

GEORGE NICHOLSON

Introduction

From the Editor-in-Chief

This is my first issue as editor-in-chief of *California Legal History* and it is dedicated to the late Presiding Justice **Norman L. Epstein** of the California Court of Appeal, Second Appellate District, Division Four.

Justice Norm Epstein: The Man and his Legacy

Justice Epstein was an extraordinary man. Although a Democrat, Governors from both political parties appointed him to important judicial roles. “He was a judge for all seasons and all parties,” recalled Presiding Justice **Arthur Gilbert** of Division 6 of the Second Appellate District in the lead article in this issue of *California Legal History*, entitled “March is the Cruellest (Cruellest) Month.” (As Justice Gilbert uses “Norm” throughout his article, I will do the same as to all the friends whom I reference in what follows.)

Norm was Art’s dear friend, and he was mine. We three, and many other jurists, served together, argued together, and learned together for decades. But Norm was different. More than most of us, he was a teacher. Although it took an immense amount of extra work, he often taught at the Appellate Court Institute conducted regularly by the California Center for Judicial Education and Research. These Institutes are attended by many, and sometimes most, of our state’s 105 appellate justices and seven Supreme Court justices.

Norm was also a close friend and colleague of Bernard E. Witkin, or “Bernie” to all who knew him. Most (if not all) trial judges and appellate justices are very familiar with, and use Bernie’s three dozen volumes of treatises on key legal subjects. Although Bernie died in 1995, he lives on in

the minds and hearts of his many friends and in his treatises, from which others continue to rely for their research. After Bernie's death, Norm went from co-author to assuming Bernie's role with Witkin's three-volume criminal law treatise.

Of relevance here, Norm almost became the co-editor-in-chief of this very journal: After **Daniel M. Kolkey**, my friend and former colleague on the bench, became president of the California Supreme Court Historical Society, he asked me to become editor-in-chief of *California Legal History*, beginning with this issue. I worried, however, whether I was up to such a huge, complex task, which Selma Moidel Smith had handled so well for so long until she retired with the 2022 issue at the age of 102. So, I sought Dan's permission to bring in a friend to be co-editor-in-chief. When he asked whom, I responded: "Justice Norman Epstein." Dan, of course, knew him, as did everyone who has served on the California appellate bench, and he quickly agreed.

And since I had heard that Norm's obligations on the Witkin treatises had ended, I could not pass up the opportunity to again work with such a remarkable legal scholar and put his talents to use for the Society. So, I called and asked him to join me as co-editor. He asked what it would entail. I told him something that he well knew – that there are considerable, thankless tasks related to editing and publishing such a journal. But I assured him he would be burdened with none of them. Instead, his role would relate entirely to substantive editorial and literary work. He remarked, "You can't beat that!" and accepted.

We spoke many times by phone and by Zoom during the next several weeks. Finally, we planned an important, extended Zoom call to finalize our plans. But that call never happened. Instead, I received word that Norm had passed away peacefully in his sleep the night before, March 24 of this year. It was a very sad day for Norm's family, friends, all who knew him, and for me. Even so, I am certain he was excited about, and enjoyed, his far too short period of work on *California Legal History*.

Finally, I recall here a special memory I have of Norm. It began during an Appellate Court Institute more than 20 years earlier. Norm and I sat together for lunch. And I had the feeling that he had sought me out. After some small talk, he asked me for a favor. He began by reminding me of his experience as general counsel and vice chancellor of the California State University and Colleges – now California State University (CSU) – from 1962 to 1975.

He then outlined a project derived from his CSU experiences: “Working with several other trial judges and appellate justices, and with CSU, I have developed a program by which various CSU campuses regularly send an undergraduate to serve as an intern with each jurist working with us. The idea behind my program is not to groom potential lawyers, but to groom potential leaders. We do this by allowing students to help with and witness close up our judicial endeavors and collegial relationships with bench colleagues, chambers’ staffs, court staff, counsel, and parties.”

He went on, “One student, in particular, a young black man, impressed me greatly. I knew he had the fiscal wherewithal to finish his undergraduate work, but nothing more. Contrary to what is usually the case with our project, this young man expressed an interest in law school, but lamented his lack of the funds. So, I called Scott Bice, dean of the USC School of Law. I told Scott all about the young man. Scott told me not to worry, he would be admitted. I told Scott that he had misunderstood me and that the young man needed fiscal aid. Scott was silent for a moment before saying, ‘Don’t worry, he will have it.’”

That did not end Norm’s story. He concluded this way: “The young man graduated, moved to another city, began practice, and is a great success. He became the type of lawyer toward whom everyone looks when he enters the room.” Norm then turned to his favor. The details are not relevant here, but it involved the same supplication for aiding the human condition that Norm regularly sought time and again. Of course, I agreed to the favor. How could I have done otherwise?

Accordingly, I am humbled and honored to dedicate this issue of *California Legal History* to a great judicial, legal, educational, and humanitarian leader (and my friend), the late Norman L. Epstein.

For more insights about Norm in this issue of *California Legal History*, I commend to you an article by lawyer and legal scholar **John Wierzbicki**, entitled: “Epstein on Witkin: A Conversation with Norm Epstein about his 15-Year Association with Bernie Witkin.”

John also discusses Norm and his participation in the Society’s Witkin Oral History Project, in another article featured in this issue in the oral history section: “Knowing Bernie: The Witkin Oral History Project.”

New Histories Regarding Revolutions in the Administration of Criminal Justice

This issue of the journal also goes well beyond our homage to Norm and Bernie: It contains fresh historical perspectives regarding two revolutions in the administration of criminal justice in California.

In fact, there have been three major revolutions in criminal justice during the past 75 years.

The first revolution began in 1953 when President Dwight Eisenhower nominated, and the U.S. Senate confirmed, California Governor Earl Warren to be Chief Justice of the United States. During the next 15 years, Chief Justice Warren and his high court colleagues rendered many dramatic decisions that substantially changed criminal investigations and prosecutions everywhere in the nation. Those changes have long since been absorbed and applied by judges, prosecutors, criminal defenders, and peace officers, even as the high court continues to modify them and address others periodically.

The second revolution began slowly, twenty years after the first, by gradually providing victims of crime and their families with a narrow variety of governmental services but, eventually, by establishing actual legal rights for them, initially in California. As explained in one of the articles in this issue, the crime victims' legal rights movement was inspired philosophically by Oliver Wendell Holmes, Benjamin Cardozo, Leon Jaworski, Martin Luther King, Jr., and Elie Wiesel, and catalyzed empirically by Frank Carrington, Tom Bradley, Jim Rowland, and John Dussich. The crime victims' legal rights movement literally burst onto the political scene and out in the open in California in 1982, when voters began to imbed in the law, largely by initiative measures, a variety of statutory and constitutional rights for the victims of crimes and their families. During the ensuing decades, this second revolution spread to the other 49 states, each of which has adopted some or all of the legal rights first adopted in California. The federal government in key ways followed California's lead as well.

The very success of the second revolution led to a third revolution or, perhaps more accurately, counter-revolution. In many ways, it is a more dramatic and far more novel departure, procedurally and substantively, than those wrought by Chief Justice Warren and his colleagues or by those who initiated the crime victims' legal rights movement. This counter-revolution is ongoing actively. It has been dynamically achieved by the criminal defense bar and its supporters, in and out of government. In its more recent stages, it has acquired new allies, progressive prosecutors driven by non-traditional agendas.

It had been my intent to include articles on both the second and third revolutions in this issue of *California Legal History*, written by distinguished and highly experienced prosecutors and criminal defenders. But while I had little trouble finding members of the prosecutorial bar to write on either revolution, I had considerable difficulty finding members of the criminal defense bar with the time to write. When I finally began to succeed in locating criminal defenders who were willing and had the time to write, it was too late in the 2023 publication cycle. Thus, their story must be presented in the 2024 issue of *California Legal History*.

As a result, the prosecutorial bar's analysis and perspective will be presented this year (2023), while the criminal defense bar's analysis and perspective will be presented next year (2024). Both sides will be represented by highly respected, able, and veteran lawyers and judges. Our 2024 issue will also feature *two* additional articles about the history and evolution of two prisoner and prison family service projects. I will then reveal the distinguished authors.

In this issue, **Todd Spitzer** and **Greg Totten** – among California's most able and experienced prosecutors – provide their analysis and perspective in their article entitled, “Did *Brown v. Plata* unleash a much larger and more dangerous Genie out of the Bottle?”

The views of these two individuals warrant our attention because there is nothing in print comparable to their work and they are exemplary lawyers. Todd Spitzer served as a trial prosecutor in Orange County from 1990 to 1996, and was elected district attorney for Orange County in 2018 and re-elected in 2022. He has been a member of the California State Bar for nearly 35 years.

Before retiring, Greg Totten served 18 years as district attorney of Ventura County, having been elected five times. He is now chief executive officer of the California District Attorneys Association. He has been a member of the California State Bar for more than 40 years.

Their article arose from discussions catalyzed by the California District Attorneys Association's Institute for Education and Research, which has, as part of its charge, the education of prosecutors, others who practice criminal law, and the general public regarding the administration of criminal justice.

In a separate article offering a historical perspective on the second revolution, **Nancy O'Malley**, who served four decades as a prosecutor in Alameda County including three terms as the elected district attorney, and **Harold “Bosco” Boscovich**, an inspector in the Alameda County District Attorney's Office, and co-founder and first director of the office's Victim

Witness Assistance Division where he served for almost a half century, draw upon their vast experience regarding the advent and evolution of a variety of victims' services offered by district attorney offices, to author their article, "Victims' Rights in California."

This issue **includes a related article, this one on the evolution of victims' legal rights from a first-hand perspective.** When Dan Kolkey invited me to become editor-in-chief of *California Legal History*, he soon learned that I had been working on a potential law journal article for two years, "The Roots of America's Crime Victims' Legal Rights Movement, 1975-2023, A Personal Retrospective." He encouraged me to publish it in this issue of the journal. I was reluctant, but he insisted. And so, it also appears herein.

To provide balance, as noted above, our **2024 issue anticipates** showcasing an article by distinguished and venerable members of California's criminal defense bar who will provide their analysis and perspective on the history of the administration of criminal justice in California, with an emphasis on the third revolution or counter-revolution, referenced above. The authors may have something to say about the articles on the administration of criminal justice published in this, the 2023 issue of *California Legal History*. Next year's issue will also feature two articles about the history and evolution of prisoner and prison family service projects. The authors of the three articles will be introduced next year.

California Without Law: 1846 Though 1850

On an entirely different historical subject, this issue includes an article by retired Contra County Superior Court Judge **Barry Goode** and attorney **John Caragozian** based on the California Supreme Court Historical Society's successful webinar entitled, "California Without Law 1846-1850: How the American instinct for the rule of law confronted an uncertain mix of Mexican and military law — and a treaty negotiated without authority." This piece offers an incredible story of the law governing California after the *Treaty of Guadalupe Hidalgo* before California became a state — a period in which few have any background.

Three Prize-Winning Articles from Our Student Writing Competition

Each year, the California Supreme Court Historical Society conducts its annual Selma Moidel Smith Student Writing Competition, awarding cash prizes for the top three student essays.

This issue also includes the three award-winning student essays in 2023 on a diverse set of subjects:

Kyle DeLand, a UC Berkeley Law student, won first place for his essay, “The End of Free Land: The Commodification of Suscol Rancho and the Liberalization of American Colonial Policy.”

Michael Banerjee, another UC Berkeley Law student, placed second for his essay, “California’s Constitutional University: Private Property, Public Power, and the Constitutional Corporation, 1868–1900.”

And **Miranda Tafoya**, a UC Irvine Law student, won third place for her essay, “A Shameful Legacy: Tracing the Japanese American Experience of Police Violence and Racism from the Late 19th Century Through the Aftermath of World War II.”

The Oral History of Supreme Court Justice John Arguelles

Finally, this issue concludes with the Society’s traditional inclusion of an oral history of a past California Supreme Court justice. In this issue, we include: “From the ‘People’s Court’ to The Supreme Court, Remembering the Legacy of Justice John Arguelles,” an oral history of former Associate Justice John Arguelles by **Laura McCreery**. The Introduction and Conclusion were done by journalist **Ryan Carter**.

McCreery is a former researcher in residence and former visiting scholar at the Institute for the Study of Societal Issues, Berkeley. She has conducted oral histories of nine justices, including two chief justices, of the California Supreme Court, Armand Arabian, John A. Arguelles, Marvin Baxter, Ming W. Chin, Ronald M. George, Malcolm M. Lucas, Carlos R. Moreno, Edward A. Panelli, and Kathryn Mickle Werdegar. Her oral history of Chief Justice Ronald M. George, “Chief: the Quest for Justice in California,” was named a California Book Award winner by the Commonwealth Club for 2013.

Some final Thoughts

I am very grateful for the kind and generous assistance provided by many friends and colleagues without which the 2023 issue of *California Legal History* would never have been compiled or completed: Daniel M. Kolkey, Art Gilbert, Ryan Carter, Jake Dear, Molly Selvin, Levin, Elaine “Em” Holland, Stuart Greenbaum, Kate Cook, Ben Thompson, Ellen Arabian-Lee, Janet Mueller, John Wierzbicki, and Chris Stockton.