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Victims' Rights Remedies, and Resources: A Maturing Presence in American Jurisprudence

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> *"[I]n the administration of criminal justice, courts may not ignore the concerns of victims."*[1]

INTRODUCTION

A decade has passed since voters adopted Proposition 8, the Victims' Bill of Rights.[2] While the initiative's impact has been substantial, it has not been cataclysmic as some predicted. Cardozo's observation in *Palko v. Connecticut*[3] seems relevant. "There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before."[4]

Proposition 8 did not come easily or quickly. Fifteen years ago, Los Angeles Mayor Tom Bradley declared: "There is a growing awareness among many today that victims of violent crime have too long been the 'forgotten persons' within our society and within

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1. Morris v. Slappy, 461 U.S. 1, 14 (1983).

2. Victims' Bill of Rights, Initiative Measure Proposition 8 (approved June 8, 1982) (codified at CAL. CONST. art. I, §§ 12, 28; CAL. PENAL CODE §§ 25, 667, 1191.1, 1192.7, 3043 (West 1988 & Supp. 1992); CAL. WELF. & INST. CODE §§ 1732.5, 1767, 6331 (West 1984)). *See* Brosnahan v. Brown, 32 Cal. 3d 236, 300-06, 651 P.2d 274, 314-20, 186 Cal. Rptr. 30, 70-76 (1982) (setting forth the ballot pamphlet containing Proposition 8's text and the arguments and analysis regarding the initiative).

3. 302 U.S. 319 (1937).

4. *Id.* at 328.

our criminal justice system. There is much justification for this concern."[5]

Later that same year, Virginia lawyer Frank Carrington wrote a book "for the average citizen rich or poor, white or black--in order to emphasize . . ." the neglected status of victims of crime in the administration of criminal justice.[6] Carrington also believed "the victim's current sorry status *need not be so* and that something can and must be done to enhance . . ." the rights of all victims of crime.[7]

Three years later, victims' rights were still not evident as Supreme Court of California Justice Stanley Mosk correctly noted: "I must concede there is an element of accuracy to the oft-repeated contention that 'criminals have all the rights.' *That is elementary constitutional law.* One will look in vain among our Bill of Rights and among its counterpart in the state constitution for guarantees to victims, or to the public, or to any person other than the accused."[8]

I. WITKIN HAS SOMETHING TO SAY

As the century's eighth decade began, Bernard Witkin, California's leading legal commentator, made some striking and relevant observations. They were particularly notable because of his unparalleled status in the state's legal community.[9]

Perhaps the most telling of Witkin's comments at the time appeared in a speech he gave to the Media Workshop on California

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5. Bradley, *The Forgotten Victim*, 3 CRIME PREVENTION REV. 1, 1 (1975).

6. F. CARRINGTON, THE VICTIMS (1975). Earlier this year, this distinguished lawyer met an untimely demise in a residential fire. *See In Memoriam*, 23 PAC. L.J. (1992).

7. CARRINGTON, *supra* note 6, at xxiii (emphasis in original).

8. Mosk, *Mask of Reform*, 10 SW. U.L. REV. 885, 889-90 (1978) (emphasis added).

9. Witkin's remarkable intellect and unique stature were colorfully described by Jack Leavitt: "The law is a seamless web and Bernie is the only spider who knows all the strands." Rodarmor, *An Interview with Bernard Witkin*, CAL. MONTHLY 10 (Univ. of Cal. Alumni Ass'n, Oct. 1983). Otto Kaus asserted, "There are twenty to thirty thousand lawyers in California who start their research with Witkin." *Id.* (That number is far too conservative). *See* Kang, *Bernard Witkin--The 'Guru to the California Judiciary,'* San Francisco Examiner & Chron. Feb. 13, 1983, at B1.

Courts held in June 1980 in Berkeley. During the speech, Witkin asserted:

> For decades many of our finest minds--in the law schools, in the bar and on the bench--have been relentlessly exposing the ailments of the system and painstakingly outlining projects of reform. Their massive intellectual products rest quietly on acres of bookshelves--no longer dusty in this modern age--but still in relatively mint condition. In various ways these studies and reports deliver the same message: that while lawyers never had it so good, the legal system never had it so bad.
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> One of these reports deserves special mention. It comes from the nation's most articulate contemporary in-house observer; John Frank of Phoenix, Arizona. Law professor, practicing lawyer, prolific author and dedicated reformer, he is virtually unknown to the American bar, bench, and public. About 12 years ago he delivered a series of lectures on the dedication of the institution at which we are now meeting, the Earl Warren Law Center. The lectures later appeared in book form under the title, 'American Law: The Case for Radical Reform.' This enlightening and frightening work ought to be required reading for every judge and lawyer as well as for those in the media who report on legal affairs.
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> Toward the end of Frank's comprehensive review of our legal institutions and manner of their operation, he offers a considered judgement:
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> > First, . . . American civil justice has broken down; the legal system fails to perform the tasks that may be expected of it. Second, the collapse is now. It menaces the rights of our citizens to a determination of their disputes and jeopardizes the capacity of commerce and industry for reasonable planning and action. Third, the curve is down; the situation is getting worse. Fourth, we have no generally accepted remedy. We do not even have a generally accepted program for discussion.
>
> Frank describes at great length and in fearsome detail our expensive advocacy and counseling, our cumbersome procedures, our crowded civil trial courts, our slow moving appellate courts, our criminal trial sideshows and our long drawn out postconviction reviews of criminal convictions. And, as he dissects the majestic failures of reform movements of the past, he warns us that our current legislative and judicial efforts are often based upon the same misconceptions that

fatally infected the others. Almost without exception they make legal procedures more complex and time-consuming and expensive. He concludes with a series of far-ranging recommendations, prefaced by this declaration:

> We must be prepared to reconstruct the institutions of law and remodel our lawyers and our judges, even our buildings. We must be prepared to change the substantive law altogether, in every reach, cutting it down to a size our groaning court system can handle. We must be prepared most radically to change our methods.[10]

Witkin declared none of this could occur without informed legislators and electors.[11] Such actions, he concluded, could only come with help from an informed and conscientious media.[12] Witkin, and this discussion, were early catalysts for preliminary work on Proposition 8.[13]

II. VICTIMS BEGIN TO ACT

Even as Bradley, Carrington, Mosk, and Witkin aired their views, there was little room for optimism. Change requires leaders, and even as these gentlemen spoke, there were few effective advocates of criminal justice reform, and even fewer in the fledgling victims' rights movement. It was soon perceived that if there was to be any meaningful leadership for change, it was essential to involve actual crime victims and their families. This perception led to the formation of a potent and credible force--

10. Witkin, *A Plan to Send the Media to School*, L.A. Daily J., July 3, 1980, at 4.

11. *Id.*

12. *Id.*

13. *See* Witkin, *The Second Noble Experiment of the Twentieth Century*, CAL. DISTRICT ATT'Y ASS'N, PROSECUTOR'S BRIEF at 42 (Sept.-Nov. 1977); People v. Barraza, 23 Cal. 3d 675, 695-96, 591 P.2d 947, 958-59, 153 Cal. Rptr. 459, 470-71 (1979); Cox, *Witkin Points to 'Mind-Boggling Novelties' in Advance Sheets*, L.A. Daily J., Oct. 13, 1980, at 2. *See also* People v. Remiro, 89 Cal. App. 3d 809, 822, 153 Cal. Rptr. 89, 98-99 (1979), *cert. denied*, Remiro v. California, 444 U.S. 876 (1979), *and cert. denied* California v. Little, 444 U.S. 937 (1979).

crime victims themselves.[14] After all, who could credibly challenge the parent of a murdered child?

Examples of advocacy by actual victims are far too numerous to chronicle. A few are illustrative. The names of Doris Tate and Marilyn Ettl, both of whom lost children to murder, became household words as the two women worked for years to change California law.

Robert and Charlotte Hullinger of Ohio, after a similar loss, formed Parents of Murdered Children (POMC), which promptly became national in scope. (There is also an organization for children of murdered parents.) Later, four dozen California members of POMC, including Sam and Louise LaCorte and Iris Skinner, played key roles in qualifying and passing Proposition 8. POMC followed up with a friend of the court brief when the Supreme Court of California upheld the initiative.

After losing a daughter to a drunken driver, Candy Lightner of California formed Mothers Against Drunk Drivers (MADD). Modern intolerance, including hers and MADD's, appears to have contributed to a continuing decline in alcohol-related motor vehicle deaths.[15]

With Frank Carrington's help, Howard and Constance Clery of Pennsylvania labored to promote safer college campuses after their daughter's death in a campus murder.[16] With attorney Kevin Washburn's help, Robert and Connie Hosemann of California similarly worked to promote safer public school campuses after a series of campus assaults on their son.[17]

Most recently, Gary and Collene Campbell of California, after losing a son and two other family members to murder, helped

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14. *See generally* Beyette, *Murder Victims' Parents Join Forces*, L. A. Times, July 9, 1982, § V, at 1; Kerr, *Victims Get Political*, 5 CAL. LAW., no. 8, at 14 (Aug. 1985).

15. This decline has been recently documented by the federal Centers for Disease Control and the National Highway Traffic Safety Administration. Neergard, *Curbing Drunken Driving*, Sacramento Bee, Dec. 6, 1991, at A17.

16. *See* Carrington, *Campus Crime and Violence: A New Trend in Crime Victims' Litigation*, VIRGINIA BAR A. J. 4 (Winter 1991).

17. *See* RAPP, CARRINGTON & NICHOLSON, SCHOOL CRIME AND VIOLENCE: VICTIMS' RIGHTS (1986); Nicholson, Rapp & Carrington, *Campus Safety: A Legal Imperative*, 33 WEST'S EDUC. L. REP. 981 (1986).

qualify and pass Proposition 115, the Crime Victims Justice Reform Act, in 1990.[18]

All these people have expressed some fulfillment at merely being able to do something. Thus, an unexpected but positive result accrued because they and other victims, along with their families, have been able to gain limited relief merely from having opportunities to become involved, regardless of whether they actually achieved anything tangible.[19]

Other people encouraged victims to get involved and worked with them to improve the administration of criminal justice, particularly in making Proposition 8 a reality. Among them were Ronald Reagan, George Deukmejian, Pete Wilson, Edwin Meese III, S. I. Hayakawa, John Doolittle, Mike Curb, Alister McAlister, Quentin Kopp, Jim Nielsen, Robert Presley, Carol Hallett, Pat Nolan, Dennis Brown, John Lewis, Don Sebastiani, Nolan Frizelle, Rodney Blonien, Frank Carrington, Donald Stahl, Byron Morton, Joseph E. Taylor, Lois Haight Herrington, Robert McElreath, Stuart Greenbaum, Stephen Boreman, Fred Hanelt and John Cotter.[20] H.

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18. Crime Victims Justice Reform Act, Initiative Measure Proposition 115 (approved June 5, 1990) (codified at CAL. CONST. art. I, §§ 14.1, 24, 29, 30; CAL. CIV. PROC. CODE §§ 223, 223.5 (West Supp. 1992); CAL. EVID. CODE § 1203.1 (West Supp. 1992); CAL. PENAL CODE §§ 189, 190.2, 190.41, 190.5, 206, 206.1, 859, 866, 871.6, 872, 954.1, 987.05, 1049.5, 1050.1, 1054, 1054.1, 1054.2, 1054.3, 1054.4, 1054.5, 1054.6, 1054.7, 1102.5, 1102.7, 1385.1, 1430, 1511 (West Supp. 1992)). *See* Raven v. Deukmejian, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990) (upholding the overall constitutionality of Proposition 115, but striking down the addition of article I, section 24 to the California constitution).

19. In California, victims now have the opportunity to gain limited relief through involvement in sentencing and parole proceedings. *See* CAL. PENAL CODE §§ 1191.1-1191.15, 3043, 3058.6-3058.8 (West 1982 & Supp. 1992); CAL. WELF. & INST. CODE § 1767 (West 1984).

20. There were 50 state legislative proponents in all, representing both parties. Others included Senators Dan Boatwright, William Campbell, Paul B. Carpenter, William Craven, Ed Davis, Jim Ellis, John Garamendi, Marz Garcia, Ray Johnson, Ken Maddy, Dan O'Keefe, Newton Russell, John Schmitz, John Seymour, and Ollie Speraw, and Assemblymembers William Baker, Marian Bergeson, Gordon Duffy, Gerald Felando, William Filante, Robert C. Frazee, Wally Herger, Charles Imbrecht, William Ivers, Ross Johnson, David Kelley, Ernest Konnyu, Marian LaFollette, Bill Lancaster, William Leonard, Gib Marguth, Richard Mountjoy, Robert Naylor, Don Rogers, Marilyn Ryan, Stan Statham, Dave Stirling, Larry Stirling, Norm Waters, Chet Wray, Cathie Wright, Phil Wyman and Bruce Young. Other governmental proponents included: Several county boards of supervisors, among them the Los Angeles, Orange and Tulare boards; several city councils, among them San Diego's; law enforcement proponents, 275 police chiefs, sheriffs and district attorneys, the California District Attorneys Association, California Peace Officers Association, California Sheriffs Association, California Police Chiefs Association, California Correctional Peace Officers Association, California

L. Richardson and various of his colleagues, including Wayne Johnson and Tim Macy contributed, most notably, to qualifying Proposition 8. Earl and Doris Huntting, and of course, Paul and Nell Gann also played key roles.[21]

III. CALIFORNIA LAW IS CHANGED

Recalling Justice Mosk's 1978 memorialization of the absence of crime victims' rights, it is instructive to consider what soon followed. Four years later, voters adopted Proposition 8 and created a number of victims' rights, prefaced by: "The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern."[22]

Justice Administrators Association, Peace Officers Research Association of California (comprised of 35,000 peace officers), Los Angeles Association of Deputy District Attorneys, Association of Los Angeles Deputy Sheriffs, Los Angeles Police Protective League, Pasadena Peace Officers Association, San Diego County Police Chiefs and Sheriffs Association, Kern County Police Chiefs Association, Kern County District Attorneys Association, Peace Officers Political Action Committee of Alameda County, San Francisco Police Officers Association, Marin County Police Chiefs Association, and the San Mateo County Police Chiefs Association. Citizens group proponents included: Parents of Murdered Children, Citizens for Law and Order, WeTip, Crime Victims Legal Advocacy Institute, Americans for Effective Law Enforcement, and the California State Chamber of Commerce. Political proponents included: California Republican Party, California Young Americans for Freedom, California Republican Assembly, and the Law & Order Campaign Committee. Byron Morton died in 1982 at age 60. His widow, Doris, also helped with Proposition 8. *See infra*, note 72 (for a partial list of opponents).

21. Earl Huntting died in 1983 at age 72 and Paul Gann died in 1989 at age 77. Both gentlemen began their work merely as interested and concerned citizens. Once engaged, however, they were tireless and effective in helping to improve the plight and enhance the rights of crime victims. They continued to help until the very moments of their deaths. Gann's demise was a tragic outgrowth of his vigorous lead role in the campaign for Proposition 8. During that campaign he overextended himself, suffered a heart attack, received an HIV infected blood transfusion, and eventually contracted AIDS. To the end, he was cheerful and undaunted. *See*, McAlister & Carrington, *Paul Gann, Citizen Politician*, BENCHMARK, Vol. IV, No. 1, at 67 (Winter 1988).

Gann, Huntting, and Carrington were indispensable to the recognition and development of victims' rights in California and America.

22. CAL. CONST. art. I, § 28(a) (enacted by Proposition 8). *See* Carrington & Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1 (1984). This was the lead article in a special symposium edition of the Pepperdine Law Review devoted to victims' rights. *See also* Carrington & Nicholson, *Victims' Rights: An Idea Whose Time Has Come--Five Years Later: The Maturing of an Idea*, 17 PEPPERDINE L. REV. 1 (1989).

California's Legislature responded four years after Proposition 8 became law and passed a series of statutes with the intent "to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity."[23] The Legislature also mandated victims' rights must be "honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants."[24]

After yet another four years, voters adopted Proposition 115.[25] Echoing Mayor Bradley from 15 years earlier, voters declared:

> We the people of the State of California hereby find that the rights of crime victims are too often ignored . . . and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system. . . . The goals of the people in enacting this measure are to create a system . . . in which crime victims and witnesses are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes, neighborhoods, and schools.[26]

The principal and traditional criminal justice purposes of Proposition 8 have been accomplished.[27] And, "[a]lthough California criminal law practitioners may regard the changes brought about by Proposition 8 as revolutionary, in reality, the most revolutionary impact of Proposition 8 is simply to bring

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23. CAL. PENAL CODE § 679 (West 1988). Section 679 was enacted in 1986 as part of Title 17 of the California Penal Code, entitled *Rights of Victims and Witnesses of Crime.* 1986 Cal. Stat. ch. 1427, sec. 1, at 5119 (enacting CAL. PENAL CODE §§ 679, 679.01, 679.02). *See also* CAL. PENAL CODE §§ 13835-13835.10 (West Supp. 1992) (establishing a statewide victim-assistance training program); 13897-13897.03 (West Supp. 1992) (establishing Victims' Legal Resource Center); 42 U.S.C.A. § 10606 (West 1991); *id.*, Historical and Statutory Notes ("Sense of Congress With Respect to Victims of Crime").

24. CAL. PENAL CODE § 679 (West 1988).

25. Crime Victims Justice Reform Act, Initiative Measure Proposition 115, *supra* note 18.

26. TEXT OF PROPOSED LAW, § 1, *in* CAL. BALLOT PAMPHLET, *supra* note 18, at 33 (setting forth preamble to Proposition 115). *See* also CAL. CONST. art. I, § 14.1, Note (Deerings Supp. 1992). "The initiative enacts procedural changes aimed at expediting the criminal justice process to benefit crime victims and witnesses." People v. Banner, ___ Cal. App. 4th ___, ___, ___ Cal. Rptr. 2d ___, ___ (1992) (*printed in* San Francisco Daily J., D.A.R. at 2663, 2666 (Feb. 28, 1992)).

27. People v. Barrow, 233 Cal. App. 3d 721, 723, 284 Cal. Rptr. 679, 680 (1991), *rev. denied*, 1991 Cal. LEXIS 5495 (LEXIS, Cal. library, Cases file) (1991). Much the same can already be said of Proposition 115. *See* Bowens v. Superior Court, 1 Cal. 4th 36, 39, 820 P.2d 600, 601-02, 2 Cal. Rptr. 2d 376, 377-78 (1991).

California law into conformity with that of most other jurisdictions."[28]

Proposition 8's purpose of establishing a legally cognizable right to public safety has been slower in coming. Beyond occasional philosophical notations, no court had declared such a right existed prior to February 10, 1992, when, in *County of San Diego v. Cory*,[29] Superior Court Judge Michael Greer found his county had been shortchanged approximately one billion dollars by a state funding disbursements formula which "was irrational, arbitrary and capricious from its inception."[30] Judge Greer concluded the formula resulted in a denial of equal protection of the law and had "brought the county government [of San Diego] to the brink of fiscal ruin" and "the criminal justice system to its knees."[31]

Judge Greer declared:

> Surely, the right of the citizens of this State to be safe in their homes and in their communities must be afforded the same protection as the rights of those people who commit crimes against the persons and property of the people of California. Since the rights of criminal defendants are protected in this State on the ground those rights are 'fundamental interests,' justice demands that the right of the citizens of this State to public safety, which is now expressly recognized in Article I, section 28 of the California Constitution [Proposition 8], be recognized as a fundamental interest deserving equal protection of the laws.
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> Therefore, within the context of judicial review under the equal protection provisions of the California Constitution, and pursuant to Article I, section 28, subdivision (a) of the California Constitution, this Court finds the right to public safety is a fundamental right, and the interest in protecting and encouraging public safety through appropriate

28. Goldberg, *The Impact of Proposition of 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases*, 24 LOY. L.A.L. REV. 621, 652 (1991).

29. *See* Amended Tentative Statement of Decision, County of San Diego v. Cory, San Diego Superior Court, Case No. 578681 (Feb. 18, 1992) (copy on file at *Pacific Law Journal*).

30. *See id.* at 58.

31. *Id.* at 59.

> detention, incarceration, prosecution and punishment of persons committing crimes in this State is a fundamental interest.[32]

Judge Greer relied on Proposition 8[33] and:

> [P]lowed new legal territory with [t]his ruling by concluding that a citizens' right to public safety is as fundamental as the rights giving equal protection under the law to all people accused of crime. . . . In doing so, [he] 'carved out an entirely new constitutional right,' said University of San Diego law professor Robert Fellmeth. 'This is going to be a very major case' Fellmeth said. '[Judge Greer] has definitely thrown down the gauntlet in applying equal protection concepts' to public safety.[34]

Whether Judge Greer's decision will withstand appeal remains to be seen. If nothing more, his opinion may remind governmental officials, especially judicial leaders at all levels, as well as state and local prosecutors, defenders, law enforcement officers, mental health care leaders, and probation and corrections officials, that justice is more than a compilation of moral and legal principals, however eloquently expressed. Justice is hard, complex work. It is also costly, in both human and economic terms. It entails long- and short-term planning, budgeting, personnel, business and statistical

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32. *Id.* at 50-51.

33. *Id.* at 28-36, 48-52.

34. Krueger & Hearn, *Judge Orders State to Give County More,* San Diego Union-Tribune, Feb. 11, 1992, at A1, A7. The roots of this decision may be discerned in a number of sources. *See* CAL. CONST. art. I, §§ 1, 28; *id.*, art. II, § 1. *See also* United States v. United States District Court, 407 U.S. 297, 312 (1972); Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Craig v. Superior Court, 54 Cal. App. 3d 416, 427, 126 Cal. Rptr. 565, 570 (1976); Breed v. Superior Court, 63 Cal. App. 3d 773, 785, 134 Cal. Rptr. 228, 235-36 (1976); Condit and Nicholson, *The Ultimate Human Right: Governmental Protection From Crime and Violence,* 52 L.A. BAR J. 314 (1977); Willing, *Protection by Law Enforcement: The Emerging Constitutional Right,* 35 RUTGERS L. REV. 1 (1982); Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals,* 16 HASTINGS CONST. L.Q. 329 (1989); Finnie, *Budget Cuts Said to Presage Justice Doom,* San Francisco Daily J., Feb. 10, 1992, § I, at 2; Matthew, *Why Has Government Failed To Provide The Basic Civil Right of Personal Safety?,* San Francisco Daily J., Nov. 16, 1990, at 4. *See generally* Armster v. United States District Court, 792 F.2d 1423, 1429-30 (9th Cir. 1976); Rider v. County of San Diego, 1 Cal. 4th 1, 820 P.2d 1000, 2 Cal. Rptr. 2d 490 (1991), *modified, reh'g denied,* San Francisco Daily J., D.A.R. at 2072 (Feb. 14, 1992); Carrizosa, *Sales Tax Case Won't Be Reheard by Justices,* San Francisco Daily J., Feb. 14, 1992, at 1; People v. Browning, 108 Cal. App. 3d 117, 122, 166 Cal. Rptr. 293, 295 (1980).

reporting and analysis and, perhaps most importantly, recognition by everyone involved that they are interrelated and must, effectively, communicate, cooperate, and collaborate in legal *and* administrative arenas.[35]

IV. RESTITUTION: A PROMISING, BUT NEGLECTED OPPORTUNITY

> It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer.

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35. Chief Justice Malcolm Lucas has formed the Commission on the Future of the California Courts. The Commission will publish a series of papers and conduct programs later this year and in 1993 to sketch a vision of where justice ought to be in the year 2020. These efforts will be followed by development of a five-year plan to help move toward that vision. The Commission provides a unique opportunity for communication, cooperation, and collaboration in a scholarly, public service oriented setting. Anyone who wishes to contribute to the Commission's important work should contact Mr. Robert W. Page, Jr., Acting Director, Administrative Office of the Courts, State of California, 303 Second Street, South Tower, San Francisco, California 94107.

"Companies need two systems. One to run the business and one to develop new ideas." Pearson, *Tough-Minded Ways to Get Innovative*, HARV. BUS. REV. 99, 100 (May-June 1988). The Commission on the Future of California Courts gives the state's legal profession an opportunity to follow the advice of Professor Pearson because the same concept applies to the operational aspects of the judiciary and the law. *See* DATOR & RODGERS, ALTERNATIVE FUTURES FOR THE STATE COURTS OF 2020 (1991); DAVIS & DAVIDSON, 2020 VISION (1991); ALBRECHT, THE CREATIVE CORPORATION (1987); Nicholson, *Judges, Technology and the Future*, 27 COURT REV., no. 1, at 5 (Spring 1990); Nicholson, *The Courthouse of the Future, in* LAW, DECISION-MAKING, AND MICROCOMPUTERS 125 (Nagel ed. 1991) (additional readings pertinent to this subject).

> The common picture of an American court is that of an institution rooted in the past, resistent to change, and resigned to inefficiency... erase that picture once and for all. Our society needs a court system that can provide justice speedily, efficiently, and responsively--and needs it too much to allow its future to be left to chance.... All of us who are involved with the State courts of this nation need to be more active and purposeful in shaping their future. We are the ones who best understand the problems of our justice system; we have given the most thought to solving them; and we are the best equipped, by our experience, our insights, and our positions of leadership, to make lasting improvements to the system.

C. C. Torbert, Jr., Opening Comments to the Future of the Courts Conference (May 1990), *in* DATOR & RODGERS, *supra*, at ix. *See also infra* notes 73-74 (comments of Roy Aaron). Some reforms are already underway. *See* CAL. GOV'T CODE §§ 68600-68620 (West Supp. 1992) (trial court delay reduction); *id.* §§ 77000-77400 (West Supp. 1992) (state trial court funding); 1991 CAL. STAT. ch. 90, sec. 1-77 (enacting Trial Court Realignment and Efficiency Act of 1991). Pressure to reform is never ceasing. Miller, *The State's Penal Code Needs To Be Redrafted*, L.A. Daily J., Mar. 6, 1992, § I, at 5.

> Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.[36]

Although court-ordered recompense for victims is thus mandated, direct restitution from criminals is not faring well. During this era of money crunches and tight budgets, restitution continues to be a problem in countless jurisdictions. Some people, including many judges, say "you can't get blood from a turnip" when discussing the matter. This faulty, but broadly held conventional wisdom assumes, without empirical foundation, that few convicted criminals can afford to pay restitution.

Nevertheless, there are credible and effective restitution programs sprinkled throughout the nation that refute conventional wisdom. For example, Montgomery County, Pennsylvania, which has a population of more than 650,000 people, computerized its court collection processes and, with periodic assistance from local law enforcement, has increased restitution collections by up to twenty-five fold, from $20,000-30,000 annually to more than a half million dollars.[37] Similarly, Montgomery County has increased its

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36. CAL. CONST. art. I, § 28(b) (enacted by Proposition 8). *See* Note, *Restitution For Crime Victims: The California Legislature Responds To Proposition 8*, 14 SW. U. L. REV. 745 (1984). The following citations provide the interested reader with a statutory and case law context for dealing with restitution in California: CAL. PENAL CODE §§ 155.5, 416, 1191.1-1191.2, 1192.3, 1202.1, 1202.4-1202.5, 1203, 1203.1, 1203.1d, 1203.1f-1203.1h, 1203.1j-1203.1*l*, 1203.4(h), 1205.5, 1214, 1214.5, 2085.5 (West 1988 & Supp. 1992); CAL. GOV'T CODE §§ 11519, 13960.1, 13967, 13967.2, 13967.5, 26820.4(b), and 72055(c) (West 1980, 1988 & Supp. 1992); CAL. WELF. AND INST. CODE §§ 729.6-729.7, 730, 730.6, and 731.1 (West 1984 & Supp. 1992); CAL. CIV. PROC. CODE §§ 37, 340.2-340.3 (West Supp. 1992). *See also* 18 U.S.C.A. §§ 3579-3580 (West 1985); People v. Walker, 54 Cal. 3d 1013, 1019, 819 P.2d 861, 864, 1 Cal. Rptr. 2d 902, 905 (1991); People v. Vasquez Diaz, 229 Cal. App. 3d 1310, 1316, 280 Cal. Rptr. 599, 602 (1991); People v. Dailey, 235 Cal. App. 3d Supp. 13, 16, 286 Cal. Rptr. 772, 773-74 (1991); People v. Broussard, 1 Cal. App. 4th 335, 339, 2 Cal. Rptr. 2d 22, 24 (1991); People v. Diaz, 2 Cal. App. 4th 1275, 1282, 3 Cal. Rptr. 2d 658, 661 (1992). *See generally* Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 112 S. Ct. 501, 509-10 (1991); People v. Cookson, 54 Cal. 3d 1091, 1097, 820 P.2d 278, 282, 2 Cal. Rptr. 2d 176, 180 (1991).

37. Harmon, *Computerizing A Court System*, THE LAWYERS' PC 8A-8L (Nov. 1, 1988). *See also* Cole, *Fines Can Be Fine--And Collected*, A.B.A. JUD. ADMIN. DIV., THE JUDGES J. at 5 (Winter 1989); Ternus, *State's Collected Fines Figure Less Than Expected*, The Daily Recorder, Feb. 3, 1992, at 1.

criminal fine and court cost collections from fourteen percent of those assessed to more than ninety percent.[38]

There is a further impediment to restitution collections that compounds the low priority such collections are often accorded by today's financially-strapped local bureaucracies. That impediment rests in the tendency to collect fines and other costs first because fines go directly into governmental coffers. Consequently, restitution collections are often neglected because they go entirely to crime victims. This practice is incongruous because restitution is the only assessment that is constitutionally mandated, at least in California.[39] Fines and other assessments are merely statutory in origin.[40]

Taking all this into account, it appears Learned Hand was on target when he asserted some things are so fundamental that even their universal disregard will not excuse their omission.[41] Eventually, perhaps this will be so with restitution.[42]

V. NATIONAL JUDICIAL LEADERS SPEAK

Several judicial luminaries have now marked the overall effectiveness of the victims of crime movement and the prescience of Frank Carrington. For example, Warren Burger, then Chief

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38. Harmon, *Computerizing A Court System*, THE LAWYER'S PC 8A-8L (Nov. 1, 1988).

39. CAL. CONST. art. I, § 28(b). *See* Abell, *Restitution: Restoring The Victim's Historic Role*, 25 CT. REV. no. 4, at 22 (Fall, 1988).

40. *See* Schmitt, *Crime Victims Can't Collect*, San Jose Mercury News, March 4, 1990, § I, at 1; Williams, *Millions In Crime Restitution Lost, State Says*, Sacramento Bee, Sept. 2, 1991, at B1; CAMPBELL, JUSTICE THROUGH RESTITUTION (1977); McGillis, *Crime Victim Restitution: An Analysis Of Approaches*, Nat'l Inst. of Justice, Washington, D.C., Dec., 1986 (copy on file at *Pacific Law Journal*).

41. The T. J. Hooper, 60 F.2d 737, 740 (2nd Cir. 1932).

42. Intervention by victims in the administration of criminal justice has led to many of the victims' rights reforms already achieved. Institutional enthusiasm, generated by internal or external pressures, may eventually facilitate additional developments, including more effective restitution efforts. General external pressure may be generated by statutory requirements of notice to victims. *See* CAL. PENAL CODE §§ 679.03, 3058.6-3058.8, 11155, 11157-11158 (West Supp. 1992). *See also* CAL. PENAL CODE §§ 11160-11162, 11164-11174.3 (West 1982 & Supp. 1992) (providing additional reporting mandates). Pressure may also be generated by statutory opportunities for victims to be heard. *See* CAL. PENAL CODE §§ 1191.1-1191.25, 3043-3043.4 (West Supp. 1992); CAL. WELF. & INST. CODE § 1767.1 (West Supp. 1992).

Justice of the United States, wrote in 1983: "[I]n the administration of criminal justice, courts may not ignore the concerns of victims."[43]

Anthony Kennedy, who soon thereafter became a Justice of the Supreme Court of the United States, aptly summarized the progress and premises of the movement in 1987. While addressing the Sixth South Pacific Judicial Conference in New Zealand, Justice Kennedy declared:

> We are taking rapid steps to recognize the *rights of victims*. There are good reasons for this. First and foremost, as a simple matter of distributive justice, a decent and compassionate society should recognize the plight of its victims and design its criminal justice system to alleviate their pain, not increase it. The crime victim has already suffered the psychological trauma of losing control over his or her destiny; inconsiderate treatment by the criminal justice system can serve to aggravate that trauma. *The system's true purpose is to heal it.*[44]

Antonin Scalia, Justice of the United States Supreme Court, noted there is a "public sense of justice keen enough that it has found voice in a nationwide 'victim's rights' movement."[45]

VI. Institutions Respond to Victims' Rights

Beyond these purely legal considerations, important and effective institutional responses to the needs and rights of the victims of crime have taken place. Among them:

- Annual state and federal observances of victims' rights now occur. California, which conducted the nation's first

43. Morris v. Slappy, 461 U.S. 1, 14 (1983).

44. Address by Anthony Kennedy, Sixth South Pacific Judicial Conference (March 3-5, 1987) (emphasis added) (copy on file at *Pacific Law Journal*).

45. Payne v. Tennessee, 111 S. Ct. 2597, 2613 (1991) (Scalia, J., concurring). *See* Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting), *rev'd*, 111 S. Ct. 2597 (1991); People v. Edwards, 54 Cal. 3d 787, 832-36, 819 P.2d 436, 464-67, 1 Cal. Rptr. 2d 696, 724-27 (1991). *See also* Mary M. v. City of Los Angeles, 54 Cal. 3d 202, 222-24, 814 P.2d 1341, 1353-54, 285 Cal. Rptr. 99, 111-12 (1991) (Arabian, J., concurring); *U.N. Resolution Renews Debate on Victim Rights Movement*, CRIM. JUST. NEWSL., Oct. 1, 1985, at 5 (copy on file at *Pacific Law Journal*).

victims' rights observance in 1977, will conduct its sixteenth observance this year. President Ronald Reagan proclaimed the first national Victims' Rights Week in 1981 while in the hospital recovering from gunshot wounds. This year marks the twelfth national observance. These annual events give some reassurance to victims and their families and keep the subject matter before the public.

•McGeorge School of Law operates the Victims of Crime Resource Center, a statewide victims' counseling and referral service accessible to anyone, without cost, from anywhere in California, simply by calling 1-(800)-VICTIMS.[46] Each year, almost 10,000 calls are made by victims to the service. More than 50,000 have been received since the number became operational in the mid-1980's. Although the service is located in Sacramento, almost ten percent of all calls come from San Diego, twenty percent from the San Francisco Bay Area, and more than thirty percent from Los Angeles. The annual budget of the Victims of Crime Resource Center is approximately $200,000. Staffing is provided by advanced law students with specialized training.[47]

•Victim assistance programs, including rape crisis centers and domestic violence shelters, among others, are proven resources that give meaning to many victims' rights and remedies. Whether funded by federal funds or state funds

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46. The Center's unique telephone number once belonged to Xerox Corporation. McGeorge School of Law got the number simply by calling it, locating the company's chairman of the board, and asking him for its use. Xerox not only gave up the number but paid for its transfer and installation at McGeorge.

47. Then Governor Deukmejian and more than 100 legislators lent early support to Dean Gordon Schaber and McGeorge School of Law in planning and developing this program. *See* 1983 A.R.J. 45, *printed in* 1983 CAL. STAT. at 5392 (Resolution ch. 24); CAL. GUBERNATORIAL PROCLAMATION (Mar. 4, 1983) (copy on file at *Pacific Law Journal*). What started as a private, academic program is now significantly funded by the state. *See* CAL. PENAL CODE §§ 13897-13897.3 (West Supp. 1992). There is also a California Center on Victimology, 1221 22nd Street, San Diego, California 92102-1909. For a directory of national organizations that address victims' needs and rights, contact the National Victim Center, 307 West Seventh Street, Fort Worth, Texas 76102.

from, for example, the Governor's Office of Criminal Justice Planning, or locally by private sources or prosecutors' offices and other agencies, victim assistance programs have proven indispensable for countless crime victims and their families. Only a handful of victim service organizations existed in 1977, but now there are more than 10,000.[48] Federal participation was boosted in 1982 by the Omnibus Victim Witness Protection Act which established specified rights for victims and witnesses,[49] in 1984 by the Victims of Crime Act which provides grants to states for victim compensation, victim assistance programs, and child abuse prevention and treatment,[50] in 1990 by the Victims' Rights and Restitution Act which codified specific victims' rights,[51] and by the Student Right-to-Know and Campus Security Act which requires colleges and universities to compile and publish campus crime data.[52]

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48. Interview with Frank Carrington, in San Diego, California (Dec. 5, 1991). Carrington contributed in many ways to the increase in those numbers. While chair of the Victims Committee of the American Bar Association, he helped prepare and publish GUIDELINES FOR FAIR TREATMENT OF CRIME VICTIMS AND WITNESSES (Victims Committee, American Bar Ass'n Crim. Justice Section) (1983).

49. 18 U.S.C.A. §§ 1512-1515, 3579-3580 (West 1984 & Supp. 1992). Akin to expressions of intent in California law, the 1982 federal act began: "Without the cooperation of victims and witnesses. the criminal justice system would cease to function; yet with few exceptions these individuals are either too ignored by the criminal justice system or simply used as tools to identify and punish offenders." 18 U.S.C.A. § 1512 Historical Note (West 1984). *Cf.* CAL. CONST. art. I, § 28(a), *supra* note 22 and accompanying text (setting forth expressions of intent regarding the enactment of Proposition 8); *id.* § 14.1, Note (Deerings Supp. 1992), *supra* note 26 and accompnaying text (setting forth expressions of intent regarding the enactment of Proposition 115).

50. 42 U.S.C.A. §§ 10601-10604 (West Supp. 1992).

51. .42 U.S.C.A. §§ 10606-10607 (West Supp. 1992).

52. 20 U.S.C.A. § 1092(f) (West Supp. 1992). Among relevant bills pending before Congress are the *Campus Sexual Assault Victims' Bill of Rights*, 1991 H.R. 2363, 102nd Cong., 1st Sess. (May 15, 1991), authored by Congressman Jim Ramstad (R-Minn.), to complement the *Student Right-to-Know and Campus Security Act*, 20 U.S.C.A. section 1092(f) (West 1991), and the *Violence Against Women Act of 1991*, 1991 S. 15, 102nd Cong., 1st Sess. (Oct. 31, 1991), authored by Senator Joe Biden (D-Del.), to mandate restitution for sex crimes, provide several hundred million dollars to train special police and prosection units in 40 high-crime cities, build women's shelters, double prison terms for recidivist rapists, require nationwide recognition of spousal protective orders, establish lengthy prison terms for spousal abusers who cross state lines, and permit damage lawsuits by victims of "crimes motivated by gender." Although it has received considerable support, Senator Biden's bill has also received significant opposition, including that of William Rehnquist, the Chief Justice of the Supreme Court of the United States, who declared he supports the bill's underlying objective

> •Judges now know they have roles to play. Those roles were formalized at the National Conference of the Judiciary on the Rights of Victims of Crime held at the National Judicial College in 1983 where judges from the fifty states, the District of Columbia, and Puerto Rico adopted a series of recommendations to help judges learn about and respond to the needs and rights of crime victims. Those recommendations concluded: "Judges have a role in improving the treatment of victims and witnesses by reason of their position in the American judicial system and their positions in their communities."[53] The Conference's conclusion also recognized that changes in the law were needed.[54] The Conference members urged judges to exercise leadership in improving the treatment of victims and witnesses before ending with the following statement: "Victims of crime should not be victims of the criminal justice system."[55]

VII. VICTIMS BEGIN TO LITIGATE

Even with his many successes in promoting victims' rights and programs, including his contributions to the subjects already discussed, Frank Carrington was weary of attempts at persuasion. During recent years his work focused on litigation. He perceived almost everything in contemporary America turned on litigation. He felt moral imperatives, which for so long provided social

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to deter violence against women, but not its significant expansion of federal court jurisdiction. *Violence-Against-Women Bill Being Stalled by Opposition*, Sacramento Bee, Feb. 16, 1992, at A11.

53. Statement of Recommended Judicial Practices, *adopted by* the National Conference of the Judiciary on the Rights of Victims of Crime, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE 13 (1983) [hereinafter Statement of Recommended Judicial Practices] (copy on file at *Pacific Law Journal*). *See generally* A.B.A. JUD. ADMIN. DIV., THE JUDGES' J. (Spring 1984) (special issue on the rights of victims of crime and the judicial recommendations arising from the National Conference of the Judiciary on the Rights of Victims of Crime).

54. Statement of Recommended Judicial Practices, *supra* note 53, at 13.

55. *Id.* The Conference built upon the recommendations published the year before by the President's Task Force on the Victims of Crime. *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982) (copy on file at *Pacific Law Journal*). *See also* Finn, *Collaboration Between the Judiciary and Victim-Witness Assistance Programs*, 23 CT. REV. no. 2, at 6 (Spring, 1986).

cohesiveness, were largely giving way to legal imperatives. Ours, he believed, was becoming an overly legalistic nation, or, as Russian novelist Alexander Solzhenitsyn suggested, we were losing our moral rudder.[56]

Carrington and others began utilizing litigation to mitigate the grief and losses of crime victims and their families. They declared their central purpose to be promotion of anticipatory crime prevention rather than collection of remedial damages. Nevertheless, they asserted that if some individual or organization failed to respond to an apparent duty to warn someone of a known danger of crime, or to protect an individual from that danger, litigation could be pursued and damages sought.

To chronicle their views of the current shape and future trends of victims' rights litigation, Carrington and Illinois lawyer James A. Rapp wrote *Victims' Rights: Law and Litigation.*[57] This treatise analyzes practically every pertinent case from all fifty states and each federal jurisdiction.[58] With publication of the treatise and formation of the Coalition of Victims' Attorneys and Consultants (COVAC), Carrington enthusiastically collaborated with more than two hundred civil lawyers committed to furthering victims' rights everywhere in America. However, he also believed most victims are not aware of their rights to civilly litigate the circumstances surrounding their victimizations. Carrington felt this promising remedy could best be promoted by teaching victim service providers about civil remedies available to crime victims so they might pass the information along.

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56. *See* Powell, *Cardozo, Hughes, and Solzhenitsyn*, L.A. Metro. News, Aug. 16, 1978, at 1 (copy on file at *Pacific Law Journal*); Solzhenitsyn, *Bitter Truth: Western World Has Lost Its Morals and Courage*, San Diego Union, June 16, 1978, at B11.

57. F. CARRINGTON & J. RAPP, VICTIMS' RIGHTS: LAW AND LITIGATION (1991).

58. Topically, the treatise covers: (1) Introduction to victims' law and litigation; (2) handling victim cases; (3) alternative (or additional) victim remedies; (4) perpetrators' actions against victims; (5) victims' actions against perpetrators; (6) victims' actions involving law enforcement failures to protect; (7) victims' actions involving the handling of prisoners; (8) victims' actions involving the handling of mental patients; (9) victims' actions against common carriers; (10) victims' actions against public or private employers; (11) victims' actions involving innkeepers, landlords, businesses, and other owners and operators of premises; (12) victims' actions against public or private educational institutions; (13) victims' actions involving family members or the family setting; and (14) miscellaneous third party victims' actions. *Id.* at vii-xii.

Pursuing this goal, Carrington helped the United States Department of Justice plan a series of conferences for victim service providers. The central theme of the conferences is legal remedies for victims as a new dimension in victim advocacy. The first conference was conducted in San Diego last December. Others will be conducted this year in Atlanta, Chicago, and Philadelphia.

Carrington said these conferences should: (1) Promote an ongoing and systematic professional relationship between victim service providers and the legal profession; (2) inform victim service providers about the basic principles of law involved in victims' rights litigation; (3) assist victim service providers in understanding what types of information can help lawyers win and enforce money judgments for victims; and (4) teach victim service providers how to elicit fresh, pertinent information from victims to undergird civil cases and encourage lawyers to accept those cases.[59]

Carrington believed that to fully understand victims' rights litigation, victims' service providers must be able to contrast criminal cases with civil cases. In criminal cases, the state prosecutes wrongdoers for violating state laws. Victims have little say regarding how criminal prosecutions are conducted.[60] In civil cases, the victim is in charge. Each victim decides whether to sue and, with a civil attorney, whom to sue for civil wrongs, such as wrongful death, assault and battery, infliction of emotional distress, and civil conspiracy. It may be surprising, Carrington concluded, but a civil suit is possible even when criminal charges are never filed by the state or, if and when filed, the charges result in the accused being acquitted.

Not everyone harmed by crime will find a remedy in victims' rights litigation. Nevertheless, Carrington asserted that such

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59. These goals are paraphrased from discussions with Frank Carrington and the conference brochure (copy on file at *Pacific Law Journal*).

60. *See, e.g.*, Dix v. Superior Court, 53 Cal. 3d 442, 448, 807 P.2d 1063, 1064, 279 Cal. Rptr. 834, 835 (1991); People v. Bullen, 204 Cal. App. 3d 22, 25, 251 Cal. Rptr. 32, 33 (1988). *See generally* Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 932 (1975); *Victims' Rights Symposium*, 11 PEPPERDINE L. REV. 1 (1984).

litigation is one more tool by which voices of such persons may be heard and institutional indifference exposed and eradicated.[61]

Many precursors to victims' rights litigation and the legal changes, events, and programs discussed in this Article arose substantially from a common public perception that some participants in the criminal justice system talk a lot, especially about civil liberties for the accused, and often say or do very little about civil liberties for crime victims and witnesses or about reducing crime rates. Once again, Cardozo provides a benchmark: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[62] Carrington is gone, but his ongoing victims' rights litigation efforts remain grounded in keeping the balance true.

VIII. SECONDARY ROOTS OF VICTIMS' RIGHTS

How did all these victim-oriented reforms occur? Primary roots are found in the rapid growth in the number of persons suffering criminal indignities during the second half of this century. Such numbers, however, did not alone prompt recognition of victims' rights. There were two secondary roots of widespread attention to the interests of victims. One involved the Supreme Court of the United State's activist era of two decades ago because "[t]he list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook."[63] The other involved the opaque and omnipresent death penalty debate that has

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61. This is a view often expressed by Carrington to friends and colleagues. *See generally*, F. CARRINGTON & J. RAPP, *supra* note 57, at v (preface co-authored by Carrington); Carrington, *Deterrence, Death, and the Victims of Crime: A Common Sense Approach*, 35 VAND. L. REV. 587 (1982).

62. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), *overruled*, 378 U.S. 1 (1964). *See* Payne v. Tennessee, 111 S. Ct. 2597, 2608 (1991); People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), *cert. denied*, Defore v. New York, 270 U.S. 657 (1926). *See generally* FLEMING, THE PRICE OF PERFECT JUSTICE (1974); FLEMING, OF CRIMES AND RIGHTS (1978).

63. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 90-91 (1970). *See generally* FLEMING, THE PRICE OF PERFECT JUSTICE (1974); FLEMING, OF CRIMES AND RIGHTS (1978); KILGORE, JUDICIAL TYRANNY (1977).

endured and confused both the public and the legal profession for decades.[64]

These matters helped create a negative public mood in California regarding the administration of criminal justice, and set the stage for achieving victims' rights and the passage of Proposition 8. The Supreme Court of California's own activist era, which spanned the 1970's and early 1980's, was a contributing factor as well.[65]

Several peripheral events also contributed to the negative public mood in California. These widely publicized events involved activities allegedly undertaken by the state high court to avoid adverse publicity surrounding controversial opinions. These events included: (1) Allegations of late afternoon filings of controversial opinions, including *Hawkins v. Superior Court*[66] and *People v. Tanner*;[67] (2) a lawsuit premised on enforcement of the constitutional ninety-day rule, challenging allegedly delayed

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64. It has been 25 years since the last execution in California. Death row has been cleared twice. *See* Rockwell v. Superior Court, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976); People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), *cert. denied* California v. Anderson, 406 U.S. 958 (1972), *superseded by* CAL. CONST. art. I, § 27. The legislature and the people have repeatedly restored capital punishment. *See* People v. Fierro, 1 Cal. 4th 173, 255, 821 P.2d 1302, 1345-46, 3 Cal. Rptr. 2d 426, 469-70 (1991); People v. Ashmus, 54 Cal. 3d 932, 1009-10, 820 P.2d 214, 260, 2 Cal. Rptr. 2d 112, 158 (1991); People v. Jackson, 28 Cal. 3d 264, 315-17, 618 P.2d 149, 175-77, 168 Cal. Rptr. 603, 629-31 (1980); *id.* at 318-19, 618 P.2d at 177-78, 168 Cal. Rptr. 630-31 (Newman, J., concurring), *cert. denied in* Jackson v. California, 450 U.S. 1035 (1981); People v. Frierson, 25 Cal. 3d 142, 176-84, 599 P.2d 587, 607-12, 158 Cal. Rptr. 281, 300-06 (1979). Today, there are more than 320 convicted first-degree murderers on death row and countless friends and families of their victims elsewhere. That may soon change. *See* Cooper, *Harris Appeal Rejected; Execution Called Near*, Sacramento Bee, Mar. 3 1992, at A1.

65. *See* Kelso & Bass, *The Victims' Bill of Rights: Where Did It Come From And How Much Did It Do?*, 23 Pac. L.J. 843, 859-60 (1992) (discussing the death penalty debate and the activist eras of the state and federal high courts, along with a discussion of coincidental political circumstances that provided ethos and opportunity to vent growing public support for victims' rights).

66. 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978), *superseded by* CAL. CONST. art. I, § 14.1 (enacted by Proposition 115). *See supra* note 18 (setting forth provisions of Proposition 115).

67. 23 Cal. 3d 16, 587 P.2d 1112, 157 Cal. Rptr. 299 (1978), *vacated by* 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979).

opinion filings;[68] and (3) a related investigation of the state high court.[69]

There were also legislative obstacles that prevented timely and effective responses to these controversies. Because it was able to block criminal justice reform with virtual impunity, the Assembly Criminal Justice Committee in particular was a contributing factor to the increasingly negative public mood in California.[70] All these circumstances contributed to a fertile political matrix in which demands for victims' rights could drive the political process and, ultimately, led to the qualification and passage of Proposition 8.[71] Even so, the advent of Proposition 8 must also be viewed in the context of direct institutional backlash.[72]

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68. Ingram, *Suit Charges Illegal Delay by Supreme Court*, L.A. Times, July 24, 1979, § I, at 3.

69. STOLZ, JUDGING JUDGES (1981). *See* Benfell, *Footnotes Indicate Court Delayed Major Decisions*, The Daily Recorder, Nov. 17, 1978, at 1, col 3; *Court's Turn-around On Gun Law*, San Francisco Examiner & Chron., June 17, 1979, at B2; *Supreme Court's Timing*, San Bernardino Sun, Feb. 21, 1979, at B14; *Supreme Court Drops Another Hot Decision On A Holiday*, Hayward Daily Rev., July 9, 1980, at 55.

70. Otten, *Tougher Crime Bills In Legislative Limbo*, Sacramento Union, Apr. 17, 1979, at A3; Cook, *Assembly Criminal Justice Committee: Pitfall Of Controversy*, San Jose Post Recorder, Aug. 31, 1979, at 1. This was not entirely a partisan matter. *See Moscone Says Bills Run Into 'Blockade,'* Tri-Valley News, Aug. 29, 1975, at 3; Otten, *Senator Rips Assembly Unit As A 'Danger To The People,'* Sacramento Union, Aug. 8, 1978, at A6; *Criminal Justice Committee May Be Abolished*, Sacramento Union, Dec. 16, 1980, Metro Today at 1. The role of the committee was entering a state of flux. As a lobbyist for the American Civil Liberties Union conceded: "Throughout the past 15 years, it has been the assumption of virtually everyone in the Legislature that the ACLU had an enormous impact on the Assembly Criminal Justice Committee." *See* Barnhart, *"Losing Our Grip" In Sacramento*, ACLU NEWS, at 3 (Oct. 1977). Even so, this same lobbyist lamented that the ACLU's "neat system has begun to come unglued" and that the ACLU was "losing its grip." *Id.* If this era proves anything, it is this: lack of some significant degree of collegial communication, cooperation, and compromise between competing legal factions serves no useful public policy ends. Only by recognizing we *share* the duty to promote a civilized *and* orderly society, may we begin to achieve better results.

71. *See* Cannon & Yoachum, *Crime And The Courts, California Fights Back*, San Jose Mercury News, Apr. 25-29, 1982 (a five-part, front page series discussing the origin and early campaign for passage of Proposition 8).

72. Two critical legislative reports were published before the June primary election. *See Panel Warns of Gann Initiative Costs*, Sacramento Bee, Mar. 30, 1982, at A10; *Another Unfavorable Report on Proposition 8*, San Francisco Examiner, May 18, 1982, at A5. Most bar associations opposed the initiative by lopsided votes of their boards. *See, e.g.*, Kendall *[Los Angeles] Bar Panel Opposed to "Victims' Bill of Rights,"* L.A. Times, May 7, 1982, § II, at 12; Cone, *State Bar Opposes Prop. 8*, San Francisco Examiner & Chronicle, May 23, 1982, at B1. Other bar opponents included: Bar Association of San Francisco, California Attorneys for Criminal Justice, and California Trial Lawyers Association. Other law related opponents included: Chief Probation Officers of California, California

A year later, apprehension about criminal justice reform continued to discomfit those same institutions and leaders as another public skirmish loomed, this one involving the "Speedy Trial Initiative." Roy Aaron, then president of the Los Angeles Bar Association, asserted: "[P]ublic anger and frustration now 'appears to be directed at the court system itself--that revered institution which judges and lawyers often have treated as their private domain rather than the domain of the public.'"[73] Aaron concluded:

> Our choice seems to be to continue resisting change, a practice not restricted to lawyers, or biting a few bullets and compromising some of those practices which become enshrined by our local legal culture. If we don't initiate reform, and soon, the Howard Jarvises among us may decide what is to be done.[74]

Organization of Police and Sheriffs, and California Probation, Parole and Correctional Association. Political opponents included: State Federation of Labor Committee on Political Education, AFL-CIO, California Teachers Association, California Federation of Teachers (AFL-CIO), California Teamsters Public Affairs Council, International Longshoremen and Warehousemen's Union, Northern California District Council, United Auto Workers, Region 6, and Alameda County Central Labor Council (AFL-CIO). Individual opponents included: former Governor Edmund G. (Pat) Brown, Professor Gerald F. Uelmen, Anthony Murray, James Brosnahan, Robert Raven, Senators Alan Sieroty and Nicholas C. Petris, Assemblymembers Terry Goggin, Howard L. Berman, Jim Cramer, Lawrence Kapiloff, Herschell Rosenthal, and Maxine Waters, San Francisco Supervisor Nancy Walker, Public Defender Jeff Brown (San Francisco), District Attorneys John Van de Kamp (Los Angeles), Stanley M. Roden (Santa Barbara), Richard Gilbert (Yolo), and Joseph D. Allen (Mendocino), and Hon. Shirley M. Hufstedler. See *supra* note 20, for a partial list of proponents of Proposition 8. Even after Proposition 8 passed, many bar associations and leaders continued to oppose it and, indeed, further reform of the administration of criminal justice. *See* Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982); Raven v. Deukmejian, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990).

73. Hilsman, *The "Speedy Trial Initiative": Criminal Justice Under Scrutiny*, 6 L.A. LAW., no. 1, at 18, 27 (Mar. 1983).

74. *Id.* at 29. The Speedy Trial Initiative was never qualified, but a similar one, Proposition 115, soon followed and was qualified and passed by voters in 1990. Crime Victims Justice Reform Act, Initiative Measure Proposition 115, *supra* note 18. *See* Lunsman, *Proposition 115--'The Crime Victims Justice Reform Act': Reformation of an Inept System or a Constitutional Disaster?*, 22 U. WEST L.A. L. REV. 59, 60 (1991) (for criticisms similar to those advanced against Proposition 8). *But see* Bowens v. Superior Court, 1 Cal. 4th 36, 39, 820 P.2d 600, 601-02, 2 Cal. Rptr. 2d 376, 377-78 (1991); People v. Barrow, 233 Cal. App. 3d 721, 723, 284 Cal. Rptr. 679, 680 (1991). *Bowens* and *Barrow* illustrate the California Supreme Court's different approaches to Propositions 8 and 115. The court treated the various elements of Proposition 8 virtually ad hoc, while it treated the various elements of Proposition 115 with some degree of organic affirmation. It would be far too easy and, indeed, simplistic to ascribe this disparity to a single cause when, in reality, social, cultural, and political pressures, not to mention public and private personnel considerations, along with practical

IX. UNINTENDED CONSEQUENCES OF VICTIMS' RIGHTS

More recently, there have been unintended consequences of the victims' rights movement as a whole and Propositions 8 and 115 in particular. For example, some lawyers have simply opted out of the legal profession. One lawyer quit saying he was "fed up with a judicial system that has taken away much discretion from judges and placed it in the hands of prosecutors. And he says he has grown tired of routinely losing trials, motions to suppress evidence and requests for bail."[75] Another top lawyer said his colleague "suffers from what most criminal defense lawyers of my generation suffer from--a real sense of hopelessness about the state of criminal law these days. . . . We no longer have the power to change the institution. We can't change the law. It's not fun anymore."[76]

Contrast this pessimism with the euphoria of just twelve years ago when the defense bar played a more dominant role.[77] At the time, prosecutors faced what they considered to be hopelessness. Leon Jaworski suggested prosecutors had fallen from their perches as law enforcement oracles; he admonished them to define programs, then go to and rely on the people.[78] This was but an early, more optimistic, and specific nuance that shortly preceded Witkin's candid discussion of Professor Frank and his challenging ideas.[79]

Prosecutors soon heeded Jaworski and Witkin, taking their messages to the public. Proposition 8 was one of those messages,

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and theoretical legal forces were at work. *See* Jordan, *Who's Taking the Initiative on Crime?*, San Francisco Daily J., Dec. 2, 1991, at 5. *See also supra* note 35 and accompanying text (discussing the need for reform, particularly in the court system).

75. Bernstein, *Another Major Defense Lawyer Blasts Legal System, Calls It Quits*, Sacramento Bee, Jan. 6, 1992, at B1.

76. *Id.* at B4.

77. *See* Kirsch, *Public Defenders*, 4 NEW WEST MAG. no. 10, at 52 (May 7, 1979) (table of contents page captioned "*More than a thousand strong, they are a dominant force in criminal justice*"). *Cf.* Nicholson, Meese, & James, *Court Decisions, Practices, Hamper Prosecution Efforts*, L.A. Daily J., Sept. 11, 1978 (Special 90th Anniversary Issue) at 18.

78. Jaworski, *Bold Leadership*, CAL. DISTRICT ATT'Y ASS'N, PROSECUTOR'S BRIEF at 8 (Aug. 1976).

79. *See supra* notes 10-11 and accompanying text.

but there were others as well.[80] All these messages were intended to inform the public and promote balance in the administration of criminal justice, just as Cardozo urged in 1934.[81] These messages were never laden with any intent to deprive accused persons of their lawful rights or constitutional protections.[82] Indeed, the fair and effective administration of justice requires dignity, discretion, and dispatch when dealing with accused and accuser alike.

By going to the public with specific proposals and engaging in debate, proponents of criminal justice reform entered the market. Holmes memorialized that market when, long ago, he wrote:

> [T]he ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [the people's] wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[83]

Thus, it now appears that changes in their professional domain may stress lawyers, whether defender or prosecutor, and alter their

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80. *See, e.g.*, CAL. PENAL CODE § 1112 (West 1985) (abolishing involuntary psychiatric examinations for rape and child molest victims, and abrogating *Ballard v. Superior Court*, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966)). *See also* Mary M. v. City of Los Angeles, 54 Cal. 3d 202, 223, 814 P.2d 1341, 1353, 285 Cal. Rptr. 99, 111 (1991) (Arabian, J., concurring); People v. Melton, 44 Cal. 3d 713, 738 n.6, 750 P.2d 741, 754 n.6, 244 Cal. Rptr. 867, 880 n.6 (1988), *cert. denied* 488 U.S. 934 (1988); People v. Barnes, 42 Cal. 3d 284, 301, 721 P.2d 110, 120, 228 Cal. Rptr. 228, 239 (1986); People v. Haskett, 30 Cal. 3d 841, 859 n.8, 640 P.2d 776, 787 n.8, 180 Cal. Rptr. 640, 651 n.8 (1982); People v. Armbruster, 163 Cal. App. 3d 660, 664, 210 Cal. Rptr. 11, 13 (1985). *See also Melton*, 44 Cal. 3d at 736-38, 750 P.2d at 737-38, 244 Cal. Rptr. at 879-80; People v. Scott, 21 Cal. 3d 284, 578 P.2d 123, 145 Cal. Rptr. 876 (1978); Bullen v. Superior Court, 204 Cal. App. 3d 22, 251 Cal. Rptr. 32 (1988) (regarding physical intrusions). Shortly after publication of Kirsch's 1979 article, prosecutors were reminded they occupied powerful moral and political positions in their respective jurisdictions. They were urged to consider taking more visible and regular public positions.

81. *See supra*, note 62 and accompanying text (setting forth Cardozo quote from *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

82. *See* Goldberg, *supra* note 28.

83. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See* Sailors v. Board of Educ., 387 U.S. 105, 110-11 (1967); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 226 (1821); Southern California Rapid Transit Dist. v. Bolen, 1 Cal. 4th 654, 681, 822 P.2d 875, ___, 3 Cal. Rptr. 2d 843, 859-60 (1992).

self-perceptions. Although such stress may occur as a natural consequence of the hard fought competition which is indispensable to Holmes' free market of ideas, it still evokes a measure of empathy. Our nation's grand constitutional experiment has always been stressed by conflicting forces which inhere in evaluating right and wrong, and in balancing the rights of victims and the rights of the accused. And so it shall remain. While there may be no end to the casualties of crime, professional casualties such as the lawyers who are unable to persevere may be minimized. Perhaps we may yet find ways to work together to improve the administration of criminal justice and reduce casualties of both categories.

CONCLUSION

It is edifying to recall some critics of Proposition 8 declared it was "inartfully" drafted. Others claimed it usurped the legislative function. Yet others lamented the absence of lawyers in the initiative's genesis. These arguments were gossamer. Taking them in order, Proposition 8 was: (1) Sufficiently simple and clear to permit a largely unsympathetic Supreme Court of California to interpret virtually all provisions generally as intended by proponents;[84] (2) consciously pursued to leap long-standing legislative hurdles; and (3) drafted, qualified, and passed with the help of many distinguished lawyers.

A few critics vaguely asserted Proposition 8 was not "the proper way" to achieve the ends sought. To that assertion, there is a single, self-evident reply: What other recourse was there? Indeed, the broader question of what is the proper way, even now, to seek meaningful reform on *any* public policy of import, prompts a similar answer.

"Upon this point a page of history is worth a volume of logic."[85] California's recent past is littered with unresolved issues

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84. *See* People v. Barrow, 233 Cal. App. 3d 721, 723, 284 Cal. Rptr. 679, 680 (1991), *rev. denied*, 1991 Cal. LEXIS 5495 (LEXIS, Cal. library, Cases file) (1991); Kelso and Bass, *supra* note 65.

85. *See* New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.).

of overriding significance. Lack of consensus abounds. Ours is a system mesmerized with appearances and rife with intractable and, apparently, irreconcilable divisions. As a people, we seem to have forgotten our duty to one another and to the primordial necessity for a civilized social order.[86]

In such a setting, the evil is not citizen use of the initiative; rather, it is our confused, often paralyzed governmental processes that virtually mandate citizen recourse to the initiative as the only viable means to effect meaningful change.[87] Indeed, citizens are sufficiently disturbed by all this to begin using the initiative to dismember the government itself.[88]

History is important to everyone. It is especially so for legal professionals. "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."[89] The only safe conclusion appears to be this: When more of us aspire to become architects of public service, rather than mechanics or masons, may we then anticipate more institutional governance and less citizen governance by initiative.[90]

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86. *See* CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). "[W]ith 5 percent of the world's population, we have 50 percent of the world's crime. We are dealing with criminal youth who are disconnected from the world and we have to find a way to reconnect them." Dobbin, *Harkin Attack On Clinton Jolts Polite Demo Debate*, Sacramento Bee, Jan. 20, 1992, at A1, A16 (quoting Arkansas governor Bill Clinton). *See* Furillo, *Crime by Juveniles Rising -- But It's Not Kid Stuff*, Sacramento Bee, Jan. 29, 1992, at A1; *Studies Find Crime, Family Connection*, Sacramento Bee, Feb. 2, 1992, at B11.

87. Walters, *Ballot Driving Policy Wrangles*, Sacramento Bee, Aug. 29, 1991, at A3.

88. *See* Legislature v. Eu, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991); People's Advocate, Inc. v. Superior Court, 181 Cal. App. 3d 316, 226 Cal. Rptr. 640 (1986); Schrag, *The Decade of Anti-Politics*, Sacramento Bee, Jan. 22, 1992, at B6. Voters may not have anticipated all the results. *See* Gray, *Retaliation Seen in Cut to State High Court's Budget*, Sacramento Bee, March 5, 1992, at A4; Gray, *Wilson's Office Budget Needs Scrutiny, Senate Demos Say*, Sacramento Bee, March 6, 1992, at A3.

89. SIR WALTER SCOTT, GUY MANNERING, Vol. 2, at 89 (Estes & Lauriat, Int. Ltd. ed. (1893)). *See* BURNS, LEADERSHIP 454-57 (1978); Burge, *Leadership: The Missing Link in the Criminal Justice System*, 2 C.S.U.F. JUSTICE CENTER NEWSL. no. 3, at 3 (Dec. 1985) (copy on file at *Pacific Law Journal*); Walsh, *Lawyers as Community Leaders*, San Francisco Daily J., Feb. 11, 1992, at 8.

90. Perhaps everyone should occasionally recall article II, section 1, of the California Constitution: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." CAL. CONST. art. II, § 1. *See* CAL. CONST. art. I, §§ 1, 28.