not.)

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<sup>39</sup> Peter H. Burnett, *Recollections and Opinions of an Old Pioneer* (New York: D. Appleton & Company, 1880), 343–44, <https://www.loc.gov/item/01006673>. Almond served in San Francisco for only seven months, until May 6, 1850. Paxton, *Annals of Platte County*, 110. He moved to San Jose and practiced law there before returning to Missouri in 1851 with \$15,000. [KansasBogusLegislature.org](http://KansasBogusLegislature.org); Paxton, *Annals of Platte County*, 290. He again served as a judge in Missouri. However, he also had business interests and appears to have been a slaveholder. In July 1854 he helped to form the “Platte County Self-Defensive Association,” whose purpose was to “urge the settlement of Kansas by Pro-slavery men, and to guard elections against the frauds of Abolitionists.” He died in Leavenworth, Kansas (about ten miles from Platte City, Missouri) on March 4, 1860. Paxton, *Annals of Platte County, Missouri*, 184, 187, 290.

<sup>40</sup> Stephen J. Field, “Personal Reminiscences of Early Days in California, with other Sketches,” (“Printed for a few friends,” no publisher: 1880), 11, 15–16, <https://tile.loc.gov/storage-services//service/gdc/calbk/114.pdf>.

## PROCEEDINGS IN THE TRIAL COURT

On November 26, 1849, plaintiffs appeared before Judge Almond and swore to the veracity of the matters in their Bill of Complaint. They posted a \$5,000 bond and obtained an injunction from the frontier judge.<sup>41</sup>

On Saturday, December 1, 1849, defendants filed an answer. It was brief, but to the point. They alleged that they need not answer the bill because “plaintiffs have not brought into this court any certificate of failure of conciliation between the said parties as required by law in order to give this court jurisdiction in the premises.”<sup>42</sup>

Two days later, on Monday, December 3, 1849, defendants filed a motion to dismiss the complaint based on that asserted lack of jurisdiction. They noticed the motion to be heard the following day.

## THE MERITS OF THE MOTION TO DISMISS

In truth, defendants’ motion was meritorious.

Prior to 1846, Alta California was governed first by Spanish and then by Mexican law. Under the 1836 Mexican constitution and an 1837 statute, civil suits alleging purely personal wrongs could not be brought until “conciliation” — mediation — had been tried and failed.<sup>43</sup> This was fundamental to the Hispanic legal system in North America.

Towns were small and communities close-knit. They were governed by *alcaldes*, who possessed judicial, executive, and legislative powers. Generally, *alcaldes* were well-respected men who sought to keep peace in the community. An 1820 manual for *alcaldes* describes them as, “‘citizens chosen as fathers of the country,’ and ‘true fathers of the pueblos.’ They should

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<sup>41</sup> The bond was guaranteed by the plaintiffs and three others, including Alexey Von Schmidt who was Peter’s son and Julius’ brother. Transcript from Records of Court of First Instance, 7.

<sup>42</sup> Transcript from Records of Court of First Instance, 8.

<sup>43</sup> Mexican Constitutional Law of 1836, Fifth Title (ley), Article 40, [www.ordenjuridico.gob.mx/Constitucion/1836.pdf](http://www.ordenjuridico.gob.mx/Constitucion/1836.pdf); Judicial Act of May 23, 1837; *Von Schmidt v. Huntington*, 1 Cal. at 59–60. The text of the 1837 law is found in Leon R. Yankwich, “Social Attitudes as Reflected in Early California Law,” *Hastings Law Journal* 10, no. 3 (1959), 251–52, citing 1 Cal. 559 (1851). (Not all versions of 1 *California Reports* contain that text.)

‘work assiduously for the interior harmony of society’ and be an ‘organ of the peace of the families and of the public tranquility.’”<sup>44</sup>

When a civil dispute arose, the contending parties were required to appoint *hombres buenos*. These were also respected men, one for each side, who worked initially with the parties and the *alcalde* to try to mediate a resolution of the dispute. If that failed, the parties might be excused from the conversation, and the *alcalde* and *hombres buenos* would continue the mediation.<sup>45</sup>

Conciliation was “a fixed principle under the Mexican law, and in fact of the civil law from which it sprang. . . . [A]lcaldes . . . were the ministers of conciliation.”<sup>46</sup> Between 85 percent and 90 percent of the civil cases brought to the *alcalde* were resolved by conciliation.<sup>47</sup>

The California Supreme Court nicely summarized the principles animating this requirement:

Judges . . . shall discourage litigation, as far as in them lies, by using their endeavors to induce parties to compose their differences voluntarily and in a friendly manner, by refusing legal process in cases of a trivial nature, whenever it can be done without prejudicing the lawful rights of the parties; and by making use of persuasion, and all other means which their discretion shall dictate, to convince the parties of the benefit which will result to them from a composition of their differences, and the damage and expense inseparable from litigation, even when accompanied by success.<sup>48</sup>

There is no doubt that this law was in full force and effect. The general law of nations, respected and applied by the United States Supreme Court, held that the law of a conquered territory persisted until the conqueror

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<sup>44</sup> David J. Langum Sr., *Law and Community on the Mexican California Frontier*, 2nd ed. (Los Californianos, *Antepasados XIII*) (San Diego: Vanard Lithographers, 2006), 133, quoting an 1820 publication by Mexican lawyer Juan M. Barquera.

<sup>45</sup> Langum, *Law and Community*, 98.

<sup>46</sup> Hittell, *History of California*, vol. II, book VII, 777.

<sup>47</sup> Langum, *Law and Community*, 98 (“approached 90%”), 101 (“about 85%”).

<sup>48</sup> *Von Schmidt v. Huntington*, 1 Cal. at 61. There were exceptions for cases seeking injunctive relief and for certain matters of ecclesiastical or public interest. The court found these exceptions did not apply to this case. *Id.* at 60–64.

affirmatively replaced it.<sup>49</sup> Indeed, the California Constitution of 1849 said as much: “All rights, prosecutions, claims and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, until altered or repealed by the legislature, shall continue as if the same had not been adopted.”<sup>50</sup>

And lest there be any question about “not inconsistent with,” article VI, section 13 provided: “Tribunals for conciliation may be established with such powers and duties as may be prescribed by law; but such tribunals shall have no power to render judgment to be obligatory on the parties, except they voluntarily submit their matter in difference and agree to abide the judgment, or assent thereto in the presence of such tribunal, in such cases as shall be prescribed by law.”<sup>51</sup>

In fact, one of the first books published in California was “A Translation and Digest of Such Portion of the Mexican Laws of March 20 and May 23, 1837, as are supposed to be still in force and adapted to the present condition of California, with an introduction and notes.”<sup>52</sup> Copies were given to judicial officers in Alta California.<sup>53</sup>

By the time the motion to dismiss was heard, the newly elected California Legislature had not met, and it certainly had not altered or repealed the law requiring conciliation.<sup>54</sup> Thus, defendants were right: plaintiffs

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<sup>49</sup> *The American Insurance Company et al. v. 356 Bales of Cotton and David Canter*, 26 U.S. (1 Pet.) 511, 542 (1828).

<sup>50</sup> California Constitution of 1849, Schedule (following art. XII), § 1.

<sup>51</sup> One legal scholar observes that this provision is identical to, and likely taken from, the New York Constitution of 1846. Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (New Haven and London: Yale University Press, 2017), 225. As Kessler suggests, “conciliation court proceedings were well rooted in California at the time of annexation,” and it is likely that at least some of the members of the California constitutional convention had the existing conciliation process in mind when adopting that provision.

<sup>52</sup> J. M. Guinn, “Pioneer Courts and Judges of California,” *Historical Society of Southern California* 8 (1909–1910): 174. Guinn says it was published in San Francisco early in 1849 and 300 copies were circulated by the military governor of the territory.

<sup>53</sup> Grivas, *Military Governments in California 1846–1850*, 147.

<sup>54</sup> The first legislature convened on December 17, 1849. Herbert C. Jones, “The First Legislature of California,” 5, Address before the California Historical Society, San Jose, December 10, 1949, [https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1236&context=caldocs\\_senate](https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1236&context=caldocs_senate).



were obliged to seek to mediate the dispute and present to the trial court a “certificate of failure of conciliation.”

## THE TRIAL COURT’S RULING ON THE MOTION TO DISMISS

At 9:00 a.m., on Tuesday, December 4, 1849, the attorneys for the parties appeared before Judge Almond and argued the motion to dismiss. Unfortunately, the record of the case is scant. It simply says, “the court hears the argument on the Answer and motion and overrules the same, give defendants till Thursday morning at 10 a.m. to file further answer.”

That was it. Judge Almond rejected the argument that plaintiffs were required to mediate their case prior to filing. As to their request for injunctive relief he was undoubtedly right. Mexican law excepted from the rule of *conciliacion* a petition for urgent relief.<sup>55</sup>

But plaintiffs sought more than an injunction. They asked to have their stock restored to them, to have a declaration about the disposition of the company’s assets, and to have a receiver appointed. None of those issues was exempt from the *conciliacion* requirement. Was that fine point laid before Judge Almond? Did he stick to his “five-minute rule”?

We cannot know, but it was said that Almond was not an indulgent judge:

[W]hen he made up his mind, which he often did before he heard any evidence, nothing could change him. He had a sovereign contempt for lawyers’ speeches, legal technicalities, learned opinions, and judicial precedents. He had an idea that he could see through a case at a glance, and imagined that he could, with a shake of his head or a wave of his hand, solve questions which would have puzzled a Marshall or a Mansfield.<sup>56</sup>

Even if the judge allowed extended argument, it is not difficult to understand the context in which he considered the case. He had learned law in America — in Missouri. He had been in California only a few months.

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<sup>55</sup> The California Supreme Court acknowledged this. *Von Schmidt v. Huntington*, 1 Cal. at 63–64.

<sup>56</sup> Hittell, *History of California*, 778.



The Mexican concept of conciliation was, quite literally, foreign to him. It may have seemed “un-American.” His ruling could have been more the product of simple reflex than studied reflection.

So, the motion to dismiss was denied and the case proceeded. On Saturday, December 8, 1849, defendants filed an extensive, fact-laden answer. They appeared before Judge Almond and swore to the veracity of the facts in their answer.<sup>57</sup>

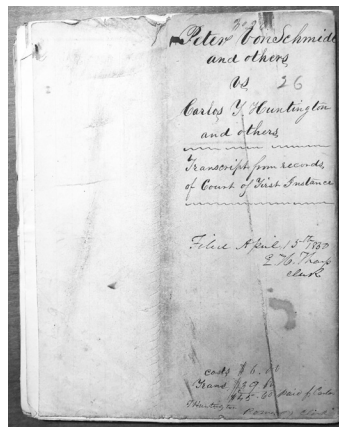
After two continuances, the case came on for trial on Saturday, January 12, 1850. It appears that the court took no testimony. The record reads simply, “the court hears the argument on bill and answer and takes the case under advisement . . .”<sup>58</sup> Although Judge Almond originally indicated that he would rule on January 14, 1850, he did not do so until Thursday, January 24, 1850.

In his ruling, Judge Almond gave each side something. He reinstated the four plaintiffs as shareholders. But he ordered that the proceeds be distributed to the labor stockholders as well as the money stockholders. And he appointed defendant, Carlos T. Huntington, as receiver to marshal the company’s assets.

Defendants appealed to the newly formed California Supreme Court. It was just the twenty-sixth case filed with the court and the thirteenth decided.

## THE FIRST CALIFORNIA SUPREME COURT

The 1849 Constitution created a three-justice Supreme Court. The initial members were chosen by the legislature: Serranus Hastings, Henry Lyons, and Nathaniel Bennett.<sup>59</sup> Each was born and studied law elsewhere in the country; each came for the Gold Rush.



RECORDS OF COURT OF  
FIRST INSTANCE.

Courtesy California State  
Archives, photo Barry Goode.

<sup>57</sup> Transcript from Records of Court of First Instance, 16.

<sup>58</sup> Ibid.

<sup>59</sup> California Constitution of 1849, art. VI, § 3.

Chief Justice Hastings was born in New York, studied law in Indiana and later settled in Iowa. (He served as Chief Justice of Iowa beginning in 1848.) He came to California in mid-1849.<sup>60</sup> Justice Lyons was born in Philadelphia and studied law either there or in Louisiana.<sup>61</sup> Justice Bennett was a native New Yorker who studied law in Cleveland and practiced there and elsewhere in Ohio and New York. He came around the Horn with a mining company, arriving in San Francisco at the end of June 1849. (On the voyage, he learned Spanish, and so, was able to read the Mexican laws at issue in the case.)<sup>62</sup>



ASSOCIATE JUSTICE  
NATHANIEL BENNETT

*Courtesy California Judicial  
Center Library.*

All three, like Judge Almond, came from a legal tradition that was very different from the Mexican law that governed the case of the New York Union Mining Company.

Each arrived in California during a difficult political time. The region was still under military law and with an increasing number of Americans pouring into the area, there was considerable agitation for creation of a proper government under recognizable laws.

## THE ATTORNEYS

Both sides were well represented. But like the parties and the judges, the attorneys were recent arrivals in California.

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<sup>60</sup> One historian puts his arrival in August 1849. J. Edward Johnson, *History of the Supreme Court Justices of California, 1850–1900* (San Francisco: Bender–Moss Company, 1963), 13–19. A more contemporary source says he arrived on June 20, 1849. Anonymous, *A 'Pile' or A Glance at the Wealth of the Monied Men of San Francisco and Sacramento City, also An Accurate List of the Lawyers, Their Former Places of Residence, and Date of Their Arrival in San Francisco* (San Francisco: Cooke & Lecount, Booksellers, 1851), 13, [https://books.google.com/books?id=jbBQAQAIAAJ&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.com/books?id=jbBQAQAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false).

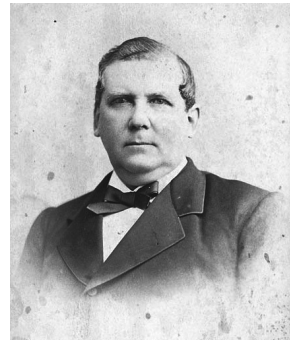
<sup>61</sup> *Ibid.*, 31–32.

<sup>62</sup> *Ibid.*, 36–38.

Defendants were represented in the trial court and on appeal by John W. Dwinelle.<sup>63</sup> He was born in New York in 1816, the son of a congressman and a descendent of a signer of the Declaration of Independence. He studied law in upstate New York, practiced in Rochester and became a “Master in Chancery and Injunction” before coming to California in 1849.<sup>64</sup> When he died, the San Francisco Bar Association memorialized him, noting: “Although he had already won a reputation, and his future was gilded with the assurance of success, in New York . . . yet he relinquished these advantages to become one of the founders of a great empire in the West. In an eminent degree he was a public man . . . .”<sup>65</sup>

He was fluent in Spanish and learned in Mexican law.<sup>66</sup> Later he would serve as the mayor of Oakland, and as a member of the State Assembly, where, most notably, he carried the legislation that established the University of California. (He served on the founding Board of Regents, and Dwinelle Hall on the Berkeley campus bears his name.) At the time of the *Von Schmidt* case, he was one of the most accomplished attorneys in San Francisco.

Plaintiffs were represented (at least on appeal) by Hall McAllister. He was equally distinguished. Born in Savannah, Georgia, in 1800, McAllister attended Princeton University and was admitted to the bar in his hometown at the age of twenty. Within seven years he became the United States attorney for the Southern District of Georgia. He later served as a mayor and state senator and ran for governor



ATTORNEY HALL  
MCALLISTER

Courtesy Bancroft Library,  
via WikiTree.com.

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<sup>63</sup> The report of the case says that Dwinelle represented plaintiffs. *Von Schmidt v. Huntington*, 1 Cal. at 56. But the record on appeal clearly shows otherwise. Transcript from Records of Court of First Instance, 8. Perhaps the reporter of decisions meant that Dwinelle represented appellants.

<sup>64</sup> “The Late Mr. Dwinelle,” *New York Times*, February 12, 1881, 8. <https://timesmachine.nytimes.com/timesmachine/1881/02/12/issue.html>.

<sup>65</sup> “Class of 1843; John Whipple Dwinelle,” *Hamilton Literary Monthly*, May 1882, 365–66.

<sup>66</sup> *Ibid.*, 366.

in 1845.<sup>67</sup> He came to San Francisco during the Gold Rush and soon established himself as one of the leading members of the bar. One notable legal historian says he was “perhaps the greatest California trial lawyer of the nineteenth century.”<sup>68</sup>

## THE SUPREME COURT’S DECISION

The file in the State Archives does not contain the parties’ briefs. But the Supreme Court was well informed about Mexican law. Justice Bennett’s printed opinion spends several pages discussing the law of *conciliacion* as it appears in Mexican and Spanish sources.

The court first considered whether Mexican law required conciliation in this case. It examined the Mexican constitution and the statute of 1837 and found both did. Indeed, it traced the requirement of pre-filing mediation back to Spanish law, which applied in Alta California before 1821: “It thus appears to be the policy, not only of the Mexican statute above referred to, but also of the Spanish and Mexican law, in all cases of a civil nature, which are susceptible of being completely terminated by the agreement of the parties, to require conciliatory measures to be tried . . . .”<sup>69</sup>

Next, it considered whether Mexican law provided any exception to that general rule. Had plaintiffs sought only an injunction to stop the auction of the mining company’s property, it might not have required conciliation. But since plaintiffs sought additional relief, the court found that conciliation was, indeed, required.<sup>70</sup>

So, the court came to the firm conclusion that Mexican law required pre-filing mediation in this case. Defendants were correct, to that extent.

Having made that determination, the Supreme Court then refused to apply the governing law. Why?

The answer reflects the changing nature of society. During the pastoral days of Alta California, communities were small, and the maintenance of

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<sup>67</sup> “Matthew Hall McAllister,” in *Biographical Directory of Federal Judges*, The Federal Judicial Center, <https://www.fjc.gov/history/judges/mcallister-matthew-hall>.

<sup>68</sup> Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln and London: University of Nebraska Press, 1991), 39.

<sup>69</sup> *Von Schmidt v. Huntington*, 1 Cal. at 61.

<sup>70</sup> *Id.* at 63–64.

harmony among the inhabitants was prized. But Americans — raised in common law states — brought other values with them to California. They did not want to be governed by what a given *alcalde* thought was right or would restore some measure of peace; they wanted predictable laws on which they could rely.

And when commercial disputes arose, they did not want a compromise that delayed payment of a debt, as was often the case. They did not want a mediated resolution that failed to declare who was right and who was wrong. They wanted clarity. They wanted a remedy. They wanted vindication.<sup>71</sup>

This debate was not limited to California. France, Denmark, and Spain all had courts of conciliation, designed to resolve disputes quickly, inexpensively, privately, and without the need for attorneys. Many in America advocated for the adoption of such proceedings. Those advocates were vigorously opposed.<sup>72</sup>

Fundamentally, the debate was between two legal systems. On one side were those who believed that it was beneficial to promote inexpensive and equitable resolutions of disputes on a case-by-case basis via conciliation. They believed it would increase the sense of community and save the polity from the worst excesses of attorneys. On the other side were those who believed an adversarial system, based on a clear set of laws, was more rational and gave predictable results on which people could rely. They believed that system was more suited to Americans' notions of freedom and independence and would promote the economic development of the country.<sup>73</sup>

It is not clear whether Americans in California were aware of this debate in the eastern states, but it is clear that they shared the sentiments of those opposed to courts of conciliation. The new Californians expressed great dissatisfaction with the entire Mexican legal system, particularly during the interregnum which prevailed from 1846 when California was conquered to late 1849 when the first Constitution was adopted.<sup>74</sup>

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<sup>71</sup> Langum, *Law and Community*, 138–43.

<sup>72</sup> Kessler, *Inventing American Exceptionalism*, 202–05.

<sup>73</sup> *Ibid.*, 250–251.

<sup>74</sup> Cardinal Goodwin, *The Establishment of State Government in California, 1846–1850* (New York: Macmillan, 1914), 61–70, Samuel H. Willey, *The Transition Period of California from a Province of Mexico in 1846 to a State of the American Union in 1850*

As early as January 1847, newspapers were publishing complaints about *alcalde* rule. In its very first edition, the *California Star* ran a piece entitled “The Laws of California” that opined,

We hear the enquiry almost every hour during the day “WHAT LAWS ARE WE TO BE GOVERNED BY;” we have invariably told those who put the question to us, “if anybody asks you tell them you don’t know” because . . . the same persons would be told at the Alcalde’s office or elsewhere that “no particular law is in force in Yerba Buena . . . and that all suits are now decided according to the Alcalde’s NOTIONS of justice, without regard to law or the established rules governing courts of equity.” . . . [W]e hoped that . . . the citizens [would be] secured and protected in all their rights by a scrupulous adherence on the part of the judges to THE WRITTEN LAW of the Territory. . . .<sup>75</sup>

A short while later, the *California Star* observed, “An efficient, honest and independent judiciary being the great bulwark of the liberties of the people . . . it is of the first importance and demands . . . prompt action. . . . The present system is worse than none — it is worse than anarchy.”<sup>76</sup>

Justice Bennett captured this sentiment in his preface to the first volume of *California Reports*: “Before the organization of the State Government, society was in a disorganized state. It can scarcely be said that any laws were in existence further than such as were upheld by custom and tradition.”<sup>77</sup>

Mexican law well served the interests of the community that existed in Alta California before 1846. But most Americans who flooded the territory did not appreciate that. The Mexican model was so different from the statutory and common law system with which the Americans were familiar

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(San Francisco: The Whitaker and Ray Company, 1901), 70–71, 78–79, Richard R. Powell, *Compromises of Conflicting Claims: A Century of California Law 1760–1860* (Dobbs Ferry, N.Y.: Oceanea Publications, Inc., 1977), 64, 79–80, 127–30; Zoeth Skinner Eldredge, *History of California* (New York: The Century History Company, 1915), vol. 3, 267–68. During this period, California remained under military rule.

<sup>75</sup> “The Laws of California,” *California Star*, vol. 1, no. 1, January 9, 1847, 2.

<sup>76</sup> “Council–Late Emigrants–Judiciary–Convention,” *California Star*, vol. 1, no. 6, February 13, 1847, 2.

<sup>77</sup> Nathaniel Bennett, “Preface,” 1 Cal. Reports vi.

that it did not even seem to be a system of law. As a result, there was little appetite among the Americans to continue any vestige of Mexican rule.

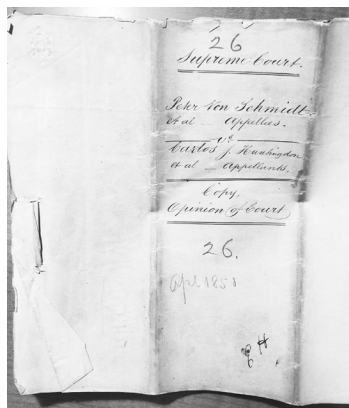
So, when the justices confronted the Mexican law's requirement of pre-filing mediation they found, "since the acquisition of California by the Americans, the proceeding of *conciliacion* has, in all cases, been deemed a useless formality by the greater portion of the members of the bar, by the Courts and by the people . . ."78

The justices understood that the supreme law of the land required the application of Mexican law. But they chose to follow the general sentiment; they chose to follow American — not Mexican — rules.

To give a semblance of authority to their ruling, the justices cited one of the first laws passed by the California Legislature: an act "to supersede certain

Courts, and to regulate Appeals therefrom to the Supreme Court."79 The law was passed two months after the trial court's ruling. And the justices admitted, "as a general rule of statutory interpretation, it is undoubtedly true that a statute should be construed to operate on the future, and not upon the past."80

Still, the justices invoked the new law that gave them authority "to reverse, affirm, or modify any judgment, order, or determination . . . and render such judgment as substantial justice shall require, without regard to formal or technical defects, errors or imperfections, not affecting the very right and justice of the case."81



**SUPREME COURT  
OPINION, VON SCHMIDT V.  
HUNTINGTON.**

*Courtesy California State  
Archives, photo Barry Goode.*

78 *Von Schmidt v. Huntington*, 1 Cal. at 64.

79 Stats. 1850, Ch. 23, § 26. The legislature passed the bill on February 28, 1850.

80 *Von Schmidt v. Huntington*, 1 Cal. at 65. Indeed, in a prior case, the court said of that statute, "[i]f its provisions were retroactive in their effect, impairing vested rights, they would be repugnant to the principles of the common and civil law, and void." *Gonzales v. Huntley & Forsyth*, 1 Cal. 32, 33–34 (1850).

81 Cal. Stats. 1850, § 26, ch. 23.



The fundamental purpose of Mexican civil law was to reconcile parties rather than drive them to active litigation. It was to seek to effect an agreeable compromise rather than to perpetuate division. Under this system of law, the “very right and justice of the case” was to harmonize the community. Mexican values reflected a very different role for a judicial system than that which the American justices had learned.

Nonetheless, the Court characterized plaintiffs’ non-compliance with pre-trial mediation — a tool that served the fundamental purpose of Mexican civil law — as a mere technical defect.

[E]ven conceding that it may operate beneficially in the nations for which it [*conciliacion*] was originally designed, still amongst the American people it can be looked upon in no other light than as a useless and dilatory formality, unattended by a single profitable result, and not affecting the substantial justice of the case.<sup>82</sup>

The Court left no doubt of the depth of its feelings:

We have entered thus fully into an examination of the doctrine of *conciliacion*, and given our views of it at length, in order that the profession may understand, that the objection for the want of conciliatory measures is, so far as the Court is concerned, disposed of now, and, as we sincerely hope, forever.<sup>83</sup>

Having disposed of pre-litigation mediation, the court turned to the merits of the case. It reversed in part and affirmed in part. It held that the three early arrivals had, indeed, forfeited their stock, but that Peter Von Schmidt was entitled to retain his money stock. It ordered the dissolution of the company — even though the plaintiffs had not expressly sought that. It confirmed the appointment of a receiver. But it determined that the proceeds of the company’s assets should be distributed among only the money stockholders.

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<sup>82</sup> *Von Schmidt v. Huntington*, 1 Cal. at 65.

<sup>83</sup> *Id.* at 66. Judge Yankwich observes that the court was more willing to ignore Mexican procedures than substantive law. Yankwich, “Social Attitudes,” 255. That only underscores the fact that the court was honoring some controlling laws and not others at a time it was required to honor all.



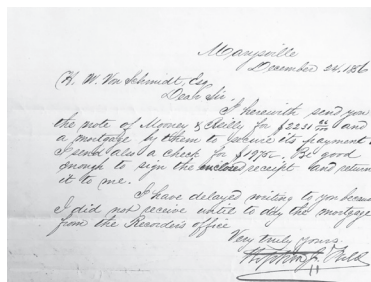
## THE VON SCHMIDTS IN LATER YEARS

Most of the members of the New York Union Mining company then disappeared from history. However, the Von Schmidt family did not. Peter died in San Francisco in 1855.<sup>84</sup> His sons, Alexey and Julius, continued to live in the Bay Area.

Alexey became quite well known as a surveyor and engineer. In addition to surveying the “Von Schmidt line” and doing considerable work relating to land grant claims, he worked with water companies to serve the needs of San Francisco, conceived a plan to bring water to the city from Lake Tahoe (anticipating by decades the plans of other engineers who sought to tap the Sierra snowpack), and built the first drydock in San Francisco Bay. In 1870, he was hired to blow up Blossom Rock, a hazard to navigation in the Bay. The spectacle attracted much attention and added to his notoriety. He built dredges that were used to create levees in the Delta, and the island of Alameda.<sup>85</sup>

He came to the public’s attention again in 1875. He was riding a Wells Fargo stagecoach near Oroville when it was stopped by an armed robber. Alexey jumped down from the coach with his revolver and foiled the robbery, for which he was presented a gold pocket watch by the company.<sup>86</sup>

However, Alexey’s relationship with his brother, Julius, was not always happy. That caused him to cross paths with Clara Foltz, the first woman lawyer in California. By the 1880s, Julius had fallen on hard times. He believed Alexey had not shared profits owed to him from patents on and income from the dredges Alexey had invented and operated. He sued Alexey and retained Foltz to represent him. She won in the trial court but lost on appeal.<sup>87</sup>



LETTER TO ALEXEY VON SCHMIDT FROM STEPHEN J. FIELD, DECEMBER 24, 1856, THE YEAR BEFORE FIELD WAS ELECTED TO THE CALIFORNIA SUPREME COURT.

Courtesy Bancroft Library,  
photo Barry Goode.

<sup>84</sup> Carle, *Putting California on the Map*, 41.

<sup>85</sup> *Ibid.*, *Putting California on the Map, passim*.

<sup>86</sup> *Ibid.*, 159–61.

<sup>87</sup> *Ibid.*, 155–56; Barbara Babcock, *Woman Lawyer: The Trials of Clara Foltz* (Stanford: Stanford University Press, 2011), 166–67.

A few years later, Allexe and Foltz crossed paths again, this time in a suit involving Allexe's son, Alfred. Allexe had committed Alfred to the Home for Inebriates. Investigations revealed the harsh treatment imposed there, including undue physical restraints. Alfred sued the home for false imprisonment. Allexe was called to testify and stoutly defended his decision to institutionalize Alfred. The jury found for the plaintiff but awarded only one dollar in damages.<sup>88</sup> Still, the publicity afforded the case illustrated both the celebrity that Allexe commanded, and the difficulty of aspects of his domestic situation.

Toward the end of his life, Allexe moved to Alameda and lived with his four orphaned grandchildren, not far from his daughter, Lily. She had married a lawyer named Charles Tilden, who served on the first Board of Directors of the East Bay Regional Park District, and for whom Tilden Park is named.<sup>89</sup> Allexe lived until a month after the San Francisco earthquake and fire, dying on May 26, 1906, at the age of 85.<sup>90</sup>

## THE RETURN OF MEDIATION

The Supreme Court said it hoped to dispose of pre-trial mediation "forever."<sup>91</sup> It came close. The court's view prevailed for the remainder of the nineteenth and most of the twentieth century. Although the ruling concerned pre-filing mediation, courts largely refrained from requiring any pre- or post-filing mediation.

But "how people dispute is . . . a function of how (and whether) they relate."<sup>92</sup> And as society changed, so did the way in which people resolved their disputes. In twentieth-century California, the value of court-ordered mediation was first recognized, formally, in the family law context.

In 1939 the Legislature enacted the "California Children's Court of Conciliation Law."<sup>93</sup> It established a "children's court of conciliation," seemingly

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<sup>88</sup> Babcock, *Woman Lawyer*, 164–68.

<sup>89</sup> Carle, *Putting California on the Map*, 175–78; Wikipedia entry for Charles Lee Tilden, [https://en.wikipedia.org/wiki/Charles\\_Lee\\_Tilden](https://en.wikipedia.org/wiki/Charles_Lee_Tilden).

<sup>90</sup> Carle, *Putting California on the Map*, 178.

<sup>91</sup> *Von Schmidt v. Huntington*, 1 Cal. at 66.

<sup>92</sup> Jerold S. Auerbach, *Justice Without Law?*, 7.

<sup>93</sup> Stats. 1939, Ch. 737. See Family Code Sec. 1800 et seq. which recodified what was originally Code of Civil Procedure Sec. 1730 et seq.

as a part-time assignment for a superior court judge.<sup>94</sup> In larger counties, the judge could be aided by a “director of conciliation” and an investigator.<sup>95</sup>

That statute authorized spouses with minor children to file a “Petition for Conciliation.”<sup>96</sup> Once such a petition was filed, the conciliation judge would conduct one or more informal conferences seeking to reconcile the spouses or to reach “an amicable adjustment or settlement.”<sup>97</sup> For thirty days after a petition for conciliation was filed, neither spouse could file for divorce, annulment or separation.<sup>98</sup> Remarkably, this law still persists, in substantially the same form.<sup>99</sup> However, it appears that no court in the state maintains a “conciliation court.”

Individual judges in some counties found it useful to require mediation of child custody and visitation disputes. By the late 1970s, courts in San Francisco, Sacramento and Los Angeles had made mediation mandatory.<sup>100</sup>

In 1980 California mandated mediation of all child custody disputes.<sup>101</sup> So, whenever custody or visitation is contested, “the court shall set the contested issues for mediation”<sup>102</sup> which shall be held before or on the same date as the court hearing of that dispute.<sup>103</sup>

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<sup>94</sup> “The judge . . . shall hold as many sessions of the conciliation court in each week as are necessary for the prompt disposition of the business before the court.” Stats. 1939, Ch. 737, § 1, adding Code of Civil Procedure Sec. 1741.

<sup>95</sup> *Ibid.*, § 1744.

<sup>96</sup> *Ibid.*, § 1760–1772.

<sup>97</sup> *Ibid.*, § 1768.

<sup>98</sup> *Ibid.*, § 1770.

<sup>99</sup> Family Code § 1800 et seq.

<sup>100</sup> Michelle Deis, “California’s Answer: Mandatory Mediation of Child Custody and Visitation Disputes,” *Ohio State Journal on Dispute Resolution* 1 (1985): 155–56, [https://kb.osu.edu/bitstream/handle/1811/75845/OSJDR\\_V1N1\\_149.pdf](https://kb.osu.edu/bitstream/handle/1811/75845/OSJDR_V1N1_149.pdf). This reflected a national move toward greater use of alternative dispute mechanisms. See generally, Larry Ray and Anne L. Clare, “The Multi-door Courthouse Idea: Building the Courthouse of the Future . . . Today,” *Ohio State Journal on Dispute Resolution* 1 (1985): 10–12, [https://kb.osu.edu/bitstream/handle/1811/75850/OSJDR\\_V1N1\\_007.pdf](https://kb.osu.edu/bitstream/handle/1811/75850/OSJDR_V1N1_007.pdf).

<sup>101</sup> Stats. 1980, Ch. 48, § 5, adding Civil Code Sec. 4607.

<sup>102</sup> Family Code § 3170(a)(1).

<sup>103</sup> Family Code § 3175. The original version of Civil Code Sec. 4607 embraced what is now Family Code sections 3179(a)(1) and 3175 in one sentence: “Where it appears . . . the custody or visitation of a child . . . [is] contested . . . the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing.”

By then, the interest in mediation reached beyond family law. That reflected a larger, national trend toward alternative dispute resolution that began in the 1960s, gained steam in the 1970s, and took serious root in the 1980s.<sup>104</sup>

In 1986 the California Legislature declared,

(a) The resolution of many disputes can be unnecessarily costly, time-consuming, and complex when achieved through formal court proceedings where the parties are adversaries and are subjected to formalized procedures. (b) To achieve more effective and efficient dispute resolution in a complex society, greater use of alternatives to the courts, such as mediation, conciliation, and arbitration should be encouraged . . . . (d) Courts . . . should encourage greater use of alternative dispute resolution techniques whenever the administration of justice will be improved.<sup>105</sup>

It enacted “The Dispute Resolution Programs Act of 1986.”<sup>106</sup> That provided for the establishment of local, informal dispute resolution programs under the oversight of the Department of Consumer Affairs.<sup>107</sup> It also encouraged courts and the Judicial Council to promote alternative dispute resolution techniques.<sup>108</sup>

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<sup>104</sup> Jerold Auerbach notes the persistence of mediation and conciliation in various communities in the United States throughout history and a more generalized resurgence starting in 1913. Auerbach, *Justice Without Law?*, *passim* (reference to 1913, at 97). However, he, too, says the modern renaissance began in the 1960s. Writing in 1983 he notes, “For nearly twenty years the idea of alternative dispute settlement has shimmered elusively like a desert mirage. The first call for its revival arose from the euphoric hope that burst forth during the sixties, when community empowerment became a salient theme of political reform.” *Ibid.*, 116. See also Jay Folberg, “A Mediation Overview: History and Dimensions of Practice,” *Mediation Quarterly* 1 (September 1983): 5 (“Beginning in the 1960s, American society saw a flowering of interest in alternative forms of dispute settlement.”); Eric van Ginkel, “Mediation under National Law: United States of America,” *Mediation Committee Newsletter* (August 2005): 43, <https://www.mediate.com/globalbusiness/docs/Mediation%20and%20the%20Law%20-%20United%20States.pdf>; Harry T. Edwards, “Commentary: Alternative Dispute Resolution: Panacea or Anathema?,” *Harvard Law Review* 9 (January 1986): 668.

<sup>105</sup> Cal. Bus. & Prof. Code § 465.

<sup>106</sup> Stats. 1986, Ch. 1313, amended by Stats. 1987, Ch. 28.

<sup>107</sup> Cal. Bus. & Prof. Code § 465 et seq., 16 CCR § 3600 et seq.

<sup>108</sup> Cal. Bus. & Prof. Code § 465(d), (f).

Still, by 1993, the Commission on the Future of California Courts found that, despite the utility of mediation, “in California . . . statewide mandates for appropriate dispute resolution are still limited to child custody mediation.”<sup>109</sup> It wrote,

Appropriate dispute resolution is central to providing effective, affordable, satisfying justice to all Californians. . . . For many disputes . . . nonadjudicatory processes allow the parties greater involvement in the resolution of their conflicts, produce results that are equally or more satisfying, and often cost less. Fundamental to the commission’s vision of multidimensional public justice is a wide array of appropriate dispute resolution (ADR) processes.<sup>110</sup>

Clearly, the pendulum was swinging back. The Legislature made that clear in 1993, when it found and declared,

The peaceful resolution of disputes in a fair, timely, appropriate, and cost effective manner is an essential function of the judicial branch . . . . Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. . . . It is in the public interest for mediation to be encouraged and used where appropriate by courts.<sup>111</sup>

It further found — implicitly rejecting the notion that animated *Von Schmidt v. Huntington*: “Mediation . . . can have the greatest benefit for the parties in a civil action when used early . . . . Where appropriate, participants in disputes should be encouraged to utilize mediation . . . in the early stages of a civil action.”<sup>112</sup>

It established a pilot program for “civil action mediation” in Los Angeles and any other county that chose to participate.<sup>113</sup> It also directed the Judicial Council to establish rules for mediation, which the Council did in

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<sup>109</sup> “Justice in the Balance 2020: Report of the Commission on the Future of the California Courts,” 1993, <https://www.courts.ca.gov/documents/2020.pdf>.

<sup>110</sup> *Ibid.*, 40 n.2.

<sup>111</sup> Cal. Code of Civ. Pro. § 1775(a), (c).

<sup>112</sup> Cal. Code of Civ. Pro. § 1775(d).

<sup>113</sup> *Ibid.* In 1992 the Legislature amended the Penal Code to add Section 14150 et seq., authorizing district attorneys to establish “community conflict resolution programs” to provide alternative dispute resolution services, such as mediation and arbitration in cases in which a misdemeanor charge might be brought.

February 1994.<sup>114</sup> Symbolically, the third week of March was designated as “Mediation Week” — a designation that continues even now.<sup>115</sup>

In 1999, the Legislature enacted Code of Civil Procedure Sections 1730–1743 which required the judicial branch to select four superior courts in which to establish pilot civil mediation programs.<sup>116</sup> The law was amended the following year to add a fifth county.<sup>117</sup>

The pilot project was reported to be successful.<sup>118</sup> Effective 2006, the Standards of Judicial Administration were amended to state, “Superior courts should implement mediation programs for civil cases as part of their core operations.”<sup>119</sup>

Those steps finally began to give the imprimatur to the alternative dispute resolution procedures with which we are so familiar today.<sup>120</sup> And it took only a century and a half from that initial, mistaken Supreme Court decision.

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<sup>114</sup> Cal. Code of Civ. Pro. § 1775.15; California Rules of Court, Rules 3.890 to 3.898 (formerly Rule 1630).

<sup>115</sup> Not all do it every year. See, Stats. 1993 Resolution, Chapter 12 (ACR 32)(designating Mediation Week), [https://www.courts.ca.gov/documents/medweek\\_09.pdf](https://www.courts.ca.gov/documents/medweek_09.pdf) (Standing Judicial Council Resolution); Report to Members of the Judicial Council, February 25, 2009, <https://www.courts.ca.gov/documents/031209tem5.pdf>.

<sup>116</sup> Stats. 1999 Ch. 67, § 4.

<sup>117</sup> Stats. 2000, Ch. 127, § 3. The five counties were San Diego, Los Angeles, Fresno, Contra Costa, and Sonoma. Administrative Office of the Courts, “Evaluation of the Early Mediation Pilot Programs” February 27, 2004, xix, <https://www.courts.ca.gov/documents/emp rept.pdf>.

<sup>118</sup> *Ibid.*

<sup>119</sup> Standards of Judicial Administration, Standard 10.70, effective January 1, 2006.

<sup>120</sup> The path has not been without its bends. In *Jeld-Wen, Inc. v. Superior Court*, 146 Cal. App. 4th 536 (2007), the Court of Appeal ruled that a superior court may not compel a party to attend and pay for private mediation over objection in cases in which the amount in controversy does not exceed \$50,000. *Id.* at 540; Rules of Court, Rule 2.891(a)(1). Reflecting the shift in favor of mediation, the court wrote, “we suspect that in a large majority of complex cases most parties will agree to private mediation; as such, we foresee no apocalyptic consequences from this decision.” *Jeld-Wen, Inc. v. Superior Court*, 146 Cal. App. 4th at 543. Indeed, that has proven to be true.

# LEGAL HISTORY TREASURES IN THE CALIFORNIA STATE LIBRARY

GREG LUCAS, MICHAEL McCURDY & ELENA SMITH\*

One of the first acts of the Legislature in 1850 was to create the California State Library. Over the past 172 years, the library has grown into an eclectic mix of physical and digital materials that includes millions of books and photographs as well as Gold Rush–era maps, suffragists’ diaries, immigration logs, paintings, and posters.

Here’s what eclectic means: One of the 232 known Shakespeare First Folios and the campaign materials from actor Gary Coleman’s mercifully unsuccessful run for governor in 2003. Lawbooks, in Latin, from the 1500s and the moustache of Tiburcio Vasquez, an infamous thief hanged in 1875. The personal diary of the leader of the first wagon train into California in 1841 and more than 100 Family Dog posters of ’60s San Francisco rock concerts.

There are stories of innovation, compassion, injustice and grit. Some well known, others obscure. Stories that describe who and what California is, has been and will become.

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\* Greg Lucas is California’s twenty-fifth State Librarian. Michael McCurdy is a reference librarian in the Witkin Law Library. Elena Smith is a reference librarian in the California History Section of the State Library.

Some of the State Library's greatest treasures can be found at its one branch, the Sutro Library,<sup>1</sup> located on the top floor of the undergraduate library of San Francisco State University.

Besides the First Folio, Sutro is home to more than 90,000 rare books, photographs, pamphlets and manuscripts including one of only two known copies of the *Ordenanzas y Compilación de Leyes*, the Western Hemisphere's first lawbook, published in 1548 in Mexico City.

One of the characteristics that sets Sutro and the State Library apart from other research libraries is access. The materials in the State Library's care are owned by 39 million Californians. And if one of the owners comes to Sutro asking to see their lawbook or avail themselves of some Falstaffian wit, it's the State Library's pleasure to facilitate the request.

That said, a librarian will likely hover protectively. And nobody is going to be taking home the First Folio or the *Compilación de Leyes* — even if Dante's Inferno freezes over.

The State Library also stores and organizes federal and state publications, is home to the Bernard E. Witkin Law Library, and serves as the lead state agency for library-related services throughout California.

This kind of wide and often deep collection fosters a unique synergy in exploring California. For example:

In the first year of California's statehood, lawmakers and the governor enacted a Foreign Miners Tax, levying \$20 a month on any "foreigner" engaged in mining. The measure was aimed at discouraging Chinese and Latino miners but also was imposed on European miners as well. Those immigrant miners who stayed, protested the measure and the tax was subsequently reduced to \$4 a month and imposed primarily on Chinese immigrants.

In the State Library's California History collection, there is a Chinese translation of the (\$4-per-month) 1852 Act and some receipt stubs issued to miners. One receipt, from the initial miner's tax, was issued to a German miner, reflecting his \$20 payment. A later receipt lacks a name and simply states that the bearer had paid \$4 — the fee Chinese miners had to shoulder after the 1852 tax renewal.

Speeches from lawmakers and the governor defending the tax are available, as are revenue records. For example, San Joaquin County's ledgers

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<sup>1</sup> <https://www.library.ca.gov/Sutro/Collection>.



Treasurer Receipt  
and Tax Collector's  
Statement for  
Foreign Miners  
Licenses Sold for  
the Month of  
December AD 1863

Filed Jan'y 15<sup>th</sup>  
AD 1864  
R. W. Nelson  
Collector

Statement of Amount of Foreign Miners  
Licenses Collected for Month of December  
AD 1863 by S. K. Woodcock Collector for San Joaquin  
County

Statement

28 Licenses Sold at 4 <sup>00</sup> Each	\$ 112 <sup>00</sup>	
Exp Cost Comis 25 p c	22 <sup>10</sup>	
	<u>\$ 89<sup>60</sup></u>	
50 On Acc State Purpos	\$ 44 <sup>50</sup>	
" " County "	44 <sup>50</sup>	
	<u>\$ 89<sup>60</sup></u>	\$ 89 <sup>60</sup>

I hereby Certify the Above Statement Correct  
7th Dec 1863  
Subscribed and sworn  
to before me this 15<sup>th</sup> day  
of Jan'y 1864  
R. W. Nelson, a Justice  
of the Peace for the County  
of San Joaquin California  
for Foreign Miners Licenses for Month  
of December 1863 Collected by S. K. Woodcock  
Collector for San Joaquin County  
as per above State and  
County Records

**SAN JOAQUIN COUNTY. "TREASURER'S RECEIPT AND TAX COLLECTOR'S STATEMENT FOR FOREIGN MINER'S LICENSES SOLD FOR THE MONTH OF DECEMBER AD 1863." JANUARY 15, 1864.**

*From the Foreign Miners Tax Documents. Box 3481, Manila Envelope.  
Courtesy California State Library.*

from the mid-1850s lay out how much revenue the tax brought in and how the county divided this income with the state. Placer County's ledger for October 1861 shows the foreign miner's tax yielded \$30,000 in revenue — 7,500 payments of \$4. The revenue from the tax represented approximately one-third of the taxes and fees recorded in this ledger for that year.

More broadly, there is also a research guide to the resources the State Library has relating to mining in general in California.<sup>2</sup>

At the law library there is an 1864 compilation of the statutes of California and the Nevada Territory relating to mining corporations, canal companies, assessments, mining partnerships, mineral lands and actions respecting mining claims, taxation and foreign miners.

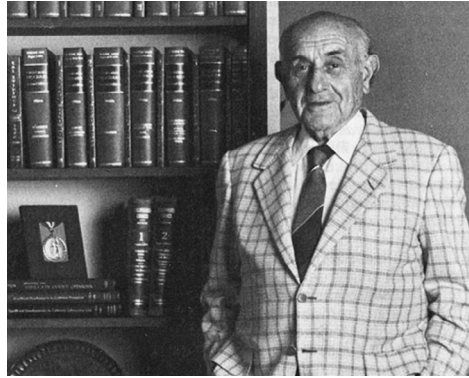
<sup>2</sup> <https://www.library.ca.gov/wp-content/uploads/2021/08/MiningResearch.pdf>.

The first compilation was followed by a subsequent volume in 1866 that includes a discussion of water rights.

A similar compendium of Spanish and Mexican law relating to mines and title to real estate, a thorny legal issue in California's early statehood, is also available.

## WHAT'S AT THE WITKIN?

Although it holds an extensive collection of photos showing Bernie Witkin on both public and private occasions,<sup>3</sup> the Witkin Law Library's focus is historical California legal and regulatory research. To better place California in perspective, the Witkin Library includes statutory and judicial law from all fifty states and U.S. territories as well as federal and international specialties. Building upon an expansive collection of primary sources, secondary sources include historical court rules and treatises.



WITKIN NEVER TIRED OF WORKING, AND CONTINUOUSLY EDITED HIS BOOKS THROUGHOUT HIS LIFE. FORMER STATE BAR PRESIDENT SETH HUFSTEDLER RECOUNTS THAT WITKIN SAID, "I'M 80 THIS YEAR. I'VE BEEN THINKING FOR SOME TIME THAT MY BOOKS NEED REWRITING . . . AND I'M GOING TO REWRITE ALL OF MY BOOKS IN THE NEXT FIVE YEARS" (AND HE DID).

*Witkin Law Library,  
Courtesy California State Library.*

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<sup>3</sup> The law library's namesake, Bernard Ernest Witkin is widely known for his foundational works on California law, which include the Treatises on Civil Procedure, Evidence, and Criminal Law, the original California Rules on Appeal, the California Style Manual, and the Manual on Appellate Court Opinions, as well as his philanthropic work in creating the Foundation for Judicial Education which provides continuing education to California judges. Bernie became the preeminent scholar of California law and created an entirely new standard for legal education and judicial ethics in California. *Bernard E. Witkin Biography*, CALIFORNIA STATE LIBRARY, <https://library.ca.gov/law/witkin> (last visited August 15, 2022).

To honor Bernie's impact on California's legal system, the state legislature passed Education Code Section 19328 in 1997 and renamed the State Law Library as the "Bernard E. Witkin State Law Library of California." At the dedication ceremony in 1998, his portrait was officially unveiled and now hangs in the library.

More and more of the Witkin's resources are available online. Various research tools and guides can be found on the law library's homepage.<sup>4</sup> A particularly useful tool is a statute-to-bill number database<sup>5</sup> to assist researchers in locating a statute's legislative bill number, which differs from the measure's "chapter" number. The interactive tool contains information regarding California statutes and their corresponding bill numbers dating back to 1865. Given the time-savings this provides, it is puzzling that no one had created this already.

Elsewhere at the Witkin Library are:

### *California Supreme Court and Appellate Court Briefs*

The collection of briefs at the Witkin Library is nearly complete. It is so extensive that not all can be housed on-site. Published opinions of these two courts are available online but briefs are not. For the Supreme Court, briefs date to 1863. Court of Appeal briefs date to the start of that court in 1904.

### *Senate and Assembly Bills*

The law library has a nearly complete collection of legislative bills from 1867 forward and virtually all versions of legislation from 1876 to the present. The State Library is working to fill the collection's holes. Bill books contain all versions of a bill from its introduction through when it was either chaptered or last amended. Trying to establish legislative intent? This collection shows how the language of a bill changes between floor readings, helping to decipher what the authors did — and didn't — intend to do.

A different perspective can be found in the California History section by examining, for example, the Commonwealth Club of California's journal, *Commonwealth*. Running from 1903–1988, *Commonwealth* and its sister publication, *Transactions*, analyze a cornucopia of state and federal issues, from treaties to state highways to fire insurance rates. Often, the Commonwealth Club invited government representatives to speak at their meetings, and those speeches are also recorded in these two periodicals.

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<sup>4</sup> <https://www.library.ca.gov/law>.

<sup>5</sup> <https://www.library.ca.gov/law/ca-statutes>.

### *California Codes*

Editions of the California Codes go back to 1872. There are copies of the original Code of Civil Procedure, the Civil Code, the Penal Code, and the Political Code. These code books provide enactment dates, notes to relevant court decisions, and complete citations of the code history to aid in legislative intent research.

### *California Code of Regulations (1945–date)*

Laws beget regulations and one can no longer be considered without an understanding of the other. This collection contains all the administrative regulations of California state agencies adopted pursuant to the Administrative Procedure Act, dating to 1945.

### *California Building Standards Code*

Routinely, the largest number of searchers on the State Library website are seeking Title 24 of the California Code of Regulations, which is maintained by the California Building Standards Commission and is published in its entirety every three years. The law library maintains a collection of building codes from various publishers dating to 1927, the genesis of the Uniform Building Code. In 1978, legislation required building standards be unified in a single code, Title 24. Ten years later, Title 24 was applied to all occupancies throughout the state. Is it any wonder, there are some many searches?

### *California Law Prior to and Immediately Following Statehood*

California laws were printed in Spanish up to 1879. As decreed by Article XI, Section 21 of the 1849 California Constitution, all laws, decrees, regulations, and provisions were published in both English & Spanish. This continued for 30 years until the 1879 Constitution no longer included this provision. Witkin has copies.

### *Pre-Statehood Leyes Constitucionales, 1836*

The *Siete Leyes* (Seven Laws) were enacted under President Antonio López de Santa Anna of Mexico mainly to concentrate power in the president and his immediate subordinates, a fundamental altering of the structure of the first Mexican Republic. These laws would have theoretically been enforceable in the area that became California, but it is still debated whether they were.

## A UNIQUE LOOK AT PATTY HEARST'S TRIAL

For an insider view, peruse the law library's transcript of the trial of Patricia Campbell Hearst and then review the personal papers of Oliver Carter, the federal judge who presided. In her 1982 memoir (also available at the library) chronicling her kidnapping by the Symbionese Liberation Army

January 29, 1976

Dear Judge,

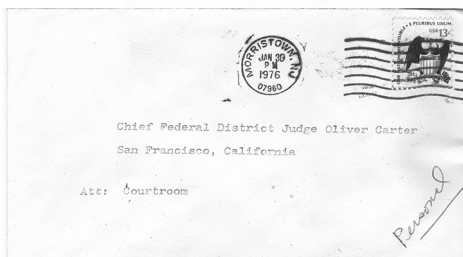
I am going to voice my opinion even though it won't mean a damn thing. This country is going to pot! And I don't mean marijuana, which incidentally should be legalized as it is no more harmful than liquor, which millions of Americans guzzle down day in and day out and is perfectly acceptable. Plus I know so many people including many members of the police force in my area who use it and then go out and arrest people. This is ridiculous.

But getting to my main point, this trial for Patty Hearst is something else. Let's face facts. The girl is innocent. What the hell did she have to go robbing a bank. Her parents are millionaires. For 21 years she never committed a crime in her life and all of a sudden she is a big bank robber. Hog Wash! What the heck did she need the money for all of a sudden? It's quite obvious that she was forced to do as she did. Let's face it, I am sure that the majority of us would do the same thing if we were with a pack of wolves holding guns, knives, needles filled with heroin or whatever they shoot into their veins, not to mention the threat of being put back in a closet for days without any facilities for daily living, etc.

This country is too much! And working as a receptionist-switchboard operator for 10 years, I have had a lot of experience with the public. The majority of the people are so bored and unhappy with their own lives, that they thrive on this sort of thing. They become a pack of wolves and cannot see beyond the fact that Patty Hearst is a millionaire's daughter. She has something they will never have or be, so she is naturally guilty right away.

I read the paper practically every day and the crimes committed and the way most of them are handled are ridiculous. For instance, you are going to hire x number of people and pay them \$20.00 a day for several months possibly to prove her guilt. Do you honestly think she is a hardened criminal out killing people, cutting up their bodies, and putting the remains in different states, women disappearing right off the streets and being found days later dead and only the authorities really know the condition of their bodies, whole families being shot up and God only knows what today or tomorrow brings as these maniacs are never captured and by now may be in your area as I am from New Jersey. Now you tell me if this makes sense that you degrade and are going through all this crap to prove Patty Hearst is guilty? This is why our country is going to pot. Get down to business and stop making movies for the stupid public out of the newspapers, etc. Get going and find these real criminals!

Disgusted in New Jersey!



**DISGUSTED IN NEW JERSEY! "LETTER TO JUDGE OLIVER J. CARTER."  
JANUARY 29, 1976.**

*From the Oliver J. Carter Collection. Box 1949. Folder 3. Letter 3.  
Courtesy California State Library.*

and subsequent trial for bank robbery, Patty Hearst calls Carter a “crusty old judge” who couldn’t “resist the publicity.”

Carter’s papers illustrate the pressures faced by a judge presiding over a high-profile trial. In addition to Carter’s trial notes and his personal summaries of each witness’ testimony, are twenty-two boxes of largely “hate mail” directed at either Hearst or Carter or both.

## VIOLATIONS OF THE CIVIL LIBERTIES OF JAPANESE AMERICANS

Lots of universities, museums and the National Parks Service have important materials that help bring the incarceration of Japanese Americans in World War II not only to life but keep it in memory so that, hopefully, such a thing is not repeated.

On February 19, 1942, the United States federal government issued Executive Order 9066. Under its provisions and subsequent military orders, 120,000 Japanese Americans were required to report to their local authorities for forcible removal to camps, where they were held for the duration of the war. Many Californians of Japanese ancestry had to sell homes, businesses, and farms at fire-sale prices, or just abandon them.

For more than twenty years, the State Library has been awarding grants to a variety of groups through its Civil Liberties Public Education program<sup>6</sup> to aid in remembering the rights violations of the past and help prevent them from happening today or in the future.

One of the grantees is the state university system, which is consolidating and digitizing its Japanese American incarceration collection to make it more accessible. The State Library is also using its own funds to create digital audio and video copies of the oral histories of camp internees in its possession.

The State Library offers several gateways into examining this stain on the state and nation including the papers of James C. Purcell, a lawyer who represented several Japanese Americans who fought the actions of the federal and state government.

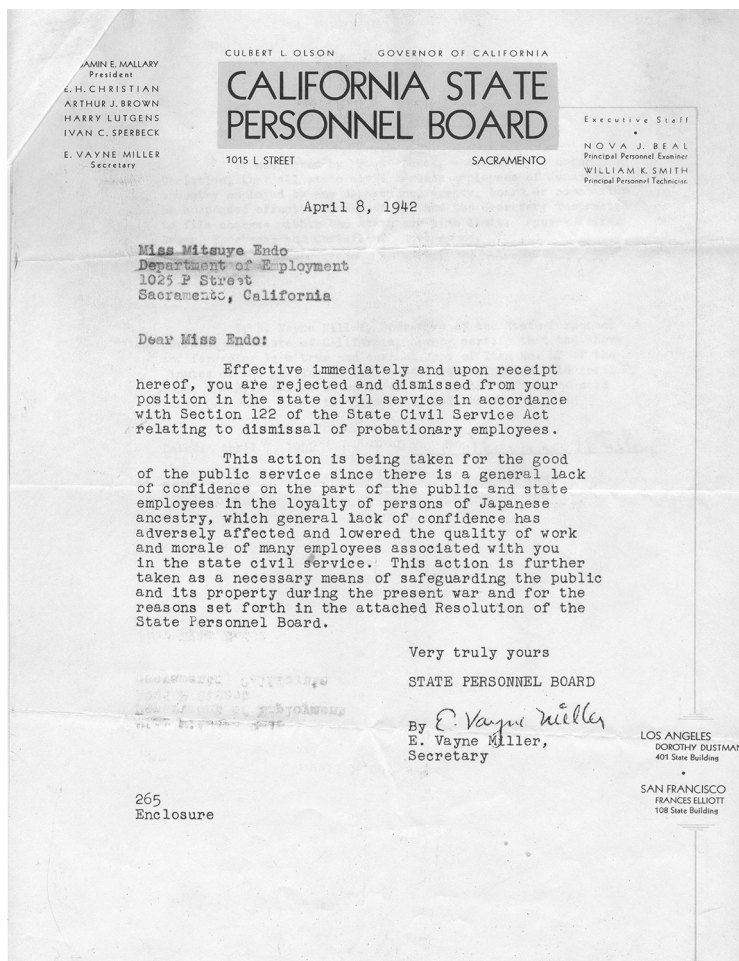
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<sup>6</sup> <https://www.library.ca.gov/grants/civil-liberties>.



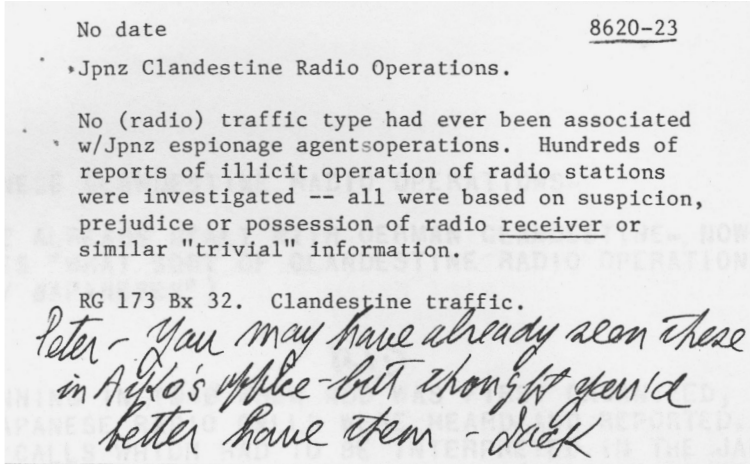
Purcell's clients include Arthur Morimitsu, Yoshio Kamikawa, and Mitsuye Endo. Like Morimitsu and Kamikawa, Endo was a state employee, fired from her job after the declaration of war on Japan due to her Japanese ancestry. She sued the state for wrongful termination.

Upon consulting with Purcell, Endo decided to aim higher and challenge the incarceration itself. Her case was eventually heard by the U.S. Supreme Court. The Purcell papers contain details of both the employment



**CALIFORNIA STATE PERSONNEL BOARD. "LETTER TO MITSUYE ENDO." APRIL 8, 1942.**

*From the James C. Purcell Collection. Box 3755. Folder 6. Letter 14.  
Courtesy California State Library.*



“COPY OF A NOTE CARD TITLED  
‘JPNZ CLANDESTINE RADIO OPERATIONS.’”

*From the Fred Korematsu Collection. Box 3895. Folder 13. Item 1.  
Courtesy California State Library.*

case and of the subsequent habeas corpus case as it wound its way through the District Court, the Court of Appeals, and finally the Supreme Court.

Interestingly, the collection includes drafts of Purcell’s various district court arguments showing how he refined his thinking before presenting the case. The collection also contains correspondence with Endo, including a letter regarding finances at the outcome of her wrongful termination case. Her award for that case was \$58.99 in back pay, which Purcell asked for in fees rather than his previously agreed-upon \$100.00 fee.

Purcell’s papers also shed light on a parallel case before the Supreme Court filed by Fred Korematsu. Korematsu had also challenged the legality of Executive Order 9066, although his grounds were slightly different than those of Endo. Purcell’s papers contain copies of some of the arguments submitted by Wayne Collins, Korematsu’s attorney, at the district court level, as well as the briefs submitted by Collins and the ACLU at the Court of Appeals and the Supreme Court.

Unlike Endo, Korematsu lost his case in the Supreme Court, but tried again in 1982 with a *coram nobis* case against the federal government. The State Library holds a collection of papers related to this effort, documents that take the researcher through many of the background steps in building



the landmark case. Along with the briefs submitted by Korematsu's legal team to the district court and eventually to the Supreme Court, the Korematsu papers contain practically every scrap of documentation that Korematsu and his lawyers relied on to build their case, right down to the time sheets submitted by the researchers tasked with unearthing the letters between government officials.

## CARYL CHESSMAN

Caryl Chessman was arrested on suspicion of being the "Red Light Bandit" in 1948. ("Red Light" because two of the crimes he was charged with involved cars stopped at traffic lights.) Chessman elected to represent himself in court, and in his legal briefs, kept on file at the State Library, he argued that he was not guilty of the crimes attributed to the Red Light Bandit.

After failing to convince the jury of his innocence, Chessman received the death sentence for two of the crimes (kidnapping for the purpose of robbery) and entered the fight of his life. He sent out appeal after appeal,

Rosalie S. Asher  
attorney at law  
May 2, 1960

Dear Rosalie:

I hope you were able to get a little rest for these grueling hours ahead. It's now nearly seven a.m. and, since you've left, I've spent the remainder of the night writing letters.

I'm doing something for Mary Crawford and I'll give it to the Warden, along with the letter to Will Stevens and a personal note for Pamy:

Accompanying this letter are notes which I'll appreciate if you'll deliver to (or mail to) Bernice, Ted + Dorothy, and Shirley and Irwin Meskowitz.

I've also written and will ask the Warden to mail notes to George Davis and Lorraine, Mrs. Nora Hull (a friend in Indiana), Phil Daniel, Danny Charleson, Dr. Jefferson, Bill Lichart (asking him to return one of the files and other property of mine he has except the Royal), and Phyllis (with).

There were several others I would have written but I simply ran out of time. Kindly, as time permits, make it a point to thank those I was unable to, including Frank Olson, son.

Rosalie S. Asher

for you to carry on calmly and and efficiently confronted with these indescribable pressures. It eloquently bespeaks your character and dedication.

I just got the word, Rosalie the California Supreme Court has denied all of our applications. How could they have waited until virtually the last minute to do this? I'll never understand.

and so I must say goodbye, Rosalie.

As ever,  
Caryl

**CARYL CHESSMAN "LETTER TO ROSALIE ASHER." MAY 2, 1960. (THE DATE OF CHESSMAN'S EXECUTION).**

*From the Asher-Chessman Collection.  
Box 3428. Folder 10. Letter 27.  
Courtesy California State Library.*

attacking the original decision on every ground he and his various legal advisors could think of, even seeking clemency from then Governor Pat Brown. The Chessman collection includes his well-used typewriter.

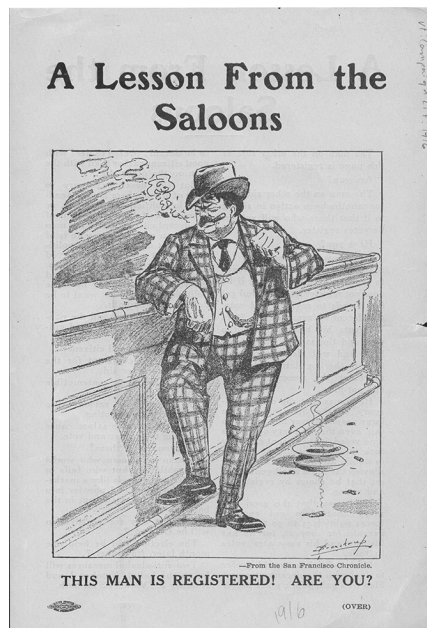
Chessman's appeals met with failure time and time again, but records of many of those attempts exist in these files, as does Chessman's extensive correspondence with individuals across the country, including Louise Caffin and legal advisor Rosalie Asher. According to Chessman himself, in his book, *Cell 2455*, also available at the library, "litigation was a means — seemingly the only means — to an end. That end was survival."

Chessman's papers were used to create a 2016 play, *Chessman*, dealing with his last months on Death Row and last-ditch efforts to avoid execution.

## POLITICS

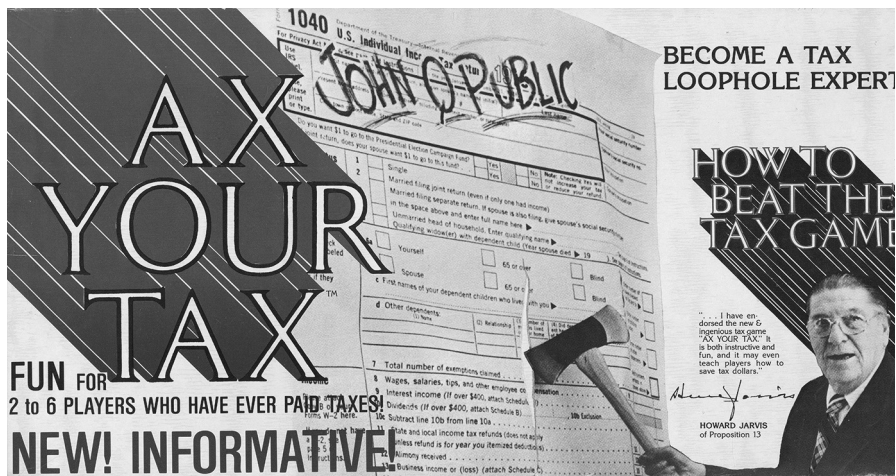
Any self-respecting state library located in any state capitol would have boxes of political material. California is no exception. Mailers, walking pieces, scripts, commercials from many statewide propositions are organized by election year. What makes this collection a standout is that the campaign ephemera goes back to 1850 for both candidates and ballot measures. Does it contain information on every campaign of every candidate and ballot measure? No. But the collection is quite extensive.

In addition to Gary Coleman's 2003 campaign materials, there are opposition arguments against Upton Sinclair's EPIC ("End Poverty in California") campaign for



### LESSON FROM THE SALOONS. SAN FRANCISCO.

Allied Printing Trades Council [1916].  
(1 sheet: 9 x 6 in). [CIFII\_Scan130] Filed  
in Vertical File : Campaign Literature :  
1916. Courtesy California State Library.



HOWARD JARVIS. *AX YOUR TAX* BOARD GAME. 1979.

*The Howard Jarvis Collection. Box 2124. Courtesy California State Library.*

governor in 1934 and the successful pitch used by supporters to win approval of Proposition 13 in 1978.

Speaking of Proposition 13, the library has collections of materials from both of the proposition's backers, Paul Gann and Howard Jarvis. In the Paul Gann collection, researchers can see items like petitions, correspondence with election officials, information sent out to mailing lists, newspaper editorials, and many of the other items involved in helping a proposition reach the ballot.

There's also information on other campaigns Gann participated in such as Proposition 8 — the so-called Victims Bill of Rights — and Proposition 4. Approved by voters in 1979, Prop. 4 caps state spending. Prop. 4's restrictions are impacting lawmakers and the governor's budget decisions today.

The Jarvis collection, meanwhile, contains several boxes devoted to the legal defense of Prop. 13, including arguments in favor of the proposition used in a lawsuit that went before the Supreme Court as well as many items from the Howard Jarvis Taxpayers Association, which Jarvis founded and ran until his death in 1986. On the offbeat side is the "Ax your Tax" board game issued in 1979, which aimed at educating players about various California tax loopholes.

## IN SUMMARY

The State Library isn't exactly Arlo Guthrie's "Alice's Restaurant." A researcher can't get anything they want. But if the library doesn't have what someone is seeking, the team will work to connect the requestor with the requested item, wherever it might be located.

As the library moves deeper into the twenty-first century, the marching order is to make more and more unique holdings available to California and the world, whenever they want it. Because that's not only what's expected by the owners but what the owners deserve.

★ ★ ★

# STUDENT WRITING COMPETITION



## 2022 WRITING COMPETITION VIRTUAL ROUNDTABLE

The California Supreme Court Historical Society met by video conference to congratulate the 2022 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 Dan Kolkey, 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 10, 2022.<sup>1</sup> The complete papers appear immediately following in this volume of *California Legal History* (vol. 17, 2022).

**DAN KOLKEY:** Welcome. I'm Dan Kolkey, president of the California Supreme Court Historical Society and a retired partner at Gibson, Dunn & Crutcher. It's my pleasure to welcome you to this virtual ceremony in honor of you, the winners, of the Selma Moidel Smith Student Writing Competition.

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<sup>1</sup> The video conference is available on the Society's website at <https://www.cschs.org/programs/student-writings> or on YouTube at <https://www.youtube.com/watch?v=rRfG8aozXrk&t=12s>.



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 DANIEL KOLKEY.

BOTTOM, LEFT TO RIGHT: WINNING AUTHORS LEAH HABERMAN, RYAN CARTER, AND SIMON RUHLAND.

Before I introduce our winners here, I'd like to make some introductions of the very distinguished jurists we have here today. I'm going to start with the chief justice of the state of California. Tani Cantil-Sakauye has had an amazing career. Even before she stepped onto the platform of the California Supreme Court, she was a district attorney; she was a deputy legal affairs secretary, and then a legislative secretary for the governor of the state of California, George Deukmejian, and thereafter she had a twenty-year career on the municipal court, superior court, and the Court of Appeal of the state of California, and indeed had some major initiatives in those positions, including — when she was on the Sacramento Superior Court — she instituted the first court solely dedicated to domestic violence issues in Sacramento.

Most people would say that is a sufficient career for anyone. However, in 2010, Governor Arnold Schwarzenegger appointed her as the



twenty-eighth chief justice of the state of California, and, through what was a fairly stormy period — severe budget cuts following the Great Recession, followed quickly by a pandemic — the chief justice steered the courts very successfully and smoothly through all of this without missing a beat. In addition, as chief justice, under the California Constitution she chairs the Judicial Council of California, which is the policymaking body in the state for the courts. As such, she had a number of initiatives, including on bail and on having some traffic violations treated as civil rather than criminal offenses in the name of fairness. She established an initiative and an organization to promote civics education for students, so the chief justice has made her mark not only in major opinions but in all facets of the courts and civics education.

Let me now turn to one of the other jurists we have here, Justice Kay Werdegar. Justice Werdegar retired in 2017, but she served on the California Supreme Court for twenty-three years. Before that, she too had a very distinguished career. If I've got this right, Justice Werdegar, you first served in the Justice Department under Robert Kennedy, and you were a professor and associate dean at the University of San Francisco School of Law, and served on the California Court of Appeal before you took your office at the California Supreme Court, where you were known for your very well-reasoned and very thoughtful judicial opinions. So it is my pleasure to welcome both of our jurists here today.

I'd also like to take a moment and make a virtual introduction of Selma Moidel Smith who is not with us today — we will see a video from her later in the program — but she is certainly worthy of a major introduction. Selma became an attorney in 1943 in California and practiced law for over forty years. She has been honored by the American Bar Association, by the National Association of Women Lawyers, and even by the UCLA School of Music which established a Selma Moidel Smith annual recital which recognizes her over 100 musical compositions. She is really an extreme talent, well beyond the law. Selma first established this writing competition in 2007 and, in 2014, to honor her for her work, and on the occasion of her ninety-fifth birthday, the Society named the competition for her. And I should also note that in 2009 Selma became the editor-in-chief of the Society's journal, *California Legal History*. As such, she doubled its

size and made it into the preeminent journal that it is today and a journal in which each of your pieces will be presented.

Now I'd like to turn this matter over to the chief justice for her introductory remarks.

**CHIEF JUSTICE:** Thank you, Dan, and what a pleasure it is to be with all of you. I think that it's a pleasure and a privilege for me to be in this Zoom call with you, the bright young minds of the future — judged by very distinguished professors [Lawrence Friedman of Stanford Law School and Rebecca Latham Brown of USC Gould School of Law] — not an easy challenge, but you all rose to it. I also want to point out why this is such a special Zoom, and that is — Dan Kolkey didn't tell you that he was also an appellate justice of the Court of Appeal before he returned to private practice and has been instrumental in helping California become a place of international arbitration through very complicated legislation that allows California to compete on the East Coast as well for international arbitration cases.

Kay Werdegar, my colleague, a beloved justice, a thought leader at the California Supreme Court — to this day, we still quote her *dissents*, because she was *right* in her dissents when the rest of us were merrily moving along on the majority opinion. Kay Werdegar is the kind of person who, when she speaks, everyone listens.

You'll hear from Selma later. The only regret I have is that we don't have Selma in person. Selma, in person, is a force of nature. Even at a hundred, or plus, she is truly, in my mind — of all the people I've met in the law and elsewhere — Selma is genius material, in all candor. She had this idea to bring and to reward smart minds who are thinking about the future. And so, it's a pleasure to be here with all of you, and I look forward to the rest of the remarks and then having an engagement with you about your papers. Thank you, Dan.

**KOLKEY:** Thank you, and Justice Werdegar, would you like to make any remarks at this point?

**WERDEGAR:** It's always hard to follow the Chief. Thank you for your comments, Chief. And welcome to our new president of the Society. It is a shame that you winners won't see Selma in person. She *is* a force of nature and an inspiration to all of us. I've been inspired by the essays that I read,

that you all submitted. I think this is a wonderful group of writings to be honored with the Selma Moidel Smith writing award. So I look forward to hearing what you each have to say about yourself, and how you came to this moment, and we will allow you to do that at this time.

**KOLKEY:** Just before we do that, we're going to post Selma's celebratory comments.

**SMITH:** Congratulations to our three winning students — Leah, Ryan, and Simon — for their splendid papers. As you know, I have chosen to publish all three in this year's volume of our journal, which is due out at the end of August.

I want to give a special thank-you to my dear “Chief Tani,” who has so kindly made herself available for this event in each of her twelve years as chief justice. And thank you to my dear friend Kathryn, who has graciously joined us every year since the competition began in 2007. Many thanks to our Society's new president, Dan, for agreeing to moderate, and I wish him every success as president.

This year, for the third time, this event is being held online instead of in person, thanks to our director of administration, Chris Stockton. With winners from across North America and Europe, it has become a very welcome step forward. Thanks so much to you all.

**KOLKEY:** All right! And thank you, Selma. Now let's turn to our winners. I'd like to start with Leah Haberman. You are our first-place winner, and I know you're a JD Candidate for the Class of 2024 at Columbia Law School, so congratulations on that. Your paper was, “More than Moratoriums: The Obstacles to Abolishing California's Death Penalty.” Leah, why don't you tell us a little bit about yourself, what motivated you to pick this particular topic, and briefly a bit of your conclusions.

**HABERMAN:** I grew up in San Diego, so I'm from California. I went to school at University of Washington in Seattle, and then I started working on political campaigns. I jumped all around the country, Iowa Caucuses, all of that, before coming back to San Francisco to work for a little while. Now I'm in New York for law school at Columbia. I sort of stumbled upon the writing competition on accident. I'm personally in public-interest work, and as everyone on this call knows, it's financially a lot harder, so I was looking into scholarship opportunities that would help make the

burden of law school a little bit easier and saw this one. A lot of these, they take just a specific legal focus, and I was really excited to see more of the historical focus because, with my political background, it's been exciting to think about law in a more political lens. Right now, where I'm currently sitting, I'm actually an hour away from a candidate whose campaign I'm working on. She's going to be on TV debates tonight, and so I'm still very much involved in the political world and wanted to see how interwoven I could make this legal argument with a political one.

In the summer, I was working at Reprieve, which is an international human rights organization, doing a lot of death penalty work. Coming from California, I was thinking, "I don't know much about the death penalty," thinking we're this progressive bastion of criminal justice, which in a lot of ways we are, so I never really thought about California's death penalty statute until starting this research, and that led me to what is the paper you all read for this — being shocked that California still had a death penalty and how, strategically, it's been used over time, with the different ballot initiatives. It's honestly been a big pivot for me. At the law school, I've reached out to the faculty at Columbia wanting to pursue capital defense work in the future, and it's been really exciting to think about this issue. In particular with our current national Supreme Court, it doesn't seem like much will change on the death penalty front, but I'm thinking about what are other creative, legislative and political opportunities to get rid of the death penalty at a state level and at the federal level. It was really exciting to learn more about California, as my home state and also thinking about applying it — I'm in New York — and seeing a more across-the-country viewpoint.

**KOLKEY:** I think that your main conclusion was that the only way things are going to change is through public opinion. Is that right?

**HABERMAN:** That is what I think. In a lot of ways, public opinion is an undertone to a lot of our judicial reasoning. It's clear — we have these jurists with us today — they are just people. All of us exist in the world. I am a queer individual. My right to get married is a legal decision, and in a lot of ways we think about Justice Kennedy's decision, that he moved with the times. We wouldn't have gotten *Obergefell* a decade before, because clearly *Lawrence* was one of all these stepping stones. So I think, when I say "public opinion," we are all members of the public, jurists included.

KOLKEY: Let me ask you a question, since you've done this incredible compendium of the history of the death penalty, particularly as it applies to California. You mentioned at the beginning of your paper the moratorium that the current governor placed on the death penalty. I don't know whether or not you've thought about this, so you're free not to answer the question, but it did occur to me that, under the California Constitution, Article V, Section 1, it provides that the governor shall see that the law is faithfully executed. So, does the governor — given that constitutional duty as chief executive to see that the law is faithfully executed — have the power to declare a moratorium on the application of a particular law, which is separate from the commutation power, which of course the governor has on an individual basis. As the chief justice and Justice Werdegar know, if it's a twice-convicted felon, it's subject to a recommendation from the Supreme Court. But beyond commutation, does the governor have the power, in light of that constitutional obligation, to simply have a moratorium and not apply the death penalty across the board?

HABERMAN: I'll ignore the pun that you implied by "faithfully executing the law" — I didn't look specifically into whether the governor has this power, but when we zoom out about our broader separation of powers in the different branches, I think that's totally what the executive has to do. If the executive was just the functioning arm of the Legislature, it wouldn't be its own branch, and so I think the intuitive gut sense of a rising 2L in law school, it makes intuitive sense for the governor to be able to do that, and I'm sure there have been challenges to moratoriums, and specifically to the way Governor Newsom has structured his, so I think there are ins and outs to that, and California is not unique in its moratorium. Pennsylvania also has one — Oregon, numerous states — Ohio has a pseudo-moratorium happening right now until they conduct more investigation, so California is not unique in this power.

WERDEGAR: Leah, I did enjoy your writing style. I thought your opening paragraph was engaging, about what a wonderful liberal state we are — all the beauties and the natural wonders and the liberal politics — and then, oops, we have the death penalty. And you found that surprising. I also found another comment in your article which, of course, is true, but it came home to me and might to the Chief as well. The California Supreme

Court is *not* the most influential court in the state. Who is? That title, you tell us, belongs to the court of public opinion. And that's the thesis of your paper. Interestingly, this ties in with our third-place winner, Simon Ruhland, who speaks about the ease of amending the California Constitution by way of initiative. A court can issue a constitutional opinion saying the death penalty, under our Constitution, is unconstitutional, and that year by initiative the populace will say, "Oh, no, it's constitutional." They've changed the Constitution, so that touched on some important and rather novel aspects of our government. Did I understand you to say that doing this paper has more or less redirected your aspirations for work after law school? That now you're drawn to defending death penalty cases?

HABERMAN: Definitely. Yes, I think at a more legislative level, too. One of the things that I did this summer at my internship was thinking about the secrecy statutes that many states are passing so that they don't have to disclose how they execute people. So there's a whole realm of legislation that's happening in very conservative states, because it's very hard to get lethal injection drugs right now, and so in a way the death penalty is *de facto* becoming non-existent. So now, they're trying to get drugs through really shady — for lack of a better word — means, and so I've found that area of legislation and those battles worth fighting. Going into law school, I was much more interested in a national security–human rights–Guantanamo Bay focus.

WERDEGAR: Very interesting.

CHIEF JUSTICE: Leah, my question to you is, I love the whole idea about the court of public opinion, and it can't be ignored, and the court seems to be getting louder and more vocal, depending on what you read and what's on social media. But I wonder what your take is on the fact that in California, in recent history, we had an initiative to abolish the death penalty. It failed. Then, thereafter, we had competing initiatives, one to abolish the death penalty, and one to speed it up — well, ostensibly to speed it up. But yet, the speed-up-the-death-penalty measure again prevailed. What does that tell us about the court of public opinion?

HABERMAN: I think it's a really interesting dichotomy. I think it gets to the way you can use rhetoric to play on people's fears, and that's especially powerful in the area of law. There's a reason that lawyers are really

respected, and for those of us who are in law school that's kind of why we pursue this path. We do see the law as a means of social change. Some people just don't understand the mechanism. They hear the sound bites on TV. They see the local news where crimes are exacerbated. It's really poignant to hear the story of a victim, but it's very rarely where you see the family of — where you see the system at large being talked about in the daily news. So, when you think about these initiatives, you have to think, who's funding them, and who has the power to put out this kind of public messaging, and what are people internalizing? Is it ever as simple as asking someone on the phone, "Do you support the death penalty?" That's not really how these messaging campaigns go. They will often message, "Do you want psychotic murderers who kill everyone they see, walking around on the street with you?" And then that's all of a sudden how people internalize the ballot. I think that is why, so often, these things that can feel so black-and-white get lost in the shades of gray. It's not a skill we are taught in law school, and I notice so many of my peers — we read these judicial opinions and we say, "Okay, here it is, it's very clean," and I just think it's incredibly messy. Coming from politics, I kind of embrace that because it's the only opportunity in a lot of ways. If California is going to continue to vote to hold onto the death penalty and then, in survey polls, say that they don't want the death penalty — figuring out what is that gap — and, often, it's who can resource for the best campaign.

WERDEGAR: Thank you.

KOLKEY: Why don't we turn to our second-place winner, Ryan Carter — Ryan, as I understand it, you have now received a Master of Legal Studies from the UCLA School of Law, is that right?

CARTER: That's right, Judge. Thank you. Yes.

KOLKEY: And you were awarded second place for your paper on "San Fernando Valley Secession: How a Quest to Change the Law Almost Broke L.A. Apart (and Whether It Still Could)." I think your paper really contributed to the legal scholarship in this area of municipal reorganizations because you interviewed a number of people who were involved in enacting these laws. I've got to say that I found your paper very interesting because a number of the personalities that you mention in your paper — Tom McClintock, Bill Lockyer, Bob Hertzberg — were all people that I dealt with



when I was in the Governor's Office, so I really enjoyed reading about some of these people, and I think that I will send Bob Hertzberg a copy of your article because I think he'd really enjoy it. So, why don't you tell us a bit about yourself, how you came to choose this specific topic — which is a very interesting topic, but not one on the tip of the tongue of many people — and then some of your conclusions.

CARTER: Thank you, Judge. And just let me say, it is an absolute honor to be here and to thank you for the platform to present this and share our work. I am a journalist. That's what I do, so the interviews came somewhat — I don't want to say, naturally — but it was an instinct for me to reach out to people and look at fusing these interviews with the scholarship, the research. I was a Master of Legal Studies student, born in Southern California and raised in the San Fernando Valley, and so the San Fernando Valley became sort of a landscape for me to think about studying in a class that I was taking with Professor Kirk Stark, called "Cities in Distress," as part of the Master of Legal Studies program. Initially, going into it, it was not my first topic. I wanted to write about San Bernardino, of all places, and its municipal bankruptcy, because every day in this class we'd be doing postmortems on these cities that had been falling apart — economically — and the politics of these cities, and how they were sort of devolving. But Professor Stark assigned us into teams and had us do work on various cities, and one of them was San Bernardino, so it kind of stole my thunder for the paper. We had to do a project with the team, and I wanted to do a paper on San Bernardino.

So I started thinking about the concepts we were talking about in the class — redistribution of wealth in cities, distribution of services in cities — and it started getting me thinking a little bit about the San Fernando Valley and secession in particular. We were coming up on the twenty-year anniversary of when secession was on the ballot, in which this portion of the San Fernando Valley in L.A. would try to break away. It made sense to see if I could maybe go there. I had no idea really what I was getting into, but I made a call to Richard Close, who, at the time, twenty years ago, was among the leaders of this breakaway movement from the city of L.A. I just had a conversation with him like I would any story as a journalist, just maybe fishing around a little bit for a story, for an angle of some degree. I asked him, "Do you think secession could happen today, twenty years later?" and



here he was saying, “Yeah, I think this is a possibility.” I didn’t have a real comeback for him, but I began to think about that answer more and more.

I put it in front of my professor, and Professor Stark gave me some flexibility to use some journalism in this paper. That really inspired me to fuse this journalism with the academic research to study whether or not secession could still happen today. That’s how this paper came about, and, of course, I never thought I’d end up here, particularly with Simon — we were in a class together at UCLA, and I can remember us vividly talking about our papers with each other, and I remember admiring his topic as we were just bouncing it around. Little did either of us know that some day we’d end up here. That’s how this paper came about. That’s the rambling version of it anyway.

**KOLKEY:** You studied a number of the different standards by which you could have a city break away and another municipal reorganization. Having looked at the various models for this, is there a model that you think would be a more effective and fair model for that portion of a city that feels that its views are not being taken into consideration? Obviously, the purpose of local government is to be closer to the people to address the very local problems that, at the state level, may not seem important. One could understand how various portions of a city that’s particularly large might want to break away to have a little bit more control over their local lives. So, is there another model that has not been tried that might be a fairer way, that balances the interests of the larger city, that doesn’t want to lose a revenue base, with the interests of the group that feel that they have just been shut out of real democratic participation in the larger municipality’s governance?

**CARTER:** Yes, thank you, Judge. It’s a great question and one that definitely has crossed my mind. There is one important thing that came out of the secession movement twenty years ago here in L.A., and of course that was Charter reform here in the city, and while that Charter reform has garnered its own criticism, there is a sense here locally that it has brought government closer to the people. There are Neighborhood Councils that now are placed throughout the city, and the secession movement was directly responsible for that reform in the Charter. But it still is a criticized measure. Even Paula Boland, the leader of one of the initial secession movements,

just thinks it's kind of a joke and that it hasn't really worked. Richard Close felt the same way, so you still have that strain of criticism happening in the city. But there is a sense that it has brought government closer, and people are activated to participate in Neighborhood Councils locally.

The other thing that still comes up quite frequently are rumblings of secession during redistricting debates. For instance, in the recent round of redistricting in Los Angeles County, at the county level, you can still sense these rumblings of the need for the San Fernando Valley — in this vast, huge city of Los Angeles — to have its own representation, to get its own fair share. As it relates to redistricting, there's been a whole push toward creating a form of representation that better represents the San Fernando Valley on the county Board of Supervisors, at City Hall, so redistricting has become an outlet and a way for government getting closer to a more remote suburb of the city. Bob Hertzberg himself, ironically, is running for the Board of Supervisors, and he's from the San Fernando Valley, so twenty years later, he might argue that it's actually working. And it's because of redistricting that this is actually possible. I don't know if that directly answers your question.

**KOLKEY:** I think it's an interesting observation because redistricting is another way to bring government closer to the people, depending upon the districts. And then the question would arise, is there a reform to the redistricting within Los Angeles County, or within the City of Los Angeles itself, that would improve the feeling of representation by the people, because redistricting is a very political endeavor, which I know because I was the lead lawyer when Governor Wilson had his redistricting litigation before the California Supreme Court in 1991 and 1992. And I was involved in the actual drafting of Proposition 20 on the redistricting of congressional districts in California. So that may be a sequel to your piece, in terms of how redistricting could do something that secession is unable to do.

**CARTER:** Yes, it's interesting that we have citizens commissions now that are redrawing boundaries across the state and in Los Angeles County. It was the Citizens Redistricting Commission that created this last round of maps for supervisorial districts, and some would say that it was actually a fresh exercise, taken away from politicians and actually given to the people. And in some sense, people are gratified here that it was given to them.

Don't get me wrong, the citizens commissions garnered a lot of criticism, but it's a fresh look at representation and drawing boundaries.

KOLKEY: Chief, Justice Werdegar, do you have any questions for Ryan?

WERDEGAR: I'll let the Chief speak last because she speaks best. I found this article fascinating. This is an area of law that you don't really get in law school, and going back to Leah's comment on the intersection of law and politics, certainly this area speaks to that. I really was so interested in all of it — about secession and what goes into it. I also marveled, and I'm sure you were gratified, that you were able to interview these individuals, one of whom has passed — that would be Mr. Close — and Paula Boland, who've been engaged in this for almost half a century. Was it difficult to access them?

CARTER: No, actually it was surprisingly easy. Coming from the San Fernando Valley, I knew the names of some of these leaders. Also being a journalist — my company and my newspaper, we cover these parts of the region — so I knew these names. I think I even had Richard Close's number in my contacts list. When the idea came up, I'm thinking, "Okay, that number's going to come in handy for me," and so I reached out. Paula Boland was a little more difficult. I had to go through some local chambers of commerce to get to her. It's been a while since she's been engaged fully in public life.

WERDEGAR: She must be of an age — she must be elderly.

CARTER: Yes, and yet just as indignant as ever about what happened. She felt like she was right on the cusp of getting a key Senate vote on the first go at secession, and still vividly recalls the politics that went into — at the time, for her — stopping her movement. And it really reminded me that, in one of the broader themes that I thought came out of some of the reporting and the research on this, it was not only how close they came to secession, and the ability to actually change the law — there was a sense of alienation that was going on, this idea of "getting our fair share," a sense of alienation happening in this part of a large, giant city, that we don't always hear about. And yet, that sense is still there among many who led this movement, certainly with Richard Close at the time I talked to him — he

passed away early this year. You could still sense that, and these are themes of alienation that still resonate today.

WERDEGAR: L.A. is massively large. I'm from San Francisco. We used to be a small town; we're not so small now. But to grasp how large Los Angeles is, that's amazing, and your article brought that forth. I have a question. Were you going to write this paper as part of your master's or, when did you come upon the competition opportunity?

CARTER: The paper was written in the fall of 2021, and then I saw something in an email the following year, and I thought, as Leah noted, just the idea of legal history, there was a lot of history in my piece and it just seemed like it might make a good fit, and so I thought I'd give it a try.

WERDEGAR: We're very glad you did.

CARTER: Thank you, Justice. Thank you so much.

CHIEF JUSTICE: Thank you, Ryan. When you were talking with Dan and also Kay, and talking about redistricting, whenever the census happens — and even the census in and of itself is controversial, or certainly was this year, and it affected the Redistricting Commission, of course, and there were a lot of delays and requests in getting the draft maps to the citizen commissions — but no matter, as you point out, there's so much litigation about the citizen commissions or threat of it, and thinking about, as litigious a society as we are becoming, it wouldn't surprise me if there is even yet more talk about secession. We live in Northern California, and we see the "state of Jefferson," and I'm not quite sure what that is about exactly, but I wondered if you — it's a twofold question, and I wondered maybe if, after talking to the folks here with the San Fernando Valley secession, you could drill down to the nub of what feeling alienated, or not having a representative voice — could you drill down to what that was exactly? How did it manifest that it caused such strong feelings and a movement, and then, do you think there are alternative ways to try to address and mitigate and be able to actually be a functioning government?

CARTER: Thank you, Chief Justice. That is — wow. One of the things, and perhaps it's more of an emotion that I came across quite a bit, particularly in talking to people like Paula Boland and Richard Close, was this idea of the way things used to be, this idea of nostalgia, and that there was a San

Fernando Valley as part of Los Angeles that was something almost romanticized in a way, the way that it was back in the thirties, and the forties, and the fifties. That was a theme that was very pronounced in the people I spoke to. That, along with a vision of development that saw well-kept shopping centers that were very easy to get to, in neighborhoods that were very well kept and maintained — city services, and again I come back to this idea of fair share.

These themes were very pronounced, and so, when you combine that with the fervor at the time — we're talking the late 1990s, early 2000s, when Proposition 187 was very much a part of the social and political and legal milieu of the time (1994), a very anti-immigrant feeling was happening, and the concern about crime that was happening in the 1990s, this all combined and fueled this movement, and so that made the movement powerful. People like Boland, people like Richard Close, people like Jeff Brain who was his associate in leading the most recent incarnation of the secession movement, bring this up a lot. And that's still, as I say, a theme even as you talk to them today.

CHIEF JUSTICE: Thank you, Ryan. It's fascinating.

KOLKEY: We are going to turn to our third-place winner, Simon Ruhland. I believe now you've gotten your LLM from the UCLA School of Law, is that right?

RUHLAND: Yes.

KOLKEY: Excellent, and you have been awarded for your paper on "Wind of (Constitutional) Change: Amendment Clauses in the Federal and State Constitutions." I thought this was a very nicely done comparative analysis of the amendment clauses in both the federal and then various state constitutions. This was a very interesting subject. So why don't you tell us a little bit about yourself and then what motivated you to write this particular paper and then a little bit about your conclusions.

RUHLAND: It's great to see all of you, and in the case of Ryan, to see you again. Ryan and I, as Ryan mentioned, went to law school together and met there in a seminar. That seminar was part of what sparked my interest here. Coming from Germany, which is also a federal state, it's almost hard to not compare and to not do comparative law. I arrived in the U.S., and I

was marveling at all those constitutional similarities, and then when you look in the details, how different those actually are. The legal details are obviously different. We amend very differently our [German] Basic Law, but that has very political implications. I talked to my friends [in the U.S.], and almost all of them felt more or less unrepresented by the Constitution. So I decided to drill a little bit deeper on that, especially because, while the paper was written, the leak in *Dobbs* came out.

There was quite a bit of waves through national news, through legal commentary, so I started looking into how the [U.S.] Constitution came to be so rigid. I started off thinking that it seems to be a design flaw. And going through the protocols of the Convention in Philadelphia, it turns out it wasn't. It was very intentionally set up to be very hard to amend, and if it is amended this amendment power should be placed with the states. I was only half satisfied at that point, first of all, because at this point it was only an observation. I had a hunch, and I didn't like it, but I couldn't quite put my finger on it. So I turned to Bruce Ackerman, who came up with this idea of "constitutional moments," those big moments in a nation's history where supermajorities of people get together and change the course of how the constitution goes. He named a number of them. Those began with the Founding, and over time, more and more constitutional moments happened where nothing changed in the Constitution, or very little changed in the Constitution — to today, where the last constitutional amendment was passed before I was born. So that was not very satisfying.

And then I looked to the polar opposite, which is the state constitutions. A lot of things change there. California, for example, changes its Constitution on average four times a year, or passes four amendments per year, Alabama roughly eight amendments per year. That seemed to be a lot, and the results are very, very long constitutions. Alabama's Constitution is around 400,000 words long, that are just as unreflective of popular opinion, popular will. If anything can be in the constitution, how much does it still matter? I came to find one constitution that does it a little bit better, which is Delaware's, where the people don't have the power to amend the Constitution through a ballot vote [but only the state legislature], and that has tamed the Constitution of Delaware quite a bit. It has aligned it with international averages when it comes to constitutional amendments. It has also caused the [Delaware] Constitution to be relatively stable and to be

relatively short, at roughly 28,000 words, about a quarter of California's, so that's my conclusion. My conclusion is, if ever there is a constitutional convention again for the states, maybe look to Delaware. It seems to be working quite well for them.

**KOLKEY:** That's interesting. You're certainly right that when you've got a power of initiative to create a constitutional amendment, then you do lend yourself to a large number of amendments because it's simply a matter of finding someone who is willing to finance that ballot initiative, combined with the fact that the Attorney General's Office does a title and summary which can, in and of itself, really affect how the voters view that particular amendment. It does generate a lot of changes to the Constitution. You said in your paper that the Delaware Constitution has — I think the statistic was 1.2 amendments a year. Do you think that even 1.2 amendments a year is a little too much for a document that is meant to be the constitutional framework pursuant to which government operates? Isn't 1.2 still quite a few amendments, which suggests that you are getting the political passions of the time enacting what ought to be a greater framework that constrains what the Legislature can do, because the purpose of a constitution is really to provide some protections against the founders' concern about the tyranny of the majority. And that majority can change in any legislature, and that means that you need a framework that can constrain those passions, which can be very great at any particular time.

**RUHLAND:** Yes, that's definitely a huge issue. I think part of it is my own biases. Coming from Germany, we have had a relatively stable constitution over the last three-quarters of a century, and that constitution has a rate of change of about 0.9, which is not too far off from Delaware's. So I do feel that a constitution can be stable, can be protective of rights and can be restrictive of the government, while still reflecting popular opinion — the opposite effect that we have from the federal Constitution, where people feel unrepresented because certain political movements just have no chance of ever ending up making constitutional law.

That being said, I think this is where this quantitative analysis, that I did relatively early — political scientists would tell me — breaks down, because those 1.2 amendments don't tell us what parts of the Constitution are amended. Certainly, a catalog of civil rights is hardly ever subject to

change, especially not subject to taking away protections. It's more likely that protections are added — marriage equality, example. Once we get to that part of the analysis, I believe we have to look a little bit closer: what is actually amended, are core features of the constitution that restrain the executive or the legislative branch amended, or — turning to the worst — are civil rights amended, or is the constitution just updated? I believe there is quite a difference there. And obviously there are the most harmless amendments, little technical fixes, updates to current language, etc. But I do believe that once we look into the details here and to this tiered constitutional design, that we do see that those 1.2 amendments per year are still creating stability, rather than instability through an overwhelmingly long constitution.

**KOLKEY:** Chief, do you want to ask any questions of Simon?

**CHIEF JUSTICE:** Simon, I find that to be a fascinating subject because, if we look at the United States Constitution and the ten Bill of Rights amendments, it was seventy-two years later until we saw another amendment. And it took a civil war, brother against brother, for even the trigger of those amendments, the Reconstruction amendments. I really just have an observation, and I think you are absolutely right. We are grappling in our courts now — Kay will be familiar with this — with which article controlled. I won't say which articles, since that would give away the case. We have dueling provisions that were added by different initiatives, and now we wonder if the latest enacted one repealed the former one, or can we harmonize it? And then we also ask ourselves, because the last amendment enacted in this particular area had a competing ballot measure, and so we ended up choosing which ones had the most votes — right now, we have remanded something like that to the lower courts, to percolate and think about the idea before the California Supreme Court takes it on.

But because the Constitution is so large and so varied in California, for example, we engage in this legal construct that, when the voters pass an amendment to our California Constitution, we presume they know the law and the Constitution when they enacted it. So we assume they meant to harmonize, or we assume knowledge for purposes of moving forward with an interpretation of the latest amendment. It is quite unwieldy, I would say. The California Supreme Court is the final word on initiatives, at least when



they are voted upon by the people. Sometimes we look like the bad guy, for interpreting an initiative in a way that might be contrary to what the people thought they were voting for. I think that history is fascinating, and I think the comparison is worth studying — and thinking about restraint in the future. Thank you.

RUHLAND: Thank you for those observations.

WERDEGAR: These papers are sort of related. Our first-place winner is speaking about the voice of the people as really the fourth court, and, as the Chief referenced, in California we have this incredibly easy way of amending the Constitution, so they are related. I was wondering, Simon, if you and your friend Ryan had known each other, and here it turns out you did. You are both our prizewinners, and we're very glad. Also, a question to you, are you established now in the United States or are you taking all this wisdom and education back to Germany?

RUHLAND: No, I'm back in Germany right now. I'm in Berlin. I'm clerking here for the higher regional court.

WERDEGAR: Oh, my!

RUHLAND: That's going to keep me busy for the next two years, and then I will, hopefully, head back to grad school and do a Ph.D.

WERDEGAR: In California?

RUHLAND: I don't know yet, wherever it will take me.

WERDEGAR: Wherever it will take you! I'm sure you'll have no problem. I found your paper very interesting, and some of the observations you made, such as that constitutional moments are not reflected in the amendments. That's absolutely true, but to phrase it that way really brings it home. The Constitution is one thing, and the changes — as we see with the recent term of our United States Supreme Court — are not happening by way of constitutional amendments. So, that's by way of saying I enjoyed your paper; I found it very informative. I found all of these papers sort of interrelated in a way, the coming together of law and politics — they're never separate — but also touching on one relates to the other. So I want to thank you for your paper, congratulate you on your degree, and wish you the best of luck.

RUHLAND: Thank you very much.

KOLKEY: I want to turn to the Chief for any final remarks before we close this ceremony.

CHIEF JUSTICE: Thank you, Dan. Well, it's been a pleasure to spend time with you and having this engagement and see and hear and read your minds at work. For all that's happening in this fluid and dynamic world, I know all of us are heartened by knowing that you're thinking about it, and you're writing and you're putting your thoughts out for everyone to share, and so by publication in our journal, rest assured that you will meet like minds, that your ideas will resonate and inspire. And in the name of our founder for this essay contest, Selma Moidel Smith, we couldn't be more honored. There are more geniuses in the making. Thank you for your work.

KOLKEY: Let me conclude by thanking the Chief for your time today, your leadership, and your wisdom throughout your career, and the same to Justice Werdegar. Thank you for being here today and, again, for all your contributions and jurisprudence that you have provided to the state of California. I want to thank Leah, and Ryan, and Simon for your contributions to California's legal scholarship, which I think are tremendous, and let me just conclude with some words of advice from Abraham Lincoln, who of course was himself a lawyer. Lincoln said that the leading role for the lawyer is diligence, and he also said, "Discourage litigation. Persuade your neighbor to compromise whenever you can." And I think both pieces of advice would serve any attorney as he or she begins his or her career to follow, because I think it's very sound advice. So, thank you, and congratulations as our award winners. We're adjourned.

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# MORE THAN MORATORIUMS?

## *The Obstacles to Abolishing California's Death Penalty*

LEAH HABERMAN\*

### INTRODUCTION

When someone speaks of California, they conjure images of the state's beautiful coastline, Hollywood's movie stars, Silicon Valley's innovation, and Sacramento's progressive policies. California maintains its reputation as a liberal bastion and progressive leader on climate, minimum wage, and a whole range of issues. None of this matters to the more than six hundred people in California sentenced to death. California's tide of progressive idealism stops at death row's shores.

Due to both judicial rulings and political movements, the death penalty remains the law of the land. This means the state has the constitutional power to execute people sentenced to death by a jury of their peers. This is not to say California executes people right and left. California has not executed anyone since 2006,<sup>1</sup> and current Governor Gavin Newsom issued

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This paper was awarded first place in the California Supreme Court Historical Society's 2022 Selma Moidel Smith Student Writing Competition in California Legal History.

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<sup>1</sup> *History of Capital Punishment in California*, CAL. DEPT. OF CORR. AND REHABILITATION, at <https://www.cdcr.ca.gov/capital-punishment/history>.

a moratorium on the death penalty just months after taking office.<sup>2</sup> In February of this year, Governor Newsom announced that he'd dismantle the state's death row and move all the inmates to other prison units.<sup>3</sup> Dismantling death row sounds perfectly in line with California's progressive policies, but this executive action does nothing to stop prosecutors from seeking the death penalty in capital murder cases. The governor cannot abolish the death penalty on his own.<sup>4</sup> Abolition must come from either a proposition passed by the majority of Californians, the California Supreme Court ruling the death penalty statute unconstitutional, or a new law passed by the Legislature and signed by the governor. Until then, the death penalty remains in the California Constitution. This leaves the men and women with capital punishment sentences in a precarious position with their lives tied to how long the governor's moratorium lasts.

Elections feel like life or death for many people, but it is literally true for those with capital sentences in California. Governors are term-limited, and following Governor Newsom there is no guarantee that the moratorium on the death penalty will continue. This is why anti-death penalty advocates are calling for abolition. The call has not been answered. Ballot initiatives, progressive legislation, and judicial decisions have all failed to eradicate this blight on California's progressive reputation.<sup>5</sup> The obstacles that have squelched abolition efforts in the past remain just as poignant in the present, which does not bode well for the future. Because of the power of public opinion and continued support for the death penalty from the majority of Californians, *California's death penalty is not going anywhere anytime soon.*

In this paper, I will analyze the history and trends of California's death penalty to extrapolate how neither legislative nor judicial abolition

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<sup>2</sup> *Governor Gavin Newsom Orders a Halt to the Death Penalty in California*, OFFICE OF CALIFORNIA GOVERNOR GAVIN NEWSOM (Mar. 13, 2019), at <https://www.gov.ca.gov/2019/03/13/governor-gavin-newsom-orders-a-halt-to-the-death-penalty-in-california>.

<sup>3</sup> *California Governor Gavin Newsom Orders Dismantling of State's Death Row*, DEATH PENALTY INFORMATION CENTER (Feb. 1, 2022), at <https://deathpenaltyinfo.org/news/california-governor-gavin-newsom-orders-dismantling-of-californias-death-row>.

<sup>4</sup> *Id.*

<sup>5</sup> *Death Penalty Report*, COMMITTEE ON REVISION OF THE PENAL CODE (Nov. 2021), [http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC\\_DPR.pdf](http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_DPR.pdf).

is feasible in the current environment. First, by outlining the decades-long back-and-forth between the different branches of government, I'll show how the current law has been crafted to be almost fully immune from an Eighth Amendment challenge to its constitutionality. By exhausting the legal arguments, I'll show how both legislative and judicial action is limited by the power of public opinion, and how public opinion still favors the continuation of the death penalty. Finally, I'll end by acknowledging that despite these very real challenges to abolition, there are opportunities to change public opinion and to bring legal challenges under the Sixth Amendment.

## I. A TRIUMPH OF REVISION: WHY THE CURRENT CALIFORNIA DEATH PENALTY STATUTE IS ALL BUT IMMUNE TO AN EIGHTH AMENDMENT CHALLENGE

California exports ingenuity around the world. Silicon Valley's startup community comes up with new ideas on a daily basis, but not all of them are successes from the start. Sometimes, even the most brilliant ideas fall short when faced with reality, and that's when it's time to go back to the drawing board until the feedback loop of revision comes up with a better outcome. Taking a page out of Silicon Valley's book, the feedback loop between the different branches of government has fine-tuned and perfected a death penalty statute that is likely beyond judicial reproach on Eighth Amendment grounds.

Because of California's ballot initiative process, there are four branches of government that shape California's laws: the executive, the legislature, the courts, and the people. The branches are constantly in conversation with each other, the California Supreme Court striking down laws passed by the Legislature, the people passing laws to bypass the Court's rulings, and so on and so forth. The tale of California's death penalty is a dance between the different branches, but now the feedback loop has reached its pinnacle. The people of California refused to abolish the death penalty through referendum in 2016.<sup>6</sup> Despite a Democratic trifecta in the state

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<sup>6</sup> *Id.*

legislature, no abolition bill has passed.<sup>7</sup> And in 2021, the California Supreme Court re-affirmed the constitutionality of the state's death penalty scheme.<sup>8</sup> All the branches with the power to change the status quo are speaking in one voice: this version of the death penalty is here to stay.

The goal of this section is to articulate the timeline and trajectory of different challenges to California's death penalty, in order to show that the trend in the tea leaves is that California's modern death penalty law is likely to sustain any Eighth Amendment challenge. This section will first outline the feedback loop between the courts, the Legislature, and the people that culminated in Proposition 7, passed in 1978, and remains California's death penalty scheme. Then this section will examine the ways in which abolitionists challenged the death penalty in light of the passing of Prop. 7. Once it became clear that the death penalty itself was not inherently unconstitutional, abolitionists turned their attention to attacking the way the death penalty was carried out. After challenges to the mechanisms of execution were no longer feasible, most challenges in California moved away from direct Eighth Amendment challenges and tried to get at it through the Sixth Amendment. This too failed, in *People v. McDaniel*, the 2021 decision that reaffirmed the constitutionality of California's death penalty.

### *A. Getting to Briggs: The Feedback Loop to California's Current Death Penalty Statute*

California's current death penalty statute emerged out of the 1970s tug-of-war between legislatures and courts. Its existence emerged from an obstacle course of changing judicial precedent and legislative maneuvering. Prior to the mid-1900s, the death penalty existed in California without much fanfare, similar to the rest of the country.<sup>9</sup> Public hangings dated back to the start of the nation,<sup>10</sup> and the country continued to operate under the

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<sup>7</sup> Alexei Koseff, *Is this another way to end California's death penalty?*, CAL MATTERS (Feb. 9, 2022), at <https://calmatters.org/politics/2022/02/california-death-penalty-end>.

<sup>8</sup> Don Thompson, *California Supreme Court upholds death penalty rules*, ASSOCIATED PRESS (Aug. 26, 2021), at <https://apnews.com/article/courts-california-race-and-ethnicity-c9f9b3d6bcd04f3a8ac6d69d56b59a47>.

<sup>9</sup> Cal. Dept. of Corr. and Rehabilitation, *supra* note 1.

<sup>10</sup> *Early History of the Death Penalty*, DEATH PENALTY INFORMATION CENTER, at <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty>.

presumption that some crimes are so heinous that they warrant the death penalty. Most Americans accepted, and still accept, capital punishment as just another feature of their legal system.<sup>11</sup>

Early death penalty abolitionists viewed the Eighth Amendment as their best chance to eradicate the death penalty from the American criminal justice system. The Eighth Amendment protects individuals from cruel and unusual punishment by the government. Abolitionists argued that the death penalty is state-sanctioned murder, and is no different in practice than the murders these individuals are convicted of.<sup>12</sup> Their argument contended originally that all murder constitutes “cruel and unusual punishment” and is therefore a violation of the U.S. Constitution’s Eighth Amendment.<sup>13</sup> The United States Supreme Court cited the longstanding history of capital punishment in the United States as a means to legitimize its future use.<sup>14</sup> However, the Court did not allow the past to retain a stranglehold on contemporary practices of punishment. In *Trop v. Dulles*, the Supreme Court altered the trajectory of Eighth Amendment jurisprudence by stating the analysis should be based on “evolving standards of decency that mark the progress of a maturing society” and not just how things have always been done.<sup>15</sup> The 1958 holding in *Trop* reinvigorated abolitionists, bringing a new wave of suits that would force judges to decide if the death penalty comported with evolving standard of decency despite its long history in this country.<sup>16</sup>

Capital punishment continued to survive federal challenges, with the Court reluctant to find that the death penalty violated the Eighth Amendment.<sup>17</sup> However, in a victory for true textualism, the California Supreme Court changed the structure of its analysis and found California’s death

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<sup>11</sup> *Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, PEW RESEARCH CENTER (June 2, 2021), at <https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration>.

<sup>12</sup> *The Case Against the Death Penalty*, ACLU (2012), at <https://www.aclu.org/other/case-against-death-penalty>.

<sup>13</sup> *Id.*

<sup>14</sup> *Gregg v. Georgia*, 428 U.S. 153, 168 (1976).

<sup>15</sup> *Trop v. Dulles*, 356 U.S. 86, 87 (1958).

<sup>16</sup> ROBERT M. BOHM, *DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES* (5th ed., 2015).

<sup>17</sup> LAURA E. RANDA, *SOCIETY’S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY* (1997).

penalty unconstitutional in *People v. Anderson*. In this 1972 decision, the California Supreme Court looked at the specific diction of the California Constitution and distinguished its language in Article 1, section 6 of “cruel or unusual” from the Eighth Amendment’s language, “cruel and unusual.”<sup>18</sup> One small conjunction opened the door to the Court’s holding that the death penalty violated the California Constitution.

In *Anderson*, the Court used *Trop*’s “evolving standards of decency” approach to reason that, despite the history of executions in California, the death penalty was now barbaric to modern sensibilities of punishment and so infrequently used that it was both cruel and unusual.<sup>19</sup> The Court articulated every point that abolitionists had been making: citing the psychological harm of prolonged appeals, the lack of evidence of any additional deterrence effect, and the inherent cruelty in the ability of the state to take a life. The Court went further in its role as the sole arbiter of constitutionality by stating, “public acceptance of capital punishment is a relevant but not a controlling factor,” pushing aside the evidence provided by the state of popular support for the death penalty.<sup>20</sup> However, public opinion ultimately won out against the Court’s decision in *Anderson*. The people of California would not allow *Anderson* to have the last say.

Just a few months later, the people of California passed Prop. 17, a ballot initiative bringing the death penalty back to life.<sup>21</sup> Prop. 17 passed with 67 percent of the vote and, just like that, *Anderson* was a thing of the past.<sup>22</sup> However, the ping ponging continued because, just before Prop 17 could be enacted, the U.S. Supreme Court found in *Furman v. Georgia* that all death penalty statutes that were applied in an arbitrary manner were unconstitutional.<sup>23</sup> Not deterred, pro-death penalty leaders went back to the drawing board. In order to avoid any conflict with *Furman*, the California Legislature enacted a mandatory death penalty scheme for certain crimes.<sup>24</sup>

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<sup>18</sup> *People v. Anderson*, 6 Cal. 3d 628 (1972).

<sup>19</sup> *Id.* at 648.

<sup>20</sup> *Id.* at 633.

<sup>21</sup> *California Proposition 17, Death Penalty in California’s Constitution* (1972), BALLOTPEDIA (accessed June 30, 2022), at [https://ballotpedia.org/California\\_Proposition\\_17\\_Death\\_Penalty\\_in\\_the\\_California\\_Constitution\\_\(1972\)](https://ballotpedia.org/California_Proposition_17_Death_Penalty_in_the_California_Constitution_(1972)).

<sup>22</sup> *Id.*

<sup>23</sup> *Death Penalty Report*, *supra* note 5, at 13.

<sup>24</sup> *Id.*



This took the sentencing power out of the hands of juries and placed it with the Legislature. The Legislature designated certain crimes as the most heinous and deserving of the death penalty regardless of the individual's circumstances. These individual circumstances, such as an abusive childhood or mental distress at the time of the crime, are called mitigating circumstances. A mandatory sentencing structure ignores the existence and the importance of mitigating circumstances.

The Court again acted as a check on legislative power when, in *Rockwell v. Superior Court*, they found the mandatory death penalty and the inability of mitigating circumstances to be factored into sentencing a violation of the Eighth Amendment.<sup>25</sup> Their reasoning followed the 1976 Supreme Court decision in *Gregg v. Georgia*.<sup>26</sup> The reasoning in *Rockwell* reflected the value the Court places on sentencing discretion for both judge and jury. They concluded that the intention of the framers with regard to the Eighth Amendment centered on the human dignity of every person, and that to dole out the highest form of punishment without any chance for the jury to weigh individualized circumstances and history denies the very humanity the amendment seeks to protect.<sup>27</sup> The dance between branches continued.

Intent on preserving the death penalty despite judicial rebuttals, Californians passed Prop. 7 in 1978. Prop 7, referred to as the Briggs Initiative after its sponsor State Senator John Briggs, crafted a death penalty statute that raised the maximum sentence for an increased number of crimes to include capital punishment.<sup>28</sup> It also expanded the list of aggravating circumstances that would trigger the possibility of capital punishment. The campaign supporting the proposition framed it as the most inclusive capital punishment scheme in the nation, seeking to punish every kind of murder.<sup>29</sup> Prop. 7 passed with 71 percent of the vote,<sup>30</sup> a clear statement of

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<sup>25</sup> *Rockwell v. Superior Court*, 18 Cal. 2d 420 (1976).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 428.

<sup>28</sup> *Death Penalty Report*, *supra* note 5, at 13–14.

<sup>29</sup> *Id.*

<sup>30</sup> *California Proposition 7, Expand Death Penalty and Life Imprisonment for Murderers Initiative (1978)*, BALLOTPEdia (accessed June 30, 2022), at [https://ballotpedia.org/California\\_Proposition\\_7,\\_Expand\\_Death\\_Penalty\\_and\\_Life\\_Imprisonment\\_for\\_Murders\\_Initiative\\_\(1978\)](https://ballotpedia.org/California_Proposition_7,_Expand_Death_Penalty_and_Life_Imprisonment_for_Murders_Initiative_(1978)).

widespread public support for a harsh death penalty. The death penalty scheme created under Prop. 7 is still the law of the land.

The statute created by Prop. 7 calls for a three-part analysis by the jury.<sup>31</sup> First, it calls for the jury to find that the defendant committed a qualifying crime, most often first-degree murder, beyond a reasonable doubt.<sup>32</sup> Next, the jury must find an aggravating factor that warrants the death penalty such as its being committed in conjunction with another felony like rape or robbery.<sup>33</sup> Finally, the jury must then conduct a balancing test, weighing the mitigating circumstances against the aggravating factors, in order to determine if the mitigating circumstances are such that the jury finds the death penalty would be an inappropriate sentence.<sup>34</sup> The three-part construction of the law results from the back-and-forth between the branches of government. Mindful of the California Supreme Court's decisions in *Anderson* and *Rockwell* as well as the Supreme Court's recent holdings, the drafters of Prop. 7 created a law that allows enough discretion, without being too arbitrary, to survive judicial scrutiny to this day.

### *B. Fine Tuning the “Machinery of Death”*

The passage of Prop. 7 with such a wide margin of victory sent a clear message. The people of California were okay giving their government the power to execute people. Once it became clear that a challenge to the state's ability to execute individuals would be unsuccessful, abolitionists changed their tactics from attacking the death penalty itself to challenging the ways it was carried out.<sup>35</sup> The next wave of challenges used the logic that if the manner in which the state kills people is unconstitutional, then it would have to cease killing people — the same result as if the law itself was found unconstitutional.

Through the 1990s, California executed people using cyanide gas in a gas chamber.<sup>36</sup> Starting in the early '90s, the state allowed those sentenced to die to choose between lethal gas and lethal injection.<sup>37</sup> Then, in *Fierro v.*

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<sup>31</sup> *Death Penalty Report*, *supra* note 5, at 14.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Cal. Dept. of Corr. and Rehabilitation, *supra* note 1.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

*Gomez*, the Ninth Circuit upheld a California district court decision that the use of cyanide gas in executions violated the Eighth Amendment.<sup>38</sup> The District Court's decision focused on factual findings that those killed with cyanide gas suffered incredible amounts of pain for what could be several minutes.<sup>39</sup> The testimony of expert witnesses refuted the state's claims that lethal gas was painless for the inmate, "like falling asleep." Instead the facts showed that unconsciousness was not immediate, and the person would feel like they were suffocating from the lack of oxygen, and then would feel the full effects of the poison on their cells as they drift in and out of awareness.<sup>40</sup> Based on these findings, the Ninth Circuit found California's lethal gas mechanism unconstitutional under the Eighth Amendment.<sup>41</sup> However, California statute provided that if lethal gas became constitutionally unavailable then lethal injection would be the default mechanism.<sup>42</sup>

Once lethal injection became the default, the abolitionists focused on challenging lethal injection as an Eighth Amendment violation. In 2006, the District Court of Northern California turned abolitionists' dreams into reality in *Morales v. Tilton*. They found that California's lethal injection procedure violated the Eighth Amendment because the drug cocktail was administered in such a way that unconsciousness was not guaranteed, and it is an accepted fact that injecting a conscious person would constitute cruel and unusual punishment.<sup>43</sup> The District Court cited failures in the execution team's credentials and training along with other administrative issues.<sup>44</sup> The Governor's Office issued an order to the Department of Corrections and Rehabilitation to address the following issues: inconsistent and unreliable screening of execution team members; a lack of meaningful training, supervision, and oversight of the execution team; inconsistent and unreliable recordkeeping; improper mixing, preparation, and administration of sodium thiopental by the execution team; and inadequate lighting, overcrowded conditions, and poorly designed facilities in which

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<sup>38</sup> *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Cal. Dept. of Corr. and Rehabilitation, *supra* note 1.

<sup>43</sup> *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006).

<sup>44</sup> *Id.*

the execution team must work.<sup>45</sup> The CDCR submitted proposed revisions to its execution procedure addressing each of the points above.<sup>46</sup>

Although there continued to be challenges about how effective the CDCR's revisions were in actually changing California's execution procedures, lethal injection challenges, nationwide, were dealt a heavy blow by the 2015 Supreme Court decision in *Glossip v. Gross*. In a challenge to Oklahoma's lethal injection procedure, the Supreme Court squelched abolitionists' hopes that through attacking the means, lethal injection, they could attack the end, the death penalty. The case ruled that as long as the death penalty was constitutional then there needed to be constitutionally valid ways to carry it out.<sup>47</sup> Justice Alito insulated further lethal injection challenges by stating that, unless there was a proven better way of carrying out the execution, the Court would give deference to the mechanism of execution chosen by the state.<sup>48</sup> *Glossip* crushed the last glimmer of hope for abolitionists to find relief in the judicial system. Most states use lethal injection, firing squad, or lethal gas, or offer options of the above mechanisms. Eighth Amendment challenges to the death penalty itself and to the mechanisms of execution now face the monumental hurdle of fine-tuned laws backed by Supreme Court precedent. The Supreme Court shows no signs of changing its position on the death penalty or on lethal injection, and without a national jurisprudence shift, the California Supreme Court's options remain limited. It is Sisyphus at the bottom of the mountain once again.

### *C. A Change in Tactics: A Surrender of Sorts*

In 2021, the California Supreme Court affirmed the constitutionality of the state's death penalty law. The Court in *People v. McDaniel* was neither looking to see if the death penalty itself nor lethal injection constituted "cruel and unusual" punishment. Instead the defendant's claim was that the three-part structure of capital sentencing in California as articulated earlier in this section violated his Sixth Amendment rights.<sup>49</sup> *McDaniel*

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<sup>45</sup> *History of Capital Punishment in California*, *supra* note 42.

<sup>46</sup> *Id.*

<sup>47</sup> *Glossip v. Gross*, 576 U.S. 863 (2015).

<sup>48</sup> *Id.*

<sup>49</sup> *People v. McDaniel*, 12 Cal. 5th 97 (2021).

argued that each part of the proceeding — the determination of guilt, the aggravating factor analysis, and the mitigating factors balancing test — were all questions of fact for the jury and thus all needed to meet the burden of “beyond a reasonable doubt.”<sup>50</sup> The court did not agree, stating that such a standard was for the first part of the test alone.<sup>51</sup> If this sounds to you like a vast divergence from the jurisprudence cited earlier in this section, you’d be right. Abolitionists are now trying to eliminate the death penalty through other amendments because the Eighth Amendment arguments have reached a dead end. The arguments presented in *McDaniel* will be explained later in this paper, but the change that *McDaniel* represents in the legal arguments used by abolitionists marks a clear end to this chapter of Eighth Amendment jurisprudence.

In conclusion, any successful challenge to California’s death penalty will have to come from somewhere besides the Eighth Amendment. It is still open for debate if any other types of legal challenges will prove to be fruitful in the future.

## II. THE POWER OF PUBLIC OPINION: A FICKLE POWER

The California Supreme Court is not the most influential court in the state. That title belongs to the court of public opinion. By virtue of being a democracy, we are a nation beholden to the whim of opinion rather than facts. Those who hold the power of persuasion hold the ultimate power. The tug-of-war between death penalty abolitionists and retentionists is really a war to control the narrative. Both sides know that neither the California Legislature nor the California Supreme Court will abolish the death penalty until Californians clearly decide they no longer want the death penalty.

California’s recent history weighs against abolitionists. In 2012, California voters decided to keep the death penalty when Prop. 34 was on the ballot.<sup>52</sup> Fifty-one percent of Californians voted to keep the death penalty

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *California Proposition 34, Abolition of the Death Penalty Initiative (2012)*, BALLOTPEDIA (accessed June 30, 2022), at [https://ballotpedia.org/California\\_Proposition\\_34,\\_Abolition\\_of\\_the\\_Death\\_Penalty\\_Initiative\\_\(2012\)](https://ballotpedia.org/California_Proposition_34,_Abolition_of_the_Death_Penalty_Initiative_(2012)).

that year, the same year that President Obama was on the ballot. However, even liberal President Obama never came out against the death penalty during either of his campaigns.<sup>53</sup> The failure of Prop. 34, which would have ended the death penalty, shocked many because even State Senator Briggs, the sponsor and the face of Prop. 7, supported abolishing the death penalty. He wrote in an editorial that he no longer supported the death penalty in California because no one was being executed, yet the cost of capital appeals continued to burden taxpayers.<sup>54</sup> Popular support or disdain for the death penalty was largely abstract and unrelated to the executions themselves.

Keep in mind, no one had been executed in the state since 2006. In 2016, the death penalty was once again on the ballot in Prop. 62, and once again Californians voted to keep it.<sup>55</sup> This time, 53 percent of Californians voted to keep the death penalty, contradicting the narrative that California was becoming more progressive and that more people opposed the death penalty than ever before. Ballot initiatives are an expensive battleground for the messaging war. Anti-death penalty advocates spent \$10 million on Prop. 62.<sup>56</sup> Pro-death penalty advocates spent \$12 million.<sup>57</sup> Ultimately that is \$22 million spent on a proposition about a punishment that hadn't been carried out in the state in over a decade.

Unless something drastically changes to shift the tide of public opinion, abolitionists will be wary of spending millions on another failed proposition. However, without a proposition to abolish the death penalty, the death penalty will remain on the books in California. Every avenue for abolition is subject to the power of public opinion. Legislators do not want to get ahead of voters on any issue. It is reminiscent of the often-quoted observation attributed to Alexandre Auguste Ledru-Rollin during the French

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<sup>53</sup> Josh Gerstein, *Death Penalty Decisions Loom*, POLITICO (June 21, 2009), at <https://www.politico.com/story/2009/06/death-penalty-decisions-loom-023974>.

<sup>54</sup> Ron Briggs, California's death penalty law: It simply does not work, LOS ANGELES TIMES (Feb. 12, 2012), <https://www.latimes.com/archives/la-xpm-2012-feb-12-la-oe-briggs-death-penalty-20120212-story.html>.

<sup>55</sup> *California Proposition 62, Repeal of the Death Penalty (2016)*, BALLOTPEDIA (accessed June 30, 2022), at [https://ballotpedia.org/California\\_Proposition\\_62,\\_Repeal\\_of\\_the\\_Death\\_Penalty\\_\(2016\)](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

Revolution of 1830: “There go my people. I must find out where they are going so I may lead them.”

Unfortunately, this is not just true of the legislative branch. The judicial branch, the safe haven of minority opinion, the least political branch, is still a victim of public opinion. In California, judges maintain their seats on the bench through retention elections. It’s a lethal combination. Public opinion failed to abolish the death penalty with Propositions 34 and 62, and both the legislative and judicial branch will take their cues from such failures. Again, it is the feedback loop between the different branches of government. However instead of ping-ponging legislation back and forth, public opinion acts like a domino force, getting all branches to fall in line. The subsequent sections will explore in depth the hurdles that public opinion creates for both legislative and judicial abolition.

### *A. Legislative Abolition: Tougher on Crime*

Every politician, no matter their political affiliation, fears being smeared with the “soft on crime” brush. For decades, politicians have bolstered their election credentials by touting how “tough on crime” they are. It’s an easy appeal to make to voters: “I want to keep you safe. I want to put the bad guys away,” and it’s all too easy to distort criminal justice reform as dangerous: “If criminals aren’t in prison, they are on the streets.” Republican strategists used that exact messaging during the 2022 primary elections.<sup>58</sup> Both Democrats and Republicans are trying to seem tough on crime ahead of the 2022 elections.<sup>59</sup>

Republicans are optimistic that 2022 could be the backlash to California’s trend toward progressive criminal justice reform.<sup>60</sup> Over the past few years, California passed legislation decriminalizing drug use and shortening sentences, and it joined the national progressive call for less prosecutorial and police discretion.<sup>61</sup> This should have given death penalty

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<sup>58</sup> Phil Willon & Hannah Wiley, *Why Crime is at the Center of California Elections this Year*, LOS ANGELES TIMES (Mar. 2, 2022), <https://www.latimes.com/california/story/2022-03-02/crime-debate-center-california-election-season>.

<sup>59</sup> Dan Walters, *California politicians now talking tough on crime*, CAL. MATTERS (Jan. 19, 2022), at <https://calmatters.org/commentary/2022/01/california-politicos-now-talking-tough-on-crime>.

<sup>60</sup> Willon & Wiley, *supra* note 58.

<sup>61</sup> *Id.*

abolitionists the momentum they needed to think the time was ripe for another proposition. However, it likely had the opposite effect.

Nationally, 2020 saw a 30 percent rise in homicide rates. California's Republicans were ready to make 2022 the referendum on liberal criminal justice policies. Republicans' messaging blames the recent increases in homicide and property crime on the criminal justice reforms passed in 2014 and 2018. Republican candidate for governor Brian Dahle campaigns with the message that liberal policies are costing people their lives and taxpayers their dollars.<sup>62</sup> Public opinion polling shows that Californians are more concerned about crime than in recent years.<sup>63</sup> It's a risky time to be seen as soft on crime as a Democrat. The political risk is too high. To strongly advocate for death penalty abolition in a political climate where people are now considering overturning other forms of sentencing reform is political suicide.

### *B. Politicized Prosecution*

California elects its prosecutors. California has fifty-eight elected district attorneys, one for each county.<sup>64</sup> Elected prosecutors are not unique to California, but they present additional challenges to abolitionists. Prosecutors play an important role in shaping the political narrative around crime in their communities.<sup>65</sup> They can point to victims' families and paint themselves as white knights riding in to ensure justice is brought. Because of these narratives, people tend to believe what prosecutors tell them about the criminal justice system.

Prosecutors use their credibility as a messaging tool. They point to the "practical" considerations and challenges of doing their job. Conservative prosecutors have said they need the flexibility that the death penalty provides.<sup>66</sup> They've stated that with the death penalty on the table, they

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<sup>62</sup> *Id.*

<sup>63</sup> Mark DiCamillo, *Voters offer a wide range of issues they'd like the state to address* (Institute of Governmental Studies, UC Berkeley, Release #2022-08, Apr. 14, 2022), <https://escholarship.org/uc/item/7sn293xs>.

<sup>64</sup> *Meet Your DA Campaign*, ACLU FOUNDATIONS OF CALIFORNIA (2018), at <https://meetyourda.org>.

<sup>65</sup> *Id.*

<sup>66</sup> Elizabeth Renter, *The Death Penalty and The Ugly Power of Prosecutors*, THE CRIME REPORT (Mar. 25, 2011), at <https://thecrimereport.org/2011/03/25/2011-03-the-death-penalty-and-the-ugly-power-of-prosecutors-2>.



are better able to negotiate plea bargains.<sup>67</sup> Just days ago, at the time of this writing, the San Francisco district attorney was recalled (the process in which voters revoke their support and remove an elected official from office).<sup>68</sup> His recall was branded as a rebuttal to “lenient prosecution.”<sup>69</sup> People saw him as too soft on crime, even people in one of the most liberal cities in the country. This is emblematic of the risks prosecutors take in this hyper-partisan debate on criminal justice by supporting progressive policies. Given this current environment where politicians are walking the tightrope between the recent “defund the police” narrative and the continued “tough on crime” narrative, the winds of change on the death penalty might blow anti-death penalty leaders right off the rope.

### C. Checks Without Balances

The founding fathers feared mob rule. They feared the tyranny of the majority. They decided that one branch of government, the judicial branch, would be the check on the more political branches. However, the myth of an independent judiciary crumbled when judges started being on the ballot. In California, the governor appoints members of the state Supreme Court, but to retain their seats, they must be elected in what’s called a “retention election.” This means that every time a justice of the California Supreme Court is penning a decision, they know that their opinion could be used against them the next time they are on the ballot.

Rose Bird, California’s first female chief justice and one of the most progressive people to sit on that bench, was not retained by California voters in 1987.<sup>70</sup> She was a strong advocate against the death penalty.<sup>71</sup> She reviewed sixty-five capital cases, and voted to overturn the death penalty each time.<sup>72</sup> She found legal technicalities to couch her decisions in, and

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<sup>67</sup> *Id.*

<sup>68</sup> Jeremy B. White, *San Francisco district attorney ousted in recall election*, POLITICO (June 8, 2022), at <https://www.politico.com/news/2022/06/08/chesa-boudin-san-francisco-district-attorney-recall-00038002>.

<sup>69</sup> *Id.*

<sup>70</sup> *The Campaign Against Rose Bird*, DEATH PENALTY FOCUS (Nov. 4, 2016), at <https://deathpenalty.org/the-campaign-against-rose-bird>.

<sup>71</sup> *Id.*

<sup>72</sup> *Rose Bird ProCon.org: The Death Penalty*, BRITANNICA PROCON.ORG (accessed June 30, 2022), at <http://www.rosebirdprocon.org/pop/DeathPenalty.htm>.

was never the sole dissenting voice on a death penalty case.<sup>73</sup> Conservatives painted her as hyper-partisan and failing to fulfill her duty as judge, rather than as a policymaker.<sup>74</sup> The people of California wanted a death penalty, and they did not want a chief justice who was unwilling to support it. She served as an example to future judges that in California even the courts are subject to public opinion. A Reuters report found that elected judges reverse death penalty sentences at less than half the rate of appointed judges.<sup>75</sup> The same analysis found that judges who are first appointed and then must keep their seats through retention elections reverse 15 percent less than appointed judges.<sup>76</sup> Despite the idea of checks and balances, it is clear that when judges face elections they make decisions informed more by politics than by legal reasoning.

Changing public opinion on the death penalty remains the North Star for abolition movements. By changing public opinion even by a small margin, the outcome of the next death penalty ballot initiative could be wildly different. By changing public opinion, legislators who support abolition in private will be willing to sponsor bills and declare their support publicly. By changing public opinion, California Supreme Court justices who have already expressed their dissatisfaction with California's death penalty can strike down the laws without fear of being ousted. By changing public opinion, everything in California death penalty politics could change.

### III. GLIMMERS OF HOPE

#### *A. The Battle over Narrative*

If public opinion is the crux of the problem, then it is also the opportunity. Abolitionists across the country continue to employ a variety of strategies

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<sup>73</sup> *Id.*

<sup>74</sup> Cynthia Gorney, *Rose Bird and the Court of Conflict*, THE WASHINGTON POST (Apr. 8, 1986), <https://www.washingtonpost.com/archive/lifestyle/1986/04/08/rose-bird-and-the-court-of-conflict/d391da7f-33dd-4fa5-87b2-a7c79e62e048>.

<sup>75</sup> Dan Levine & Kristina Cooke, *In states with elected high court judges, a harder line on capital punishment*, REUTERS INVESTIGATES (Sept. 22, 2015), at <https://www.reuters.com/investigates/special-report/usa-deathpenalty-judges>.

<sup>76</sup> *Id.*

to change the public perception of the death penalty. They focus on the emotional, fiscal, and logistical arguments.

From 1989 to the early 2000s, two hundred people had been wrongfully convicted of a serious crime in California.<sup>77</sup> This means that among those wrongfully convicted were people sentenced to death but later exonerated through Section 1983 innocence claims. Although the California Supreme Court now affirms most death penalty sentences, these are often overturned in federal court. Abolitionists make the argument that it tarnishes the credibility of California's legal system to punish innocent people and to be contradicted by federal courts.<sup>78</sup>

One of the original arguments for the use of the death penalty focused on the deterrence factor. However, studies continue to refute the argument that the death penalty serves as a greater deterrence to crime than a life sentence.<sup>79</sup> There's no conclusive evidence that the risk of a death sentence factors into a person's decision to commit a crime.<sup>80</sup>

Opinion pieces continue to be penned citing data point after data point that the death penalty is a costly and inefficient use of taxpayer dollars. The cost argument fueled Prop. 66 which passed in 2016. Prop. 66 shortened the appeals process for death sentences, attempting to "streamline" the process.<sup>81</sup> People lamented that the lengthy appeals process drove up the cost unnecessarily, and now because of Prop. 66 there's a directive to resolve capital cases in five years or less. Even current California Supreme Court justices have cited the high cost and dysfunctional nature of the system.<sup>82</sup> The cost argument stretches beyond the cost of appeals. The cost to acquire lethal injection drugs also plays into the conversation.

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<sup>77</sup> *Fact Sheet on Wrongful Convictions in CA*, ACLU NORTHERN CALIFORNIA (Dec. 1, 2006), at <https://www.aclunc.org/publications/fact-sheet-wrongful-convictions-ca>.

<sup>78</sup> *Death Penalty Report*, *supra* note 5, at 15.

<sup>79</sup> *Studies on Deterrence, Debunked*, DEATH PENALTY INFORMATION CENTER (accessed June 30, 2022), at <https://deathpenaltyinfo.org/policy-issues/deterrence/discussion-of-recent-deterrence-studies>.

<sup>80</sup> *Id.*

<sup>81</sup> *Death Penalty Report*, *supra* note 5, at 31–33.

<sup>82</sup> Steve Gorman, *Two California Supreme Court justices decry death penalty as 'dysfunctional'*, REUTERS (Mar. 28, 2019), at <https://www.reuters.com/article/us-usa-california-death-penaty/two-california-supreme-court-justices-decry-death-penalty-as-dysfunctional-idUSKCN1RA05Z>.

The cost arguments have been the most effective in bringing conservatives to the table. In Utah, the libertarian think tank, the Libertas Institute, is one of the loudest anti–death penalty voices in the state. They advocate for a small government that carefully uses taxpayer dollars, not a government so big it has the power to kill people while costing taxpayers millions.<sup>83</sup>

In California, specifically, there’s the argument of living up to the values of the state. Abolitionists press the point: can California really call itself progressive if it still has a death row? This is especially poignant for the racial justice argument used in California and around the country. The death penalty is disproportionately handed down to Black and Brown defendants for the same kinds of crimes committed by Whites.<sup>84</sup> President Obama qualified his support for capital punishment with his concerns of its racist application.<sup>85</sup> The racism in the death penalty’s application has been an effective tool in engaging progressive elected officials.

There’s hope that Governor Newsom’s 2022 Executive Order to move all death row inmates to lower security units that allow them more freedom and opportunities will slowly change public opinion.<sup>86</sup> Since California does not actively execute people, death row exists as a symbol and as a threat. Once the threat no longer looms like the grim reaper in California’s prisons, abolitionists hope that people will realize it did not do much to begin with.<sup>87</sup> It’s easier to abolish something that you have no emotional connection to, and abolitionists believe that this executive order will dissolve whatever emotional connection is left to the death penalty.

Each of the approaches articulated above has slowly moved the needle on public opinion, but there’s a long way to go. In a public opinion poll conducted in April 2022, crime was listed as one of Californians’ top concerns. As long as there are fears to play on, pro–death penalty advocates will play to those fears. Fear of crime plays to our most irrational selves, and so rational arguments about cost, innocence, and racial justice go out the window.

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<sup>83</sup> *A Case Against the Death Penalty*, THE LIBERTAS INSTITUTE (May 17, 2022), at <https://libertas.org/justice-and-due-process/a-case-against-the-death-penalty>.

<sup>84</sup> *Death Penalty Report*, *supra* note 5, at 20.

<sup>85</sup> *President Obama Calls Death Penalty “Deeply Troubling,”* DEATH PENALTY INFORMATION CENTER (Oct. 26, 2015), at <https://deathpenaltyinfo.org/news/president-obama-calls-death-penalty-deeply-troubling>.

<sup>86</sup> Koseff, *supra* note 7.

<sup>87</sup> *Id.*

### B. *The Sixth Amendment Window*

Justice Liu's concurrence in *People v. McDaniel* opened the door to future challenges to the death penalty on Sixth Amendment grounds. As discussed earlier in this paper, Eighth Amendment challenges have become futile because the current death penalty statute is too well insulated, after years of back-and-forth between the Legislature, the people, and the courts. The law's staying power is further bolstered by the power public opinion holds over each branch of government with the power of abolition. However, in his concurrence, Justice Liu pointed out future opportunities, although he refused to explore them with regard to the case at bar.<sup>88</sup>

The holding in *People v. McDaniel* validated the current death penalty scheme where jury members are allowed to determine aggravating factors without the "beyond a reasonable doubt" standard.<sup>89</sup> This means different jury members can all have different reasons for issuing a death sentence. The majority opinion in *McDaniel* attributed the constitutionality of such variability to the bifurcation of capital cases.<sup>90</sup> The initial factfinding trial that decides guilt is subject to the Sixth Amendment protection that the jury must find guilt beyond a reasonable doubt.

However, the court refused to extend those same protections to the sentencing part of the trial. Justice Liu points abolitionists toward challenging that bifurcation and making the claim that the Sixth Amendment applies to both the fact finding and sentencing components of a capital trial, and that both demand the jury to rely on facts proven beyond a reasonable doubt. Liu wrote in his concurrence: "The constitutionality of our death penalty scheme in light of two decades of evolving Sixth Amendment jurisprudence deserves careful and thorough reconsideration."<sup>91</sup> The Supreme Court has expanded the Sixth Amendment rights of criminal defendants over the years, and therefore the Sixth Amendment might be the window of opportunity that abolitionists have been looking for.<sup>92</sup>

It is a small window, but a window nonetheless.

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<sup>88</sup> *People v. McDaniel*, 12 Cal. 5th 97 (2021) (Liu, J., concurring).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 160.

<sup>92</sup> *Id.*

#### IV. MORE THAN MORATORIUMS? IN CONCLUSION . . . NOT YET

California does not carry out its death penalty, yet Californians are reluctant to let go of it. The tough on crime narrative continues to persist even in a state where criminal justice reform succeeded in both 2018 and 2020. However, it might be those very successes combined with an uptick in people's concern over crime rates that will make it even harder for death penalty abolitionists.

It might be troubling to read a paper about life-and-death issues and have it all come back to narrative. Yet narrative remains the greatest obstacle to abolition. We've constructed this idea of law as an entity devoid of passion, devoid of opinion, devoid of politics. We call it "black-letter" law because we want to believe the law is black and white, good or bad. This is not the case. Not in California. Not anywhere.

Narrative fueled the progressive court decision in *People v. Anderson* where the court cited psychological harm, innocence, and other abolition talking points. The justices' thinking in *Anderson* was as much a product of narrative and political spin as was the reaction to *Anderson*, the passage of Prop. 17. Narrative fueled the ouster of Chief Justice Rose Bird, and Republicans are hoping that narrative will fuel their victories in the November 2022 election. Every branch of government is made of people, and as people we are shaped by the narrative around us. The abolition movement might consist of lawyers, but their best tool and biggest obstacle is not the law. It is public opinion.

The legal history of the death penalty in California is the story of our beliefs around the death penalty — beliefs about its effectiveness, about its power, about what it does for victims' justice, for prosecutors' flexibility, for communities' safety. The longevity of the death penalty is intertwined with a narrative that Californians believe. Until that narrative changes, it is doubtful that California will see more than moratoriums when it comes to the death penalty.

# SAN FERNANDO VALLEY SECESSION:

*How A Quest to Change the Law Almost Broke  
L.A. Apart (and Whether it Still Could)*

RYAN CARTER\*

INTRODUCTION: SO CLOSE, BUT SO FAR . . .

A quarter of a century ago, then California Assemblywoman Paula Boland, a Granada Hills Republican, was oh so close to realizing what for decades indignant San Fernando Valley homeowners and business leaders had only dreamed of, tried, and failed: A new state law that would have eased the path for the San Fernando Valley — from Sunland and Tujunga on the east to West Hills — all 254 square miles of it, to legally secede from the city of Los Angeles.<sup>1</sup>

The moment — August 22, 1996, in the state Senate — was decades in the making, forged by northwest Valley business leaders, who with Boland found a true believer in the halls of the state Capitol. They finally had a

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<sup>1</sup> "Map of Proposed San Fernando Valley Secession from City of Los Angeles, 2002," *Los Angeles Almanac*, accessed Dec. 5, 2021, <http://www.laalmanac.com/geography/ge30secession.php>.



**A MEMORIAL DAY PARADE FLOAT SPONSORED BY VALLEY VOTE RALLIES IN SUPPORT OF VALLEY SECESSION IN THE SAN FERNANDO VALLEY'S WOODLAND HILLS NEIGHBORHOOD, MAY 27, 2002.**

*Photo: Gary Leonard, Los Angeles Neighborhoods Collection / Los Angeles Public Library.*

shot to lock in a legislative mechanism that would enable the Valley to get its “fair share” of services. If the state legislature passed her AB 2043, no longer would the L.A. City Council have veto power over applications to leave the city of 3.5 million. The Valley would have a clear path to creating its own city of more than 1.5 million people.<sup>2</sup>

Boland herself was part of the movement that years earlier had spurred the legal barrier in the first place. Sensing passage of an epic piece of legislation in her grasp, Boland had momentum — until she didn't. She needed 21 votes for it to pass. She got 19.<sup>3</sup> Twenty-five years later, Boland is still

<sup>2</sup> Nancy Hill-Holtzman, “Valley Secession Measure Clears Assembly Panel,” *Los Angeles Times*, Apr. 18, 1996, <https://www.latimes.com/archives/la-xpm-1996-04-18-mn-59934-story.html>.

<sup>3</sup> Nancy Hill-Holtzman, “Boland’s Valley Secession Bill Fails by 2 Votes in State Senate,” *Los Angeles Times*, Aug. 23, 1996, <https://www.latimes.com/archives/la-xpm-1996-08-23-mn-36935-story.html>.



indignant over what she says may have been the Valley's last and best chance to break away from L.A.

"It would have been a done deal, right now," said Boland of a new Valley city, reflecting on what might have been: local control over land-use, a suburban ideal.<sup>4</sup>

In the rubble of Boland's bill, a battle royale to break away from L.A. would ensue. It would lose.<sup>5</sup> By then, the legal and political barriers to seceding and incorporating were immense, bolstered by nearly thirty years of state law that discouraged the kind of explosion of municipal incorporations seen in the 1950s. But the movement to secede would ultimately bring major legal change to how cities are born and break away in California, amplifying tensions between public choice and collective goods theory, and would prompt reform in local government in L.A. This paper examines the history and path of Boland's bill and the impact its fate had on future attempts to secede from the city of L.A. It then explores the likelihood of the San Fernando Valley ever seceding. This examination draws on my interviews with sources who led the movement for and against secession and on scholars who both studied the effort and who were involved in the city reform that responded to it. It concludes that current law, transformative demographic change in the Valley, city reforms prompted by secession, and still lingering distrust of potential secession leaders, make such a breakaway unlikely twenty years later.

## PART I: DECADES OF NO "FAIR SHARE"

Boland's generation of Valley secessionists built on the success of west San Fernando Valley business leaders who in the early 1960s found traction informally agitating for a breakup from the city.<sup>6</sup> Fueled by complaints

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<sup>4</sup> Interview with Paula Boland, Nov. 17, 2021.

<sup>5</sup> A secession effort in Hollywood, Measure H, also was defeated. It was motivated by similar reasons. Noah Grand, "Valley, Hollywood secession measures fail," *Daily Bruin*, Nov. 5, 2002, <https://dailybruin.com/2002/11/05/valley-hollywood-secession-meas>. The L.A. Harbor area's three-year effort to break away failed after a commission found it could not be on the ballot in 2002.

<sup>6</sup> Tom Hogen-Esch and Martin Saiz, "An Anatomy of Defeat: Why San Fernando Valley Failed to Secede From Los Angeles," *California Policy Issues* (Nov. 2001): 49, [https://www.csun.edu/sites/default/files/Anatomy\\_of\\_Defeat.pdf](https://www.csun.edu/sites/default/files/Anatomy_of_Defeat.pdf).

of lackluster city service, a lack of adequate political representation and the need for control over land development, members of the Valleywide Better Government Committee (VBGC) were among early agitators. They failed to bring in their east Valley counterparts. But the inequities they complained of caught the eye of then L.A. Mayor Sam Yorty, himself a resident of Studio City in the southeast Valley.<sup>7</sup> Yorty's rise to power in the 1960s was fueled by northwest Valley residents like Boland — conservative, White homeowners with a united zeal for having more control over land-use policy and who longed for a suburban ideal.<sup>8</sup> By the time Yorty came around, residents had long transformed the Valley from an agricultural hub. But as the population grew, they were determined to maintain a small-town community vibe within the great metropolis.<sup>9</sup>

By 1975, Boland, along with fellow west Valley business people — future L.A. City Councilmen Hal Bernson and Greig Smith — would pick up the secession mantle under the name of Committee Investigating Valley Independent City/County (CIVICC).

“We were working on the breakup in the middle 1970s,” Boland reflected. “We had meetings constantly. It was just a community of people trying to strategize about how we could maybe break up the Valley. With a million and half people we certainly were not getting our fair share.”<sup>10</sup>

But in contrast to their 1960s progenitors — even the right-leaning Yorty — Boland's group had major political momentum on its side.

### *The Prop. 13 Connection*

The same sense of anger and alienation that fueled the Valley's middle-class property tax revolt in 1978, and ultimately pushed Proposition 13 to

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<sup>7</sup> Ibid.

<sup>8</sup> The first organized secession movement in the Valley dates back to the 1920s, but efforts picked up steam in the post-World War II boom. It galvanized over complaints about zoning, parking, traffic and services. Tom Hogen-Esch, “Urban Secession and the Politics of Growth: The Case of Los Angeles,” *Urban Affairs Review* 36, no. 6 (July 2001): 788–89, [https://www.csun.edu/sites/default/files/Valley\\_Secession.pdf](https://www.csun.edu/sites/default/files/Valley_Secession.pdf).

<sup>9</sup> Raphael J. Sonenshein, *The City at Stake* (Princeton University Press, 2004), 73–74.

<sup>10</sup> Interview with Boland, Nov. 17, 2021.



LOS ANGELES MAYOR JAMES HAHN LEADS AN L.A. UNITED DEMONSTRATION AGAINST VALLEY SECESSION IN THE SAN FERNANDO VALLEY'S LAKE BALBOA NEIGHBORHOOD, OCTOBER 26, 2002. THE OPPOSITION, AS REPRESENTED BY THE "VALLEY CITYHOOD" SIGNS, ATTEMPTED TO DISRUPT THE MARCH.

*Photo: Gary Leonard, Los Angeles Neighborhoods Collection / Los Angeles Public Library.*

victory, was still lingering.<sup>11</sup> The movement for Prop. 13 had its start in the Valley — leaning on its homeowner groups for fundraising and political support. Its earliest backers included Boland. Bernson himself, the San Fernando Valley Republican allied with Boland on secession, was elected to the L.A. City Council at the height of the anti-tax fervor.<sup>12</sup> Like secession, that fervor was rooted in mistrust of government and a sense that the

<sup>11</sup> Statewide voters approved Proposition 13 in 1978. It amended the California Constitution to cap property taxes at 1 percent of a property's assessed value, and it effectively decreased taxes by fixing a property's assessed value to its original price, adjusted for inflation at a maximum annual rate of 2 percent. *Cal. Const.*, art. XIII A, §§ 1–7 (Tax Limitation), [https://leginfo.legislature.ca.gov/faces/codes\\_displayText.xhtml?lawCode=CONS&article=XIII+A](https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CONS&article=XIII+A).

<sup>12</sup> Staff report, "Former L.A. City Councilman Hal Bernson dies at 89," *L.A. Daily News*, July 21, 2020, <https://www.dailynews.com/2020/07/21/former-l-a-city-councilman-hal-berkson-dies-at-89>.

region was not getting its fair share.<sup>13</sup> A similar fervor was fueling campaigns against public school busing.<sup>14</sup>

Boland, a Granada Hills real estate broker, herself was a Prop. 13 activist in the west Valley. She even opened up her real estate office for anti-busing phone campaigns.<sup>15</sup> It was here where the political lines that would persist throughout the secession battle of the late '90s and early 2000s were clearly drawn.

Both movements, anti-busing and anti-tax, were direct challenges to the political establishment at the time. It was an establishment led by then L.A. Mayor Tom Bradley, an African-American mayor whose rise to power was fueled by a coalition of African Americans, liberal Jews, and still relatively nascent but growing Latino and Asian populations. Bradley's liberal administration would form powerful alliances with unions and also around downtown redevelopment. But it was happening as conservative agitators, fighting a court-ordered school integration busing plan for the Valley and lobbying for Prop. 13, were also fighting Bradley's agenda — from civilian police oversight to bond measures.<sup>16</sup>

With conservative support at their backs, CIVICC — now a coalition spurred by Boland and Bernson, among other Valley leaders — was joining with the south and west Valley chambers of commerce, plotting out a vision that this time actually had a chance of succeeding.<sup>17</sup>

### *The Veto: L.A. Gets the Law Changed “in the Middle of the Night”*

A loophole in state law offered an opening for secession that centered on the city of San Fernando, one of the few in the Valley — along with

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<sup>13</sup> Sharon Bernstein, “Secessionists Taking Their Cues from the Past,” *Los Angeles Times*, Oct. 4, 2002, <https://www.latimes.com/archives/la-xpm-2002-oct-04-me-prop-134-story.html>.

<sup>14</sup> Howard Blume, “School busing and race tore L.A. apart in the 1970s. Now, Kamala Harris is reviving the debate,” *Los Angeles Times*, June 28, 2019, <https://www.latimes.com/local/lanow/la-me-busing-schools-los-angeles-harris-biden-20190628-story.html>.

<sup>15</sup> Doug Smith and Lisa Leff, “Boland Gaining Political Clout on Secession Drive,” *Los Angeles Times*, May 12, 1996, <https://www.latimes.com/archives/la-xpm-1996-05-12-mn-3338-story.html>.

<sup>16</sup> Sonenshein, *The City at Stake*, 75.

<sup>17</sup> In the 1940s, the City Council rejected a borough plan when a secession bill floated by a group of Northridge ranchers failed in the state legislature. *Ibid.*, 74.

Glendale and Burbank — that had not joined L.A. when the Valley was annexed in 1915.<sup>18</sup>

“We were going to go to the city of San Fernando and have them annex us,” Boland said of CIVICC’s “stealthy” plan.<sup>19</sup> The idea was that by annexing the Valley, the city of San Fernando would allow part of it to secede.<sup>20</sup> San Fernando narrowly rejected the plan. But as secessionists have subsequently told it, other business interests essentially double-crossed CIVICC, trying to get the city of San Fernando to annex Granada Hills and Mission Hills — without the rest of the Valley.

“That’s the double-cross that hurt the movement more than anything else,” Bernson later recalled.<sup>21</sup> It hurt because it got L.A. officials’ attention.

“Sacramento got wind of it. In the middle of the night, they went and made it impossible” to break away, said Boland. “That’s why we didn’t get it there right on the spot.”<sup>22</sup> In 1978, with heavy lobbying from Bradley and The League of California Cities, L.A. got the state legislature to amend what was then known as the Municipal Reorganization Act. Sponsored by Assemblyman John Knox (D-Richmond), the legislation required the Valley secession proposal to be approved by the Los Angeles City Council before it could become a reality.

In itself, the “dark of the night” law would be a major barrier in municipal detachment and incorporation for the next twenty years, giving statutory power to the city of Los Angeles (or any other city) to unilaterally veto a breakaway. Just like that, under state law, the L.A. City Council could veto any secession, dooming the chances of secession — for the moment.

### *The Fight to Change the Law: State v. Local Control*

The state’s intervention was a first glimpse at what would become a secession movement defined by the ability of city political actors to influence state government — and hence legislation. While L.A. won the first round

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<sup>18</sup> Staff report: “1915–1916: Annexation spurred growth, *L.A. Daily News*,” Oct. 31, 2010, <https://www.dailynews.com/2010/10/31/1915-1916-annexation-spurred-growth>.

<sup>19</sup> Interview with Boland, Nov. 17, 2021.

<sup>20</sup> Hogen-Esch, “Urban Secession and the Politics of Growth,” 790–91.

<sup>21</sup> Phil Willon, “Valley Secession Roots Go Back to the 1970s,” *Los Angeles Times*, Aug. 16, 1998, <https://www.latimes.com/archives/la-xpm-1998-aug-16-mn-13780-story.html>.

<sup>22</sup> Interview with Boland, Nov. 17, 2021.

in the Legislature, west San Fernando Valley secession leaders were galvanized around a sense that “you couldn’t fight City Hall.”<sup>23</sup>

“Our taxes were outrageous . . . and we were a million and half people, which is bigger than most cities,” Boland said. “We weren’t getting our fair share of anything. The mayor never even showed up. Bradley was a joke, if he even knew his way out here.”<sup>24</sup>

Boland was echoing early studies commissioned by CIVICC, including a 17-page report coordinated by Jackson Mayers, an economics instructor at Valley College, which concluded that Valley residents contributed 40 percent of the city’s taxes and received only 15 percent of the city’s services.<sup>25</sup> While the study garnered its share of scholarly criticism, it was clear that the movement to change the law would not die — and Boland and her allies would not give up. Flashforward twelve years, and the same fervor that propelled Bernson into the L.A. City Council fueled Boland’s rise to the state Assembly in 1990, representing the northwest Valley. It’s in Sacramento where she would battle to tear down the very L.A. law that she and her allies sparked in the first place.

Boland’s battle was happening against a backdrop of a rapidly changing city of L.A. — and Valley — many saw in a state of crisis. It’s that perception that only propelled her legislation to secede.

By the 1990s, the Valley’s once powerful aerospace and manufacturing bases — which powered its residential boom — were giving way to a job market consolidating around immigrant labor and lower-skill jobs. By 1990, one-third of the Valley’s 1.7 million residents were foreign born; only half were Anglo. The “Mestizo Valley” was rising.<sup>26</sup>

“The Valley looked less like a post-World War II bedroom suburb and more like a sprawling, economically and ethnically fragmented city unto itself.”<sup>27</sup> And the change was not easy.

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<sup>23</sup> Smith and Leff, “*Boland*.”

<sup>24</sup> Interview with Boland, Nov. 17, 2021.

<sup>25</sup> Willon, “Valley Secession.”

<sup>26</sup> Joel Kotkin and Erika Ozuna, “The Changing Face of the San Fernando Valley,” Pepperdine University and the Economic Alliance of the San Fernando Valley, 2002, <https://publicpolicy.pepperdine.edu/davenport-institute/content/reports/changing-face.pdf>.

<sup>27</sup> Jean-Paul R. deGuzman, “Resisting Camelot: Race and Resistance to the San Fernando Valley Secession Movement,” *California History* 93, no. 3 (2016): 28–51.

### *Once Again, Secession Thwarted*

In the foreground was Prop. 187 — the 1994 measure that aimed to prohibit undocumented immigrants from using public services. And the region was reeling from the civil unrest that came in the wake of the beating of Rodney King Jr. and the subsequent acquittal of LAPD officers who beat him during a traffic stop. No longer was the Valley not just getting its fair share, but civil unrest, rising crime, poverty and immigration were fueling a rejiggered argument for local control. That's why Boland thought she had political momentum going into the Senate vote in August of 1996.

"I had gone to all the Democrats up there and talked to them before I even presented the bill. They understood it. They knew where I was coming from. They knew I would never lie to them," she said. "I had the voters on the Democratic side in the Senate. We'd locked it up in the Assembly."<sup>28</sup>

August 22, 1996: Vote fails. 19 to 18, and she needed 21.

Once again, Boland's secession drive ended with last-minute politics and legal maneuvering, over which Boland still appears indignant.

At the time, a nascent Valley group — composed of Van Nuys and Sherman Oaks homeowners, the Valley Industry and Commerce Association, the San Fernando Valley Association of Realtors — was meeting. They called themselves VOTE — or Valley Organized Together for Empowerment. Their aim was to mobilize voters in support of Boland's bill.<sup>29</sup>

Knowing they needed key Democrats to support a change in the law, the group engaged with then state Senator Bill Lockyer, D-Hayward, who opposed Boland's bill. Lockyer — who would become known as the "villain" who engineered the defeat — had offered amendments that would add a requirement to study the cost implications of Los Angeles and the Valley breaking up. He wanted to know what the respective tax bases would be and how services would be allocated. "This is a complicated issue that requires a revamping of California urban policy," Lockyer would say

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<sup>28</sup> Interview with Boland, Nov. 17, 2021.

<sup>29</sup> Kate Folmar, "Group Forms to Back Secession Bill's Passage," *Los Angeles Times*, May 30, 1996, <https://www.latimes.com/archives/la-xpm-1996-05-30-me-9989-story.html>.



at the time. “It strikes me, given the issue’s complexity, that this bill is more public relations than policymaking.”<sup>30</sup>

For Boland, it was the end of a six-year battle in the Assembly for Valley cityhood. Without Democrats on board, “nothing was possible.”<sup>31</sup>

But it marked the start of a whole new coalition aimed at changing the law to make it easier to secede. From here on out, the battle would more formally amplify the tensions between state and local control and the limits of “self determination.” And it would test the power and strength of coalitions in Los Angeles while giving rise to the power of a previously obscure state agency that would determine the fate of secession.

## PART II: A NEW FIGHT, NEW WARRIORS, THE SHADOW OF TIEBOUT AND “RIGHTSIZING”

### *History of California’s Municipal Organization Law / The Birth of LAFCOs*

The legal barriers that had stopped San Fernando Valley secession for so long were baked into what by the mid-1990s was California’s long-established but often obscure set of municipal reorganization laws. It was a law rooted in the municipal incorporation explosion that occurred throughout 1950s.

The law did not come without considerable tension over who would get to control municipal incorporation and how easy should it be.

Incorporations in California exploded in the ’50s. The state saw fifty new city incorporations, fueled by migration, a doubling of the state’s population over twenty years, and freeway construction. In Los Angeles County alone, ten new cities formed in the single year of 1957.<sup>32</sup> A watershed moment for that explosion in L.A. County emerged when the city of Lakewood incorporated. The city of Long Beach might have annexed it, but supporters of incorporation realized a new city could afford to incorporate

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<sup>30</sup> Greg Lucas, “San Fernando Valley Wants to, Like, Secede from L.A./Little support for legislator’s bill, however,” *San Francisco Chronicle*, Aug. 19, 1996, <https://www.sfgate.com/news/article/SACRAMENTO-San-Fernando-Valley-Wants-to-Like-2969446.php>.

<sup>31</sup> Sonenshein, *The City at Stake*, 75.

<sup>32</sup> State of California, *Growth Within Bounds: Report of the Commission on Local Governance for the 21st Century* (Jan. 2000), <https://calafco.org/sites/default/files/resources/GrowthWithinBounds.pdf>.



if it continued to contract with the county for its municipal services. Ultimately, 60 percent of voters approved the incorporation. Dubbed “The Lakewood Plan,” it was advertised by Los Angeles County and the new City of Lakewood as a more affordable means to successfully incorporate.<sup>33</sup>

But it was also a key moment for Sacramento, by then looking for a way to deal with growth and urban sprawl in a rapidly growing Southern California. At the time, even as independent districts were on the rise, no state or regional agency was regulating or reviewing the formation of municipalities. And there was a lack of coordination among districts in dealing with common problems.

“It was entirely up to the local government and the voters to decide when new governments or boundary changes were needed.”<sup>34</sup>

By the 1960s, lawmakers were faced with clear tensions. On one hand, you could see the shadow of Charles Tiebout’s “Theory of Local Expenditures” infusing the explosion of new and smaller cities across Southern California — the argument that municipalities were the rational result of market preferences among “consumer-voters.”<sup>35</sup> Essentially, it was a free-market model that Tiebout and many afterward — including secession supporters — said “rightsizes” a local government between taxes and services based on the preferences of its residents.<sup>36</sup> For this school of thinkers, the explosion of smaller, independent cities was a positive, rather than a negative result of free choices — public choice.<sup>37</sup>

On the other hand, many urban planners and social scientists were concerned about duplication of government functions across regions and social inequities arising from what were permissive state statutes.<sup>38</sup>

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<sup>33</sup> Ibid., 15.

<sup>34</sup> Ibid., 25.

<sup>35</sup> Charles M. Tiebout, A Pure Theory of Local Expenditures, *Journal of Political Economy* 64, no. 5 (Oct. 1956): 416–24, <https://www.jstor.org/stable/1826343>.

<sup>36</sup> Ronald Oakerson and Shirley Svorny, “Rightsizing Los Angeles Government,” *The Independent Review* IX, no. 4 (Spring 2005): 516, <http://www.csun.edu/~vcecn007/publications/OakersonSvorny.pdf>.

<sup>37</sup> Sonenshein, *The City at Stake*, 81.

<sup>38</sup> Raphael J. Sonenshein and Tom Hogen-Esch, “Bringing the State (Government) Back in: Home Rule and the Politics of Secession in Los Angeles and New York City,” *Urban Affairs Review* 41, no. 4 (March 2006): 473, [https://www.csun.edu/sites/default/files/LA\\_and\\_NY.pdf](https://www.csun.edu/sites/default/files/LA_and_NY.pdf).

By 1959, then Governor Edmund G. Brown Sr. was concerned about “the lack of coordination and adequate planning” that “led to a multitude of overlapping, inefficient jurisdictional and service boundaries, and the premature conversion/loss of California’s agricultural and open-space lands.” In 1959, Brown appointed the Commission on Metropolitan Area Problems to study and make recommendations on the “misuse of land resources” and the growing complexity of local governmental jurisdictions.<sup>39</sup>

The result was LAFCOs — local agency formation commissions. But it took compromise to get there. Just as the desire for municipal sovereignty was blanketing Southern California, there was considerable fidelity to Dillon’s Rule — the principle that local governments are creatures of the state. At first, state policymakers proposed a statewide commission that would oversee the process of incorporation, annexation and secession. But by 1963, state policymakers had worked out a compromise with local counties and cities: A LAFCO in each county. The agreement was fragile, but the new agencies were charged with reviewing and approving or disapproving proposals for incorporation, creation of special districts, and annexations. In reviewing these proposals, LAFCO was required to consider several factors, such as population, need for community services, and the effect of the formation or annexation on adjacent areas. After approval of a proposal by LAFCO, the affected jurisdiction would hold a protest hearing on the proposal and, if no majority protest existed, it would be put before the voters for approval or deemed approved if a vote was not required under the provisions of the statute.

By 1996 — as San Fernando Valley secession heated up — California’s legal framework for city incorporation was governed by the fusion of three laws rooted in the still relatively obscure LAFCOs: The Knox-Nisbet Act of 1963, which established local agency formation commissions (LAFCOs) with regulatory authority over local agency boundary changes; the District Reorganization Act of 1965 (DRA), which combined separate laws governing special district boundaries into a single law; and the Municipal Organization Act of 1977 (MORGA), which consolidated various laws on city incorporation and annexation into one law. MORGA also added legislative

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<sup>39</sup> CALAFCO, *What is LAFCO’s History?*, The California Association of Local Agency Commissions, <https://calafco.org/lafco-law/faq/what-lafcos-history>.

intent language, which declared as state policy the encouragement of orderly growth and development of cities, the need for logical local agency formation, and the finding that a single governmental agency was better able to respond to community service needs. But LAFCOs had to consult three sets of laws to process different types of applications. In 1985 the Knox-Nisbet Act was renamed the Cortese-Knox Act, consolidating the laws into one act. The L.A. amendment that the city pushed through to save itself was part of MORGA. And it would stay that way until Valley VOTE picked up the cause for secession.

### *Valley VOTE/The Rise of a Coalition and Changing the Law*

With the City Council veto law still embedded in the Cortese-Knox Act, Boland's loss marked the rise of Valley VOTE — an uncommon coalition in a city where up to that point business interests and conservatives had dominated the secession activists' ranks. A fragile alliance of homeowners associations and business associations emerged, led by Sherman Oaks Homeowners Association President Richard Close and business leader Jeff Brain. In contrast to previous secession attempts, it brought together HOAs and business on ground where they were often opposed: a "shared suburban land-use vision."<sup>40</sup> It was a vision that sought to protect single-family areas while creating high-end retail districts catering to middle-class tastes — and it would generate tax revenue. It was a vision that pushed poor residents and undesirable businesses to other areas.<sup>41</sup> It still lamented lack of fair share and local control.<sup>42</sup>

"But underneath it was much more about land-use," Hogen-Esch said.<sup>43</sup>

Within a month after Boland's bill failed, the resurrected idea of secession grew into a coalition of 24 business groups and 17 homeowners

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<sup>40</sup> Hogen-Esch, "Land Use in Los Angeles," 787.

<sup>41</sup> Ibid.

<sup>42</sup> There is some scholarly disagreement on the message of "local control" in contrast to "fair share." Hogen-Esch and Saiz have posited that secessionists failed to embrace a larger vision of "multicultural suburbia." But Michan Andrew Connor posits that they were able to tap larger, more expansive minority partners in the coalition, by adopting "color-blind rhetoric." See note 69 below, Connor, "Color-Blind Rhetoric," 48–64.

<sup>43</sup> Interview with Tom Hogen-Esch, Nov. 8, 2021.

associations that supported VOTE. But they still needed a new law that would do away with the L.A. City Council veto.

### *Path to Changing the Law: The Bipartisan Alliance*

By 1996, there had been few major changes to state incorporation law.<sup>44</sup> LAFCOs were obscure agencies, made up mainly of a hodgepodge of political appointees from local cities and counties dealing with relatively minor boundary changes.<sup>45</sup> The first major change to the law came in 1992, with the passage of the “revenue neutrality” provision. It required that in a secession, neither area could be financially harmed.<sup>46</sup>

Lockyer, eyeing a run for state attorney general, apparently didn’t want to be the villain. Convinced state law had to be reformed, he’d been working with Brain and Close on how to craft a kind of compromise bill. He still wanted a citywide vote, and secessionists still embodied the “local control” angst of Boland’s bill, which was revived by her successor, Assemblyman Tom McClintock (R-Granada Hills).

Neither side was going to get what they wanted without a compromise. Nor was the city of L.A. going to walk away easily from the now twenty-year-old veto provision it had originally pushed into the law.

In 1997 — spurred by the San Fernando Valley secession movement — Assemblyman Robert Hertzberg, a key Democrat who represented Sherman Oaks, crafted a compromise.<sup>47</sup> It would become the next major change in state law, governing “special reorganizations.” The city of L.A.

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<sup>44</sup> *Growth Within Bounds*.

<sup>45</sup> Sue Fox, “LAFCO feels heat from all sides,” *Los Angeles Times*, May 21, 2002, <https://www.latimes.com/archives/la-xpm-2002-may-21-me-method21-story.html>.

<sup>46</sup> *Growth Within Bounds*, 27.

<sup>47</sup> The Valley VOTE secession movement was happening as political power in L.A. was shifting to the Valley. Hertzberg, who would become the speaker of the Assembly in 2000, “provided legitimacy to the idea of lowering the state’s threshold for secession.” (Sonenshein and Hogen-Esch, 477). But even as Wilson signed his and McClintock’s legislation, Hertzberg noted . . . he wasn’t a secessionist. What he was interested in was reforming L.A.’s charter. Amid the push for secession was a concurrent push for reforming L.A.’s city charter that became more intense as secession got closer to becoming reality. Moreover, as Sonenshein and Hogen-Esch note, the Valley became the centerpiece of Richard Riordan’s 1993 and 1997 mayoral campaigns, as well James Hahn’s victory in 2001. Hertzberg himself could see the emerging influence of the Valley on the horizon.

would join, on three conditions: 1) that the removal of the council veto applied to all California cities, 2) that a majority vote of both the city as a whole and the area seeking separation was required, and 3) that secession had no negative fiscal impact on the remaining city.<sup>48</sup> It broke the legal “logjam.”<sup>49</sup>

The result — The Cortese-Knox-Hertzberg Local Government Reorganization Act — would be the next major change to state law regarding incorporations. It eliminated the city’s unilateral veto power and replaced it with the requirements that secessions win concurrent majorities city-wide (including the seceding areas) and in the seceding area itself. It also defined “special reorganization” — which up to then was sparsely mentioned in state law, and which defined a whole new process for the obscure LAFCOs.<sup>50</sup> Moreover, any breakaway that did cause harm would have to be made whole by payments from the new city to the remaining city.<sup>51</sup>

But in a way, Governor Pete Wilson faced a tension similar to that faced by Brown back in the 1960s. This time the tension was over who gets to claim “home rule” — the urban core — cities like Los Angeles — or territories who want to break away and start their own city.

Opponents of the bill — like the League of California Cities — argued that elimination of the veto power would once again give rise to an exodus from urban cores — leading to the same kind of explosion in the 1950s that state law aimed to control.

But by then, the shadow of Tiebout’s theory had become a rationale that made it from the courts to state law. You could see it emerge in some form in foundational reorganization cases.<sup>52</sup> Proponents saw it as a fundamental

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<sup>48</sup> Sonenshein, *The City at Stake*, 77.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> See *Bd. of Supervisors v. Loc. Agency Formation Com.*, 3 Cal. 4th 903, 924 (1992), where the Court upholds the constitutionality of the Cortese-Knox Local Government Reorganization Act against Equal Protection claims that it precluded county residents from voting to confirm a municipal incorporation unless they lived in the territory to be incorporated. “To frustrate the endeavor of individuals to fix the unit of their local governance . . . would be to stifle that self-determination. The seeds of democracy lay in the Greek city-state; we would be reluctant to stay the fruition of that democratic expression in the city of today. Neither the state nor federal Constitution sanctions such negation . . . .”

right of self-determination, and, conjuring Tiebout's language, the ability of residents — "consumer-voters" to vote with their feet. "This is Independence Day come in October," McClintock said at the bill-signing. "It's common in history for people to lose power to the government. It's a rare instance when government loses power to the people."<sup>53</sup>

With the stroke of Governor Wilson's pen, the threshold for secession was lowered, and LAFCOs would play a huge role in whether a city could secede.<sup>54</sup>

In assessing "home rule" in Los Angeles and New York city, Sonenshein and Hogen-Esch argue that secessionists in both cities were successfully "leapfrogging" traditional legal and political constraints within their cities. They expanded "the scope of the conflict" by forming political coalitions that allied with state leaders. In the end, the power of the city itself was diluted, and "Dillon's Rule" still casts a shadow over municipal self-determination.<sup>55</sup> That in itself was a huge victory.

### *The Battle Had Just Begun*

Even with the legal change in place, as Richard Close would say, it was just the beginning. An epic battle for the future of L.A. ensued over the next five years — underpinned by arguments over local control for the Valley,<sup>56</sup>

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<sup>53</sup> Nancy Hill-Holtzman, "Governor Signs Secession Bill," *Los Angeles Times*, Oct. 13, 1997, <https://www.latimes.com/archives/la-xpm-1997-oct-13-mn-42262-story.html>.

<sup>54</sup> Many other political chips were in the right places to make this happen. And they would be advantageous as the battle to get secession onto the ballot ensued. Larry J. Calemine, an early member with Boland of CIVICC, was executive officer of the nine-member LAFCO in Los Angeles — five years as executive officer and five years as alternate commissioner. Another alternate commissioner was Richard Close of the Sherman Oaks Homeowners Association. And while the city of L.A., by law, had only one pick for the board, its one commissioner was Hal Bernson, who worked tirelessly with Boland back in the '70s on secession. Bernson had been at LAFCO for several years at that point. Citizens Economy Efficiency Commission, LA County, Presentation by Larry Calemine, <http://eec.lacounty.gov/Portals/EEC/Presentations/2000/10-05-00percent20Presentation.pdf>.

<sup>55</sup> Sonenshein and Hogen-Esch, 488.

<sup>56</sup> On December 9, 1999, Valley VOTE submitted roughly 205,000 signatures to LAFCO. On March 15, LAFCO announced that enough signatures had been validated to meet the 25 percent threshold (132,000). Hogen-Esch and Saiz, "Why the Valley Failed to Secede," 2001.

versus unifying control of the city of L.A.<sup>57</sup> Valley VOTE's goal was to get the question of Valley cityhood onto the November 2002 ballot. LAFCO — whose role became amplified through the legal reform — would play a much larger role than it ever had as dueling cost estimates and feasibility reports volleyed back and forth.<sup>58</sup> Secessionists would double down on the rightsizing arguments as a large anti-secession coalition of unions, politicians, labor and downtown business leaders cascaded across the city.<sup>59</sup> In 2002, LAFCO approved the San Fernando Valley Proposal for Special Reorganization. Voters would have a say. Ballot Measure F was scheduled for the fall 2002 election, giving Los Angeles residents the opportunity to vote on the issue. They'd be able to name the new city, too. "Camelot," was among the potential names.

### *Voters: The Final Say*

On November 5, 2002, Los Angeles voters defeated secession. In the San Fernando Valley, it was close — 50.7 percent (136,737) yes and 49.3 percent (132,831) no. But in the rest of the L.A., it was a landslide against — 19.5 percent (68,813) yes and 80.5 percent (283,914) no. Citywide, it was 33 percent yes to 67 percent no. There would be no Valley mayor, and the 14 Valley council seats designated by LAFCO would not happen.

The name "San Fernando Valley" easily won as the new city's name — beating "Camelot" and "Rancho San Fernando." Boland, who was running

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<sup>57</sup> The LAFCO comprehensive financial study was the biggest such study it had ever undertaken by that point, with the state legislature allocating \$1 million for the study. Leah Marcal and Shirley Svorny, "Support for Municipal Detachment," *Urban Affairs Review* 36, no. 1 (Sept. 2000): 94, <http://www.csun.edu/~vcecn007/publications/SupportForMunicipalDetachment.pdf>. Extensive reports from Valley VOTE and the city of L.A. would ensue. LAFCO decided a new Valley city's design should be akin to a contract city, where the Valley would essentially hire the city of L.A. to provide municipal services for a year, and, to compensate L.A. for lost tax revenue, the Valley would have to pay an "alimony payment" — with estimates ranging from \$56 million to the city's number of \$153.8 million.

<sup>58</sup> One city report, in 2001, raised issues over the legality of the authority a Valley city would have to collect tax revenues and share in water and power service at existing rates. Patrick McGreevy, "City Report Says Secession Not Viable," *Los Angeles Times*, June 16, 2001.

<sup>59</sup> Outgoing L.A. Mayor Richard Riordan and incoming Mayor James Hahn both opposed secession.

for the northwest Valley council seat also won easily. But it was a moot point. Despite the mammoth effort to change the law, the result was that the giant city of L.A. would remain intact.

*A Huge Victory in Itself, but It Could Have Been More . . .*

Despite losing at the ballot box, secessionists had achieved a mammoth victory in changing the law. Despite being far outspent financially and “facing enemies on all sides” — including a downtown establishment coalition highly organized against — they were able to go beyond local coalitions to include state legislators, who built a bipartisan alliance to lower the legal threshold of secession. Moreover, they shaped the state commission that was tasked with studying fiscal feasibility and whether breakaways should go to the electorate.<sup>60</sup>

“Given all the constraints, and the difficulties of it, they made a heck of a run at it,” Sonenshein said.<sup>61</sup>

Hogen-Esch echoes Sonenshein: “They rewrote local boundary change law that had been in place since the 1960s . . . . It’s amazing what they were able to accomplish.”<sup>62</sup> In fact, the results in the Valley reflect how close the effort came to why that change mattered. If secessionists had created a broader coalition, it might very well have changed the result — at least in the Valley, and might have left them with more political clout than they had. That’s because the depth of support was surprisingly strong in much of the Valley.

In 82 percent of the 685 Valley precincts, Measure F garnered more than 40 percent support.<sup>63</sup> It was soundly defeated in only five heavily Latino northeast Valley districts, where Latino union and political leaders had waged robust campaigns against it. It also failed in heavily liberal

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<sup>60</sup> It was also the first time that secession has been presented in the context of governmental reform, rather than a series of suburban complaints. Sonenshein, *The City at Stake*, 80.

<sup>61</sup> Interview with Raphael Sonenshein, Nov. 18, 2021.

<sup>62</sup> Interview with Hogen-Esch, Nov. 8, 2021.

<sup>63</sup> Tom Hogen-Esch, “Elite and Electoral Coalitions: An Analysis of the Secession Campaign in Los Angeles,” Paper presented at 2003 Western Political Science Association Meeting, Denver (April 2002), 17, [https://www.csun.edu/sites/default/files/Elite\\_and\\_Electoral\\_Coalitions.pdf](https://www.csun.edu/sites/default/files/Elite_and_Electoral_Coalitions.pdf).



and Jewish Studio City and Sherman Oaks.<sup>64</sup> Hogen-Esch noted that, had a more “diverse elite coalition emerged within the Valley, particularly among Latino and Jewish groups, unions and the Democratic Party, the results may have been quite different.”<sup>65</sup> Indeed. As Sonenshein notes, the Valley was included in the city’s tally of votes. So theoretically, a hugely enthusiastic pro-secession Valley turnout could have overcome the citywide vote.<sup>66</sup>

But the movement “never really incorporated those growing areas of the San Fernando Valley” where L.A. city services were highly valued, he added.<sup>67</sup>

Not all agree — including Boland and Close, both of whom say they were mindful of embracing communities outside of White, home-owning Valley-ites.

“It’s not true,” Boland said.<sup>68</sup> “It was to be abundantly fair, to have the east side of the Valley not feel isolated whatsoever,” she added, remembering the drawing up of district maps for the new city. Scholars have disagreed on the extent to which secessionists missed the opportunity to build a larger tent for their movement.

Michan Andrew Connor argues that Valley activists did craft a “color-blind rhetoric” of “local control” and community empowerment that won Latino support.<sup>69</sup>

But Jean-Paul R. deGuzman pushes back, arguing that secessionists underestimated the extent to which Latinos, Blacks and Asian Americans in the Valley saw their fates inextricably linked to the rest of Los Angeles.<sup>70</sup>

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<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Interview with Sonenshein, Nov. 18, 2021.

<sup>67</sup> Ibid.

<sup>68</sup> Interview with Boland, Nov. 17, 2021.

<sup>69</sup> Michan Andrew Connor, “These Communities Have the Most to Gain from Valley Cityhood: Color-Blind Rhetoric of Urban Secession in Los Angeles, 1996–2002,” *Journal of Urban History* 40 (2014): 48, [https://www.researchgate.net/publication/274635306\\_These\\_Communities\\_Have\\_the\\_Most\\_to\\_Gain\\_from\\_Valley\\_Cityhood\\_Color-Blind\\_Rhetoric\\_of\\_Urban\\_Secession\\_in\\_Los\\_Angeles\\_1996-2002](https://www.researchgate.net/publication/274635306_These_Communities_Have_the_Most_to_Gain_from_Valley_Cityhood_Color-Blind_Rhetoric_of_Urban_Secession_in_Los_Angeles_1996-2002).

<sup>70</sup> deGuzman, “Resisting Camelot,” 29.

Twenty years later, this leads to the question of whether this matters — as L.A. and the Valley grow and change — and whether conditions are ripe for a new secession attempt to take root.

### PART III: COULD IT STILL HAPPEN?

When it came to secession, Richard Close spoke like a man on a mission.<sup>71</sup> Until his death in early 2022, he continued to head the Sherman Oaks Homeowners Association, which nearly twenty years after the secession ballot box loss, remains a powerful force among Los Angeles interest groups.<sup>72</sup>

The angst of twenty years ago is still there — along with the factors that fueled a massive movement. “Right now the Valley represents only about a third of the City Council, so two-thirds of the decisionmakers do not live in the San Fernando Valley,” he said. “That’s dangerous and it’s not fair to the residents of the San Fernando Valley. That was the argument then, and that was the argument now.”<sup>73</sup>

Yes. Secession could still happen, he said.

But could it?

Ironically, the very law that his coalition of homeowners and business groups brokered, to lower the secession threshold is the very law that would have to be struck down, Close said — at least the part where the whole city gets to vote.<sup>74</sup>

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<sup>71</sup> Close passed away not long after I spoke with him. Dakota Smith, “Richard Close, leader of Valley secession movement, dies at 77,” *Los Angeles Times*, Jan. 31, 2022, <https://www.latimes.com/california/story/2022-01-31/richard-close-sherman-oaks-homeowners-association-dies>; Elizabeth Chou, “Richard Close, influential San Fernando Valley political player, dies at age 77,” *L.A. Daily News*, Jan. 31, 2022, <https://www.dailynews.com/2022/01/31/richard-close-influential-san-fernando-valley-political-player-dies-at-age-77>.

<sup>72</sup> Elizabeth Chou, “Homeless housing proposal has some worried in Sherman Oaks,” *L.A. Daily News*, Aug. 24, 2018. <https://www.dailynews.com/2018/08/24/homeless-housing-proposal-has-some-worried-in-sherman-oaks>; Jay Caspian Kang, “How Homeowners Associations Get Their Way in California,” *New York Times*, Oct. 14, 2021, <https://www.nytimes.com/2021/10/14/opinion/california-housing-renters.html>.

<sup>73</sup> Interview with Richard Close, Nov. 9, 2021.

<sup>74</sup> *Ibid.*

“When we got started, state law gave the City Council the authority to prevent any Valley cityhood. We were able to get that law changed. And it now provides that if the Valley majority and the whole city votes for secession, then it happens. One of the first things we need to do in a new movement is to convince the Legislature to eliminate that second hurdle,” he said.<sup>75</sup> But that would not be easy today.

On the legal front, a movement today would need to have allies in Sacramento who would change the law — much like they did in 1997 — and a governor who would sign that bill. Wilson, the governor who signed the compromise bill that eliminated L.A.’s veto power, had long been attuned to the wishes of secessionists. After all, they helped elect him. And voter discontent was strong twenty years ago. It’s not clear that’s the case now — at least to push through a law that would eliminate L.A. voters’ voice.

“They would have to go back up to Sacramento and find some way to lower the threshold for secession, and I just don’t see that happening in Sacramento, coming out of a two-thirds Democratic-controlled Legislature,” Hogen-Esch noted.<sup>76</sup>

Moreover, what has been clear over nearly fifty years of California state incorporation law is that “special reorganization,” despite lowering the threshold for secession, is still an uphill climb in comparison to municipal incorporation.

“A secession is not supposed to be easy,” Sonenshein said.<sup>77</sup> This is not like a referendum. Or a proposition on the ballot. This isn’t like putting in a bond measure for mass transportation. This is breaking up the second largest city in the country. Cracking it right down the middle and saying we’ll figure out how to distribute the assets later on. “If a city can break up because people in an area just want to get out, that’s a pretty hard way to run a city. Basically, the cities would have breakups nonstop.”

Moreover, as Sonenshein and Hogen-Esch have observed, it tweaks the angle on the debate between public choice and collective goods theory. Secession is different from the traditional issue of movement between cities, because the issue is “no longer a question of whether there should be many

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<sup>75</sup> Ibid.

<sup>76</sup> Interview with Hogen-Esch, Nov. 8, 2021.

<sup>77</sup> Interview with Sonenshein, Nov. 18, 2021.

cities available so that dissatisfied city residents can opt out and move away. It is about whether big cities themselves should even exist.”<sup>78</sup>

Framing in such terms makes it hard to imagine that parts of contemporary L.A. would seek a breakup.

### *The Power of Reform in Response to Secession*

The secession movement itself spurred reforms that in theory brought downtown L.A. government closer to once disconnected neighborhoods. This in itself could make secession less likely.

“Charter reform [in L.A.] was a direct response to secession,” said Sonenshein, who between 1997 and 1999 was executive director of the City of Los Angeles Charter Reform Commission.<sup>79</sup> “I mean, there were other fish being fried like the power of the mayor and stuff like that. But the creation of the neighborhood councils was a direct response to secession. After that, I think what you started to see was a more sophisticated sense at City Hall that they needed to be more attentive to the San Fernando Valley both politically and in terms of services. In that sense, you could say the secession movement shook some things loose.”

It was secession that provided the spark that when fused with then Mayor Richard Riordan’s own desire for more formal authority, provided the energy for charter change that for some years had been simmering.<sup>80</sup> Faced with the breakup of the great metropolis, voters by a 60 percent majority passed a new charter on June 8, 1999, the first comprehensive charter revision in twenty-five years.<sup>81</sup> The new charter’s Section 900 created a system of Neighborhood Councils,<sup>82</sup> advisory boards that gave residents a public forum on issues in communities from Chatsworth to San Pedro. Their power was not binding, but the goal was that they “include representatives of the many diverse interests in communities and . . . have an

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<sup>78</sup> Sonenshein, *The City at Stake*, 81.

<sup>79</sup> Interview with Sonenshein, Nov. 18, 2021.

<sup>80</sup> Sonenshein, *The City at Stake*, 57–71.

<sup>81</sup> *Ibid.*

<sup>82</sup> The neighborhood councils have grown to a system of 99, each serving about 40,000 people on issues including development, homelessness and emergency preparedness. Thirty-four of them are in the Valley. City of Los Angeles, <https://www.lacity.org/government/popular-information/neighborhood-councils>.

advisory role on issues of concern to the neighborhood.”<sup>83</sup> The revisions also created area planning commissions, quasi-judicial bodies with power to make determinations and recommend zone changes or similar matters referred to them.<sup>84</sup> “The Neighborhood Councils have made a difference,” Hogen-Esch said. “There’s greater possibility for participation. The regional planning commissions probably have some die-hard followers who otherwise might be frustrated by the long commutes to L.A.” But others are less certain that L.A. city reforms have worked.

“Right now, who are making the decisions?” Close lamented.<sup>85</sup> Two-thirds of the decisionmakers are outside the Valley. They’ve never heard of these areas. If I represent San Pedro, why would I care about Northridge? But if we had a city council made up of Valley residents, these issues would be decided by Valley voters.”

With regard to neighborhood councils, Close bemoaned the lack of any binding power. Boland sees neighborhood and regional commissions as ineffective, plagued by low voter turnout, low participation and led by “wannabes.”<sup>86</sup>

Still, with such reform, city officials had something they could point to, to offer some sense of government responsiveness — a reason secession was not necessary.<sup>87</sup>

### *The Power of Change*

The Valley is also a different place than it was 20 years ago. The demographic landscape that was fertile ground for secessions decades ago is waning.

“That revolt was strongest among homeowners, White voters and among conservative voters, who don’t represent the majority of the Valley,” Sonenshein said.<sup>88</sup>

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<sup>83</sup> Los Angeles Charter, art. IX, [https://codelibrary.amlegal.com/codes/los\\_angeles/latest/laac/0-0-0-3722](https://codelibrary.amlegal.com/codes/los_angeles/latest/laac/0-0-0-3722).

<sup>84</sup> City of Los Angeles, Department of City Planning, “Area Planning Commissions,” (Jan. 22, 2022), <https://www.arcgis.com/home/item.html?id=da2e20211f8c4c2ca94a6c49e0b5e091>.

<sup>85</sup> Interview with Close, Nov. 9, 2021.

<sup>86</sup> Interview with Boland, Nov. 17, 2021.

<sup>87</sup> Sonenshein and Hogen-Esch, “Politics of Secession,” 478.

<sup>88</sup> Interview with Sonenshein, Nov. 18, 2021.

As of the 2020 Census, 762,316 — 41.5 percent — of the Valley's 1.84 million residents are Latino — near parity with 834,146 Whites in the region.<sup>89</sup> In 1990, when Boland took office in the state Assembly with a goal of breaking the Valley away, 56 percent of the population was White and Latinos comprised 32 percent of Valley residents. Today, 45.4 percent of the Valley is White.

With the change came profound political shifts — particularly in the northwest Valley, where movements like Prop. 13 and secession drew much of their support.

In 2019 — following the departure of L.A. City Councilman Mitch Englander — a race for City Council's northwest Valley seat pitted progressive Loraine Lundquist against John Lee, the presumed heir apparent to the succession of right-leaning elected officials from what was known as the city's most conservative seat. But the race was exceedingly close. In the runoff election, the final tally separated the candidates by only 50 votes. Lee would go on to win the seat in the general election, but for many observers it signaled that the politics of the northwest Valley — Porter Ranch, Northridge, Granada Hills, West Hills and parts of North Hills and Reseda — were changing.

Since 2000, the number of Republicans in the district has dropped from 37 percent of registered voters to 24 percent in 2018, while Democrats remained around 44 percent of voters.<sup>90</sup>

### *The Power of History*

History suggests that secession is unlikely, though it leaves the door open.

In 1976 and 1978, the northern L.A. County communities of Saugus, Agua Dulce, Newhall, and Canyon Country tried to break away into Canyon County I and Canyon County II. In 1977, El Segundo and Hermosa Beach tried to break away into South Bay County and Peninsula County. And there were similar attempts in Santa Barbara, Fresno, and San

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<sup>89</sup> United States Census Bureau, San Fernando Valley CCD, Los Angeles County, California (2020 Decennial Census), <https://data.census.gov/cedsci/profile?g=0600000US0603792785>.

<sup>90</sup> Olga Grigoryants, "John Lee takes lead in race to represent Council District 12 and may elude runoff," *L.A. Daily News*, Mar. 3, 2020, <https://www.dailynews.com/2020/03/03/john-lee-takes-early-lead-in-race-to-represent-council-district-12>.

Bernardino counties.<sup>91</sup> The attempts had “remarkably similar patterns”:<sup>92</sup> better representation, expanded local control over land-use and stronger services at lower tax rates. Each one got to a vote — what Hogen-Esch noted was an achievement in itself and shows such issues fuel the effort to bring attempted secessions to a vote. But in each case at the county level, a concurrent majority was needed. Voters countywide rejected the measures, in effect illustrating their fear of a loss of tax base.<sup>93</sup> This shows that while a successful secession is formidable, it’s not out of the realm of possibility for the Valley, where so much of the city’s voting power resides.<sup>94</sup>

### *The Power of Trust*

Future secessionists would need to find ways to pierce layers of distrust among communities of color to expand their coalition and voting strength. As it is, many Latinos in the Valley’s northeast area, despite reasons for being an agreeable audience for the idea of secession, have worked within the city’s current system to invest in leaders from the area. By 2000, Latinos — who by then were 42 percent of the Valley’s population<sup>95</sup> — were beginning to see a generation of Latino leaders come onto the scene. Richard Alarcon had gone from L.A. city councilman, representing the Valley’s 7th District and its heavily Latino population in the northeast San Fernando Valley, to state senator. Alex Padilla would follow in Alarcon’s footsteps in the L.A. City Council, ultimately becoming the council’s first Latino president (and later U.S. Senator). Since 2013, Nury Martinez has represented the area — and was elected City Council president in 2019. For years, Latino Valley leaders had been battling for the day when they had some representation downtown at City Hall. That battle was rooted in the northeast San Fernando Valley, where Latinos had good reason for being open to arguments from secessionists.<sup>96</sup> By the end of the twentieth century, Pacoima had the highest unemployment

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<sup>91</sup> Hogen-Esch and Saiz, “An Anatomy of Defeat,” 41.

<sup>92</sup> *Ibid.*, 46.

<sup>93</sup> *Ibid.*, 47.

<sup>94</sup> *Ibid.*

<sup>95</sup> deGuzman, “Resisting Camelot,” 30.

<sup>96</sup> *Ibid.*, 36.

rate in the San Fernando Valley, at 9.6 percent.<sup>97</sup> More than 30 percent of Pacoimans fell under the poverty line. Housing shortages, healthcare inequities that blanketed the northeast Valley, and a crumbling infrastructure were all reasons why many organizers in the Valley decried the northeast Valley as “nothing more than a ‘forgotten stepchild.’”<sup>98</sup>

But many saw those conditions as a result of the actions of the very generation who were leading the secession. Irene Tovar, then a community organizer who as head of the Latin American Civic Association opposed the secession, like Boland grew up in the Valley, but in a very different part: Pacoima. She pointed to “two Valleys” in the 1950s and 1960s — “There was a northeast Valley and the west Valley and the west Valley was White Valley.”

“We knew if there was a new city, the leadership that was advocating for secession were the ones who never helped us,” Tovar said.<sup>99</sup> They were the ones who segregated us. They were against the things we represented as a community. Remember, there had been two Valleys that would have been reinforced more because of their leadership. We’d have a better chance of succeeding in a city of Los Angeles like it is now versus a Valley city. The leadership, . . . we knew who they were. They dominated its politics, its social life, its cultural life. And we were left out of that — the opportunity for betterment for our community. I was very outspoken against it.”<sup>100</sup> She still is.

“It’s almost the same issues today,” she said.<sup>101</sup> “We’d still be left with a city that has a lot of poverty. A lot of homeless. It would reinforce poverty.”

Any movement would have to disassociate itself from a difficult past that prompted much distrust among minority–majority populations and find ways to gain trust.

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Interview with Irene Tovar, Nov. 16, 2021.

<sup>100</sup> It was Tovar, then the head of the Latin American Civic Association, who said just before a meeting on Valley secession in 1999 that “there are racial implications to secession. . . . We’re not just going to follow like sheep.” Miguel Bustillo, Latino Activists Planning Summit on Secession, *Los Angeles Times*, Dec. 3, 1998.

<sup>101</sup> Interview with Tovar, Nov. 16, 2021.



## CONCLUSION

Policymakers still reference the Valley's distinctiveness from the rest of L.A. when pushing for change at city and county levels. The Sherman Oaks Homeowners Association — and Close — loomed large in the city's recent fractious redistricting debate. Even on the county redistricting level, L.A. City Councilman Paul Krekorian made an eleventh-hour plea to the redistricting commission to keep the Valley “whole” in one supervisorial district. The commission was reapportioning boundaries based on population change in the 2020 U.S. Census. He told the commission:

The Valley has for the last century had a distinctive identity, and today we have distinctive issues around public transportation planning, air quality, water quality, public health, housing — all issues that the Valley as a whole has common interests in, and yet we don't have any guarantee that a resident of the Valley, despite having 2 million people living here, will have a representative on the Board of Supervisors or on the Metro board.<sup>102</sup>

Hogen-Esch suggests that a new secession movement could resurface. “This is something that definitely rears its head every generation or two,” he said. But taking hold today will be a challenge. Not only will this group need to change the law. It will have to broaden itself.

“If there's a reincarnation of Valley secession it will have to be from a whole broad spectrum of Valley interest groups.”<sup>103</sup>

Paula Boland, still living in the Valley, continues to lament the lack of “fair share.” For Boland, the Valley may have lost its chance.

“You don't have the passion we had over twenty years ago.<sup>104</sup> There was a cohesiveness in the Valley — there was an understanding,” she said. “People might say they want to do it, but I don't see the commitment that there would ever be enough people to get together and work, and believe in it and do it.”

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<sup>102</sup> Ryan Carter, “LA County Redistricting: Map debate takes an 11th-hour turn for San Fernando Valley,” *L.A. Daily News*, Dec. 4, 2021, <https://www.dailynews.com/2021/12/04/la-county-redistricting-map-debate-takes-an-11th-hour-turn-for-san-fernando-valley>.

<sup>103</sup> Interview with Hogen-Esch, Nov. 8, 2021.

<sup>104</sup> Interview with Boland, Nov. 17, 2021.

Still, the movement changed the law enough to make secession at least a possibility, which in itself was a significant victory. If a movement did take root today, a coalition would have to emerge able to circumvent an exclusionary history, and engage and neutralize coalitions set up to fight secession. It would also have to be broad enough to negotiate with Sacramento legislators to change the law of concurrent majorities. Given reform that has taken place in L.A., and lingering distrust within minority communities, that kind of cohesion is not likely.

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# WIND OF (CONSTITUTIONAL) CHANGE:

## *Amendment Clauses in the Federal and State Constitutions*

SIMON RUHLAND\*

### I. INTRODUCTION

“We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . .”<sup>1</sup> On May 2, 2022, an anonymous Supreme Court insider leaked an explosive draft opinion penned by Justice Alito that sent the legal world and large swaths of civil society into a frenzy.<sup>2</sup> Law professors<sup>3</sup> and cable news

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<sup>1</sup> Thomas E. Dobbs v. Jackson Women’s Health Organization et al. 5 (draft, 2022), at <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504>.

<sup>2</sup> Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022), at <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

<sup>3</sup> Mary Wood, *Unpacking the Supreme Court Leak: Professor Douglas Laycock Discusses Dobbs Breach*, UNIVERSITY OF VIRGINIA SCHOOL OF LAW (May 3, 2022), at <https://www.law.virginia.edu/news/202205/unpacking-supreme-court-leak>.

commentators<sup>4</sup> publicly debated what *Dobbs* would mean for women's rights and landmark cases of civil liberties. Citizens around the country took to the streets to protest against the judgment.<sup>5</sup> But it seems that, privately, some wondered why exactly it is that the right to abortion is not "protected by any constitutional provision," be it implicit or explicit. After all, a majority of Americans are in favor of such a right.<sup>6</sup> Within 24 hours of the leak, Google reported a 500 percent uptick in searches for the search term "amendment."<sup>7</sup> This is a familiar phenomenon. Whenever a breaking story highlights a mismatch between popular opinion and constitutional jurisprudence, Americans start to wonder how they could amend their constitution. Searches for "amendment" peaked, for example, in January 2021. With searches up 370 percent from December 2020, citizens asked Google what the Constitution had to say about ousting a president and rioters storming the Capitol. And all too often, when they found out the Constitution didn't say what they wanted it to, they started to wonder how that could be changed.

Inevitably, this lands them on one of the many articles that deal with either the necessity of new amendments,<sup>8</sup> impossibility thereof,<sup>9</sup> or both.<sup>10</sup> Such coverage is not just sensationalism. The last amendment

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<sup>4</sup> Kevin Breuninger, *How the Supreme Court went from Cementing Abortion Rights in Roe v. Wade to Drafting their Demise*, CNBC (May 6, 2022), at <https://www.cnn.com/2022/05/06/how-supreme-court-went-from-roe-v-wade-to-drafting-opinion-to-overturn-it.html>.

<sup>5</sup> Joseph Guzman, *Nationwide Protests Planned in Response to Leaked SCOTUS Abortion Ruling*, THE HILL (May 5, 2022), at <https://thehill.com/changing-america/respect/accessibility/3478491-nationwide-protests-planned-in-response-to-leaked-scotus-abortion-ruling>.

<sup>6</sup> *America's Abortion Quandary*, PEW RESEARCH CENTER (May 6, 2022), at <https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary>.

<sup>7</sup> *Amendment, April 29–May 6, 2022*, GOOGLE TRENDS, at <https://trends.google.com/trends/explore?date=now%207-d&geo=US&q=amendment>.

<sup>8</sup> Ana Becker, *We the People*, N.Y. TIMES (AUG 4, 2021), <https://www.nytimes.com/interactive/2021/08/04/opinion/us-constitution-amendments.html>.

<sup>9</sup> Eric Posner, *The U.S. Constitution is Impossible to Amend*, SLATE (May 5, 2014), at <https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html#:~:text=It%20provides%20that%20an%20amendment,two%2Dthirds%20of%20the%20states>.

<sup>10</sup> Dave Levinthal, *Why a Constitutional Amendment Enshrining Abortion Rights is Next to Impossible*, INSIDER (May 2, 2022), at <https://www.businessinsider.com/roe-v-wade-abortion-rights-constitution-2022-5>.

passed in 1992. Roughly 10 percent of voters are under the age of 25,<sup>11</sup> meaning that during their lifetimes, the Constitution has remained completely static. This is because the American constitution is notoriously resistant to change. It is so resistant, in fact, that when Donald Lutz<sup>12</sup> and later Zachary Elkins, Tom Ginsburg, and Tom Melton<sup>13</sup> turned the ease (or difficulty) of amendment into a numerical score, Article V of the U.S. Constitution ranked most difficult in a field of some 900 historic and contemporary amendment provisions.

This is no accident. Andrew Johnson was of the opinion that “[a]mendments to the Constitution ought to not be too frequently made; . . . [if] continually tinkered with it would lose all its prestige and dignity, and the old instrument would be lost sight of altogether in a short time.”<sup>14</sup> This paper discusses two historic developments that played a crucial role in lending the amendment process its rigidity: the debates on Article V at the Constitutional Convention in Philadelphia and the rise of political parties in the early republic. It will then contrast the amendment procedure of the federal constitution with that in California and other states, which are plagued by excessive length rather than underinclusive brevity. Lastly, it will discuss legislative amendment clauses that are part of the constitutions of Delaware and Germany as possible solutions for both issues.

## II. AMENDING THE FEDERAL CONSTITUTION

### *History of the Amendment Clause*

“Depending on one’s normative perspective, [the difficulty of amending the U.S. Constitution] is seen either as a reflection of the Constitution’s genius

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<sup>11</sup> *Number of Voters as a Share of the Voter Population, by Age*, KAISER FAMILY FOUNDATION (Nov. 2020), at <https://www.kff.org/other/state-indicator/number-of-individuals-who-voted-in-thousands-and-individuals-who-voted-as-a-share-of-the-voter-population-by-age/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

<sup>12</sup> Donald Lutz, *Towards a Theory of Constitutional Amendment*, 88 AM. POL. SC. REV. 355 (1994).

<sup>13</sup> ZACHARY ELKINS, TOM GINSBERG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 101 (2009).

<sup>14</sup> Andrew Johnson, Speech at the Capitol in Washington, D.C. (Feb. 22, 1866).

and a key to its endurance, or as a barrier to modernization.”<sup>15</sup> When the Constitutional Convention was in session in Philadelphia, most attendees did not see the impossibility of amending it as a reflection of constitutional genius. Just a few years after the Articles of Confederation were ratified, the constitutional order in the young republic was about to collapse. The Articles had proven to be too confederal and too restrictive of the new government. Besides featuring paralyzing oversights like the federal government’s inability to regulate commerce or to raise taxes, it provided for no means of amending the document upon ratification unless all states agreed on a proposed change, which essentially fossilized the status quo of 1777.<sup>16</sup> Hence, a handful of state representatives were summoned to Annapolis in 1786 to revise how the Articles dealt with trade and commerce. Quickly, they came to the conclusion that this narrow objective was not sufficient to fix the Articles of Confederation and instead came to agree that “the Idea of extending the powers of their Deputies, to other objects, than those of Commerce, which has been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future Convention.”<sup>17</sup> A year later, this convention then assembled in Philadelphia. Its “sole and express purpose” was to revise the Articles of Confederation.<sup>18</sup> In other words, amendment procedures are at the core of U.S. constitutional history.

Unsurprisingly, the debate around Article V was kicked off by deciding that the Constitution was to be amendable at all. The delegates “[r]esolved that the amendments which shall be offered to the confederation by the Convention ought at a proper time or times after the approbation of Congress to be submitted to an assembly or assemblies of representatives, recommended by the several Legislatures, to be expressly chosen by the People to consider and decide thereon.”<sup>19</sup>

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<sup>15</sup> Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at all?* 13 INT’L J. CON. L. 686 (2015).

<sup>16</sup> RICHARD R. BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 245 (2009).

<sup>17</sup> *Address of the Annapolis Convention*, NATIONAL ARCHIVES, FOUNDERS ONLINE (Sept. 14, 1786), <https://founders.archives.gov/documents/Hamilton/01-03-02-0556>.

<sup>18</sup> JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789: VOLUME XXXII. 1787 JANUARY 17–JULY 20 (Roscoe R. Hill ed., 1936).

<sup>19</sup> 2 RECORD OF THE FEDERAL CONVENTION OF 1787 85 (Max Farrand ed., 1911).

What exactly this meant, they were not sure. The debate quickly focused on one question: Should the power of amendment be given to the people or to the states? The faction wanting to empower the people could count on important advocates. After Oliver Ellsworth and William Patterson had moved to entrust the state legislatures with the power of amendment, George Mason of Virginia was the first to speak on their proposal. “A reference of the plan to the authority of the people,” he exclaimed, was “one of the most important and essential of the Resolutions.”<sup>20</sup> Mason argued that because the state legislatures were products of the states’ constitutions, the power to amend should thus be granted to special conventions, elected directly by the people.<sup>21</sup> Nathaniel Gorham of Massachusetts and fellow Virginians Edmund J. Randolph and James Madison concurred with Mason. Madison pointed out that a constitution was no treaty. To him, changes to the constitution would make “essential inroads on the State Constitutions.” Allowing state legislatures to amend a constitution would mean “that a Legislature could change the constitution under which it held its existence.”<sup>22</sup> But if the existence of a constitution rested on the shoulders of the people, then they, too, should have the authority to amend it.

Outside the Convention, the Antifederalists also had strong opinions about proposed Article V. They, prophetically, pointed out the risks of bad faith politics and obstructionism by a minority of states. Patrick Henry, who had refused a call to serve on Virginia’s delegation to the Convention, expressed fear “that the most unworthy characters may get into power, and prevent the introduction of amendments.” To him, “[t]o suppose that so large a number as three-fourths of the states will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous.”<sup>23</sup> He went on to point out the undemocratic nature of the draft amendment clause: “[F]our of the smallest states, that do not collectively contain one tenth part of the population of the United States, may obstruct the most salutary and necessary amendments. Nay, in these four

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<sup>20</sup> *Id.* at 88.

<sup>21</sup> *Id.* at 89, 90; *see also* BEEMAN, *supra* note 16, at 245.

<sup>22</sup> *Id.* at 93.

<sup>23</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 49 (Jonathan Elliot ed., 1845), [https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=003/lled003.db&recNum=60&itemLink=D?hlaw:l:/temp/~ammem\\_LAQ1::%230030061&linkText=1](https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=003/lled003.db&recNum=60&itemLink=D?hlaw:l:/temp/~ammem_LAQ1::%230030061&linkText=1).

states, six-tenths of the people may reject these amendments.” These lines have aged well; they are still an apt summary of the ills plaguing Article V.

Yet, the proponents of popular empowerment and their arguments did not prevail. To those in favor of having state legislatures amend the federal constitution, there was no need to directly empower the people in the first place. Elbridge Gerry, like Nathaniel Gorham a member of the delegation of Massachusetts, “could not see any ground to suppose, that the people will do what their rulers will not. The rulers will either conform to or influence the sense of the people.” On the contrary, he thought that the people “would never agree on any thing.”<sup>24</sup> Oliver Ellsworth was more cynical: “If there be any Legislatures who should find themselves incompetent to the ratification, he should be content to let them advise with their constituents and pursue such a mode as wd be competent.” He believed that “more was to be expected from the Legislatures than from the people.” But he also had historical fact on his side: “To whom have Congs. applied on subsequent occasions for further powers? To the Legislatures; not to the people. The fact is, that we exist at present . . . as a federal society . . .”<sup>25</sup> This seemed to convince the delegations at Philadelphia. All but one voted in favor of submitting amendments to the legislatures in the states.<sup>26</sup> The “populists” had to accept defeat by the “statists.” One year after the debates in Philadelphia, former “populist” James Madison, writing as Publius, published *Federalist 43* and came to praise Article V:

The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments

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<sup>24</sup> *Id.*, vol. 5, at 353, [https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=005/lled005.db&recNum=374&itemLink=D?hlaw:1./temp/~ammem\\_Stzt::%230050375&linkText=1](https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=005/lled005.db&recNum=374&itemLink=D?hlaw:1./temp/~ammem_Stzt::%230050375&linkText=1).

<sup>25</sup> *Id.*, vol. 5, at 354, [https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=005/lled005.db&recNum=375&itemLink=D?hlaw:1./temp/~ammem\\_2574::%230050376&linkText=1](https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=005/lled005.db&recNum=375&itemLink=D?hlaw:1./temp/~ammem_2574::%230050376&linkText=1).

<sup>26</sup> BEEMAN, *supra* note 16, at 246.



to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.<sup>27</sup>

Once this was settled, the framers still had to decide about the precise modalities of the amendment procedure. On August 6, 1787, the delegates decided that an application by two-thirds of the states would suffice to call a constitutional convention.<sup>28</sup> But one month later, on September 10, Elbridge Gerry voiced concern that this rule would allow a majority of states to “bind the Union to innovations that may subvert the State-Constitutions altogether.”<sup>29</sup> Hamilton added that states would “not apply for alterations but with a view to increase their own powers.”<sup>30</sup> Finally, they agreed on the procedure as we know it today: a two-thirds majority in Congress may submit amendments to the states, three-quarters of which then have to vote in favor of the proposal.<sup>31</sup>

It was clear that this design of Article V was not meant to serve the people or to make sure that the Constitution kept up with the political and social zeitgeist of a majority of Americans. Instead, it was meant to protect the states against tyranny by other states or by the federal government. During the Convention, Hamilton stated, “There was no greater evil in subjecting the people of the U. S. to the major voice than the people of a particular State.”<sup>32</sup> And a year after the Convention had ended, he wrote to the people of New York:

[H]owever difficult it may be supposed to unite two thirds or three fourths of the State legislatures in amendments which may affect local interests [there can be no] room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.<sup>33</sup>

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<sup>27</sup> THE FEDERALIST NO. 43, at 278–79 (James Madison) (Clinton Rossiter ed., 1961).

<sup>28</sup> 2 RECORD OF THE FEDERAL CONVENTION, *supra* note 19, at 188.

<sup>29</sup> *Id.* at 557, 558.

<sup>30</sup> *Id.* at 558.

<sup>31</sup> *Id.* at 559; of course, Article V now also features two alternative modes of amendment.

<sup>32</sup> *Id.* at 558.

<sup>33</sup> THE FEDERALIST, *supra* note 27, No. 85, at 526 (Alexander Hamilton).

In essence, the difficulty of getting three-quarters of the states to accept an amendment was a conscious design choice and not an unexpected flaw. But as the past 230 years have shown, the delegates' fears of activism and even active bullying by some states were unfounded. On the contrary, it is the states that have had a foot on the brake when it comes to codifying social progress. If not for their hesitancy to amend the Constitution, we would have a constitutional ban on child labor, an amendment protecting equal rights, and D.C. would be the fifty-first state of the Union.<sup>34</sup> And those are just the proposed amendments that made it through Congress. All too many proposals died there, as members of Congress know all too well that if not Congress, the state legislatures would kill the proposals. Truly, "it is an unfortunate reality . . . that Article V, practically speaking, brings us all too close to the Lockean dream (or nightmare) of changeless stasis."<sup>35</sup>

### *Amendments and Partisanship*

Of course, neither the Framers nor the states deserve all the blame. Raging partisanship in Congress has made it virtually impossible to get consensus on political matters ranging from ambassadorial confirmations to combating climate change. To change the Constitution, two-thirds of both the House and the Senate need to vote in favor of the proposed amendment. Such clauses disproportionately empower small, vocal minorities, especially if they stand to gain from the status quo. In light of this, achieving the constitutionally mandated supermajorities in both chambers of Congress seems to be a thing of the past. This poses the question: How did we get here?

When Article V was drafted, the Framers did not expect the rise of unfettered partisanship and bad-faith politics. Oliver Ellsworth's advice to lawmakers suggesting they ask for help if they do not feel competent to form an opinion is of course cynical, but it also contained an ounce of truth. There was still a widespread belief that legislatures would follow the better argument, vote in favor of the greater good, have the intellectual honesty to seek out advice, and not deal favors to interest groups.

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<sup>34</sup> Michael J. Lynch, *The Other Amendments: Constitutional Amendments That Failed*, 93 L. LIBR. J. 303 (2001).

<sup>35</sup> SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 21 (2006).

Holding this ideal high, the Framers were terrified of the formation of parties, fearing that they would erode the political culture of the young republic. John Adams, then residing in Amsterdam, stated in a 1780 letter to Jonathan Jackson, who had just served as a delegate to the Constitutional Convention of Massachusetts, “There is nothing I dread So much, as a Division of the Republick into two great Parties, each arranged under its Leader, and concerting Measures in opposition to each other.”<sup>36</sup>

But it did not take long until partisanship started to creep up on the founders. The rift between Federalists and Antifederalists gave them an early taste of what was to come. In May of 1789, Thomas Jefferson, then minister to France, wrote a letter to John Adams. The summer before, civil unrest had shaken major French cities and in January, the Estates General was summoned to assemble in Paris later that spring.<sup>37</sup> Jefferson witnessed the growing divisions and tensions between factions in France firsthand. Indeed, just weeks after sending his letter to Adams, revolution broke out in Paris. Now, he felt pressed to declare whether he was affiliated with the Federalists or the Antifederalists, when the newly formed federal government was just a week old.

I am not a Federalist, because I never submitted the whole system of my opinions to the creed of any party of men whatever in religion, in philosophy, in politics, or in any thing else where I was capable of thinking for myself. Such an addiction is the last degradation of a free and moral agent. If I could not go to heaven but with a party, I would not go there at all.<sup>38</sup>

Certainly, Jefferson’s experience in France shaped his fear of the impact parties might have on American political culture. He was concerned about the free flow of ideas and independent thinking, without which parties would come to poison the practicability of the amendment process.

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<sup>36</sup> *From John Adams to Jonathan Jackson* (Oct. 2, 1780), <https://founders.archives.gov/documents/Adams/06-10-02-0113>.

<sup>37</sup> The Editors of Encyclopaedia Britannica, *French Revolution*, ENCYCLOPEDIA BRITANNICA (Sept. 10, 2020), at <https://www.britannica.com/event/French-Revolution>.

<sup>38</sup> *From Thomas Jefferson to Francis Hopkinson* (March 13, 1789), <https://founders.archives.gov/documents/Jefferson/01-14-02-0402>.

The American people got a last warning by George Washington as he left office. In his Farewell Address, he cautioned about the ruthlessness of parties and their officials. In his view, they served

to organize faction, to give it an artificial and extraordinary force; to put, in the place of the delegated will of the nation the will of a party, often a small but artful and enterprising minority of the community; and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill-concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common counsels and modified by mutual interests.

He went on to predict that

they are likely, in the course of time and things, to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.<sup>39</sup>

Unfortunately, by that time, the Constitution had already been ratified and Article V embodied the final decision on its amendment procedure. It was too late to account for rising partisanship and the dangers associated with it.

### *Amendments as a Reflection of Constitutional Moments*

So far, we have seen how the states were empowered in the amendment procedure at the expense of the people, and how the framers failed to make Article V party-proof until it was too late. Together, this has led to an increasing inability to amend the Constitution. In the eyes of some, this is a good thing. John O. McGinnis and Michael B. Rappaport, for example, argue that supermajority rules — like those of Article V — are “a sound method of producing legitimate and desirable entrenchments.”<sup>40</sup> This may

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<sup>39</sup> George Washington, *Farewell Address* (1796), [https://avalon.law.yale.edu/18th\\_century/washing.asp](https://avalon.law.yale.edu/18th_century/washing.asp).

<sup>40</sup> JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 11 (2013).

be true in theory. But has it worked out in practice? Are the entrenchments caused by Article V legitimate and desirable?

In 1993, Bruce Ackerman published the first volume of his *We the People* trilogy.<sup>41</sup> There, he develops a theory of “constitutional moments.” These are distinct points in history that “involve the overthrow of preceding ruling arrangements, including the important role in these arrangements played by established judicial doctrine” and are “extremely high-temperature, high-pressure bursts of energy that sweep across the whole political system.”<sup>42</sup> Originally, Ackerman felt that the United States had only had three of those moments: the Founding, Reconstruction, and the New Deal. Eventually, he accepted that there were more than three, including the Senate’s accession to congressional–executive agreements in 1945<sup>43</sup> and the Civil Rights Era of the 1950s and 1960s.<sup>44</sup>

In the late eighteenth century, constitutional moments and constitutional amendments went hand in hand. This started with the Bill of Rights. During the drafting of the Constitution, it was subject to heavy debate between Federalists and Antifederalists. Initially, it seemed like the Federalists and their opposition to the Bill would emerge from this debate triumphant. Hamilton slammed the idea of a codified Bill of Rights and instead pointed to the people’s *pouvoir constituant*: “Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.” And further: “[B]ills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous.”<sup>45</sup>

The Antifederalists, meanwhile, strongly believed that the Bill of Rights was necessary. For example, to “Brutus,” the much-quoted opponent of the Constitution, there was nothing distinct about a republic that would safeguard the people’s rights better than monarchies did. To him, elected

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<sup>41</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993).

<sup>42</sup> Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman’s “We the People,”* 108 *YALE L.J.* 2237, 2239 (1999).

<sup>43</sup> Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 *HARV. L. REV.* 799, 835 (1995); David Golove, *Against Free-Form Formalism,* 73 *N.Y.U. L. REV.* 1791 (1998).

<sup>44</sup> Bruce Ackerman, *The Living Constitution,* 120 *HARV. L. REV.* 1737, 1765 (2007).

<sup>45</sup> *THE FEDERALIST*, *supra* note 27, No. 84, at 513 (Alexander Hamilton).

politicians were as capable oppressors as monarchs: “But rulers have the same propensities as other men; they are as likely to use the power with which they are vested for private purposes, and to the injury and oppression of those over whom they are placed, as individuals in a state of nature are to injure and oppress one another.”<sup>46</sup>

Eventually, James Madison stepped up and lobbied for the Bill, convincing eleven of the fourteen states to ratify it.<sup>47</sup> A constitutional moment happened, and ten constitutional amendments were at its center.

The next of Ackerman’s moments happened just three-quarters of a century later. The young republic broke apart over the South’s fervent embrace of slavery. After its defeat in the Civil War, the Union demanded that the former Confederate states ban slavery, accept a significant reduction in state power, and give Black men the right to vote. It was not a legislative bill or a treaty between the North and the South that codified this, but three constitutional amendments.<sup>48</sup> The Waite Court initially gutted them, but their continued existence as the Thirteenth, Fourteenth, and Fifteenth Amendments ensures that the constitutional moment of Reconstruction remains part of this nation’s constitution.

The reflection of the next three constitutional moments in amendments is much murkier. The New Deal upended much of American economic policy and legislation. Yet its only reflection in the Constitution is the Twenty-first Amendment, which ended Prohibition. At least part of the rationale behind this amendment was that banning alcohol turned out to be exorbitantly costly for the taxpayer. Its enforcement alone cost \$300 million, and it caused a loss of \$11 billion in tax revenue.<sup>49</sup> During the Great Depression, this was a luxury the federal government could no

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<sup>46</sup> *Brutus II*, NEW YORK JOURNAL (November 1, 1787) at [https://archive.csac.history.wisc.edu/Brutus\\_II.pdf](https://archive.csac.history.wisc.edu/Brutus_II.pdf).

<sup>47</sup> RICHARD E. LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 178–255* (2006).

<sup>48</sup> *The End of Slavery and the Reconstruction Amendments*, BILL OF RIGHTS INSTITUTE, at <https://billofrightsinstitute.org/essays/the-end-of-slavery-and-the-reconstruction-amendments>.

<sup>49</sup> Michael Lerner, *Unintended Consequences of Prohibition*, PBS, at <https://www.pbs.org/kenburns/prohibition/unintended-consequences/>; Jesse Greenspan, *How the Misery of the Great Depression Helped Vanquish Prohibition*, History (January 2, 2019), at <https://www.history.com/news/great-depression-economy-prohibition>.

longer afford. But this is only a faint reflection of the New Deal. None of the core programs and institutions we now associate with the New Deal have found their way into the Constitution, nor has the extent to which it has transformed the role of the government in America's society and economy. The Twenty-first Amendment hardly does justice to the New Deal's importance as a fundamental constitutional moment.

The civil rights era suffered a similar fate. Its only reflection in the text of the constitution is the Twenty-fourth Amendment of 1964, which prohibits states from limiting suffrage to those who paid a poll tax. This amendment helped fight disenfranchisement of voters in the South and is an important achievement of the civil rights movement.<sup>50</sup> But it is not reflective of the movement's ambitious goals and far-reaching accomplishments. And the accession to congressional-executive agreements changed congressional dynamics and the way America interacts with the world so fundamentally that Ackerman deems it a constitutional moment, but it has left no trace in the text of the Constitution at all. Hence, in the almost six decades since 1964, no constitutional moment has been lifted to actual constitutional status.

This list is of course subjective and not exhaustive. One might disagree with the inclusion or exclusion of one event or another. But the general point stands: over time, moments of supreme historic importance are seeing decreasing reflection in the Constitution. Where, at the founding, social and political history had a strong influence on the text of the Constitution, this is not the case today. That is not for want of trying. The current Congress alone has made 117 proposals to change the Constitution.<sup>51</sup> All of them failed. And the proposed Equal Rights Amendment remains unratified. The last time a state legislature picked it up was in 2021, when the North Dakota Legislative Assembly actually rescinded its 1975 ratification.<sup>52</sup> Put simply, amendments and constitutional moments used to

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<sup>50</sup> Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63 (2009).

<sup>51</sup> Congress.gov (saved search), at <https://www.congress.gov/search?q=%7B%22congress%22%3A%5B%22117%22%5D%2C%22source%22%3A%22all%22%2C%22search%22%3A%22%5C%22Proposing+an+amendment+to+the+Constitution+of+the+United+States%5C%22%22%7D>.

<sup>52</sup> Nicholas Quallich, *North Dakota Legislature Rescinds 1975 Ratification of The Equal Rights Amendment*, KXNEWS (Mar. 19, 2021), at <https://www.kxnet.com/news/local-news/north-dakota-legislature-rescinds-1975-ratification-of-the-equal-rights-amendment>.

be intimately related. Just consider the Bill of Rights. Today, they seem to be strangers. Amending the federal constitution no longer plays a role in entrenching broad societal consensus.

### III. AMENDING STATE CONSTITUTIONS

If states truly are to be laboratories of democracy, as Justice Brandeis suggested in his *New State Ice v. Liebmann* dissent,<sup>53</sup> then their amendment provisions are exhibits A and B for it. On the one hand, their drafting histories show disagreement on what the best provisions were, followed by a gradual convergence over time resulting in remarkable homogeneity today. On the other hand, they have come to create environments in the state that are hyper-conducive to experimenting with different constitutional clauses. The excessively long constitutions of California and also of states like Texas and Alabama, enabled by lax amendment provisions, are testament to this.

#### *Revolutionary Constitutions*

In 1816, Thomas Jefferson commented on proposals to revise the 1776 constitution of Virginia. In a letter to Samuel Kercheval, he lamented, “Some men look at Constitutions with sanctimonious reverence, & deem them, like the ark of the covenant, too sacred to be touched.”<sup>54</sup> Since the first revolutionary constitutions were drafted, states had wrestled with this issue, unable to find a uniform answer to the questions: “Who should touch a constitution?” and “When should it be touched?”

In essence, there were three competing models of amendment clauses. Seven states, among them Virginia and New York, followed the lead of the Articles of Confederation and did not include any provision that allowed for subsequent amendments or delineated the process.<sup>55</sup> A second group of states, comprising South Carolina, Delaware and Maryland, allowed their

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<sup>53</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>54</sup> *From Thomas Jefferson to “Henry Tompkinson” (Samuel Kercheval), Proposals to Revise the Virginia Constitution* (July 12, 1816), <https://founders.archives.gov/?q=Ancestor%3ATSJN-03-10-02-0128&s=1511311111&r=2>.

<sup>55</sup> WALTER FAIRLEIGH DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* 118 (1910); the states were New Jersey, Connecticut, North Carolina, New Hampshire, and Rhode Island.



legislatures to vote on amendments. And lastly, four states had provisions that allowed for special constitutional conventions to make amendments.

These four states — Pennsylvania, Vermont, Georgia, and Massachusetts — were the first to let the people participate directly in a constitutional amendment procedure. Section 47 of the 1776 constitution of Pennsylvania, for example, holds that amendments “shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject.”<sup>56</sup> In these systems, popular input played a vital role in the amendment process. About four months later, the constitution of Georgia adopted a similar mechanism that took this idea one step further. Article LXVII of the state’s 1777 constitution states: “No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State.”<sup>57</sup> For the first time, citizens of a state were directly called upon not only to voice their opinions on an amendment or to publicly discuss it, but to decide its fate by casting a vote.

Other states were quick to adopt this model. In 1784 New Hampshire did away with its 1776 constitution and drafted a new one. While the previous constitution had no codified amendment clause, part of the new constitution was a provision that allowed for amendments if they were proposed by delegates to a constitutional convention and “approved by two-thirds of the qualified voters present, and voting upon the question”<sup>58</sup> Such supermajoritarian amendment rules can still be found today.

While other states followed suit, there were no new developments in amendment provisions until 1818. It was then that Connecticut decided it could no longer rely on its so-called “charter” of 1662 but that it needed a proper constitution.<sup>59</sup> Article XI contained this new constitution’s amendment provision:

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<sup>56</sup> PA. CONST. (1776), [https://avalon.law.yale.edu/18th\\_century/pa08.asp](https://avalon.law.yale.edu/18th_century/pa08.asp).

<sup>57</sup> GA. CONST., art. LXVII (1777).

<sup>58</sup> N.H. CONST. (1784), [https://en.wikisource.org/wiki/Constitution\\_of\\_New\\_Hampshire\\_\(1784\)](https://en.wikisource.org/wiki/Constitution_of_New_Hampshire_(1784)).

<sup>59</sup> WESLEY W. HORTON, *THE CONNECTICUT STATE CONSTITUTION: A REFERENCE GUIDE* (1993).

[I]f two thirds of each house . . . shall approve the amendments proposed . . . , said amendments shall . . . be transmitted to the town clerk in each town in this State; whose duty it shall be to present the same to the inhabitants thereof, . . . and if it shall appear . . . that a majority of the electors present at such meetings, shall have approved such amendments, the same shall be valid, to all intents and purposes, as a part of this constitution.<sup>60</sup>

With this provision, Connecticut established the now-familiar practice of amending the constitution by a proposal in the legislature (and not a convention or delegation as was the case in previous constitutions) which is subsequently adopted by popular vote.

Some believe that Alabama's constitution was the first to let citizens vote directly on proposed amendments during regular elections.<sup>61</sup> This is correct but does not show the full picture. Alabama was merely the first state to combine regular elections and votes on proposed amendments. As seen, it was in fact in Connecticut that the legislature and the people started working on the constitution hand in hand. From there on, the idea caught on. Today, all but one of the states require constitutional amendments to be accepted by the citizens after they are placed on the ballot either by the legislature or by a ballot proposition.<sup>62</sup> In nine states, amendment by way of a constitutional convention has even been struck from the constitution altogether.<sup>63</sup>

### *Excessive Change in the States*

Since then, state constitutions have exploded in length. Early constitutions were just a few thousand words long, which hardly changed for about a century. But once the responsibility over constitutional amendments was placed in the hands of two different entities — legislature and voters — as opposed to giving any one party (near) complete control over the process, the rate of amendment quickly picked up.

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<sup>60</sup> CONN. CONST. (1818), <https://collections.ctdigitalarchive.org/islandora/object/30002:22194671>.

<sup>61</sup> DODD, *supra* note 55, at 123; ALA CONST. (1819), [https://avalon.law.yale.edu/19th\\_century/ala1819.asp](https://avalon.law.yale.edu/19th_century/ala1819.asp).

<sup>62</sup> 53 THE COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 8 (2021).

<sup>63</sup> *Id.* at 11.

When the constitution of California was ratified in 1879, for example, it was about 8,900 words long. By the 1960s, amendments had caused it to grow to 75,000 words. This was deemed too long and convoluted, so a Constitutional Revision Commission was tasked with shortening it. It found that “too many amendments have been submitted and adopted”<sup>64</sup> and recommended cutting the document by an impressive total of 40,000 words, spread over several smaller proposals.<sup>65</sup> Californians got to vote on these proposals, but unfortunately, far from all recommendations were approved and, today, the constitution has surpassed its 1960s length, standing at 77,000 words. Other constitutions are doing even worse. The constitution of Alabama, for example, has been amended more than 900 times since its adoption in 1901 and has grown to an astonishing 403,000 words in length, making it the longest by far. For comparison, this is about 4.4 times more than the constitution of the runner-up, Texas.<sup>66</sup> Most of this length is due to a controversial provision that allows voters of just one county to single-handedly amend the constitution as long as the amendment only concerns this one county.<sup>67</sup>

Of course, constitutions that are this easy to amend and that are this flush with change are not reflective of constitutional moments either. In such systems, amendments do not come with “extremely high-temperature, high-pressure bursts of energy that sweep across the whole political system”<sup>68</sup> anymore, since change has become so commonplace. This is not just an academic problem. Early on, Californians felt that their constitution was getting out of hand and was awash with amendments that had nothing “constitutional” about them. In 1931, Charles Aikin observed in a short piece written for the *American Political Science Review* that “[t]he electorate has become so accustomed to approving or rejecting

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<sup>64</sup> Constitution Revision Commission, *Minutes of the Article XVIII Committee 2* (July 14, 1966).

<sup>65</sup> JOSEPH R. GRODIN, CALVIN R. MASSEY & RICHARD B. CUNNINGHAM, *THE CALIFORNIA STATE CONSTITUTION 19* (1993).

<sup>66</sup> THE COUNCIL OF STATE GOVERNMENTS, *supra* note 62, at 7.

<sup>67</sup> *Id.*; ALA. CONST., § 284.01; WILLIAM HISTASPAS STEWART, *THE ALABAMA STATE CONSTITUTION 242–43* (2016).

<sup>68</sup> Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman’s “We the People,”* 108 *YALE L.J.* 2237, 2239 (1999).

constitutional amendments that the man in the street refers to all proposals placed on the ballot as amendments.”<sup>69</sup> Little has changed. Today, clauses in the Californian Constitution stipulate that textbooks are to be used until the eighth grade<sup>70</sup> or that certain tax exemptions are applicable to buildings under construction.<sup>71</sup> This has nothing to do with the revered document a constitution should be and that citizens have come to expect. When the Golden State’s constitution was ratified, it was described as “a sort of mixture of constitution, code, stump-speech, and mandamus.”<sup>72</sup> California’s amendment practices have all but made sure that it has become much heavier on the code aspect and even lighter on the constitution aspect.

#### IV. A WAY OUT?

Neither the situation on a federal level nor that in the states is ideal. But is change likely? Certainly not with the federal constitution. While Article V could itself be changed, making amendments easier and more reflective of popular opinion,<sup>73</sup> is all but impossible to get supermajorities in Congress and the states that would vote to cut their own powers.

In California, the situation is somewhat different, but not much more hopeful. In the 1960s, California’s Constitutional Revision Commission remarkably managed streamlining the state’s constitution significantly. But many of those recommendations were defeated at the polls, and, more importantly, they failed to adequately address the roots of the problem. While a modest proposal was made to reform Article XVIII, which lays out the amendment procedure, by requiring votes on amendment proposals on two separate days,<sup>74</sup> some members of the Article XVIII Subcommittee

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<sup>69</sup> Charles Aikin, *The Movement for Revision of the California Constitution: The State Constitutional Commission*, 25 AM. POL. SC. REV. 337 (1931).

<sup>70</sup> CAL. CONST., art. IX § 7.5.

<sup>71</sup> CAL. CONST., art. XIII § 5.

<sup>72</sup> Henry George, *The Kearny Agitation in California*, 17 POPULAR SCI. MONTHLY 43, 445 (Aug. 1880).

<sup>73</sup> George Mader, *Unamendability in the Constitution*, 99 MARQUETTE L. REV. 841, 848 (2016).

<sup>74</sup> Constitution Revision Commission, *supra* note 64, at 2.

felt that even this was too much.<sup>75</sup> As a result, the provision ended up surviving the reform period of the 1960s and 1970s unscathed. As long as it is exceedingly easy to propose amendments, either through a ballot proposition or by a disinterested legislature, amendments will keep playing a subordinate role in constitutional moments.

But there is an alternative. Not all states suffer from the ills that plague the constitutions of California, Alabama, or Texas. Until now, Delaware has been the state of choice for corporate lawyers. Its 1,000,000 corporations — one for every Delawarean — are a testament to that.<sup>76</sup> For the most part, constitutional lawyers have overlooked the Diamond State. But it might be time to change that. Delaware is the only state in the Union that does not require its people to vote on constitutional amendments. Instead, it places the amendment process completely in the hands of the legislature. While it is counterintuitive that this would serve the people better, it actually means that state legislators have to take complete responsibility for the fate of the constitution. Unlike in California, they know that they would be punished at the ballot if the constitution deteriorated. This makes them trustees of the constitution of sorts. As a result, the state's constitution was not changed at all in 2020 and only 1.2 times per year on average since its inception, as opposed to Alabama's 8.1 times, California's 3.8 times, and Texas' 3.5 times.<sup>77</sup> This amendment system has also succeeded in preventing excessive length. Today, the Delaware Constitution is just 25,445 words in length, up from 7,495 in the original version of 1897. This is a rather modest increase that stayed well below the national average of 42,000.<sup>78</sup> In light of this unique attitude toward the amendment process, it seems like a fitting coincidence that Delaware was the only state in 1787 that objected to handing the power of amendment in Article V to the states.<sup>79</sup>

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<sup>75</sup> Constitution Revision Commission, *Article XVIII Minority Committee Report* (Oct. 1966).

<sup>76</sup> *About*, DELAWARE DIVISION OF CORPORATIONS, at [https://corp.delaware.gov/aboutagency/#:~:text=The%20State%20of%20Delaware%20is,made%20Delaware%20their%20legal%20home;Quickfacts:Delaware,U.S.Census\(July1,2021\),https://www.census.gov/quickfacts/DE](https://corp.delaware.gov/aboutagency/#:~:text=The%20State%20of%20Delaware%20is,made%20Delaware%20their%20legal%20home;Quickfacts:Delaware,U.S.Census(July1,2021),https://www.census.gov/quickfacts/DE).

<sup>77</sup> THE COUNCIL OF STATE GOVERNMENTS, *supra* note 62, at 5.

<sup>78</sup> *Id.* at 8.

<sup>79</sup> 2 RECORD OF THE FEDERAL CONVENTION, *supra* note 19, at 188.

States might be served well if they adopted this model for their own constitutions. But it might also be the better option for the federal constitution. Take Germany, for example. The European country is also organized as a federal state with separate constitutions for the federal and state levels. There, the amendment process requires two-thirds majorities in both chambers of parliament (Bundestag and Bundesrat), but it involves the states only indirectly (through the Bundesrat) and no popular votes at all. As a result, the Basic Law of the Federal Republic of Germany (the German constitution) has been amended about fifty-four times in the first sixty years of its existence, a rate quite comparable to that of Delaware. The German people, in the meantime, could trust that societal changes and constitutional moments would be reflected in the federal constitution. In the same time period, they hardly touched the sixteen state constitutions. There, the total number of amendments is between zero and thirty-six.<sup>80</sup> This shows two things: First, entrusting constitutional amendment to one sufficiently democratically legitimated branch of government calms amendment rates.<sup>81</sup> Second, if the people feel that the federal government is responsive to popular discourse and a gradually changing consensus, they feel less need to make changes in the state. For the U.S. Constitution, this would mean that changing Article V and making amendments more frequent as a consequence, would likely cause amendment rates in the states to slow down.

The examples of Delaware and Germany are quite different indeed. But this is a good thing. They show that certain design choices — legislative amendments, limiting the actors involved in amendment processes — work in a variety of contexts and on both a federal and a state level.

## V. CONCLUSION

Of course, neither changing Article V nor changing any of the states' amendment procedures is probable. The fact that a Constitutional Reform

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<sup>80</sup> Deutscher Bundestag Wissenschaftliche Dienste, *60 Jahre Grundgesetz – Zahlen und Fakten*, DEUTSCHER BUNDESTAG (2009), <https://www.bundestag.de/resource/blob/414590/7c0ab6898529d2e6d7b123a894dbeb8f/wd-3-181-09-pdf-data.pdf>.

<sup>81</sup> This would not be the case if, for example, the *states* had complete control over the amendment process of the *federal* constitution: see e.g., Charles L. Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963).

Commission in California could not even agree to recommend two readings instead of one should suffice as proof thereof. However, this paper is not intended as a policy brief. Instead, it aims to highlight the shortcomings of amendment clauses in the state and federal constitutions, investigate their historical origins, and finally show that better solutions are readily available. Importantly, it showed that both a lack of public participation and an excess thereof can be counterproductive to constitutional culture. Solid amendment provisions neither make it too easy to change the constitution, nor do they ensure that the constitution is all but fossilized. Instead, they give citizens an incentive to reach out and work together so that whatever is deemed a social consensus would be reflected in the constitution.

Luckily, we do not have to resort to our imagination or to foreign mechanisms to come up with a better solution. At least for states like California, Texas, or Alabama, this better solution has been tried and tested by one of their peers. Delaware has a model of amendment that has served the state well in preserving the constitution's "constitutionality," i.e., its limitation to essential social and political questions and its openness to change, while ensuring that the rate of amendment does not get out of hand. Today, Delaware is the only state with this model. But it needn't be. California, Texas, and Alabama all have multiple constitutions in their past. If they decide to add one more to that list, its drafters should take a look at the Diamond State. They might strike constitutional gold.

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ORAL HISTORY

JUSTICE  
EDWARD A. PANELLI

ASSOCIATE JUSTICE  
CALIFORNIA SUPREME COURT  
1985-1994



EDWARD A. PANELLI  
ASSOCIATE JUSTICE, CALIFORNIA SUPREME  
COURT, 1985-1994

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*Oral History of*  
**JUSTICE EDWARD A. PANELLI**

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*Preface to the Oral History of*

# JUSTICE EDWARD A. PANELLI

LAURA MCCREERY

In the spring of 2005, the idea began to take shape for a possible series of oral history interviews centered on Governor George Deukmejian's appointees to the California Supreme Court. Of his eight appointments in eight years — a great number by any measure — two, Justices Joyce Kennard and Marvin Baxter, were still serving on the court. Another two, Justices Marcus Kaufman and David Eagleson, had died in 2003 without having had the chance to add their spoken recollections to the archival record of California's judicial history.

But four of the justices appointed by Governor Deukmejian had retired from the bench and returned to private law practice in California: Chief Justice Malcolm Lucas and Associate Justices Armand Arabian,<sup>1</sup> John Arguelles, and Edward Panelli. With scholarly guidance from Professor Harry N. Scheiber, Stefan A. Riesenfeld Professor of Law and History at Berkeley Law School, I designed the California Supreme Court Oral History Project with them in mind, reasoning that interviews with several

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<sup>1</sup> A condensed version of Justice Arabian's oral history was published in the 2020 volume (no. 15) of *California Legal History*.

justices who served in overlapping time periods might yield a richer historical record than interviews with one or more justices in isolation.

In addition, such a series of interviews might shed new light on the unusual period before, during, and after California's November 1986 statewide election, in which voters — at odds with the California Supreme Court's handling of death penalty appeals — declined to retain three sitting members: Chief Justice Rose Bird, Associate Justice Joseph Grodin, and Associate Justice Cruz Reynoso. (Although Chief Justice Bird recorded no oral history before her death in 1999, her two colleagues have been interviewed by others,<sup>2</sup> and Justice Grodin also authored a book, *In Pursuit of Justice*, about his experiences.)

The 1986 election and its aftermath changed dramatically the makeup of the court and its leadership. Not only did three new justices join the court in 1987, but all three retired within two to four years, allowing Governor Deukmejian the opportunity to replace them, too, before his second term expired.

Happily, all four of the retired justices did, in time, consent to participate in the California Supreme Court Oral History Project. Scholars, students, and the bench and bar owe a debt of gratitude to each of them, as they have immeasurably enriched the record of California's judiciary. It was an honor and a personal pleasure to explore in detail their lives and careers, a lengthy process that each justice bore with dedication, humor, and kindness.

My discussions with each interviewee naturally varied in scope and style, but I urged them all to recall in some depth their entire judicial careers, not only their time on the California Supreme Court. Without exception the justices revealed a wealth of experience in California's court system over time. All four had been trial judges, and each emphasized the importance of that experience to their work on the state's highest court. I spent substantial time exploring their personal stories as well, so that future researchers may better understand who they were and why they made certain choices in their lives and careers.

Each justice had been retired from the bench for at least ten years at the time of interview. Users of this material should know that, as interviewees,

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<sup>2</sup> Justice Grodin's oral history and a condensed version of Justice Reynoso's oral history were published in the 2008 and 2015 volumes (nos. 3 and 10), respectively, of *California Legal History*.

they had the disadvantage of chronological distance from events they discussed. But while the human memory is imperfect, all four justices demonstrated remarkable recall, even across so many years.

Justice Panelli was the first of the four to record an oral history. All but one of our seven interview sessions (December 2005 through May 2006) took place at his office in San Jose in the late afternoon. He had an extraordinary ability to conclude a day of mediation and then take up our discussions with barely a pause. Razor sharp and always delightful, he traversed both the big picture and the fine points with ease. He later edited his draft transcript only lightly, preserving the informal, conversational quality that is so highly prized by historians, revealing as it does the small but telling details that exist nowhere else.

This project could not have begun in 2005 or continued thereafter without the financial support of the California Supreme Court Historical Society. The officers and board members have been true partners in a shared historical effort, as have the attorneys statewide whose individual contributions make the Society's programs possible. I thank them all. Justice Panelli's oral history also was supported in large part by the Santa Clara University Law School through the efforts of its dean, Donald Polden, and associate dean, Mary Emery.

I also acknowledge a personal debt of gratitude to Professor Harry N. Scheiber. He alone, through graceful and effective leadership at crucial moments, made it possible to complete the project.

In turn, he and I jointly acknowledge Professors Bruce Cain and Jack Citrin, former director and current director, respectively, of UC Berkeley's Institute of Governmental Studies, the project's administrative home. The staffs of the IGS library and business office helped immensely at every phase of my research.

The justices themselves are, of course, the heart of the California Supreme Court Oral History Project. Any success achieved in the service of history accrues to them, while any errors are mine alone.

Institute of Governmental Studies  
University of California, Berkeley  
December 2008

*Oral History of*

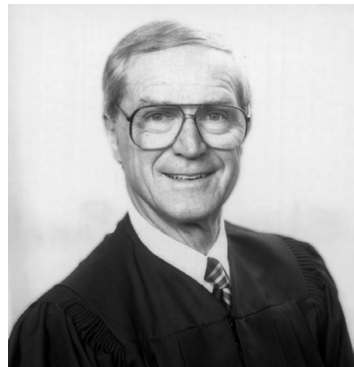
## JUSTICE EDWARD A. PANELLI

## EDITOR'S NOTE:

The oral history of California Supreme Court Associate Justice Edward A. Panelli (served 1985–1994) was conducted in 2005–2006 by Laura McCreery of the Institute of Governmental Studies at UC Berkeley,<sup>3</sup> with funding from the California Supreme Court Historical Society and Santa Clara University.

Justice Panelli's oral history is presented here in slightly condensed form, and it has received minor copyediting for publication.

— SELMA MOIDEL SMITH



EDWARD A. PANELLI

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<sup>3</sup> Edward A. Panelli, "From the Bottom to the Top: An Immigrant Son's Rise to the California Supreme Court, Capping Twenty-Two Years of Judicial Service on California's Superior and Appeals Courts, 1972–1994," an oral history conducted in 2005–2006 by Laura McCreery, Institute of Governmental Studies, University of California, Berkeley, 2009. 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: Justice Panelli, we like to start at the beginning, so I'll ask you to state your date of birth and then say a few words about where you were born.

PANELLI: I was born on November 23rd, 1931, in Santa Clara, California. I was born at home. My mother [Natalina Della Maggiora Panelli] was concerned that if she went to the hospital they might switch babies on her, so I was born in a house.

MCCREERY: Were you the first?

PANELLI: I was the fourth, but it was very interesting because the home that I was born in is now part of the Santa Clara University student center. When the university expanded southward, they acquired the property that I had been born in, and it presently has a plaque sitting there, saying that the hundredth justice of the California Supreme Court was born on this site.

MCCREERY: That's lovely. Where were your older siblings born, may I ask?

PANELLI: My oldest sister was born in Italy, and she passed away when she was six, in Italy. My parents then returned to the U.S., and my older brother [Aldo] and my sister [Angela] and I were all born in California. My brother and sister were born in San Jose, and I was born in Santa Clara.

MCCREERY: Tell me what you know of the family history in Italy.

PANELLI: I don't know much about my father's side of the family, but my mother's side, my mother was literally a feudal serf in Italy. She lived under the authority of a count. He kind of controlled their lives. My mother wanted to go to school, she wanted to be a schoolteacher, but the count says that, no, she needed to be working in the fields. So after the third grade, which I guess was a mandatory level of education, she had to go and work in his olive groves.

But as a young girl she made flax into yarn and then had a loom and did her own clothing and sheets. She was ninety years old when I went on the supreme court, and so she indicated she could not believe in the course of one lifetime that there'd be such a change.

But as I say, my dad's side, I just don't know much about it. He [Pilade Panelli] came to the U.S., I think, around the turn of the century and



worked in the California logging camps and then returned to Italy and married my mom, and then they came back.

MCCREERY: Something I read about you indicated that the family went back to Italy when you were quite young.

PANELLI: Right. At nine months old we went back to Italy. It was during the height of the Depression. My father and mother both were unskilled laborers, and so there wasn't much work here. But they had been pretty frugal, and they had saved some money, and they thought that with the money that they had that we could live better in Italy.

So we went to Italy and were there for about three and a half, four years, and then Mussolini was coming into power. My older brother, who was four years older than I was, had to join the *Balilla* they were called, which was the Mussolini youth group. My father didn't think that that was a very good idea, and so we left before any of the activities with Mussolini and Hitler came together.

We returned to Santa Clara to a place that was probably three blocks away from where I was born, which also, incidentally, is now owned by the university, so that when we returned to this country, obviously, I didn't speak English.

My brother and sister, who were two and four years older than I was, had a problem in school with the language. I was either in the kindergarten or first grade, so it really didn't mean too much, the language part. But they had to stay back for a year, and then when they became proficient in the language they moved up to their regular grade levels.

But I was freckle-faced, blond-haired, and the three people who really kind of taught me English and took care of me were a couple of Irish sisters and their brother, and they used to pass me off as this little Irish boy.

MCCREERY: What did the family think of that?

PANELLI: Even before I spoke English the Grahams would invite me over when they had some family gatherings, and they'd say, "This little Irish boy's going to sing you some songs." Of course, the only songs I knew were Italian, so it was kind of a joke, but my parents appreciated the fact that they looked after me.

MCCREERY: What sort of work were your parents able to get upon returning from Italy?

PANELLI: My father and mother both worked in the dried-fruit industry. Across the street from where we lived when we came back from Italy was a dried-fruit packing plant, and my dad worked there as well as my mother. My dad worked in the receiving of the fruit, and my mother worked with the women who sorted and packed the fruit. It was prunes, apricots, nuts, and that kind of stuff.

Also, my mother during the war — she was really quite a woman — worked in the packing house during the day, came home and cooked dinner, and then would go back and work in the cannery for eight hours. Yes, and it was difficult for her, because we didn't have hot water in the house. She washed our clothes by hand. We had an outdoor oven like an igloo where she baked bread. This she would do on Saturday afternoons, because she'd work half a day on Saturday and on Sunday she would catch up with the housework, so it was really — she had a real tough life.

MCCREERY: I see where you learned your work ethic, from your mom among others.

PANELLI: Yes.

MCCREERY: How common was that to have such things as an outdoor oven?

PANELLI: The area that we came back to in Santa Clara was an area of about six square blocks, and it happened that all the people who lived there all were Italians from generally the same part of Italy that we were from, but I think we were the only ones that had this oven. My mother would bake this bread, and you could smell it throughout the neighborhood, and so all the neighborhood kids would come over and ask for some of this bread. It got to the point where my mother says, "I'm baking all this bread. By the time everybody comes over, there isn't anything left." So she said, "Maybe we ought to decide to do something differently." So we finally at some point in time knocked it down.

MCCREERY: How long did she continue to work nights like that, as well as days?

PANELLI: This was during the war years, so I'd say probably three or four years she'd work the double shifts, eight hours here and then eight hours in the evening. As I say, for washing we'd have to heat the water. We had a wood stove, so when she did the washing and stuff, she'd have to heat the water on the stove, and so it was a tough deal.

MCCREERY: But that shows how your parents had to work as the Depression went on, and then the war, as you say.

PANELLI: Right. Then, as things improved, then the work was steadier, and so there wasn't that problem. There was always a concern they'd lose their jobs until the unions came in and they became unionized, where they had some sort of seniority rights. It was always, kind of, you were at the will of your supervisor. In fact, I was named after my father's boss, because my father thought that the fact that they'd named me after this fellow, he would be reluctant to lay him off.

They were tough deals, especially since my father was considerably older than my mother. He was fifty-four years old when I was born. So it was kind of tough for someone at his age even to learn English, whereas my mother went to night school, learned English, so she could get by okay. My dad's English was not very good.

MCCREERY: You described living in this little Italian-American enclave in Santa Clara. What about at your school? What was the student body like?

PANELLI: In Santa Clara in those days there were a lot of immigrants, Spanish, Portuguese, Mexican. Everybody else we called Irish, so that if you were German or English or Irish, or what we called Americans, you were Irish. I went to the public schools and it was a mix of people, because Santa Clara in those days, I think, only had six or seven thousand people. It's well over a hundred thousand now. When I graduated from Santa Clara High, I think there were 150 in our class, which was one of the biggest classes that they had had.

MCCREERY: Did your parents talk to you much about when the unions came in and their workplaces began to change?

PANELLI: Yes. One of the things you have to understand is that because they lacked education they really stressed education. They always viewed that education was the key to getting around the type of work that they

had to do. As a result, I tell people that if I ever had a problem in school I would never, ever tell my parents that I'd had a problem at school. Because if I thought things were tough in school, they would really have been tough at home, because their view was that these people are trying to teach you, and you'd better pay attention, and you'd better understand what it is that they want you to do.

So they were very supportive of that. My father said, "You don't want to have to work like a jackass like we're working," and so there was always this push for education. From the time I was probably seven or eight years old they said, "We want you to be a lawyer," so there was never any choice. Once I came home and I said I thought maybe I would become a doctor. They said, "No, you're not going to be a doctor. You're going to be a lawyer."

MCCREERY: Why a lawyer, do you know?

PANELLI: I had a cousin, Louis Pasquinelli, who was twenty-one years older than I was, a first cousin, who was a lawyer. There were others in the neighborhood who were older who had become lawyers, and so it was kind of one of those things that they just expected you to do. My sister they pushed to become a teacher, which she did. She taught school for thirty or forty years.

MCCREERY: And your older brother?

PANELLI: My older brother, being the oldest, he got drafted just as World War II was ending, and then, of course, when he got out of the service he was expected to help the family, so that he went to work. He worked for the Bank of America for maybe twenty years, and later became the director of personnel at Santa Clara University.

MCCREERY: So the family ties to that university are very strong and broad.

PANELLI: I've been on their board of trustees since 1964, and I was chairman of the board of trustees from 1984 to 2003, so it's a long time.

MCCREERY: Yes, it really is. I wanted to ask something else about your parents. Knowing that they had fled Mussolini's Italy, what were their own political views and interests here?

PANELLI: They were anti-Roosevelt. I think they probably registered — my dad didn't become a citizen until much later, but my mother — I think

she registered as a Democrat, but we never really talked politics much. I think part of it probably came from a concern that in Italy with Mussolini, you probably had to be careful what you said.

But they were not royalists. In those days Italy had a king and, of course, from my folks' socioeconomic level they did not particularly care for the king, who did little to better their lives. There was some sense that maybe Mussolini could turn it around, but they could see soon enough that things were not the way things should be.

But they never really talked much about politics at home. The resentment towards Roosevelt stems from their very strong dislike for the English. As a result, I think the issue was that because Roosevelt and Churchill were as close as they were, that had something to do with it. I don't remember who my mom voted for in the national elections, nor in the state elections. We really didn't discuss that very often.

MCCREERY: That's pretty common. Now, you said if you had a problem at school you wouldn't bring it to your parents. Who would you bring it to?

PANELLI: I wouldn't bring it to anybody. I'd just keep my mouth shut.

MCCREERY: The self-sufficient type?

PANELLI: If I talked back to the teacher, let's say, which I never did, but if I got in any kind of difficulty — like one day when walking to school. On the way to school there was this old Victorian house. It looked like a haunted house, and it had a wrought-iron fence. As kids, when we'd go to school, we'd get on this fence and walk on the top of it. The woman, who was about — I thought she was a hundred years old, she might have been forty — she reported us to the school. So we had to go to the principal's office, and we were disciplined for that.

I never went home and told my parents that Mr. Moore had me in his office and disciplined me for this, because my father would say, "You're disrespecting these people." Corporal punishment was not unknown, and as a result I'd keep my mouth shut.

I was fortunate that where we lived near the railroad tracks there were Mexican kids whose folks worked on the railroads and who were similarly situated. Then where we lived with most of the Italians, some worked where my mom worked, some were in the produce business, some had a restaurant, so you had that kind of mix.

Then as you moved further towards town there were other types of people. There was a friend of mine that I grew up with. He later became a professor at UC Riverside. He had a doctorate in chemistry and got a Fulbright scholarship. So I got a chance to meet all kinds of people at different levels both of interest and education. Some of the kids weren't interested in going on beyond high school. I guess in my high school class probably we had 150. Maybe only twenty or so went on to school, but the ones that did well — we had professors, we had school teachers, principals. So it was a very great experience, really.

MCCREERY: What sort of child were you?

PANELLI: Very self-sufficient. I started working when I was six years old.

MCCREERY: What was your first job?

PANELLI: I worked in a dried-fruit yard. When they cut apricots, they put them on a tray, and they then put them out in the sun to dry. I was a spreader of the cut apricots and placed them on the tray.

Then I conned my way into being a pit boy. The pits from the cut apricots went into boxes, which would later be cracked and the kernels used for lotions and that kind of stuff. As a pit boy, when the pit boxes were full you'd replace them with empty boxes, and you would get extra compensation for that.

Because I was small, I had other jobs. They would stack the dried-fruit trays after the apricots had been dried. Because the trays had been sitting in fields for drying, you'd get dirt on the bottom of them, and you didn't want the dirt to get on the fruit as they stacked them. So they would lift them, and I'd go under there with a broom and sweep the clinging dirt away. Because I was short I could do that. For that job you'd get paid by the hour.

I sold magazines, I sold newspapers, and later I shined shoes. I worked in a pear-packing plant where, when they packed the pears in boxes. I would stamp the boxes with the variety of pear and how many were in the box.

So I did anything. I probably shouldn't make an admission, but I forged my birth certificate so that I could get a work permit, because I wasn't old enough. One year the child labor people came out, and we had a place where we would hide. When they came on scene the boss would

blow a whistle, and so we'd know to go hide. My sons have told me, "Dad, they were trying to protect you." I said, "No, they were trying to take my job away." So it depends on one's perspective.

When I was about twelve, thirteen years old, one summer I made more than my dad did, because of working longer hours. But you never got paid time and a half. I worked in the fields. As I got older I worked in farms. We had a lot of truck farms. In fact, one was where the San Jose airport is now. There were farms all over there, and I worked on them. They raised celery, onions, and cabbage and that kind of stuff, so I did all of that kind of work. So when they start talking about working with a short hoe, I worked with a short hoe.

MCCREERY: Oh, yes. That became a big thing later on, didn't it?

PANELLI: Yes, yes, it did.

MCCREERY: It doesn't sound like you had much free time, but what were your other interests as a youngster?

PANELLI: I didn't have much free time. When I was real young, when we first came from Italy, we lived next to a blacksmith shop, and I used to spend my time there in the summer when my folks worked, with my brother and sister. We just kind of hung out and looked out for each other. You didn't have babysitters or that kind of stuff. Then around the corner there was this Irish family that really kind of took care of me.

As I got older and went to grade school I was involved in operettas, and when I went to high school I participated in all sports. I lettered in all sports for four years. I was the freshman class president, sophomore class president, junior class president, and senior class president, and I was the head of the student council. Then I had the lead in the senior play.

So as I got older I got an opportunity to do more, but then I wasn't doing the physical labor as I had in the past. I got a job in a shoe store, because that was a job that I could work year-round on Saturdays and in the summer and during vacations. I kept that job through college, but when I went to law school I recognized that in the summer I had to make money, since I couldn't work during the weekends. At least I didn't think I could.

So it was important for me in the summer to get a job that paid a lot more, so then I started working in the canneries. So while I was in law school I worked in the canneries, which have now disappeared in San Jose.

There were a lot of students working there. Some turned out to be lawyers who later appeared in my court, and others went on to dental and medical school. It was a place for college kids to make money in the summer.

MCCREERY: And support themselves, sure. Before we get you out of high school, how did you like high school? You had all these extracurricular —

PANELLI: I loved high school.

MCCREERY: Academically as well?

PANELLI: Yes. I was probably in the top five of my class. I tell people high school was the best time of my life. Oh, we just had such a great time. I never got to do the spring breaks, because I was selling shoes, and in those days that was a very busy time. Everybody used to go to Santa Cruz. But I enjoyed high school. I wouldn't take that back, because I was involved in everything. We had a cadre of friends that — we did everything. The fact is, we just had our fifty-fifth class reunion of high school.

My parents never really could participate in many of the school activities, because they worked during the day. I remember when I was in grade school they used to have whist parties to raise money. My folks couldn't go to them. Later, of course, if the event was in the evening they could come. In middle school — they now call it middle school, we called it the intermediate school — we had plays and operettas. The operettas were at night, and they could come to them.

But my folks never knew that I played football, because they were concerned about injury, so I always told them that I was playing basketball. They didn't have any idea of sport seasons and that kind of stuff. Of course, you'd get bruises on your face in football, and they'd wonder. "I fell," or stuff is what I'd tell them. They were secrets I kept.

MCCREERY: Were your siblings the same way, limiting what they would bring home to the family?

PANELLI: No, no. It was an entirely different situation with them. My sister was also very active at school, but they were a little more up front than I was.

MCCREERY: Tell me just a little bit more about your family life. With your parents working so many hours, what were things like at home?



PANELLI: It was good. We didn't have a lot of money. We probably raised most of what we ate. We had chickens and rabbits, and we had vegetables. My uncle, my mom's sister's husband, had a truck farm in San Jose, so we'd get vegetables there. What we would buy is milk, and maybe meat once in a while. But my mom baked, and she was a great cook. We would have a lot of pasta and that kind of stuff.

But it was neat. We never had a vacation, and we never ate out in a restaurant, because my father says, "First of all, it isn't as good as we can do at home," and it was costly. The first time I remember that we went out as a family to a restaurant was on my folks' twenty-fifth wedding anniversary. But we were close. My brother and sister and I were very close.

The social life of the family revolved around your relatives, and when we lived in this area in Santa Clara, maybe on a Saturday night you would just go visit. You would drop in, and in what we called *viglia*, where you just come and visit. You'd have coffee and cookies.

I was telling someone the other night — we had some people for dinner and we were passing something around, and people were a little reluctant to help themselves. I said, "No, no, please, help yourself." I said, "I remember as a kid we'd go to visit and they'd pass these cookies, and my mother would give me this look like, 'Don't you dare take them.' I'd come home and I said, 'Mama, they wanted me to take —.' 'No, they didn't want you to take the cookie. They were just being polite.'" [Laughter]

MCCREERY: I was wondering how much extended family you had nearby?

PANELLI: In the same area in Santa Clara we had two of my father's sisters, and in San Jose we had two of my mother's sisters. So with the cousins, especially the ones in San Jose, on the holidays we got together all the time, and we would rotate the holidays. So we'd have big groups, and it was really kind of neat.

With Santa Clara, on my father's side — my father was not as close to his sisters, so while we visited and all, there wasn't the same feeling. This cousin, who I said was a lawyer, was the son of one of my father's sisters. He's one of the fellows that I practiced law with when I started practicing law.

But it was all kind of community based. We didn't have a car. On Memorial Day relatives would come and visit the family grave sites. On the

Fourth of July we'd have some relatives from San Francisco. We'd get together and we'd go to a park in San Jose and have a barbecue. No one had much money, so everybody was in the same boat.

**MCCREERY:** What about religion in the family?

**PANELLI:** Obviously, I was raised as a Catholic. My father was not a churchgoer, coming from Italy. An Italian male never went to church. But my mother was religious, and I remember saying, "Papa, how come you're not going to church, and you make me?" He says, "You go with your mother, and you be quiet." So we went to church every Sunday, my mom and then my brothers and sisters.

We didn't have much discussion about religion, because I guess things in Italy — the clerics were maybe not as celibate as they should have been, and so my father was very cynical about it. Because we used to go to church on Sunday at the university, which was just two blocks away from where we lived.

But my father made sure that I went to church, and my mother made sure that I went to church, as well as my brother and sister. So we went through all that stuff. Whatever religious training we did, we did on what was called release time. They'd allow you to cut school on one day maybe an hour early, and you would leave and go — at one point in time you could do it at the school, but then because of the separation of church and state you had to go off site. So that was the extent of religious training. They had some nuns that would come around to teach you.

Because some of my friends went to Catholic schools. It was fifty cents, I think, a week or something, which we couldn't afford. They had to go to school in uniforms. In fact, my best clothes were the castoffs which came from my father's sister. The mother of the lawyer cousin worked as a housekeeper for this one family — it was very well-to-do — and they had a son that was about a year or two older than me. So when he outgrew his stuff she would bring the stuff home to me. They had salt-and-pepper corduroys that they used as part of the uniform in the school. These kids would say, "You can't wear those pants. You didn't go to St. Clare's."

**MCCREERY:** But here you were at the public high school, student body president. Did you have political aspirations, or what drew you to leadership?

**PANELLI:** I wasn't student body president, I was senior class president.

MCCREERY: Senior class, pardon me.

PANELLI: The interesting thing is that I would have been student body president. As I told you, I was freshman, sophomore, junior class president. But the fellow who was vice president in all those years was my best friend, Gene Pasquinelli (no relation). When we had to run for student body president at the end of the junior year, someone says, “Gene, why do you let Ed get all the glory?” Of course, in those days I was known as Eddie, “— why do you let Eddie be the president and you the vice president? You ought to also run for student body president.”

So there were three of us in the race, myself, my best friend, and the principal’s son. Now, there wasn’t any way that the principal’s son was going to win. But my best friend and I split the vote. We together got about 60 percent of the vote. But they didn’t have runoff elections, so the principal’s son became the student body president, and then I was elected the senior class president.

But I was always doing things in high school. I participated, and I won, the Native Sons of the Golden West speech contest, where I did a talk about the Gold Rush something-or-other, I forget now. But I don’t know, I just always liked doing things. Maybe I was pretty aggressive about it.

MCCREERY: You practically grew up at Santa Clara University and went to church there and so on. How much of a decision was it to go to college there?

PANELLI: Oh, no, it was very easy, and I got a scholarship, so the economics of it made a lot of sense. You know, I could walk over there. I lived at home, and Santa Clara was largely a boarding school in those days. They had day students, they called them “day dogs,” so I missed part of what you would get in college.

But my going to school was encouraged by my parents. “You’ve got to get through school, and then you’re going to go out and work and help the family.” The expectation was to help the family. There was one pot, and whatever you earned went in that pot. I never was able to keep any money I earned. My father would say, “The money’s here. If you need It, you know where it is, whereas if you have it you’ll probably spend.” And he’s probably right.

So I went to Santa Clara, and I did a combined program. At the end of my third year, I started law school. I did my last year of undergrad and my first year of law school at the same time, so that at the end of my first year of law school I got my bachelor's degree, and then two years later I got my degree. Then it was LL.B., now J.D. So I went through in six years. One of my professors, who taught me political science — I was a political science major — then became president of the university.

MCCREERY: Who was that?

PANELLI: Patrick Donahoe, Father [Patrick A.] Donahoe. When he became president of the university, I had been practicing law for maybe three or four years, and then I became general counsel to the university.

He appointed me as general counsel, and I came on the board of trustees, because in those days the members of the board of trustees were all Jesuits, except for the university attorney. So here I was counseling people who had been my professors, which was kind of interesting, and I was very young. Then later, of course, when we went to a lay board, I stayed on.

As I say, I've been there ever since, although I just got a message today from the president. I told the president, "I think it's about time for me to leave." I finally got out as chair of the board after nineteen years. Now I think it's time for me to move on. But that's how I got involved in that.

I had toyed with the idea, after Santa Clara, to go to maybe Stanford Law School. It didn't really make any sense to do that, and I felt kind of disloyal after they had given me this scholarship, and of course I got a scholarship to law school as well.

MCCREERY: But that was an existing program where you could finish your bachelor's and start law school at the same time?

PANELLI: Right, right. Yes, you had to take, I forget, a certain number of courses, but they still, I believe, have what they call a combined program.

MCCREERY: I wonder who was influential to you in those years, either faculty, students, or others?

PANELLI: Growing up I would say this Irish family. The fact is, I named my first son after Tom Graham, and my sister named her first daughter after the sister. The sister, Katherine Graham, was an English teacher, taught at the high school. When I went to high school she was still teaching there,

and we decided best that I not take English in her class. I always called her “Teach,” in the broken English, for “teacher,” and so for the rest of my life she was always Teach. When I became a judge she was there. She was then in her eighties, and I introduced her as Teach. But they were very influential when I was young.

In fact, this Tom Graham ran the state office for unemployment, whatever office that was. He hung out in a saloon on Saturdays, and I’d go and mooch a dime to go to the movies. This one day I told his sisters that I’d been there, and they just raised hell with him, because they said, “How could you take this little boy in that den of iniquity?” So Tom got me aside, and he says, “You’re not supposed to tell them what we’re doing here.” They were influential in my life.

In high school I had fantastic teachers. They were really good, dedicated people. In fact, it was the principal who was also the superintendent of the district, Emil Buchser. His son and I were very, very good friends, the one who became student body president. Mr. Buchser was a strict disciplinarian, and he stressed the importance of education. “Do well in school,” and the teachers also did. The coaches that I had were all very, very helpful. The football coach, the baseball coach, and the basketball coach were all really good people, and they were very helpful keeping me on the straight and narrow. Plus my folks. There wasn’t any expectation that you would do other than what they expected you to do.

MCCREERY: So you were all primed already to go to law school all along.

PANELLI: Oh yes, yes. I knew what I was going to do.

MCCREERY: What about as an undergraduate? Why did you choose political science?

PANELLI: I really didn’t know what you did as a pre-law, if you will, and someone said you can do English or you could do accounting. But I don’t know, maybe political science because someone told me that’s what you ought to do. It really didn’t make any difference, because the base courses were about the same, except that I had more political science courses, and the fellow who later became president, Father Donahoe, taught political science. He was a great teacher. I learned more constitutional law from him in undergraduate school than I did when I was in law school.

MCCREERY: That's quite a statement.

PANELLI: Yes, well, he was a frustrated lawyer. He would have loved to be a lawyer. He was the brightest man I've ever met. He was just very, very good, had a fantastic memory. He was so sharp. So he was probably my mentor at that point in time.

Then, of course, when I went out and practiced law, my cousin was there, although we had different views about the practice of law. He was a nice guy. He was a very, very quiet, humble fellow, a little different than when I got in there. I was a little more aggressive. I was a little more street smart. I had had to find my way around things growing up, getting these jobs, doing this stuff.

During the war when the soldiers were garrisoned at Santa Clara, that's when I decided I could make some money shining shoes. So I'd go there, and then I found out that on Sundays I could sell the *San Francisco Examiner* there as well, so I staked out a location, and you could make a nickel for each paper you sold. But it was money, and I figured if I made a dollar a day, it was good. That was always my goal, to make a dollar a day.

MCCREERY: I wonder, since you majored in political science, what were your own political interests, if any?

PANELLI: I had none. I was not interested. I never got involved in a political campaign until — first of all, I registered as a Republican, and all the people that I worked with in the law were all Democrats. All the people in our law office were Democrats, and other people that were in the same suite of offices that had — one fellow owned newspapers and a radio station. He was a big Democrat. I don't know how that came about, but I registered as a Republican.

But the only political campaign I ever got involved with — I take it back now. I'd forgotten about — the first one was for a Democratic assembly candidate, Marc [Marcel B.] Poche, who is a judge now, went to the [California] Court of Appeal, and he was in Jerry Brown's [Edmund G. Brown Jr.'s] cabinet. Another one was a Republican assemblyman, Jim Sanders, in Saratoga. Both of those candidates lost, by the way. That was my only foray into politics. I never contributed to political candidates. My partners contributed bigtime. One of them may have been on the county central committee for the Democrats.

So I never really got involved in politics. It wasn't something that really interested me. I first got involved myself in politics when I ran for the West Valley Community College board. That was when the district was formed, so I'm a charter member of the board of trustees of the West Valley Community College District. So that was my first public foray. I got elected, and I was on that board until I became a judge, because you couldn't have both. So I was on that board for nine years.

I was first elected from a trustee area of the Campbell Union High School District, and when we moved from where we were to another location, while we were both in Saratoga, one was in the Campbell Union High School District. The other was in the Los Gatos-Saratoga Union High School District. They were different trustee areas, so when we moved I had to resign. Then there was a vacancy in the Los Gatos district, and since I had been elected twice they appointed me to fill this vacancy. So all together I was there for nine years.

MCCREERY: So that was all through the sixties, it sounds like.

PANELLI: Right, right, '63 is when that happened. Frankly, I did it because I started to have in mind maybe I would like to be a judge, by virtue of the fact that it would be quite a — I think part of it was because of my folks, that it would be nice if I became a judge. Although some relative said, "The only people who become judges are lawyers who can't make a living at it," which I didn't think much of. So I thought this would be kind of nice to go through an election, to kind of see what you have to do. I really didn't like it, because it was a very contentious election.

MCCREERY: Why?

PANELLI: Because everybody suspected that we would build a campus in Saratoga, and they were very, very opposed to building a campus in Saratoga, which is where we built the campus finally, after many bond elections that were defeated. The fact is, I don't think they've ever passed a bond election, but we were able to raise the taxes so we could build it. So people would come to these forums, raise hell with you, and people would ask you all these questions and stuff, and I figured, gee, do I really need this?

MCCREERY: And you were successful?

PANELLI: Yes, I got elected every year.

MCCREERY: It was annual, then, or pretty often anyway?

PANELLI: No, I think it was four years. I think I went through either three or four elections. I went through the first one, and then we may have had staggered terms. I think I drew one of the shorter terms, so I think I was up a little more often than others. Then you kind of learned where, what groups you talk to, what groups you don't talk to.

On one occasion I ran with this woman who was also on our board. We decided we would run together, kind of as a slate, and we both got elected. But I was always involved in something. Just like in our church I was elected to the first parish council that we ever had. I was always involved with something like that.

Then when we were practicing law, I decided that I thought being a judge would be something that would be very, very nice, that my parents would be proud of, and that I wanted to do. I had previously had an opportunity when Pat Brown [Edmund G. Brown, Sr.] was governor, maybe to get a municipal court position. But it didn't pay anything, and I was making more money than that and had young kids. The timing wasn't right.

MCCREERY: We didn't actually talk about law school. I was just wondering a little bit about your experience there, and how you decided to go into private practice to begin with.

PANELLI: When I went to Santa Clara Law School it was very small. My class started out with thirty-five, we ended up with ten. I was a student bar officer every year, and in my third year I was student bar president. I almost didn't go there, because Santa Clara was not passing many people on the bar.

I remember the dean, who later became a judge, Judge [Edwin J.] Owens, when I went to talk to him, he said, "Look. The problem why we're not passing as many on the bar as Stanford is because I can tell you that this group of students at the top part of the class, they're going to pass 90 percent. The problem is, we don't have as many of those students, because we're taking students that fall below that level." He says, "You're going to pass the bar whether you go to Stanford, Santa Clara, or somewhere else."

Plus, I felt a certain loyalty by virtue of the fact that I'd gotten the scholarship, and so we stayed there. But the first year of law school was a drag. I remember I didn't know what I was doing until after Thanksgiving.



But then it got on, and I had a very, very good friend of mine, Bob Blake, that I would study with. They called us the Bobbsey Twins. But law school — there wasn't much time for a lot of fooling around.

I met my wife-to-be [Lorna C. Mondora] just before I graduated from law school, like a month before, and even then, I'd study. She says, "It was the craziest dating that I'd ever seen. He'd come at ten, we'd go out and have a hot cup of chocolate, and then he'd go home."

But, yes, law school wasn't a lot of fun. Plus there was a lot of transition going on in the law school. I'm convinced that we taught ourselves. The fellow who had been dean for years, Judge Edwin J. Owens, when we were freshman decided to become a judge, so he left. So his courses — he taught contracts and he had taught contracts for a hundred years — we'd have to do that on Saturday. Then they got another dean who was a problem, so we had a lot of adjuncts teaching us. So it wasn't a very good experience.

As I say, I think we kind of taught ourselves. Things have progressed, obviously, since then. It's a huge school now, and I'm not sure that I could pass it. But I did fine. I was happy to get through, and I'm happy I passed the bar.

The fact is, the other day I swore in some new admittees from Santa Clara, because I have, obviously, a continuing involvement with the law school there. They have the Panelli Moot Court Room. I volunteered to take some students to lunch. They bid on it, I guess, or something. I took them to lunch and so I told them, "When you pass the bar, I will swear you in privately in the Sixth District [of the California Court of Appeal]."

So here, the other day I get a call from these kids — they're not kids. They said, "Do you remember that?" I said, "I do." He said, "We passed the bar." I said, "Oh, great."

So we did it December seventh, and that happened to be — fifty years ago December seventh is when I found out I passed the bar. It's kind of a sad thing for me, because I passed the bar on the seventh, my dad died on the seventeenth, we buried him on the twentieth, and I was sworn in on the twenty-first. So I told these people, "Fifty years ago today is when I passed the bar."

But it was kind of strange in a way, because my dad had taken grief from friends. They had said, "How could you have a child at fifty-four? You're unemployed. It's the Depression." I kind of figured that he got to

see me through to the finish, so from that point it was good. But, yes, law school was a bear.

MCCREERY: Luckily, you were a pretty self-starting young man, and perhaps could handle that sort of situation. But I can see why they weren't having a lot of top graduates in those days.

PANELLI: No. Part of it, I didn't — growing up, when you talk about family things. My sister and I and my brother used to go to the city library and get books, and we'd read books. But it wasn't literature and that kind of stuff. My best friend in law school, his family — his dad was a lawyer — and his mother, too, they had all of the great authors that they had read, and that kind of stuff, whereas you know, the stuff that I was reading, like the Rover Boys, the Motor Boys and that, but I wouldn't be reading Poe or that kind of stuff.

So it was a much different environment then. The language was not easy for me, because at home we always spoke Italian. Outside the home, never. When we were with kids we spoke English, unlike my neighbors, the Mexican kids. Unfortunately, they always spoke Spanish even in school, which I thought was a mistake. But that's a different issue. So that made it a little tough, but we got through it.

MCCREERY: How did you like the law once you started learning it officially?

PANELLI: I liked the law, and I liked the practice of law. It was a lot of work, because we were a small firm, and so we didn't bill by the hour. We had big ethnic clientele, a lot of Italian farmers, a lot of Hispanics. I'd say a third of what I did was pro bono, so it was a tough deal. We did well, but you had to work long hours. I worked weekends, and it got to be kind of a drag.

Although I did other things as well. When my kids were growing up, I coached Little League for them. We did that kind of stuff. But when I decided to become a judge, I had envisioned myself somewhat of a legal scholar, and I saw that in the practice of the law, we were just too busy. A lot of the stuff you did by the seat of your pants. You couldn't have done some of the things that I did in the practice of law today, because you'd never get malpractice insurance. You have to specialize. We didn't. As I say, I did everything.

When I became a judge, I found there wasn't much difference in the workload. The first day I arrived on the job, they assigned me seven jury trials. . . . Then when I went to the court of appeal, I thought now here I can really spend some time and think about the law. I got to the First District and the first thing they told me is that, "They're coming in at fourteen a month per justice, and you have to do ten of the backlog, so you've got to do twenty-four opinions a month," which was kind of a difficult deal.

MCCREERY: Yes, the numbers are a bit daunting. But when you were in private practice did you develop special interests? I assume you did general business practice and —

PANELLI: Yes, right. We did whatever came in the door.

MCCREERY: It was you and your cousin?

PANELLI: And two other fellows. Actually, we'd first started out with three other fellows. When we split up, we ended up with four.

MCCREERY: Where was your law office in San Jose?

PANELLI: In San Jose it was right downtown. We were one block from the courthouse, and then we moved out to The Alameda. We bought an old house. The Alameda had been where all the grand homes were. We bought this big home that had been the home of Judge Marshall Hall's family, and they had these old intercom phones. They had on there, "Mrs. Hall," and then, "the maid." Judge Hall wanted to know which of the rooms we used as offices, because we might be where his room was. I said I took what was the dining room, which is a big room, and my partner took what had been the living room, and we had these three bedrooms upstairs. The maid's place was down below, and downstairs we put our law library.

MCCREERY: Did you end up in court quite a bit?

PANELLI: Yes, I did.

MCCREERY: Was it mostly trial work?

PANELLI: When I started practicing law in Santa Clara County, we did not have a public defender's office. So what happened is the judges would be advised that we have these new admittees, and then they would assign you to represent these people pro bono. So you started out trying these cases.

The first felony trial that I had, the fellow who was the defendant happened to be in the office talking to one of our lawyers on the day that the governor called to appoint me to the superior court. He came into my office and said, "It's appropriate that I should be here, because after all I gave you your start."

MCCREERY: I'd like to set the stage, if I may, for the further discussion of your career by just returning briefly to the subject of your family and your personal life as it evolved while you were still in private practice. You mentioned meeting your wife towards the end of law school. May I ask how you met?

PANELLI: We met at a wedding of a mutual friend. It's kind of ironic because my wife's family had these friends that they had come over from Italy with, and they had a son who was a year ahead of me at Santa Clara, but he was in the same army reserve unit that I was in. So I knew him by virtue of the reserve contact, as well as I kind of knew him in school. His family kept saying that they knew this family that had a daughter that lived close to where I lived, but we had never met.

At his wedding, which was on April 30th of 1955, I was just getting ready to graduate from law school, and my wife was just getting ready to graduate from undergraduate school at San Jose State. It's kind of a funny story, because she went to the wedding over her objection, because she had been out the night before at a senior prom, and had gotten in very, very late. Her mother said, "No, no, these are very close friends. You're going to come to the wedding."

So she went to the wedding and met my mother and my older brother, who was also unmarried, and, of course, the typical Italian mother, my mother says, "Here I have a son, and he's single." But my wife knew that my brother wasn't interested in her, so my mother said, "But I have another son, and he is studying because he's in law school, but he is coming to the reception."

Sure enough I was going to the reception, which was in Atherton. I'm on a little country road, Selby Lane in Atherton, and there's this car in front of me driving very slowly, and I'm blowing the horn on my car and suggesting to the woman driving this car that if she didn't know how to

drive she ought to park the car. That was my first encounter with my future mother-in-law.

Later in the day, at the outdoor reception, it started to rain. They had this canopy outside, and so the crowd kind of compressed itself to avoid the rain. All of a sudden my wife said she saw this woman dragging this other son behind her, and she told her mother, she says, “My God, it’s the person that was tooting at you when we were driving in.” [Laughter] So we met and we talked. We didn’t make any arrangements for any future meeting, but on her way home she told her mother, “That young man I just met, I think I’m going to marry,” which was news to me.

So the next couple of days, to one my best friends I said, “I met this young woman. She’s a very nice gal. I think I’d like to ask her out, but I don’t want to seem too anxious, so I’m going to wait a while.”

I did call her, and she said fine. We were going to go out. We went out and then about a week later she called my home, and unfortunately I wasn’t in. My father was there. My father didn’t speak English very well, but he got the message that she invited me to dinner. So I go to her house and, as I say, as the crow flies it was just right over one block, and she had this fantastic dinner.

I came home and I told my parents, I said, “You should see this girl cook. It was just a fantastic dinner,” and this, that, and the other thing. Okay. Then we started dating, and, of course, then I graduated, and then she graduated, so we were a little closer. Then on the 25th of August we got engaged. Then she went to Boston to do her dietetic internship in the first week of September, so we really didn’t know each other very well.

She went back to Boston for a year, and she came back in late September, and we were married on October 27th of 1956, so it was kind of an interesting situation. [Laughter] Of course, after we were married my wife told me the story that she had told her mother, that she was going to marry me that day, because, had I known that, maybe I wouldn’t have had to do all the fancy courting footwork that I thought I was doing.

But when we were married and I was practicing law with my cousin, I said, “We need to invite them for dinner.” She panicked because she said — well, she didn’t tell me this — but she hadn’t cooked very much. I said, “Just do the dinner that you did for me when you first invited me.” It turns out that her father, who was a chef, had cooked that dinner.

So she called her dad and said, “Daddy, you need to do this for me.” He said, “Look, I’ll come over and I’ll prepare everything, and you only have to do very little.” My partner’s wife was the world’s best cook, and so my wife was very, very nervous about their coming over for this dinner. So she had had a couple of Manhattans, and we had a small kitchen, we had an apartment about the size of this room. The kitchen got very, very warm, and she just couldn’t complete the dinner, so she had to call Mary, my partner’s wife, in to help her with the dinner.

So then I found out the true story about the dinner. But it’s almost been fifty years, so it all worked out.

**MCCREERY:** Whereabouts did you live in those early years?

**PANELLI:** When we came back from Italy we lived in Santa Clara. I think I described this area where there were many Italian families in kind of this four-block area. So that would have been probably 1935, ’36, until 1952. Then in 1952 we moved to San Jose, in this home that was a block from where my wife’s family lived. My dad wanted to build this home, and so we bought this lot and we built the house there, and so from 1952 I was in San Jose.

**MCCREERY:** And in due time you had three sons?

**PANELLI:** Right. I had a son, Tom, in 1958, Jeff in 1960, and Michael in 1963. In 1959 we moved from San Jose to Saratoga, and we built this house in November of 1959. So it was from ’52 to ’59 that we were here in San Jose, and then in 1966 we moved from the first home we built in Saratoga up into the hills, where we built a much nicer and very large home overlooking the valley, and we were there until the boys left for college.

**MCCREERY:** I’ll bet you saw a lot of changes in this Santa Clara Valley.

**PANELLI:** Oh, sure. In fact, these lawyers that I had here today flew in from Los Angeles. I mentioned to them that those runways that you can see out the window are where we worked when I was a teenager. They were agricultural fields. They were in row crops, and that’s where we worked. Similarly, here, just a block from where we are was the main business area of Santa Clara County. San Jose was its commercial center, but everything else around here was orchard and farmland, and of course now that’s all built over and it’s all gone.

So there have been enormous changes, from probably just before the war until after the war, when the veterans returned, things really started to develop because during the war there were soldiers stationed in Santa Clara as part of the Western Defense Command. One of the units had been the Michigan National Guard, so a lot of those people came, had their taste of the Santa Clara Valley and when they came back either stayed or while they were here met people and married.

Then some of the industry changed from agricultural to light industrial. Owens Corning Fiberglas built a big plant in Santa Clara, and so then we started to get some industries. Food Machinery, of course, then became a military contractor, and it was much larger. So we started to develop a different base of industry. Then housing took off and farms disappeared.

MCCREERY: What happened in the Italian-American community around here during those years of change?

PANELLI: Until after the war it was a pretty homogeneous group. But as the generation ahead of me either went off to war or married, then they just kind of went and did their own thing. So the only people left in what I'd call this old quad area were the older folks.

Frankly, what happened — as they got older and died, the university would buy their properties. So the university moved not only southward towards the house where I was born, but it also moved to the west and took all of those homes that had been this Italian community. It has also moved north, so that most of that part of Santa Clara now is part of the university.

MCCREERY: Tell me just a little about your own family life, as your boys were growing up. I know you had a long history of being involved in many things in your community. How did you balance that with work?

PANELLI: It was tough, because we worked at the law practice five and a half days. I was in the army reserve, so that took a weeknight per week, and two weeks in the summer, which made it a little tough because I only had two weeks' vacation, so it was kind of tough to plan family vacations.

But I was very involved in our church, and when my kids were in school there, we kind of ran the athletic program. We put on a bunch of pancake breakfasts, spaghetti feeds and stuff to raise funds to convert what had been the church hall into a gym for basketball. I coached my sons in Little League every year. But there wasn't a lot of time to fool around with.

But we did have — which is, I guess, today not as common — most of our meals we ate together, the evening meal, breakfast, kind of, more or less. It all depends what the kids were doing in school. But we were always together on the evening meal. Then on Saturday and/or Sunday we would have dinner either with my mom or with my in-laws.

Then when we built the big house in Saratoga, my wife's folks bought a lot down below us, and so they were close by. So the boys spent a lot of time running up and down the hill back to their place. I said it was the only appellate court that was actually lower than our home, because whenever there was a problem they'd go down to the grandparents to argue their case.

**MCCREERY:** Did your kids learn Italian?

**PANELLI:** No. No, they never learned Italian. When my mom would baby-sit them and some of my sons' friends would come over, they'd say, "Your grandma sure talks funny," because it was in kind of broken English. No, but they weren't interested in speaking Italian. Of course, while I was active in Italian-American affairs, even when I was practicing law, it wasn't until I got on a court that really I had the exposure more to statewide Italian organizations, and then national and then international. Then there was a program where I was honored in Florence by the Italian government. But no, the boys spoke Spanish, and they didn't want to contaminate their Spanish with Italian.

**MCCREERY:** It sounds like you had a busy life. We touched on the fact that for a good deal of this time you were also serving as Santa Clara University's general counsel. You mentioned that Father Patrick Donahoe became president and appointed you to that position. You were quite young.

**PANELLI:** I was.

**MCCREERY:** I wonder, how were you received by the board of trustees at the time?

**PANELLI:** It was funny because most of those people were people who had taught me, because, let's see, I was born in '31. That was '63, so I wasn't very old. The fact is, I went to prepare a will for Father Donahoe's mother, and she said, "Pat, are you sure he's old enough to be a lawyer?"



But I had no problems with that. They seemed to follow the advice that I gave. Then, of course, I stayed on in that role until I went on the bench. But it was different, and I looked very young, so it was kind of a combination. Not only was I young, but I looked younger than I was.

MCCREERY: I can guess, but what did you actually do as general counsel? What kinds of things came up?

PANELLI: We had the typical problems that you have with students, issues with faculty, off-campus problems with students, the relationship between the city and the university, because we had become coeducational at that time, so it was a problem with student housing. I remember when we went into parietal hours, oh, that was a big issue. Then when we went to unisex dorms, there were problems with respect to dealing with parents and all this kind of stuff.

But it was the general run of corporate issues, as well as the educational problems. I belonged to the National Association of College and University Attorneys, and so issues that affected higher education nationwide, either by virtue of laws passed in the Congress or other things, were the kind of things that we dealt with. Litigation, we had some litigation. People sued the university, had issues with respect to gifts that had been made or were contemplated, all that kind of stuff.

MCCREERY: I did want to ask you about when the school started admitting women, because that was, I think, when Father Donahoe was president. What actually led to that happening? Do you remember how it got started?

PANELLI: No, I don't. We always would have permitted women in the law school, but none had applied. O'Connor Hospital, which was a Sisters of Charity hospital here in San Jose — probably one of the oldest hospitals, if not the oldest hospital in San Jose — had a nursing school, and some of the nurses then came to Santa Clara for their chemistry classes and those kinds of courses. So they technically were the first women to be admitted, but they were only part-time students.

Then I think the realization was that you needed to bring women on campus because of the way things were changing. It was not a change that came easily, because here it had been an all-boys school since 1851, and there were a lot of people that felt that's the way it should be. Of course, the

first few classes of women, they were really pioneers, because they probably had to put up with a lot more stuff than they needed to.

But the transition, really, after the beginning, wasn't all that difficult. It really changed the whole character of the university. First of all, the males dressed a lot better than they had before, although I can tell you that has now reverted. I see them on campus, and both the men and women look like they're going to the beach, or they're semi-dressed, undressed. I think the competition in the classroom, the decorum in the classroom, improved a bit.

In 1952 I was a senior basketball manager, and that's the year we went to the Final Four in basketball. We won the western regionals in Corvallis, Oregon, and then the following week was the Final Four in Seattle. But in those days Santa Clara would not permit the teams to travel by air, so you had to travel by rail. So to come back to Santa Clara and then go back didn't make a lot of sense. Seattle University was a Jesuit university, so they said, "We will have you go take classes at Seattle U."

Seattle U. was a coeducational school, and some of the people on our team had gone to grammar school that was coeducational — but since then it was the first time since grammar school they had been in a classroom with women. They acted like they had never seen a woman in the classroom. It was really kind of funny, because I remember we were in this political science class at Seattle, and these guys were just acting up to impress the girls. [Laughter] It was unreal.

**MCCREERY:** I wonder how this change of admitting women played with the board?

**PANELLI:** I think it was a function of a recognition that you needed to expand your base, and you needed to be competitive. I don't know how much later St. Mary's also went coeducational, and, of course, later USF [University of San Francisco] joined, with Lone Mountain, a women's college, and then they became coeducational. But I just think it was maybe a question of a felt need.

My wife would have probably have gone to Santa Clara, although the courses that she needed to take in dietetics we probably didn't have at Santa Clara. But it wasn't an option for women. If you wanted to go to a Catholic college and you were a woman, you went to Lone Mountain, or

Dominican, or Holy Names, or Belmont, which were all-girls schools. So I think that was part of it, and the other is that you needed to increase your base of potential students.

During this whole time there's another transition, too, not so much early on, but later. When I went to Santa Clara, most of the professors were Jesuits, and while they had a substantial number of lay professors, there weren't that many, and of course you didn't have to pay the Jesuits. As things progressed and priests got older, and you had to be more competitive, then you had to go out in the market for professors. You had to pay people salaries that became competitive with what other schools were doing, and that necessarily meant that you had to raise not only the tuition, but the student base that you had. So I think it progressed over time.

MCCREERY: How much was the board of trustees a force in the larger community?

PANELLI: Not at all at the beginning. At the beginning the board of trustees was entirely composed of Jesuits. I was the only layperson, as the university attorney. At one point there was concern about the effect of church-state relationships and the government benefits, because of federal grants to education and all of that stuff there was a need to expand the trustees to include lay members. There was a case called the Maryland case, which was a big topic in higher education because of its effect on non-profit religious-affiliated schools.

So the determination was made to go to a lay-controlled board. Most of the church-related schools decided that they would go to lay boards, some with some sort of a kicker that you couldn't really change the role of the school or its purpose without having the religious component of the board with some sort of veto.

Others decided that they weren't going to do that. There was some concern about lay control because schools like Harvard, USC [University of Southern California], had been church related and then drifted away from their church sponsors.

So we went to a board the majority of which were lay members, but there were thirteen Jesuits, which formed one-more-than-a-third of the board. To change the basic articles of incorporation and/or the bylaws required a two-thirds vote, and you could not do that if the Jesuits didn't go

along with you. As someone told me later, if you ever thought that the Jesuits voted as a bloc, you were sorely mistaken, because they wouldn't have, though we never had that problem.

**MCCREERY:** But by the numbers they could have veto power.

**PANELLI:** By the numbers they could have, because there were thirteen, and I think twelve was one-third, so they had one-third plus one. Just at about that time then, Father Donahoe was — well, it's the other way around — Ben Swig was impressed with Father Donahoe, and they became very, very close friends. So he said, "If I give you half a million dollars, can I have a voice in this university?" We had never had anybody give us anything like half a million dollars.

So Ben came on the board and became its chair, and I became the vice chair. Running meetings, Ben was used to telling people what to do. Roberts Rules [of Order] didn't have much to do with the way he ran meetings. He changed the whole attitude of fundraising. We had been afraid to ask for more money from our donors, because they had maybe given us a hundred thousand dollars a year. Ben would come out and say, "We need five million from these people." We were all concerned that all the people were going to scatter, but they didn't. So he really changed the fundraising culture of the university.

As a result of his presence on the board we also got other people of that stature on the board. So the board really developed to where today I think it is a very, very effective board, much more sophisticated. There are many more rules, and the subcommittees of the board do a lot more work, so most of what takes place at the actual board meetings is merely reacting to the committees and their reports, because most of the work is done in the committees.

Now we're not concerned about the two-thirds, one-third rule. The fact is we're probably operating with fewer Jesuits because there are fewer Jesuits available. A big issue now is what to do about the university president. Do we change the bylaws that provide that the president of the university has to be a Jesuit?

We don't think that Santa Clara needs to face that issue at this point in time, because we have the reputation which attracts the young, bright Jesuits to come to Santa Clara, even from other provinces. So as long as

we have that attraction, we feel we will always be able, at least in the near future, to have a Jesuit president, although we've talked about whether it would be a woman or a laywoman or a layperson. I don't think there's any problem with that, but we don't think we need to face it yet. Some of the other Jesuit schools are in that situation. But some of our key administrators are women. In fact, there's a provost who is a woman, and the heads of a lot of the departments are women. The faculty is probably, I'd say, fifty-fifty women.

The whole complexion of the university has changed. In the religious studies program there are Buddhists, Hindus, Jews, all of that kind of stuff, so that it is, while I'd say not a majority — the largest single group are Catholic — there are all kinds of other groups there, which, of course, was wholly unknown at the time I went to school. You talk about homogeneity, they were all homogeneous. Now the diversity is rather significant.

Still not as many African Americans as we'd like, because the competition for them is difficult by virtue of our admissions standards. That's one of the reasons I don't think our athletic teams have been as strong as we'd like. We've done much better with the women in the athletic area than the men, because we can recruit really good women. But the men! We're talking women's basketball or women's soccer, women's softball, women's volleyball. But when you start talking baseball, and, of course, we don't have football any longer, but basketball — it's really tough, because if you're that good a student then you can go to Stanford or some other top school, so it's become a problem to compete for scholar athletes who can qualify for admission.

MCCREERY: You've certainly seen it all now, being on the board yourself so long. We started off with the subject of how much the board had power in the greater community. Mr. Swig was quite a figure in business, in politics. How else did he change Santa Clara?

PANELLI: Because of his influence he was able to bring people to assist the university in the fundraising capacity, but in addition, also he brought speakers — he was Mr. Democrat. He also was very helpful in our relationship with the City of Santa Clara, because they respected what he did. I just think he made us less provincial, and that helped. But I think part of it was, by having him here, it gave us a certain recognition and status that we may

not have had, and so I think we were able to maybe get people on our board that otherwise we would not have had.

He was a very interesting character. He would call people and say, “Okay. I will give \$50,000 to your charity, but you’ve got to give \$50,000 to Santa Clara.” I remember one day we were up in his apartment with Father Donahoe and my wife. We were up there for dinner. Bing Crosby called, or Cathy Crosby called for some money for some project, and he said, “No, I’m not going to give you any money. Your husband pledged \$50,000 to Santa Clara, and he never paid it.” So he says, “You pay his pledge and I’ll give you the money.” So I think that all came about.

MCCREERY: You were his vice chair on the board, so worked fairly closely with him?

PANELLI: Right. The fact is, we had a key to his penthouse apartment at the Fairmont [Hotel], so whenever we were in the city it was really kind of neat to go there. If my wife was there, he’d always give her flowers. That apartment is renting now, I think someone told me, for \$7,500 a night.

It’s a very interesting apartment, and the memorabilia in there was unreal. He was a big Democrat. He had stuff there from every big Democrat, Kennedy and others. He was a big buddy to Hubert Humphrey, had him at Santa Clara on more than one occasion. He had a billiard room, and this huge dining room, and this library that was circular. It was two stories, and it looked like the library in *My Fair Lady*, where Rex Harrison was on the ladder going up to the library. It was really an interesting deal.

MCCREERY: On a personal level, what kind of guy was Mr. Swig?

PANELLI: He was a great guy, really. He didn’t tolerate fools very much, and he was used to making decisions alone. That’s why it was kind of difficult. My role, really, as a vice chair was maybe to suggest that you can’t do this, because it was all kind of — he was used to telling people what to do. He wasn’t big on having a lot of consensus, necessarily.

But he was effective, and people respected him, because he had no axe to grind. He was there because he thought the Jesuits were doing a very good job of education, and they were all principled, and he wanted to help them. Of course, he was also a big benefactor of Brandeis University, so he never forgot those things. But he just made an enormous change. He was

the difference, I think, he and Father Donahoe, in transformation to where we are today.

MCCREERY: Just quickly, what sort of leader was Father Donahoe?

PANELLI: He was very well liked. He was a brilliant man. I mean, he was a Ph.D. in political science, would have been a great lawyer, and I think he would have loved to have been a lawyer. People would do things for him. But he and Ben got along fabulously, because they were the same way. Father Donahoe didn't want to talk to vice presidents about different stuff. If he had an idea, this is what he was going to do, and everybody went along with him. By force of personality he was able to get things done that other people might not have been able to get done. He was just a brilliant man.

He gave me his Ph.D. thesis, which I have, the original, and it's clear to see that he was very, very bright. It had to do with the Constitution. As I think I may have mentioned, I learned more constitutional law from him in my political science class than I did in constitutional law in law school. But yes, he was very, very instrumental, he and Ben, in getting things done.

MCCREERY: Thank you for telling me that. That does set us up to move into your judging career, because I think you talked briefly about the fact that there were maybe a couple of occasions, or at least one, where you might have been considered for a municipal court position. Didn't Mr. Swig have some role in that, can you tell me?

PANELLI: Right. Pat Brown was governor, and he and Pat Brown were very, very close. In fact, on more than one occasion when we would go up to the apartment, Pat Brown would be there. So I got a call from one of the local attorneys asking if I would be interested, because Ben had talked to Pat Brown about a municipal spot. But my kids were young, and it didn't pay all that much, and you had to live in the judicial district, and we lived in Saratoga. So I said no, I wasn't interested.

I really wasn't interested again until, oh, let's see, I was probably just not quite forty, when things were changing in our law office. My partner's son — I mentioned my partner was my cousin, who was twenty-one years older than I was — his son was going to come in. He just graduated from law school and was going to come in, and I could see that the dynamics in the office were going to probably change, and as a result I thought this might be an opportunity for me to explore the judiciary again. I read

that there was a potential judicial vacancy on the superior court, and I mentioned to this friend of mine that had been my commanding officer in ROTC at Santa Clara.

MCCREERY: Who was that?

PANELLI: Gene Ravizza was his name. He's the founder of Cupertino Electric, which is now probably one of the largest electrical contracting firms in the State of California for sure, if not one of the largest in the nation. He's now retired.

I knew that he had been very instrumental in Reagan's first gubernatorial campaign, so I asked him about judging and this kind of stuff, and he didn't say much about that. But as I say, one day I'm driving down Saratoga Avenue and he's driving down. He toots his horn and pulls me off to the side of the road and says, "The other day when you mentioned that you were interested in maybe exploring the judiciary, were you serious about that?" I said, "Yes, I think that I am." He said, "Let me see how things are."

Then he called me and said that there was this vacancy, but that most likely it was going to go to Bill Ingram. Judge Ingram was a muni judge in Palo Alto who later became a federal court judge here in San Jose, very well respected. So he says, "That isn't going to happen, because Bill Ingram's going to get that. But there's a possibility of some other appointments coming through. In the meantime, I will see how things are," this, that, and the other thing.

Then it turned out that he and the fellow who started the young Republicans — it was called YROC [Young Republicans of California] — turned out to be the appointments secretary for Governor Reagan.

MCCREERY: That was Mr. Hutchinson?

PANELLI: Ned Hutchinson. I never had any contact with him and, of course, I never had talked to the governor.

MCCREERY: I was wondering if you'd met him at all.

PANELLI: No. The first time I got a call is when he called the law firm and appointed me. He said, "I'm going to make these other appointments," and so it was one of those things he was obviously just going down a list.

The next thing is I get a call from the newspaper. He says, "Congratulations on your appointment." I said, "How'd you find out? You weren't



supposed to know.” He said, “We didn’t, until you just told us.” So they had tricked me, so I learned about how you need to deal with the press.

MCCREERY: Yes. I’ve heard the same story from other people, needless to say. What did Ned Hutchinson want to talk with you about, upon checking you out?

PANELLI: He wanted to know something about me. He knew what my academic record had been, what I did in the practice of law, because we had a very broad range of practice. I represented some people who would pay me in chickens and vegetables. When their kids would get into trouble, they came to me for help. This one Puerto Rican family, poor guy, had about twelve kids. “Oh, we have a problem.” He’d come to you, “Mr. Panelli, you’ve got to help me with this problem.” It had nothing to do with the law. So I got some of that.

I represented someone in a proxy fight for a New York Stock Exchange company, which we won, so I became a member of the board of this company. It was on the New York Stock Exchange. As a result of that, I was on the board of another company that was on the American Stock Exchange and met Ron [Ronald M.] George’s father. He would tell me, “I’ve got this son who’s going to Stanford Law School,” all this kind of stuff. I knew his dad before I knew Ron. But as a result of that — and having done domestic work, contract stuff, represented criminal defendants, all that kind of stuff — I had a real broad experience that I think they felt would really be good in the superior court. I’m sure they checked up on me, but I think he had a lot of confidence in my friend, that they could rely on him. But there weren’t these questions about a litmus test or any of that kind of stuff. They didn’t ask me any of those kinds of questions.

MCCREERY: No, not in those days. This was your friend from school?

PANELLI: From Santa Clara, right. What happened was that there was this proposal for new judgeships in Santa Clara County. Santa Clara County had thirty superior court judges, and they were seeking three more. So I was advised that if they only authorized two, that the governor would probably elevate two municipal court positions, because they always like to get the double appointments. But if there were three there was a possibility that they would look to the practice for the third position.

Was I interested in that [being considered for municipal court vacancies]? I said, not really, because — I think it was okay, I don't think the district issue was a problem anymore. I think I could still live in Saratoga. But I don't think I was interested in doing that.

MCCREERY: Why?

PANELLI: What you were doing in municipal court in those days, you were doing nothing but DUIs, 1538 suppression motions, traffic stuff. I don't mean to demean what they were doing, because they were doing a good job. I just didn't think it was going to be intellectually challenging. I had done some pro tem work on the traffic calendars, and that didn't interest me very much.

So when they passed the three positions, then I was told by my friend that I should meet with Ned Hutchinson. So one day he invited me to his home, and Ned Hutchinson was there and says, "We've investigated your background. You have a very good reputation. You're respected in the community by the judges and the lawyers," and all that stuff, "so we think that you are a viable candidate. But there are other people we need to look at." This, that, and the other thing. Okay.

So then I had a very good friend of mine who was the controller of the Ford plant out here in Milpitas. I used to have lunch with him maybe every other week, and I told him of my interest. What's his name? Smith, who was the solicitor general for Reagan —

MCCREERY: William French Smith, the attorney general?

PANELLI: William French Smith, yes. Wasn't he the solicitor general for him?

MCCREERY: I think he was attorney general.

PANELLI: Okay. William French Smith had represented Ford, and so my friend says, "I will contact him and put in a good word for you." The other person was a person by the name of Holmes Tuttle. Holmes Tuttle was the largest Ford dealer in California, a big supporter of Governor Reagan.

So my friend contacted him, and he got a very nice letter back from Holmes Tuttle that said, "That's all right. If people aren't qualified, we don't do anything. But I'll look into it." Then about a month later he got a letter back that says, "Your candidate is very well qualified and is well suited to

be a superior court judge. I'll do what I can, but you know there are no guarantees." Okay. So we left it at that. Then I got a call from my friend and I said, "Gene, this is what I'm doing." He says, "Don't do anything else. Just wait."

Then I got a call from someone who said, "There are going to be some muni appointments coming up, and would you be interested?" Of course, they didn't know about this parallel thing that was going on. I said, "No, I'm not interested. If I don't get a superior court judge position, I'm not interested." He said, "They don't like to do that." I said, "I understand all of that." Then, as I say, it came out I got the appointment.

MCCREERY: That's a fascinating story, though, because of what goes on behind the scenes, and the kinds of people that are involved, and major local businesses.

PANELLI: See, I was not politically involved, and so most of the appointments, especially in Santa Clara County, because Pat Brown had been the governor, were all people who'd been pretty active in the Democratic Party in Santa Clara County. As I say, my partner and his former partner, who died the weekend that I came, they were very involved in those kinds of things, fundraising, doing stuff.

It was by happenstance that I found out that my friend Gene Ravizza had been involved with Governor Reagan. I had always been a registered Republican, but as I say, the only campaign that I'd been involved with was Marc Poche's assembly candidacy as a Democrat. So I wasn't that much into it, and so what I was trying to do is to get people that might know people, at least to look at your name.

That's what's ironic with respect to this Deukmejian relationship, because I didn't know George Deukmejian at all. I'm convinced but for the fact that when I was nominated by Jerry Brown, they did some research on me, that they probably hadn't thought about me. I'm sure I was not on their radar screen for those positions, because I knew other people who were very active Republicans, who were on the trial courts, who wanted to go to the court of appeal.

When I was on the superior court one of my running buddies that we'd run every morning with was Tony Ridder, who was the CEO of the Knight-Ridder newspaper chain. At that time he was not the CEO. He was

the publisher at the time. He talked to Gray Davis about my possibility of going to the court of appeal, because I had told Tony that I'd always hoped to get to the court of appeal. I never had any expectations that if I got to the court of appeal I would go any higher than that.

But Tony one morning told me that Gray Davis, who was then the chief of staff for Jerry Brown, said there's no way that he will appoint a Reagan Republican to the court of appeal. "If he was a muni judge and wanted to go to the superior court," he says, "we could probably do something." So Tony told me, "Don't expect anything." I said, "I understand that."

Ben Swig was trying to get Jerry Brown to do something for me regarding a court of appeal appointment, but Jerry Brown did not listen to Ben Swig. So Ben put a lot of pressure on Pat Brown. One day I'm on the bench and I get a call from Pat Brown, telling me, "Would you please ask Ben to back off?" He says, "He's putting all this pressure on me, but Jerry doesn't listen to me." I said, "I understand the story." He says, "But Swig's really on my case about this."

It was funny. I was on the bench and someone says, "Governor Pat Brown is calling." So I said, "Hey, I understand the drill. That's fine. I have no problem with that."

**MCCREERY:** [Laughter] As an aside, how well did you know Governor Pat Brown through Mr. Swig?

**PANELLI:** Not except through Ben, but not well.

When Joe Alioto was running for governor, Ben had me host here in Santa Clara County a dinner where I invited all these folks to hear Joe Alioto with respect to his candidacy, which Ben, of course, paid for, because I could never afford to pay for it all. The expectation, hopefully, was that if he became governor, then that would have been an entrée. Now, I must have been on the bench at the time. I'm not sure about the timing, because I don't remember when Joe Alioto ran.

The funny part or the ironic part of it was that later I was going to be a nominee from Jerry Brown for the Sixth District [of the California Court of Appeal]. Of course, the timing of that was when Jerry Brown was running for the U.S. Senate, and there was a lot of concern about some of his judicial appointments.

The feeling was that in San Jose, by virtue of my reputation — I think I was rather popular with the bar; I always rated either one or two in those judicial polls that they had — it would be a good idea to maybe squeeze me in with Marc [Poche] and Jerry Smith. So that's how that all turned out.

I don't think — I may have had conversations with Jerry Brown before I was to be named, but I sure had a lot of them after I was named. He'd call the house because he wanted to see if I could talk to Deukmejian about approving these other folks, and what I would do if I was nominated as the P.J. [presiding justice], and all that kind of stuff.

MCCREERY: He was thinking ahead, even, wasn't he?

PANELLI: He was thinking ahead. I said, "I can't — how can I commit myself to something if I don't know what the hell it's all about?"

MCCREERY: Yes. What was your view of how he operated, Governor Jerry Brown?

PANELLI: He's obviously, again, very bright, but very mercurial. I remember he came down to Santa Clara County for the investiture of one of the judges. He looked around, and he said, "There aren't enough brown or black faces here." So he immediately went out and appointed someone, and I think that person never got reelected, at the next election he was defeated, which was kind of unfortunate. The guy was a very nice fellow, but it wasn't going to work because he was a weak candidate.

So he was kind of a shoot-from-the-hip person, and "I'll show you what I can do," and "I can change things." I understand the necessity — having been on the outs years before as a little Italian kid, I understand that you want to maybe boost people. But I think you've got to do it with a little more finesse. Just, as I say, with Rose [Elizabeth Bird]. If he had appointed Rose as an associate, and [Stanley] Mosk as the C.J. [chief justice], Lucas and I would have been the two people [representing an opposing view from the majority] on that court for a long time.

But he was about to show people that that's what he was going to do. He was going to put a woman there. Similarly, with the Sixth District, I think if he'd stuck with Poche and Smith, my sense is that Deukmejian would have approved them, because Poche had good rapport with Deukmejian when he was in the Senate, and [Deukmejian] also respected Smith, who had been in the Senate with him. So you would have had a

situation with Brown getting two of the three appointments on the Sixth District, as opposed to none, and then [instead] Deukmejian getting all three appointments.

MCCREERY: Yes, the timing is everything on some of these things. We'll come back to some of that, but thank you for filling me in. We wanted to talk about your career as a superior court judge. Just to set the stage again, after you were nominated by Governor Reagan to that post in 1972, by what process were you confirmed?

PANELLI: There wasn't any confirmation process.

MCCREERY: Nothing whatsoever.

PANELLI: No. I don't even think "Jenny" [Commission on Judicial Nominees Evaluation] was in existence then. I don't think I had to go through the Jenny Commission for that. What you did is you just had a swearing-in ceremony. On the 17th of March, 1972, two of the people who were elevated, Judge [J. Barton] Bart Phelps and Judge [James] Jim Duvaras [Jr.] had been muni judges in Sunnyvale and Palo Alto. They wanted to get on the superior court bench now. I didn't want to be left behind, so we had our swearing-in ceremony on March 17th of 1972, which for me was kind of a tough turnaround, because — I forget the date of my nomination.

MCCREERY: The record says you were nominated on the second of March.

PANELLI: Okay, so it's only fifteen days later that we're sworn in, and so the three of us were sworn in at the same time. Unfortunately for me, we then had to draw lots for relative seniority, and I drew the last lot, so I became the junior person.

MCCREERY: Where did the drawing of straws take place, where and when?

PANELLI: The 17th, as I recall, was a Friday, and Judge Marshall Hall was the presiding judge. I think we did it that very day, because when I reported on Monday I knew that I was junior, which meant that I had the last choice of the assignments. As a result, I also had no chambers. So my chambers was my briefcase. If someone was ill or someone was out, I'd go use their chambers, or I'd use a jury room as my chambers.

Now that was March, so the assignment selections for '72 had already been made. So from March of '72 through the end of that year I did civil jury trials. In fact, as I reported on Monday, on whatever that was, 18th,

19th, 20th, I report and I'm using this judge's chambers. I met my crew. My bailiff comes in, and he says, "We've been assigned a jury trial." I said, "Oh, that's fine." A few minutes later he comes back with another file. He says, "Judge, we've been assigned another jury trial." I said, "Oh, that's interesting." A few minutes later he comes back, another. I get eight jury trials assigned to me.

So I get on the phone to Judge Hall. I said, "Judge Hall, I'm sorry, I think you made a mistake. You assigned eight jury trials to me today. There's no way I can try eight jury trials today." He says, "Of course not." He says, "You're supposed to settle seven and try one." And so I did.

I told all the lawyers, "Look, this is my first day on the job. You've got to make me look good." I was pretty good at negotiations, so we did settle seven. The one case that I did not settle was one that was a goofy case, and there weren't any jury instructions, so I was up all night, not knowing that the lawyers were supposed to prepare these instructions, because they did it kind of lax in Santa Clara County. And we tried that case.

But as a result of settling the other seven, then Judge Hall kept sending cases to me for settlement purposes, and so that's kind of how I got in the settlement business. But anyway, that's what we did from March until the end of the year. Okay, then in December what they did is they sent around a yellow pad, and it showed, let's say, twelve civil departments, twelve criminal departments, three criminal-legal departments. Then they had domestic-relations departments and juvenile.

When it came to me the only thing left was the presiding judge of the juvenile court, and so that was my assignment. The good part of it was that I was the P.J. of the juvenile department, so I had a very nice chamber set up. The problem was that it was probably the most difficult assignment that I ever had, because, I went out there with the expectation that I was going to save all these kids. After six months I thought maybe I'd save half of them. At the end of the first year I said, gee, maybe one. So it was very, very difficult.

I stayed on for an extra year in juvenile, so '73, '74 I was in juvenile. Then the following year — because what they did is the top two names came to the bottom and you moved up, and I think then what I did is I got — I'm not sure. I may have had the family law, because I did some family law calendars, but I'm not sure whether I did that as part of my regular civil

trial. But it could have been family law. Then I became a civil department and also the probate department, which was merely handled by a judge before the trial calendar was called.

MCCREERY: Kind of an aside, almost?

PANELLI: Yes, because you wouldn't start your jury trials until nine-thirty, and you'd call the probate calendar at eight-thirty. Because I'd had a lot of experience in probate, I became the probate judge.

So what I would do is I would hear a probate calendar from eight-thirty to nine-thirty. If there were contested matters, then I would either send them to the trial department for assignment, or I would hear them if the case that I had wasn't going to go forward.

But what that involved was that I reviewed all the cases — it was almost like a consent calendar. I'd meet with the probate examiner the night before, and I had gone through all the cases, usually through my noon hour, and I'd say, "These are the problems I have with these. These are okay."

When I took the bench at eight-thirty I'd say — and we'd have the approved list out there — "Is there any objection to any of the matters on the approved list?" If anyone said no, I said, "I've signed the orders." We'd dump them on the clerks, and the attorneys would come up and pick up the orders. Then I would hear the matters that weren't on the approved list, and then at nine-thirty I would hear my regular trials. So I think I did that probate calendar for about eight years.

MCCREERY: What was the volume of those cases?

PANELLI: I think we said we wouldn't put more than fifty a day on. But I'd say thirty to thirty-five of them were consent issues, which means I'd look through the file, I saw that the file was in order, there weren't any problems. But it took a lot of extra time.

MCCREERY: How did you like that assignment?

PANELLI: I liked it, because first of all, most of the lawyers who were doing probate were people who had been around a long time, so I knew them. It was kind of a way for people to keep contact with you, because most of these people weren't doing trials. This is a different breed of cat that did the probate work, as opposed to the trials. But at the end I said — it got to be



a little much, and then I think Judge Allen, Bruce [F.] Allen took over the calendar and he did the same.

MCCREERY: I want to return to the juvenile court for just a minute. How did those cases come up?

PANELLI: In those days there were two departments, the presiding judge and there was a second department in the juvenile. It was physically located at the Juvenile Hall, the juvenile center. There was no distinction in assignment between 600, now 300, and 602 cases. The 602 are the crime cases, the violations of what would be penal law. The 600s, now 300s, were dependent children. They now split them up so they have a dependency court and the juvenile court.

They were both in the juvenile court, and I would hear both. Then you had all the administration, see, because as a presiding judge in juvenile court, the juvenile probation department is responsible to you. It's now been changed. It was a political issue. The social services people wanted to get it away from the juvenile probation department. The county board of supervisors wanted it under their control rather than under the control of the courts. They had a big fight here recently, within the last three or four years. The courts lost, and now the juvenile probation department is responsible to the board of supervisors.

MCCREERY: What did you think should be the setup?

PANELLI: I thought the court needed the tools to take care of these people, and to do what they needed to do. I thought that by getting these other people in it would be a political nightmare, and I think it's proven to be that. But it became a question of economics, because the board of supervisors, if they held the purse strings, could do things that — maybe as a judge you'd order people to do things that they didn't want to do.

Placements became very contentious. Do you put them in a costly placement, which was best, or do you put them in a less-costly placement? Some of these kids needed some placements that were costly, and the board, they'd get unhappy that they had to pay \$3,000 a month for some placement. You're supposed to have the parents reimburse the county for the placement. Most of these people were on AFDC [Aid to Families with Dependent Children] anyway. It didn't really make any difference.

But that was the hard part, too. You'd take kids out of their home and tell the parents, "Okay, now you've got to pay." Those were some of the hairiest moments I've had as a judge. But it was a very difficult experience, and at the end of eighteen months my kids could see the big change, because I'd get tougher on them. Because you'd see the signs, you'd say, oh, this is a bad deal, and so after two years I had enough.

I used to visit some of the kids in placement. I'd go out to the ranch at least probably once a month, maybe twice a month. There was a program called Campus Life. It was some Christian church had this — Youth for Christ, I think it was. They had a fellow who was very, very active in that, and he was really a good person, and he would counsel these kids. They've had these programs down at the ranch, and so once or twice a month when they had one of these things I'd go down and meet with the kids and talk to them.

**MCCREERY:** What kind of a model were they using?

**PANELLI:** It was a behavioral modification program. You did not sentence them for x number of days or months. Depending on how you performed, you could run through the program in, I think the shortest period of time was two months, the average was four-and-a-half months. But you could go there for about nine months or ten months, because it was a behavioral modification program, and if you didn't shape up you didn't get promoted. You start in, I think it was D class, then you go C, B, A, and then home.

During the latter part of my tenure there they changed the rules. I don't know if it was a federal court or a state court that says, "No, you cannot confine a minor for more than the maximum period of physical confinement," so that you have to make a finding that for this particular crime you could not have been confined for more than such-and-such a period of time.

So it changed the whole dynamics of how you were working things, because you'd have to say, for this crime maybe the maximum period of physical confinement is four years. You obviously wouldn't keep anybody for four years, unless you sent them to Y.A. [California Youth Authority]. We usually tried the least-confining type of placement first. But we used to tell juveniles that if — my predecessor said, "If you ever run away from the ranch, it's Y.A."

I thought that was a little harsh, because I knew if I sent somebody to Y.A. they were not going to come out better. I visited the Y.A. facilities, so I kind of knew what was going on there. So I tried to keep them on the ranch as long as I could, even if they ran away. The people who came from south county — that's where the ranches were, down in Morgan Hill — because it was so close to home, they were the ones that we'd have problems with keeping them there. It's kind of an isolated area, although it wouldn't take much to get away. It's not restricted by fences at all. It's open. But I felt that we ought to try that before we sent them away to Y.A. So we did.

But I thought it was a good program. For a lot of kids, they picked up their reading abilities, their math abilities. They were much more wholesome. The problem was after they completed the program they'd go home. Then they'd go out again and they wouldn't go to school. Then they'd start getting into trouble, and then they'd start — burglary was a big thing, breaking into houses, and then they'd be back.

We also had a facility for the girls, called the Muriel K. Wright Ranch for Girls. She had been the juvenile probation officer for hundreds of years. It wasn't really a ranch. It was really more like a school, but the girls were more difficult. The boys were more transparent. They'd try to con you when you'd go out and talk to them. When I went out to the girls' facility, they're coming at you differently, and they're flirting with you. It was really an experience. They'd say things that boys would never tell you, for fear that maybe you'd get upset. They'd tell you the way it is.

MCCREERY: That surprised you?

PANELLI: It surprised me, for sure. Unfortunately, the uniforms for the girls were these miniskirts that were mid-thigh or higher, and so these young gals would sit back in their chairs and lean back, very provocative, just to rattle your cage a little bit by some of the things they'd say and their language.

It kind of also changed my attitude about a lot of stuff. I was pretty conservative about certain things, that people should go to school, what they should do, and how they should conduct themselves. We had a program called the Foundry School, and that's where kids who would not go to school were sent. It was beyond a continuation school. They wouldn't even go to continuation school. I went out and visited this Foundry School,

and I said, “What’s going on here?” The girls are putting on fingernail polish and combing their hair, and the boys are sitting there talking, or reading a magazine. I said, “What kind of a school is this?” I said, “This is ridiculous.”

Then the instructors got me aside and they said, “Judge, do you realize for some of these people to come to the same place for two days in a row is a major accomplishment? The fact that they’re coming here and they’re learning how to groom themselves might not seem important, but they come back every day. That is the first step for them to get back to school.” I said, “You’ve got a very, very good point about that.” So I became very supportive of the Foundry School. I made sure that we tried to encourage them to come, and then hopefully at some point in time they would be amenable to going to the continuation school. They would never be able to get back in the mainstream school, because they’d start messing up again.

At about the same time when all of this was going on, we were starting to have problems with the dependent kids, the 600s or the 300s. They have to be segregated from the 602s, so we had what they called the Children’s Shelter. So if you busted the mother and father for drugs, and they’re in the county jail, well, the kids would go to the Children’s Shelter. So everybody — not everybody — some of the people, the supervisors, one in particular, may he rest in peace, thought that these were like a bunch of Mickey Roneys, you know, in the Father Flanagan *Boys Town* stuff.

These kids were pretty tough and worldly. They may not have been busted for anything, but they kind of knew the real world. So things were going on in the Children’s Shelter that caused this alarm in the community. These are supposed to be neglected and abused children, and here there are kids who’ve had these other problems. It’s because they’ve come out of households and families where things went on, so if there was violence or sexual misconduct it was very, very difficult. Plus we were overcrowded, and so they had this big drive — this is after I left — for a new children’s shelter, and it was supposed to be much better.

But I see in reading the paper, they’ve had problems with respect to behavior at the shelter, because kids now are much more violent than they were when I was there. Most of the crimes were property crimes. You would have some violent crimes, but not many. Some of them are very young. I had an eight-year-old kill someone, and they’d want to send them to Y.A. I

said, "I can't send an eight-year-old to Y.A., for goodness sakes. They'll eat him up." Even though he was a tough kid.

But those were some of the problems that you had to face. My concern with the Children's Shelter was the kids would go to a regular public school, and then, of course, they were taunted. "Oh, you're one of those juvy kids." So that would cause a problem in the school. It was a difficult experience.

MCCREERY: You mentioned being aware of what went on at the Youth Authority. What was the book on that?

PANELLI: It's tough. It looks beautiful. You go there, I went to the ones in — I forget, I used to know the names of them. One was for older kids, one was for younger kids, out of Stockton. You walk in, gee, it's a nice facility. You see a track with an athletic field, and classroom buildings. But the kids are tough, man. If you weren't a very good criminal before you went in, you certainly were going to be a much better one when you came out.

So I was very disappointed in the rehabilitation, and I'm sure there was a lot of victimization of younger kids, sexually. As I say, it's an open area. Sure, they've got the high fences around it, but it was this big campus. It looked like fifteen acres, twenty acres. There was plenty of room for mischief. Not a great deal of control, at least at the time that I visited, and they've had their problems.

MCCREERY: How much was it a threat to say to the kids you were seeing, "You might be sent to the Youth Authority?" Did that mean anything to them?

PANELLI: No. Some of them thought it was a status. "I want to go Y.A.," you know, the big deal, tough things. I said, "You'll go there when I tell you you can go there."

MCCREERY: It's interesting to hear how your own ideas about juvenile work evolved over this. Functioning as part of your larger court, did you have any battles to fight there, or did you make any particular changes?

PANELLI: No. You were by yourself out there. The other judges were downtown and you were out there, and they'd see you at the Thursday meetings. They did support my predecessor, Judge Ingram, on this social services/juvenile probation issue, i.e., who was going to have control, and

we won it then. When I was at juvenile we won it again, but here, as I say, recently they lost it. You had the courts' support, but no one really got too involved. It was your responsibility. You were the presiding judge. It's a statutory position, presiding judge of the juvenile court. We had a — what do they call them? — Juvenile Justice Commission, where you get to appoint people, and they're supposed to oversee the operations of the court and the juvenile facility.

MCCREERY: How well did that work?

PANELLI: That worked very well. We had some very good people, very dedicated people, been there a long time. But the problem even for those folks is that we had changed. The type of kid that you saw had changed, the violence, the idea that some kids would attack counselors in the juvenile facility. It would happen, but it was pretty rare.

Then it got so that it would be not a daily occurrence, but a weekly occurrence that you'd have some problems. Then you had problems with kids escaping. They'd come to the court, and they'd take off out the front door. I remember sometimes I'd come by on a Sunday night. I think that's when parents' visiting nights were, for kids that were in the [Juvenile] Hall, in case somebody wanted to talk about stuff. But you were pretty isolated out there.

MCCREERY: Let's talk a little bit more about the superior court as a whole at that time. You mentioned Marshall Hall was the presiding judge when you came in. What kind of a leader was he?

PANELLI: Marshall Hall was the old, Republican establishment. He came from probably the most prominent Republican political firm in San Jose, old-line, Rankin, O'Neal, Luckhardt, Center & Hall was the name of the firm, and they go back to the days of Governor [James] Rolph and all this. They were very, very, very powerful, the O'Neal office. In fact, there are still two of the sons in the law practice, but they're not active in the firm any longer.

So he was kind of happy when we came on, because we were three appointees by the Republican governor. He was, I thought, a pretty good administrator, kind of a crusty guy. There was a very notorious kidnapping in San Jose in the early thirties, late twenties. The son of the owner of the biggest department store in San Jose, called Hart's, was kidnapped and was

murdered. The murderers, kidnappers, were apprehended and were held in the county jail, and a lynch mob came in, knocked down the door to the county jail, and took them across the street from the courthouse and hung them up, hung them in the park.

Judge Hall helped in the search. He'd always been into boating and had a boat. He was out in the bay in Alviso and found the body. The police figured that Hart was killed and thrown off the Dumbarton Bridge. So I didn't know this at the time that [Judge Hall] was alive and I was on the court. But this fellow who just died here two days ago, Harry Farrell, who was the political writer for the [San Jose] *Mercury News*, wrote a book, a very interesting book [*Justice: Murder and Vengeance in a California Town*], and in that book he talks about Marshall Hall. I said, gee, I wish I had known all that stuff. I could have asked him some questions about that.

He was a good administrator, but it wasn't technically an elected position. It was, again, by seniority. You rotated to the top. So he happened to be the P.J. when I came on. Then I forgot who followed him, and then my turn came on in 1980, so it didn't take long to get to the top of the list.

One of the interesting things also was that most of these things happened just by rotation, not necessarily merit. The superior court also had what was called an appellate department — it still does — that hears appeals from the municipal court. What happened was that you knew when it was going to be your next turn. So when it came time for my turn, Rose Bird was the chief justice, and she decided that she wasn't going to follow any rotational deal, that she would appoint whomever.

So she appointed some of the new judges — that had just been appointed by Jerry Brown and were new to the superior court — to the appellate department. Some of us who felt our appointment was just a matter of, almost a right, were a little chagrined that this would happen. But about two years later, two or three years later, then I did get a stint on the appellate department. I don't know if I was the chair there, or whatever they called it, but I remember I was on for at least one year, maybe two.

But there again it was one of the situations where Rose wasn't going to go along with the old boys' network kind of thing. Similarly, with the election of P.J.s and assistant P.J.s, she wanted to have an actual election, rather than just doing it by rotation. As you got larger, now, I can see that you can

maybe do it by election. But the concern was the court was small enough that they didn't want dissension, you're politicking for this, whatever.

MCCREERY: Were you in a position to compare much with other counties on these matters, of changes in court administration?

PANELLI: Not much. We did cover for San Benito County, because they only had one judge. If there was a disqualification then someone would go down, and Judge Ed Brady, who was the judge in San Benito County, would come to Santa Clara County. I did that three or four times, but I think that was just, you'd get a call from the P.J. I don't think it came from the Judicial Council, it might have, where you were told to go down there and try this case.

MCCREERY: But on matters of, for example, Chief Justice Bird's changes to your appellate division, were things like that going on in the other counties? This was across the board?

PANELLI: Oh yes, oh yes. It was across the board. It wasn't just in our county.

MCCREERY: Was there any opportunity to compare how that was working?

PANELLI: I think everybody had the same view. If it was your turn and you kind of liked what had been tradition, you weren't too happy with it. If you were new you'd kind of like it, because number one, it goes on your résumé, and if you had ambitions for higher things it's always nice to say you were on the appellate department.

MCCREERY: As a practical matter, how well did this change work in terms of getting appellate work done?

PANELLI: I think it was okay, because I think the people that she appointed that were junior, much junior to me, were people that I'm working with now, Judge [John A.] Flaherty and some of these others. They were good judges, smart, they knew how to do it. We just felt that, at the time, you put in your time and then it's your turn and you do it. But it wasn't a question that they were a bunch of hacks. They were good judges, smart people, good lawyers. One of the responsibilities that I had while I was on the court, and unfortunately I don't remember the timing, is I was elected by the court to the Santa Clara County Law Library board of trustees. It was at a time that the library had to move, and so we had to locate a site and build a facility.



I don't know how long my tenure was on that, but it was while I was P.J. Supervisors appoint someone, and the court appoints someone, and there are some public members. I don't know exactly the composition.

Frankly, I had almost forgotten about that, but they're doing a history of the library, and they wanted me to look at the draft to see whether what they have to say about my participation in there is what happened. The problem is I've only gotten to about 1950 [Laughter], so I haven't gotten to the time that I was on. But that was something that was kind of an interesting thing because we had to issue bonds. The law library had always been part of the superior court building. Now it was going to be a stand-alone facility far from the courthouse, and now it is at some distance from the courthouse.

MCCREERY: What were you looking for in a site?

PANELLI: We were looking for a place that was close to the courthouse that we could afford. We figured how much we could finance. I think we issued bonds, and it was a question of how much we could do, how much we could raise. We found this property out on Fourth Street and built the library there. I haven't visited there since I went on the court. There's a portrait that my court staff had done for my tenth anniversary as a judge, and it's hanging on the wall in this library. When I went there — I forget what I was looking for. I was doing some research, and the librarian wanted to know if I had a library card. I said, "No, but I'm in that picture over there."

MCCREERY: You've mentioned your staff a couple of times. Tell me about who worked with you.

PANELLI: My bailiff that I started out with was Leo Howard, a retired lieutenant commander from the navy. Leo was a Kansas farm boy who got drafted into the navy and became the commander of a destroyer, a really nice guy, but he was like Barney Fife. In those days, see, the bailiffs were not deputy sheriffs. I said, "Leo, whatever you do, don't you ever pull your weapon." I says, "Lock it up in the drawer."

Joe Molina was my clerk, and what was the name of my court reporter? I've got her picture in my mind, but I can't think of her name.

MCCREERY: We can fill it in later. Did these folks stay with you?

PANELLI: They were assigned to you. Later Joe left, and I picked up Ann Greco, and then my court reporter became Barbara Ives. Then my bailiff became, oh, what was her name? Louise Ondi. She's a great gal. She was a deputy sheriff. By this time we had decided we wanted patrol deputies in the courtroom for security.

MCCREERY: Was that being done quite a lot elsewhere?

PANELLI: What happened, see, when you first started they had bailiffs who were retired police officers, retired military people. Then they decided that — when the killing of the judge [happened] up in Marin County, then everybody got a little nervous, maybe we'd better do something. On the criminal side they wanted to put deputy sheriffs in there. But on the civil side, in order to save money they came up with what they wanted to call court attendants. So you would have someone with a blue blazer, either a man or woman.

Then, because sometimes you were trying criminal cases, we said, "No, every judge should have a patrol deputy who knows what they're doing in the courtroom." Again, it's funding. The sheriff says, "Gee, I can't do this. It's going to cost a lot of money. I've got to pull them off the patrols." The judges said it became a question of whether you had the authority to order them to do it. The board of supervisors said, "You can't do it." We said, "We're going to do it."

Just like our clerks. They did not work for the court, they worked for the county clerk, who was an elected official, later appointed official, and so you really had no control. All you can say is, "I'm not too happy with this person. Will you do something?" The only person that really you had control over appointing and firing was your court reporter.

I was very fortunate that I had two very good court reporters. The first one that I had, she was about this tall. I can't think of her name — it just escapes me now. She left because she needed to make more money, and she could do it if she went to the criminal courts, because then they have the transcripts. And then Barbara Ives came. Barbara is a very, very good court reporter, and she was with me until I left. Gee, I can't think of the gal who was the bailiff for me, but it'll come to me.

MCCREERY: How did you use your clerk?

PANELLI: The clerk just took care of the ministerial things. They were not your secretary. They didn't do letters for you or do any of that. There were

maybe two secretaries for the whole court. The P.J. kind of got first dibs on the secretarial staff, but that was a big deal. We wanted some control over the people that worked with us, because first of all, the record is very important on appeal, and that's why, I guess, maybe they let you have your court reporter, because it's what's in the record that's going to kind of run the show. But the clerks merely kept the exhibits, did the minutes, and all that kind of stuff, but all the ministerial stuff.

MCCREERY: Yes. Between them and then these two shared people, was that the extent of your staff help? That was it?

PANELLI: Oh, yes, that was it. The court later got one research assistant that was to work with the appellate department and later also did law and motion. Then when they developed the regular law and motion department, then I think they had more than one or two. But that's it. You had no research help. You had to do your own research, or you'd have externs from the law school. I'd have externs from the law school that would help me with the research.

MCCREERY: You could pick your own externs?

PANELLI: Yes.

MCCREERY: What did you look for?

PANELLI: They had to be a Santa Clara student, because I had felt that for years we were overlooked because we weren't one of the name law schools for appellate positions, plus they were close by. When Judge Owens, who had been the dean of the law school — when I started to law school Judge Owens got appointed to the superior court bench. Judge Owens hadn't ever practiced law in California. He went to Harvard, he was a Boston lawyer, came out to kind of turn the law school around, I think in the mid-thirties. He was the law school. He was its dean.

As luck would have it, when I started my first year of law school, probably into the first month, he got appointed to the superior court, so that he felt that he needed some help in research, so he took a second-year student. He paid for him to do the research for him. Now, the second year, when I became a second-year student, he hired me to do that. But thereafter, he was hoping that the county — and the county may have paid part of my

salary, I'm not sure, because I think I may have gotten something from the county, but otherwise he paid you.

Then years later they had this [extern] program. But you had to do your own research, and I'd have these law students and I would look for, typically, the students that were good writers, researchers. I'd go to, I forget what her name is now, Barbara Weatherholt. She was the only female faculty member when I was in the law school, but she taught research and writing, and she'd say, "Yes, I think these people are good." So they'd come and maybe do it for three months, four months. Some of these people I see now that are lawyers. In fact, I was with one on Tuesday that was one of the research people.

MCCREERY: Yes, I wondered if you kept in touch with each other in this community.

PANELLI: Not so much. For a while my supreme court clerks would have a reunion, but then, it kind of loses some stuff. I've got pictures of the last one with all that stuff.

MCCREERY: On the superior court we talked about Marshall Hall. Say a little bit about some of the other judges you worked with, and what the atmosphere was like there.

PANELLI: I thought it was pretty collegial, bearing in mind that it wasn't too political. I'd say the mix was probably half had been appointed by Republicans and half by Democrats. It wasn't until the Jerry Brown era that you started to feel a little tension between those appointees and some of the older judges.

MCCREERY: Why was there tension?

PANELLI: I don't know. Maybe they were a little more activist. They'd been a little more involved maybe in politics. That's not to suggest that some of the other judges that we had hadn't been involved in politics.

Bruce Allen had been an assemblyman, and Bruce Allen had also served as president of the West Valley board when we first got elected to the West Valley board. But you would never —. As political as he was, he was probably the least political on the bench. It was really amazing. In fact, it amazed the Jerry Brown appointees that that's the way he would be, because everybody figured that this guy was Attila the Hun.

MCCREERY: Yes. What's the lesson there for the public? People have this concept of how judges' own beliefs and experiences feed into their judging.

PANELLI: Obviously, you bring to bear on the issue your own experiences.

MCCREERY: That's inevitable.

PANELLI: Yes. You are what you are, and that's what I tell people. I've been around, I've seen a lot, and so sometimes I react differently to things than someone else who doesn't have the same experience as I do. But that doesn't direct you. If the law says you go straight ahead, even though you would like to veer to the right or to the left, if the law directs you that way, then you're going to go straight.

On the other hand, if the issue isn't that clear, and you have to bring your own judgment to bear on this particular issue, your own experience is necessarily going to temper how you approach that problem. Clearly, on the trial courts you don't have much opportunity for that. It's pretty easy. It's not until you get to the appellate courts, and that's why I guess Jerry Brown said he wasn't going to have a Reagan Republican on the court of appeal, and clearly, more so on the supreme court.

But I thought we had a very good bench. I thought we had a hardworking bench. We had some people who worked harder than others. You had some that you could count on if you had a problem and you needed to get a case out. They would work with you. You had some that would say, "Hey. You sent me a case. I got rid of it. I'm not available until tomorrow."

When I was P.J., I told my colleagues, "Hey, we're all in this together, and if you get rid of the case in the morning, I want to send you something in the afternoon." When I had a case, I might stay late. That led to some problems with the staff. They'd say, "Judge, our hours are eight to five, and if you're staying late you're cutting into our own time."

I said, "We're in a service business, and we're here to serve these people. I understand, but that door swings both ways," because we'd go, sometimes I'd go five, six, and we might start early. We might take a half-hour for lunch, because I wanted to get through these cases, because you knew there was a calendar backlog. We had a master calendar system, so as P.J. you not only assign cases in the morning, but then you become a trial court.

Or if I was a trial department, I'd want to finish the case I had if I knew that the P.J. would say, "We need this case done. We're going to send you

this case on Monday, but we've got a bunch of other cases coming out on Wednesday. This is a case that should be able to be tried in two, two-and-a-half days. We'd like you to be available Wednesday afternoon." Then you would do what you could do, and there are a lot of times you're picking a jury when you've got one out deliberating.

Some of the staff would say, "It's our hours." When I first became a lawyer, ten to four were the judge's hours, ten to twelve, two to four. When I went on it was just the opposite, man, you went on. But there were some judges who would tell the P.J., "No, I'm not going to do it, and you have no authority to tell me what to do." They'd tell you, "I was elected by the same people who elected you." So a lot of it's just based on collegiality, that they would do things you asked them to do.

But I thought we had a very good court. We had Judge Ingram, who went to the federal court. Judge Jim [James B.] Scott went to the court of appeal. Poche, of course, went to the court of appeal. He was with us. So we had a few future justices on the court. Poche came after me. But I thought it was very good. Judge Homer Thompson was a P.J., I think, after Marshall Hall. He was a very, very good settlement judge, one of the guru judges on settlement, also came to JAMS. Judge [Peter] Anello, very respected judge, was a very good trial lawyer, Judge [George H.] Barnett. Both Barnett and Anello had been appointed by Pat Brown.

**MCCREERY:** In your early years, who of these could you go to? Did you have any kind of mentor, or how did you get your start here?

**PANELLI:** No. I became a mentor judge for most of these Brown judges. But no, there wasn't any particular one. I'd kind of talk to Marshall Hall, because he was older and I kind of respected him. He had been a judge that I had tried cases before. Judge Owens I would talk to, although I'm not sure Judge Owens was on the bench when I went on. I talked to Judge Anello a lot, because he was one of the graduates of our Santa Clara Italian community. He had married one of the Giannini girls that lived down the street from us, so I talked to Peter. But there wasn't any special confidante. Of course, I went to the trial judges' college in Berkeley.

**MCCREERY:** How was that?

**PANELLI:** That was good. I also went, my first deal was I went to a program that the superior court in L.A. County did for its new judges, because

in that same batch of new judges they got something like thirty-five new judges. They had a very sophisticated program, and they invited all the other newly appointed judges.

In fact, Justice [Nat A.] Agliano, who's here today, who later sat with me on the court of appeal, the Sixth District, he went down there as well. That's the first time I ever met him. He practiced with a fellow by the name of Panelli, Mike Panelli. I had heard of him but I had never met him. So they went through a weekend program for judges, and then, but see, we were appointed in March, they probably did this in April, and you didn't go to the trial judges' college until July, so you had this period of time without much training.

But I'd ask around with the judges that I felt comfortable with. There was a judge that I really liked. His father had been a professor at Stanford Law School, and we would talk a lot. I can't think of his name now. He died. I remember he had a problem with a raspy throat. I kept saying, "Jack —," Brenner, Jack Brenner, John Brenner, "you've got to go see about that." "Oh, no, I'm okay." He had cancer of the esophagus and died. But he was a good guy. He was very helpful as well.

MCCREERY: What about outside the court, knowing that your business had to stay within, but was there anyone you could talk to?

PANELLI: No, no, I never talked to — sure, I'd talk to the people I'd been in the practice of law with. We'd have lunch, we'd talk about stuff, but we wouldn't talk about the court business. No, but I had a lot of friends on the court, and some I got along with much better than others, and I'd say I got along with all but maybe two.

MCCREERY: It was a pretty big court.

PANELLI: By then it was probably in the forties, and part of it is just that we got over some crazy stuff, because I was admitted on the 17th, which is St. Patrick's Day, so every year my crew would have a party. Because one of the other judges had a St. Patrick's Day party because he was Irish, there was a concern of whether we were conflicting, and would we maybe do something together.

I said, "Hey, I have nothing to do with this party that my people put on." Every year they had signs, "Year two, year three, year four," and at the end, "four more to go," or whatever it was. So I said, "If you want to talk to



them about doing it some other time, or doing something, that's fine, but I won't even get involved in that."

Then I had another judge that I suggested that maybe before — because this particular judge was going to be the assistant presiding judge, and this judge sat in criminal — that maybe it would be worthwhile to come to civil to see what happened, just to kind of get a feel for it. The judge says, "If you don't think I'm qualified, then don't appoint me." I said, "That wasn't the point."

I'll never forget, Judge Flaherty was sitting on the other side and he says, "What the hell was that all about? You were just trying to give some helpful advice. You weren't suggesting a lack of qualifications."

But on the most part I think I got along with them. I think they respected me, and I respected them. We had differences of opinion. As I say, Judge Flaherty, Judge [Read] Ambler, Judge [David] Leahy, all those people, I sat with them on the bench when they first came on, helped them pick a jury, told them what to do, that kind of stuff.



FIRST REUNION OF RETIRED JUSTICE EDWARD A. PANELLI (CENTER REAR) AND HIS JUDICIAL STAFF, SEPTEMBER 6, 1995, HOLDING T-SHIRTS PRINTED, "EAP'S SWIFT JUSTICE TEAM." JUSTICE PANELLI'S SUCCESSOR, JUSTICE KATHRYN MICKLE WERDEGAR, FORMERLY OF HIS JUDICIAL STAFF, IS SEATED AT FRONT RIGHT.



MCCREERY: In your own early years, I wonder how your expectations of judging compared with the realities.

PANELLI: I tell this story because it's true. I really thought that it would be kind of nice to be a legal scholar. Of course, I practiced law in a situation where you were doing everything off the seat of your pants, because you had so much to do. But I thought when I got a chance to go to the court, obviously these judges are going to sit there and contemplate the law and all that kind of stuff.

As I say, the first day I got eight cases, and it was just the same old rat race. You just do the best you can, hope that you're right most of the time, and hope that the lawyers are good enough that the information they give you, that you rely upon, is good information. So from that perspective I found out that it wasn't much different than the practice of law. It's go, go, go. Sometimes you're making decisions based on your view of the law, without being 100 percent sure that that's the way it is, with a recognition that if you are wrong some court of appeal could correct you.

In the old days when I first started practicing law, people went on the bench to retire. By the time my classes got on [the bench], it was a career, a new career, and you were expected to do the same thing as you did in the practice of law. There wasn't any taking days off, going out and playing golf in the afternoon, shutting down, being dark on Fridays. You started early and you went late, and sometimes you would go late into the night. Sometimes on these settlement conferences, when I was doing them on Thursdays, we wouldn't get through until ten o'clock.

So that I found that it was a lot more work than I had anticipated, and I was resentful of the fact that some people thought that, oh, well, people who can't make it in the practice of law and want to take it easy go on the bench, because that wasn't the way it was. It may have been years before, when they were working ten to twelve and two to four, but I'll tell you, everybody on that court, for the most part — now, there were some, as I say, that — they were dark and you couldn't get them to open up. So I was surprised at the workload.

Of course, when I got to the court of appeal I was even more surprised, and the supreme court topped it all, because it was the same everywhere, except you had more help on the various levels, on the court of appeal and on the supreme court, with respect to research. But the work was the same.

But it's like anything else. It depends how much do you want to rely on others, and how much do you want to do your own work? And my view — when I put my name on something I wanted to make sure that I was comfortable that that was the way it should be. Unfortunately, you run into, on all levels, where there's a great reliance on staff. You wonder how much input the decision maker really had before that name went on, and that can be disappointing, because I think it happens more often than it should, and more often than people believe it happens.

MCCREERY: Talk a little, if you would, about the trial work you did on the superior court.

PANELLI: When I was doing civil trials, of course, most of them were personal-injury cases, medical malpractice cases, not so much then legal malpractice cases as they have today, but I think I tried eighteen medical malpractice cases. We had sixteen defense verdicts and two plaintiffs' verdicts. I tried some significant personal-injury cases, but not too many non-jury cases. But it was a whole potpourri of cases that came to the superior court.

Now, what happened is, because of backlogs — and probably Judge Homer Thompson was responsible for this — there was a recognition early on that most cases are going to settle, and that only about 5 percent are tried. So here you have these hundreds of cases that are on the docket until they get a department, and then when you say, "You're going to go to trial tomorrow, or this morning," the case settles. So everybody recognized that what had to be done is you had to get the cases out of the system earlier. So the question then became, when in this process do you put the pressure on the case to settle, because we know it's going to settle at the time you're assigned to trial.

The first method was not to grant continuances, because lawyers thought they'd come in and get a continuance. So then I guess Thompson was the first on our court who said, "Uh uh, you've got a trial date, you're going to go to trial that day." That took care of some cases.

But then we realized that you had to give them a firm trial date. It had to be firm, but if you said, "Okay, you're going to trial on Monday," and it didn't go to trial on Monday and you had to kick it over, then you're going to lose a little credibility. So then it became a question of, we ought to get

these cases early on, and have a settlement conference to try to resolve the 95 percent of the cases that we know are going to resolve before they get to the trial.

So then the question became, when in the process? And that was very difficult. If you do it too early, the parties haven't done enough discovery. Various counties did it in various ways. What we did, and it later developed that while it was good, it didn't cut the cases out of the system soon enough — the week before the case was scheduled for trial all of the cases would be scheduled for mandatory settlement conferences. Myself, Judge Thompson, and Marshall Hall, too, was a good settlement judge. We would take these cases and probably resolve two-thirds of them, so that the following week there would be enough judges on line to try those cases, and so those cases would go to trial, or they might even settle in a week's time.

Now what they've done is they figure they're in the system too long when you get to that point, so early on, after the at-issue memos are filed, they have these new status conferences, and you don't get a trial date at a status conference until you've been to some form of ADR, usually mediation, so that they're trying to get them out of the system early.

Myself and two other judges went to Hawaii and had the whole Hawaiian judiciary at a meeting where we tried to suggest to them case administration with respect to getting cases settled, and getting them out of the system, because they just clog up the system and you know that you're only going to try 5 percent of these cases. So now it's much more efficient, and as a result, there isn't as much backlog.

The problem that you have in Riverside now, Riverside County, and San Bernardino County is going to have the same problem, they have so many criminal cases that they have to shut down the civil departments, and so that's going to back up all the civil cases. Now, I saw in this morning's *Daily Journal* that four judges from San Bernardino are retiring. They're going to be in the same problem. Riverside now has shut down — no civil cases for, I think, the first three weeks, because usually criminal defendants do not want to get to speedy trial. They'll waive their time.

As soon as they know that you've got this hangup, no one waives time, because they know that they're going to have to deal the case. So the only way you get around that, you have to put more judges on the criminal side, and criminal cases get priority. So you back yourself into a situation where

in Riverside County I am sure that the judges down there that do what I do in private mediation are going to be very, very busy, because the lawyers will want to get the cases out, because especially if you're a plaintiff's lawyer, you don't get any money until the case resolves. Or they'll agree to forgo the trial and go to binding arbitration, or reference, and hire a judge.

MCCREERY: You said you yourself didn't do too many non-jury trials.

PANELLI: Right, because there weren't that many around. I got my share.

MCCREERY: I was going to say, what was the ratio, approximately, of jury to non-jury?

PANELLI: Most of the non-jury trials were the domestic cases, the family law cases, which you would get — if they were going to be long cases, they would assign them to you. But you'd get some contract cases.

But the bulk of the litigation in those days was personal injury, and that's all kind of dried up now because of various processes. But a lot of the defense firms in San Jose that used to do insurance defense have disappeared. You'd always say, you never get rich being an insurance defense lawyer, but it was like a good annuity. That's all changed, and two of the biggest firms are gone in San Jose that used to do insurance defense. But those are the kind of things that we tried. There weren't any spectacular cases that I can think of that we tried.

MCCREERY: Yes, anything memorable in the civil area?

PANELLI: No, not really. Then we did some criminal work. I tried some murder trials.

MCCREERY: Yes, I gather you didn't do too much of that, but say a few words about the criminal side.

PANELLI: It was good that I'd had the juvenile experience, because the laws were the same. The evidentiary problems were a little different, but the search-and-seizure issues, the Fifth Amendment issues, and the trials themselves were very similar. You had to be a little more careful with jury selection because of discrimination, bouncing jurors of a certain ethnic mix, et cetera.

Unfortunately, most of the time you had public defenders that probably didn't have as much time to prepare for the cases. The prosecutors usually were a little better prepared and their cases were much better, because

if the prosecutor thought he had a weak case he'd deal it. If it was a case that the public defender really wanted to plead, and the guy didn't want to do it, you had no choice, you've got to try it. So you'd get usually the bad cases, the tough cases.

I remember one criminal case we had involved two African-American students charged with armed robbery. It involved something out of Cumberly High School, which was up the peninsula, and for some reason it had drawn a lot of media attention for the racial aspects of it. So we had to close the courtroom. When we tried it, no one could come in or go out, because by then we had metal detectors. The same with my bailiff. He was unarmed. The courtroom was packed, very tense. The witnesses were really concerned, because there had been some intimidation. In fact, there was one attempted burning of a witness' home.

But that one I remember, and I remember this woman who killed her boyfriend, first degree murder. She had two young kids, and it was a first-degree murder charge, but we were trying her case downtown in the civil courts. There wasn't a holding cell, so she would sit out in the anteroom with my bailiff. I'd go out there in the morning and have a cup of coffee with her.

It was kind of a sad thing. She shot this guy seven times. She had been married to a police officer, so she thought that she could get by with claiming self-defense. She said she thought that he had a gun under the pillow, and when he reached under the pillow she shot him. But if she had kept her mouth shut she would have walked. But as she was being interrogated the officers had people at the scene to see if her actions conformed to the scene. When she said, "I was here, he was there." "What did you do then?" The officers at the scene determined that what she said was just physically impossible. They just had her tied up in an improbable situation.

But I had to sentence her, take her kids — well, I didn't take her kids away. They went to foster care. But I remember those two cases. There were a lot of others. I had a guy who raped a ninety-one-year-old woman, and the other woman next to her in bed died of a heart attack. It was gross, a gross case. But they were the harder cases, because as I said, they wouldn't deal them out. But I'd say probably only 10 percent of my superior court experience was in criminal cases. But as a lawyer I tried criminal cases.

MCCREERY: During that time you were on the superior court, on the national scene there was all this change in the death penalty laws, and I was just curious about your view of that, even though it was somewhat at a remove.

PANELLI: We represented a death-row inmate [Earl Sears]. In fact, we represented him at the trial. He was convicted, got the death penalty, we got it reversed, tried again, convicted, got the death penalty [People v. Sears], and then *Anderson* came along, *People v. Anderson*, which changed it to life with possibility of parole, and, in fact, he was paroled, and he used to hang around our office.

MCCREERY: Yes. But you got to see this from all these different viewpoints, didn't you, over time?

PANELLI: Yes. At the time I was on the superior court I think there was this moratorium on the death penalty. I don't think there were any death penalty cases tried.

MCCREERY: As California, though, reinstated its own death penalty law, later on —

PANELLI: By then I was gone, on the superior court. As a law student, whenever there was a death penalty trial it was a big deal, and you'd go down and watch it. I remember Margaret Morton was the chief trial deputy for the D.A.'s office. She couldn't have been five-foot-one, and she tried all of the death penalty cases. Tough, tough. We called her the Reverend Morton's daughter.

Then when she left, Jack Schatz tried the death penalty cases very successfully. In fact, I think he may have tried Earl's case, Earl Sears. Schatz later became a muni court judge, and later became a superior court judge.

MCCREERY: Is there anything else to say about when you were presiding over the appellate department?

PANELLI: No. You'd get the search-and-seizure cases, the 1538.5, some business cases, but the calendar was not heavy. You'd only do maybe three cases. I think we only had the calendar one half-day a month maybe. It wasn't that time consuming, and the briefs, unfortunately, generally were not of the quality that you got later in the court of appeal, because if they were civil cases they had to be \$15,000 — or \$25,000 or less, so they weren't

that significant. A lot of them were people who just felt on principle they ought to appeal the thing.

But at the time I was on the superior court there was this big change in the way the courts were administered. Whereas originally lawyers controlled what happened with the calendar, the courts took over control of calendars and cases, and no longer would they succumb to the lawyers' wishes necessarily. They realized that in order to get any kind of calendar management, the courts had to do it, which required, as I say, the judges to be much more attentive, to work harder.

Of course, as the criminal laws toughened, then there was more pressure on judges with respect to sentencing. Then they came out with the determinant sentence. Just at about the time I was ready to leave, the determinant sentence came out, and you had to go through all of those steps, and find the maximum, the minimum, and why you did things.

MCCREERY: What did you think of that?

PANELLI: To be honest with you, I wasn't with it long enough to have any lasting impression. At the time I thought it was an exercise that you didn't need to go through. The problem was they didn't trust the judges, the discretion of the judges. That's what it was, it was a way to control judges from going crazy one way or the other.

MCCREERY: You're saying they didn't trust the judges? They?

PANELLI: The public, or whoever's responsible for leading to the change, because they thought that some judges were too lenient, and this would be a way to make them accountable, because you'd have to give your reasons why you did what you did. But my view always was that you didn't necessarily need to have that, and it just was another step that you could trip on and make some error, because you didn't use the magic words as to why you used the median as opposed to some of the other stuff.

I remember I had some problems just trying to work through it. But fortunately for me it was near the end, and it wasn't on many cases. Whenever I had a problem with that I talked to the probation officer, or I talked to some of the judges that did it every day, and got through it. But it was a way to make judges somewhat accountable, or more transparent in what they did.

Similarly, at or about that same time they were getting into the family law, where they computerized what the child-support payments or alimony payments would be, based on earnings.

MCCREERY: So suddenly there was a record.

PANELLI: Yes. My view always was, hey, if you need a computer to do this, you don't need me. I understood I was supposed to exercise judgment, and the judgment was based on what I heard, what I saw, what I felt was appropriate, not some mechanical method of doing it.

MCCREERY: Talk to me just very briefly, if you would, about your elections, 1974, and then reelection in 1980. What was involved there, if anything?

PANELLI: Nothing. I'll tell you the truth. The first time after I was sworn in, I was lying in bed and I said, "My God, I've got to come up for election. Suppose I don't get elected?"

MCCREERY: Yes, because you talked about doing the community college district to get the ropes.

PANELLI: Just to get a feel, yes, get a feel of it. I kind of panicked, because in the old days there were very few judicial contests, but they had started to come up. But as I say, I had very good rapport with the lawyers, because they knew I was hard working, they knew I was conscientious, they knew that I was paying attention to what they were presenting, and so I felt very comfortable with the bar.

I tried not to go crazy on the bench, even sometimes where some lawyer was doing something that normally you'd jump up and down and maybe lose your cool on. So once I got through the first election, then it was a no-brainer, and I never had anybody even suggest that I had a problem, because every time they came out with these questionnaires and evaluations, I was always in good shape.

I think the worst I ever got I had five negative votes and all the rest were positive votes. It was obviously a popularity contest, because you were supposed to have appeared before the judge, and like I had, let's say, 350 affirmative votes and 5 negative votes. I hadn't had 350 trials in that period of time [Laughter], which was okay. That's why it's kind of hard for the public to really evaluate judges.

MCCREERY: You can see why it is hard. There's a distance between them.



PANELLI: People call me all the time now at election time, and they'll ask, "What do you think?" I say, "First of all I don't know most of these people now." I said, "I can't help you. I don't know. I would need to talk to the people. I would need to talk to their colleagues." But it was really a non-factor.

The fact is, I think you had to pay a filing fee, a certain percentage of your salary, but then you could get people to sign petitions in lieu of the fee. The idea was if you would get people to sign the petition, so many signatures were worth so much, but it would show someone that you had the support. I may have done it once, and then I figured I'm not going to go to the trouble again.

MCCREERY: But you didn't have to sweat it here.

PANELLI: No, I had no problem.

MCCREERY: How well known were you in this community by then?

PANELLI: Very well known. Very well known through Santa Clara [University]. I was well known in the bar association. I had a very good reputation. I was involved in various charitable organizations. I was elected Trial Judge of the Year I think in '80, '82, and I think part of that was because when I was P.J. we got things so that the court was in great shape.

No, I always got along fine. It sounds kind of trite, but I think I was very popular, and had lots of support from all sides. As I say, not being a political animal, there wasn't anything that people could point to about that. So, no, I felt very comfortable.

MCCREERY: I note you had a brief amount of experience as a pro tem justice on the court of appeal from your time on the Santa Clara Superior Court. Can you tell me a little about that?

PANELLI: I served in Division Three of the First District, with Justice James Scott, and I took the place of Justice Sidney Feinberg for a two-month period when I believe he was either on vacation or an illness situation, I'm not sure which. Unfortunately, I don't remember who the other — oh, Clinton [W.] White was the presiding justice of Division Three, so I did have a stint there and kind of convinced me that I liked it and I could do it.

MCCREERY: You knew what you were getting into.

PANELLI: Yes, I knew what I was getting into, for sure. As a pro tem you didn't have any research help, so that you had to do everything on your own, which was challenging. Justice Feinberg had a full caseload. I don't remember if I just took a whole bunch of new cases. I don't think I worked on his cases, but I know I worked on the cases assigned to that division.

MCCREERY: What did you get out of that brief experience?

PANELLI: First of all, it told me that I kind of liked it, and I convinced myself that it was something I could do. You often wonder. You think about it, but you're outside looking in, and once I got inside I said, I really like it. So that kind of really whetted my appetite to try to see if I couldn't get a court of appeal appointment.

MCCREERY: So by the next year, 1982, when the first opportunity came up, you were actively seeking?

PANELLI: Right.

MCCREERY: How did you go about making your wishes known, do you recall?

PANELLI: I think I probably talked to Justice Poche, who was on the court of appeal, and Justice [Jerome A.] Jerry Smith, who was also on the court of appeal.

It was during this period of time that there was discussion about the creation of fifteen new positions in the courts of appeal. Actually, it was eighteen. It turned out to be eighteen new court of appeal judgeships, but initially it was fifteen. Of the fifteen, three were to be designated for San Francisco.

At that point in time there was a suggestion that instead of sitting those three in San Francisco, they ought to sit in San Jose. The promoters of that move were Justice Poche and Justice Smith, who were residents of Santa Clara County, and they persuaded Senator Al Alquist to make that suggestion. I was present before the Assembly Judiciary Committee when this proposal was presented. It was opposed by Chief Justice Rose Bird, by Dr. Ralph [J.] Gampell, who was the head of the Administrative Office of the Courts (AOC), and by Clinton White, Justice White, who was a senior presiding justice in the First District.

MCCREERY: The one you had worked with before.

PANELLI: The one I had worked with in Division Three. That was on one side of the aisle. On the other side of the aisle was Justices Smith and Poche and Senator Alquist. Chief Justice Bird was opposed to splintering off a division for administrative purposes. There had been a similar split off in the Second District, with a division sitting in Santa Barbara or Ventura, but I think it was Santa Barbara, and there was a question of how you could manage the administration of that, so Chief Justice Bird was opposed to it.

So Senator Alquist suggested that if that were the case, then he would propose a new appellate district for the four southern counties of the First District, that is, Santa Clara County, San Benito, Monterey, and Santa Cruz. During this hearing, as I say, there was this discussion, and each side presented its view, and it appeared as if Senator Alquist's view was not going to be accepted. So in kind of a — I don't want to say a fit of rage, but obviously he was agitated — Senator Alquist suggested to the Assembly judiciary panel that their house had 500 bills in his committee, which was the Senate Finance Committee, and that possibly before the end of the session they might be able to get only one of those bills through.

So with that announcement you could see that the votes were going to shift. The chairman of the Assembly Finance Committee was Elihu Harris, and Elihu Harris was very upset, and so he relinquished the gavel and left. The position advocated by Senator Alquist was passed out of the Assembly Judiciary Committee. At that point there were these fifteen positions, three of which were to go to San Jose, and then this issue with the Sixth District.

In the confusion that occurs on the last day of the session, apparently, the legislature chaptered both, so there was the fifteen created, three of the fifteen for San Francisco, and a new Sixth District Court of Appeal with three. So instead of having fifteen, they ended up with eighteen, and that was obviously a mistake. So what happened was the confirmation hearings for those positions occurred late in December, I think it was December 28th of 1982, at a time when Attorney General George Deukmejian was now the governor-elect.

MCCREERY: Oh, the election had happened.

PANELLI: The election had happened in November. So when, with respect to the fifteen appointments — well, with respect to any of the appointments — to the extent that they were not filled when he took over as governor, he

would be able to fill those positions. The confirmation panel for the courts of appeal consists of the attorney general, the chief justice, and the senior presiding justice of the district.

In all of the other districts, obviously, there were senior presiding justices, so the panel consisted of Attorney General Deukmejian, Chief Justice Rose Bird, and whoever the senior presiding justice was in that district. So to the extent that Deukmejian wanted to block any of those appointments, he'd have to convince somebody else to go along with him, and he was unsuccessful.

**MCCREERY:** One of those other two?

**PANELLI:** One of those other two, and he was unsuccessful. So all of those fifteen to existing districts were confirmed. When it came to the Sixth District positions there wasn't any presiding justice because it was a new district. So the two people on the panel were the attorney general and the chief justice. So when Justice Feinberg, who was nominated by Governor Brown to be the presiding justice, proceeded with his confirmation hearing, Rose Bird voted yes. George Deukmejian voted no, which caused quite a stir.

My confirmation hearing came up next. At the hearing Chief Justice Bird voted yes, George Deukmejian said, "I can't vote against you, because I think you are qualified, and the research that we've done indicates that you would make a fine appellate justice. But you can't have an appellate court with one person, and I voted against the person who preceded you as a presiding justice, and I'm going to vote against the person who's coming after you," who was Jerry Cohen, who was the lawyer for the United Farm Workers, and, of course, Deukmejian and the United Farm Workers had a long history together.

So he said, "I'm going to abstain on your vote." Chief Justice Bird suggested that they anticipated that, and they did some research and said you needed two affirmative votes to be confirmed, and therefore I lacked the necessary confirmation. So I was not confirmed, and following my hearing Jerry Cohen's hearing was heard, and he was voted down as well, one to one. So the Sixth District didn't come into being. The fact is, as Governor Deukmejian said, "You know that this was a mistake, the creation of these three positions, and we really don't need those. We don't need eighteen, we only need fifteen."

But the whole history of even the fifteen was very, very interesting, because when the bill was passed for the fifteen there was an objection, a taxpayer suit filed by an attorney in San Francisco by the name of Richard J. Wall, who took the position that they were improperly created by virtue of, there wasn't any appropriation for the positions in the bill.

The lawsuit was filed. Somehow or other it got transferred from the superior court of Sacramento to a judge in Placer County. I think his name was Judge [Charles F.] Fogerty. He held that it was unconstitutional. So it went to the court of appeal, and the court of appeal ruled — my recollection is that they ruled that it was constitutional. There was then a petition for a review by the [California] Supreme Court. Now, I'm not sure that it didn't go to the supreme court directly. I'm a little unsure of that.

But the supreme court had a lot of recusals, by virtue of the fact that this was really a challenge against Governor Jerry Brown, and they were trying to prevent him from making these appointments, because obviously he was the governor when this was passed. The supreme court took the case, heard the case, and as I say there were maybe three or four pro tems that were appointed to the supreme court to hear it, and in the four-to-three opinion they ruled that it was constitutional. But this was near, I think, the end of Governor Brown's term.

The interesting part that I found out about later was that — I wondered how it was that the entire superior court of Sacramento recused itself, and apparently there was a process whereby what they did is they passed around a sheet that you signed off if you wanted to recuse yourself. Years later I found out from one of the judges that that sheet never got passed around. So how it was that they were all recused and it got into this particular judge's courtroom in Placer County is kind of a mystery. But anyway, that happened.

MCCREERY: Have you solved the mystery?

PANELLI: No. No, it's just that I asked one of the judges who was sitting in Sacramento, who is now with JAMS. I was always curious about that. He says, "Join the club, because we still don't know how that happened, by virtue of the fact that that is how we handled recusal requests."

MCCREERY: So it may be just some kind of procedural misstep or mystery in that regard.

PANELLI: Right. Or maybe just the presiding judge says, “Our court’s not going to hear this, so I’m recusing the whole court.” That’s not normally how it’s done, but that could have been how it was done.

MCCREERY: How common is that to have an entire superior court recuse itself?

PANELLI: Oh, it happens frequently. I think the Santa Clara County Superior Court here just recently recused itself because I think one of the judges — there was some issue with one of the judges, and so they decided that the whole court would recuse itself. That just happened recently. So I don’t think it’s that uncommon. Maybe there was a basis for it. As I say, it was only within the last three or four years that I found out there was some concern amongst some of the judges as to how that happened. However, they didn’t raise the issue at the time, apparently.

MCCREERY: In 1982 it had been a while since the State of California had established a new district, but it’s surprising to learn that because it was just the chief justice and the attorney general left to vote on individual nominations, there was no accommodation for a tie breaker in the Constitution.

PANELLI: What happened was — and this is kind of what was going on behind the scenes — originally the proposal was for Marc Poche, Justice Poche, to be the new presiding justice, and the other nominees were to be Justice Smith and myself. This was occurring during the time when Jerry Brown was running for the U.S. Senate.

There had been some criticism of Governor Brown’s judicial appointments, and so they suggested that this kind of a panel, and especially having a Republican as one of these — and as I say, I think I was respected. The suggestion that I heard from Poche and some of the Democrats was that this would be someone who would be well accepted, and you could point and say, “See? My judicial appointments are fine, they represent a cross section of the community,” et cetera. But apparently what happened was that there was an indication that Chief Justice Bird would vote against Justice Poche’s nomination.

MCCREERY: Why?

PANELLI: I don’t know, other than the fact that apparently when they were in Brown’s cabinet there may have been some friction between them.

My understanding was that Governor Brown did not want to have something like that surface during the course of his campaign for the Senate, so the sense was, “Then I will remove him, and I will nominate Jerry Smith to be the presiding justice.” Then it would be myself and apparently some other nominee.

When Justice Smith heard what had happened to Justice Poche, that his name was being withdrawn — now mind you, these weren’t actually submitted to the committee or something. This was just proposed. So that when Smith heard that he says, “I’m not interested,” and so I get the call from Smith saying, “I guess you’re going to be the P.J.” Well, I never got that call [from the governor], but I did get a call from the governor asking whether Justice Poche was kind of upset by what had happened, and I said, “As a matter of fact, he was.” He said, “That’s unfortunate, but he’s still on the court of appeal, so nothing’s really changed,” and all of this. There was kind of a suggestion of, if I were nominated as the presiding justice, how would I vote on the other two nominees?

I said, “How can I suggest what I would do in advance of hearing anything, or who the people are?” So that may not have come directly from the governor, but I kind of obliquely was asked that kind of question, so they never went that far. The next thing, when formally the nominations were made, it was Justice Feinberg, myself, and Jerry Cohen. So it was very interesting how that all worked out.

I did get calls asking if there was some way that I could approach George Deukmejian to see whether he would be acceptable to these other folks, but I didn’t know George Deukmejian at all. I had never met him, and the people in the Republican Party that I knew who were active had all supported Mike Curb in the gubernatorial election, so there wasn’t any way that that would happen.

But apparently what happened was, as a result of my being nominated — now, whether it was because I was nominated by Jerry Brown — the Deukmejian camp did a lot of investigation and knew probably more about me than I knew about them, so that they were comfortable with me. But as Governor Deukmejian said, “This is a mistake creating this new district,” because it was supposed to have taken those three from the fifteen positions. So San Francisco ended up with three more people, and yet lost a

third of its business to the Sixth District. So they were in great shape; we were going to be in trouble.

So that's what happened at the confirmation hearings, and I remember that all the other nominees for the other fifteen positions who were confirmed were kind of conciliatory towards me. They said, "Didn't you hear what he said? When he becomes governor, you know he's going to appoint you to the court of appeal." I said, "All I heard is that I wasn't confirmed." So I kind of left with my tail between my legs.

**MCCREERY:** Attorney General Deukmejian did announce to you, though, that he had just vetoed the nominee before you, and would also veto the nominee after you. Did he openly say why?

**PANELLI:** I think part of it is because — of course with Jerry Cohen, he represented the UFW [United Farm Workers], and George Deukmejian's political career was made fighting the UFW. He wasn't about to have one of those people on the court of appeal.

Justice Feinberg was a little different. Obviously, he was a liberal Democrat. He was a big friend of Rose Bird. What happened, and to this day I'm not sure that it was happenstance — when you have these confirmation hearings, they call you up and then people testify on your behalf, and they ask you questions. Then the nominee comes up and usually they may ask questions. Then they usually say, "Is there anything you want to say to the commission?" Normally, most of the time people say, "No, there's nothing." You don't want to rock the boat. But what happened with Justice Feinberg is that question was not asked: "Is there anything that you want to address to the panel?"

He then went and took his seat, and then Chief Justice Bird says, "Oh, my goodness. We forgot to ask you if there was anything that you wanted to address to the panel." Now you have the situation where this person has been rejected. Now he gets an opportunity for, in effect, a rebuttal. It was very, very heated, to say the least.

I happened to run into Justice Feinberg's son here by accident, standing in line waiting for a plane to Los Angeles about three or four months ago, and he introduced himself and told me who it was. I said, "I thought your father's rebuttal was the most articulate argument that I had heard."



I said, “Your dad, I wondered if it he had it all prepared.” He says, “No, he didn’t have it prepared, but he kind of had it in mind.”

Justice Feinberg talked about the fact that he had been on the court of appeal, that this was an affront, and all this kind of stuff. I don’t remember all the words, but he was able to have some kind of a discussion, if you will, a dialogue — well, hardly a dialogue, but he was making his closing argument on this thing. I don’t remember what Deukmejian said in response, or what the reasons were. He may have said, “This court isn’t needed,” or something, but I think it went beyond that.

I was waiting my turn, so I wasn’t paying too much attention to what was going on there. But that wasn’t a pleasant situation. After my hearing the Cohen hearing came on, I left, and I heard that that was really heated, because the people who were going to testify knew, based on what had been said, and the fact that there wasn’t going to be any court, they might as well unload, and so they did.

MCCREERY: I was wondering about testimony on behalf — in favor or against any and all of you?

PANELLI: Most of it wasn’t against. Most of it was in favor. But it’s almost perfunctory when you get to that stage. I wonder, I think in the history of appellate confirmation hearings, I may have been the only one who’s never been confirmed, because usually, I’m told, they never used to even convene a hearing. Even for the supreme court they would just get on the phone and they’d approve it. It may have been Chief Justice Bird who decided that, no, no, this is supposed to be a regular public confirmation process. So that there wasn’t much history. Of course, by the time I got involved, you had to go through “Jenny,” so there was some screening. But in any event, that’s what happened with that first experience.

Then I would say about a week later George Deukmejian was sworn in as governor, and I’d say probably in July, mid-June or July, I got a call from the governor’s office, asking if I was interested in any position that might become due in the First District. I said, “Certainly.” That was fine. When I was pro tem I was, of course, in San Francisco. So at or about that time, Justice Winslow Christian resigned, and so I was nominated for that position. So I became Governor Deukmejian’s first appellate nominee.

MCCREERY: Let me stop you. I apologize, but may I just go back to the earlier attempt by Governor Brown to put you on the appellate court? You said that some of these maneuverings after his initial idea of having you and Judges Poche and Smith be the three — after that sort of fell apart and didn't even get to the confirmation stage — and then he substituted Feinberg and Cohen, you said that perhaps all of this didn't come directly from him. It may have been others on his staff. Now, are you aware, for example, of [Anthony J.] Tony Kline's role in all this, as his judicial appointments guy?

PANELLI: No, no. I know Tony Kline because I had met him, but maybe I'd heard what happened about the fact that they weren't nominated, maybe from the nominees themselves. The governor never told me, "I was concerned that Rose was going to vote against them." I never heard that from him.

The only communication or conversation I had with respect to that — he wanted to know whether Marc Poche was disappointed that he wasn't one of the nominees, and I said that he was. He didn't say, "This is why I didn't nominate him." What he said, "He's already sitting on the court of appeal." I kind of got the impression this gave him the opportunity to give someone else an opportunity, although Justice Feinberg was already on the court of appeal.

But you needed someone to be a P.J., although he could have picked anybody. He didn't have to be on the court of appeal. I could have been nominated as the P.J., and then there would have been a panel of three. But no, and I don't know that I ever had any conversations with Tony Kline at that time at all. Later I got to know him.

MCCREERY: Or anyone else on Governor Brown's staff?

PANELLI: No, no. It's all kind of fuzzy, because these calls took place at home, usually at dinnertime. It was a very kind of unsettling time for me, because I didn't know what was going to happen. The irony of it is, I am convinced that had the original panel been nominated, we would have all been confirmed.

MCCREERY: That is, you, Poche, and Smith?

PANELLI: Yes, because my understanding is that Deukmejian respected Poche in his dealings when he was, I guess, the legislative secretary for Brown. He also, with Smith, they were in the Senate together. So I've never asked, obviously, Governor Deukmejian, "Would you have approved of those?" but I kind of got the sense, and again, it may have been from the nominees themselves, that that would have happened.

MCCREERY: It was interesting that those were the two that you consulted when you first began considering going onto the appeals court.

PANELLI: Because I knew that they were interested in getting a court in San Jose. I am convinced that they were the ones who approached Alquist, although one of the other persons who was interested, who's now the P.J. of the Sixth District, was Conrad Rushing. I think Conrad Rushing may have been president of the bar association. I don't think he was on the bench then, but he was on the Alquist side of the aisle on this thing. I don't know if he testified before the Assembly Judiciary Committee or not, but I know he was — my recollection is that he was there. As I say, it's kind of interesting now, because now he has the spot that I had as the P.J. of the Sixth District.

MCCREERY: It's interesting about Alquist's role in pushing this in the legislature by threatening to withhold people's bills in another committee.

PANELLI: I came home and told my kids, "If you want to see the political process in action, I saw it in action." Senator Alquist felt that we contributed one-third of the caseload to the First District, and we ought to have local people who were part of the community on the bench. So I think that was part of his feeling on it. I don't think initially he was interested in creating a whole new district.

MCCREERY: You started to go on and say how within a very short time of becoming governor, Mr. Deukmejian returned to you and brought you in to replace Judge Christian.

PANELLI: Right. So I sat on the Division Four of the First District, and the judges were Presiding Justice [Thomas W.] Caldecott, Justice [Joseph A.] Rattigan, and Justice Poche. As it turned out, when I got there Justice Rattigan was closing out, because he was going to retire, and not much later

Presiding Justice Caldecott also retired. But I don't know that he retired necessarily when I was there. I was only there for a year.

I was there from '83 to '84, and one day when I'm in San Francisco I got a call from the governor's office to say that the governor is going to start the Sixth District, and he's going to nominate me as the presiding justice. We had no conversation about that. It just came out of the blue, so I didn't know that that was going to happen. I probably figured at some point in time it was going to happen, but I didn't think it was going to happen within a year.

MCCREERY: Had you gotten to know the governor by then?

PANELLI: No. I had, I take it back. I think I had — I'm not sure that I had an interview with him for the First District. I may have only talked to the appointments secretary. I'm not sure about that, and, in fact, I'm not sure that I had a conversation with him, or interview with him for the presiding justice of the Sixth District. As I say, there was no — I don't think I followed up on it. My recollection is I'm sitting there, I get this call and they say, "We want you to know," and it may not have been from the governor, it may have been from someone in his office, "that we're going to do this. You're to be nominated."

So then, of course, you have to go through the "Jenny" process again, and then, of course, that all came down in '84. So for a while I was the only person on the Sixth District. So I came down and my first task was to find a spot to have a court. So with the Administrative Office of the Courts folks, we went and looked at different sites, and then we kind of decided to locate in what is now the Comerica Bank building. I forget the name of the building at that point in time.

I liked the location because it was near the freeways, so that people from Monterey, Santa Cruz, and San Benito could get there. It was close enough to the courthouse where people could walk over, and what we did is we took the major portion of one floor in this building, initially. So then I got to sit down and try to do the layout of the court and the courtroom, and at about that time, there was the nomination of the two associate justices, Justice Agliano and Justice [Harry F.] Brauer. They came on before the court was built out, because I remember the three of us going with this woman who was a designer to get furniture and stuff.

We had a confirmation hearing, and, of course, I was P.J. The attorney general was John van de Kamp, and Rose Bird was still the chief justice. The confirmation hearing with Justice Agliano was easy. He was very well respected, from Monterey County, very well liked. Justice Brauer, on the other hand, was a little more controversial. He was from Santa Cruz County, and apparently in his personal data questionnaire that you fill out, that you send to the governor's office, he had as part of the comments — it said that if he were selected, his opinions would be “pithy denunciations of the Rose Bird Court.” So, of course, that created some stir.

Also, there was some issue whether or not he was tougher on women lawyers, and whether he had ever said something about when a woman lawyer loses a case, she blames it on the judge rather than the fact that she wasn't making a good argument or whatever. So that was kind of a touchy subject.

So when his confirmation hearing came, it was all the same day, Rose Bird said — usually you just vote out in front — “We may have to confer.” [Laughter] I had previously told Justice Brauer, I said, “At the end they're going to ask you, is there anything you want to say, and what you should say is that, ‘I have nothing to add, but if you have any questions I'd be more than happy to answer them.’” They asked him this question, and rather than saying what I told him he should say, he said, “Well, there's been this issue.” And so he got into this issue, and I said, “Oh, my God.”

MCCREERY: Which one, the one about Chief Justice Bird or about women lawyers?

PANELLI: No, about women lawyers. He said that he was misquoted — this, that, and the other thing. So there was this dialogue going back and forth, and Rose kind of got after him, and van de Kamp got after him. But in any event, they decided they'd vote to confirm him. Harry Brauer was a curmudgeon. But he was very bright, and unlike the confirmation hearings going on in Washington, the issue was, do you have integrity, do you have intellectual capacity, judicial knowledge, integrity, judicial temperament. Maybe there was a little deal because of what he said, but he was smart, hard working, and I respected him.

We didn't always agree on things. At oral arguments if he figured he'd heard enough he'd say, “I've heard enough.” [Laughter] But he was a very,

very bright man, and so that was helpful, because Justice Agliano and I were more practical, as far as certain things. Harry was more of a precision — he's more of a surgeon than we were.

MCCREERY: But as presiding justice, you were supporting both of these nominations.

PANELLI: Oh, yes, because I knew them. I didn't know Brauer as well as I knew Agliano. But anyway, we waltzed through the hearings.

For our workload I decided to use a system that I had learned in Division Three when I was a pro tem on how you would look at cases. What they did in Division Three is the judges would divide the caseload, whoever was on the panel, they'd say, "Okay, you have four cases, you have four cases, you have four cases." We all read the four, and then we will, in effect, talk about the cases, and you tell me whether my tentative views are agreeable, or if not tell me why not, and if what I've said doesn't have at least preliminary concurrence, then we'll shift them around.

So we had all read these cases before we assigned them to law clerks. Now, many of the divisions, what they do is the law clerks see them first, but as I say, Justice Scott started this system in the Third District and I liked it, because it meant that the judges were really making the initial decision, not first seeing some first cut of views on the case from a law clerk. So that's what we did every Thursday, the three of us would get together.

At or about the summer of '85, I'm in New York at NYU at a seminar for court of appeal justices, and there was this vacancy [on the California Supreme Court] created by the retirement of Justice Otto [M.] Kaus. I get a call from my assistant saying this is happening. I said I'd heard it. One of the other justices from California who was more politically involved than I was said — you know, you hear this. She says, "One of the rumors has it that you are one of the judges that may be considered." And I said, "They're probably talking about anybody George Deukmejian appointed would be a possibility." Then I got another call that said, "There are six names that are being submitted, and you are one of the six names."

MCCREERY: Called by whom?

PANELLI: By, again, my assistant. I'm in New York, and this is all happening out here in California. Apparently the San Jose *Mercury News* ran

a story that these are the six names, or I guess maybe all the California papers.

MCCREERY: The rumors were in print and the whole bit.

PANELLI: Right, right, but I said, "That doesn't mean anything," because all the people who were nominated were all — not all people had been Deukmejian appointments, but they were all Republicans, and Jim Scott was one of them. I said, "That's very nice, but I'm not counting on it." Then I had heard that some of these other people had had interviews with the governor, and I hadn't had an interview. When I got back to California, this one fellow who was on the court of appeal down in Southern California says, "I can tell. You're going to be the person."

I said, "No, it's not going to be me." Frankly, I felt it would be Jim Scott, but Jim Scott was older than I was, and there had been some question about health. But he said, "No, no." He said, "I know it's going to be you." I said, "We'll see."

Then I hear that these other people are getting these interviews. I don't have an interview. Then I get a call from Marvin [R.] Baxter, and he said, "We would like to have an interview with you. Could you be in Sacramento on such-and-such a date?" And I said, "I certainly can." About a day later I get a call and he says, "The interview's been cancelled."

I said, "Has it been cancelled, or has it been postponed?" If you know Marvin Baxter, you'd hate to play poker with him because you could never tell what he's thinking. He's got this poker face. Of course, I'm talking to him on the phone. He says, "It has been cancelled." That's all he said. I said, "Has it been postponed or cancelled?" He says, "It's been cancelled." Okay, thank you.

MCCREERY: Did you know him before this?

PANELLI: No. No, I had never met him. I may have — I shouldn't say that. I may have talked to him with respect to the Sixth District, I'm not sure. I didn't know him very well. Then the next day I get a call and he said, "Could you meet to have an interview with the governor in San Francisco at his office tomorrow, because he's going to be in San Francisco?"

I don't know what the event was in San Francisco, whether he was giving a speech. It was something, because I appeared in the San Francisco governor's office, which is a very small office. The receptionist is there, this

fellow that I knew because in the First District we're all in the same location. My wife is with me and we're having this conversation, and he didn't know anything about that I was going to be there. I said, "I was told that I was supposed to meet the governor here at twelve." He says he's giving this talk or something. Twelve, twelve-thirty.

At about one-thirty in walks the governor, Marvin Baxter, and his chief of staff, Steve Merksamer. They all walk in, they all walk by me, and I'm sitting there. They said, "We're sorry we're a little late, but the governor got hung up, and we'll talk to you in a minute."

So a few minutes go by and I'm called in. The governor is sitting at his desk, and Marvin Baxter and Steve Merksamer are there, and there may have been someone else, and we have this conversation. The governor is talking, and I'm talking about my background. There weren't so many questions, necessarily, as much as there was my responding to inquiries, how I liked being a judge and all this. It was kind of an interesting conversation.

**MCCREERY:** But more general than you expected?

**PANELLI:** Oh, yes, more general. When people said, "Did they ask you about the death penalty?" they didn't get into any of that kind of stuff, "What is your view about this?" or any of that kind of stuff.

But I thought things were going pretty well, and I guess I expected that he was going to stand up and say, "Congratulations, you're appointed." What happened is when I was through he stood up and he said, "I want you to know, whether you get this appointment or not, you're very well respected. Our research has indicated that people have had nothing but good things to say about you, and I'm sure that whether you get this appointment or not, you should be pleased with the reputation and the esteem in which you're held." I said, "Thank you very much," and that was it.

So I walk out. I tell my wife, "It ain't going to be me." She says, "How did it go?" I said, "I thought it was going well, and all of a sudden he stands up, and he gives me this talk." So I go back; that was on a Wednesday. The next day was a Thursday when the three of us at the Sixth District get together to go over these cases. So I tell my colleagues, I said, "You'll have to put up with me, because it certainly isn't going to be me."



In the course of that [meeting] I see my assistant. She comes to the door and her eyes are all large. She whispers, "The governor's on the line." So I said, "What?" I go to my office and it was Governor Deukmejian. He says, "I want you to know that I'm going to nominate you for the vacancy on the supreme court." Of course, I said, "Gee, thank you very much." I said, "It's an honor, and I hope that I live up to your expectations," and all that.

So he said, "I want you to know that your background is very similar to mine, with respect to your parents coming over and all this stuff, what you did. I feel very comfortable that you will do a fine job, and I'd be proud of what you do." But he said, "We don't want you to say anything, because I want to announce it on my Saturday radio program." I guess it was Saturday morning. I had never listened to the program. [Laughter]

So all of a sudden, having been burned by the press when I got the appointment from Reagan, I called my sister and I said, "If anybody calls you, I want you to know you don't know anything." I called my kids, and one of them had already gotten a call, and [the reporter] said, "We want to congratulate you on your father's appointment." He says, "What are you talking about?" "He's been appointed to the supreme court." He says, "If it is, it's news to me. I've never heard of that." He says, "Are you sure?"

Well, they weren't sure, they were fishing. They did the same with my wife, one of the reporters from the *Mercury*. She went on and she said the same thing. "Congratulations," all of this. My wife said, "What are you talking about?" And she says, "You know, about this." And she says, "I've never heard of it. I'm sure my husband would have told me if that's the case." They even called my sister, and fortunately I'd thought to call my sister, so that was okay.

Then on Saturday morning when he makes the announcement, this reporter, this woman calls my wife and says, "Boy, you really can keep a secret." So we had a very fine interview, and then, of course, we had to go through the confirmation hearing.

It was interesting at the confirmation hearing, because there was some indication that there may be some opposition. It wasn't really necessarily opposition against me. There was some general opposition with respect to the appointment process, as I recall, but no one really got up and said much. They had filed a letter saying, "We propose to object." But it was

more of a functional objection with respect to the process and the procedure, rather than me, and I don't remember exactly now specifically what it was.

But there was another person who said that he was going to oppose me, and it was a fellow that I knew as a student. I had been on the board at West Valley Community College for nine years, and this was a fellow who used to come to the board meetings, and before the board meetings would set up a tape-recording thing and go up to the podium and have all this. He was at the Veterans Hospital, and he used to wear his identification band from the hospital. He was kind of unusual.

He got more and more involved in these meetings, and on one occasion he tried to grab papers from the superintendent, and so he was arrested for disrupting a public meeting. Much later I used to see him all the time at the superior court, because he spent all his time in the law library there, and he was fighting his conviction from the meeting incident. In fact, he went all the way to the Ninth Circuit [Court of Appeals] and won. [Laughter] But I'd see him all the time, and I'd say, "Hi, Steve." We never had any real problems with each other. Steve Stevens was his name.

When he indicated he was going to appear, I suggested that maybe there was, knowing — I don't know why he was at the V.A. Hospital, although — he was unusual. So they said, "Okay. We will have security at the hearing." He appears at the confirmation hearing with two briefcases full of books. It was funny because he had a jacket and a tie, and I'd never seen him with a jacket and a tie. And he had these tennis shoes on.

When it got time to get up he says, "I want you to know that I didn't object to him when he went to the court of appeal, because I figured on the court of appeal that he couldn't do too much damage. But the supreme court, I feel I must object to his appointment." He starts to go through some of my opinions. He said, "Look at this opinion. I'm really surprised that Justice Poche went along with him, but he probably conned Justice Poche into signing this opinion." And so he went on.

Finally Chief Justice Bird says, "Mr. Stevens, we're not going to go through —." He wanted to go through every opinion that I had written on the court of appeal. She said, "We're not going to do that. Do you want to say something?" So he's kind of summarizing.

Then when I came up I said I was really hurt that Stevens had taken this position. I said I was always very courteous to him. I kind of supported him on some of this stuff. With that he jumps up and starts to get agitated. Behind him the security people had seated themselves, because they were anticipating something, they just shoved him down in the chair and ushered him out of the hearing.

Anyway, Van de Kamp and Chief Justice Bird and Presiding Justice Lester Roth voted for me. I was confirmed. As I say, my mother was there. She was ninety years old at the time. It was quite a deal. At the confirmation hearing, the president of the university, Father [William J.] Rewak testified on my behalf. He knew Rose Bird and was a friend of hers. Others also testified. I had many letters from lawyers who had written in support as well.

After the hearing, we go to what is going to be my chambers, and this office, chambers, was the oldest, shopworn-looking thing I'd ever seen. The drapes had been exposed to sun and rain, were all kind of shredded by the elements. The carpet was old. I'll never forget, Father Rewak told Chief Justice Bird, "This can't be it. He had much better quarters where he was." I think they advised me that I could have some window coverings, but it was a historical building, and so there wasn't a great deal that you could do. But I'll never forget, it wasn't anything like what I had on the court of appeal.

MCCREERY: And probably not like what Justice Kaus had had before you?

PANELLI: It was the same place. It was the same place.

MCCREERY: It was. Oh, my gracious.

PANELLI: It surprised me. All of them were about the same. They were just — nothing had been done for years. They did allow some painting, but the drapes were brocaded kind of things, but they faced the southwest, so you can imagine the sun and stuff, and it looked out over the park. The bathroom was not much, I'll tell you.

After the earthquake, we built out the quarters at Marathon Plaza, and then we had really nice ones. Now what they've done in our old building because of the historical nature — we used to always kid about, "We have historical toilets." They have taken what were two chambers and made them one, so now they're long and narrow, but you have more room. But they still haven't moved the walls out into the hallway area.

But okay, that was on the eighteenth of December, and I got my case materials for the calendar that was going to be in the first week in January. By the way, at my confirmation I had asked Presiding Justice Caldecott, who was now retired, to swear me in, because I respected him, and he'd always been very nice to me for the year that I was on Division Four.

On Christmas Eve I get a call from the chief justice's office, saying, "You've got to come to San Francisco and be re-sworn, because Chief Justice Bird has determined that your swearing-in by Justice Caldecott was ineffective. We're concerned that we gave you all of these files for these January arguments, and you're not correctly sworn." So I hustle on up to San Francisco, she swears me in, I'm now official.

What they did was they used to have the January calendar the first day after the new year. I had a very interesting experience on my way to the court in Los Angeles. I was going down on a Sunday. I think it might have been New Year's Day, I don't know for sure. I go to the airport, and I'm ready to take the flight, and I see that they're working on this engine. They said, "There's been a slight delay, because there's a problem. We don't know if it's just a dial that shows something's wrong or whether there's something actually wrong."

After about an hour and a half they said, "It's all taken care of." Get on the plane, we're out of San Jose maybe twenty-five minutes, all of a sudden you hear this grinding noise. The flight attendants were ready to come and serve things, and all of a sudden they go back and they come out with a cart with these huge books on it. Shortly thereafter the captain comes out, and he's looking around.

So he goes back to the cockpit and says, "As you may have suspected, there's a problem." He says, "We have good news and bad news. I'll give you the bad news first. We lost an engine. The good news is this plane can fly on one engine. What we're going to do is we're going to go through all the safety procedures and all of that kind of stuff." So we go through that. They took all the young kids and put them in the back of the plane and moved everybody else up front, took all our sharp objects, put them in a big black plastic bag, went through the drill for an emergency landing.

I'm thinking to myself, I was not confirmed to the court of appeal, which was a first. Now I'm going to have the shortest tenure on the supreme

court. I'm going to go down in history as having been on the supreme court for eight days. [Laughter] Oh, dear.

Anyway, the plane lands safely. We roll and roll and roll, because the pilot couldn't reverse the engine, and, of course, all the emergency equipment is out there with the red lights flashing, all that kind of stuff. It wasn't till everybody got off that people started to cry.

In the course of it, I'll never forget this woman sitting next to me saying, "We're going to crash, we're going to crash." I said, "No, no." This was at the time of the space shuttle. I said, "The space shuttle doesn't have any engines, and it lands." I didn't tell her that you needed Edwards Air Force Base, and you had to come down at the speed that it did.

But anyway, it all worked out, and so I went through my first calendar. But it was a kind of interesting introduction to the supreme court.

MCCREERY: We've been talking about your process of getting nominated and confirmed on these three courts. I'd like to go back, if I may, to talk a little bit more about the substance of what happened when you had the two assignments on the appellate courts. First of all, I'm just wondering if you could reflect a little bit on the adjustments that you faced as a longtime trial judge going into appellate work.

PANELLI: I've been asked that question, especially by lawyers who had appeared before me, because they said, "Judge, you are a people person. How are you going to get along without people contact?" I never was one to stay cloistered. I'd get out and I'd talk to the clerks and all that kind of stuff.

It is obviously a little different, because you don't have contact with other than the people that you're working with, generally, because oral arguments are going to occur once a month. Most of your daily activities are with not so much even the other judges, as much as with your staff and central staff, because in each of these courts a central staff worked on some of these cases that were assigned to you, so that you had some contact with them.

There is what they call the principal attorney that was kind of in charge of the central staff, but some of those people were working on cases that were assigned to you, in effect preparing drafts for you to approve or not approve. When I was in the First District with Justice Poche, it was somewhat unusual in that Justice Rattigan was not participating in any new

cases, and Presiding Justice Caldecott shortly thereafter was also not taking new cases. So there were only two justices, Justice Poche and myself. We survived by the use of pro tems being assigned to us for two-month periods.

So it was kind of tough because, first of all, you didn't have a long working relationship with these folks. You may have known some of them, although some of them I didn't know at all. It was kind of hard because they were only there for two months, and you couldn't get a sense of what you'd like to do on this kind of a case. In the court of appeal the rules are, "no harm, no foul," so even if there's error, if it's not prejudicial then, of course, you don't reverse, because it's only prejudicial error that requires reversal.

So the standard of what is prejudicial error can be variable, depending on the standard of who's deciding it. So it was kind of difficult because we had a situation where one month there was a pro tem on this particular issue that saw it the way I saw it; Justice Poche dissented. Three or four months later the same issue presents itself, and there was a different pro tem. This pro tem saw it the way Justice Poche had decided in his dissent and disagreed with what I had said, so now it was two-to-one going the other way. So there was that kind of potential inconsistency. So it was a little different.

However, the First District had a lot of judges, so there was a certain collegiality, even with people not in your division. We generally would go out to lunch together. I especially spent a lot of time with the Fifth Division, the people who took the three spots that were destined for San Jose, in part because my chambers were close to them. We were kind of spread out, and the divisions weren't necessarily all quartered in the same area, so that I happened to be over with what was part of the Fifth Division.

That was another problem, a space problem, because originally these divisions all had three people, and then they went to four people. So there weren't many offices, and the one that I had in the First District was really not much. But it was fine, because I was happy to be there, and that was more important to me than where I was working.

I don't remember any kind of significant cases that I heard at the First District. It was really a production, because I remember I wasn't on the court very long when we had — we may have had weekly meetings or monthly meetings of the whole court, and Justice Scott, who was a

take-charge guy, stated that the cases are coming in at fourteen per judge per month, so we've got to do fourteen cases, and we've got this huge backlog, so in order to cut the backlog we ought to all do an additional ten cases a month each. So all of a sudden it was ratcheted up to cut into the backlog, because there was some embarrassment that it had taken so long for some of these cases to get decided.

MCCREERY: This is throughout the First District?

PANELLI: This is throughout the First District.

MCCREERY: What was the workload in terms of the civil cases versus criminal?

PANELLI: More criminal than civil, because every criminal case went up there. Then they came out with the *Wende* decision [People v. Wende] that says that you as the judge have to review the case, whereas in the past most of those types of cases were done by the central staff. So that even though the clerks may have written a memo, you had to personally go through them. A lot of these cases were of little merit. You might as well take a shot at the appeal, so predominantly the work was criminal. I don't recall many cases that we had, at least in the First District, that I was involved with that may have made it to the supreme court. I could be mistaken, but my sense — I don't recall any grants of review of any of the decisions that we rendered.

MCCREERY: I'm sure other divisions had central staffs as well, but how did your division —

PANELLI: No, the central staff was for the whole court, but they would assign maybe two or three people that would work with you. I'm not sure the point in time when it started. They used to only have one research attorney, one law clerk, if you will. They then went to two law clerks, and what they did in order to maintain some ability to rotate the second one, they called them Attorney A, Attorney B. Attorney A had a different salary range. Attorney B, however, was a salary range that you maxed out at two years. The theory was then that person would go and you'd get a new person. That's why the central staff was helpful, because you didn't have that much research help on your own.

Thereafter what they did is the judges put the pressure on to remove the two-year limitation on the second clerk, and so, in effect, both positions became permanent positions. The point was that people with more experience could do more work, as opposed to training someone new. It might take three or four months to train a clerk, and then before long they're gone again. So you had staff that was yours, plus you had a divisional writ clerk that handled the writs, and then you had this help from central staff.

When we got to San Jose we had the same setup with two lawyers, with a writ clerk, but my recollection is that we had very few people in central staff. I don't remember the number, but it wasn't — we thought we were shorted with respect to the numbers, because as I say, we ended up with a third of the business [from the First District], with less than one-fifth of the judges, because they had seventeen, we had three, but we had 30 percent of the business. So when they moved one-third of their caseload they were happy, and all of the cases were old cases. The First District looked great in terms of caseload after the transfer.

**MCCREERY:** Starting with the First District and moving forward, talk a little bit about your own staff. Did you, that early, inherit or take over the work with Kathryn Mickle Werdegar, for example?

**PANELLI:** No. I don't know who I had at first, but Kay Werdegar was in central staff. I asked for her to be one of the central staff people working for me. Then whether she actually became one of my clerks, or whether our relationship was just by virtue of the central staff I don't recall now. My sense is she probably became one of my two clerks.

One of them was a young woman who was a new lawyer, a Santa Clara graduate, Melanie Gold. She may have been the other one, because when I went to the Supreme — no, I take it back. I had her in the Sixth District, and she came with me to the supreme court, so I'm not sure, that may be wrong. But I don't remember now what the relationship was, but Kay Werdegar was one of the lawyers working with me that I relied on.

**MCCREERY:** What led you to single her out as someone you wanted to work with more closely?

**PANELLI:** Justice Poche had a close working relationship with her. He said she was probably the best lawyer in the central staff. The principal attorney was not too happy to give her up, but I said, "If she's willing to do this, this



is what I want.” You have certain perks by being on the judicial side, as opposed to the administrative side.

So I did that, and there was some other — mostly in the First District I relied on Justice Poche, because I knew him. He had practiced law in our office. We weren’t partners or anything. We weren’t formally associated, but he rented space from us, so there was some cover for us on some of his cases.

He worked also in our office building. He also was the legislative representative for Don Edwards, so the congressional regional office was in our office building. We were there every day, so we knew him. In fact, when he went to the court of appeal some of his clients stayed with us. So I knew him and I kind of relied on him with respect to some of that stuff. But that’s how I came to know Kay Werdegar.

MCCREERY: And built up your staff. How did you use them? What distinguished your way of working with them from other judges?

PANELLI: I think the same. As I say, I would read the briefs, I’d tell them this is the way I think I would want to decide this case. This is how I think we ought to do it. You tell me whether or not you think we can write it that way. Let me see what kind of a draft — I’m doing my stuff and they’re doing their stuff — what kind of a draft you can give me. Then you just become an editor. If they come back and say, “Judge, it won’t write the way you want it to come out. The law doesn’t support that.” Then we’d have a discussion and we’d say, “Okay, let’s see what we can do. This is what I’d like to do. Let’s see how far we can go this way.” So that’s what happened.

MCCREERY: Did they ever try to change your mind about your actual position, or was that kind of exchange welcome? [Laughter]

PANELLI: No, that kind of exchange was welcome. I told them — not so much on the court of appeal, that wasn’t a problem, a little more on the supreme court. On the court of appeal that wasn’t a problem, because I always told people, “I understand that if you’re unhappy and you feel this is something that you’re uncomfortable with, then I appreciate that. You’re free to go back to central staff.”

That’s what used to happen, when judges came on and they weren’t really too happy with their clerks, because maybe temperamentally, or the working relationship wasn’t very good, they would go to central staff.

Sometimes that was a weakness of the central staff in that you would get people who maybe weren't as strong going to central staff, as opposed to those who were very strong, whom the judges would select.

There was a committee that selected the lawyers for central staff. You would hire the principal attorney. He would make a recommendation and would sit in during the interview process. It's the judges committee that decided who they would hire. In the First District the quarters were very limited, because the court had grown. They hadn't expanded their space. They were always looking for more room to house the central staff. I don't know that they ever got up to where the attorney general's offices were located. We were all in the same building, but we were all over the place.

I don't even remember now where the central staff lawyers worked. I don't have as many memories of that, about the workload, other than the fact that Poche and I would get together and talk about cases. Because obviously when you'd get something and you'd pass it on, and you'd sign off. We'd sit down and say, "I don't agree. What about doing this?" Or maybe we might have even done that before, but I had a good working relationship. We didn't agree on everything. We had different views on some stuff. On the criminal law we kind of differed a bit.

**MCCREERY:** How so, do you recall?

**PANELLI:** I remember one case — when we say there was a difference of opinion — it was a question of whether there was a properly imposed five-year enhancement. On one case I wrote an opinion, and the pro tem went along with it, and five-year enhancement was affirmed. I had the same issue about three or four months later, and Justice Poche, who had dissented on the prior case, got the new pro tem to go along with him, and they struck the five-year enhancement. So we had an opinion affirming a five-year enhancement and another striking a five-year enhancement in the same division.

But when I got to the supreme court there was a writ of habeas corpus raising that issue. The court then resolved the matter. They decided to strike the five-year enhancement. But it was just a difference of opinion on the law. I was a little more conservative on the criminal law issues than Marc was. On the civil stuff I don't think we had many differences. We might have had some.

I had had much broader trial experience and practice experience than Marc. Marc was teaching. In fact, when we were in the same law office he was teaching, practicing law, and was the rep for Edwards, so he had lots of things going for him. But we had a good relationship, and I never had any problems with him. He had a good staff. I got along with his people.

MCCREERY: He really was your closest colleague, given the turnover in the third position, and the instability.

PANELLI: Right. And I knew him also when he — for the short period of time he was a superior court judge in Santa Clara County when I was. As I say, the only political campaign that I ever got involved with was when he was running for the Assembly as a Democratic candidate. So I knew him, and I felt comfortable with him. It was a good relationship. It would have been nice to have a permanent third judge, because lack of stability could be a problem in the supreme court.

When you're an institutional court like the supreme court, to get people who come in for a one-shot deal isn't good. You don't know whether that person is trying to impress someone or they don't want to make waves because for some reason there could be the possibility they could be appointed permanently to that position. You don't want someone saying — suppose you're close to the appointing agency — “We had this person on as a pro tem, and they're terrible.” But I never had any problems with any of those folks.

MCCREERY: You mentioned that you and Justice Poche had quite different backgrounds and brought different experience to it. As a general matter, again, trying to recall as you thought about it then, at the appellate level, what was your view on what kinds of experiences judges should bring? Should there be a broad variety of judges, or what are the requirements, in your view?

PANELLI: My sense is that, especially on the appellate level, the appellate court, not the supreme court, the appellate level, I think to have experience with respect to being a trial lawyer and a trial judge is very, very helpful, because of “no harm, no foul.” Because a lot of things, especially trial judges don't have a great deal of time to study a lot of stuff, so a lot of stuff is almost done on feel. So while a decision may be wrong, “Is it more probable

than not that the result would have been different but for the error?” which is the constitutional standard for prejudice.

If you’ve seen how juries react, both as a lawyer and as a judge, some of the things that on their face clearly were not right, you *know* had absolutely no effect on the result. So, can you apply the constitutional standard that it’s more probable than not the result would have been changed? In most of these cases the answer is no, and if that’s the case you affirm.

The other thing is, most of the opinions that you wrote were not published opinions. I’ll never forget, I was on a panel with Justice Joan Dempsey Klein, who may be the senior presiding justice now. I think she may have been on the Corrigan confirmation panel, I’m not sure. We were on a panel and people were talking about our published opinions, the quality of the published opinions. She said, “If you think our published opinions are bad, you ought to read the unpublished opinions!” Because in the unpublished opinions, obviously, you’re not setting any kind of a precedent. You’re just deciding this particular dispute, and so you don’t have time to finely hone language and all that kind of stuff. It’s are you comfortable with the result?

In a lot of cases you don’t even have oral argument. In the First District with Justice Poche we had a lot of oral argument, because as a former professor, just like Justice [Joseph R.] Grodin, they loved to get out there and have this Socratic method employed.

MCCREERY: Yes, tell about his style.

PANELLI: He loved oral argument. Oral argument to me — I figured I’d read it all and it was all supposed to be in the briefs. If it wasn’t in the briefs, why isn’t it in the briefs? Now, if there’s something that you’d like to clarify, or something that’s happened in the interim, that’s fine, I’d like to hear it. Whereas Justice Poche was like the law professor. He’d ask these questions and he’d prod and probe. It may not have made any difference in the outcome, because I’m not sure that there were that many cases that we really disagreed on. I could be wrong, but nothing stands out in my mind.

MCCREERY: But for you the process of oral argument wasn’t that important to your decision?

PANELLI: It wasn’t that important to my decision, because — on the series of lectures that I just gave, I said, if it isn’t in the record, it didn’t happen. If it isn’t in what’s before the court of appeal, then the court of appeal doesn’t

go and retry the issue. It isn't really a second trial. It's more of a contemplative exercise, as opposed to the oral exercise that occurs in the trial courts. So you're supposed to put all of that stuff in the briefs.

Sometimes if the briefs aren't clear, and I'd hate to tell you that some briefs were unintelligible — I cited the example of, there was one brief that one sentence ran a page and a half. A page and a half, one sentence, and they just kept putting commas. It was obviously just a stream-of-consciousness brief, and someone got behind a dictating machine and dictated it. You get that kind of a brief and you're not certain what people are saying. Many times you say, if I don't know what they're saying, they didn't raise the issue properly, and then it's waived and we're going to deny it.

But sometimes even with the poorly drafted brief you say, "There's a kernel of some problem here we need to deal with." Then you can explore that in oral argument. Clearly, if you disagree with — if you're in the minority, you may want an opportunity to have oral argument to try to get the side that you think should win the appeal to convince these other two people that one of them is wrong, so that you could change the result.

So that was part of oral argument. But what we used to do is we'd ask people — now most of the times they will ask people, "Do you want to waive oral argument?" My suggestion is don't ever waive oral argument, even though it may not have a great deal of impact, because sometimes it's construed as a weakness. But whenever we would have oral argument we'd ask people, how much time do you want? I don't know that we ever set maximums. The supreme court obviously did.

So if someone says, "I want ten minutes," we'd take the ten-minute case first, and then take longer cases last. But the other thing, it was an opportunity to have some discussion with someone that you don't see all the time. It's like getting outside.

But it was more — I don't want to say drudgery, but it was a lot of the same: a lot of reading, a lot of writing, a lot of editing, directing, because the bulk of what you did, especially as you were trying to pump out all those cases, was really kind of to direct the people who were working with you to make sure that what they were doing is what you wanted done.

I never had an experience where someone tried to run something by me, because they'd know that that would only happen once. But I had a very good relationship with my folks. I think we got along, and when we

start talking about my supreme court staff and how that started, I'll talk a little more about that.

MCCREERY: But you've just alluded to the fact that you were more isolated in your work as an appellate court justice.

PANELLI: Yes, oh, much more. Especially up in San Francisco, because I had practiced out here in San Jose, and most of the lawyers that I knew were in San Jose. But most of the appellate judges I knew, not some as well as others, but I knew Harry Low, [Donald B.] Don King. I came to know Zerne [P.] Haning very well, because as I said, I was in their location. I knew Scott and I knew a fellow who just died, what's his name. He was from San Mateo County, just died within the last month.

The other thing — and I wasn't on that First District all that long. I went from August or October for about a year. As a result I didn't get involved so much in a lot of the committees that they had. As I say, the person who really kind of drove First District was Jim Scott, because he was a forceful person, very, very conservative. That's why I always thought that he would be the appointee to the supreme court.

MCCREERY: Did you ever talk about that with him later on or anything?

PANELLI: Yes, I think that became a sore subject between us, because I really, I think, in conversations I probably said, "If there's an appointment you probably deserve it," because he had been on the appeals court. If there was someone who was always trying to resist — if there's an ideological difference, he was the one who was always pushing the conservative views, when most of the other people were not conservative at all.

So I think maybe he may have felt somehow or other that my getting the supreme court appointment was by virtue of what I may have done with respect to his consideration, which was not true. I think what happened was that I was younger, and there was a concern that he was not in good health. He had had some heart problems, and I think part of it — this was 1985 — part of it was you didn't know whether during this governor's administration he'd ever get another appointment.

I don't think it's by accident that you see [John] Roberts and [Samuel] Alito [appointed to the U.S. Supreme Court], who are relatively young for those positions. In the old days, you didn't get to those positions till you were in your mid-sixties.

So I think that was part of it, but I respected him. I thought he was very good. But in my judgment, he ran the First District.

MCCREERY: And the others accepted his leadership?

PANELLI: Oh yes, yes, because he was looking out for the court. He said, "It's embarrassing that we have the worst backlog, and we ought to do something about it. We need to work harder." The First District had some very interesting characters before I got there, [Paul N.] Halvonik. They talk about the fact that there was pot smoking in chambers. Then, of course, he opened the door, or his wife opened the door, and they had the marijuana plants growing in their apartment. That's what cost him his job. But he was a free spirit. So I heard those stories.

There was this other fellow from Oakland who apparently only appeared on the days that oral argument was there, and was never there otherwise. So there were some very interesting stories. Fortunately, I wasn't involved. I don't know if any of that is true. The people when I was there, I thought they were all trying to do what they were supposed to be doing. Part of it, see, the whole idea of the judiciary had changed. When I first became a lawyer, a lawyer became a judge to retire.

MCCREERY: Yes, we touched on that before, that it was considered an end-of-career thing.

PANELLI: Right. See, now everybody's started thinking that this is a career, and you started earlier, and so a lot of the people on the court of appeal were younger judges.

MCCREERY: And probably working a lot harder, too.

PANELLI: Working a lot. You had to have been younger, because it took a lot of energy to do all that kind of work. But there were people up there like Judge [John T.] Racanelli, who was very influential. He was very close to Chief Justice Bird. They used to commute together with Justice Feinberg, and, of course, I knew both of them from Santa Clara County. They commuted from Palo Alto, and I would commute with Justice Scott from Palo Alto, but we never commuted together. [Laughter]

So there were those people that I felt comfortable with, and they were always very helpful. But there was a certain cliquishness to it. It was the

Brown appointees and there weren't too many other — there were some Reagan appointees. Allison Rouse was the one that I was thinking of earlier.

MCCREERY: Yes, of course. He just died.

PANELLI: He was a Reagan appointee, Scott was a Reagan appointee, Caldecott was, Rattigan wasn't. But there was some of that, but not in a divisive sense. We all went out to lunch together. The First Division had a historical tradition of having lunch on a particular day with Justice — he was on the supreme court, had been in the First District. Justice Grodin was his protégé. What was his name? I never knew him that well.

MCCREERY: Oh, you mean Justice [Mathew O.] Tobriner? I think that's who Justice Grodin worked so closely with.

PANELLI: Okay, then that's who it was, that's who it was. So we'd go to lunch. It was a nice experience. It was a little difficult. The commute and stuff had some problems. But you know, I haven't really ever thought much about the First District, because it was almost transitional, as it turned out.

MCCREERY: Kind of a blur.

PANELLI: Yes, really. I have more vivid recollection of the Sixth District, because obviously I started it, built it, had much more of an ownership interest in that.

MCCREERY: Let's talk about the Sixth a little bit more. You've described locating where the court was going to be, and the very early things about getting it set up. What was your approach to actually serving as presiding justice?

PANELLI: I wanted to make sure that it was a collegial situation. I told them, "I'm the head of the court administratively, so I have administrative responsibilities, but I want you to know that we're all in this together. If you have some views with respect to any of this I will be more than happy to talk to you about it." I think I made very few decisions without their input. I'm not sure that I always accepted all their input, because ultimately I had the responsibility for it.

All the people that we hired, we hired together, except for their own clerks. But as far as acquisition of stuff, the selection of the clerk [of the court], which was very important, where I had that responsibility. But we



all did it together, so it was a very fine experience. The three of us still socially get together.

Justice Brauer is now in Phoenix. When I was in the hospital he called my wife because he'd heard about my hospitalization. Justice Agliano came to visit me at the hospital, came to visit me at home, called to follow up. Harry Brauer did the same. So it was a very, very nice experience. Being together the way we were, and having started all together, it was an entirely different feeling than the First District.

First of all, it was much smaller, and we had all started out the same. We were all appointed by the same person, which maybe avoided some of the problems that I could see in the First District. We had some personnel problems at the beginning, with respect to some of the central-staff lawyers, because some of them were coming from Santa Cruz, and that's a tough commute over Highway 17.

What I decided to do is, because we were a new court, we held a session of the court in each of the counties, so that we went to Santa Cruz and held court there, and had a big bar association kind of a deal. We did the same in Monterey. I'm not sure about San Benito, because San Benito was a one-judge county. It didn't produce very much. But we got plenty up out of Santa Cruz and Monterey.

Of course, Santa Clara County was the biggest deal. We tried to become known in the community. One of the things that struck me, I really thought that we would be higher profile in San Jose, by virtue of the fact that we were the court of appeal, it was a big thing. It didn't make that much of an impression. Rarely — not rarely, but not as often as I thought it would be — would there be reporting in the press of what we did.

MCCREERY: Are you talking about in the newspapers?

PANELLI: In the newspaper, yes. Obviously, the lawyers who were involved knew what we were doing, but I would have thought that they would have been more — like they might have someone whose courthouse beat was to cover the court of appeal. In San Francisco the *Daily Journal* had a beat person who kind of followed what was happening, both, I think, for the First District and the supreme court, whereas down here they might call you every now and then. But the San Jose *Mercury* didn't do that, which surprised me.

We were totally understaffed with the volume of cases that we took in. Fortunately, they did not come in as fast as they had in the First District, because San Francisco, Oakland, and some of the larger counties would pump in a lot of cases. But I think we made some strides. I think we were respected. We had good people, and the clerk had been the assistant clerk — the clerk in the court of appeal is very important, because just to move the paper, there's a lot of paper — he had been the assistant clerk in San Francisco. So we brought him down, and when the court had the twentieth anniversary, [Richard J.] Dick Eyman came to the event.

MCCREERY: Oh, yes, Mr. Eyman was there the whole time.

PANELLI: Right, when I was there. They passed out twenty-year pins at the event. He's now up in Redding. Mike [Michael J.] Yerly, who's the clerk now, of course, does a very, very good job. He came over from the superior court. Most of our clerks we have here came from the superior court, because it was a step up in pay, and we got good people.

MCCREERY: Yes, I was wondering where you got your staff. Did you bring any with you from the First District?

PANELLI: No. There again, you mentioned Kay Werdegar. She wouldn't come, because her husband was at UCSF. So while I asked whether she would come, she said, "I really can't do it."

So I hired this young woman. The fact is, I keep getting Christmas cards from her with pictures of her kids now. She was just married when I hired her. Rosalie Kennedy is her name. Now I get these Christmas cards and her kids are grown. They might even be in college now.

Then I had another, Clerk B, which was Melanie Gold, and Melanie Gold came with me to the supreme court. That's the one I thought had been with me in the First District, but she was here. What I had tried to do was hire people with appellate experience. Kennedy had been working for a justice in the Fourth District. That's the other thing you found. People sometimes moved, they'd gotten married, and had been with one of the courts, and this helped.

Rosalie. Rosalie Kennedy. She had been, I think, with the Fourth District. But then her husband had moved, and so she had to move. But I had decided, because it had been very, very difficult to get Santa Clara graduates into these positions, that I was going to hire my law clerks from Santa

Clara. Melanie Gold was the first one, and I don't remember who I got afterwards. When I went up to the supreme court, I really kept just about everybody that was there. I think I brought on two, and one was from Santa Clara and the other was either from Stanford or from Davis.

MCCREERY: Did you do anything special to try to raise the profile of the Sixth here in the community? You just noted that it wasn't quite what you'd hoped.

PANELLI: No, it's not something that you really like to have. The interesting thing was that there was some concern that — one of the reasons I wanted us to get out is we were all going to face confirmation elections. It's a small community, so that it isn't like running for a confirmation election statewide or in the First District that covered all these counties. It wouldn't be very difficult to mount any kind of a campaign with these four counties.

So the thought was it would be kind of nice for people to know what we were doing. But as I say, it just wasn't something — we didn't have a press officer that would come out and say, "We're doing such and such." Every now and then there might be a case that was important that they would want to report on, but they didn't report it as they would in the *Daily Journal*. They didn't say who wrote the opinion. It used to say, "The court of appeal upheld this." It usually had to do more at the time with criminal cases that may have had some notoriety.

But we held oral argument in — the facility that we had for the court was not the best, because the lawyers were very close to us, because we had to make a court in what was essentially the space of the floor of an office building, and it was kind of narrow. They made us put a ramp to the bench to accommodate disabled persons (of which we had none), and so we didn't have much room. So when we first set it up I said, "My God, the lawyers, we're going to be able to read their notes." It's kind of disconcerting when you're eyeball to eyeball. But we worked that out. It wasn't that bad. Now that they've made the new changes, they've made the courtroom much smaller. I think they raised the ceiling a little bit.

MCCREERY: Other than that, how did oral argument differ on the Sixth from the First?

PANELLI: It was a little different, there was a little different style. Brauer was more of the Poche style. Agliano and I were more like trial-court

judges. We might ask some questions, we might prod them if we thought they were misstating or overstating their position.

I remember once we jumped all over this young lawyer on a case. There was a situation where there was a lawsuit involving an auto accident, and the insurance company referred the case to the panel counsel, and the panel counsel called this plaintiff's lawyer and said, "I haven't got the file yet from the insurance company, but I want you to know that we're going to file an answer." And he says, "You'd better file an answer within the thirty days." He said, "I don't have the file, but please, give me the courtesy of not filing a default." On the thirty-first day they file a default. Then, clearly, the other side made a motion to set aside the default, which you grant as a matter of course. In those situations you'd always just get a phone call from the opposing attorney. "Okay, just make sure to file an answer when you get the file."

Then the lawyer who had filed the default which was set aside took an appeal alleging an abuse of discretion on the part of the trial judge. I remember we just jumped all over this person. I said, "There's a certain thing as courtesy, and he told you that he was going to file an answer. You know that the file is going to come. They're going to file an answer. You take a default and then you make them set it aside, you don't stipulate to set it aside. You have a hearing. You take the judge's time, and now you take our time." I said, "That's absurd. You've got to learn early in life that you've got to get along with these people."

"The law says my client had the right to an answer in thirty days."

I said, "There are certain things of client's rights which must be tempered by fairness." So the three of us just jumped all over him, so I remember that one was just kind of a learning experience.

**MCCREERY:** Yes. But you wouldn't hesitate to do that if it were called for?

**PANELLI:** Oh no, no. There are some lawyers that really misstate the facts. And that's one thing. We were pretty — as they call it, a hot court. We pretty well knew the facts, knew the case, so if someone tried to suggest something that wasn't really in the record, or wasn't the way it was in the briefs, we didn't hesitate to go after them. But that didn't happen very often.

I remember we had some big-name lawyers come up from Los Angeles on some cases, and I guess they thought that they were in the cow counties

here, because they used to have what they called the cow counties association, and I guess they thought we were one of them.

MCCREERY: Do you have an example of that, of the big-name lawyers coming up?

PANELLI: No, I'm not going to say his name, because he's a lawyer now that I've done a lot of work with. [Laughter]

MCCREERY: Okay, that's fine.

PANELLI: But I knew him by reputation.

MCCREERY: But just your point that they thought this was the hick town here?

PANELLI: Right. Just to digress for a minute. One of the lawyers that was in our office when he retired from practice with a big firm in San Francisco had done all of the defense work for the San Francisco Muni. But he was the defense lawyer in Bronson's office, which was a big defense firm [Bronson, Bronson & McKinnon]. He used to come to Santa Clara County to try cases, and they had a booklet on what they called "trying cases before the cow-county judges." Three of our superior court judges that I sat with were mentioned in this thing.

So he gave the booklet to me, and I made the mistake one day, just in jest, talking about what was written about this one judge. The judge wasn't too happy with it. But it said who you talk to in their office, you give this guy a pint of whiskey, he'll tell you where the jurors are drawn from, watch out for this kind of juror, watch out for this judge with these lawyers, because there's a special relationship.

So my sense was that they may have thought that this was the case up here. I think it was in the Sixth District we did have a major case involving — which was argued by Shirley Hufstедler, who had been the Secretary of Health, Education, and Welfare. I don't remember the case, but I remember that she did appear before us. She was obviously very impressive, because we didn't get — at that point in time we didn't get a lot of the Academy of Appellate Lawyers arguing cases before us in the court of appeal, even in San Francisco not too much.

What you usually saw were the trial lawyers arguing the cases, although for some of the major insurance cases you would get the Ellis Horvitz firm,

maybe not necessarily Ellis Horvitz, but some of his people. But most of the time you saw the lawyers who typically were the trial lawyers, and so the problem was that a lot of times you'd get jury arguments. Just as I say on this seminar that I just put on, I said, "That doesn't sell. The oral part of it isn't as important as the written part and the record part, because that's all that the court of appeal knows about. They don't know what happened, except what's in the record and what was said."

I remember, as I think I've mentioned, Justice Mosk would go ballistic when someone would make a jury argument. He'd jump down on them. But yes, we had some good lawyers on some major cases.

We did the same thing that we did on the court of appeal in the First District. Following oral argument we would meet again and talk about whether there was anything that we heard that would change our opinion. We really didn't have a final opinion, but you were pretty close, your memos were pretty close to an opinion, so it wouldn't take long to turn out an opinion.

What we used to do is, as we did in the First District, your lawyers, the lawyers who were responsible for the cases, would sit in on oral argument. Then when we'd have these critiques they would say, "We think that maybe they overstated this issue," or maybe, "The point that they made might be a pretty good point. We need to do some more work on it," that kind of discussion. But the court of appeal, since you're correcting for an error, is an entirely different process than the issue situation that you ran into on the supreme court.

**MCCREERY:** I wonder, how was your own judicial philosophy evolving, since your time on the superior court? Any major changes in your thinking at the appellate level?

**PANELLI:** I remember as one major plaintiff's lawyer said, "Whatever happened to Ed Panelli between here and San Francisco?" So I thought the thinking was that I had become more conservative.

**MCCREERY:** The thinking out there in the world?

**PANELLI:** At least for these plaintiffs' lawyers that was the case. I don't think that that necessarily was the view of the district attorney's office. But I don't think that my views really changed. It's that you got to see more of them. Obviously, you try a case, let's say you try a case or two a week. With

me, I was looking at something like twenty-five appeals a month, reviewing that number of cases. So you may start to see stuff where you figured that really didn't warrant even maybe the expenditure of the trial time, let alone appellate time, and you would say so.

But I forget what the filing fee was. You might as well file an appeal. I think sometimes lawyers told their clients, "We're going to get like a second trial." They didn't know that our role was very limited in what we could do. That's not to suggest that, as I say, the prejudicial error rule is — we took a lot of flak in the supreme court when we found a lot of stuff to be non-prejudicial, and people would say it was grossly prejudicial. That's a judgment call, and you have to rely on the integrity of the judges, that you're comfortable that that's the situation.

If you were to make those kinds of decisions based on some other extrinsic determination, either because you didn't like the people, or you felt that things shouldn't go this way, well, then I think you're in trouble. As I say, that's why a letter that I got recently from the D.A. — about what he said in the newspaper — I felt pretty good about. He was saying he knew that this person — I think I told you the story, that he had stated he killed this person, but that the statement didn't pass legal standards for admission, and so I didn't consider it and I didn't revoke this person's probation. The occasion of that was here within this twenty-year-old murder case, they finally were able to get the evidence and they convicted the guy. So the D.A. had written this press release to the newspaper, and in part of it, it says that as an example of judicial integrity was the fact that Justice Panelli, having read this, knew that that was the case, but under the law he couldn't permit it.

So I kind of felt good about that, because I used to tell people, the example I used to use was of a wide receiver who goes over the center of the line and knows that some cornerback is just going to smash him as soon as he catches the ball. If you start to hear those footsteps and look for him, you're going to drop the ball. I said it's the same way with judges. If you start to be concerned about how people respond to what you've done and what you think you've done fairly, then you ought to get out of the business.

But I always felt very comfortable in the decisions that I made. I never felt that I was leaning one way or another because of some bias or prejudice or predilection to do a certain thing, so I never had any problems with that.

People say judging is hard. I don't think it's hard at all, because when you're a trial judge it's: "Was it shown beyond a preponderance of the evidence?" If you're not sure, then it hasn't been shown beyond the preponderance of the evidence. On the court of appeal and the supreme court the prejudicial standard is: "Is it more probable than not that the result would have changed?" In a lot of cases you could say yes, and in other cases you felt very comfortable that you couldn't, so I never had any problem with that.

MCCREERY: But as you say, different judges will have a different answer.

PANELLI: They'll have a different answer, sure, and that's why I tell people that there's a human aspect to it. Otherwise we'd just be computers. You would punch the stuff in and it'd come out. That's why I was never totally in favor of this mandatory sentence kind of thing, because it removes the discretion of the judges.

MCCREERY: Right. We touched on that. That had come up when you were still on the superior court. How did that change the system?

PANELLI: Just like now with the family court with the [alimony] support. They punch these numbers in and you get a reading, and they tell you what the support should be. It doesn't take into account the human factor, and I said, judging involves discretion. The problem is they don't trust the discretion of the judges, and so they come at ways to, in effect, restrain what judges can do, and I'm not in favor of that. The problem, they say, "You can't get rid of the judges." That's not necessarily true. I was on the court that lost three supreme court justices, so you can do it. Now, whether that's good or bad, that's not for me to decide.

But I know that there was even some issue with respect to the Sixth District, just recently, maybe two or three years ago. They were concerned that there might be some backlash, and there might be some retention-election contests by virtue of some decisions that they had written. So I remember there was a little nervousness, because the district is so small as far as the electorate is concerned. It wouldn't take a hell of a lot of votes. But most of the people don't know who the trial judges are. They clearly don't know who the appellate judges are.

We made it a point, I think, to be involved with the local bar associations. See, part of it was just to let them know who we are, who we were. You got to know — generally on the criminal side they had somewhat



appellate specialists, so you wouldn't necessarily get the trial lawyers on those sides, because they had so many appeals, both the public defender and the D.A. They had people that you would see.

Then we had people like Jerry Maher, who was probably one of our leading appellate lawyers from Palo Alto, who recently just died. We'd see him often, and we'd also use him as a resource, because we respected him. But I remember they later had, I guess, on the criminal cases the attorney general would appear — and it later became the Sixth District Appellate Project — and would represent the public defender on the appeals.

One of the fellows that is the head of it worked for Rose Bird, and we'd see him all the time. I can't think of his name offhand. But so they did a little better job. They had a lot of canned arguments, because a lot of the issues were the same.

MCCREERY: Was the public defender's office evolving much over these years, since you had first begun working with it?

PANELLI: Yes, yes, because as I told you, when I started to practice law we didn't have a public defender. The judges would appoint lawyers, not pro bono technically, but what they paid you almost made it pro bono.

There were a certain group of lawyers who did a lot of those cases, so they were almost de facto the public defender's office, and they also opposed the creation of the public defender's office because they thought that they could do a better job at lower cost, et cetera, so there was some political stuff. But I knew all those folks. We got along fine, because I used to see them, obviously, when I was in juvenile.

MCCREERY: Is there anything else you'd like to say about the Sixth District?

PANELLI: Not really, other than the fact that it's now grown to seven. That's the other thing, we decided against breaking into divisions. So it's now, they just pick three and rotate the panels from all seven, which I think is good. Although even with that situation they did have a situation where two panels came up with opposite conclusions on the same issue, and there was some resentment because apparently there was some — I don't know this for a fact — there was some pressure to try to get them to be uniform. There was a resistance, and, in fact, there was some — I don't know that it got to the level of formal complaint, but I know there was some anxiety

over the fact that someone would approach one side and say, “Gee, this doesn’t look good.”

MCCREERY: But those districts that had divisions, that had been somewhat controversial now and again, going back at least to 1980 and maybe farther — the consistency within the district, and those issues of which groups of judges worked together.

PANELLI: Right, right.

MCCREERY: What did you think was best here?

PANELLI: I suggested that we sit as a court, as opposed to various divisions. First of all, you then start to get — it’s another little fiefdom. You have an administrative assistant to the P.J. of that division. There’s more bureaucracy. I think it’s better to have writ clerks that work for the whole court, as opposed to a particular division.

MCCREERY: What about the process of facing elections? Of course, you didn’t do that, because you weren’t here long enough, or on the First District long enough. But the whole question of should those elections be contested, and how often should they be?

PANELLI: No, I don’t think they should be contested. See, the problem is the electorate really doesn’t know what you’re doing. That’s why I think the long terms, the twelve-year terms, are important, because it gives a person an opportunity to establish some sort of a track record with respect to what kind of a judge you are, and it doesn’t lend itself to some emotional response to a particular decision, which would then generate some sort of a contested election.

The problem with a contested election is it’s hard for the sitting judge if some lawyer — let’s say you have an open election, some lawyer can make some crazy accusations about you, and it’s hard for the judge to defend. What can you tell the electorate, “I am going to be fairer than I’ve been?” This case in Washington where this fellow had never tried a case, but his name was similar to someone else who was well known, and he got elected. He only lasted, I think, one term, until people found out that he was really a fraud, but I mean it’s very, very difficult.

On the other hand, I understand you have to have a check. There’s a federal court judge sitting, a district court judge that — I’ve seen the

transcript, that he tells the lawyers, “This is what we’re going to do. I don’t care what you say, what they say. I’m here for life. I’ve been reversed more by the Ninth Circuit than any other judge, but I don’t care what the Ninth Circuit says.”

That kind of arrogance is — I told these lawyers that showed me this, I said, “In California you’d be before the Commission on Judicial Performance [snaps fingers], and you’d be out in a nanosecond.” But this guy is well known. I don’t remember his name. When I’ve explained this the lawyers tell me his name; they know it. It’s kind of sad, because there’s got to be some system on the federal side where these kinds of things are taken care of. I don’t know.

But I think it’s very difficult and kind of unfair for judges to defend themselves. Look at when my three colleagues [on the California Supreme Court] were removed. Everybody took this, “They’re against the death penalty.” What are they going to say? “That’s the way we saw it.” From a statistical point of view it was kind of hard, because in my judgment you can’t hear sixty-four cases and reverse sixty. I mean, maybe fifty-fifty, but they reversed better than 75 percent.

Then you can make an argument, that, oh, wait a minute, there’s an agenda out here. Whether there was or not I don’t know. I wasn’t there long enough. I know I didn’t agree with them on a lot of these cases, because a lot of the issues that they were reversing on, in my judgment, really make no difference in the case. Like the *Carlos* error, which was whether you had an intent to kill, which was the basis of a lot of reversals. I really had a problem with that.

Of course, we overruled *Carlos*, and then everybody started raising hell about what we were doing. But it’s a difficult deal. I think what you’ve got to ask of judges is that they be honest, that they are industrious, and that they have a knowledge of the law. As I say, we’re not all fungible. That’s the beauty of the system, I think, is that you get different views, and you arrive at a collegial resolution, and most times I think it’s generally fair.

It’s just like certain cases that just stick with you. Clarence Ray Allen. I’ll never forget Clarence Ray Allen’s case. I thought in reading the record, in reading what happened, and how it happened, and that the guy was in prison and contracted to get these other people killed, it was, of all — I mean, I heard a lot of cases. He’s one I remember. Billy Ray Hamilton, who

was the guy who did the killing on the other three, he also has another horrible case involving an eighteen-month-old little baby girl. It's horrible. I started to tell my wife that story. She said, "I can't hear it. It's just terrible."

So that on some of these things we just had different views. But fortunately, we didn't have a problem in the court of appeal. As I say, no one knew what you were doing. The trial judges, obviously, they'd kind of give you the needle if you overturned them, but you know, my view is similar to a judge, that the trial judge says, "I've never been reversed." Then you've never really sometimes done your job, because there are ways that trial judges can cover their mistakes.

A lawyer told me the other day, when I was giving a lecture on protecting the record, that if it's not in the record it didn't happen, but in that case the judge said, "I think this lawyer, she's the best lawyer I've ever had, and I think she does a fantastic job, and I've yet to find that she's misstated something." That didn't appear in the record. When the lawyer goes to see the court reporter to confirm the statement, it's not there. That's not right either.

What these lawyers asked me — because I said, "As part of this process you've got to get it in the record. If you have a sidebar conference you've got to make sure that at some point you get it on the record." "Suppose the judge doesn't let you do it?" I said, "You don't want to be thrown in jail for contempt, but you've got to in some way make a record of it. You say, 'I'd like to put on the record what happened in the sidebar conference,' and if the judge doesn't do it just say, 'I think I need to do it to preserve the record.'" If the judge is a real jerk, he or she could say, "I'm not going to let you do it." I think that's a rare occurrence. The problem is you don't know how it gets sanitized, because what I did tell them is that the reporter is the only person who works directly for the judge. Everybody else is assigned. So there's this relationship. "Hey, you'd better clean it up."

But anyway, with respect to retention elections, I think twelve years is not a bad term, and I think that the problem is that in a small district you could be subject to attack by a small fringe group. So far it hasn't happened. Statewide it's a little more difficult, and in big districts it's more difficult.

**MCCREERY:** I wonder if you could just for the moment talk very generally about that early transition of arriving at the [supreme] court, and getting yourself physically set up, and meeting people. What did you do about hiring a staff to work with you?

PANELLI: That was the first issue, because the people who had worked for Justice Kaus, one of them had indicated that he wished to move on and work with Justice Grodin. I knew I was going to bring Kay Werdegar with me, because I had asked her right after I got the call from the governor if she was willing to come, so I knew I'd have her. I had a young woman, Melanie Gold, who had been with me in the Sixth District, and I wanted her to come.

There had been three. One of them left, so I had two left, Alice Shore and Barbara Spencer, who had been with Justice Kaus. I had talked to the chief justice about them, because Alice Shore had been there for many, many years. She had worked, I think, at one time for Chief Justice Bird. The chief suggested that maybe those weren't people who would be compatible with me, which surprised me.

So I interviewed them and I said, "What I'm going to do is see if we can get along for a period of time." I suggested maybe ninety days, and maybe they wouldn't be happy with me and I wouldn't be happy with them. But after about a month or two, they were obviously very professional, very experienced, so I went and told the chief that I had decided to keep both Alice Shore and Barbara Spencer. She was very surprised. I don't think she necessarily encouraged it, but it was very, very important to me, and Alice Shore became my chief of staff.

She was very helpful, and Barbara had been there a while, and they had both worked with Otto Kaus. So then I had Alice Shore, Barbara Spencer, Kay Werdegar, Melanie Gold. That left me with one other position, and I think I took another first-year. The idea had been to have some sort of rotation. Usually you had the one-year people that stayed on maybe for an extra year.

But I found out that first year that that really wasn't very good, because — like Melanie Gold, at the end of her year, she had been working on a death-penalty case, but it wasn't ready yet to be put on the calendar. When I assigned it to someone else they said, "With all due respect, we want to start all over again." So it became clear to me that you needed people who were going to stay, and so the trend began that you would get people who were going to do it for a period of time.

MCCREERY: That was happening across the court, I gather?

PANELLI: Yes, yes. The only one who had some sort of an outside limit was the chief. She felt, I think, that it was five years — after five years you had to leave. But most, like Justice Mosk had Peter Belton, who had been there for a hundred years, and similarly with Jane Brady, who had been there for a long, long time.

The reinstatement of the death penalty changed the character of the court, because those were the only appellate cases that you received, and when they were coming in the quantities that they came in after the reinstatement of the death penalty, it just required people with more experience. It slowed down the process because it took so long. Then, even when some of the cases got affirmed, you had to go through the habeas, and so the habeas was redoing everything all over again. Whoever was assigned to work on that particular death penalty case had not only that case, but ultimately the writ as well, so you needed people who kind of knew the process. But I can't remember offhand who the fifth person was. It might have been Louis Moro, who was from McGeorge [law school].

I was a judge on the California finals of the Traynor Moot Court competition, and Judge (now Justice) Anthony Kennedy was on that panel, and when I saw who one of the oralists was, it was this fellow that I had selected to be my next year's law clerk. I said, "Gee, I'd better recuse myself from this." I said, "I'm not going to tell you anything about who he is." But I'm not sure, I'd have to go back.

But that was the first thing that we did is to try to get a staff. Similarly, very important then was to get a secretary. I was very, very fortunate, because we had a woman who had been kind of a backup secretary, kind of a floating secretary, but more of a backup for Justice Reynoso, Anna Helsley. She was from El Salvador. So she was very, very helpful, because she knew what we needed to do and what the process was.

And so we started. I'll never forget the first week I was there I got this huge — not the first week, because the first week was oral argument in Los Angeles. But while I was there, I got the first batch of petitions for review that we had to work through, and there was a certain learning process. While I had sat as a pro tem on one case previously, I didn't really understand the inner workings of the court. What we called the secretary, which was kind of the internal clerk, [was the position] where all the confidential

briefs, the work in progress, the assignments, all of those things took place. I had been unaware of that, so I had to find out what they did.

Then I had to learn what the civil and criminal central staffs did, how that functioned, and who had the responsibility for oversight, because I found out that that's a rotating assignment — and I forget how long you had it for, two months or three months — where you met with them to in effect be the liaison between the court and these attorneys, suggesting to them that what you may have heard in conference, that the memos are too long, that there are things that need to be done that aren't being done, those kinds of things. So I was introduced to that.

Of course, I was introduced to the fact that the way they operated with respect to circulation of opinions was the way they had done it, I think, from time immemorial, because they literally had a box that they passed from justice to justice, and all the materials were in the box. So after a while you start to get acclimated and you start to know what you do, and you found out that most of the negotiation was done with staffs, which I didn't like.

MCCREERY: As opposed to justice-to-justice? Give me an example.

PANELLI: You'd get someone's draft and you'd read it and you'd tell the lawyer, "I really have a problem with this. I could be persuaded maybe if some of these things are changed this way."

So that law clerk would go to the other law clerk and say, "My judge thinks that we're having some problems with this, and maybe if this could be modified maybe we could go along with you," or something like that. I found that a little disturbing, because sometimes it gave the impression that the law clerks had more power than I thought they should have. I'd like to go talk to the judge myself. I shouldn't say this, because I'm not that fresh! But I knew that I could always go talk to Justice Grodin. We could sit and have a talk, and I knew that he was on top of the case.

That was part of the problem. You don't know what they were working on, so you might come in and say, "Gee, I'd like to talk about *A vs. B*." Sometimes [the response is], "*A vs. B*, tell me what it's about," because he's working on *X vs. Z*. Whereas the lawyer who was working on *A vs. B* could go to the other lawyer who was working on *A vs. B*, because you're assigned responsibility for these cases. That may have been part of it. But I

could always go talk to Justice Grodin, always to Justice [Malcolm] Lucas, somewhat less with Broussard and Mosk, because Peter Belton was kind of the keeper of the gate with Justice Mosk.

Plus, I'd be less than candid if I didn't suggest that there was some hesitation, because now all of a sudden you had two appointees from a Republican governor, whereas all the others had been appointed by either Jerry Brown or his father, so that there was some issue with that.

MCCREERY: When you say you knew you could always talk to Justice Grodin, you knew him from his days on the court of appeal? How much were you acquainted?

PANELLI: Not very well, because he was in a different division, and he may have gone to the supreme court before I got to the First District. But I knew him because — I forget which division that he was in, I think it may have been the First. Tobriner had a lunch, I don't know if it was once a week or once a month, and they would invite people to join them. I had been invited there at least once, and so I kind of knew them. But I was still kind of awed by all of these people, because here I had been a trial judge, and sure, I'd gone to the court of appeal for a year, and then I'd been the P.J. on the court of appeal for a year, but that had only been two years.

So I was like a kid in a candy store in a way, and so it takes a while to really — I'd call them "Judge," rather than calling by — it wasn't for a while I said "Stanley" or "Joe" or "Malcolm." It was always "Judge." But after you start to feel comfortable with what you're doing — because at the beginning, frankly, I wasn't sure what was expected of you. One of the first calendars that I came on I voted to rehear a bunch of cases that had been decided just before I was sworn in.

MCCREERY: Were those the death-penalty cases?

PANELLI: I don't think so, I don't recall. But I know there were some that there was some feeling that maybe they were rushed to judgment by virtue of the fact that there was going to be a new voter, and there may have been some four-to-three votes. I don't recall the details of it. But I did vote to rehear some cases.

C: As the deciding vote, it sounds like?



PANELLI: Right. Yes, well, because it had switched. It must have been four-three one way, now it was three to three, and so what were you going to do. I remember there was a certain issue about that, and my view was that if these are precedents that I'm going to have to live with, I would like to at least have some say in how they're decided. I'm not sure that ultimately we changed some. Some may have been death-penalty cases that we granted rehearing on, and then I don't know how they ultimately were decided. But others I just thought I'd like to participate in.

MCCREERY: That was your thinking.

PANELLI: Yes, that was my thinking. I couldn't really tell at the end of the day how I'd come out on them, because you didn't have all the information, but they were issues that I was concerned enough that I thought that I should participate. So that's kind of how I started.

But after, I'd say, the first few months I felt — it was a little difficult, because I only had two people who had worked on the court, so as far as the weekly conferences — what you do, what was expected — was new to three of my people. So you had to kind of go along with what they suggested. Later I could start to see that there was a sense of some, I won't say dissension, but there were some differences of opinion by virtue of who had been there for a while, and who you brought on who were yours, like Kay Werdegar.

But they were all professionals, just like Alice Shore and Barbara when I had those interviews and there was a question of, "Can you work with them?" They said, "Look, we're professionals. You tell us how you want to decide this case, and we'll try to help you make sure that we can write it that way, and if we can't, we'll tell you." That's all you can ask for. But I soon learned that the work on the court was like a traffic cop, and an editor, I used to tell people, because you have to keep the work flowing, but on the other hand you have to know when to stop doing some of this stuff.

Since I was new, I was asked to speak, and I used to always start my talk with a little story to kind of explain my work. I said there was this fellow who was driving a panel truck, and every so often, maybe every quarter of a mile he'd get out of the truck and get out a baseball bat and beat the side of the truck. Then he'd get back in the truck, drive another quarter of a mile, get out, repeat the process.

After a while it caught the eye of a highway patrolman, and he was pulled over. He said, “Officer, what have I done wrong?” He says, “I don’t know that you’ve done anything wrong, but I’ve seen this behavior where you stop, get out and beat the side of the truck, and go, and then repeat it.” He says, “Oh, that’s very simple.” He says, “What I am carrying is one ton of canaries, and this is only a half-ton truck, so I have to keep half of them flying at all times.”

So I said that’s how my work is on the court. I have to keep half of the things going at all times, because you’d get two, three hundred petitions for review that you’d have to do, plus you were working on opinions, plus all the other stuff that you were doing, and it was trying to keep things in the air all the time.

I gave a talk to Law Day in some Central Valley bar association. [Laughter] They gave me a bat with a little plaque on it that says, “To keep the birds flying at all times.” But I soon found out that what the justices used to do for the Wednesday conferences was to get together with their staff on the Tuesday before the Wednesdays and go over all these petitions for review, which I did for probably a couple, three years, maybe even longer.

Then it became obvious to me that we were five people spending two hours. That’s ten hours. That’s like an extra day and a half, and we probably needed to spend more time on what we have decided to do, rather than what we decide [about] whether we’re going to do it. So then what I did is I would — because on Saturdays and Sundays I read all the petitions for review. But Alice Shore would allocate those among the staff people, who were responsible. They might have had ten, fifteen, twenty apiece, I’m not sure — what I then decided to do is I would read them, and then I’d come in on Tuesday and say, “With any of them that you’ve read, is there anything that you think is special that I should look at in greater detail?” Those conferences then would take maybe a half hour, as opposed to two hours.

MCCREERY: [You met with them] individually.

PANELLI: Yes, individually. That would work, because most of the petitions for review after they’d been screened by the central staffs — the central staffs prepare memos, usually five to fifteen pages kind of summarizing, with a recommendation as to what you should do with it. When I was there the central staffs weren’t fully staffed, so the justices other than

the chief had the responsibility for the preparation of 17 percent of the petitions for review.

But what happens is they segregate them into two categories, the A list and the B list. The B list are cases that have been screened in a manner that whoever made the recommendation suggested it isn't worthy of discussion. So you'd get the big stack of B lists. The A lists are those, whoever screened it, whether it was one of the justice's staff or the central staffs, felt that it was important enough that it should go on the calendar for discussion by the judges. Any judge could put a B-list case on the A list.

So what I found is what I would do with the B lists is I would just look through to see what the issues were, and that might only take you three or four hours to go through maybe even a hundred, a hundred fifty, because you're looking for issues. You're not deciding whether it was decided correctly.

I always felt a little uncomfortable about that until one of my law clerks — after he left me, he clerked for Justice [William] Brennan [on the U.S. Supreme Court]. He said Justice Brennan told him that on certain petitions he could tell in forty-five seconds what the story was, because, see, you're an institutional court, and so you're not supposed to be correcting for error. You're supposed to be deciding issues, in the U.S. Supreme Court, of national interest, whereas with us we're: "Are they of statewide importance, or are there conflicts?" So that you kind of know what issues are important.

So when you see that this B-list case talks about something that maybe you have a particular interest in, or that you have started to see it four or five times, and you think maybe this is something that we ought to now take an interest in, you could always put it on the A list. But the A list were the ones where on Wednesday you're going to go and talk about it.

One of the first things I found, and probably it didn't take me long to find this out, is that everything they were doing, they'd do it by seniority, so that it was Justice Mosk, Justice Broussard, Justice Reynoso, Justice Grodin, Justice Lucas, and myself. So when a case came up on the conference, first the chief would go to Justice Mosk. It would go around. When it comes to you, the votes were all cast.

MCCREERY: It's the opposite of the U.S. Supreme Court, isn't it, where the junior justice speaks first.

PANELLI: Yes, right. No, here you spoke last. So you'd have to really be a great persuader after they had four votes, that anybody's even going to pay much attention to what you have to say, after they've already decided either to deny it or to grant it. Then I learned that if you prepare a supplemental memo to the memo that you wanted to discuss, you got to be the second person to speak. So when I'd see things that I really thought were of interest to me, I would prepare a supplemental memo. Then when Justice Mosk had something to say, I'd have an opportunity to respond before everybody else got to vote on it.

MCCREERY: How did you learn this, from someone else?

PANELLI: One of my staff people told me that, probably Alice, because she'd been there for, as I say, a hundred years. Because they were strictly by the book. You didn't talk out of turn. Chief Justice Bird, she was pretty stickler-ish of that.

MCCREERY: Talk a little bit about how she ran those Wednesday conferences.

PANELLI: She had trail mix, a big jar of trail mix in the center of the room, and she was pretty formal. There wasn't much joking around. She was pretty rigid. As I said, there wasn't a lot of discussion with her. She'd go around. She was pretty firm. It wasn't a very happy occasion.

Plus, see, I guess part of it, there may have been remnants of the fact that here is Justice Mosk, who had been there for years and years, and he had been passed over for the chief. There must have been some, I don't know, some tension, because Justice Mosk was the absolute perfect gentleman at all times, and you would never know it. But sometimes I could see a little resistance, maybe.

But there were people that she could always count on with respect to certain issues, like Broussard and Reynoso, to a lesser extent Grodin. But I always felt Grodin was always a lot more independent than Broussard and Reynoso.

MCCREERY: Where did Justice Mosk tend to fit in, being that he was so senior?

PANELLI: He tended to be on the liberal side, as well as Broussard and Reynoso and Grodin. But he was independent. He could be a maverick if he wanted to.

MCCREERY: And did sometimes.

PANELLI: Even in that election of '86. He would have been a target except he would never say whether he was going to seek reelection. He said, "I've been here a long time. I don't know." So they weren't about to mount a campaign against him, and then figure that he's going to quit anyway. So he got under the radar. He was politically astute. But obviously everybody respected him, because as I say, even though you disagreed with him, he was always very respectful.

Some of the nicest things that I have in my scrapbook when I left were written by Justice Mosk. He wrote me a very nice letter. I forget, I wrote him something and he came back with — this was after I was gone, I don't know if it had to do with an opinion or whatever. But no, no, I always got along with him. Sometimes I'd go over and ask him for advice on some of the stuff, but it soon became clear to me that my ally was Justice Lucas.

MCCREERY: Yes. How well did you know Justice Lucas?

PANELLI: I didn't know Lucas at all.

MCCREERY: Not at all?

PANELLI: Not at all. I think I may have met him at some reception when I was in San Francisco. Maybe it was the supreme court reception that they had for the court. Every year the lawyers have something up at the Mark Hopkins [Hotel], and I think I may have met him there. But Broussard used to always tease me, because the lineup of the chambers were: the chief's chambers, Lucas, Broussard, Panelli. Broussard says, "Oh, you're going to wear out a path between your chambers and Lucas' chambers."

MCCREERY: Going right past his door each time?

PANELLI: Yes. I said, "Allen, who knows? Maybe some day I'll stop in and see you." But I think there was a concern that if you were seen coming out of Broussard's chambers, if the chief saw it there'd be some concern of whether there's some conspiracy. I think she had some issues that — I heard a story about once Justice Racanelli was talking to somebody, and as a result she felt — I don't know whether she felt they were conspiring or something, and so they had a falling out. They used to commute together. So no, you had to be careful with respect to that.

MCCREERY: Kind of a watchful atmosphere, perhaps?

PANELLI: Right.

MCCREERY: Then you say you learned that Justice Lucas would be something of, I don't know what word, an ally?

PANELLI: Because you could see that on some of the issues where they were going one way, and, of course, he always spoke before me, because he was senior to me. He was on my right. I'd come in and I'd say sometimes, "Gee, Malcolm, it seems so clear to me. I can't understand what's happening." His view was, "Hey, I agree with you. We've got it right, and they've got it wrong." Of course, I wrote a lot of dissenting opinions that first year, because you don't get to write the opinion if you haven't got four votes. [Laughter]

MCCREERY: Talk about Chief Justice Bird's assignments of opinions a little bit, to the extent that you were privy to it.

PANELLI: I don't remember that very much, how they did it. But because you had to have been on the grant side of the case — if you were on the grant side of the case then, of course, that probably meant that you had a view on the case that was agreeable to three other people. Because unlike the Supreme Court of the United States, it takes four votes. It takes a majority to grant review. So you could kind of see where you were, and so if you voted to deny, you weren't going to get that. It would be kind of curious for me to go back and see how many cases I wrote in '86.

MCCREERY: That first year.

PANELLI: That first year. I knew I wrote some death-penalty cases, because I remember one, Bloyd, was one of my first ones, *People v. Bloyd*. There was another death-penalty case, *People v. Boyde*, and I think on Bloyd, Alice Shore worked on it, and, of course, she had been with Justice Kaus. I told her, "No, Alice, this is a case that we're going to affirm, because I don't see any problems with what happened on here." So we worked it, and then I saw some draft opinions and then I reworked them.

The suggestion that you could sit down at your desk and write an opinion from beginning to end is a myth, because there's just too much to do. So that's part of where the editor's job comes in. I would read the briefs. I'd call in the particular lawyer or clerk that I wanted to work with on this

case. I'd say, "I've read the briefs." I would outline the issues, and I would say, "This is how I tentatively want to decide this case." I might have maybe three or four sentences of a summary of how I thought I would address this issue.

Then what they would do is they would go do a draft of something, a memo, and then they'd present it to you. Then you would work with it, send it back with whatever corrections or whatever, maybe additional research you wanted to do on your own with respect to maybe some of the cases that they cited. You would do that, and then that's how the things got turned out. Of course, you're doing this with five people at the same time you're doing all this work with respect to petitions for review. So that's what I did.

MCCREERY: You gave this example of the dissent in the death-penalty case, *People v. Boyde*, on which Alice Shore worked. Were you saying that it presented some kind of —

PANELLI: What I was trying to say was that this was coming from a different point of view than she was accustomed to. It took, I think, a little adjustment, because I don't know how Justice Kaus would have decided it, but I know where he was on some of the death-penalty cases. At that point in time we — no, I guess that didn't happen until after the '86 election, where a lot of these cases were being reversed on the basis of what was called *Carlos* error. Following the reconstituted court, if you will, we overturned the *Carlos* case. It had to do with intent to kill, so with that a lot of the basis for the reversals of the death-penalty cases no longer existed.

The other issue that, again, was prominent in the election of '86, had to do with harmless error. I had written a letter to the editor, which I never do, but the San Jose paper here probably two months ago ran a weeklong series on the criminal justice system in Santa Clara County. They first examined the district attorney's office and found fault with overzealous prosecution, et cetera.

Then they examined the defense. Then they examined the trial courts, and then they examined the court of appeal, and they were unhappy with all segments. One of the big things that they had is how many of these cases the court affirmed on the basis that the error was harmless. So I wrote a letter, and I said the constitutional basis for reversing for error has to be

that it's more probable than not that the result would have been different but for the error, because if it's "no harm, no foul" the courts of appeal have to respect the jurisdiction of the trial courts. The trial courts make certain decisions, and the court of appeal has to determine as best they can whether they think that "but for the error" the result would have been different.

So what it is, is a respect for the various responsibilities. They had made a comment that, "The problem with the appellate judges is they look at these cases like lawyers, rather than how the general public looks at it." And I said, "But the appellate judges are supposed to look at the issues like lawyers. They do represent the community in a larger sense, but ultimately the decisions have to be made on the basis of the law." You can't have appellate court nullification, if you will.

MCCREERY: Right. You're looking at legal issues, not deciding the facts of a case itself.

PANELLI: Right, right. And see, the other thing I said, you have to understand that the appellate court only looks at what's in the record, because if it's not in the record, from an appellate judge's point of view, it didn't happen. So those were some changes that some of the staff people had to accommodate themselves to.

MCCREERY: In working with you, as opposed to Justice Kaus.

PANELLI: Yes, in working with me. We never had any — there might have been one case where we had a very substantial disagreement. I don't know what it was, but I remember telling this particular lawyer, I said, "I appreciate your position and I respect it, but as long as I'm sitting on this side of the desk and I'm wearing the robe, we're going to do it my way." I always took the position I respected what they had to do, but I told them many times — not many times, because it didn't come up many times — that if they were really unhappy with the way things were going, they were free to leave. No one ever left.

MCCREERY: The other justices had been at this a little bit longer than you had, some quite a long time, but some of them only a couple of years. But to what extent, really, was the court as a whole still grappling with the changes and the reinstatement of the death penalty with the 1978 statute?



That statute was said to contain some problems that had to come up in the form of individual cases.

PANELLI: Most of those had been addressed before I got there, because the whole campaign in '86 was over the fact that they had reversed sixty of sixty-four cases that they had decided, so that they had obviously set the ground rules for what was expected. As I say, *Carlos*, this intent-to-kill requirement, was one of the big issues. Then there weren't any affirmances on the basis of harmless error, or if there were a few, there were only four out of sixty-four.

But honestly — people may not believe this — I really didn't pay that much attention to it, because first of all, when I was on the trial courts I never had a death-penalty case, and when I went to the court of appeal we didn't get the death-penalty cases. So you have — this may sound a little cavalier — you have a tendency not to pay attention to what you're not getting involved with.

If I had had a lot of criminal trials, and I had had trials that involved the death penalty, then I might have been a little more in tune with what people were saying. Our [law] office did represent a death-penalty inmate who got the death penalty twice, and then when *Anderson* came out, of course, it was commuted to straight life, and Earl Sears died a free man. So I kind of knew it from that point of view, and we would talk about it in the office when I was a lawyer.

But I really, frankly, didn't pay a great deal of attention to it, not until I got on the court, obviously. Then the rules, most of the rules, were already established, so that was kind of the frustration that I had, because I thought some of the cases should have been affirmed.

MCCREERY: But this matter of a harmless error versus a prejudicial one, what room is there to consider the seriousness of the penalty in a death case? Where does that enter in, as opposed to other penalties?

PANELLI: The thing is that people don't really appreciate how heinous the crimes are. It may have been at one time, like when [Caryl] Chessman got the death penalty — it wasn't even a murder case, it was a rape case. It may have been someone who killed an individual. It wasn't good, but it wasn't like the special circumstances that you had to show.

When you got into the special circumstances, multiple murders, and some of these guys, they'd been out on the street for two months and they'd commit another murder, so they're charged with multiple murder, and you look at it: This jury's going to convict them every time he's tried. It doesn't make any difference. Then, of course, as things developed, then the big issue became whether the aggravated circumstances outweighed the mitigating circumstances, and so that became the battleground: they could have put this on, they could have shown this. Part of it, you have to make a judgment call.

MCCREERY: I wonder, to what extent did you discuss this directly with your colleagues, and again, we're talking about that first year before the election changed the makeup of the court. Do you recall?

PANELLI: You would discuss it, and they would tell you why they viewed it differently. That's why I say on occasions I'd ask Malcolm Lucas, I said, "Gee, Malcolm, it seems so clear to me. I just can't understand where they're coming from on some of this issue."

But anyway, we got along. I wrote — see, one of the issues was that we didn't, because we weren't voting to — I shouldn't say we, because I don't remember what Lucas was doing. But I was dissenting on some of these cases. So then the concern was that you're not doing your share of the work, because five people, and it usually would be five, were going one way, and you're not writing those cases. You're dissenting to those cases.

So there were certain cases that I wrote as an affirmance by the court, where I would then dissent. I would write them the way five votes wanted them, and then I would write my dissent the way I really think it should have been decided.

MCCREERY: What would prompt you to do that?

PANELLI: Just out of concern that people were thinking that I wasn't doing my fair share of the court's workload. There was criticism, "You're not getting out a lot of opinions."

MCCREERY: That's kind of an odd angle to it, isn't it, separate from subject matter itself.

PANELLI: Yes, because there are only seven of you there, and you don't want people to go back to their chambers, grumble, grumble, grumble,

“Gee, he’s got it made. He didn’t have to do anything.” And so we’d tell people, “Okay, this one here you have to do it the way these other folks will do it,” and it was kind of easy, especially for those people who had been there. “Then I’ll decide whether I want to write something in addition to it.” There were some that I felt should have been reversed, and I wrote them that way. At one point I knew what they were, because there were certain cases that people dissented to my reversal.

MCCREERY: Not thinking only of death-penalty matters, but in general, what was the usual thing on that court in terms of any attempt to have the court speak with one voice?

PANELLI: Oh, I don’t think that that was — the fact is, I think the view of some was that that’s not good that you all agree, you’re kind of in lockstep. That was a criticism after the ’86 election.

MCCREERY: Later on, yes.

PANELLI: Yes, later on. In the civil area the difference wasn’t as pronounced, but there was clearly, I think, a view that was favorable to plaintiffs, and clearly disadvantageous to insurance companies. There was always a willingness to extend remedies, in torts especially, and especially when it was involving insurance companies, businesses. One case I remember, *Seaman’s*. That was a case where they, in effect, tortified contract damages. That was always a sore spot, and that later got reversed after I left the court, but I knew it was an issue that people were concerned about.

MCCREERY: But at the time, the early time that we’re talking about, there was no unwritten or unspoken routine about when and how one would dissent or speak separately.

PANELLI: No, no. I’ve got to say that I think Chief Justice Bird wanted people to say what they felt they needed to say. I don’t think she was ever one to try to stifle dissent or disagreement. I don’t think she was happy if you disagreed with her, but as far as suggesting — let’s face it, I wasn’t in her inner circle, so I don’t know what conversations she may have had with some of the others.

But she was always nice to me. She was always pleasant and courteous. We had some differences at times in the cloister of the conference, but we always, as far as our relationship, she was very nice to me. She’d ask me

about my mom, because my mother had been there when I was sworn in, and all of that kind of stuff. That part of it she was — you know, I knew her when she was a pig-tailed public defender in Santa Clara County.

MCCREERY: That's right, you went way back, didn't you?

PANELLI: Yes, so I knew her.

MCCREERY: Who was in her inner circle, both among her colleagues and staff?

PANELLI: Broussard. Broussard and Reynoso, very close. She named Broussard the assistant chief justice, or the acting chief justice, skipped over Mosk. So no, he would be the point person for her, and Reynoso also was very close to her. Her staff people, I can't think of some of them now. But one of the things that was different. You'd have to make an appointment to see her.

MCCREERY: I wondered about how accessible she was.

PANELLI: No, you'd have to make an appointment to see her, and you never spoke with her in the absence of Steve [Buell], who was her administrative assistant.

MCCREERY: Why was that?

PANELLI: I have my ideas, but it's not something that I want to express publicly. [Laughter] I think she was concerned. Maybe she had been burned, so she wanted to make sure there was a record of what went on.

MCCREERY: Really, by the time you came, the lead up to the '86 election was already very much in the public eye.

PANELLI: That was in my confirmation. Everybody wanted to know how you were going to vote on the death penalty, because obviously Deukmejian, I guess — I don't remember on what platform he ran, because as I say, all the people that I knew had supported Mike Curb. But I knew that the death penalty was one of them, and so that was all the big thing, "How do you stand on the death penalty? Did you talk to him in your interview about the death penalty?"

I always kept saying, "When you get to this stage they don't have to ask you those questions." That's why I found it kind of amusing with these U.S. Supreme Court confirmation hearings. Whoever did the groundwork on

these people knew enough about them that you don't ask those questions. So my views when I was on the court here, I was viewed as a moderate, especially on social issues. With respect to taking responsibility for your own actions I was very conservative, because that's the way I was brought up. "You did the crime, you does the time" kind of thing.

But having had my folks, my mom working in unions and the sometimes the lack of support she got from the unions with respect to those kind of issues, and issues with respect to disrespect because you didn't speak the language and that kind of stuff. On those issues I kind of had my own views. I would think probably fiscally I was pretty conservative, but other than that I always viewed myself as kind of a middle-of-the-road person.

But then after a while you start to see, especially — there were these death-penalty cases. I couldn't even talk to my wife about them, some of them were so heinous. One case, this guy takes an eighteen-month-old little girl and tries to rape her. There was no way that guy — the jurors — they finally caught up with him in Texas and some mob was trying to string him up, and had they caught him they would have.

But those are the kind of things. We had one, these two poor women who worked on Labor Day go to their office at an insurance company in Sacramento, and the next thing is one of the janitors rapes them and cuts their throat. In another case the assailant took two women out and bludgeoned them to death with a rock. She's crawling, this woman, she's barely alive with no clothes on. She comes out and gets saved, that's how they caught the guy.

But those kinds of things. After a while you start — it isn't some guy in the heat of passion kills his lover, or somebody else. They were tough, tough cases, and so I think you tend to change your attitude towards them.

MCCREERY: I wondered how your own attitude might have evolved.

PANELLI: Because I had represented criminals when I first started. My first case, Don Signorelli, ten counts of armed robbery. But you start to change. In the civil area, of course, you start to change because you start to see things getting stretched way beyond where you think they should have been.

So then people start to categorize you, and, of course, let's be honest. Most of the people who teach in law schools are very liberal, and most of the papers are very liberal, so when you start — and they're all opposed to the death penalty — so when you start to affirm those kinds of cases, then you get categorized like you're some sort of a devil. Then people start to characterize you as this conservative, and I'm thinking to myself, gee, how could I have changed from San Jose to San Francisco?

So that first year was very stressful, because there was all this stuff going on. You knew that these three people who were on the firing line were trying to keep their jobs, yet trying to do their work on the court, wanted to maintain their integrity with respect to their views with certain issues. So there was a lot of pressure. Suppose all of a sudden you started to change what you felt was right that you had been doing. Then people say, "They're hypocritical. They're only doing it —," it would only be worse. So it was a tough situation for them.

As a result, it was tough for the rest of us who knew we weren't in danger, because no one was shooting at us. In a way they're asking you for your support, but you don't want to get in the line of fire. I remember I told them, I said, "My mother told me if they're not shooting at you, don't get in the war." That's been the Italian way. [Laughter]

So I didn't do much, and I think there was a certain resentment. As I say, if people asked me I told them they ought to vote for Joe Grodin. The only thing I did publicly for him is I brought him down to the San Jose Rotary Club that I'd been a member of while I was down here, which is a big club, and I had Joe give a talk to them. But that's all I did. But I think some of the folks resented that you didn't really get out and do more, and publicly support them, because all the people wanted you to publicly support them, and I said I'm not going to do that. So that probably didn't bode well for the collegiality.

**MCCREERY:** As you say, wanting to keep the spotlight off yourself. But you felt that you could actively speak in favor of Justice Grodin, as opposed to the others?

**PANELLI:** I would do it privately. I didn't get out and say, "Yes, you can put my name on a newspaper ad." But if friends say, "What do you think of this?" They'd call you. I'd say, "I think he's" — because as I said, he was

a loss to the court, because he's a scholar, he's a bright guy. We probably wouldn't agree on much, but part of the job is to have people who may point out to you that you're wrong, and he wasn't afraid to do that. Even our last thing here, we had some issue over how I phrased something, and he said, "Instead of burden of proof, would you say burden of persuasion?" I said, "That's okay with me."

So that was kind of the first year, and I had these new people coming in. But after the election, of course, then things kind of changed, because number one, I jumped way up in seniority, because then I was junior only to Justice Mosk and Justice Broussard.

MCCREERY: Quite a change.

PANELLI: Quite a change. And while I knew the people who had been appointed, I didn't know them well. I knew Justice [David N.] Eagleson somewhat, I knew Justice [Marcus] Kaufman not at all, I knew Justice [John A.] Arguelles a little bit, but not really very well. They were all from down south. Justice Kaufman was from San Bernardino and that area, but for me it was all south.

One of the things that was difficult is that I came on the court on the eve of when all of this was going to happen, so it wasn't as if I had been there for a year, or a year and a half, and then it all happened. But here you're the new kid on the block, and all of a sudden the people that you're working with, three of them were being challenged, and how to conduct yourself in those circumstances was a challenge.

On the one hand, there's a certain collegiality that exists on the court, obviously, when you have seven people. On the other hand, there's a thing that you don't want to jeopardize your own position when you know that you're not really known, statewide especially. As it turned out I think I got 80 percent of the vote, or something, the "yes" vote. So how people differentiated between you and the people who didn't get confirmed, it was a difficult decision as to how to conduct yourself.

MCCREERY: You and Justice Lucas were in the same boat in that regard.

PANELLI: He had been there a little longer.

MCCREERY: He'd been there a year and a half or something when you came, so he did have more time.

PANELLI: He kind of knew a little better how things went than I did. My first calendar is we're in the year that they're going to have the election. I was hoping, see, from my own point of view, that I wouldn't have to stand election for a couple of years, because I said, I could get caught in this "throw all the rascals out," especially when — Chief Justice Lucas came from Los Angeles, he was well known. He had, I think, probably a base of support in a much larger area. Down here, of course, or in San Jose and around here I was well known and that was no concern. I knew I was going to do okay here. But in Los Angeles and that area, I wasn't a lawyer who had ever gotten down to Los Angeles to try a case, so you didn't know what was going to happen. I don't remember if there was any polling on how we were going to do. All I knew is I wanted to stay out of the fray if I could and keep my nose to the grindstone and hope that I didn't do something stupid.

MCCREERY: Yes. The media reported that you were a very cool customer, just along the lines that you're saying, stepping back. In fact, didn't you go off and run a marathon just before the election?

PANELLI: I ran the New York Marathon just the weekend of the election.

MCCREERY: Tell me about that. That's an interesting hobby.

PANELLI: Someone from the *Daily Journal* took a picture of me in my running outfit on the lawn there in front of the state building. It was on the front page of the *Daily Journal*, saying he wasn't going to pay any attention to the election — "His only preparation for the election was to go to New York to run the New York Marathon."

MCCREERY: That put some distance between you and the election quite literally, didn't it?

PANELLI: It did.

MCCREERY: How did you do, by the way?

PANELLI: I did pretty well. I don't know, my certificate with my time is at home. I did it in a little over three and a half hours.

MCCREERY: Sounds great.



PANELLI: Before the race, where we gathered in this park, Fort something or other near the Verrazano Bridge, where you start the marathon — I think they call it Fort something [Wadsworth], but it isn't a military base.

There was a gym where the seeded women runners were preparing. They were in there on these mats being psyched up by their coaches, and they were all just little things. It was raining, and Tony Ridder, the CEO of Knight Ridder, was one of my running buddies. He said, "We've got to get in there, because it's cold and rainy outside." So I said, "We're not supposed to be in there."

We got in there and we're walking around, and then Lynn Swann is coming with someone on the TV thing, and so Tony Ridder says to him, "This is Justice Panelli. He's on the California Supreme Court. He's running for retention the next day." He was doing it kind of as a joke. I said, "And he's the CEO of the Knight Ridder newspapers."

He said, "Oh, that's great. We'd like to interview you about your running. You've got this election," and all this kind of stuff. So he says, "At the nine-mile mark is where we've set up our booth." Just about then some guard comes over and he says, "You people aren't supposed to be in here," not to them, to us. So he says, "We'll see you at the nine-mile mark." Okay.

So when we run the race and we get to the nine-mile marker, he's saying, "Sorry, the race at the end is close. They're at the eighteen-mile mark or something." He said, "We haven't got time to do that." I had my people videotape the thing, and they show myself and Tony going behind the booth and on our way again.

But yes, so it was fine and we came back and found out that I won, and I don't think that on election day that — I must have had somebody check it out or do something, because I know I must have followed it. I don't remember. I remember the only election that I really followed was the first time I ran for anything, when I ran for this West Valley Community College board.

MCCREERY: Before we leave the subject of the election, you talked a few minutes ago about how Justice Mosk managed to separate himself in the minds of the public from the others who were being targeted. Indeed, I think some of the organizations that were set up eventually dropped him as a target, so perhaps that had something to do with it. But just talk a little

bit more about what you saw happening there. As you say, he was very politically astute.

PANELLI: Yes, they kept asking him whether he was going to seek reelection ahead. He'd taken the position that yes, he was seeking reelection. I think the fate that befell the other three could have happened to him, because he had been on the majority on most of those cases, but he was smart enough to say, "I'm not sure that I'm going to do it. I haven't made up my mind." So I don't think they wanted to waste their resources on someone who may not be a candidate and who politically probably had more clout than any of the other three, because he was very close to Governor Pat Brown. Here he'd been the attorney general of State of California, so he had run on a statewide ballot, so he had a lot of name recognition. So I think that probably also figured into it.

MCCREERY: I wonder what you thought in principle about these groups being formed for the express purpose of ousting judges. Was that something that we had experienced much before then?

PANELLI: No. I hadn't really thought about it. I was surprised later to find out who some of those groups were. After the election when you're going out and speaking to bar associations or other groups, and people would come up and say, "We had this view of those folks." I think Cardinal [Roger] Mahony, who had sat with Rose on the farm labor board [Agricultural Labor Relations Board], I found out that he was opposed to her, which surprised me. I don't know if that was public, or whether he told me this later or something.

There was this fellow who's a well-known — he's deceased now, a well-known television actor, also told me that he contributed to groups to remove these folks, which really surprised me. I don't know how active that was here in Santa Clara County, but I'm sure that there were groups that were opposed.

MCCREERY: They started way in advance of the election, a couple of years even. Of course, some of them had been working on it since earlier retention elections.

PANELLI: That's why I told you that clearly it wasn't something just done then, because that was the big issue about the appointments that

Deukmejian was making. These groups wanted to know what you were going to do, because they understood that this was a big issue, although I was never approached.

MCCREERY: One of these groups was put together by someone who had close ties with Governor Deukmejian.

PANELLI: I'm sure that he was all in favor of it. I'm sure that he probably led the charge.

MCCREERY: Indeed, he had come out, again quite a bit ahead of the election, and stated that he would not vote himself to retain Chief Justice Bird.

PANELLI: That was probably a campaign thing. He felt — that's one thing I've got to say about — I didn't know the governor before I got appointed. But whether you liked his views on things, I found him to be a man of great integrity, and I found him to be very, very honest. He felt strongly in his position, and he felt that if you were going to seek the office that he was seeking when he ran for governor, I guess, part of his platform, I think, was to get the supreme court straightened out.

They viewed it as that the majority was disregarding the law, and they were injecting their own personal views in how they interpreted the law, and that isn't what they were supposed to do. I have that view with some of the folks that I see on the Ninth Circuit [Court of Appeals]. I think there's at least two of them that they don't care what the law is. If they don't like this particular thing, they're there for life and they're going to do what they want to do.

MCCREERY: That's, of course, one of the great controversies about judging in general, isn't it, at every level?

PANELLI: Yes, well, except that at the state court level you have the electorate that has something to say, whereas on the federal side, once you're there, you're there. I'll bet you they remove more judges in California in elections than have ever been removed by impeachment in the federal side.

MCCREERY: There's a move afoot now, I think, to at least make a change in California, so that the retention election, or the first retention election is always for an additional twelve years, rather than this four years, eight years, twelve years. Everybody has something different.

PANELLI: I had to stand for election within a year of my appointment. Because of the year, it was the next general election, and then that was only to fill out Otto Kaus' term. Then I had to run again four years later for a twelve-year term. Because my term ran to 2002, and I was elected until 2002, it's my view that I was precluded from obtaining any other public office until my term expired because I had been elected to a term that still hadn't expired.

There had been a situation recently where someone was reappointed to the superior court after a retirement, and there was a question in my mind whether you could do that, because Justice Racanelli, when he was a judge here, had been elected for a six-year term, and Jerry Brown wanted to appoint him to another state position. There was a rumor that he couldn't do that because he had been elected as a judge for a term that was still in place. Maybe if you resign, maybe that was it. I don't know, I didn't follow it.

But it would have been nicer not to have to go through it again four years later. After four years on the job I still got confirmed by a large percentage in the seventies, but I didn't have as much of an affirmative vote as I did when I was brand new.

MCCREERY: Of course, it wasn't that kind of polarized election either.

PANELLI: I always was concerned about when I came down and formed the Sixth District, that that was a risky maneuver, because only the people in the district vote on those retention elections, and it's a small district. It wouldn't take a lot to get a group together [in opposition] if the issue was hot enough.

That's why it's kind of interesting with this article that I had mentioned that the San Jose paper ran. They had one judge who was the most reversed, or affirmed more cases or something. It was a very interesting statistic, and if someone wanted to take that issue up, I could see that they could make a problem. But no, I think they picked on the wrong issue. The public isn't concerned that people are affirming too many convictions.

MCCREERY: Right. Just finishing up about the election, as you point out Governor Deukmejian was running for reelection, of course, at the same time in November '86, and he had really made a prominent issue of victims' rights.

PANELLI: Yes, it was a platform.

MCCREERY: Indeed, he had had his Victims Bill of Rights Act passed as a proposition in the '82 election, I guess.

PANELLI: That's when he was elected the first time.

MCCREERY: Yes, the first time. And, of course, that had made its way through the courts and been declared constitutional, and so on. I just wonder what your view was of the changes coming to California law as a result of that act. Did you have much of a view of it by that time?

PANELLI: No. I don't think — you mention it. I don't remember what its provisions were.

MCCREERY: It changed some of the search and seizure — it was actually kind of a variety of different things, held together under one act.

PANELLI: I knew one was that, I think, victims had the right to appear at sentencing, that you had to take into account the victim's position with respect to the sentencing, but I don't remember it all. There's a lot of those issues that I — just like when I mentioned *Carlos*, I remember that. I hadn't thought about that for a long, long time.

MCCREERY: I just was wondering to what extent it seemed to be prominent in the minds of the public at that time.

PANELLI: During that period of time everybody was concerned that maybe we were coddling criminals, and so the public wasn't being protected. You've got to be tougher. The tough on crime, the law-and-order thing, that was a very, very strong political issue. Whether that was really as bad as people portrayed it to be, it's hard for me to know, but I know there were some goofy decisions, in my view some goofy decisions.

MCCREERY: What did you think about victims' rights? Was that an appropriate thing to emphasize?

PANELLI: I think it's a balance. I used to tell people, if the Constitution says you can't do it, you can't do it. The problem is, there's a lot of discretion in some of these things. What is probable cause? That's the other thing that we dealt with. We started to have inevitable discovery. That started to come down, so that these were all things that probably worked to the disadvantage of criminals, but to the advantage of the public. It still was within the sanctions permissible by the Constitution.

But that's one issue that I remember. When all is said, was it inevitable, would they have been able to get that evidence? That was always — you had to make sure that you really paid attention to those issues, because the probable cause when you knew that they were the fruits of a crime and you couldn't get it, you couldn't use it. It's not a question that the person didn't do it. It's a question that under the Constitution could you prove that he did it?

I just cited an example this Saturday at a mediation. We were talking about juvenile. I said, I remember the one time that this kid is selling marijuana out of the trunk of his car in a high school parking lot. He gets arrested, but the officer didn't have probable cause in my judgment, so I said, "No, you've got to throw out — you can't say that you found this in the trunk."

The parents then turned on the cop and said, "See? You arrested my son improperly," and all this. I said, "Wait a minute, wait a minute. Time out. The law says he can't use [the evidence], but you should be on your son saying, 'What's the idea that you're selling marijuana out of the trunk of your car to other high school kids.' You put the accent on the wrong syll-LA-ble."

MCCREERY: [Laughter] Yes, very well put.

PANELLI: So those are kinds of things that you needed to think about. But the problem was, I remember poor Justice Grodin when I brought him down here to San Jose. He was trying to suggest why some of these things are constitutional rights, and this and that. I remember he answered this one question. He said, "It isn't a question of guilt, because they probably were guilty, but there's a question of their constitutional rights." Then, you can imagine, someone says, "They're guilty? Then, come on now."

MCCREERY: But that's the public's lack of understanding of the appellate process, or what?

PANELLI: It's lack of understanding by the public of the court system. I got a call from Justice [Marvin R.] Baxter here about a month ago, asking if I would be willing to participate in a conversation about the courts, and the perception of the courts, and how ADR may or may not affect it. I said sure. So I got a letter here recently from the Administrative Office of the Courts saying that they're going to have this conference call with a bunch

of different people, to talk about some of these things. Part of what I think they're trying to show is people don't really understand the court system, and that is so true. I think people get their impression of the courts by watching *Law and Order* and those kinds of programs.

It was kind of discouraging to me, just the other day, a week ago Friday. I'm in line waiting to get on the cattle car on Southwest [Airlines]. I get on the A list [for boarding], and so I get there early, maybe an hour and ten minutes early, so we've got plenty of time before the plane leaves. This guy's behind me and we start talking, "What do you do?" and I told him, and then we start talking about, "What did you do before?" and I tell him.

I'm trying to explain to him the appellate process. Here's a guy who's got his own business in marketing. He had no idea of what I was saying. Then he was asking about Barry Bonds and the indictment process, and I said, "But you understand the indictment process is just to determine whether there's probable cause. They can do it in the indictment process, or they can do a preliminary hearing." I said, "The D.A. prefers to do it in the indictment process, because the defendant isn't there. He tells them what he wants to tell them. But as a result it is supposed to be private. It's supposed to be confidential until they file the thing, because it's a fact-finding thing."

So then he still didn't understand. Then we were talking about the appellate court. "What do the jurors do?" I said, "No, there isn't [any jury]." I'm trying to explain the story. It's very frustrating that people just don't have any conception. Or when people say, "What did you do?" "When I retired I was on the California Supreme Court." "Oh." They think it's a trial court. Part of the confusion — for most of these people that isn't the basis, but in New York the general jurisdiction trial court is the supreme court.

MCCREERY: They call it the "supreme court."

PANELLI: And the higher court is the court of appeal. So the people who sit on the supreme court in New York are the justices, the guys who sit on the court of appeal are judges. So there's some of that. So my point is, if I get to do [the conference call] — because when they want to schedule it, it's times that may be inconvenient for me — is I think people don't spend enough time talking about it in school.

I think one of the good things is that they have these mock trials in some of the schools, and they do that. So those kids know it. But I think it's a hopeless task. If you go on the street and ask someone, "Who's the vice president of the United States?" they don't know. People don't know. Lawyers don't know who the justices are on the California Supreme Court, or where they sit.

MCCREERY: Yet the public is voting on whether to retain judges. It's an interesting system, isn't it?

PANELLI: It is. It's crazy.

MCCREERY: I wonder what else you have to say about the tenure of Chief Justice Bird and her colleagues, knowing you were with them only a short time. How do you deconstruct that?

PANELLI: She either was very well liked, or she was disliked. You had very strong opinions one way or the other. There wasn't anyone who was neutral with respect to her, and part of it, I think, unfortunately, was her personality. I think she was distrustful of people, and I think that hurt her. But she could be charming, she could be warm. It was interesting to see how she would react, depending on how she perceived you viewed her.

MCCREERY: She had the aspect of needing to lead the entire court, which everyone does in a different way.

PANELLI: Plus, in a way I felt sorry for her. Here she's a woman at a time where women — it isn't like today, for goodness' sakes. I don't think people would think twice if you had a woman president. But years ago — was it Justice [Sandra Day] O'Connor who said she was [asked if she] was going to be a legal secretary, as opposed to a lawyer? So I think that was part of it.

Part of it was that people felt that this was a Jerry Brown stick-it-in-your-face kind of deal, because everybody figured it would be Justice Mosk [elevated to be chief justice]. But he wasn't going to do it that way. So I think she started out with a difficult deal. She had no judicial experience, not that you need to have judicial experience to be a good judge on the court. Especially on the supreme court it may not be as necessary.

I think it is necessary, personally, but if you have enough people who have had judicial experience, then it doesn't matter if you have one or two who don't come that way, because I think once you sit on the bench you



get a perspective that you may not get when you're just a lawyer. But on the supreme court, since most of it is reviewing records and doing legal stuff, it isn't as important.

But I think those were all kinds of things, and then immediately, they took this position with respect to the death penalty. So that automatically turned half of the people who had voted for the death penalty against her. So it was a tough deal for her, and I just think that she felt that what she was doing was right and she wasn't about to change, and so you've got to give her credit for that. She went down with her beliefs, as opposed to being like many people who are in politics, not that I suggest the judicial branch is a political branch.

But when you're running for election, obviously it has those [aspects], that a lot of these politicians will say whatever they think is necessary to get themselves elected or reelected. I can guarantee you that Rose Bird would have never done that. She felt perfectly secure in what she was doing. She thought she was right and that the law supported her. It's just unfortunate that the public didn't.

MCCREERY: What was the atmosphere at the court after the election?

PANELLI: I never saw her again. The fact is, I made a special effort to come back from — I was supposed to watch the Rose Bowl, but they were going to have a party for her so I had to get back for the lunch, and she never showed. So I don't think I ever saw her again in the court. Apparently there was something about the fact that they came and removed a lot of the administrative files from her office. I never got involved with that. No, I didn't see her.

MCCREERY: Just talk then a little bit, if you would, about the transition period, and then learning of Governor Deukmejian's elevation of Malcolm Lucas to the chief's chair. How did you learn about that process?

PANELLI: There was a fellow who was a writer for the Sunday news magazine for the San Jose *Mercury*. I forget what the name of it was. They ran a caricature of me on the front page that says, "Will he be the chief justice?"

MCCREERY: Yes, you were up for consideration, by some accounts.

PANELLI: Yes, yes. But, I knew that — here Malcolm Lucas had practiced law with Deukmejian. He had been his first appointment. There wasn't any

question in my mind. I am satisfied had I stayed I'd have been the chief justice, because I'm sure that Pete Wilson would have appointed me. But I wasn't interested in that. I never, ever suspected that I'd be on the Supreme Court of California. When I decided to go into the judging business I always had expectations that I'd get to the court of appeal, but I never thought beyond that. So the idea of being the chief justice was not something that I liked. I didn't like the high profile. I don't like the schmoozing that you have to do, to go to all of these things, smile all the time, have your wife on the dais, "And his lovely wife."

My wife, she was fantastic. When I left they had kind of a roast, and she was one of the speakers. She said, "If I ever have to go to one of these where he says, 'And Justice Panelli and his lovely wife.'" They don't say even "his lovely wife Lorna." "And his lovely wife." And so she had this whole shtick. She was really funny about that.

But some people are very good at — Ron George is. He loves it and he's very good at it, and he likes to do that. Lucas, of course, had the persona of a chief justice. Everybody used to always say if you ever went to central casting and you were looking for someone he'd fit the perfect image of that.

MCCREERY: Why was that? What was it about him?

PANELLI: He's a tall man, handsome, got the gray hair and all. He's more senatorial. I was the kid from Santa Clara, and that never was — I obviously got along with people. I got elected. We were talking about that today, some of the staff were talking about high school. I said, "I was class president each of my four years." "Oh, you were?" I said, "I had the lead in the senior play," and all this kind of stuff.

In a small environment I was popular and all that kind of stuff, but I never was high profile. We had a small-time law firm. When people used to always ask — even when I was on the bench — "Who's your firm?" We really didn't have a firm. So it's just a different deal, and so that wasn't anything that I was interested in.

In this article I told the reporter, "I'm not interested. It isn't going to be me." It was nice of him to write this thing. I have it in my scrapbook.

MCCREERY: I'd love to see it. But it's flattering to be thought of as a serious candidate.

PANELLI: Yes, it was something. It was okay. But I was just happy to be on the court.

MCCREERY: You mentioned briefly a few minutes ago that you had a slight acquaintance with some of the others who then joined the court the following year.

PANELLI: Right. Probably of those I knew somewhat better John Arguelles. But see, all of these people were longtime friends of the governor. Maybe not Kaufman, but Kaufman was a very outspoken conservative, and he was one of the names that was considered when I got the appointment. He was one of the six, also a very, very bright fellow, but really outspoken.

Sometimes he'd ask these questions, he'd get red. I was concerned he'd have an apoplectic fit, because he was so intense, and his voice — he'd raise his voice. So he may not have been the most popular, but personally and in private he was a pussycat, a very, very nice fellow. I came to really like him.

We agreed mostly, but if you didn't agree, he disagreed passionately with you, and he had some strong views on certain things. But there again, if he felt he was right, he was going to stick by his guns. You could go and say, "Gee, maybe it would look better if you didn't do what you're going to do."

MCCREERY: Just talking about your other new colleagues. How did you know Justice Arguelles?

PANELLI: I think I might have met him at some of the judges' conferences. They called him "the Cardinal," because he was always very proper — his presence. I knew Dave Eagleson somewhat because he had been the presiding judge of the L.A. Superior Court, and I ran into him at some of the judges' things. As I say, I didn't know Marcus Kaufman at all.

MCCREERY: As you pointed out, here it was all of a sudden early '87, and these three began coming on the court fairly quickly. You were suddenly much more senior than you had been, and Malcolm Lucas was the chief justice. Talk just a little bit about getting reconstituted and getting going again in this new environment.

PANELLI: There was a certain amount of hesitancy on the part of, now, the two who really were, as far as the appointing authority, outnumbered.

Where it had been five to two one way before the election, it was now five to two the other way.

MCCREERY: Just instantly.

PANELLI: Yes, and so it required some adjustment, and there was some vehemence with some of the dissents. I think you would find if you went back and read some of those opinions afterwards that some of the language was a little harsher maybe than some people would have preferred, because even though you disagree you'd like to at least project the image of collegiality, as far as the public is concerned.

It's almost like what they say, "What happens in Vegas stays in Vegas." You'd hope that what happens in the court, especially in the conferences, stays within the court. Clearly, when you write an opinion it's a public opinion, and at times there were efforts to maybe tone down some of the rhetoric in some of the dissenting opinions. I think over time that changed, but at the beginning it was — cases that had been assigned one way now were being reassigned differently, and what had been a tentative [majority] view now was a minority view, especially on the death-penalty cases. Clearly it had changed overnight. I may be wrong, but I think the opinion that was written reversing the *Carlos* issue was written by Justice Mosk. I could be wrong, but in my recollection it was.

MCCREERY: How did the conferences themselves change, in general?

PANELLI: If there was a lot of sameness before the election with one view, there was a lot of sameness with respect to one view now, but it may have been the other view, because you're all appointed by the same person, who probably was looking for the same type of person to appoint. So the views were pretty much the same. Clearly in the death-penalty cases they were.

We had some differences of opinions with respect to some of the civil issues. I'm not sure that we necessarily dissented. But I think that other than the death-penalty cases, Justice Broussard and Justice Mosk got to write majority opinions on some cases. Justice Broussard did the Prop. 103 affirmance, and I know Justice Mosk had some, but in the criminal side they were definitely in the minority on most of the issues. I'd have to go back and look. Like some people keep a journal of what we did. I didn't keep any of that stuff.

MCCREERY: How about Chief Justice Lucas' style? Yes, talk about that for a moment.

PANELLI: Entirely different. You'd just walk down and walk in, and he was out in the hall. It was just a lot different. We went from the trail mix to muffins. We took turns bringing these muffins in, and the muffins got bigger and bigger. First you had these little small muffins, then they had these things that looked like the atomic bomb, with this great big head on them. Then people started to think, gee — people were concerned about getting fat, so that kind of all died down. But it was a much, much different atmosphere. I think people felt a little more comfortable in approaching him, and one thing that was interesting is the dress code changed. All the justices wore coats and ties to work.

MCCREERY: That was brand new? What did you wear before?

PANELLI: I always wore a coat and tie, but some of them would wear a sweater, an open shirt. That's not uncommon on the court of appeal, because you don't see people when you're working. It's a little more comfortable. But it doesn't look as professional. I'm not sure that Lucas ever said anything.

MCCREERY: I wondered if it was explicit.

PANELLI: No, I don't think he ever said anything. It's just that's the way it was. As a result you could see, even, a change in the staff. There was never a dress code promulgated, but even the judges from L.A. I think were a little less inclined to wear coats and ties. But even when they came up, they all did.

MCCREERY: How about his style as chief in the Wednesday conferences, just generally?

PANELLI: I think it was just a lot more relaxed. It was a lot more relaxed for a portion of the time, until we acquired one member, and even then with that member it was okay for a while, and then it became a different experience. I'm not going to tell you who that was.

MCCREERY: For the moment, we'll just stick with that early time after the change and so on. What about assigning opinions? You talked generally about the criminal cases and the switch in the majority, typically.

PANELLI: It was the same way. He tried to balance. He would make sure that everybody had the same load. If you had five cases and someone else had two, you'd get the next case. What he did do that was different was with respect to the assignment of pro tems. It was a blind draw from the presiding justices of the courts of appeal, whereas under the previous system the chief would select who she was going to assign. See, there was some criticism of that because you could pick and choose, depending on how you wanted things to go.

MCCREERY: Yes. What was your view of that?

PANELLI: I was one who only got appointed once, and it was a situation that I think [Chief Justice Bird] felt that there wasn't any way that it was going to make any difference. It turned out that there were two pro tems, and Justice [Frank] Richardson had a dissenting opinion. He persuaded one of his colleagues and the two of us, and it went four to three the other way. I don't think she was a happy camper. It wasn't an important issue, either. It was some criminal law issue. I don't even remember what it was.

MCCREERY: But in general, when Chief Justice Lucas made this change, did you think this was a big deal?

PANELLI: Yes, it was a big deal, because there was a lot of criticism that people were being appointed by virtue of a recognition of how that person would vote, whereas when you do it the other way, you may pick someone who disagrees with what the chief may wish the case to look like. Now, I think, it's all of the justices on the courts of appeal are in the pot, and only the inside secretary knows who's the next name up.

MCCREERY: So they can't be matched with the cases or anything?

PANELLI: Right, right. I think that's important, because it's like judge shopping.

MCCREERY: Once Malcolm Lucas became chief justice, did you have any view of his ongoing relationship with the governor?

PANELLI: No, but they'd been old, old friends. I don't think he socialized with him at all. I think we may have had dinner once, maybe once in Los Angeles, and part of it was to reminisce. But he may have been retired then.

I don't know that we ever had a social event with him when he was governor, other than a public event.

But I know that they had this thing in L.A. where I asked Malcolm, "It would be kind of nice to see the governor. I never really had a chance to spend any time with the governor and personally thank him." So we had a dinner in Los Angeles, just four or five of us. Then one other time he was in San Francisco on some sort of a speaking thing, and after that we got together for dinner. It was mostly arranged by Martin Baxter.

MCCREERY: Okay. But in terms of the chief justice and the governor —

PANELLI: I don't know. They may have had communications, and they may have seen each other. Lucas' son, Greg Lucas, is the Sacramento beat reporter for the [San Francisco] *Chronicle*, and so there may have been some contact by virtue of if he went up to visit Greg when the governor was there, but I don't know that.

MCCREERY: We talked about these new colleagues, Justice Arguelles, Justice Eagleson, and Justice Kaufman, and you can't help noticing, looking at their service, that none of them stayed very long.

PANELLI: My view was that that was probably a plan, that they were friends of the governor, had been very loyal — very loyal judges — had particular views, and this was an opportunity for them. I don't know that for a fact. I never discussed it. Everybody talks, especially with respect to the presidency, that appointing supreme court justices is the most important thing you do, because people are there for a long time. So you want to put people that stay a long time, and these people obviously didn't stay long.

It may have been that, okay, I'm sure there wasn't any understanding or that, but knowing those three people, you wouldn't have had to have an understanding that, "If I'm not going to be here, and if there's going to be a Democrat who's elected as governor, I sure as hell don't want to give my seat to that person, so I will leave before that and I'll let you put someone who you think is going to be here for a long time."

MCCREERY: But it was never discussed, in your presence anyway.

PANELLI: No, no, and I don't think — see, those are the kind of things that you don't have to talk about. They knew each other. Not so much Kaufman, but Kaufman had the same problem as Kaus. They're from

Southern California, and while his wife came up to San Francisco, she really wanted him to be back down south. Plus, I'm not sure that he was in the best of health, so his was a little different thing.

It really was kind of tough for the Southern California judges, because unless like Lucas, who unfortunately, at or about — I guess he had an apartment up here. Then, I don't know how many years into his tenure, he got a divorce, or split up from his wife, or was living separate, so it wasn't too bad. But for people like Eagleson and Arguelles, whose families were down there, and you're going to come up here, it's tough. One of the reasons they say that Kaus retired was that his wife was very upset that he was up in Northern California all this time.

So I could see that it might have gotten — I know with Eagleson it got so he hated living in this apartment that he had rented down off of Market Street. It's a bed and something. It wasn't very fancy. Whereas the people from Southern California who were much younger and didn't have the time in grade, if you will, they all came up and bought residences, like Baxter bought a place, Kennard bought a place, George bought a place.

Even what's his name, [Armand] Arabian, bought a place in Pacifica, and I was surprised that he left when he did. But I think part of it was that he had more than enough time [to be eligible to retire], and he saw the opportunity to go out into the ADR, where he could make a lot more money. But it is tough. I found the last two weeks, I'm in Los Angeles, my wife's up here. She's by herself. My kids are saying, "Mom's by herself." It's a tough deal, and so I can see some of that. Plus they were much older. They were older than I was.

**MCCREERY:** Yes, on a personal level there are some compromises, certainly. But what is the —

**PANELLI:** Plus, if you don't have other things that you want to do, then you could stay until you're a hundred, like these people on the U.S. Supreme Court, and as Justice Mosk did. But Eagleson, I think, wanted to be able to say that he was on the California Supreme Court, because he was proud of that, as well he should have been.

Arguelles, I think, wanted to get back into somewhat the practice of law, because he went of counsel with [Gibson, Dunn & Crutcher], I think, and he was doing mediations. Kaufman, I just think he felt that he had



been a judge a long time, and as I say, I kind of think that he wasn't well. In the end, I think he wasn't well.

MCCREERY: Yes, the health issue was certainly a separate thing. But what is the downside for the court itself, and for the public system of law?

PANELLI: You get new views! You get new views, so you're not as predictable.

MCCREERY: That's certainly true.

PANELLI: But I don't think — I could be wrong. Ron George will probably stay because he enjoys it, and he'll stay as long as he wants to. But a lot of people want to get on and do something else, especially if you've done it for a long time. After a while it's a lot of work, and you're in a high-profile public position. A lot of people figure, man, I've got my twenty years, I'm gone, and I could see that happening.

MCCREERY: Wasn't the retirement program for the justices sweetened sometime in this period, do you know?

PANELLI: No. The fact is, recently it has changed. You have to stay longer, and you get less money. There was an automatic pay increase, a cost-of-living thing that Tony Kline got killed when he was with the governor's office, but no, there's no automatic stuff.

The thing is, of course, your retirement-based pay is based on what the incumbent in your position gets, so to the extent you're a supreme court justice, as opposed to an appellate court justice, there's a differential there.

But I never even thought about that part of it, because I tell people, if you're going to go on the bench and expect that you're going to make money, then you're fooling yourself, because lawyers, first-year associates, are making more than the supreme court justices are making. So you have to understand it's a sacrifice. For some people, if they have wealth, it's a lot easier, because then the salary doesn't make much difference.

When I went on the bench I thought I was enough financially secure by virtue of the investments that I'd made, but inflation killed it. If it wasn't for my in-laws helping, putting the kids through school, I would have never been able to do it. Had I known that I could earn what I'm earning now, I'd have probably left earlier, because it's sure given me the opportunity to do things for my kids that I wouldn't have been able to do otherwise.

So there's a lot of considerations that go in, but my sense is that those three came on with some view that they weren't going to stay as long. On the other hand, I wasn't really — I knew I was going to do my twenty [years in the court system], and I stayed for twenty-two, so I stayed two years longer than I had anticipated. I think one of the reasons I got the appointment over some of these others is because I was younger.

MCCREERY: Yes, you were fifty-four when you came in. You certainly have had a lot of productive years even since leaving the court.

PANELLI: Yes, I've been working for twelve years now. It doesn't seem possible.

MCCREERY: I wonder, politically, what did this accomplish for Governor Deukmejian? He got to make this great number of appointments in a short time and brought in a lot of his known quantities from Southern California.

PANELLI: I think what it was is that it was a reward for these people who for years weren't going to ever have an opportunity to either go to the court of appeal or the supreme court. As I think I've told you earlier in our discussion, when I tried to get to the court of appeal, and Tony Ridder told me he talked to Gray Davis, who was the chief of staff. He said, "If Ed Panelli wanted to go to the superior court, that's fine, but there's no way they're going to put a Reagan Republican on the court of appeal." I understood that.

So I think that's part of it. Some of these people had been laboring for a long time and never had the opportunities, and so this was an opportunity to do that. Plus they were all capable. It wasn't like he put on some hack. They were all very capable, smart people.

MCCREERY: How well did you get to know them? Did you develop any closeness to those three?

PANELLI: Not really. Probably of the three I had a semi-close relationship with Justice Kaufman, as I say, We'd socialize. My wife and I would socialize with him. Not as much with Eagleson. Eagleson was a little more reserved. I remember he told my wife Lorna that — he said, "You ought to tell Ed he ought to be a little more circumspect in what he says." My wife said, "But that's not Ed." And Arguelles probably to a lesser degree.

MCCREERY: He was only there two years, of course.

PANELLI: Yes. See, part of it was, I'm not sure at that point in time that we had our place in San Francisco, so I was going back and forth daily. When we got our place in San Francisco then I spent a lot more time with Lucas, because he was there by himself. If my wife didn't come up, then he and I would probably have dinner every night together. There was a little Italian restaurant down in North Beach called U.S. Restaurant that we'd go to.

MCCREERY: Yes. You've made some reference earlier, I think not on tape, to attempts to loosen up Chief Justice Lucas a little bit, and I think you mentioned U.S. Restaurant.

PANELLI: Yes, the U.S. Restaurant, we went there.

MCCREERY: What was that about?

PANELLI: The U.S. Restaurant was an oilcloth table thing, and it was not very expensive. People would have been surprised if the chief justice of California was in there having dinner. But he's a very, very well-read person and stuff. It's kind of just — he was a little stiffer than what I was used to.

But he's developed into one of my dearest friends, because he's been very, very gracious and I just enjoy him. We used to play golf together and kid around. I just haven't seen him as much now as I would have liked. But he was a federal judge.

MCCREERY: Yes. He didn't follow the usual path to the California Supreme Court.

PANELLI: No. No, but I'll bet you a federal judge is a little tighter than the state court judges. But no, I think he's a wonderful man. I thought he did a great job. He's very bright. He could clearly articulate his point of view with respect to issues when you talked about them, and it was interesting to me. He'd have the pages folded over, dog-eared, on the things that he wanted to talk about. I think he made a good presence as the chief, as I think Ron George does.

I got to know Ron very well. We vacationed with them, and socialized with them for a while, and as I say, I knew his dad before I knew Ron. But I thought it was a good choice.

I'd like to be a fly on the wall in some of the conferences, though, with the different characters that they have, especially now. They've got a

new person [Carol A. Corrigan]. It will be kind of interesting to see what happens.

MCCREERY: Yes, a brand-new appointment early this year.

PANELLI: Yes. I've just wondered how long Justice Kennard's going to stay. But you know, there again, she's by herself. She hasn't got family. What is there to do? I don't think she has any other interests. That's the other thing. For some people the court's their whole life.

MCCREERY: Was that true of anyone in your time?

PANELLI: No, I don't think so, not even Justice Mosk. I think he had other interests. Maybe not, because he stayed until he died there.

MCCREERY: The longest service ever, from what I understand.

PANELLI: Yes. But I always felt I had other things to do. As I said, I tell people it was a great experience, it's one I wouldn't trade for anything. I never thought I'd have the opportunity or the good fortune. But eight years was enough.

MCCREERY: We want to talk about some of the opinions you authored while serving on the California Supreme Court. Perhaps before getting into the specifics of that process, we'll talk about the supreme court's process leading into that. We've touched on that, but I'd like to just flesh out a little bit about how you would run things in your chambers. We know that the process of setting up the court's docket begins with the petitions for review, and that the supreme court selects to hear a small percentage of those. Talk just a bit about the volume of those petitions coming in.

PANELLI: The only true appellate jurisdiction that the supreme court has are the death-penalty cases, because those automatically are appealed to us, and the court when I was there had the exclusive jurisdiction with respect to Public Utility Commission cases. We also had oversight of the state bar. But everything else came to us by discretionary review and petitions for review, and we would hold weekly conferences every Wednesday, except the week that the court had set for oral argument and the first week in July and the first week in August. My sense is we would probably average about 400 petitions for review a week.

MCCREERY: Did that volume change much over the course of your eight years?

PANELLI: Or maybe that was a month. It was a lot. In fact, we were earlier looking through my scrapbook, and there was some comment that they took a picture of the judges at the conference, and it looked like they had skyscrapers standing in front of them, because we had stacked all the stuff up. In talking to other supreme court judges, to the effect that — I'll never forget, I think it was someone in New Hampshire or one of those smaller states said, "The biggest year we ever had, we had 600 petitions."

MCCREERY: For the whole year?

PANELLI: For the whole year. I said, "That's interesting. That would probably take us through the first week of February." So there was a heavy case-load. The problem is that first of all, it doesn't cost much. I think the filing fee was \$200, so there wasn't any point if you lost in the court of appeal to let it end there. You might as well file a petition for review. The fear is that if you don't and something happens, you might be sued for malpractice.

So we got a lot of petitions for review. But as I indicated, the bulk of them went onto the B list, so that it didn't take a great deal of time to review those. But the A-list cases required some considerable work.

MCCREERY: Just to sidetrack for a moment, for those that never made it to the A list and were not heard, let's talk about the options for disposal of those cases. The supreme court could either outright deny —

PANELLI: What they would do is — all of the B lists were denial cases, so any justice who in reviewing the B list felt that the case deserved further consideration could put it on the A list. But what would happen would be — the chief, when he'd start the conference, would ask, "Is there anyone who wants to put a B-list case on the A list?" If there were they'd say, "Yes, number whatever, *People v. Jones*, or *A v. B*. I'd like that." So then that went over to a different conference so that you could look at it differently.

If there were none, the chief would say, "All right. If there aren't any comments with respect to the B list, they're denied." So all the recommendations on those cases were denial, so he would merely — the orders denying it had already really been signed, and he would just hand those over

to the clerk before we started our discussion, so that they could get those orders out.

MCCREERY: So in those cases the court of appeal decision stands, period. Now, what about sending a case back to the court of appeal for reconsideration?

PANELLI: Okay. The dispositions were grant, or grant and hold, or deny, or deny and depublish. Those were the categories. If you granted the case, of course, that meant that you were going to address the issues addressed in the case. A grant and hold was a situation where the issue presented is similar or may be impacted by the case that you had already previously granted, but you were waiting to decide what disposition to make on those cases, dependent on how the lead case was decided.

Once the lead case was decided you could, and probably in most cases would, send it back to the court of appeal to reconsider in light of the lead case. Sometimes you could send it back with directions, or you could maybe deny it because the issue that you thought might be impacted in that case really wasn't affected by the lead case.

One of the controversial issues always addressed by the court was the depublication situation.

MCCREERY: Yes, I'm very eager to get your views on that.

PANELLI: Yes. Everybody suggested this was a problem, why you did that. You have to understand that in California the Constitution requires that you have a reasoned opinion. You can't have a memorandum opinion. So every case that you grant, you're going to have to write a full-scale opinion on. So there are many cases that you feel maybe the result isn't correct, or you feel that some of the reasoning might be a little loose, and it could lead to mischief but you don't have enough votes, either, to absolutely grant it. So you would take the position, if I can't get the necessary grant votes I'll vote to deny and depublish, because at least the issue, in your mind, can be raised again later.

A lot of times when there were not enough votes to deny. You might say, "I'll join three others to depublish," if you felt that there wasn't a majority who would go one way or the other with respect to the case. So as I tell people, you would live to fight that war another day, maybe when the issue was presented more clearly, the issue that you wanted to address,

because as I tell people, everybody thinks that the supreme court is some sort of court of last resort. It really isn't. It doesn't correct for error. That's not the role of the supreme court.

The supreme court is an institutional court. Its role is to clarify the law for the state, and doing that either by resolving conflicts of the courts of appeal, or it's an issue that you feel has statewide importance. So you don't take cases where the court of appeal may have erred, because that's really not your role.

Now, to suggest that we wouldn't do what we used to call a rescue mission every now wouldn't be correct, because sometimes you saw the error was so egregious that you just felt you really can't live with it. So you would grant a case that really didn't meet the Rule 29A standards.

So the depublishation was a tool that allowed the court to handle its caseload, because there were a lot of cases that you may not have been too happy with, and so you could convince other people to join you to depublish. The idea that suggested, oh, you're hiding something, you want to hide the case, it kind of seems to me misses the point, because all these cases, you can get them. You can get them on the Internet even though they're depublished. You just can't cite them as authority. They're not precedent for anything. So the idea that you would somehow try to censor the courts, I think that's not the purpose.

I don't mean to be flip, but sometimes — I remember one particular instance, and I'm not going to mention the name of the justice who didn't like the analogies that were made. All the analogies were to baseball, and I thought it was very well done by this particular justice. There was a view that a case with that type of language didn't belong in the annals of California published authority, so there were four votes to depublish that case. It had nothing to do with the case itself, it had to do with the language.

So there were many, many reasons that you would depublish a case. My sense is if you could decide cases in one paragraph, or per curiam, on a one-paragraph deal, you probably would do away with the depublishation. But it's a way to handle the volume of cases.

Even in the denial process, sometimes where you couldn't muster four votes to grant, when you voted to deny, the chief would ask you whether you wanted to be noted, because you could vote to deny anonymously. Sometimes people would say — even on the B list — sometimes someone

would say, “I don’t want to grant, but I’d like to be noted.” So you send out a signal that at least you had one or maybe two people who might be interested, and when the next case came up, if you did your homework you could in your petition for review say, “The court addressed this issue before, and there were two votes to grant.” You might pick up another two votes. But many times you would be noted even on the denials, because you wanted to signal how you felt with respect to that particular issue.

**MCCREERY:** So your strategy would be to somehow set the stage for future actions?

**PANELLI:** Right. Especially if you ever got three votes to deny, that’s a pretty strong signal that there were three people who weren’t going to be happy with the result in that case, even though it wasn’t — well, no. If it was granted, obviously, it would just say it was granted. It would tell you who voted to grant.

That’s the other thing, sometimes, that you wanted to signal to people where you were with respect to the case, so that they’d know who their audience was. Because, clearly, when you dissent it’s a disagreement that you have with respect to the direction that the court has gone on that case, and so you feel strongly about your position. So you’re hoping to encourage other cases that maybe will come along and either argue the issue more persuasively, or maybe there had been a change in the composition of the court, and it might appeal to someone.

**MCCREERY:** How well did that work? Is it possible to follow it through in an example or something?

**PANELLI:** I don’t know that — maybe today with — everything’s on electronic, computerized, that you might be able to do it, but I never followed it. It was just, you have your own view of what you think the law should be, or where the law should go, and always it’s a process of trying to convince three or more others to agree with you. If they don’t, then the idea is to try to make a persuasive argument in the dissent, when you’re dissenting, that others might pick up on what you said, and it might encourage — maybe on the courts of appeal they said, “We think this is the direction that the law may go into,” and so they may write it that way.



MCCREERY: Going back to depublication, what did you think of that option, in principle?

PANELLI: I don't think anybody was totally happy with it, because it generated so much criticism. But it was a fact of life. It was the only survival tool that you had — if you had to write opinions every time you weren't sure whether the courts of appeal were right in what they said, it's better to wait for another day. Of course, a lot of times you'd see an issue that you depublished because you weren't sure it was right, and then you'd see other people writing the same way. Then you may have to step in and get it clarified.

There was one division at the court of appeal that on a particular issue it was clear what the court had said. This particular division I don't think was too happy with what the supreme court had said, and under *Auto Equity* they're obligated to follow the rulings of the supreme court. So they would write this opinion, you would depublish it because it was clearly not in accord with your view of where the law was. Then they would write on the same issue in unpublished opinions, so then you'd almost have to grant review, and then write it this time. So you couldn't just keep depublishing them when they were wrong and their opinion was not published.

MCCREERY: What about the option of partial publication?

PANELLI: That was not used very often, and I'm not sure — my recollection, you only had that option on the court of appeal. I don't think that with the supreme court you can do that. You can grant review only on particular issues, so you don't have to grant review on the whole case. But I think the option of just partial publication is only in the courts of appeal.

MCCREERY: With respect to how well this worked or didn't work in practice, did you have any suggestions or improvements that you could see for the process as you worked with it?

PANELLI: We just hoped that there was some way, and it would probably require a constitutional amendment, that there would be some way that you could have summary dispositions.

MCCREERY: Of course, the Constitution had only recently been amended when you came on, to allow for some of these new options.

PANELLI: Right. The thing is that if you had summary dispositions, then people would probably complain, “We don’t have the reasons why they denied or why they granted,” so you’d get some criticism. It all depends. My view is you can’t make all the people happy all of the time, or even half of the time. That’s why you really kind of have to be true to your own ideals and your own sense of the law, because for every person you satisfy there’s at least one other person that isn’t satisfied.

MCCREERY: Noting that many of these details are specific to the California Constitution, were you in a position to compare what other states were doing in any way?

PANELLI: Not in any meaningful way. New York University used to have a program where they had a two-week symposium for selected court of appeal justices, and they had the same program for the supreme court. I was fortunate enough to get invited both to the court of appeal two-week program and to the supreme court two-week program. So you would have some dialogue with how other people did things. But there was no question that California was the leading state, both in what we did, how we did it, and we had by far the greatest volume of cases. So a lot of the attitudes of these other states: “We don’t care how they did it in California.” They thought we were kind of crazy out here.

So there wasn’t a great deal of cross-pollination with respect to those types of deals. It was just an awful lot of work because, as noted, we have been talking recently about the work that you do deciding what cases you’re going to decide. Then, of course, you have the processes we discussed of the decision process, which also took a great deal of time, because it’s hard sometimes to maintain the votes that you need and yet write the opinion in a way that will satisfy what it is that you’re trying to say and not give away too much to get the votes. Because sometimes you’d get in a situation where you would say, “Really, if that’s the way you want it written in order to get a majority, then maybe you ought to reassign it to somebody, because I can’t write it that way.”

MCCREERY: All right. Let’s return to the process in your chambers then, and work up to that opinion stage. A conference memo is prepared. We touched on that a little bit, and I read that there was for some years —

PANELLI: Excuse me. Are we talking about now the decision process as opposed to the review process, the petitions for review? We're beyond that?

MCCREERY: We're beyond that, unless you have anything to add?

PANELLI: No, so we've granted review. Okay. Then the chief would decide who to assign the case to, so you would get all the materials. You would get the record, you would get the briefs when it was fully briefed. When I first went on the court they had a process that it would go to the senior person first, and then when that person was finished with it, it would go to the next senior person. If that person decided to make some changes, the box would go back to whomever had already worked on it. So that's why I say there was this issue that when I first went on the court, part of the Wednesday conference not only was to act on petitions for review. It was also to discuss cases that had been granted and argued, and where the process was in the decision making.

They had what they called the salmon sheet, and it was called the salmon sheet because that happened to be the color of the paper that it was printed on. It would have when the cases were argued, where, who had voted, where the people were. Then the chief would say, "The box is with x. How long do you think you're going to be?" and all this kind of stuff. So the process took years, could take years.

I'll never forget, and I may have mentioned this early on, when I saw this when I first went on the court. I recognized that some of those cases had been argued more than a year before and still hadn't been decided. I was interested in determining how you could get paid if the case hadn't been decided within ninety days, because as a trial judge and a court of appeal judge you knew that before you got your paycheck you had to sign this declaration that said everything that had been submitted to you within ninety days had been decided, or you didn't get paid.

When I saw this I asked Chief Justice Bird, "How do you folks get paid? These cases were argued — there's one, two, years before." She said, "We don't submit the case for decision until the day before you file it." Of course, that made it easy, because you'd never run afoul of the ninety-day rule. But the intent was when the case was submitted, which usually meant after oral argument, that started the clock running. But that was the way the court operated.

It so happened that one of those cases — apparently it was authored by Justice Broussard. The person who argued the case years before — and as I say, I wasn't there — thought that Justice Broussard was with their view, and here he writes an opinion going the other way. So there was a lawsuit filed against the court naming all of the justices for having violated the ninety-day rule and requesting that all of the salaries that had been paid while these cases had not been decided be returned with interest, which was a problem for me. I hadn't been involved in it, but I was named as a defendant.

So we turned all our lawyers loose, all thirty-five staff lawyers, and I don't think we hired outside counsel, but we concluded that, in fact, they were right, that the Constitution, the ninety-day requirement was really directed to the supreme court, because in the early days of the state there were companies like Southern Pacific and some of these big land-holding companies that they were concerned they were so powerful that there would be an opportunity to somehow approach the judges. So that's what it was directed at.

So we said, "You're right." So we confessed judgment that we would decide cases within ninety days of the order of submission, and we paid them a private attorney general's fee, and they forgot about paying back the salaries with interest.

So that changed the whole dynamic of how the court can operate, because unless you know where the votes are, it's hard for you to get a case out in ninety days. So that they may assign the case to me. I have a view of it which is written, although after oral argument you do have a conference where people say how they felt about the case, so you would have maybe a general idea of where people were. But you might write a proposed opinion and then find that you don't have a majority, and then to either modify your opinion or to turn it over to somebody else to do the opinion was very difficult within ninety days.

**MCCREERY:** How often did that come up, that need to reassign the case elsewhere?

**PANELLI:** Not often. But under the old system you wouldn't know where the votes were until you saw everything. So we came up with what we call the front-loading system. What would happen is a case would be assigned

to whomever was the author, and the author would then put out what they proposed. Then everybody else had fifteen days to do a preliminary response, so that you would know where people stood with respect to that issue. This is before oral argument now, you would know whether you had to reassign it, or you would know whether you could make the accommodations that were necessary. It wasn't until all of this was done that we would then say at the weekly conference, okay, this case is now ready to be put on the calendar for oral argument, because you knew where the votes were. So therefore, that's why since that time every case is decided within ninety days.

That's not to suggest that you couldn't set aside the order of submission, because of various things happening. But everybody tried to do that infrequently, because then it looked like you were trying to get around the rule. It had been known for trial judges sometimes to set aside the order of submission because it starts another ninety-day clock. So that kind of changed the dynamics, and what happened was that the preliminary responses got very detailed. You'd get back paragraphs of how they wanted to rewrite what it was that you said.

So it got to be pretty cumbersome, but my understanding is that's still the way they operate, because they get these cases turned out in ninety days. As I told people, even with that process that's not to suggest that you don't get situations where after oral argument you may lose a vote or two, and things get turned around, and so then you have to really chug to get it out. It isn't too bad if you lost it if you were in the majority, because then it's very easy to write your dissent, but if you were a dissenter and you had to put it into a majority opinion it's an entirely different approach, so you really have to work hard at it.

I had two instances, one where I picked up a case at oral argument, and one that I lost at oral argument, which was kind of unusual, but it happens. But I bet you that happens less than 5 percent of the time.

MCCREERY: I'm interested in the role of oral argument, and it may vary among the different justices in terms of its importance, but can you tell the story of those, too, or the importance of oral argument to your process?

PANELLI: Oral argument after we went to the front-loading system obviously had a different role, because then it was if you had the majority, oral

argument was you were trying to, in effect, use the attorneys as foils for your particular position, so you would ask questions which were directed to solidify what it was that you were saying, or to get some confirmation that what you were saying was right, or questions which were to point out the fact that the other view really didn't have a great deal of merit. So you had these surrogates for the various positions.

It wouldn't take a rocket scientist sometimes to know who had the majority and who had the minority, just by virtue of who was asking the questions. Although we did have justices on the court that sometimes, I think, were asking the questions just to give the impression that they were hot on the case and were prepared. But the questions really weren't directed to shed any light on the particular issue. But that's how oral argument was.

Some of the justices liked oral argument because it gave you an opportunity to get into a dialogue with somebody. It was a way to be able to express yourself in a public forum. However, it's kind of an interesting situation, because they were supposed to have all of their arguments and all of their case authority in their briefs, because you'd say, "If it was important why isn't it in your brief?" That was always a criticism. Someone would raise an issue and they'd say, "Is it in your brief?" "No." "Why isn't it? It's supposed to be in your brief."

So that there isn't a great deal of new information, and the fact that you've had this case and you've discussed it with your colleagues, you've discussed it with your staff. Generally there isn't much more that can be said other than maybe clarify some of the arguments, clarify some of the questions that the judge may have with respect to some of these issues, because it was unclear in the briefs, or one of your staff attorneys raised an issue, so you would probe, maybe, that particular point.

But as far as really persuading you otherwise, after you've spent all that time reading and you have a half-hour to make your point, it doesn't — I never found it was all that helpful. You got to test your views, but as far as getting new information, rarely did you get much. You'd jump all over them if there was new information, because it should have been either in a supplemental brief or they should ask permission of the court to cite new authority. On the other hand, there are some people . . . Justice Grodin liked oral arguments. Justice Mosk every now and then would get on it. Justice Broussard was a pretty intent questioner. I asked a lot of questions. I

shouldn't say a lot, but especially if I thought someone was arguing a position that I didn't really appreciate, I might jump on him a little bit.

The other thing that we would do, what you'd have at oral argument is that the staff attorney who was your liaison on that case, and similarly the staff attorney for the other judges who were on that case, would listen to oral argument. We had special seating for them. What would happen is after oral argument, before you went into the post-argument conference, you might meet with your lawyer or your law clerk and say, "Did you hear anything there that you think we missed, and maybe something we need to clarify?" Or you might say, "I heard something that I'm not sure we're as clear on this point as we should be. Now we need to make a note of that."

Of course, the other folks would be doing the same, because especially if there was someone who didn't agree with you, they wanted to kind of find out what the story was. After oral argument you would meet, immediately after oral argument, and go over the cases that had been argued that day. So you would go around. If it was my case I got to present. I said, "I didn't hear anything today that is different than what I've written, so I'm still with my position." And then people would go around, and people might say, "Yes, I'm still with your position." Or someone would say, "I heard something. I think I'd need to see how you write it on this particular issue," or, "I'd like you to do something more on this particular issue," so that you would kind of know before you left that day where people were.

Sometimes people would say, "I need to think about it. I hadn't thought about what this person said, so I'll get back to you." But generally you knew where the people were. Clearly, with the front-loading system you'd say, "I'm still with my memo," and people would say, "I'm still with the memo," or whatever the deal was.

But I tell people each side gets thirty minutes, except the death-penalty cases you get forty-five minutes for oral argument. If you're the petitioner and you save ten minutes for rebuttal, and we generally wouldn't allow less than ten minutes to be reserved. At one point they used to, but then we said, you can't even say your name in ten minutes. So that gives you twenty minutes.

It's hard to develop any kind of argument in twenty minutes. Generally, you would just respond to questions. Then sometimes they would say, "We've deferred some of our oral argument time to amicus." There again,

you get five minutes. Five minutes, so you'd ask one question and it would be gone.

If I ever consult with people who are going to do arguments, I say, "Whatever you do, don't give away your time." I think now they have a rule you can't do it, and you can't do less than five. But sometimes we gave him two and we'd give someone else one. You'd get up there and your minute was gone.

MCCREERY: But were there instances when your own views were somehow changed by what transpired in oral argument?

PANELLI: Yes, sometimes, sometimes. But if you really did all the work, there shouldn't have been many occasions, because hopefully, unless you really missed the point, and that's not to suggest that sometimes the way the briefs were written left you uncertain. Most of the briefs were pretty well done, but some briefs were not as good as others, and so you weren't sure. The fact is, sometimes you'd have to wait for the amicus briefs to see what the issues really were, because they were presented so poorly.

MCCREERY: But as you say, it's generally not a time of presenting a lot of new information.

PANELLI: No. It's just a question of trying to hit your strongest argument to convince that what you said has merit for some basic reasons.

MCCREERY: This conference of the justices right after oral argument strikes me as interesting, not only because you're really in the heat of your discussion with one another, but that's where you're cloistered in the room and the personalities enter into it, too.

PANELLI: Yes, but those post-oral-argument discussions aren't as intense or as extensive as you would think. It's just a question of, has anybody really changed their position. The negotiation, if you will, and the discussion takes place on the Wednesday conferences when you go through the salmon sheet, where people talk about what it is, why they haven't signed, what they're doing, and you get into that.

But even there it isn't that extensive, because most of it is done one-on-one. You'll go talk to someone and say, "Gee, I saw this memo. I think this is why you're wrong," and so you negotiate that way.



There wasn't a great deal of discussion on the cases themselves while you were together. Most of that kind of discussion took place on the petitions for review, when people were deciding what they were going to decide, because that was where, if you will, your advocacy was needed, because it was very important as whether you were going to grant or not grant the case.

MCCREERY: Thank you for clarifying.

PANELLI: But these post-argument conferences wouldn't take very long.

MCCREERY: When it came time to write actual opinions, there's a lot of work already done, as you say, and a lot of views clearly established, and so on. What would be your approach at that stage, and how would you use your staff to aid you?

PANELLI: As I mentioned, when the case was assigned to me I would read all the briefs, and I would have had my staff attorney read all the briefs, and then we'd have a discussion. I would outline how I thought the case should be decided in kind of a template for the approach to how to address the issues. They would be taking notes on this, plus I probably had some notes. I'm sure I had some notes.

Then I'd say, "When do you think you can get something back to me?" It depended. Some people were faster than others. Justice Mosk had a law clerk, not Peter Belton, that he could get something out in a week. I wasn't always sure that it was right. Sometimes I thought maybe it was a stream of consciousness, but anyway, he got stuff out.

So then you'd have some sort of a deadline, and say, "Do you think you can get something?" "Maybe it'll take me a month, two weeks." Depends on how many problems there were. So then you'd start getting drafts. Maybe you might get drafts with respect to a particular argument, before they went on to the next argument, to see if what was written was something you could agree with, or you agreed with, or that's how you'd like to say it. So you would edit that and then you'd send it back. That's how the process went. You just kept refining it.

Sometimes you'd say, "We're saying too much. It's too long." We had a tendency to write too long. But you feel that you don't write enough. I think Jerry Uelmen has written some critiques about the opinions being too long. Some of them were really too long. But it's hard sometimes, if

you want to say everything that you think you need to say. But that's what you did.

But, of course, you probably were working on five cases at a time, because every one of the clerks always had some project that they were on. Then sometimes once you circulated something you'd get feedback from probably the law clerk, because what would happen is the law clerk from the other chambers would come. They wouldn't come to you, they'd come to your chief, because she would know who had the cases, and then they'd try to set up an opportunity to go and talk with them about it.

Then your person would come back and say, "I talked to Justice Broussard's clerk, and they said that Justice Broussard was having a problem with this," or they don't agree, they're not going to go along with this, and these are their reasons. So then you'd talk to them more, so they could go back. Every now and then you would go talk to them directly.

**MCCREERY:** What would prompt you to do that?

**PANELLI:** Because sometimes I didn't think maybe that they were getting what I wanted to tell them, because there was this filter.

**MCCREERY:** Yes, you expressed some surprise that the law clerks talked to one another so much, when you first arrived.

**PANELLI:** Yes, there was a lot of that. The problem is, and I can understand it, is that some people work differently, and so you couldn't go talk to them about the case, because they weren't up to speed on it. They might have been working on something else, or their chambers operated differently.

Maybe there wasn't the weekly discussion about, "How are you doing on this case? Where are you?" They may have waited until the end before they did that, and so it was kind of tough.

But as I mentioned, I always felt I could go and talk to Justice Grodin, Justice Lucas. Who else was there after — oh, Justice George. Part of that was also because I was close personally with them, so it made it a little easier. Even when you were maybe together socially you could talk about some of this stuff.

**MCCREERY:** Yes. Actually, this might be a good time. We spoke about several of the justices who came after you did, but didn't stay on the court very long, and so then they were in turn replaced by others. So, for example,

when Justice Arguelles left Justice Kennard came on. Maybe you could just talk a little bit about getting to know her and how she changed the mix.

PANELLI: When Justice Kennard came on I was kind of her mentor judge.

MCCREERY: Someone asked you to do that, do you recall?

PANELLI: I don't know if someone asked me, or whether I did it, or whether I felt comfortable doing that. I remember she was concerned about getting things out, and I said, "Don't worry about it."

MCCREERY: What kind of advice could you offer her as a new justice?

PANELLI: How things work, how you meet with your staff, how important the petitions for review are, what you need to do, how much you need to do, the timetables of things. I'd spend quite a bit of time talking with her about different things, issues on the cases. She was obviously a good, smart lawyer. But over time our relationship changed.

MCCREERY: Can you say why?

PANELLI: I don't know why. I was very hurt by it at the time. We had a cool period, but that's the way it goes. And then, of course, didn't Arabian come on?

MCCREERY: He came next, yes, replacing Justice Kaufman.

PANELLI: Right. So now he was ostensibly very close to Justice Kennard, because it was his view that he was responsible for her being on the court of appeal. He called her his "child of destiny." I think that's what he used to say.

MCCREERY: What was that about, do you know? I know they'd served together on the L.A. court of appeal.

PANELLI: I don't know. That relationship changed as well. Then Justice Baxter came.

MCCREERY: Justice Baxter replaced Justice Eagleson.

PANELLI: Then it was Ron George came last. I think as that came around, Justice Kennard was more isolated. I wouldn't want to convey the impression that because of that, what I'm about to say is what we did. I had noted that we only see each other in a difficult, hard-working, driven environment, and so I said, "It would be kind of nice if we had maybe once a

month, if we could get together socially, just the seven of us, and we would take turns as to where we would select to go.”

We did that. I don't think we did it maybe more than two rounds. This was in the Lucas Court. I remember Justice Mosk got the first choice and we went to Tommy Toy's. It's interesting, the selection, where people went. Then I think with Justice Broussard we went to the University Club or something, in one of the buildings overlooking Lake Merritt. I don't remember if I went to Albona or where.

But anyway, so it was an opportunity. You'd have a drink or two, some wine, and you could kind of let your hair down and talk about things. We did that and I think it was helpful, but things got a little strained. Of course, you had different characters. Justice Arabian was pretty aggressive, Justice Baxter pretty quiet. I used to tell Justice Baxter — of course when I met him he was appointments secretary. I said I would never want to play cards with him, because he was expressionless.

MCCREERY: Poker faced.

PANELLI: Oh, very poker faced. But, we got along, ate those muffins, and then at the end as I say, the muffins got so large that people said, time out. But you've got seven people with seven different views, and sometimes — it's hard to discuss those, because I think you get probably into stuff that is confidential or privileged. But there were times where it wasn't fun.

MCCREERY: Yes. And these, of course, presented new issues to Chief Justice Lucas as the head of the court.

PANELLI: Yes, yes, for sure, for sure. But he was a gentleman about it all. Sometimes people misread motives and stuff. It was really kind of strange. It's a mystery to me why the relationship with Justice Kennard changed. I never quite figured out what happened. She became very close to Justice Broussard, and I don't know what the voting patterns were, but I wouldn't be surprised if she voted a lot with or joined Broussard's dissents a lot. I'm not sure. Those are not things that I paid any attention to in the aggregate. At times you would think that.

I remember once both Justice Broussard and I needed her on a vote, and Justice Broussard says, “You're not going to get the vote.” I said, “Oh, yes, I think I'm going to get the vote.” He said, “No, because I'm fixing my gumbo, and my gumbo will get the vote.” [Laughter] He used to cook

gumbo in his chambers. He was from New Orleans. It was an interesting time. Then, of course, things changed somewhat when we moved to Marathon Plaza.

MCCREERY: Yes, talk about that for just a moment.

PANELLI: Of course, we got out of those antiquated historical courtrooms with their historical bathrooms, and we were able to lay out chambers in accordance to the way you wanted to do them, so it was really much, much nicer. You had more room, but as a result you were also spread out further, so you weren't as close physically. Sometimes unless you really went looking for people, you wouldn't see them.

MCCREERY: It's amazing what a difference that makes, isn't it, the physical setup?

PANELLI: Oh, yes. It makes a big difference, because like the folks that were on the east side of the building overlooking the bay, you'd have to make an effort to get over on that side, and the chief's chambers were over there. Justice Mosk was over there. I forget where it was. I came on this side, and then Justice Kennard was next door to me, and Justice George was down near the corner.

But the floors were rather, I don't know, thousands of square feet, so you were really spread out. But the ambiance was much better, because as I recall, we did it so all of your lawyers were kind of in clusters around you, whereas before in the old building you might have one at the far end of the building, another one somewhere else. So even as far as the staff was concerned, they weren't together. So that was really kind of nice. That made a big difference in how they worked, so you kind of felt like you had your own little nest of family, if you will.

MCCREERY: Yes, I'm sure that facilitated your own work with your staff.

PANELLI: Oh yes, it was much easier. Plus, I had a little more room, so I had a little alcove with a sofa and a couple of chairs, so if you wanted to bring one of the lawyers in, or someone in to sit down, you could sit down and talk about it, as opposed to across the desk, which psychologically removed the barrier between you and whoever you were talking to.

Of course, then you got to also put your own feel in your chamber, so it was really kind of nice. I've only been back to the reinstated state building

I think when they dedicated the new courtroom, and maybe twice or so. So even there, apparently they had to maintain the same perimeter walls, so that the chambers — I think what they did is they knocked out some walls between two and made them one, because as I recall they were long and narrow. But as I say, I think I've only been back twice.

MCCREERY: Let's talk about some of the cases that you worked on, and also keep in mind the various themes that were prominent during that time. You mentioned to me a couple that stand out in your mind. In no particular order, I do want to ask you about Moore versus UC Regents [Moore v. The Regents of the University of California, 793 P.2d 479 (Cal 1990), known informally as "the spleen case"], decided in 1990, how you approached that and why you thought it was important.

PANELLI: I learned a lesson in Moore versus the Board of Regents, and that is never grant review where there has been a demurrer sustained without leave to amend, because when there's a demurrer to the complaint you have to assume as true all the facts, all the matters alleged in the complaint. Here was, I think it was a 150-page complaint with the result that there were a lot of things that are said that probably you would never be able to prove, but you have to assume that they're true.

It was a very interesting case. That case has become very well known to law students. It's in most of the property casebooks now. The issue dealt with the removal of Moore's cancerous spleen. Did the patient retain some sort of property rights in the spleen? So that when a later cell line was developed as a result of some of the tissue that was removed, whether that constituted a conversion, because later the scientist at the University of California developed a cell line which apparently had substantial economic value.

I think it was called Mo cell. They kept bringing this fellow back when they had removed this cancerous spleen to do further tests. They alleged that they brought him back not to treat him but to get further information about this research that they were doing that was going to have this great economic development. So it was kind of hard to apply property principles. The theory sought to apply property principles to this, and it really didn't fit.

MCCREERY: You were charting some new ground here.

PANELLI: Very much so. So we didn't really address the property issues directly, and what we said was that the health and safety codes provided that once you had removed tissue surgically and it goes into the surgical tray, then you have to dispose of it in approved methods. One is you send it down to pathology. When they're through with it they're supposed to do whatever they're supposed to do under these codes.

So we took the view that once it was removed and it's in that surgical tray, you no longer, as a patient, retained any rights to it. So we then said, but however, if they knew at the time that there was some economic benefits that could be derived from this, then maybe under informed consent you should have advised the patient of this, and so that's where we took off on that.

Later they did go to trial and there was a defense verdict, so they didn't get anything. He died, but they didn't get anything. Last August was the fifteenth anniversary of the *Moore* case, and I got a call from DePaul University, a letter. They were having a symposium. They were dealing with current problems with the sale of body parts and all that kind of stuff, and they wanted to know if I'd be the keynote speaker.

Before that I'd gotten an e-mail from someone in France, wanting to know if I would talk to them about *Moore*, which I wasn't interested in doing. I told DePaul, "What I had to say is in that opinion, and I'm not about to come out and give some talk with respect to that." So that was last August.

I was asked to speak to the property class at Santa Clara's law school. What they decided to do is they would have it as an event. While I was talking to the property class it was piped into all the other rooms, and the people could ask questions. There weren't too many people there, too many students, who were happy with what I had to say, so I decided I don't think I need to talk about this case anymore.

But that was an important case. As an interesting sideline, Chief Justice Lucas is in Russia with a delegation of American judges, including, I think, Justice O'Connor, Justice Scalia, and there were some American professors there and they said, "After lunch we would like you to drop in to this class that we are teaching." They went there and they were talking about *Moore* versus UC Regents, so that was an important case.

Most of the cases that I see frequently now in what I'm doing are the insurance cases that I wrote, the *Montrose I* case that had to do with the duty to defend, the *Horace Mann* case, which was a further refinement of the duty to defend, and *Bank of the West*, which was, again, how you interpret insurance contracts. So I see those cases cited all the time.

We talked about how some of these justices left early. I see here there's a quote, it says — this is Justice Arguelles, "Considering that I am eligible after all of twenty-five years as a judge to retire at 75 percent of my salary for life at any time, it ironically actually costs me money to continue working rather than to retire." So that might have been part of the reason.

MCCREERY: I'll just mention for the tape that Justice Panelli is looking through a scrapbook that was put together when he retired from the court. It has many articles of interest to his service there.

PANELLI: Some also are articles when I was appointed.

MCCREERY: Yes. It goes all the way back to some very early things as well.

PANELLI: Just going through something [in the scrapbook]. We were talking about *Horace Mann*. It says, "During its seven years under Chief Justice Lucas the supreme court has gained a reputation as a friendly forum for insurance companies, but 1993 will not be remembered as one of those years." Then they talk about my *Horace Mann* case, the *Montrose Chemical* case, and then one of these other cases that I wrote was *Mirkin v. Wasserman*, that held that California courts do not recognize a fraud-on-the-market theory of securities law. I think there have been some modifications to that opinion.

Then I wrote *Ann M. v. Pacific Plaza*, which had to do with — [Laughter] I'm just laughing because I'm reading — this person says, "Justice Panelli's opinion in *Ann M.* strained to avoid overruling *Isaacs* outright," which was a case by Chief Justice Bird. "Instead he suggested that in determining a landlord's duty the courts balanced the foreseeability of crime against the burden of implementing security measures." This was a case where a woman was assaulted in a shopping center. Then I wrote another case that had to do with the Fair Employment Housing Commission, as I recall.

MCCREERY: *Dyna-Med*? [*Dyna-Med Inc. v. Fair Employment & Housing Commission*]



PANELLI: *Dyna-Med*, with respect to the damages, and then, of course, a lot of criminal cases.

MCCREERY: Let's take a look at some of those insurance cases. I wonder, do you agree with that statement that up to that point the Lucas Court was a friendly forum for insurance companies?

PANELLI: I think so, because I think the feeling was that the Bird court had gone too far the other way, and so there was a question of maybe trying to level the playing field. But as far as the case itself, it was just a question of how do you expand coverages.

There was an issue I remember I had with Chief Justice Bird, where we had a disagreement with respect to certain coverages. I remember telling her, I said, the problem is as we expand coverages that maybe the carrier didn't believe they had, they're going to raise the premium, and to the extent that they raise the premium to a point where maybe low-income people can't afford it, we're going to deny them the opportunity to get automobile insurance. If they don't have automobile insurance, they can't drive, and if they can't drive they can't go to work. Although we know that some of them will have to drive without insurance, and if they get stopped and don't have insurance, they're going to get their license suspended, and they're going to continue to drive because they need to drive to go to work.

So the next thing is they're going to be incarcerated for driving without a license, and the next thing is we're going to have all the kids on AFDC [Aid to Families with Dependent Children]. I said, this insurance money doesn't fall from the sky. These insurance companies all want to make a profit, so we have to bear in mind that when we expand coverages. This particular case had to do with whether we were going to extend *Dillon Legg* to an unmarried or unrelated bystander. The rules would probably be different today, because things have changed with respect to gay couples and all that kind of stuff, whereas, although at that time there wasn't a couple, I don't believe. But that was the kind of discussion that we got into.

But *Montrose* was merely, maybe, a clarification of *Gray v. Zurich*, maybe an expansion somewhat, because I said, if there's any possibility of coverage then you have a duty to defend until it's determined that there wasn't any coverage. So I protected insureds, or potential, putative insureds from

not having a defense paid for by the insurer when they were being sued. So insurance companies I don't think were too happy with that.

Similarly with *Horace Mann*, because in *Horace Mann*, of course, it was an educators' policy, so the issue was, can schoolteachers be sued for scurrilous claims and have no ability to defend themselves, when here they have this insurance policy? Ultimately, if it's determined that what they did is uncovered, in *Horace Mann*, the question of whether he was sexually harassing this young woman, or whether there was some sexual contact. They determined that that's what he did, and therefore there wasn't any obligation to indemnify, but he was at least entitled to a defense.

But the feeling was, some kid could be upset with a teacher because of a grade and say okay, he did, or she did this to me, and you wouldn't have the opportunity to defend yourself if the duty to defend wasn't there. So again, carriers weren't too happy with that opinion.

MCCREERY: You were reading something out of your scrapbook before we started taping, in which someone gave the view that you didn't write dissents very often, and that it was too bad because they were strong, ringing documents. Talk about what would prompt you to write a dissent.

PANELLI: That case I felt strongly about, because I just thought it was nonsense. I look back on my own high school graduation, and we had some Methodist minister or something came up, and I'm thinking, gee, how long are we going to be here, because in those days we all would go up to San Francisco. You'd have a date. It was a big deal to go up to San Francisco to the Fairmont or the Venetian Room or something like that. So to suggest that whatever it was that he said was going to, in effect, be a violation of the separation of church and state, I just thought it was too far. So anyway, I went at it.

Similarly, this one that I was reading about the juvenile thing, because I had been a juvenile court judge for two years, so I just felt that they were way off base on what they did. On the other hand, you really have to be temperate, I think, in what you say. I remember one that I ended up writing the majority opinion, although I started out with a dissenting opinion, was *Smith v. UC Regents*. That was the student activity fee case.

This was at or about the time — I think it was after the state bar case, where you couldn't be forced to pay dues that supported programs that you

didn't approve of. So this was the same thing with student activity fees at Berkeley. They were mandatory, but it could support clubs that you didn't approve of.

I'll never forget at oral argument, I asked this person, "Is it your view that if there's a Ku Klux Klan chapter on campus, that the black students have to pay fees to support that club?" She said, "Yes." I said, "Thank you," and that's all. I picked up two votes.

So I'd gone in on that case as a dissenter, and I think it was five to two finally. Smith was the son of Arlo Smith, who I think was the city attorney in San Francisco, or the public defender, one of those things [district attorney].

The National Association of College and University Attorneys had its annual meeting in San Francisco, and they wanted me to talk about that. But about a year or two ago someone said there was a similar case coming out from the University of Michigan that was before the court, and I haven't followed it. I haven't found out whatever happened, whether they overturned that or not.

MCCREERY: In this case, though, you had the state bar matter as a precedent. That just leads me to ask, how strong a follower were you of precedent in general? Can you address that?

PANELLI: I think you try to follow it, I mean because stare decisis, certainty in the law. You can't just on a whim overturn something. But on the other hand, if you think it was really wrongly decided and it's leading to a lot of mischief, I think you have an obligation to reexamine it. Similarly, as I say with this *Carlos* case, and I think Mosk may have written *Carlos*, because as I was reading in the scrapbook it said recently — this is about the time of the election — it says, "Justice Mosk and Justice Grodin are reexamining *Carlos*." They may have joined *Carlos*. I think Mosk did, because we were going to take a lot of flak on overturning this decision on the intent to kill.

Another case that I wasn't there to overturn — it was the *Seaman's* case that in effect had tortified contract breaches. That was recently overturned. There was another case where this person shot and killed this individual, and this was a question of intent. The insurance company said it wasn't a covered occurrence, but the court held otherwise. The name slips my mind

now, but it's a case that I had just last week in a mediation. But anyway, that later got overturned. It really was a maverick case.

But there were a lot of goofy cases that, in my judgment, were wrongfully decided. *Moradi-Shalal*. That was a case that, when I left the court and started doing mediation, there was a question of whether California Trial Lawyers' Association lawyers would ever agree to me as a mediator because of *Moradi-Shalal*. I'll never forget, one of the first cases I did, this person said, "I figured the insurance company wanted Justice Panelli. They'll probably listen to him, so it's okay with me." He figured coming in that I would be some sort of shill for the insurance company and found out that that wasn't the way it was at all. I've done probably a hundred cases with that fellow now, and through that I've done work for all of the big plaintiffs' lawyers.

MCCREERY: Let's return to the subject of the insurance cases, though, while you were on the court. This was an area that was really developing in the law, it seems to me, and our notions of liability and personal liability and so on.

PANELLI: California, though, had a reputation. They all viewed the California Supreme Court as the leader in expanding the liability. I'll never forget when I was on the court — and I don't know if it was the Bird Court or the Lucas Court — we had a delegation of judges from around the world. There was someone who must have been from India, because I think he was a Sikh. He had a turban. When we were through I said, "Does anybody have any questions?" He says, "Yes, I have a question." He was kind of agitated. He says, "What about the case that someone is in the phone booth making a phone call, and a car runs into the booth, and they held the telephone company responsible?"

That was a case that had been decided by the California Supreme Court before I went there. Here's this guy from India, and this is what he wanted to talk about. I was talking about what we do in the death-penalty cases and how our system of justice works, and this guy is kind of ranting about this telephone-booth case that he felt was ridiculous.

MCCREERY: But here he had an actual example from your court.

PANELLI: Right. So there was some of that, and I know that people always kind of ridiculed what the California court was doing. You have to

understand that all of these things depend on your perspective, because while some people would say that was very progressive, and that's what the California court was known for, such as Justice Traynor on the automobile liability cases, strict liability, et cetera, and that what we were doing was not progressive and had taken away the luster that the California Supreme Court had had in the past, that we were becoming something less than what the court had been.

But, of course, there were a lot of people thought that we were saviors, that the court had gone too far one way, and that hopefully the court would at least try to swing back, maybe, towards the center more. I tell people it's like a pendulum. There's no question of things swaying one way or another. The problem is, you never, ever get back to dead center, because you may swing one way and you only come back a partial way.

But we were criticized for not being as illustrious as the previous court. But my view was that we weren't supposed to be legislators. We weren't supposed to be making the law, although everybody accuses judges, especially at that level, that you're a super-legislature. Sometimes you're forced to take positions on these initiatives. It was very, very difficult to act on initiatives, because you didn't have legislative history. You look at the ballot pamphlets and they were just propaganda pieces for the respective positions, and so it was very, very difficult.

Then the single-subject rule — you couldn't say, "This part seems okay, but the other part isn't." Whereas the legislature, they can always hook something onto some bill and get it passed. So it was difficult.

Prop. 103, whereas the insurance companies were critical of it, my view was that they should have been very positive with respect to that, because we said that you are entitled to a reasonable rate of return on your automobile insurance. Of course, part of the initiative requires that they pay Harvey Rosenfield to oppose any increases, so I mean there was part of that. But, interesting, Justice Broussard wrote that case.

MCCREERY: The very fact that there were so many [auto insurance] measures on the ballot simultaneously that year shows you what a state we've gotten into.

PANELLI: Yes, it's a terrible thing to legislate, it seems to me, by initiative, because you don't have the discourse that you can look at when you're

looking at legislative history, what went on in the committee hearings, what people had to say. Not that it's necessarily conclusive, but it sure gives you an aid to interpretation.

**MCCREERY:** You're presented with measures that may be drafted by any number of people from different walks of life. So what are the sort of pros and cons of that system? Do you see anything positive in the initiative process?

**PANELLI:** I think what happens, maybe this is my prejudiced view, is it's because the legislature isn't responsive to what segments of the population believe might be necessary, so they feel that they, if you will, almost take the law into their own hands by getting these crazy initiatives out there. A lot of people don't know what the devil they're signing. They'll sign a petition saying yes for this, and another petition signing no for the same proposition, depending on how it's presented to them. Someone standing outside of the supermarket says, "Do you want your taxes to go down?" "Oh, sure." So you'll sign. Someone else says, "Do you want big companies to get a tax break?" "No." It's very, very difficult.

But I think the problem is that the legislature sometimes doesn't respond to what, obviously, in some cases at least 50 percent of the electorate wants, because they get these things passed that haven't been passed in the legislature. I never was too happy with the initiative process, because it was very difficult to steer your way in interpreting those things.

Everybody said, "You ought to decide those things before the election." The theory was, you hate to deny the electorate the right to express their views, and on some of them you'd hope that they were unsuccessful and mooted the issue, but if they passed, as some did, then, of course, you're charged with the obligation to try to see whether they're constitutional.

**MCCREERY:** As you say, that happened frequently, though, because of our system.

**PANELLI:** It happened frequently. I'm thinking, I wasn't on the court at the time, but I'm thinking of the first Indian gaming initiative, where they said no, you couldn't do that, because the Constitution didn't provide for it. That was an initiative, I believe. So then they went out and amended the Constitution so that they could have Indian gaming. I understand that the Indians had probably a right, had a legitimate beef with the way they were

treated, or mistreated, but I'm not sure that all of this gambling money really helped them out much. It's helped some, but a lot of them are still having the problems that they had. It's unfortunate that, I guess, now with some of these compacts, the state is getting money, but a lot of it is being spent to help them. They're an independent nation, so you don't have the same control. The rules aren't as applicable to them.

MCCREERY: They've also gained tremendous political clout.

PANELLI: Because they had so much money. On one I saw that I think the whole beneficiary, the group is only like about 150 people, and that there were another 30,000 that might have been benefited, but it depended on these 150 people to make that decision.

MCCREERY: Returning to the initiative process, from your seat on the court could you see any improvements to that system? Do you think it should be changed in any way, and if so, how?

PANELLI: I don't know how you can change it. You get people who are getting paid a dollar a signature to go out and get signatures, so it's almost a cottage industry now. I just think the problem is, and it's maybe something that I know that we touched upon, it's the electorate really has very little idea of what goes on, whether it's disinterest or what it is. Most of what they know is what they see on television, and it isn't in the in-depth television programs, news programs or those types of programs. It's *Seinfeld* and those kinds of things, and so I think people are easily persuaded by rhetoric that may not really be tethered to actual facts.

That's the problem I see with the initiative process. As I say, I've had people approach me on things that I know, that may have had something to do with a case that I was responsible for. They're out there trying to get my signature to either overturn it or to somehow modify it.

I remember once I started to get into some dialogue with this person who was getting signatures. He didn't know anything. No way, he was getting a buck a signature and he was telling people what they told them they ought to say that would appeal to someone to sign the petition. That's the problem. Then they spend this inordinate amount of money to sell either the pro or the con.

I've got to tell you, it really bothers me because I think of all that money, the only people who are benefiting from it are the people at TV stations,

the newspapers. They could give it to education. They would improve the whole educational process. People would probably be in a much better position to act responsibly, because of the fact that they may be better educated.

It troubles me to see how many high school-age people don't know how our system of justice works. They haven't any idea of the structure of the courts. They've never been to a court. The only people that are there are those who want to go to law school. Even the fact that they have moot court programs and all. But reading the experiences of the young people who have done that, they all talk about, "I'm thinking of becoming a lawyer," or, "I want to be a judge," or something like that.

But I think we need to spend more time in civics classes, so that people know how the laws are made, why they're made. Sometimes I get the impression just with respect to legislators that they're more interested in getting reelected than they are in doing what maybe I think they should be doing.

That was another issue. When we had the term limits, that initiative [Proposition 140]. We upheld the initiative, and as a result of that there was retaliation. Part of the initiative was not only that it [instituted] the term limits, but it cut the legislative budget by a certain percentage. So what happened when the judicial budget got up before the legislature? They cut our budget by the precise [same] percentage. We had nothing to do with passing the initiative, but we had an obligation to pass on whether it was constitutional, and we were satisfied that it was.

So there was this retribution, which denied the judicial branch the opportunity to do some of the programs that we would normally do, that the Administrative Office of the Courts used to do. That required us then to form this Amicus Foundation. We were advised by the attorney general that it's something we ought to do. So we get the legislature to pass this bill. It's created, and Lucas is the president and I'm the secretary-treasurer. It then seeks contributions to fund these programs, and funding was necessary. Of course, we didn't know who was doing that.

Then people started to say, "You're going to have a conflict of interest." Conflict, I'm thinking to myself? Some of the programs that we sponsored I didn't even get invited to or get a free lunch. But we were forced to form the foundation to raise money by virtue of what the legislature had done to us in retaliation for upholding that initiative. Since then, fortunately, we've had no need for the foundation and it's been terminated. The problem was I



think people were anxious to see some turnover in the legislature, because they were unhappy with what they saw there. We didn't put the damned thing on the ballot.

MCCREERY: Yes, or cut the budget.

PANELLI: Yes. We understood that — see, there's that situation. People just thought, hey, fine, we'll take whatever, 35 percent we're going to cut, not recognizing what that may do.

MCCREERY: It's an interesting question, though, about limiting the terms of the legislature, and I realize you were there to decide the constitutionality of the measure. But in light of our discussions of the tenure of judges, can I ask your own views of term limits and what that does to our three-branch system of government?

PANELLI: I was in favor of term limits. I wasn't sure that two terms or three terms was right, what the limit should be. But I thought it would be good to have turnover, because you're supposed to be a representative body. It isn't like judges. People think that judges are representatives of the people. They're really not, they shouldn't be. Obviously, they come from the community, but they should be following the law, and sometimes what the community thinks the law should be is not what the judges should say the law should be. Hitler proved that.

If you get judges that are going along with a majority view with respect to something that you as a judge know isn't proper under the law, then I think you've got a real problem. That's why I kind of feel sorry for what happened to Chief Justice Bird, and Grodin and Reynoso, because in their view they were following the law as they saw it, and the electorate believed that they weren't. So that's the tension between those two things.

On the other hand, my view is the legislature does represent the will of the people in the laws that they pass, so I think it's kind of helpful, maybe, to get some turnover. When you get people that their whole career has been where they haven't ever had to go out and meet a payroll, I think sometimes you get pretty myopic in your view of things. But whether that's twelve years or ten years or twenty years, I don't have any firm views on it. I think it's pretty good to turn things over. Maybe it sounds kind of a self-protection measure by saying judges don't need to do that, but I just think their functions are different.

MCCREERY: Yes, it's a tradeoff, isn't it? The value of experience in any job, versus, as you say, the clearly stated desire on behalf of the electorate to have some kind of turnover. But that whole movement towards term limits, nationwide. It's been an interesting phenomenon, hasn't it?

PANELLI: I find it interesting locally. There was one of my friends who lived across the street from my wife's folks. He was on the board of supervisors here. He'd been on the board of supervisors for quite a while. Then someone came up and said that he was going to run against him, because you need to have turnover in this thing. He'd been there a long time, and you need this. Well, he won. Then, now, when he was on board of supervisors, they're talking about term limits, he says, "You can't have term limits. Then you'd lose all this experience," and stuff. I've wished I would have gone back and gotten some of the quotes that he had said before, because now it depends whose ox is being gored.

MCCREERY: Isn't that true? Yes. But clearly, you've articulated the difference in your mind between the role of judges and the role of legislators in our system.

PANELLI: Right. The problem is that you do have, other than the retention election, you do have a way to kind of monitor what judges are doing.

Maybe I'm naïve, but I think we've been very, very fortunate in California that I really don't think that the judiciary is politicized in that it's a nonpartisan position. I recognize a Republican governor is going to probably appoint judges who are Republicans, and Democrats are going to do the same.

But I think it's different than having in every election, "This is the Democrat slate for judges, and this is the Republican slate for judges." Because I've talked to people who are judges, were judges in those states, and you owe your loyalty and allegiance to the party, because they're the ones that are funding your election. So as I say, it's a lot more highly politicized than I see in California.

Plus, again, maybe I'm naïve, but I see, when you see the small number of judges who are disciplined by a very aggressive Commission on Judicial Performance, my sense is by and large the judges do a pretty good job. That's not to suggest that they all do, and that's not to suggest that some of them shouldn't be removed and haven't been removed. But there is some

oversight. I think we have a culture — I just hope it doesn't change — in California, where people are really nonpartisan and impartial.

As I said, maybe I'm naïve about that. It's just like corruption, where you see that in some of the states, especially where you're elected by a party designation, that there may be corruption. I'll bet you, other than what happened in San Diego, and I'm not sure that they were active. Maybe they were sitting judges, Judge Gregg and those others. There isn't much of that. In twenty-two years that I was on the bench no one even intimidated, "Would you, could you do something?"

I guess maybe, I'm just thinking here in San Jose, Judge Danzer did that. He was removed here recently from the bench, because he was convicted of apparently trying to fix some traffic tickets or something. But those are isolated cases.

Whereas I found in many of the programs we did as judicial exchange programs with these countries for the U.S. State Department that there's a culture of corruption in the judges. Even when you talk to the judge, you're talking to them about corruption. They acknowledge that's part of the system. If you've got money you can buy your way out. If you don't, forget it. It's different.

MCCREERY: Since you mentioned the political parties, am I correct that you were officially designated nonpartisan?

PANELLI: Yes. No, I've always been a registered Republican. . . . As I say in this article that they had, whether I was going to be the chief justice, they talked about that and I said something about, you would think by virtue of my background I would be a liberal, but my folks told me that whatever you get you've got to earn it. No one's going to give you anything for nothing.

MCCREERY: But were you interested in being known to the public as nonpartisan? Am I correct about that?

PANELLI: Right. Yes, that's right.

MCCREERY: Just tell me your thinking behind that.

PANELLI: Because I just wanted to be, in effect, neutral with respect to political issues. It wasn't until later that someone said, "You really are a conservative." I had never thought about it, what it meant, what it was,

because I felt the way I felt. I'll never forget, someone gave me this tag, and this woman, she said, "You know, you are a conservative." I said, "Yes. I am? I didn't know that." [Laughter] They were very conservative. This particular woman and her family. They worked for Goldwater. I never voted for Goldwater!

MCCREERY: You talked earlier about how, I guess around '93, your decisions in those insurance cases surprised people, because they clearly expected you to respond, quote, unquote, "as a conservative" of this particular court.

PANELLI: There wasn't any knee-jerk — this sounds so self-serving that I'm almost embarrassed to say it. You call them the way you see them, and sometimes that's how you happen to see them, and other people happen to see it the same way. As I mentioned, when I went to Lucas and I said, "Malcolm, gee, it seems so clear to me that they're wrong. Am I wrong?" He'd say, "No, no. You've got it right. They've got it wrong."

People are so quick to judge what you've done by virtue of the fact that you start at the end, the conclusion, and somehow want to work towards that conclusion. That isn't the way it is, because you need to look in that mirror every day, and if you really think that you've sold out, then it's a difficult deal.

That one quote that you picked out, "If someone says I've started acting like a judge, I hope that they kick me in the butt." It's the same thing. I don't think that you can do something because somebody would be unhappy with what you did.

I remember we did something that — oh, when George Deukmejian nominated, who was it, was it Jones for some position, and we said he didn't have the authority to do it. We were all in the anteroom waiting to come in for the State of the State [address], and the governor was there. I think we said something like, "I guess you're not too happy with us." He says, "That's right." But he clearly didn't have the authority to do what he did.

MCCREERY: So you called it as you saw it?

PANELLI: We said, "Sorry, you can't —." I forget what position it was that there was some issue with respect to that, and we decided that he couldn't do it.

MCCREERY: This is Bill Jones that you're speaking of, attorney general?

PANELLI: I think so. I think it was, he wanted to appoint him — oh, I think it had to do that he needed the concurrence of both houses, and I think he had of one and didn't have of the other, and he said, "I can go ahead," because he interpreted it. We said, "No, no, you can't do it. You need both." I don't remember what the position was, but I remember his comment. He says, "Yes, that's true." So it would have been easy — you really couldn't justify doing that, even though you knew that obviously that's what he wanted done.

MCCREERY: Why do you think the public is perhaps so poorly informed about how the judiciary views its role? I don't know if I'm putting that very well, but the idea that you start with a certain result in mind.

PANELLI: I think the media has a lot to do with it. When we did things, the Lucas Court rendered certain decisions, they would be perceived by the pundits as some conservative agenda, whereas when our predecessor court did things that went the other way, no one ever said, "Gee, there's this liberal agenda." Everything was okay. That's the way things were supposed to be. I just think it was the people who were reporting on you had agendas.

Clearly, the death penalty was a very divisive factor as far as how our court was perceived. There wasn't one law professor that would ever say a positive thing about us. I mean, Steve Barnett, Jerry Uelmen, all the people who watched the court, there wasn't anything that we could do that was right as far as they're concerned. It's interesting now. I see how they write about the George Court. They're much more accepting of what they're doing, or they're not reporting them in a pejorative way as they did with our court, and that gets out to the public.

I've got an example. This morning's paper — I read the *Mercury*, which raises my blood pressure. On the second page it says, "Republicans do something with the oil companies," agree or support the oil companies, or something about the tax on the oil companies. My wife says, "Look at this headline. People aren't going to read the article." She says, "If you read the article it does not conform with this headline, but people see this headline." Similarly with the story that they did here recently, as I mentioned, on the courts. There is no question that some of what they said was very necessary to be said, but the slant of the article was that the D.A. was

hiding all this stuff, and they were trying to convict all these people with all these improper means.

The public defender — they weren't doing what they needed to do, and they needed to be more aggressive. The judges — they were too close to the prosecutors, which is kind of interesting because I'd say maybe a third of them are former public defenders. But they conveyed this impression, not necessarily in the story, because my view is that not a great percentage of people who take that paper read the whole paper, or read these stories, so they're reading the bold part of it and forming opinions. Because you will talk to people and you ask them something and they have this opinion. I'd say, "Where'd you get it?" "I read this thing." I said, "Did you read the whole story?" "Well, no."

I had a talk that I used to give. It was a graduation talk about how people learn everything in snaps, snippets of time, the headlines, the evening news, it's two minutes or thirty seconds of this. You never really get beyond what this little snippet of news is, and it's a fast-food way to get this stuff. A lot of stuff you need to think about it.

**MCCREERY:** Yes. And people are probably just as poorly informed about the other branches of government. There's no question that we do the "thirty-second" everything.

**PANELLI:** Every now and then I'll flip on what's his name [on television] — I don't particularly like him, because I think he's too aggressive, Sean Hannity. He has on Friday a feature. They send this woman out on the street and they ask these questions. They'll ask, "Who's the vice president? Who's the secretary of state?" These people have no clue who they're talking about.

Whether the interviewer on the street goes out and asks someone who she knows wouldn't know the answer, or whether she goes to someone who's got a suit and tie and probably would have it, I don't know. I'm not naïve enough to believe that they don't maybe select the people to whom they ask the question, because they have an agenda. They want to show that these people really don't know what the hell is going on. So that's why a lot of times I'd be curious to see how they selected these people to whom they're asking these questions.

Similarly, when I see these surveys, they talk to these people. "What do you think about it?" You ought to first kind of screen them into saying,

“Have you read the newspapers? Do you know what’s happening?” as opposed to asking the question.

It’s like, as you know now, this whole issue with respect to free preschool. If you say, “It’s not going to cost you anything, and it’s not going to cost you any taxes, because we’re only going to raise the taxes of the people who make over \$250,000.” I’d say probably 80 percent of the people in the State of California make less than \$250,000, so heck yes, we’re for that. I don’t know, it’s very discouraging at times. But I’m probably getting afield from what I should be talking about.

But those are kinds of things that I think, what I’ve said many times. You bring to the court what your experiences were, how sometimes when it’s the subliminal message of what isn’t really articulated in the transcript that you see, that you know it’s going on. I think I may have mentioned that with law clerks that hadn’t had any real courtroom experience, which most of them hadn’t, when I’d read the transcript, I said, “Don’t you know what’s happening here?” “No. What’s happening?” I said, “This is a setup.” And they’d say, “Oh, no.” “Oh, no, believe me, this is the setup. This is being set up in a certain way.” They’d say, “Gee, we didn’t see that.”

So you bring those kinds of experiences. But on the other hand, the law is pretty flexible. You know what they say about equity, it depends on the size of the chancellor’s foot. That’s part of why people have differences of opinion.

MCCREERY: I’d like to talk just a little more, if we could, about the court’s work vis-à-vis the legislature. You were called on many times to decide the constitutionality of things that originated there.

PANELLI: In 1990 we had to do the reapportionment.

MCCREERY: That’s a good one. Talk about how you approached that.

PANELLI: There again it went by default, because the legislature didn’t do what they were supposed to do. So here we had to use the various criteria. You can’t gerrymander, you try to get balance with respect to ethnicity, so that you want to make sure that you didn’t try to structure it in such a way that, let’s say, the Hispanic population was segmented in a way that they may not have a voice. On the other hand, you can’t say, “We’re going to do it all so we know we can assure that this is going to be a Democrat district or a Republican district,” which is, of course, what the legislature wanted.

The reason that they couldn't get it done is because this was how it was being driven.

MCCREERY: Yes, the partisan part of it.

PANELLI: So here we were trying to create districts that met the requirements that the U.S. Supreme Court had set, and yet be apolitical, which was kind of difficult. Fortunately we hired — his name escapes me now, who had been, I think, the dean at USF. So we had to come up with computer models, and then we had to look at what impact those had. They did all of that work, and so that was work that we could — we probably were, I don't remember now whether we were criticized by virtue of how some of the districts were created. But we attempted to do it — whether people believed it — as antiseptically as we could, so that it didn't favor one party or the other. I don't know, ultimately, whether we accomplished that or not. But that's why I got a kick out of it recently when there was this question about, you're going to have retired judges [work on redistricting]. Some reporter called me, and I said, "I did it once, there's no way I'm going to do it again. My name is not going to be one that's going to be submitted."

MCCREERY: Who should decide? Is a panel of retired judges appropriate?

PANELLI: I didn't see a problem with that. Then people say, "Because you were appointed by a Republican, or you were appointed by a Democrat, then you had these problems." But you're hoping that people you select are people of integrity that aren't going to do that. But it's an arduous process. That's why it's very, very difficult. I remember we spent hours, hours, doing what I didn't think was a judicial function. It was a legislative function.

But by default we had to do it, because everybody in the legislature — it was a question of self-interest. Whether judges, or some agency, some commission should do it, you're always going to run into this same argument. "They come from a certain political persuasion, and so we've got to be careful of how we select them." Unless you get someone from outer space, everyone's going to have some views. But you're hoping that when they take the oath, or whatever they take, that they will do what they're supposed to do under the law. That's no assurance that they won't let their own political persuasion interfere with what they're supposed to do.



MCCREERY: That particular subject matter is quite an entrenched problem. Now we find ourselves with this great number of so-called safe seats, and very little chances in any given election for real competition.

PANELLI: Yes, that's a real problem. But anyway, we went through that, so that was an issue with the legislature. We had always an issue with respect to judicial salaries. At one point there was the law that says that you got the automatic cost-of-living increase, so that it wouldn't require the judges to go to the legislature each year.

Then, as I say, Tony Kline was opposed to that and lobbied — I remember he lobbied with a fervor to get that overturned. So that went away, so then there wasn't any increase in salaries. Then, fortunately, I think they finally got it tied into whatever they did for — we're tied into some group, as I recall, now. I'm not sure.

Although I see that Chief Justice George was before the legislature trying to get additional funding, and funding is always a problem. There's only so much money to go around. There's a reluctance to raise taxes. You can't raise the filing fees, because it prevents people from access to justice, although I always felt that you could always file *in forma pauperis* and get granted. Someone says, "That's demeaning."

I always thought we should have raised the filing fees for petitions to review, because I said that would be a source of funding, and secondly, you probably would not have the frivolous — what I sometimes thought were grossly frivolous filings.

One of the things that we haven't talked about that was a change that took place not early on, but near the end of the Lucas Court, had to do with review of state bar matters. We used to have to hear all of the state bar matters, whether it was a private reproof or a public reproof. That changed. What happened was — it was kind of ironic that you could get life without the possibility of parole and have no right to have the supreme court review your case. But you could get a public reproof or private reproof in the state bar, and we were going to give you oral argument and file a written opinion.

MCCREERY: That was that exclusive jurisdiction over the state bar that you talked about at the outset?

PANELLI: Right. Then they created the state bar court, and then they decided they would do it the same, similarly, by discretionary review: matters that were more important, and these matters that could be delegated. So that's when the state bar court came up, and they had their whole administrative system that was created. But the thing was that the critics of the court said, "When you wrote ninety opinions, forty of them were state bar opinions, so they were just done just to give the semblance that you people were really pumping out a lot of opinions."

MCCREERY: How well had that state bar court worked out, in your opinion?

PANELLI: I think it's worked out okay. I was there when we picked the first set of judges and we went through the interview process. I think that the supreme court should only address the more serious — the disbarment cases, the serious breach of fiduciary duty cases. So I think it's working now. They just take the more serious cases, and state bar court handles most of it. But that was a change that evolved as a measure of trying to give more time to the judges to do the work that really needed to be done. Some of the other suggestions were made to increase staff. You can only supervise so many people. The issue of splitting the court into a civil supreme court, criminal supreme court — Justice Mosk maybe favored that. I was always opposed to it, because evidentiary rules cross the line, so that you can't say, "The civil supreme court says you can do this, the criminal supreme court says you can't." So I guess maybe you could have some sort of an en banc procedure to take care of it.

My experience, what I've been told — I have no experience, obviously, but what I've been told by people that have operated that way, I think it's either Texas or Oklahoma, that it really doesn't work well. This way here you get — you don't want to get specialized judges. I was always opposed to one judge doing all of this type of case, because then he becomes the law on this kind of case. I think it's good to have people across the spectrum, different judges handling all of these things. Similarly, I felt the same way — if all you did was criminal, you'd probably get kind of biased one way because you'd start to see all this stuff. Whereas when you get it every now and then, I think you're a little more open minded about it.

MCCREERY: Which of your own opinions are you most proud of?

PANELLI: That's an interesting question, because I've never thought of it in those terms. I'd have to probably think about that. I'm proud of *Bank of the West* and *Montrose*, because those I see all the time, and people know when they submit briefs to me that those cases are always in there.

MCCREERY: The identification is strong to this day?

PANELLI: Oh, yes. When someone says, "Oh, you didn't really mean that, did you, when you said that?"

MCCREERY: Why do you single those out?

PANELLI: Because they probably had more impact on the state as a whole. On the other hand, there are other cases that — I never thought that *Moore* was a big a case, as I say, it defined [the issue]. It's probably one of the very few cases of mine that found itself into the casebooks. I didn't think it was that big a deal. I'd have to — let me just quickly — *Mirkin v. Wasserman* I've talked about. That had to do with the fraud on the market.

This case *Title Insurance Co. v. State Board of Equalization* was not one of my — I didn't think it was an important case, but it was the one that generated this criticism about how we had this conflict of interest, because of the Amicus Foundation, which was the foundation that I talked about. Of course, *Horace Mann*.

MCCREERY: I realize you don't think in terms of favorites or anything.

PANELLI: No, no. *Moore* is here. One that I kind of — it was an interesting case that I enjoyed; it was criticized in Napa — was the Napa wine train [Napa Valley Wine Train, Inc. v. Public Utilities Commission]. I had a view that there's so much congestion up there that people would get on — I viewed it as like the train that you get on in Kanapali, in Maui, and you ride up the way. So you park your car and you take this train, and I thought that that's what this Napa wine train would be, that people could park at the southern end of the valley and then go up and stop along the way at these various places.

MCCREERY: Which of those, or perhaps more than one, caused you the most satisfaction looking back, and why? Have you had a chance to give that any thought?

PANELLI: Yes, I've thought about it. The ones that were interesting, I don't know necessarily that they were the most satisfying, were because the challenges were a little unusual. One had to do with the surrogate mother [Johnson v. Calvert], because it was a situation where the statutory provisions really didn't cover the determination of maternity, because obviously, a woman delivers a child and everybody believes she's the mother, whereas with the paternity rules there's blood tests and things such as that, that generate how you determine paternity.

So we had this situation where it was really a contractual situation. This husband and wife decided that the wife could not carry a fetus, and so they had, as I recall it, a zygote, where they fertilize the egg and then implant it in this woman. The contract provided that they would pay her \$15,000 for carrying this fetus for nine months and they would take care of her medical bills and things such as that.

After the child was delivered the woman took the position that she wanted to keep the child, and so here we had an issue where she was genetically not related at all. So under the paternity rules there wasn't any genetic relationship, so she was really a stranger to this child. So what I tried to suggest is the legislature needed to address these issues, because — now it's even gotten a little more complex, because sometimes the male, it may be his sperm, but it may be the surrogate mother's egg that gets fertilized, so that there is a genetic relationship, and contract rules are really a little more difficult to apply. Especially now when you have same-sex parents that have a child, and if they're two women and one of the women bears the child, and the other partner — what is the legal relationship?

So it's a complex situation. We worked through and we decided that we would try to apply as best we could the paternity rules to a maternity situation. I suggested at the time, it's like a round peg in a square hole, and we just found out that yes, the fact that there is no genetic connection to the child apart from the contract — these other folks were the natural parents of this child. So that was an interesting case.

The other one I think we talked about was Moore versus the board of regents of the University of California, where there again we were trying to apply property law to a situation where we address ownership of your organs, are they property, and how long do you retain property rights in them? Again, the legislature needs to address these kinds of issues.

As I mentioned, it happened to be that last August was the fifteenth anniversary of *Moore*, and so they were doing this symposium at DePaul University, dealing, however, more with the sale of body parts, the ethics of it and all, and people buying livers, buying hearts, buying lungs and kidneys.

So those were interesting from a point of view that they were unusual for a court to have to make those kinds of [decisions], really, which were kind of moral and ethical decisions. But the day-to-day cases that really drive a lot of what happens in trial courts today are more *Montrose I*, which deals with the duty to defend, *Bank of the West*, which had to do with the 17200 unfair competition laws and how you interpret insurance contracts.

Then there's *Bay Cities*, which was also a case dealing with insurance coverage and related acts — whether they give rise to more than one occurrence, which therefore gives rise to more than maybe one limit of liability. Those cases I see in the work that I do today, because they drive a lot of what happens in the insurance industry.

MCCREERY: Thank you for summarizing some of the ones that are meaningful to you and why. It's interesting you mention the surrogate mother case, and also *Moore*, and the crossover with the legislative arena, because I wanted to explore that a little bit, the judiciary's role vis-à-vis the legislature. When you're dealing with a statutory matter, or perhaps going to the statutes in your thinking, as you did in the surrogate mother case, even though it doesn't fit exactly, how do you approach that task?

PANELLI: If there is an act that is applicable, or the law that may be applicable to this area, you have the benefit at least of the statutory history, so that you get information concerning the debates, the positions. There are services that provide this for you, so that at least you have some sense of what the legislature has done, if you are interpreting legislation.

The challenge becomes when you are forced to go into an area that the legislature has not addressed, and it really is an area that they're probably better able to address, because they can take into account — they can have public hearings, hear input from the public, and make policy decisions that really are outside the arena of what we as judges do. So you have to be guided by some structure, whether it's existing precedent or where you extrapolate from some existing legislation, and that's what becomes difficult.

So we always would say, “This is an area that the legislature needs to address.” But you can’t duck the issue. Once the litigants present the issue to you, you’ve got to decide it. You can’t say, “Sorry. We’re not going to address this, because we don’t know what the legislature might do.” You have to decide it and you address to the legislature this hope that they will address this. These are some of the things that you need to think about. Of course, they could always legislate to overturn a decision that you’ve passed. One of the opinions that I wrote, they did that. I can’t think of it offhand, but I remember that they passed legislation which, in effect, disapproved it.

MCCREERY: I wonder if that arena in which the judges operate is evolving or changing at all? It’s one thing to look at legislative intent, but as you say, it’s quite another to start getting into policy considerations and that sort of thing. Did you see any changes in that over time that you served?

PANELLI: If the public wasn’t happy with your decision, they’ll say, “See, these judges are legislating, and they’re supposed to merely interpret the law, not make the law.” Those are broad statements that in some cases may be true, because you’re writing on a clean slate, and so necessarily you’re going to make some policy decisions.

I think there were times where we may have had to do that a little more because there was a vacuum in certain areas. The problem, as I think I touched upon, had to do with the initiatives, because there isn’t any legislative history. You don’t have the benefits of the hearings, so that you know what’s going on. You look at the ballot arguments, and whether they’re based in fact you wonder sometimes. It’s just the way you can get people to vote for this, and so it made it very, very difficult.

I always felt it was a terrible way to legislate, to have these initiatives. Of course, the rules with respect to how you interpreted initiatives, the single-subject rule, people say, “Why can’t you knock out part of it and keep what you like?” But you can’t do that.

There was some criticism where we, I remember, affirmed some of the initiatives, and someone said, “Why did you affirm them when they violated the single-subject rule, and then in another case you rejected the initiative on the basis that it violated the single-subject rule.” It’s a matter of judgment.

I was never a legislator, so I may be off the mark, but I think to the extent that in some of these areas that have generated disputes in courts result from the fact that there may not be any legislation to cover those issues, and so whoever may feel aggrieved decided, “If I’m going to get any redress, I have to do it through the courts.” So to the extent that legislatures don’t address certain issues, people file these lawsuits and then the court is required to resolve this particular dispute. It becomes really a policy decision, because it’s an area that the law hasn’t acted on, the legislature hasn’t acted in.

Just even like with this *Johnson* case, which was the surrogate mother case. I think had the legislature anticipated that these kinds of things would happen then you could suggest that this is what needs to be done. Maybe it’s the type of contract that whoever is going to carry the child is entitled to some sort of psychiatric counseling or something before you do it, so that there would be certain rules, or those types of contracts could only be enforced if they had been presented to someone [for review beforehand]. I don’t know all of the things that you might have done, but it seemed to me that that was an area that needed some sort of direction, and obviously they could see it coming. I would think the legislature could see it coming.

It’s just the same area with same-sex marriages, or same-sex relationships. The acquisition of property can’t be community property, yet the property may have been acquired during this relationship. How do you address property division? So when someone files a lawsuit against one partner and takes the position, “I want to have some property rights.” You’re applying property law that is applicable to the rights between strangers when this is not that kind of a situation, so do you apply partnership law or joint-venture law? These are the kinds of things that judges have to address, and it would be kind of nice if the legislature would say, “In these kind of situations we’re going to apply these kinds of rules, so we’re going to call it quasi-community property.” Those are the kinds of things.

MCCREERY: When things did originate in the legislature and you were called upon to determine their constitutionality, how did you approach that?

PANELLI: I think what we tried to do — if there was a basis to support its constitutionality, the presumption was that we would go along with it. I don’t know that we ever overturned anything as being unconstitutional. We may have, but offhand I don’t remember that.

MCCREERY: My impression is that it was mainly approving, affirming the constitutionality of both the things originating in the legislature, and also the initiatives that came before you.

PANELLI: There were some issues that had to do with separation of powers. Like I remember one case was whether the governor's appointment book was available to the press, and the question is whether, no, that was part of the executive privilege, that some of those things weren't available. I don't know that we decided necessarily on the separation of powers, but I think we may have said for security reasons maybe that you shouldn't be able to get that information.

Of course, they wanted to see who the governor was talking to, who he was making appointments with. I wasn't sure that it had to do with judicial appointments or whatever, but those are some of the things where it got a little tricky — when was the legislature stepping into our realm, and were we stepping on their toes, as it were?

That's always been an issue with respect to judicial compensation and judicial budgets, where fortunately they never had a showdown, but there was always some fear that we might have to at some point say, "We're a separate branch of government, and we're entitled to be properly funded." Then do you order them to do something, and then if they don't do you hold them in contempt? Fortunately, we never had to go that route, but that was always a possibility.

MCCREERY: How were relations with the legislature during your time? You had both houses led by these longstanding leaders, Willie Brown in the Assembly, David Roberti in the Senate.

PANELLI: I don't think that we were all that well received by the legislators.

MCCREERY: What do you mean?

PANELLI: I think especially because after 1986 we were mostly all Deukmejian appointments and, of course, both houses were controlled by Democrats. They were always very cordial to us, but I'm not sure that they viewed us other than having maybe horns [Laughter], by virtue of who they perceived to be conservatives.

Some of the people that were leaders in the legislature, like John Vasconcellos — I knew John since student days, and we had very significant



differences of opinion with respect to some issues. I don't think they were totally in favor of these affirmances that we were doing on the death-penalty cases, and there were some issues that they viewed as probably more conservative in our approach than they would have preferred. That's just my own sense. I know John — we disagreed on many things. A lot had to do with where they put their dollars, and where maybe we thought they should have put their dollars, but obviously that's their task, not ours.

MCCREERY: Other than the matter of the legislative budget and the court's budget that we talked about before, were there any direct confrontations of any kind?

PANELLI: No, no. We would sit as a court; I shouldn't say sit as a court. We would go as a court to listen to the State of the State address. I don't know that there was much communication, if any, between legislators and the justices. Of course, some of them had friends that were serving in the legislature, and so I'm sure there was some socialization. But no, I think the relationship was pretty respectful of one another's responsibilities.

MCCREERY: I'd also like to talk a bit about the matter of interpreting the California Constitution, and in working on cases, when do you go to the constitutional issues, versus other methods of resolving? What are your thoughts generally about that?

PANELLI: The conflict was more, when do you apply the California Constitution when the federal Constitution permits you to do so?

MCCREERY: State constitutionalism.

PANELLI: Right. Can you be more restrictive in interpreting the California Constitution than the federal Constitution has been interpreted by the U.S. Supreme Court? So even if they say that something is permissible under the Fourteenth Amendment, in interpreting the California Constitution can we say, "But under the California Constitution that's unconstitutional?"

The biggest proponent of that was Justice Mosk. Justice Mosk felt that we should not defer to the feds in interpreting some of the clauses in our Constitution, which may have read verbatim like the federal Constitution, but that we had the authority to be more restrictive or expansive with respect to how we interpreted the Constitution.

I don't think that we ever took a position, as a court, that we did that. There may have been dissents by Justice Mosk when he believed we should not have deferred to this issue and based our decision on the federal Constitution. He would have expanded the rights under the California Constitution. But I don't think we ever said, "Yes, we're going to take a position that while you may not have this right under the U.S. Constitution, we're going to grant you the right under the California Constitution," nor do I think what we said was where we would become more restrictive.

MCCREERY: Was that something that was discussed among the justices, though, as a separate matter from the details of an individual case? The whole question of "state power really is at stake."

PANELLI: Oh, sure. Oh, yes. Justice Mosk felt we shouldn't defer to them, and he was very restrictive on federal preemption. He believed that on occasions — one of the cases that I wrote, where I deferred to the U.S. Supreme Court on *Pilot Life* [*Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987)], which had to do with ERISA preemption. I said, "The Supreme Court of the United States says that this is preempted," and therefore — I think it was Commercial Credit or something was the name of the case [*Commercial Life Insurance Co. v. Superior Court* (1988) 47 Cal. 3d 473, 253 Cal. Rptr. 682].

He wrote a stinging dissent saying that we shouldn't defer to the U.S. Supreme Court's decision in *Pilot Life*, because it involved some rights that affected California citizens in a way — there was a savings clause that if it dealt with insurance, somehow or other it wasn't preempted. So there have been many attempts since that day to try to narrow *Pilot Life* and try to get claims outside of ERISA, on the basis — like bad faith. They say, "Bad faith really deals with how insurance companies treat their insured." So if some HMO or Blue Cross or one of those denies benefits to someone, that may be covered by ERISA. Since bad faith is applicable to how insurance companies deal with their insureds, bad faith should be under the safe harbor, and therefore you could have a state court action. They've tried that. There have been three or four cases and the federal courts have all said, no, it's preempted.

Just as an interesting aside: One day I was going to be a speaker at the California Trial Lawyers' Association on appellate practice or something.

I was a little early, so I walked into this meeting room, and there was some speaker up there. He was going on and on about — I didn't know it was this case that I had written, and how they had "succumbed to the U.S. Supreme Court's determination in *Pilot Life*, and only Justice Mosk had the guts to file a dissent." [Laughter]

When I heard this, I started to realize they were talking about my case, so I decided to better quietly leave through the back of the room. But there again, it's the supreme court of the land, and while you may not be too happy to suggest that it's covered by federal preemption, in my judgment it was pretty clear. So far, every state that's tried to make an end run around *Pilot Life* has been unsuccessful.

MCCREERY: In principle, in areas where there are independent and adequate state grounds, and one would not need to turn to the federal —

PANELLI: We may have done that. We may have done that, where we say, okay, we can decide this on state constitutional grounds. We may have done that when there hasn't been a conflict, we just decided we could apply the California Constitution.

I'm thinking in one case — I had the lawyer who argued that case before me last week in a mediation, *Rojo [v. Kliger]*. I think it was sexual discrimination, or maybe sexual harassment, and we went under, we found a hook in — I shouldn't say we. The appellate court found a hook in the California Constitution, and we went along and more or less did the same thing, which was kind of an unusual step for us. It was really out of character for what we normally did.

That's why the mediation was kind of interesting, because this young woman — she's not so young anymore — that argued the case, she says, "Do you remember *Rojo*?" I said, "I remember it very well," because the judge who wrote the opinion in the appellate court was sitting in the front row, as was the trial judge. The trial judge kept making some comments during the course of the argument, and Justice Mosk got very upset and told him to be quiet or he had to leave. But it was a little stretch for us to find the predicate for the relief in the California Constitution.

MCCREERY: What in general is the importance of preserving state supreme court independence?

PANELLI: To Justice Mosk it was very important, because it gave you more power, obviously. If you say that you're bound by everything that the federal courts say, by virtue of how they interpret the federal Constitution, then necessarily your jurisdiction, if you will, or your authority is somewhat limited.

If you think that you, as the highest court in the state, should be able to do something that isn't prohibited by the federal Constitution, then you ought to do it. Normally, it was to expand things. It was give greater rights to criminal defendants on search and seizure and things such as that.

MCCREERY: I'm just wondering if you think there's an ethical or moral dimension to relying on the state law whenever you can.

PANELLI: Let's be honest. If you wanted to reach a result, because for whatever reason you felt it was right to do it, and you needed a basis for what you did, and you could find it in the Constitution of California, even though maybe the federal Constitution didn't grant that right, then, of course, you could go there.

I would think like in the abortion situation — suppose the federal supreme court says that there wasn't a right of privacy, and therefore *Roe v. Wade* wouldn't have happened. We could have if we wanted to in California interpreted the California Constitution and said, "Yes, the California Constitution does grant you a right of privacy, and therefore we're going to do this." Those were the types of situations, and we may have done it. I just don't have a recollection.

Just thinking of *Rojo* now, when we're through I'm going to go back and look at it, but I think it was one of those situations where we did that.

MCCREERY: Among other things, Justice Mosk wrote an essay in the *Texas Law Review* at one point — this was probably in the mid-eighties — I think trying to resurrect interest in this idea of emphasizing the state Constitutions. He suggested it was an area where so-called liberal and so-called conservative judges could work together, that they would each perhaps have different reasons for pursuing that doctrine, but that they could agree it was best for the citizens, or that sort of thing.

PANELLI: Justice Mosk was very politic when he said that, because let's face it, the only reason that people were talking about that is they either thought that the court — the federal court or whatever court that you

disagreed with — was either too liberal or conservative, and therefore you wanted an opportunity in your state to do what you felt was appropriate in your state. So if the federal court, if the U.S. Supreme Court was being very restrictive with respect to the rights of criminal defendants in search and seizure, then you'd say, "We ought to see under state law if we could give them more rights."

On the other hand, if the U.S. Supreme Court was being extremely liberal with respect to some of these, you might try to say, "We're going to restrict it somehow." I can only think in terms of the search-and-seizure area, because that was always an issue. When it got into inevitable discovery and all of those kinds of things, there were all ways to find — you knew that there was some law that had been broken, and if you felt that you were hamstrung by some of these rulings, maybe you'd want to do something else.

I always thought an issue that — and, of course, it's been addressed now by the court — had to do with parental consent for underage girls for abortions. I always thought that that would probably be an issue that would have been addressed under the state Constitution. Then they tried to pass an initiative. It didn't pass, but they're circulating petitions now again to put it back on the ballot. Justice Mosk may have voted on it, because I think the court did have that issue, and I think Justice Werdegar wrote the opinion that said you didn't need parental consent. I think that's what the initiative is, maybe to overturn that. I'm not sure.

MCCREERY: But, of course, on these hot-button issues like abortion, people who are taking one side or the other are always coming back, aren't they, to whatever they're trying to accomplish? It never ends.

PANELLI: My own personal view is that this whole issue is not an issue that should be a legal issue. I think it's a moral issue, that people need to make their own decisions. I think the worst thing that the U.S. Supreme Court could do, and they'd be absolutely stupid if they did it, was to mess with *Roe v. Wade*. People are living with it. They understand what the deal is. I think to go back and reopen all of that would be a huge mistake.

Those aren't the kind of issues that should predominate in judicial confirmations. It should be, "How do these people view the law? What kind of lawyers are they? How are they going to look at the Constitution

with respect to legal issues?” Now, I recognize they said that you have the right of privacy, and that’s how they came out of *Roe v. Wade*. Leave that alone, then. Forget about it. Those aren’t the kinds of things that I think you should be asking people. But that’s become the litmus test. My own view is that, I tell people, when they were having these confirmation hearings, I said I think they’d be absolutely stupid to do anything [to change abortion law]. It would be kind of nice if one of these judges came out and said, “Yes, we’re not going to mess with it.” Because this idea that it’s *stare decisis*. *Stare decisis* is fine until you get five votes that someone wants to do something different.

There were cases on the California Supreme Court where I thought it had been terribly wrongfully decided, and if I ever had an opportunity to overturn them I would. And we did. *Carlos* was one, that intent-to-kill issue that we talked about.

There was another one, had to do with tortifying contract breaches, the *Seaman’s* case. As Bernie Witkin would say, “Have opinion, looking for case.” That was one, and it never came up while I was on the court, but it has since been overturned. Because I just thought that was really opening up Pandora’s box, when you get breach of contract and you make it into a tort claim, because all the remedies can be so different. Someone could say, “Yes, I’ll breach the contract, because I understand if I perform the contract it’ll cost me a million dollars, and if I breach it it’s going to cost me only five hundred thousand under the damage rules. I’ll just breach it and pay you the five hundred thousand and go away.”

But there were things such as that. So when people say, “You’re overturning the precedent,” well, that happens. When we were being criticized for some of that, if they had really done any kind of research they could have seen that some of our predecessors had done the same. So a lot of these things, it’s just a question of the perspective of the person who’s reporting what you’re doing.

**MCCREERY:** Just as an aside, talk for a moment about the media role in things, and how that might have evolved while you were on the court.

**PANELLI:** I thought that the media was very unfair with us, because unfortunately, all of this was driven by the death penalty and the fact that most of the media was not in favor of the death penalty. I always used to

say, “Hey, if the people want to say that that’s no longer the law, that’s fine with me. It would have made my job a lot easier.” But unfortunately, as I say, I tell people, “I took an oath to uphold the laws of the State of California, and that was one of them.”

But I thought that the press was not fair with us, and I similarly didn’t think — like Professor Barnett at Cal, and Jerry Uelmen and some of the so-called court watchers were really fair. But you understand that’s part of when you’re a public figure. They have a right to make the comments. The problem is you can’t sometimes get into a real dialogue with them and talk about it, because then you’d be breaching your judicial ethics about what you can and can’t talk about.

That’s why I used to, whenever I’d get out and speak to groups, I’d say, “You can ask me any questions you want. I’ll decide which ones I’ll answer.” Because on a lot of that stuff — and, of course, I’m talking at a time when the court — it was a controversial period.

This was a court that came into being after three people were removed, and it was clear they were removed on one issue. It wasn’t a question that they were incompetent or that they had committed moral turpitude. It’s just that they were doing what they thought the law required, and the public disagreed with them.

MCCREERY: Before we finish talking about independent and adequate state grounds, am I correct that some of the appellate lawyers were advocating for that in support of death-penalty defendants? In other words, [interpreting the] state Constitution?

PANELLI: They may have. I can’t recall but I would think that they would, because I guess you could find that — maybe Anderson came along and found that it was a violation of, I guess they said it was — I’m not sure whether it was the California Constitution or the federal Constitution. But when the feds said it was okay and then they brought it back, assuming you went through the mitigation, and did all the things, dotted all the i’s and crossed all the t’s, you could have it again.

But I’m sure that they raised it. They raised everything else. [Laughter] As I say, they’re very aggressive, as well they should be — they’re trying to protect their client, save his life. They raised a lot of issues that you’d even have addressed before, but who was to know that maybe one day one of

those would catch the attention of four people. The Ninth Circuit, on some of this, have changed their position, depending on what panel you get.

MCCREERY: As you just reminded us, the environment was so politically charged after that '86 retention election. I did want to talk just a bit about Chief Justice Lucas and his leadership during his whole tenure as chief. Just returning to that early time after he took over, what did he do to remove the court from the media spotlight, and to get the whole operation back on track? Three new justices coming in — how did he handle that?

PANELLI: I think that he's a very intelligent person, and he has a nice presence about him. As a result, I think he's very calm about how he approaches things. Someone could say something to me and the Italian in me rises to the bait. [Laughter] He would never do that. He's very measured, and I think as a result he was very respectful to others. I think that generated respect for what he was trying to do. Like his appointment of pro tem [justices], where he said, "I'm not going to even be involved in the process. The presiding judges will be those of the courts of appeal, the six districts. They will be in a pool, and the secretary will know who they are."

He tried to convey the fact that if there had been some suggestion that there was some politics in how people were appointed, he was going to separate himself from that, and make sure that it was just going to be a random selection. I think in the appointments that he made with respect to committees, I think he was very aware of the impression of being impartial. So there were people who were appointed on committees that probably he didn't agree with, but that he wanted representation by all. There was some sense that that may not have been the case before. There was even the appointment, as I think I've mentioned, of people to the appellate departments of the superior court. There was kind of a protocol, so that you just did it by seniority.

Of course, people criticized that because if you're just there long enough you got it. But everybody then got a chance, whereas under Chief Justice Bird, she would select these people, and some of them were new to the bench. It seems to me that you'd be better to have some people with some experience.

He tried to make sure that everybody understood that everybody was going to get a fair shot, and that there weren't going to be any preferences



or any priorities given to certain people by virtue of where they came from, who they were, because it was obvious he could have — his appointments to the Judicial Council, his appointments to these other committees, like when we had the [Vision] 2020 commission, and gender bias in the courts, I thought he included everybody.

Even on the court committee, Justice Mosk, Justice Broussard, they weren't treated any differently than the others who were more in tune with the chief. We were all appointed by the same person that appointed him, which hadn't always been the case. So I think the press respected him, and the people that he dealt with even in the legislature, you knew where he stood. He was not duplicitous. If he said something, that this is what it was, that's the way it was. I don't think he had any kind of hidden agendas.

As a result, I think he was liked and respected. Of course, the people he was working with, he knew. David Eagleson, when he came on, he had practiced law with him. Justice Arguelles, they were from down there, so there was a certain camaraderie that existed. I don't think he knew Justice Kaufman very well, and, of course, he didn't know me at all. But like with the assistant presiding justice, he decided to rotate that position so that if he was gone and you needed orders signed and stuff, there would be — I think we did it on a two-month rotation, maybe three-month rotation, so everybody got a shot at it.

When it was my turn, it was when the American Bar Association came out to California. He was ill, and so I had to welcome them. In the same way, when the American Law Institute — which was the first time they'd ever come west of the Mississippi — I was the acting P.J. so I had to do stuff, because he was unavailable. But everybody had a shot at it, even the newest people, but it was done — first it was Mosk, then Broussard, then myself.

MCCREERY: You mentioned the Vision 2020. What kinds of things was Chief Justice Lucas trying to accomplish in the court system with that?

PANELLI: Part of the problem was that as a result of the legislature cutting our salary, there weren't funds to do a lot of this stuff. I don't know if we covered the fact that we created this Amicus Foundation.

MCCREERY: I don't think in much detail, no.

PANELLI: What happened was we didn't have monies to do those kinds of things like 2020, discrimination and gender bias in the courts, et cetera.

So we were advised that what we should do is we should create a nonprofit foundation, and so the legislature passed a law authorizing this and it was formed. It was called the Amicus Foundation. Chief Justice Lucas was the president, and I was the secretary-treasurer.

Then what they did is the Administrative Office of the Courts got contributions to this foundation, and then that became the funding source for some of these programs. But I think 2020, the vision of the court was one that was funded by Amicus, and there were some others.

But then when the climate changed we shut it down and terminated it. I think that final termination — I don't think occurred, maybe two or three years ago, because I remember getting stuff at home where I had to sign that we had finally gotten rid of it, because it became a real headache for everybody to try to account for all of this money.

MCCREERY: Yes, I think we had touched on this but not in much detail, so I appreciate that. When you say the climate changed, though, what do you mean?

PANELLI: I think then the legislature — we started getting funding and things got back to normal, and everybody became more rational in their relationship with one another. So then the AOC started to get the funding that they needed to do this stuff. The fact is, just the other night I spent two hours on the phone with some survey that the AOC is doing on, I think, the public perception of the court system, and how ADR may have impacted it, or has it impacted the courts, and that kind of stuff.

MCCREERY: I actually want to ask you about that, but before I do, what about the Administrative Office of the Courts during Chief Justice Lucas' time. What was going on there?

PANELLI: We hired a new director, Bill Vickrey, who is still there, because — what's his name, Davis, I forget what his first name was [Bill Davis] — he left. So I was chair of that committee to hire the new AOC director. He and Lucas got along fine, although he had gotten along fine with Davis as well.

I forget who was there before Davis. Ralph Gampell was there for a while when Chief Justice Bird was chief, but I don't know if Davis succeeded to Gampell. But it's a very close relationship with the Judicial Council.

There again, when the chief got to appoint someone from the court, I thought it was going to be me, [Laughter] and it was Justice Eagleson. I remember telling him I was a little surprised and a little disappointed, because I had been there longer. His view was, "Don't worry. You'll get your chance." I think Eagleson did two years. I think it may be a two-year term. Then I went on, so I was the vice chair of the Judicial Council.

MCCREERY: Yes. You did that from '92 to '94, I think my notes say. Tell me a little about that role.

PANELLI: We had some very interesting people on the Judicial Council. We had Senator [Bill] Lockyer, and Assemblyman [Phil] Isenberg. Of course, they had much different views, because they were much more liberal than what we were doing.

But Isenberg was rational. In those days Lockyer was just off the wall. Really, he was embarrassing at times the way he'd conduct himself in the meetings. He'd lose his temper and rant. It was really kind of embarrassing. I haven't seen him in that mode [lately]. He's calmed quite a bit. But it was very interesting to see the differences.

But even there, Lucas may have put Isenberg at the head of some committee on the Judicial Council, which would have never happened before. So I think he was trying to have us function in the role that we were supposed to function in, and that was a separate and equal branch of government, but the playing field was leveled for everybody. I think as a result of that, things were really kind of calm. I can't think of many problems that we had.

MCCREERY: To what extent was Chief Justice Lucas showing some political savvy here, too?

PANELLI: I think he's a good politician. I think he was sensitive to the needs of minorities and women on these committees in the things that he did. His staff, he had at least two or three women that were there. Beth Jay, who worked for him, had a responsible position.

MCCREERY: And is still there.

PANELLI: Yes, she's still there. But I think he was a good administrator. I think people liked him. They were comfortable with the way he managed. He had a comfortable management style, delegated, but you knew who was

responsible. I think as a result everybody was kind of comfortable. I don't really think there were any cliques.

Socially, everybody's staffs — I remember Jane Brady would have her monthly event — whatever party it was. She worked for Eagleson, but Lucas and I and whoever else wanted to go would come to her house. It was just a much different atmosphere.

MCCREERY: How did you operate as chair of the Judicial Council?

PANELLI: I was vice chair.

MCCREERY: Excuse me, vice chair.

PANELLI: It was when Lucas wasn't there I was in charge, and I think I may have headed some committee. I had very little insight into what the Judicial Council does. I always, when I was a trial judge, just thought they were a pain, because they had all of these rules that you had to do. I remember when we came to the new sentencing guidelines, and they came down and tried to instruct us. I never really understood what you had to do if you were going to do the minimum or the maximum, so you did the median, all that kind of stuff.

But I got a lot more involved when Bill Vickrey became the chair, because as I say, having interviewed him —. In fact, he brought this up when the supreme court was here recently. I think it's been a year or two now that they came down, sat in San Jose when it was the anniversary of the Sixth District. He said, "Justice Panelli interviewed me, and I was coming from Utah. So he ordered a bottle of wine. He wanted to see what I would do with it." [Laughter] So he says, "He found out that I liked it." So he's done a good job.

MCCREERY: You mentioned these colorful characters from the legislature who were involved and so on. How well did this group work together on the real nuts and bolts?

PANELLI: I think it worked well, I really do. It was a pretty good cross section. I remember — no, I guess she wasn't on the Judicial Council, she was on the board of governors, the woman who was murdered by her son. I forget what her name is now. But she was a Deukmejian appointment to the board of governors. I was thinking that she was on the Judicial Council, but she wasn't.

I think it functioned well. The leadership — Lucas definitely had things in mind that he wanted to do, like clearing the trial calendars, speeding up the process. I'm trying to think if the speedy trial thing was under his watch, or whether that was under [Chief Justice] George. My recollection is that it was under Lucas, because in L.A. the civil cases were all up against the five-year statute, and I think that he was the one that got this stuff going with the new rules and all that, that really cleared up a lot of the court congestion.

He was into management of the courts coming from the federal side, which I thought was a lot different then. It was almost — on the state side it was kind of *laissez faire* a little bit. I know that he was instrumental in trying to get summary judgment to have a greater impact in the trial courts, so that a lot of the cases that didn't belong in the system would get out of the system early, which again was something that happened with regularity in the federal courts. It was irregular in the state courts.

MCCREERY: How much of an influence was his federal experience?

PANELLI: I think it was a big influence. I think it was a big influence because maybe part of it came from the fact that he came from life tenure. As a result maybe some of the things — although I don't think that would have affected him. If he thought this was what you ought to do, he would have done it. But sometimes, it's interesting, just on this issue of summary judgment.

I was recently on a panel and we were talking about it, a judge from West Virginia, Pennsylvania, and myself, and there was Judge [Alex] Kozinski from the Ninth Circuit. We were talking about why state court judges don't grant summary judgment very often, and federal judges do.

We took the view that maybe it was because state court judges were elected, and as a result to throw out a case without having it go to jury trial, lawyers might — if you had a contest it may have impacted you. Kozinski said that wasn't it at all, it was that the federal judges were smarter than the state court judges, and that's why they did it. [Laughter]

But I remember, Lucas wanted us whenever we talked to judges to suggest that there were a lot of cases that needed to be pared down by summary adjudication, summary judgment. Part of it was that the law in California was different than the federal system, and then maybe four or five years

ago, maybe it's longer than that now, where the legislature did bring the summary judgment rules more in line with what the feds were doing.

MCCREERY: Was that a positive change?

PANELLI: It all depends. Justice Mosk was against summary judgment. He figured that every case should go to jury trial, and then if the jury screwed up, the trial judge had the tools to make the thing right, either by JNOV [acronym for the Latin phrase "judgment notwithstanding the verdict"], new trial, those kinds of things. But he was a firm believer that everybody had a right to at least have their case exposed to a jury.

MCCREERY: What did you think?

PANELLI: Yes, I thought that — I never granted summary judgment when I was a trial judge, and that's why — it's a funny incident. One day when I was out talking to these judges at the judges' conference, and I was talking about the need for summary judgments grants, and some judge raised his hand and he said, "You were a trial judge, weren't you?" I said, "Yes, for twelve years." He said, "How many summary judgment motions did you grant?" I said, "None." He said, "You were on the court of appeal, weren't you?" "Yes." He said, "How many grants of summary judgment did you affirm?" I said, "None." He said, "Then I rest my case." [Laughter]

That was true, because it wasn't — my sense always was, first of all, you're much safer to let it go to trial, and if you think you might have a sense of how it's going to turn out, let it run its course. The result is going to be what you think it's going to be. Now, granted you've taken some judicial resources, because you're going to have a trial. But then you're probably going to prevent an appeal, which saves everybody everything. If at the end of the day it turns out that a jury screwed up, you can fix it. I always felt that I'm not going to, in effect, give them a spare tire on an appeal.

That's like a lot of times when you've made evidentiary rulings that you might have been reaching over backwards, because you knew that this person wasn't going to win anyway, and you might as well maintain a clean record with respect to that.

MCCREERY: You're suggesting, though, that Chief Justice Lucas took a different view?

PANELLI: He took the federal view. To this day if you're in federal court — I know some of these cases I mediate I tell the litigants, "They're going to grant summary judgment in this case, and the lawyers all know that," whereas in the state court it isn't going to happen.

I'm thinking of all these bad-faith insurance cases. When we had the bad-faith stuff on the Northridge earthquake and I was doing those mediations, I'd say 50 percent of the time the bad-faith stuff was knocked out in the federal courts, rarely in the state courts.

So the trial lawyers were trying to do whatever they could to keep it in state court. They might throw in some defendant who prevented it from going to the federal court, and then just before it went to trial they would dismiss that person. Then what they started to do is the defendant says, "Okay, now the diversity situation's gone, we'll go back to federal court." So that's part of the games that lawyers play.

MCCREERY: We've been talking about the various interests and reforms of Chief Justice Malcolm Lucas while he headed the California Supreme Court. You were talking about his efforts to speed resolution of cases, and so I wanted to explore some of the ways that he did that. I have the impression that there was an increasing role for alternative dispute resolution during this time.

PANELLI: I think what they required is earlier status conferences. To be absolutely honest with you, I didn't follow it very much because I wasn't involved, but it was that you had to get everything done within a year. If the case came — I forget what they called it. They had some name for this thing, that if your case came within the parameters of these rules, then you had to do everything within a year. As a result, it got the judges involved in setting up these status conferences sooner in the process, and got up to speed sooner with their cases. So I think they either settled as part of the court system, or — I don't think that ADR had started as a big factor then. It may have been starting to turn around.

MCCREERY: But that came later, in your recollection?

PANELLI: Yes, because I've been out twelve years, and this occurred — I may have been off the court when that happened. I'm not sure. But in any event, it was the pressure to get on top of these cases and manage the cases sooner, because under the system that we'd operated under for years and

years, the judges did not really control their calendars. It was more or less the lawyers, and the lawyers would decide when they're going to take certain steps, as opposed to the court saying, "We're going to do this, and in the first ninety days after you file a lawsuit you've got to do this, and then in the next sixty days you've got to do these other things. Discovery has got to be all completed by a certain date, and then we're going to go to trial."

Under the old system you would set the motions when you wanted to set the motions, and you didn't have a timetable within which these things had to be done, and so lawyers would tend to drag things along. I think those are the types of measures that got lawyers focused in a case sooner, recognized when they had to do things, and therefore as soon as they knew the case they were in a position to try to resolve it. That's why cases in the old days resolved on the courthouse steps. That's because people never really did anything until they knew they were going to go to trial.

In those days you could also, by stipulation, continue a case for trial, which, of course, now never happens. A judge decides. I never continued a case. You'd have to die before I'd continue a case, because you know, as I've mentioned — no, maybe it was on this interview that I had with this AOC thing. We knew that 95 percent of the cases were going to settle, so you're only going to try 5 percent of the cases. So the task was to find out which of those hundred cases, which of this 100 percent, that is, 5 percent, are going to be tried, and get the rest of them out of the system and try those 5 percent.

I think this process did that, so you'd get to trial in only those 5 percent of the cases that were going to be tried, and you got those done early. As a result, these court calendars become clear. I think part of that was — I'm not sure that Lucas was the one who did it.

My sense that it was, because part of the federal system was that you did these kinds of things. There was more regimentation, more control by the trial judge, because most of the federal system went to direct calendaring systems. So you became responsible for your cases, whereas under the master calendar system, you picked up the case when it was ready to go to trial. Someone else did the law and motion and did those kinds of things. So I think the federal influence that Lucas had, I think, spilled over into the state side.

**MCCREERY:** What kinds of resistance was there to this change?



PANELLI: I think that, while I didn't see it or feel it, I'm convinced that there was resistance, because they were used to always doing it their own way. Whatever anyone else did, Los Angeles says they did it different. So the mantra was, "We don't care what they do in Los Angeles." That's why they had these civil cases that were all up against the five-year statutes.

They were in horrible shape calendar-wise, and now there's a question about, "We didn't have all the judges." They don't have that many more cases, percentage-wise. It's just that they're managing their cases, and as soon as the judges start managing the cases, the cases started to disappear, because people would settle.

MCCREERY: May I clarify, when you say you know you're only going to try 5 percent of the cases, and settle 95 percent of them —

PANELLI: Statistically we know that you'll be able to resolve short of trial 95 percent of the cases.

MCCREERY: But so the change, though, was in promoting settlement?

PANELLI: That was part of it. But the idea was to get rid of the 95 percent that you knew were going to settle early, get them out of the system early in the process, and then the residual 5 percent you could then try. But if you had half of those 95 percent cases that you knew were going to [settle] still in the system, then, of course, that jammed the calendars, it jammed the courts, and they were in the system too long. So the idea was to get those cases out of the system early on. Part of it was to have early settlement conferences, early mediation, early status conferences, so that the judges could decide, "Is this going to be a settled case, or is this going to be a tried case?" You could find that out pretty soon.

MCCREERY: Am I right that there were some sealed settlements that were never reported?

PANELLI: Oh, sure. There were a lot of them that'd you'd stipulate where the parties said, "We'll agree, but it's got to be sealed." That's all changed. Now it's very different. But it was just a tool for settlement judges to get people who were concerned that, "If they saw we paid this amount of money, it'll generate a lot of lawsuits."

You'd get the institutional litigants. Ford Company would say, "Gee, if we'd paid a million dollars on this Pinto case and people find out about it,

all the other Pinto cases we have now, a million dollars is going to be the floor.” So that was kind of what you did. I am sure that there were some that were sealed because they wanted to hide something.

But there were also cases where the plaintiff wanted it sealed. If all of a sudden you’ve come into a lot of money, and you’re not accustomed to handling money, and the paper says you’ve just recovered \$500,000, you’re going to find out you have a lot of relatives that you didn’t know about. Because a lot of these people would never have been able to handle that kind of money. So if someone would come up and say, “I have a hard-luck story. My kid needs this thing.” It could have been a con. They’ll write a check and away they go. So a lot of people said, “I don’t want anybody to know that I recovered this money.” That wasn’t the usual reason, but to this day, confidentiality is a standard term in any settlement.

This case that I said yesterday, they said that they wanted it confidential. I said, “To me that’s a given in any settlement it’s going to be confidential.” There are certain cases that you obviously can’t — if it’s a minor’s compromise, unless the court will seal it, when you go to court, or a governmental agency, it’s a matter of public record, so those issues. But there were cases that were sealed for a variety of reasons.

**MCCREERY:** Did you and the other justices — I don’t know that you held the same views, but did you see any problem with that happening so frequently?

**PANELLI:** No. I think that the bad reason didn’t happen that often, that is, that you really did something that was despicable, and you wanted to hide it by sealing it. More of them were pragmatic reasons. They’ve had other cases and they don’t want — just like I had a case on Monday involving a school district. I found out something I didn’t even know, that if you’re a handicapped student they have to have an individualized educational plan for you. If you’re unhappy with it you’re entitled to a due process hearing where an administrative law judge hears this thing.

In this case, I think we’ve come to some resolution, which would be good because they’ve been fighting each other for four or five years. But they said, “We can’t really settle this case yet, because we’ve got two other cases out here. If they say this is what you paid here, all of a sudden, which

we don't think these other cases would warrant as much, we're going to start at this number."

But because it's a governmental agency and it wouldn't be private they said, "So we're going to back off for sixty days, until we resolve these two cases, and then we'll come back and talk with you." So there are those kinds of reasons.

I think the important thing was — and this was still while I was on the superior court — the important thing was to get cases settled early. As I say, Judge Cohn, Judge Joe Campbell and myself went up and down the state holding symposia for trial judges on how to settle cases.

MCCREERY: Yes. That's exactly why I wanted to ask you, knowing you had such history as a settlement judge and had a really long view of this whole matter. As you say, it's changed now in terms of the sealed settlements.

PANELLI: It's changed, right. Now it's very rare that — because judges are very concerned about being criticized for sealing the records. But I'm sure that a lot of cases that aren't — if you settle them outside the system and you dismiss the lawsuit, you can still get the Michael Jackson thing. You'd get those. His settlement, that first settlement, was sealed.

I had an opportunity to get involved with what would have been a very, very interesting mediation involving a movie actor, who wasn't named. They had to do it on a Saturday and Sunday, because they were filming somewhere. It must be some sort of a sexual something or other.

MCCREERY: It wasn't named to you even? You don't know who it was?

PANELLI: No. No, it wasn't. But I couldn't do it because I'm doing a wedding that weekend, which is too bad. I would have loved to have done it, just to find out who it was.

MCCREERY: I know you brought a lot of background in this area to the court, and I was just curious kind of how it played out during Chief Justice Lucas' tenure.

PANELLI: One of the other issues that came up was what they call stipulated reversals, which probably had more impact than even the sealed settlements. It's where you would agree to settle the case after trial, and you would enter into a stipulation — this is when it's on the court of appeal — and you'd stipulate to reverse the trial judge's ruling. Justice Tony

Kline took serious umbrage to that, and there was legislation that resulted from that. I guess maybe it was even the court of appeal judgment — it was stipulated they'd reverse what the court of appeal did.

I'm not too sure of my facts on this, but there was now statutory authority for when you can do this and what has to be determined in order to do it. I think it has to be that it's not a matter of public interest. There are various rules so it's hard — it is almost like this sealing thing. There is authorization for it, but in practice you're rarely going to be able to get the benefit of it.

MCCREERY: I wonder how these stipulated reversals originated. Where did that practice come from?

PANELLI: They just decided that we will pay you a certain amount of money for this case if you agree that we can — you won it below, we'll pay you this money, maybe a little kicker, but we need to get rid of the precedent.

MCCREERY: A new twist on how to do that?

PANELLI: Right. And let's face it. For judges, if they thought they were going to get rid of this case, they said, "Fine. I'll go along with it."

MCCREERY: We spoke at length about the Constitution of California, for example, and the circumstances under which the justices would go to the U.S. Constitution. I wonder if you can characterize Chief Justice Lucas' views of these matters. Is that an easy thing to do?

PANELLI: To be quite honest with you, I don't think we ever discussed it. I'm sure he had a view, but I couldn't tell you what it was, because as I say, I don't think it was a big thing with him. The only recollection I had of any member of the court who really had that on their agenda was Justice Mosk, as we've discussed. I think he, as I think you had indicated, had gone around, suggested in some of the talks that he'd given, that state supreme court justices should look more to their own constitution where they could, as opposed to the federal Constitution.

But as we discussed, I don't think that that was really a major topic of discussion for the court, probably because he may have felt that there wasn't a great deal of support for that view, because it was somewhat — I don't want to say radical, but it was kind of a new view, because everybody

kind of operated under the fact of the supremacy of the U.S. Constitution, so you kind of deferred to it.

MCCREERY: You had mentioned the influence on Chief Justice Lucas of his federal appointment, in other matters, and I just got to wondering if you felt that extended to his approach to judging in any way?

PANELLI: I think that the federal rules were in certain areas much more restrictive. I'm thinking in terms of the rules on summary judgment. He clearly had views that the federal system of summary judgment rules were something that were superior to the state rules.

I think that with respect to — I think he enjoyed his federal service. But it's much more regimented, it seemed to me. I have never had a federal practice, so I can't speak from experience, but I think a lot of what guided him was his experience on the federal court, although he had been a state court judge as well, before he went to the federal court, to my recollection.

MCCREERY: Yes, he had a few years in Southern California.

PANELLI: Yes, Southern California, Los Angeles Superior Court. But it's hard to say. He keeps things pretty close to the vest. If you were to ask him about things, I'm sure he would answer you, but as far as going out and espousing a particular view, I don't think that he did much of that. I think he did with respect to court administration. I think he was very much interested in getting the process so that it would operate more smoothly, efficiently, and quickly. But other than that, I can't think of anything that was a major topic for him. But I think he was an excellent administrator, as far as getting things done, because he was on top of a lot of things. He could delegate, but yet he felt the pulse of what was happening.

MCCREERY: Just to bring up once again this matter of judicial philosophy, how would you characterize the Chief Justice's approach?

PANELLI: I think he was conservative. Under today's standards he would be termed a conservative. I think he believed in strict law enforcement, was probably what they want to call a law-and-order type, but I think he was fair. He was very intelligent. He would be able to read a case, some precedential case, understand it, and apply it, and he wasn't afraid to say he was wrong if his initial understanding of what he thought he would like to do wasn't possible. When you review cases you obviously have some view

of what the law is, or what you think the law is. Maybe the law isn't there where you'd like it to be, and I think he knew what you could and couldn't do. Someone said — who was it? Justice Mosk or someone said, "With four votes you could do anything."

MCCREERY: Yes, that's a good reminder, isn't it? The chief's views, generally, how did those compare with your own? We talked about how these labels of conservative or whatever can only take you so far, but how did you two line up?

PANELLI: We were pretty much in agreement on most things, not all things, but on most things I think we saw things the same way. That's not surprising. We were both appointed by the same governor. It's not to suggest that everybody is a clone of the other, but more or less your views with respect to certain issues, you have — as I say, a lot of how you come to some of these things is based on, obviously, your environment, your background. I was a firm believer, as we've discussed, early on, is that you had to earn everything, and you had to take responsibility. So the idea on some of these issues that it was everybody else's fault in the tort area, as opposed to assuming responsibility for it — those kinds of things obviously have some impact on how you decide issues.

But I think more or less we agreed on most things. I don't know that we had many dissents to one another's opinions. On most things I think we probably saw eye to eye on them.

MCCREERY: And no great change in that over the years that you served together?

PANELLI: No, no. But the one case that stands out in my mind was a dissent, the Morongo Valley School [District] case that had to do with an invocation at a high school graduation. The majority ruled that it was a violation of the First Amendment on the separation of church and state, which I disagreed with. I know that he didn't agree with me, which disappointed me. Not long thereafter, the U.S. Supreme Court ruled in an eighth-grade graduation case that the invocation was a violation of the First Amendment, and I disagreed with that as well. I viewed the one-minute invocation at a high school graduation — where the kids are eighteen or close to eighteen — that the invocation is nothing more than a gaveling to order. These kids are not about to be proselytized by someone by a minute

invocation. They're anxious to go out and have a party, and so this is just a way to get them quiet, to start with the ceremony.

I can see in the eighth-grade graduation where the kids are still immature that maybe there's some problem. But the irony of the Morongo school case is I had read thereafter, a year or two thereafter, that the young woman who was giving the valedictory address started to get up, came to the podium and sneezed, and the class all stood up and said, "God bless you." [Laughter] So they got around that issue.

I still think I'm right. I think it's a big difference between the [school] levels. Even if someone gave an invocation at a university graduation, I guess some would say that's still in violation of the First Amendment. But I have my own view of the First Amendment establishment clause. I disagree with the way the U.S. Supreme Court has come down on that. I think that the whole jurisprudence with church and state has been greatly expanded.

In Los Angeles you can't have a cross on the shield of the city, the coat of arms of the city. Somehow it crosses the barrier, or the violation of church and state. I don't think that that's what it was all about. I don't think our founding fathers had that in mind when they talked in terms of the First Amendment.

I have a talk that I gave where I'd talk in terms of what I think was really meant by establishment of religion, but it's obviously a minority view. [Laughter] I haven't been able to muster even five votes for that.

MCCREERY: But just in brief, what do you mean, or what do you think was meant by establishment of religion?

PANELLI: I just think that you couldn't have a state-established religion, nor could you force people to belong to a particular religion. When these people left England to come to this country it was because they wanted the freedom to exercise their religion. As you see the way, early on, many of the functions that are now taken care of by social agencies were really church-related agencies, hospitals, orphanages, those types of things. I think that the idea that religion was supposed to be totally outside of government — the fact that the coins say "in God we trust," the [U.S.] Supreme Court has some God reference over the court — I just think that they've taken it to ridiculous extremes, but I'm in the minority on that.

MCCREERY: Let's talk about the U.S. Supreme Court for just a moment. I was noticing that during the time you were serving here in California, the U.S. Supreme Court was having a lot of turnover of justices, too, say from the mid-eighties to the mid-nineties. William Rehnquist was promoted to chief while you were serving on the court. What were your views of how some of the areas of law were developing at the federal level?

PANELLI: I kind of liked what they were doing. Over the years I've, frankly, become a little disappointed in Justice Kennedy. I think that he has moved from the center, or even if he was maybe right of center to somewhat on the left. As I say, I've chided him a little bit about — he wrote the [U.S.] Supreme Court opinion dealing with the grammar school graduation prayer. I know him socially, because one of my best friends is his first cousin. So there are occasions when he visits, both in Saratoga and in the desert, where we will have dinner together. We've been on many panels together. But I'm disappointed in some of his positions, but he may have felt the same about some of mine.

I've met and had some social contact with Justice Scalia. We have been honored by some of the same Italian-American organizations and have been on the dais with some of these Italian organizations. One of his children went to Santa Clara [University], and as a result, when we had the graduation, he may have been the speaker there, and so we were together. We've had some luncheons at Santa Clara where we were together. He's a firebrand southern Italian. [Laughter]

MCCREERY: You can relate?

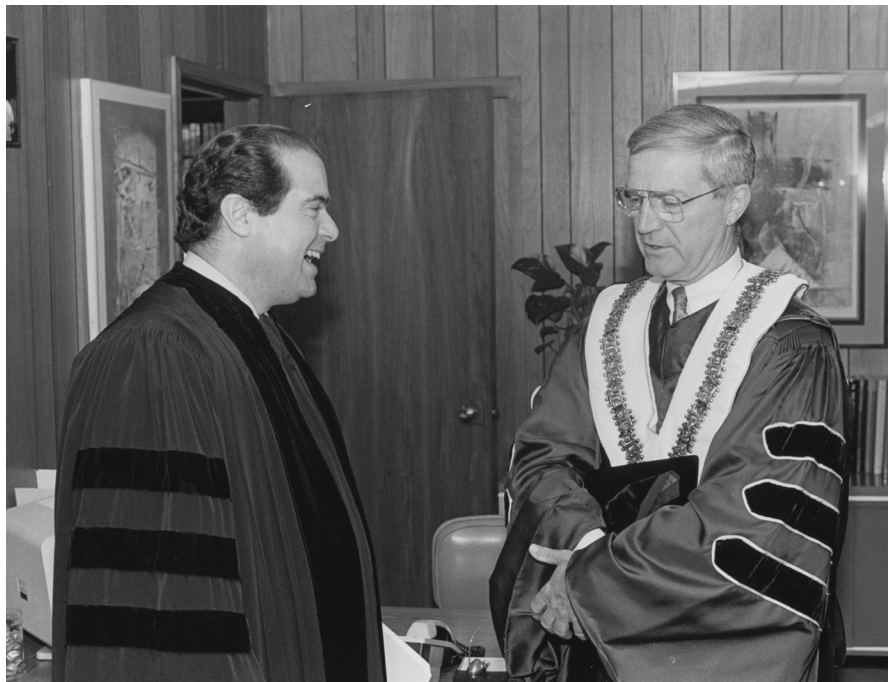
PANELLI: Not to the southern Italians.

MCCREERY: Oh, that's right.

PANELLI: Right. I used to say we're northern Italians, but my wife's relative says, "You're not a northern Italian at all. You're from the central part of Italy." So I've had some contact with him. I've met Justice Breyer socially. But other than that I really haven't had a great deal of contact with, nor had any discussions with any of the others.

Some of my law clerks — Mark Epstein clerked for Justice Brennan, and another one of my law clerks clerked for Justice White. I went when I





JUSTICE EDWARD A. PANELLI (RIGHT) WITH  
U.S. SUPREME COURT JUSTICE ANTONIN SCALIA, EARLY 1990S.

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was in Washington to visit them, and they introduced me to these folks, but that's about it.

MCCREERY: How closely were you and the other justices here following some of the developments, particularly in areas relating to state powers, as this court went on?

PANELLI: I don't think we paid that much attention to it. I think we'd paid more attention to what they were doing in the criminal area, because it impacted a lot of what we were doing, especially with narcotics and search and seizure and those areas. And, of course, clearly with the death-penalty cases, because as I'm sure you appreciate, a big part of our caseload was the number of death-penalty cases we had. Someone said now there's six hundred and some-odd inmates on death row, and I think when we were on the court they were at least into the three and four hundreds, so a lot of what they were doing with the criminal jurisprudence obviously impacted what we were doing, or what we couldn't do based on some of their rulings.

So you would [take note] more in those areas, I think, than in others, although on free-speech areas, clearly we were interested in what they were doing, because of the anti-abortion rallies and what you could or couldn't do, the rights of individuals to picket and those kinds of things, as protected or not protected by the First Amendment.

MCCREERY: You mentioned the criminal area, and, of course, there were several different times in California these victims' rights propositions that came forward under the wing of Governor Deukmejian, starting the year he was first elected that, in fact, as I understand it, required California law to look more frequently to federal law in those matters.

PANELLI: Because they were concerned that the California Supreme Court was going its own way. As we discussed, you can be more restrictive or more expansive, but you can't do anything that's already in contravention of what the court has said is prohibited by the Fourteenth Amendment or the Fifth Amendment. But even though the federal courts might say this was permitted you could, in interpreting your own constitution, say it's not permitted. I think that was the concern, that the court was veering away from some of the [U.S.] Supreme Court decisions, by virtue of the fact that the court wanted to be more restrictive, or more protective.

MCCREERY: It was a pretty long history, so I'm wondering how big a change was this?

PANELLI: You had a history because the California Supreme Court for a long time was pretty liberal. Again, we're talking labels — was pretty liberal. For a while the only conservative on the court was Justice Richardson, and you can't do too much with one vote. But Justice Tobriner and some of those others, they had a much different view than I know Justice Richardson did.

So I think the feeling was, and, of course, again, we get back to the whole death-penalty issue and how the public reacted to what they perceived the supreme court was doing, that is, thumbing its nose at the law that was in place at the time.

MCCREERY: Coming back to the California court in the time of Chief Justice Lucas, you're describing a pretty harmonious relationship not

only between you and him, but among this group of justices that was coming along.

PANELLI: The views were pretty homogeneous. Again, part of it is because the person who is appointing them is looking for people he believes will interpret the law in accordance with what the appointing agency thinks the law should be. But again when people say, “Do they ask you these questions?” No, they don’t ask you those questions. They look at your track record, they look at what you’ve done, how you’ve conducted yourself around these issues, and so they already know. They don’t have to ask you.

If they have to ask you those questions, you’re never going to get appointed, because they don’t have any confidence in you. I’m sure that in my case — here I was nominated by Jerry Brown on one occasion, so they may have some questions. How does he really view some of these issues?

MCCREERY: You were just saying you can’t do much with one vote, or even two votes. I wonder, is there a downside to a court with so much harmony, so that many of the decisions turn out six–one and five–two?

PANELLI: Yes, I think that’s a legitimate criticism, because then if you tend to maybe rubber stamp what somebody says, if the chief especially, if you’re all — like when we were, all but two, people who had been appointed by Deukmejian, if you just went along by virtue of that factor alone, I don’t think that’s good. But you find that people become very independent.

There were lots of — not lots, but there was some disagreement on some of these issues. Especially even if you agreed on the result, how you got to the result was important, because how you got to the result could be the predicate for another case later on, by virtue of the reasoning that you’ve used. So sometimes people would say, “I think you got the right result, but I don’t like the way you got there.” So there would be some disagreement. But I think to suggest that if people don’t view the other’s work critically, then I think that would be a downside, because I think it’s important. You get sloppy, first of all, if people aren’t being analytical about what it is that you’re saying, if they just go along with you.

My own view is that there was a lot of that in the previous court, because there was some question in my mind — how much time was being spent on some of these cases by some of these folks? But again, you never know what goes on in the mind of people. But there were occasions

sometimes where I'd see people on the grants for review, you'd kind of wait for the signal. The touching of the ear, is that a grant, or the touching the nose a denial? You know.

MCCREERY: You wondered if there were some setups?

PANELLI: Yes. I remember on one case we went around, and it had to do with a question of the identity of informants in the prisons, because the process was that the informant could talk to a correctional officer, and then the correctional officer could testify at the disciplinary hearings without disclosing the identity of the informant. Then the question was, no, this person has a right to face and hear the informant. My view of prison was that if that were the case, if some officer, if there was some danger to some correctional officer and someone says, "They're going to get you," and the person who supposedly is going to get you finds out that this person was the one who ratted on him, then someone's going to find himself with a shiv in the back.

My view was that you have to rely on the integrity that the correctional officer is going to be honest in the recalling of what was being told. There was a difference of opinion on that. I don't think that my view prevailed, but I don't recall. But this was one where I think we had gone around the table for the votes, there was some hesitation, and I was wondering if someone was waiting for the signal. What do we do here?

It was only a question of granting [review]. I don't think — it may have been a writ, I don't really recall. You have to remember, all of this stuff occurred twelve years ago now.

MCCREERY: I know. You're being asked to recall things from a long time ago. Later on, though, when Governor Deukmejian's appointees were all in place, to what extent did you find the other justices predictable in their views? I don't know if that's the right word.

PANELLI: No, but you kind of, again, knew just in discussion, and when you start to see the pattern of votes, you knew where the people were. But a lot of the work that's being done to assist you is being done by staff, and there could be people on the staff that don't necessarily agree with everything you do. So there's a certain amount of keeping you honest by these folks as well, so that there'd be discussions, minor debates sometimes, among people on your own staff who may not have agreed with the way

you were going to go, and gave you reasons why they believed that maybe you ought to reconsider or think about it.

But ultimately, you have to make the decision. What would bother me would be, and it's been known to happen, where someone said, "I'd like to do it, but my staff doesn't like it." My view always was that when they wear the robe then I guess they can do that.

But we talked about it, I think, earlier, that that was one of the things that Chief Justice Bird felt was a drawback to having permanent people on staff, is they start to have a belief or a sense that they're as important as the person that they're working for. That's why she had a turnover. I think it was a five-year rule, and I can see some merit in that. On the other hand, it takes a couple of years or so to really know what you're doing.

MCCREERY: Yes, and as we've said repeatedly, there were so many new justices during this time, so it's kind of hard to look at trends, isn't it?

PANELLI: Yes. But the interesting part of that was that the staff did not change much, so the staffs that were there for Justice Grodin stayed on. Some of the staffs that were with Justice Reynoso stayed on. Not many of Chief Justice Bird's people stayed, but the others, I don't know that there was much change.

MCCREERY: You've described how you inherited some people who worked for a different sort of person before you.

PANELLI: Two of my people had worked for Chief Justice Bird early on, and then she had put them into central staff. Then both of them worked for Justice Kaus, so I kept them on. I forget who Justice Lucas kept from Richardson's staff, which wasn't as surprising as when Eagleson came on and took on some of the people, because then, of course, obviously they replaced people who had been removed.

MCCREERY: That's a different sort of thing. Recognizing that the new justices coming in had an effect, let's look a little bit, though, at the kind of work trends of the court. We've pointed out that the death-penalty backlog was a huge burden, as were the attorney-discipline cases in those early years before the state bar court, and so on.

PANELLI: Right.

MCCREERY: But the court watchers, as we know, were sitting on the side saying, this court now is granting fewer new hearings, publishing fewer opinions. Dissent is much less frequent. How do you think about those matters, looking back at that period of time?

PANELLI: One of the things that I think is overlooked often is that by virtue of the fact that you are affirming death-penalty cases, it then gives rise to a parallel habeas corpus petition, so you have to, in effect, go through the whole process all over again, so that there's a review of the record, there's all of this kind of stuff. So it isn't as if once you wrote an opinion on this case it's gone and you can now turn to something else. You know you're going to get a writ of habeas corpus with respect to that particular case, so there's no question that the death-penalty cases were clogging the court, taking a lot of its resources.

But again, there wasn't much you can do, because that is your only appellate jurisdiction — other than PUC. You have to take those cases. When the Bird Court was reversing sixty of sixty-four cases, they never saw those sixty cases again, unless they went back and got retried and came back up again, but that'd be years later. Whereas, once you start affirming them and you start coming back, the same lawyer who worked on the opinion had to get back and work on the habeas.

With respect to the number of petitions for review, they tell a story about Justice Newman saying that when they'd granted three petitions for review, or four, at a conference he'd say, "That's the quota. We're not going to grant any more." Whether that was true or not, I don't know.

So there was never any suggestion that you were granting too many or we ought to grant more. It's just that sometimes maybe we looked at — the standards for review were different, or may have been a little more restrictive. Not to suggest that at times, as I mentioned, we'd do what we called a rescue mission, but that didn't happen very often. We really tried to adhere — "Is it an issue of statewide importance? Is there a conflict in the court of appeal?" Even if there was a conflict in the court of appeal, is this an isolated instance on this issue, so that we depublish it and let it percolate, see what happens? Then, of course, if you start to see the issue reoccurring, then you may have to grant review.

But when you're writing all these opinions, unfortunately, as I say, and these people would properly mention that they're pretty long, and it's hard

to know how to cut them down. Everybody wants to look scholarly, and it's hard sometimes to really shave them.

MCCREERY: We talked also before about some of the pros and cons of the depublication process, which is kind of a vagary of the California system, if you will. What role would that volume of depublications have on the overall picture, in your view? Some years there were a greater number of depublications than there were published opinions. What's the effect on the development of California law?

PANELLI: I tell people the standards for publications in the courts of appeal are very loosely followed by the courts of appeal. They don't have to publish all these opinions. But everybody likes to see their name in print, and especially when you get — it was always kind of a joke. If you were a pro tem you had to have a published opinion during your term, so that you could point out to your grandchildren later that, "See this case here? You see, I'm in the law books."

So sometimes there are more cases published by the courts of appeal that really need not have been published. So my standard response was, "At least you're having the same seven people reviewing all of these cases," as opposed to, what are there now, 104 court of appeal justices or whatever the number is. There used to be 88 when I was there. Hopefully the standards by which you're depublishing the case will be the same, as opposed to one division is granting publication on this issue, and another division in the same district on the same issue decides it's not important enough to publish. Because everybody has different views of what is significant.

As I mentioned in this letter to the editor that we talked about, when the San Jose *Mercury* ran the story on the criminal justice system in Santa Clara County, I said the only people who make money with the published opinions are the law book publishers. So when you have as many panels writing opinions, if there wasn't some way to control them it would be very, very difficult.

I tell lawyers all the time, "If you think that this unpublished opinion and the reasoning is pretty good, you could use it in your briefs." You can't cite it as authority, but you could see what this particular court of appeal said, and you could almost plagiarize it.



MCCREERY: Thank you for illuminating that a little bit. Why do you think the standards for publication at the courts of appeal are so loose?

PANELLI: Because it says — I forget how they read, but — “If you think this is an issue of importance,” or I forget what the standards are, “you can publish your opinion.”

MCCREERY: Just stated pretty broadly in the language?

PANELLI: Or sometimes they don't publish an opinion that would meet the standards, because they're not sure about their position, but they like the result. So you figure that the risks of being granted — there's some myth that if it's an unpublished opinion it's not likely to be reviewed, and to some extent that's true, just as there's a myth that if there's a dissent you will probably get a petition for review granted, which again isn't true. It depends on what the issues are, the basis for the dissent, the reasoning, how it may impact how you view the law on that particular issue, what the state of the law is on that particular issue.

But there have been cases where it was an unpublished opinion and there were seven votes to grant review, so that happens. Yes, it's not often, but it does happen, because the court of appeal's opinion may be so far out of whack that — and they may have known it when they wrote it, but they liked the result and they hoped that it could avoid review and scrutiny by making it unpublished. That may be a disservice to some of these folks.

There was one particular division that figured they could get by with writing some of this stuff, as long as it was unpublished. Then you'd have to grant review to, on that particular issue, write an opinion that disagreed with this. Then they were bound by that result. If they were to file another unpublished opinion in violation of what you've said, then, of course, you'd run into serious problems. But that would rarely if ever happen, because they're bound under *Auto Equity* [*Auto Equity Sales v. Superior Court* (1962)] to follow the precedents of the [California] Supreme Court, whether they liked them or not.

That's another criticism, that this is a way to stifle people who are critical of the position of the court, and in dissents you can get their attention by pointing out how the court — why the precedent should be changed. But you read that anyway, whether it's an unpublished opinion. If it's a significant enough issue it comes to your attention. I just think a lot of it



is people — maybe it's because when you're there and you know that the motives that are ascribed to you aren't really true. That isn't why you did it, but they would hope that maybe that's why you did it, because it makes you look bad.

MCCREERY: And you have no direct way to answer that at the time.

PANELLI: No. But sometimes I just would kind of chuckle to myself when they'd say, "It was obvious the court had this in mind," when we never even gave it a thought. [Laughter] It wasn't on the radar at all. Sometimes with public opinion, when people say this is why they did it, really, rarely did you bring into the discussion, "How is this going to sell?"

The problem with all of this stuff is, we're just a huge state with so many lawsuits. We have more lawyers than some countries, oh, than most countries, and as a result you have to find a way to function. So the alternatives, as we've discussed — do you add more judges? That doesn't help much. Do you add more staff? That really doesn't help a great deal. You can't really split up the courts, contrary to Justice Mosk's view, for the reasons that we discussed.

But it's almost come to the point where on the civil side — you almost get 100 percent appeal on the criminal side, but on the civil side lawyers, if they don't at least try to file a petition, there's a concern that they may be sued for malpractice, because who knows, there may be another case that's in the pipeline that raises the same issue that you've raised and may be of some help to your position. If you haven't kept your case alive you don't get an advantage. You can't come back and say, "Hey, wait now." You've decided this case; your case is final.

I had that happen in one of my own cases. I really was very, very disappointed at the court of appeal, because they shot me down. This is when I was a lawyer. They shot me down on an issue, and then about four or five months later the court of appeal decided it the way that I thought they should have decided it. But my case was dead, in that we had filed a petition for review, which was denied.

MCCREERY: You mentioned the civil cases, and I got to wondering with all of the great volume of death-penalty matters, and other criminal matters, how much time was left to work on the civil side of things? Was that discussed in any way?

PANELLI: First of all, with a lot of it you have to wait until the case is briefed. With a lot of the death-penalty cases there weren't that many cases that were fully briefed. So while you had to pay attention to them and it took a certain amount of work, the civil cases would get briefed a lot sooner, and so you would have time to work on them. Sometimes you might say, "I'm only going to devote two of my people to the criminal side, and three are going to do the civil cases." A lot depends on how complex the cases were as well. Some of the civil cases were cases that took a lot of time to analyze, research, and write, where some of them weren't too difficult.

MCCREERY: I was wondering about the court's responsibility to develop case law over time, and how well this court was holding that up.

PANELLI: I don't think that we were — that is, the Lucas Court — was all that interested in being frontrunners. We would many times see what other states were doing, whereas I think in the past the California Supreme Court prided itself in being at the forefront of all of these issues. Again, it's on your perspective. Some people thought that's great. Other people thought that was not so good, because they were doing things — what those who disagreed with the court perceived to be legislation by the court, where the judges are doing things that the legislature hasn't done or won't do. So they thought that was the luster of the California Supreme Court.

My own feeling was that I'm not so sure that that is lustrous. I think the more restrained you are, and to see what the rest of the country is doing — you don't have to follow what the rest of the country is doing, but if we're swimming one way and the rest of the country is swimming a different way, then you've got to look at it differently.

I knew that business and insurance companies hated what was happening in California, because they perceived it as the state being anti-business, anti-insurance. That has some impact, obviously, on the economy in the state. I know that now if I'm retained to give some advice with respect to, "What are the issues that you think the court is interested in?" or how you approach a petition for review, I stress what impact it will have on the state as a whole, both on its economy and on its citizens. Because some of these issues, as I say, if that's the case, then all of our industry is going to go to some other place, not in California, which will have some significant impact on the state's economy.

If the state's economy goes into the tank, then you don't have the taxes, you don't have the ability to do things that government is supposed to do. I'm sure that we considered that when we looked at issues, but I always suggest to people, at least in petitions for review, those are the kinds of things you ought to point out, because you want to point out what the impact of these decisions may have on the state as a whole.

But I remember many, many times when I was a trial judge and I was doing settlement conferences, insurance companies would just — and you'd have representatives from the East and Midwest. They just thought that we were crazy out here.

MCCREERY: You mentioned looking to some other state courts on occasion. Which states did you tend to look to, or can you generalize?

PANELLI: No, I don't think it was any specific — obviously you would look to the more populous states. You'd get to Vermont and New Hampshire, and they didn't do much. But New York was obviously influential, Michigan, some of those. I don't think we looked much to Washington or Oregon, even though they were out where we were. But I'd say Michigan, New York, not too much Texas, but it depended. When you did the research you'd find, or you kind of knew, what the trend is. You read about it. Things are happening in the tort area or products liability area.

Again, there were some people that felt, why do you care what the — or when we talked about what the majority of the states were doing, and we'd go along with the majority, there would be criticism even among some of my colleagues. "Oh, no, we shouldn't worry what the majority opinion is, or what the majority view is. We ought to say what we think our view is." Obviously, you have a right to do that, and in certain cases you do, but the fact that everybody or many people see it differently than you is something that should give you reason to pause and think about it, not to be different just for the sake of being different.

MCCREERY: We wanted to talk also about some of the evolving new areas of law, and perhaps that will dovetail with the question of whether or not California is a leader in certain areas. One could talk, for example, about the emerging area of environmental law, which was really still in development in your time, and where California was a leader really in all environmental matters.

PANELLI: Yes, but I think most of it had to do with environmental clean-up and the questions of who was to pay for it. Usually it interpreted whether these particular insurance contracts that may have predated when this whole issue of pollution and the environmental issues came up. So again it was a question of saying does this policy cover, or provide a means whereby the state or whoever else is claiming damages can seek recovery from?

Now most of the insurance policies all have pollution exclusions, and it's very difficult. So I think this whole environmental issue is different than when we were there, because *Montrose II* had to do with the continuous loss, which was very, very important, because if you had a policy during a period in which any of the loss occurred, then you were on the hook to the extent of your coverage. So I think those things were important.

The issue of whether you needed to have a suit, or whether a claim was sufficient to trigger the duty to either defend or to indemnify — those kinds of issues I think we were involved with. I get a kick out of when people say we were beholden to the insurance companies. They weren't too happy with my opinion in *Montrose*, because we said if there's any possibility of coverage, then you have a duty to defend, even if at the end of the day there wasn't any duty to indemnify.

In many cases, the defense exposure is more costly than the indemnity exposure, because you probably spend — if you have a \$500,000 policy limit, but you could easily spend two million dollars on defense, protecting the \$500,000 policy limits. Presently a lot of the carriers are now including defense costs within the indemnity limits, so that we have now many, many policies that are eroding limits policies to the extent if you have a million dollar policy and you spend \$300,000 in defense, you only have \$700,000 left for indemnity. Whereas usually the defense costs were outside the indemnity limits. So by virtue of the fact that the defense of these cases has become so expensive, and sometimes so many times greater than the indemnity exposure, it's why these carriers are making these changes.

MCCREERY: I wonder what you think were some of the evolving areas of law that the court faced?

PANELLI: I think in the tort area we tried not to expand the law. Obviously *Moradi-Shalal*, the bad-faith case.

MCCREERY: That was a big change as well, wasn't it?

PANELLI: It was a huge change. It didn't make the California trial lawyers very happy, but it was a terrible case to challenge that ruling. I'm not sure if I was on the court when we granted review on that case. I'm not sure. But you had another case which involved a non-delegable duty issue, where we placed a limitation on the liability of a homeowner for the negligence of a subcontractor that was hired.

MCCREERY: Oh, yes, we mentioned that.

PANELLI: Then there was the barefoot skier skiing backwards, Jewett? I forget the name of the case [Knight v. Jewett, 3 Cal. 4th 296, 318 (1992)]. We heard that case twice. My best friend, not my best friend but a very close friend of mine represented the plaintiff, and we shot him down twice.

But those are kind of the things that I think — there wasn't an agenda to say, "Okay, now this is an area of law that we're going to change." But as I think we did mention, there was this tortification of contract damages that we were interested in looking at, because again, you were moving ahead of the field. But in my view you can't look at a contract and say, we're going to give them the tort remedies for it, because people can breach a contract. They know what the ramifications are.

MCCREERY: When you talk about no agendas for change, I'm just thinking, too, of the fact that California society was changing so greatly. It still is, but there was a great change in the demographics of the state, the ethnic representation. I don't know how much those kinds of issues worked their way up to the supreme court —

PANELLI: Not many.

MCCREERY: Not many? Okay. I was just wondering how you see the court's role as societies do change. Should you only respond to those changes, or should you lead them in any way?

PANELLI: You have to have a case in order to do anything. So if people don't present a problem to you, then there's no way that you can address whatever it is that they're suggesting is now a problem. So it doesn't start from the top down, it starts out in the community. As people have problems, either caused by virtue of the demographic change or whatever's happening in the state, it will impact someone in a way that will give rise to a lawsuit. Then, of course, the court will address it, and dependent on how

the case is presented, in what area, they will decide that issue and that issue will have some impact, obviously, on the state and that particular area that is, if you will, under attack or that's being questioned.

Again, I don't want to repeat myself — what they put in these voter pamphlets may not be very close to the actual facts of what's actually occurring. But it's really kind of hard to know. Look what happened with respect to desegregation of the schools. The court didn't come out and say, yes, gee, this is really unfair that black kids have to go to one school and white kids go to another school. Someone filed a lawsuit saying, "Hey, this is a violation of my rights under the Constitution," and the court addresses it. I think that's what you have to do.

This whole immigration issue, it'll be very interesting to see what some of the cases or the issues that arise out of this whole immigration process. I know that based on my own experience with my family and immigration, it would probably have some impact on how you view the problem. But all of these societal issues, sometimes — they all believe that the courts can solve them, and my view is that you really can't, because you're deciding on the basis of this particular case that's before you, that obviously will have impact.

*Roe v. Wade*, for goodness sakes, was one woman with the issue, but the issue impacted a lot of people. But even there again, the court didn't say, "Yes, this is what we want to do." Someone said, "Hey, I believe I have a right of privacy, and this impacts that right," and you address it. But clearly the fact that the demographics of the state have changed, it'll bring new problems. I can see in the schools, maybe they're saying — certain school districts have already done that. "We're not getting the funding that we need. Our kids are being undereducated by virtue of the fact that our tax revenues aren't sufficient," So you'll get someone challenging whether that's equal protection and all those kinds of things, and then the court is forced to address them. Those are the tough questions, because they're really policy questions.

**MCCREERY:** As we talked about before, sometimes you were in a position of having to look at them when there wasn't much to go on.

**PANELLI:** You're forced. Right, right. It makes it tough. But maybe because I've been away now for twelve years, the issues don't seem as critical

to me. I always felt very comfortable. People would say, "Those are hard decisions." I never felt that they were hard decisions. I felt very comfortable with what I was doing. Maybe that's a kind of a naïve simplistic way to look at things, but I never said there was a case that I'm really worried about and said, "Gee, is this the right thing?" Because once you decide what you're going to do, you have to be comfortable that that's the right thing to do. I always felt comfortable about that.

MCCREERY: What about occasions where you had to reconcile your own personal views with your responsibilities as a judge?

PANELLI: My view always was that if your personal views interfered with your being objective, then you'd better just say, "I'm going to recuse myself." Because whenever you start to think about that, then you're going to make a mistake one way or the other. It came home to me very early on, when I first went on the superior court. Someone, one of my former associates, had a domestic case, and it was just a preliminary, temporary child support payment. "Oh, gee, it only runs for about three or four months." I said, "No, I want to recuse myself." They said, "No, no." The other side said, "We want you to hear it. We have no objection to that."

I heard it, and I was so concerned as to, if I made this order, will they think that I was being favorable to my friend, or am I going to do more for the other side just to be sure that I haven't favored him. When I start to get into that kind of a discussion with myself, that's very, very bad, because now I'm having extraneous outside influences that are bearing upon my opinion. From then on, I said if I have a question at all that, gee, is this something that maybe I have some questions about personally, then I won't participate.

When I went on Italian television people said, "How you could vote for the death penalty?" I said, "Because it's the law in the State of California, and when I became a judge I swore, took an oath, that I would follow the laws of the State of California." Someone said, "Then you should have resigned." I said, "I guess you could have," but I didn't feel that morally offended by it.

I remember when I took my ethics class at Santa Clara, Father [Austin J.] Fagothey, who was a great ethics person, we talked about the death penalty, and his view was that it was moral so long as you can say that it

somehow related back to society's right to defend itself. You have the right of self-defense, and if society says that this is, in effect, kind of an offshoot of self-defense, then it's okay. If not, if it's retribution and that kind of stuff, then you may have some moral problems. So I said, "If it was good enough for Father Fagothey, it was good enough for me."

MCCREERY: So as your own view of it evolved, though, you were able to —

PANELLI: Oh, yes, I had no problem with it, especially with — the cases we saw were horrible. They were horrible. There weren't many whodunits, and the question just always became, not always, but 90 percent of the time it was just, what impact do you think the mitigation had? It all became, was he abused as a kid, would the parents do this or that, the other thing? That just became a judgment call.

MCCREERY: It is interesting, though, when you go to a country that views such matters differently. Governor Schwarzenegger had that problem, upon facing his first death penalty last-minute appeal, with his home country of Austria.

PANELLI: Yes. The Italians are obviously very much opposed to the death penalty, and I understand why, because, clearly, if you have money and position you're never going to get the death penalty, whereas you're some lesser person, it's easy. You watch. When they start to have problems with the immigrants that they're having now, like the Albanians that were coming in and some of these other folks, they're going to start to rethink how they approach that issue.

It was easy for Italy when it was a homogeneous society. But the last time I was in Italy they were talking about, "We have to send these people back. We have the Coast Guard cutters that are stopping these ships and taking these people and sending them back to their own country," because they were starting to have some impact on the Italians.

It's much like our problem with Mexico. These people were coming in and doing the jobs that the Italians wouldn't do, and then the numbers got kind of large and they had some of the same social problems. The people weren't getting the education and they weren't getting the help that they needed. They turned to crime, and then all of a sudden it became this thing, "These people are all a bunch of criminals. We've got to get rid of



them.” I don’t know that I’ll live long enough to see it, but I can see that there will be some changes.

But a lot of it is cultural, just with respect to the judges. Maybe this is a gross overstatement, but we are very fortunate here because overall, people really, I think, generally have confidence in our judicial system, in our justice system. They may talk about, “The rich get better treatment than the poor,” and that may happen sometimes, but on balance that really doesn’t happen here all that often. I’m not naïve enough to think it doesn’t happen sometimes, but generally, overall, you’re going to be treated fairly.

I can tell you in the countries that I visited where we did these programs, that isn’t going to happen. It’s who you know. I know growing up, because of our own background, if you knew the people in power they would take care of you. It may have been that early on, but I just didn’t see that. In fact now I think it’s even worse. If you know somebody, everybody goes out of their way to make sure that they treat you differently, but more stringently.

Like Justice Kennard, when they stopped her for that drunk driving thing — come on now. They should have just — the poor woman. She wasn’t under the influence. They should have just taken her home and forgotten about it. No, now everybody gets afraid.

I think I’ve told you this. I always told my kids, “Don’t you ever tell any officer who stops you who your dad is. You just keep your mouth shut and say, ‘Yes, sir,’ and sign the ticket, because they may want to give you a break, give you a warning, but as soon as they find out who you are it’s not going to happen.”

Just like jury duty. I got summoned for jury duty and I said, come on. No one’s going to really want me to sit on a jury, because they’ll think they’ll have a jury of one, because everybody’ll look to you and say, “What do you think?” because of who you were. If you say, “I’m not going to tell you,” then you’re not participating.

But there isn’t a judge that will excuse you, because they’re afraid that someone will come up and say, “These other poor yokels have to come down for jury duty, but Justice Panelli, because he knows these folks, doesn’t have to.” So I go down, and then they kick you off. I’ve never gotten to sit in a seat. I would like to have done that. I’ve said many times, I could be a fly on the wall in the jury’s room, because first of all it gives you some

sense of how jurors deliberate. I've seen enough of mock juries. It kind of scares you because there you see what they do. You hear the conversation. They talk about everything but what they were supposed to be talking about. But again, it isn't the real thing, and maybe that doesn't tell you how they really do their job.

What I think could be a problem is that you become isolated, and you are cloistered. There's this criticism that the U.S. Supreme Court, they're bound up in Washington. All they know is what's happening in Washington, and so they get a distorted view of what the country is thinking about different things. I think it's important that you not become cloistered, and that you are not isolated so that you don't know what's going on in the world around you. That's why I always found it helpful to get out and talk to groups.

I think it's helpful for judges to belong to organizations like Rotary or Kiwanis. Trial judges do, appellate judges do. I don't know why supreme court judges don't do it. As long as you don't talk about what it is that you're doing and why you're doing what you're doing, but I think it's good to know, to listen to speakers that talk to these kinds of groups, so that you have some pulse of what's happening other than just reading the newspaper, or reading some *Time* or *Newsweek* or whatever.

**MCCREERY:** Yet they're being asked to resolve problems originating all over the country.

**PANELLI:** Right. As I say, it's just to know — some of the questions you've asked. What is the impact of the changing demographics, all of this kind of stuff. I think you need to know that, just so that you're in context when you're deciding the case, that you're not in a sterile laboratory where you're looking at it through a prism that doesn't reflect what's going on in the world about you. But that may be a view that isn't shared by many.

But I always felt that it was important for me to have contact with the outside world, and so I maintained social relationships with people other than the folks that I worked with. Even with the folks that I worked with I'd have some social contact with them, some more than others, because like anything else, some people you do more things with than others.

But as I say, a collegial court is different than when you're an individual judge making decisions. That's why, as I mentioned, we would try, I think it

was once a month, to do something socially, so people could feel comfortable with one another. It wasn't necessarily to curry favor or anything, but it was kind of nice not to have the pressure of what you were doing, to talk about family and this kind of stuff.

MCCREERY: We did want to talk just a little bit, though, about the changes there since you left, just to the extent that you can comment. I know that the current Chief Justice, Ron George, came on before you left, briefly.

PANELLI: He was a very good friend of mine, and we've socialized. I've stayed at his house. When we would go to L.A. I'd live with them, so no, I spent a lot of time with him.

MCCREERY: When he first came on, what did he add to the mix of the court?

PANELLI: I know very well because I did all that I could to see that he got the appointment. He's obviously very bright. He reads everything. He's amazing to me. He had a system. He had a big basket, and he'd throw all these newspapers in these baskets that he wanted to read, and then through the night or whatever he'd read these things. It's amazing to me.

So he brought an energetic view, and there was no question in my mind that he had ambitions to do — when he first went on the court of appeal I knew that he had ambitions to get on the supreme court. I did what I could to help in that regard, because I thought he was a very good addition, by virtue of both his scholarship, his intelligence, his writing ability. It proved to be right. So I thought that was something that was — we needed a younger person, because I think he was the youngest person that came on. Yes, I'm sure he was younger than I was. I don't know when he was born.

MCCREERY: Let's see. Born 1940, came on the court in '91.

PANELLI: Yes, so he was a lot younger than everybody else. But I think that was a good addition. After the first wave went off, Kaufman, Eagle-son, Arguelles, and then you got Kennard, Baxter, and Arabian. You got a much different mix. But now, I don't know. I've met Justice Moreno twice socially. I don't know Justice Corrigan. I've read about her, but I've never met her personally. She went on the court of appeal, I believe, after I had left the supreme court. Justice Werdegar, of course, I know. As we talked about, she was one of my staff people.

MCCREERY: What was your role in her appointment, if any?

PANELLI: I didn't have to do much for Justice Werdegar. She had gone to school with Pete Wilson, and [Laughter] I don't know if this is true or not. Rumor has it that she kind of helped him get through, so I think that was almost a foregone conclusion, because she was also a very bright woman. The only concern I have about the court now is I'm not sure how much trial experience they've had, and so whether there is a recognition of the impact of their decisions on how trial courts function.

Of course, Justice Werdegar is one of those that had no trial court experience. Some of these others had limited trial court experience, but I think that's important that you do that, because you see some of the issues that are facing trial judges, and so when you have to address some of these issues you can see why things happen sometimes.

But there are a lot of decisions that the court has issued that I don't necessarily agree with, and there are a lot of decisions that Justice Werdegar has made that I don't necessarily agree with, but she's calling them the way she sees them, and when I was there I called them the way I saw them.

MCCREERY: As new members have come on, some of the existing members seem to have shifted a little bit on the continuum.

PANELLI: They have. That has been a concern of mine, because I think that — I can understand your views change with respect to certain issues. But anyway, it's my own prejudices. I'd like them to decide cases certain ways. Some of the issues, to me, were rather simple, and some of them — just like on the question of same-sex marriage. I predicted that they would look at it right after the City of San Francisco took it on. I don't know what they'll do with it.

But I remember a local newspaper fellow called me and said, "Do you think the court will take it?" I said, "I think they will." Justice Grodin was asked, and he didn't think so. So it's just how you view — certain issues you have to take, it seemed to me. Just like the Gore–Bush issue in the Florida Supreme Court. My sense is we would have never touched that. We would have said, "That's the issue for the secretary of state." In Florida's case it was her decision. "We're not going to go there." Of course, the Florida Supreme Court went there, and then the U.S. Supreme Court went there.

MCCREERY: Yes. By extension, do you think the U.S. Supreme Court should not have gone there?

PANELLI: I think what they did there is they did a rescue mission. I don't think they should have gone there, but I think they felt in view of what the Florida court did that they needed to get it straightened out. But I'm satisfied that we would have let it fall, whatever it was, because it's a no-win situation for you. Then they say, "That's all a political decision." The U.S. Supreme Court got that criticism.

We would have said, hey, it didn't matter, even though we might have preferred one candidate over another. Why go there? We'd duck — maybe that's an improper term, duck. We chose not to exercise questionable jurisdiction, because clearly that was an administrative decision. That wasn't a judicial one. She said, "We said this was the date. This was the date." She runs the elections. That's when you get into trouble, I think, when you get caught up in some of that.

MCCREERY: You mentioned here in California the same-sex marriage, and so I just wanted to make sure I understood you on that. You feel the California Supreme Court will, as a matter of course, need to take that on.

PANELLI: They have to address that issue.

MCCREERY: And better to go ahead and do it now, kind of thing?

PANELLI: This had to do with, remember when they were doing these weddings in San Francisco?

MCCREERY: Right, the weddings themselves.

PANELLI: Then they took that, I guess it was a writ, and the court said, "Yes, you can't do it," but they hadn't decided the merits, and I think that may have sent it back to the court of appeal. But see, that's an issue that they're going to have to decide.

But it would have been an issue, I thought, that would have been better addressed by the legislature, to define what the rights of same-sex partners are. Because as we talked, this whole issue of property rights, how do you decide that? Because the statutes, community property is a husband and wife. Okay, what's a husband and wife? I guess you can have two of the same sex. One says, "I'm a wife," and the other one says, "I'm a husband,"

or two guys say, “I’m the husband, he’s the wife.” It doesn’t make a lot of sense to me that you can decide that.

MCCREERY: In a court?

PANELLI: Yes, in a court. I guess they’re going to try to decide it on constitutional principles, but I’m sure that was never intended by any of the framers that those kinds of issues would — a definition of what is marriage. That’s why when this whole issue of the original intent, that’s a touchstone, but I don’t know that it’s necessarily a total guiding principle that you follow.

MCCREERY: You mentioned that when Pete Wilson was in the governor’s office you thought that had you stayed on, you might have had a shot at the chief justice seat.

PANELLI: Oh, yes.

MCCREERY: Was that explicit even?

PANELLI: No, but I felt comfortable that’s what the case was. I had a good relationship with Governor Wilson. I think he respected me. I was the senior person. I don’t think it would have been a situation where there would have probably been an expectation that you would stay long. It would have probably been more or less of an honorary thing. Maybe you’d stay a couple of years, with a wink, and you’d go. But as I told you, I wasn’t ever interested in that.

I just think the administrative part of it, I did it when I was in the Sixth District, but that wasn’t really what I liked to do. There’s a lot of politicking that you have to do in that position, and I don’t really like to do that. But I never asked him and he never told me, but I always felt that had I decided to stay — and I think maybe Lucas felt that.

MCCREERY: How early did you know Governor Wilson?

PANELLI: I don’t know how I met him or when. But I know that we appeared at a bunch of events together, we talked. I have been to a bunch of social stuff with him. One of the fellows who’s on the board of trustees at Santa Clara with me is a good friend of his and used to do stuff for him. But I always felt comfortable with him. But that’s an interesting question. I don’t know how I came in contact with him.

MCCREERY: In due time he had the chance to promote Ron George.

PANELLI: And he's been good. There wouldn't have been anybody else I'd have picked. I think that he's done a fine job. It's a job that I think he always wanted, and I think he'll stay on. He doesn't have any economic pressures. He's in good shape financially.

Sometimes that is a reason for people not staying too long. It used to be you'd stay at least to vest your pension, which is twenty years. But now people are leaving early because they can do so much better financially in ADR. But I think, again, if you leave for that reason and you knew what you were going to get paid when you opted for this — I always looked at it as a career.

Like I say, I became a judge at forty, and the maximum retirement was forty and twenty. I stayed for twenty-two years, at sixty-two, so the last two years, because my pension was 75 percent, but I was paying — while I was still on the bench you still contributed 8 percent to retirement, so for all practical purposes I was working for 17 percent of my salary. That's fine, but I felt I needed to get out and try to earn some money. I tell people that I had twenty-two years that I had to amortize it over, so I've done twelve, I've got ten more to go.

MCCREERY: You stayed a long time by today's standards.

PANELLI: Yes, but see, you've got a different breed of cat now on there. Ron George, as I say, he's very, very comfortable financially, especially now since his dad passed away. His dad was in good shape financially. Marvin Baxter, I think he likes it. I don't know, he'll probably stay. Same with probably Justice Kennard and Justice —

MCCREERY: Ming Chin?

PANELLI: No, Ming Chin I think the rumor has it that he may be leaving. Werdegar, I think she'll stay. My sense is Moreno, he'll stay until he vests, and I don't know enough about Justice Corrigan. My sense is there's another life out there. But a lot of people like it [on the bench]. You get this security, and people bow and scrape to you. You can get recognition, and that's nice, too.

Like I tell my wife, I got more than I ever suspected when I was a little kid that any of this would have ever happen, and so I'm very grateful for it.

It was a fantastic opportunity, but I was happy to move on. People ask me all the time, “Do you miss it?”

I say, “I don’t miss it. I enjoyed it, I really liked it when I was there, but I like what I’m doing now.” I don’t go back, because once you’re gone, you’re gone. You’re not part of the team, and as a result I always feel like I’m a fifth wheel. And similarly, they just renewed my term on the board of trustees at Santa Clara, and I said, “I’ve been there forty-some-odd years. That’s enough.” “No, we want you to stay.” But I can tell. New people are in, and they don’t know that you were there as long as you were, and what you’ve done, and so you’re kind of — in certain things it’s time to move on.

MCCREERY: Yes, we all outlive our usefulness in certain roles, even if we can continue.

PANELLI: But you don’t know what the inside stuff is going on. Even if you go back to the court, you can’t talk about what the work is that they’re doing. They have their own thing. They have their own relationships. The influence that you may have had is no longer there. I don’t want to say that they humor you, but it’s just a different deal. And so my sense is, forget it.

Plus now, when I tried to go back the last time, and they’ve got all this security now, and someone was wondering who I was, because I wanted to get in to see my former secretary. I said, “Why don’t you go down the hall and look at the pictures on the wall, and you count to a hundred. The hundredth picture, it’ll be me.” [Laughter]

Because, see, now they have the highway patrol that does the security for them. We used to have our own folks. Then they went to the state police, and then when the state police became part of the highway patrol — so none of the same people are there.

MCCREERY: Let me just ask you one other question about the court’s makeup. Some of the appointments in recent years have either for the first time, or restored representation of non-Anglo male members. I wonder, how important is it for the judiciary in general to reflect the population of the state it’s representing?

PANELLI: I don’t think you should have quotas. I don’t think that you should say, “Okay, we have 5 percent blacks, so we need that kind of representation, so many women.” I’m not in favor of that. But I think it is very helpful to get people of different backgrounds, and by that I mean both



ethnically and racially, or gender-wise, because I think people have different views —

MCCREERY: You mentioned that before, actually, that you thought that was important.

PANELLI: Yes, and you need to do that. So I think it's too bad that there isn't a black member on the court, because people are looking at these people, and they don't see any of their kind of people. And so the view is sometimes that you do something by virtue of who you are. If you have an Italian sitting there, and the litigant is an Italian, somehow you think you're going to get some extra advantage.

That isn't it. But I knew from my own point of view growing up, it was very, very important to have a role model, and there weren't that many. I remember the big thing going with my dad was, Primo Carnera was the heavyweight champion of the world for a little bit of time. But it would have been kind of nice — and then Giannini comes along. Those kinds of things when you are, I don't want to say in a down class, but those are kind of important to say, "Gee, these people did it. You can do it."

While that was important in my case, it wasn't totally necessary, because I was getting so much motivation from my parents, by virtue of the fact that they viewed education as the key to getting beyond what they were doing, where they were working with their backs. That whole thing was a big factor, plus it's helpful when they say, "If you work hard enough, then you can do it. Look at these people," and they could name some.

So I think that's important, and that's why I think it's good to have representation of various groups, because their parents can say, "See? If you work hard enough and do it, you can do it. Look at X up here."

MCCREERY: In a state like California, there's such a cross-section.

PANELLI: Such a cross-section. I was just telling these lawyers that I had here today, who are in Saratoga now. Saratoga used to be all-Anglo white, probably WASP. Now all my neighbors are Asian and Indian. It's amazing. I gave a talk to Saratoga High School, to their leaders' club, and they were all Asian kids. I asked the principal, I said, "Gee, I'm really surprised." He said, "Why?" He said, "Sixty percent of our school is Asian." In Saratoga.

MCCREERY: That's a change, all right.

PANELLI: It really is.

MCCREERY: I wanted to ask you about Justice Janice Rogers Brown, the most recent African-American member, who, of course, left last year to go to the federal appointment in Washington, and faced quite a bit of controversy in regards to that appointment. May I ask your view of that situation and why it was so volatile?

PANELLI: She was one of my favorites. I got on Rush Limbaugh's show, talking about Janice Brown.

MCCREERY: Did you?

PANELLI: We were at our home in the desert, and my wife had tuned in to listen to the program. It was about eleven o'clock in the morning, and they were talking — this was before her confirmation. They were talking about the problems that she was having. My wife was saying all this stuff, and I said, "It's really unfortunate, because here's a gal who is very bright, had to ride in the back of the bus, knew all the problems that they had. You would think that this is a woman who could really bring to bear on these issues the understanding of some of the underclass. I cannot believe why they're attacking her," calling her an Aunt Jemima and that kind of stuff. So my wife said, "Why don't you get up and call him?" I said, "I'm not going to call him." She said, "No, they should hear what you have to say." I said, "No, I'm not going to do it."

So she starts to dial, and she dials and dials and dials and dials. You never get through. So we had to leave. I said, "No, we've got to leave," because we were going to the airport there, which is about fifteen minutes from our house. Our place is in Rancho Mirage. This is our second home, and Palm Springs airport is about fifteen minutes away. So while we're driving she says, "Why don't you try on your cell phone?" So she dials the number, and sure enough it goes through. So I said, "This is Justice Panelli. I was formerly on the California Supreme Court, and I was calling about Janice Brown."

Then everybody, "Oh, wait a minute, wait a minute. Judge, we want to talk to you." Of course, I'm driving to the airport, and they put you on hold. They had to go through the commercials, so I had to pull off to the side of the road into this parking lot to try to talk. I talked about this, and I said that I found it very unfortunate that they were attacking



RETIREMENT PARTY FOR JUSTICE EDWARD A. PANELLI (CENTER),  
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this woman. She's qualified, she's a woman of integrity, she obviously has views, but in my experience she would listen to people. I encouraged her to become a judge.

When we used to go to Sacramento, we used to stop by to talk to the appointments secretary. Either it was when it was Marvin Baxter, and later when it was Chuck Poochigian, and some of those people. We would just come and — because we were almost in the same building. Janice Brown was there, because she was the legislative secretary for the governor.

MCCREERY: The legal affairs secretary.

PANELLI: Yes, right. I'd always say, "Janice, how's it going? You ought to be a judge." Oh, she wasn't interested in that. I said, "No, no, come on. You'd do a good job," and all this. So when I talked to [Rush Limbaugh] I said the things that I just said. I thought it was unfair, here's a woman who's seen these problems, sharecropper's daughter. What more of a role model could she be for a lot of these kids? It went on, and he called me by name, because normally they don't tell who you are.

That afternoon — it’s amazing to me — that afternoon I got a call from a woman that used to be my wife’s roommate when they did their dietetic internship in Boston, who lived in Pittsburgh. She said she heard it on the program. A friend of mine, one of the fellows who’s one of my best friends was in Charlotte, and they were driving and they were listening. They heard it. I got a bunch of calls from people.

I said, gee, I wanted this to be low profile. I didn’t want to hear — so the *Daily Journal* runs a story. It says, “Janice Rogers Brown gets support from unexpected sources,” and they talked about the fact that I had appeared on this Rush Limbaugh program, supporting her. Of course, Jerry Uelmen, with whom I had very little agreement on anything, he also supported her, because he said she was qualified.

That was my point. Here was a woman who was qualified, but they didn’t like some of the stuff that she did. But I’m impressed with her. I think she’s a smart, smart woman, and obviously had to go through a lot to be where she is. I think that’s very important for people to know that. I’m sure as a little girl riding in the back of the bus, she never thought that she was going to be sitting on the California Supreme Court, a little black girl. But they ran a cartoon of her as an Aunt Jemima in some magazine, which was terrible.

So that’s a long way of saying, yes, I think it’s very important. I think Allen Broussard — well, before him, Wiley Manuel. Wiley Manuel was really, I really had a lot of respect for him. I got to know him because they assigned him to Santa Clara County for a month or something. I forget the reason. I was kind of his person that he had contact with while he was with us, and so we had lunch and stuff. He was a very bright, intelligent person.

Of course, I knew Allen Broussard, who succeeded him, by virtue of the fact I think that he was president of the California Judges Association, and so I used to see him. But I think it’s unfortunate that there isn’t — but there will be, I’m sure, if there’s another vacancy.

MCCREERY: Similarly, with Hispanic members of the court?

PANELLI: You’ve got Moreno.

MCCREERY: Women?

PANELLI: You’ve got three now, you’ve got three women. It would have been — I think Janice, she’s on the D.C. circuit. I doubt seriously if she’d

— I was really surprised that she didn't just say, "Forget it. I don't need all of this stuff." Withdraw. But I think she's a tough lady.

MCCREERY: How's she doing back there? Are you in touch with her at all?

PANELLI: No, no. The fact is, I never heard from her at all, even after my Rush Limbaugh appearance. Maybe she thought that my association might not help her. But no, I think this whole process, as we've talked about, it's become much more politicized than I thought it should be, but anyway.

MCCREERY: You retired at the end of '94, as you've pointed out, twelve years ago. Just talk for a moment about the mediation work you've done since then.

PANELLI: I've done, probably, I figure close to 3,000 mediations, maybe a hundred or so arbitrations, and it's been very interesting. Every day is different.

MCCREERY: What do you like about it?

PANELLI: The people. I get a chance to tell stories. A lot of it is getting people to relax, to feel comfortable with you, because when you then start to suggest maybe this is what they ought to do — because it's all consensual. As I tell people when I start out, sometimes it's not in this configuration. Today we're sitting around a round table, but if we're at a regular rectangular table and I'm sitting at the end, I say, "Usually when you see a judge sitting where I'm sitting, the expectation is, this guy's going to decide something." I say, "That's really not my role. As a mediator I'm going to try to get the people sitting across from one another to try to come to some sort of resolution, because I have no power to force you to do anything. It's all consensual."

So you get to talk with folks, and then you might tell some stories about — something will come up, and then they feel comfortable, and so when you start talking you say, "This case, you ought to evaluate these issues. I think you have a problem here, and you have this problem. This is an opportunity for you to get it resolved, get it behind you." All this kind of stuff.

But it depends. That's when you're talking to certain kind of people. When you're talking to executives — the other day I had people here from a wireless phone company. Obviously, you talk differently with them. You get different cases.

Last week on Monday I had a case involving a student's individual education plan that they're entitled to under the State of California. They

claimed that this kid who has cerebral palsy can't communicate except through a DynaVox [device], and so part of the plan for him was that he was supposed to have a teacher who understood this, and they didn't, so that was a problem.

The next day I had this issue with respect to the cellular phones. Then the next day I had — I forget what kind of a case I had, and the next day was a big case involving the healthcare providers. Oh, on Wednesday it was a question of bank employees not getting paid for meal breaks or rest breaks, and then on Friday I had a breach of contract from someone who had an exclusive distributorship agreement with respect to some tiles, roof tile stuff. So every one is different, and it's just a lot of fun.

MCCREERY: You've always had a lot of interests, I notice, even talking about your very early life, so this sounds like a good fit.

PANELLI: As I tell people, when I was in high school I played every sport. I was class president every year. I had the lead in the senior play, so I always did everything. I always tried everything.

I was thinking about it today because I got the Santa Clara alumni magazine. I saw one of the fellows that I played freshman basketball with died. I said, gee, and I kind of thought back. I said, he was a good basketball player. He was there on a scholarship. I wasn't all that good, but I lived at Santa Clara. It didn't cost them anything to keep me on the team. On all this stuff I was able to participate in all this. I was good in some stuff, not as good in other things, but I always did the stuff.

My wife was telling someone, she was talking the other day about, "When is Ed going to retire?" She said, "He started working when he was six years old. He's not about to quit now." But yes, I enjoy it. Plus, let's be honest, it's very remunerative, and it has enabled me to do things for my kids that I wouldn't otherwise be able to do. We started a foundation called the Heritage Education, where we fund things for public education in the elementary schools, generally the ones that my son teaches in. We provide for kids who can't afford to go to science camp; we pay for them. We'll pay for a bus to do field trips.

Every year he does an Olympics, and we fund that, where each of the grades has a country. It's kind of a geography thing. They have to study about it. Then they have the opening ceremony. They light the torch, and then they have relays and that kind of stuff, and then they have an awards

ceremony. They all march in with their flags from their country, different colors. So we do that kind of stuff. That's kind of neat.

I was able to help him buy a house. On a schoolteacher's salary, in San Jose you can't even buy a tent. One of my sons was a counselor at a drug-rehab facility. He now does the administrative work. But they needed a walk-in freezer or something, and we funded it. Then they had a big stove that broke down and we funded a new stove, so we're doing that kind of stuff, which is kind of nice. I couldn't have done that before.

MCCREERY: Really all throughout you've been engaged in giving back to your communities, the various ones. I've really noticed that.

PANELLI: The West Valley Community College District that I was on, they're still having some of the same issues that we had years ago. [Laughter] Now it's been thirty-five years, because that started in '63, and they're still talking about whether they can have lights on the football field, as well as loudspeakers. The City of Saratoga has been dealing with that for as long as the college has been there.

I've had a very interesting life. I have been very fortunate. My cousin's son just graduated from law school Saturday, and they had a reception for him and a dinner. My brother and sister were there and we were talking, and it's the first time we've really kind of talked about our time in Italy. My brother, of course, who was older, was telling me things that I didn't know, or hadn't remembered about when we were there.

He was telling me about that — apparently when we went to Italy my dad bought some property over there. My brother said that now, that the property — they've built a lot of houses on it. I said, "Gee, I didn't know that Papa had the money to do any of that." He says, "Yes, but when we came over there it was the Depression, and he had saved some money, and over there he was able to do something."

MCCREERY: That's why he went back, isn't it?

PANELLI: That's right, that's why he went back. And he talked about — this I remembered, when we'd gone over, on the train. It was a long train ride, and my mother was nursing me, and I got sick.

Then, of course, we started talking about when I lost all my teeth when the kids jumped me when I had this little trumpet, and we talked about



where always they'd lose me when we went to Via Reggio, which is the seashore there. But they'd find me trailing the ice-cream vendor. But I had remembered that. But it was a nice deal.

MCCREERY: You learned something new from a long time ago. It makes you realize how far you've come.

PANELLI: Yes. Really, I'm very, very fortunate. I've had opportunities that it's just hard to believe, because when you look back — it's really hard to believe.

When I think about when I was just a child, the best clothes I had were the ones that my aunt, who worked as a maid — I think we talked about this — for this family, they had a son who was about a year or two older, and so when he'd outgrow his clothes she'd bring them home to me. Like I remember I had a Mickey Mouse sweatshirt. There's no way I would ever have had a Mickey Mouse sweatshirt. He had gone to parochial school, so he had the salt-and-pepper cords, so I ended up in salt-and-pepper cords.

But it was really great, and that's why I say this country has been just fabulous for me, because the opportunities would not have presented themselves. But I worked hard. It didn't just happen. That's like my kids always give me, "Okay, Dad, don't tell us about the onion story, please." They don't want to hear the onion story.

MCCREERY: You did a little bit of law teaching, too.

PANELLI: I did.

MCCREERY: How did you approach that idea of being in a classroom and facing the students?

PANELLI: I kind of liked it, but what I found is if you don't do it often enough the preparation — once you prepare the course it's okay. But man, I spent innumerable hours preparing the course. Then if you only did it for a while — and I was teaching custody and support. It was a family law course. That was tough. Then I've taught appellate advocacy programs. We just did one on a MCLE [Minimum Continuing Legal Education] cruise, and one of the lawyers that was on the cruise, I bumped into her on Saturday and she said, "We've got to do that again."

MCCREERY: What do you like to emphasize with the students?

PANELLI: I like to emphasize integrity, honesty, and ethics, that those are the things that are going to follow you. I used to give an orientation talk to



the new law students when they'd first come in, and those are the kind of things we talked about, because I said, "Even though, wherever you practice, unless you're practicing in New York or Los Angeles, most places the judges will certainly find out about you, so it's very important that you be honest, ethical, and have the integrity of when you say something it means something." So [I lecture] around those kind of virtues. That's kind of what I talk about.

I think when I get tired of doing this, if I ever get tired of doing it, what I'd like to do is hang out in the law school and be like a mentor, kind of like a father-confessor, where people come up and say, "I'm having this problem with this thing. What do you think?" Or, "I'm having these problems at home. What do you think?" beyond just the educational stuff.

MCCREERY: I know your ties to Santa Clara continue. Maybe that'll happen.

PANELLI: They gave me another three-year term.

MCCREERY: On the board?

PANELLI: Yes.

MCCREERY: Tell about the Panelli Golf Classic.

PANELLI: Yes. I started on a scholarship, and the money that we raise in the golf tournament is to fund, in part, the scholarship. The other part of the funding is for a student emergency loan fund. If you get sick — because some of the students are working — and you can't pay your rent because you're sick, we will make you a loan to take care of you until you get back on your feet. So part of the money that we raise in the golf thing goes to that.

We started that about six or seven years ago. We do a lot of work for a little money. But what it does, it does get people together, and hopefully in the long term the school will benefit from it, because as you know, fundraising is everpresent and you just have to keep at it. Hopefully when people do that, then some other people will start to do stuff.

We have this one woman who comes every year. She's not a Santa Clara graduate, but I did a mediation for them years ago, maybe eight, nine years ago, and she comes every year. Not only does she bring a foursome, but then she'll write a check for \$1,500, which is really kind of nice. She's been really faithful. But we do that.

MCCREERY: There's the Panelli Moot Court Room.

PANELLI: There's the Panelli Moot Court Room. I had these lawyers from Phoenix the other day, and he says, "I don't know if you remember, but my partner's daughter was going to Santa Clara and she lives at Panelli Place. There is a cul de sac that's maybe two blocks south of the university. It has about five or six town homes on it. It's called Panelli Place."

MCCREERY: Is that named after you?

PANELLI: I don't know. The city never asked me, but it's there.

MCCREERY: I'll have to have a look sometime.

PANELLI: Yes, if you're ever down at the campus.

MCCREERY: How are things at Santa Clara?

PANELLI: Good, good. They had their graduation on Saturday. I did not attend, because I figured I've been to probably — I used to have to go to the undergraduate, the law school, and the graduate graduations for nineteen years when I was chair. I used to always go when I was the assistant chair, because Ben Swig would only go to the undergraduate graduation, so I had to do the other two, as the assistant presiding chairman, vice chairman. So then I said, I don't need to listen to another commencement speech.

But things are going fine. They put up my plaque, as I told you. I checked it. No one has stolen it or defaced it yet.

MCCREERY: Congratulations. And the law school made lots and lots of progress over the years?

PANELLI: Right. Dean Polden is doing a very good job. Yes, the law school, of course, is so different from when I went there. First of all, the classes are so much larger, and the students are so much better. The profs are — this whole ABA supervision has gotten a lot more stringent than it used to be. I was on an ABA committee for clinical education, because they wanted to get them on the tenure track rather than having adjunct professors. Was it called clinical training? I remember one of the big issues was that they wanted to do away with externs, because you take them out of the classroom, and so the class — this almost felt like a union issue, because the professors, to the extent that you have someone away for a semester, if you had enough of them, then they wouldn't need this clinical instructor.

Of course, some of the extern programs were being abused, because sometimes some son or daughter would work in their father's law office, and that was the clinical training. But I was really a supporter of clinical training, externships, because I said for many people, that's the only exposure they got to working for a justice.

There's a young woman here, she introduced herself. She says, "You may not remember me, but I was an extern for you." I used to take so many externs. The face looked familiar to me, but I didn't really remember her. She introduced herself to me, and last week I had another one come up.

The fact is, one of the lawyers I had here today, he said, "Did you remember this person?" I've already forgotten her name. I said, "Yes, I remember." She said, "She was an extern for you." I said, "I know that, but I also did her wedding," at Berkeley at some, I don't know if it's a Jewish garden, or there's some sort of a garden out there and I did her wedding. I said, "I remember that." So my view was that it was an opportunity for people to get to work in the court they probably would not be able to do, especially when we're not doing annual clerkships. So I said, I think there has to be some supervision over these externship programs. A lot of people don't want to do it, because you have to supervise these kids.

MCCREERY: There are a lot of lawyers in California now. I wanted to ask you how you think the state bar is faring these days.

PANELLI: I'll be absolutely candid with you. I've never been a big supporter of the state bar. I obviously have belonged. I had a very interesting issue recently. The big issue now is they want — when you retire from the bench, most of us went inactive, because if you wanted to go on assignment you couldn't be an active member of the bar. If you had a certificate of good standing, which they give you, then you can do things.

But the state bar needed the money, so they suggested that all the retired judges who were doing ADR should pay the active bar duties. No one wanted to do that. No one wanted to become an active member. Then there was a question, if you did ADR whether that's the practice of law. There's a big dispute going on with the retired judges and the state bar over this.

I got someone who filed a complaint with the state bar suggesting that I was practicing law and I was an inactive member, which really bothered me, because this person never appeared before me, so he couldn't have said

I was giving legal advice, which, of course, you don't do in mediation. But they were going to use me as this test case, because all these other people here were inactive judges, and no one — but because here I was on the supreme court. The retired judges, the California Judges Association, had been negotiating with the state bar about this issue.

They were talking about, well, they may have some special deal. Anybody can do mediation. You don't have to be a lawyer. An engineer can do mediation. So it was just a way to get people to pay the dues. I said, if they want to say if you're in ADR, if you work for an ADR provider, even though you're inactive we want you to pay the dues, we've got to pay the dues. So rather than go through all that hassle, JAMS suggested that those of us who were inactive go active, so I'm now an active member of the state bar, requiring that I do the MCLE and all that kind of stuff. But I gave these lectures, so I don't have to worry about MCLE until 2008.

Meanwhile, the California Judges Association and the state bar are trying to come to some agreement. They may have had some tentative agreement what they can do, but the supreme court has to approve whatever these rules are. But I never was an active — I guess I was an officer of the county bar association in Santa Clara County, but I never was a delegate. I never got involved too much in that kind of thing. It was the politics of it, and I wasn't interested in it. Plus, I thought that a lot of the stuff they were doing, like legalizing marijuana and some of those crazy issues, they were not issues that I was interested in. I always thought they were much more to the left of where I was. But I paid my dues, and they did what they did, and that was fine with me.

MCCREERY: Thank you. I wonder if there are any topics we've talked about that you would like to say more about, because it's an awful lot of material to cover.

PANELLI: No, no, I don't think so, other than that I really appreciate this opportunity more than I can tell you, because of my background, and where I came from, and what I was able to do. To me that is very, very important, and so the fact that it is going to be memorialized historically to me is very, very significant.

I hope that my time on this earth was doing something more than taking up space. I always said that I wanted to make sure that there was something I did — people may not have always viewed it as what they would

want, but that the world might be a little better off in certain cases because I was here for a while. So that's why this was very important.

When I told my family — not my kids, my kids aren't interested — but my brother and sister, they thought that was a big deal. I mentioned yesterday — I was with this fellow who was responsible for me starting on the judicial track — and I told him we're doing this. He said, "That's appropriate." He said, "I'm glad that they're doing it, because they should recognize what you've done."

MCCREERY: You have given us a tremendous gift, and it'll be of great value for many years to come, so I thank you for that.

PANELLI: I hope so. I want to thank you, and I'm glad that the [Santa Clara] law school did something [in support of the oral history]. My wife hasn't been too fond of the law school, but when I told her that Dean Pol-den did this, she said, "I'm glad to hear that."

MCCREERY: Yes, their support was very important, very important. You'll get a chance to review this oral history in draft, and let me know if there's anything you want to add later on, but let me thank you so much, Justice Panelli.

PANELLI: Thank you. You have been just a pleasure.

MCCREERY: Thank you.

PANELLI: I think I may have asked you this. Are you a lawyer?

MCCREERY: I'm not a lawyer, so that's important to have in this record, I suppose.

PANELLI: Oh, I'm surprised. No, no, but the reason — I thought that by virtue of some of the questions you asked that you probably were.

MCCREERY: Thank you, but there's plenty about the law I don't know, so that's why I counted on you to illuminate things.

PANELLI: Thank you.





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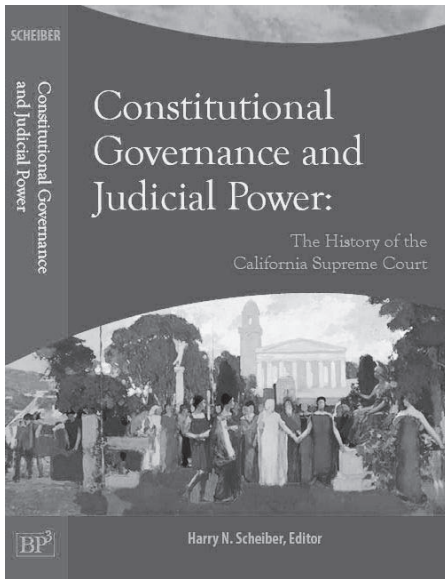
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