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# "Genie's out of the Jar": The Development of Criminal Justice Policy in California, The

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# "The Genie's Out of the Jar": The Development of Criminal Justice Policy in California

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## I. INTRODUCTION

No Californian who lived through the 1970s, 1980s, and 1990s, needs to be reminded that those times were characterized by high public anxiety over crime. Crime stories—drug wars, child abductions, rapes, robberies, murders, drive-by shootings, and crack cocaine dealings—dominated the nightly news and morning headlines. Parents were unabashedly fearful for the safety of their children, and Californians everywhere changed the way they lived to avoid becoming a crime victim.

It is no historical wonder, then, that Californians revamped their criminal justice system to address their fears. That was predictable. But the scale of the overhaul—ousting Supreme Court Justices viewed as soft on criminals and restructuring the laws of criminal procedure and criminal punishment—was anything but foreseeable.

How these dramatic, sweeping changes took place is the topic of this discussion, a topic that takes us to the roughest, most rugged edge of democracy.

California law institutionalizes the means for populist revolt. In 1911, through the California initiative process, California's citizens granted themselves a significant tool to implement change when they are dissatisfied with their government. Through it, the people of California circumvent their elected representatives.[1] The last thirty years have produced power shifts and new legal milestones as voters passed state propositions in response to the perceived failure of the Legislature to act.

The changes in criminal justice have essentially transferred the balance of power from the legislative and judicial branches of government to the executive branch. The shift began in 1978 when voters passed the "Briggs Initiative" to expand the death penalty and then ousted the Bird Supreme Court because they believed the Court would not enforce it. This shift of power continues today with the passage of the Gang Violence and Juvenile Crime Prevention Act, targeting violent juvenile offenders, and Proposition 36, mandating the Drug Treatment Program, as Californians mold the criminal justice system in their own image. Throughout it all, the public

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1. Ballot provisions play a major role in state government in only California, Colorado, and Oregon. Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 48 (1995).

directly challenges the will of institutionalized players—politicians, judges, and legislators.

But how was the public mobilized to act, to defy institutionalized leaders, and to take the law into their own hands?

## II. POWER SHIFT

The traditional route for creating law involves an interested group taking its case to the State Legislature. Legislators hear testimony, vote, and pass laws—lots of them—which are in turn blessed with a Governor's signature or cursed by his veto. This traditional process bears almost no resemblance to the process of reform that has reshaped criminal justice over the past three decades.

The California initiative, embodied in Article II of the California Constitution, allows California citizens "to bypass the Legislature and go straight to the public in an effort to place an issue of interest on the ballot for voter approval or rejection."[2] Approved initiatives even provide that they cannot be amended or repealed by the Legislature without a vote of approval by the electors, and they are not subject to a Governor's veto.[3]

By this populist measure, voters gave themselves ultimate authority over state law. It was not until the late 1970s that California citizens began to exercise this power in criminal law, a response to their palpable fears. Violent crime rates in California rose significantly in the 1970s and 1980s. They peaked in 1980.[4] By 1980, California's state prison population (98 per 100,000) was thirty percent below the national average, but the rate of violent crime and burglary was forty percent above the national average.[5]

These statistics were the backdrop for sensationalized crimes, as murders became short-handed by television news. Where and when would the Hillside Stranger, the Nightstalker, or the Freeway Killer strike next?

Even as crime took center stage as a public concern, criminal justice policy continued to be driven by an expansion of rights for the criminal defendant. What the United States Supreme Court under Earl Warren had begun, the California Appellate Courts, including the State Supreme Court, seemed determined to continue: expanding rights and process for the accused; limiting the authority of police to detain, search, and question suspects; and curbing the use of evidence by prosecutors against criminal defendants.

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2. CALIFORNIA SECRETARY OF STATE, A HISTORY OF THE CALIFORNIA INITIATIVE PROCESS 3 (JULY 2001) [hereinafter CALIFORNIA INITIATIVE PROCESS].

3. *Id.*

4. CALIFORNIA DEP'T OF JUSTICE, CRIME IN CALIFORNIA, *available at* http://caag.state.ca.us/cjsc/publications/misc/cinc/califcrime.pdf (Apr. 2001) (copy on file with the *McGeorge Law Review*).

5. NATIONAL CENTER FOR POLICY ANALYSIS, CRIME AND PUNISHMENT IN AMERICA: 1998, *available at* http://www.ncpa.org/studies/s219/s219d.html (May 13, 2002) [hereinafter CRIME AND PUNISHMENT IN AMERICA] (copy on file with the *McGeorge Law Review*).

The legislature, led by liberal Democrats, was, fairly or not, seen as supportive of the direction of the courts. Criminal convictions were overturned for what became a term of popular defense, "a legal technicality," and the public increasingly saw the courts as acting counter to their interests.

As a fearful populace became increasingly frustrated with judges and legislators, it turned to the initiative process. A new coalition developed. Republican politicians, in the minority in the state legislature, had long been critical of liberal courts on policy grounds. They saw the initiative process as a way to distinguish themselves from the Democrats and strike a political nerve. Meanwhile, public prosecutors and advocates of crime victims added their voices. And the battle lines were drawn. The first battle was over the death penalty.

### *A. Proposition 7—The Briggs Initiative-Murder Penalty (1978)*

On March 3, 1893, the first California state-conducted execution was carried out as Jose Gabriel was hanged at San Quentin State Prison for the murders of an aged farm couple.[6] Over five-hundred executions by hanging and lethal gas followed.[7]

In February 1972, the California Supreme Court opined that "contemporary standards of decency" had changed. Then-Chief Justice Donald Wright wrote in the majority opinion of *People v. Anderson* that the death penalty "degrades and dehumanizes all who participate."[8] In a six-to-one vote, the California Supreme Court declared capital punishment a violation of the California Constitution's prohibition against cruel and unusual punishment.[9] As a result, more than one hundred condemned individuals were spared from the gas chamber. Among these spared individuals were Charles Manson, whose commune family engaged in ritualistic slaughter, and Sirhan Sirhan, who assassinated Senator Robert Kennedy, a candidate for President.[10]

Then-Governor Ronald Reagan, the quintessential Republican, reacted to the Court's decision by saying he had made a "terrible mistake" in appointing Wright as Chief Justice.[11]

After a lengthy legal tug-of-war, the California Legislature passed a new death penalty law authored by Republican Senator George Deukmejian; it went into effect

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6. CALIFORNIA DEP'T OF JUSTICE, CAPITAL PUNISHMENT IN CALIFORNIA, *available at* http://www.cdc.state.ca.us/issues/capital/capital2.htm (last visited May 2, 2002) (copy on file with the *McGeorge Law Review*).

7. Dan Morain, *California Debate: Agony Over Resuming Executions*, L.A. TIMES, Aug. 18, 1985, at A1 [hereinafter *California Debate*].

8. People v. Anderson, 6 Cal. 3d 628, 656 (1972).

9. *Id.* at 656-57.

10. CALIFORNIA DEP'T OF JUSTICE, MURDER & THE DEATH PENALTY: A SPECIAL REPORT TO THE PEOPLE (1981); *California Debate*, *supra* note 7.

11. *California Debate*, *supra* note 7.

in August 1977.[12] Significantly, the new law was enacted by overriding the veto of Democratic Governor Jerry Brown, who opposed the death penalty as a "matter of conscience."[13] In a move that would prove even more significant historically, in the same year, Governor Brown appointed Santa Clara County Public Defender Rose Bird as Chief Justice of the California Supreme Court. The appointment was immediately controversial, drawing fire from Republicans, prosecutors, and crime victims, who prophesized that the new Chief Justice would prove to be a liberal ideologue. The Governor also appointed Justices Cruz Reynoso and Joseph Grodin.[14]

The 1977 death penalty law passed by the Legislature was a compromise measure, viewed by Republicans as a watered-down law. Under the measure, the basic sentence for first-degree murder was "a life sentence with the possibility of parole," which meant that killers "would become eligible for parole after serving [only] seven years."[15] A person convicted of second-degree murder could be out of prison in as little as four years.[16]

To Republican legislators, the passage of the law was merely a sop to the public, something that permitted their liberal colleagues to tell their constituents that they had passed a tough law-and-order statute. Policy and politics mandated a highly visible campaign to enact a "real" death penalty law. The effort was led by Republican Senator John V. Briggs from Fullerton, who was seeking the Republican nomination for governor. Tapping into public sentiment, he paid former Assistant U.S. Attorney Donald Heller five thousand dollars to draft a new, tougher death penalty law,[17] a "Murder Penalty" bill as it was initially called; it was later referred to as the "Briggs Initiative."

Supported by many prosecutors and by law enforcement,[18] the initiative provided that the basic sentence for first-degree murder became twenty-five-years-to-life. Additionally, special circumstances were added that made more murder offenses capital cases, making more killers subject to the death penalty.[19]

Proponents of the Murder Penalty initiative targeted liberal legislators, claiming they had made every effort to thwart a death penalty law that protects families

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12. CAL. PENAL CODE §§ 187, 190 (West 1999 & Supp. 2002).

13. CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, TIME LINE, 1974-1999 5 (Feb. 29, 2000); Scott G. Parker & David P. Hubbard, *The Evidence for Death*, 78 CAL. L. REV. 973, 977-80 (1990).

14. Parker & Hubbard, *supra* note 13, at 977-78.

15. CALIFORNIA ATTORNEY GENERAL, FULL TEXT OF PROPOSITION 7, *available at* http://holmes.uchastings.edu/cgi-bin/starfinder/20313/calprop.txt (last visited Nov. 3, 2002) [hereinafter FULL TEXT OF PROPOSITION 7] (copy on file with the *McGeorge Law Review*). A person convicted of second-degree murder faced a term of five, six, or seven years, and could be out in four years with good time behavior credits. *Id.*

16. *Id.*

17. Briggs placed another item on the ballot that sought "to ban homosexuals from teaching jobs," which lost. "Briggs dropped out of the gubernatorial race for lack of support." Heller later became a death penalty opponent. *California Debate*, *supra* note 7.

18. *Id.*

19. FULL TEXT OF PROPOSITION 7, *supra* note 15.

from "ruthless killers."[20] Proponents invoked in their ballot statement a list of infamous killers—Charles Manson, Sirhan Sirhan, the Zodiac Killer, the Skid-Row Slasher, and the Hillside Strangler—as reasons to support Proposition 7.[21] The legislative-passed death penalty was described to voters as follows:

> Even if the President of the United States were assassinated in California, his killer would not receive the death penalty in some circumstances. . . . If Charles Manson were to order his family of drug-crazed killers to slaughter your family, Manson would not receive the death penalty. . . . And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, that criminal would not receive the death penalty.[22]

Opponents employed scare tactics of a different sort in an attempt to defeat Proposition 7. It would, they claimed, result in the death penalty being imposed too often and in inappropriate cases. For example, a person "could be sentenced to die for lending another person a screwdriver to use in a burglary, if the other person accidentally killed someone during the burglary."[23] They also argued that the initiative was carelessly worded and would result in a waste of taxpayers' money.[24]

However, Proposition 7 promised "the protection of the nation's toughest, most effective death penalty law."[25] Indeed, a poll of Californians showed that eighty-three percent supported the death penalty—the highest figure since the California Poll began asking the question in 1956.[26]

In 1978, the Briggs Initiative was approved by an overwhelming seventy-one percent of the voters and superseded the 1977 statutes.[27] California voters not only affirmed their support for capital punishment but also demonstrated their capacity to express their policy positions at the ballot box in direct defiance of state legislators and judges.

### *B. Proposition 8: The Victim's Bill of Rights (1982)*

By 1982, the California courts developed their own set of laws, and the State was almost a nation unto itself. Through a doctrine called "Independent State

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20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, *Has the Present California Supreme Court Systematically Blocked Enforcement of the Death Penalty?*, *in* PROSECUTORS' WHITE PAPER ON THE SUPREME COURT CONFIRMATION ELECTION 3 (1985) [hereinafter *Blocked Enforcement of the Death Penalty*]. With amendments, the death penalty law as passed by Proposition 8 is still in effect.
27. FULL TEXT OF PROPOSITION 7, *supra* note 15.

Grounds," the California Supreme Court ruled that the State Constitution provided "wider civil liberties than those afforded by the U.S. Constitution," especially in the areas of privacy and rules restricting police conduct.[28]

Prosecutors and victims' rights activists voiced the anger and angst felt by many citizens, making the case that the California Supreme Court was readily willing to "free criminals 'on technicalities.'"[29] They claimed the Court's practice of excluding illegally obtained evidence had become "silly."[30] The response was Proposition 8, a measure viewed by some as a "war of the people to gain control of their government."[31]

In 1982, the rights of crime victims were a point of controversy. That year, then-President Ronald Reagan's Task Force on Victims of Crime issued its final report recommending numerous changes in the criminal justice system, especially as related to the treatment of victims. Liberals characterized this trend as the "politicization of the victim" and accused conservatives of rhetorically painting victims as "sympathetic figure[s]" in an attempt to counterbalance the rights of defendants.[32]

The legal debate marked a political movement towards recognition of victims' rights. Proposition 8, "The Victim's Bill of Rights," proposed to create new constitutional protections for crime victims—amending California's Constitution, imposing restrictions on plea bargaining, abolishing the defense of "diminished capacity," and restructuring the defense of insanity, providing for a right for crime victims to receive restitution and a right to testify at parole and sentencing hearings.[33] In addition, the initiative proposed that criminal courts admit "all relevant evidence"[34]—a slap in the face to the courts, which routinely restricted evidence against criminal defendants. The measure was broad, adding a section to the state Constitution to give students and staff an "inalienable right to attend campuses which are safe, secure, and peaceful."[35]

Stated in the noblest of terms, the debate over Proposition 8 pitted two important ideals against one another: the duty of government to protect its citizens from violent crime and the rights of citizens to be free from overzealous police.

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28. Dan Morain, *Evidence Decision Reverses 30-Year State Court Trend*, L.A. TIMES, Feb. 10, 1985, at 3 [hereinafter *Evidence Decision*].

29. *Id.*

30. *Id.* (quoting Professor Phillip E. Johnson, of the University of California, Berkeley, Boalt School of Law).

31. Dan Morain, *Victims' Bill of Rights Provision Overturned State Supreme Court Says Judges Need Not Add Five Years to Sentences for Repeat Offenders*, L.A. TIMES, Oct. 29, 1985, at 1 (quoting Christopher Heard of the Criminal Justice Legal Foundation).

32. Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 949 (1985).

33. CALIFORNIA ATTORNEY GENERAL, FULL TEXT OF PROPOSITION 8, *available at* http://holmes.uchastings.edu/cgi-bin/starfinder/20313/calprop.txt (last visited Nov. 3, 2002) [hereinafter FULL TEXT OF PROPOSITION 8] (copy on file with the *McGeorge Law Review*).

34. *Id.*

35. *Id.*

But the real driving force behind Proposition 8 was a public sense that a judicial elite was imposing unrealistic—and at times downright absurd—limits on the police. Further, elected representatives in the Legislature were bringing into this inning lower views of the law.

To the public, the Court had increasingly become an Ivory Tower with its unrealistic expectations of police and prosecutors. Several cases were emerging demonstrating the Court's detached analysis of legal principles. For instance, the Court reversed the conviction of James Fries because of the trial court's willingness to allow a prior robbery conviction to impeach his potential testimony. The court stated that a robbery conviction is "only partly relevant to credibility"[36] and expressed sympathy for defendants with prior records who are "far more at the mercy of the authorities . . . than is warranted."[37] In *People v. McGaughran,* officers detained a defendant and his passenger after they were driving the wrong way on a one-way street and acting suspiciously. It took ten minutes to obtain a warrant check showing an outstanding burglary warrant for the defendant. The court found the ten-minute delay unreasonable and reversed the conviction.[38]

These examples created allies. Prosecutors saw crime victims as a way to personify and humanize the impact of these decisions. Republican candidates saw prosecutors and crime victims as their ideological kin.

Republican George Deukmejian, who had by then become Attorney General and a gubernatorial candidate,[39] took the lead, and Republican Senator Pete Wilson became the Southern California chairman for the Victim's Bill of Rights Campaign. It was time, they advised, "to take decisive action against violent crime" and reverse the trend of the courts and legislators who showed "more concern with the rights of criminals than with the rights of innocent victims."[40] These tools were necessary to keep dangerous criminals off the streets and protect law-abiding citizens.[41] Senior Assistant Attorney General George Nicholson, a chief architect of the Bill and a top aid to Attorney General Deukmejian, called it "the most effective anticrime program ever proposed to help the forgotten victims of crime."[42]

Proponents offered a coherent message that touched people's fear of crime. Opponents were discouraged, and many were afraid politically to stand in the way of a juggernaut of public resentment. Those that spoke out were shrill, claiming the initiative would reduce personal liberties, allow strip searches for even minor traffic offenders, permit spying and wiretaps, and even take away the right to bail.[43] They called the initiative a "hoax," a "political ploy," and even

36. People v. Fries, 24 Cal. 3d 222, 229 (1979).
37. *Id.* at 232 n.10.
38. People v. McGaughran, 25 Cal. 3d 577 (1979).
39. In January 1982, George Deukmejian was sworn in as Governor of California.
40. FULL TEXT OF PROPOSITION 8, *supra* note 33.
41. *Id.*
42. *Id.*
43. *Id.*

contended that the initiative would take killers off death row and make convicting people like the "Freeway Killer" (William Bonin) nearly impossible.[44]

Thoughtful analysts saw Proposition 8 as "a reaction to a series of rulings by the State's highest court expanding the rights of suspects in criminal cases."[45] Deputy Attorney General William Weisman remarked: "What is the price we pay for excluding evidence? In many cases, it is crucial evidence, the evidence that is key for a determination. Many cases cannot even be tried. That is a terrible price to pay."[46]

Proposition 8 was passed by 56.4 percent of the voters in June 1982.[47] Its effect was to force the California Supreme Court to reconsider many of its rulings in criminal law and procedure. Assistant Attorney General George Nicholson, now himself a Republican candidate for Attorney General, remarked: "The court can interpret Proposition 8 narrowly or broadly, but the genie's out of the jar. The public knows it can play a role in criminal justice."[48]

To prosecutors and crime victim advocates the passage of Proposition 8 harbingered a new day. They believed the public had raised itself against legislative indifference that ignored the reality of crime and frustration over a judicial system seriously out of whack.

### *C. The Supreme Court Retention Election (1986)*

Theodore Frank was a repeat child molester, convicted of kidnapping and torturing young children. He served short sentences for his crimes and was released from Atascadero State Hospital's program for sex offenders with mental disorders. Two months later, he kidnapped Amy S. from her babysitter's home in Ventura County. He forced the child to drink beer, raped her, systematically and brutally tortured her, and murdered her. Amy was two-years-old. Frank was arrested and prosecuted. In a well-publicized case, a Ventura jury convicted Frank and sentenced him to death.[49]

On appeal in 1985, the California Supreme Court, in an opinion by Justice Mosk, found that evidence seized under an "overbroad" search warrant should have been suppressed by the trial court. The court ruled that failure to suppress the evidence was "harmless error" in the guilt phase. However, the evidence was

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44. *Id.* Bonin was found guilty of the rape and murder of fourteen young teens and boys that he picked up on freeways. He became the first person to die in California by lethal injection on February 23, 1996. *Id.*

45. Bob Egelko, *High Court Changed Some Provisions, Didn't Kill Any 3 Years Later, Victims' Bill of Rights Survives*, L.A. TIMES, Dec. 8, 1985, at 16.

46. *Evidence Decision*, *supra* note 28.

47. CALIFORNIA INITIATIVE PROCESS , *supra* note 2, at 6.

48. Egelko, *supra* note 45.

49. People v. Frank, 38 Cal. 3d 711 (1985).

ruled prejudicial in the penalty case.[50] To the horror of the public, the California Supreme Court affirmed Frank's guilt but reversed the death sentence.[51] Lawyers, as well as ordinary citizens, wondered: how could evidence seized pursuant to a search warrant signed by a judge, ruled admissible by the trial judge, found "non-prejudicial" in the guilt phase of the trial, now be found of such import to overturn a sentence of death? When weighed against Frank's horrific crimes and criminal history, it appeared to many critics, prosecutors, and crime victims that the court was waging a guerrilla war on the death penalty.

Without declaring the 1978 law via Proposition 7 to be invalid, the California Supreme Court continually found convictions in individual cases flawed. The leadership of the California District Attorneys' Association (CDAA) remarked that despite deep public support for the death penalty, the California Supreme Court demonstrated pronounced antipathy toward the death penalty by reversing "some of the most ferocious, bestial, and monstrous crimes ever committed by human beings" for at times trivial reasons.[52]

In fact, more than ninety percent of death penalty appeals were reversed by the court under the tenure of Chief Justice Rose Bird.[53] In 1984 alone, the California Supreme Court reversed every death penalty case it decided.[54] On the last day of 1985, the California Supreme Court reversed eleven death penalty homicides; this would later be called by prosecutors "The New Year's Eve Massacre."[55]

Just as alarming to critics, case reversals followed years of delay—delays labeled by critics as "unconscionable." From 1979 to 1984, the Court only managed to hear thirty-three cases, while a backlog of cases was building.[56] Thirty of the thirty-three cases were reversed, and the court's time taken to hear these cases was "an average of 1,141 days from trial court judgment to decision on the appeal."[57] The court's "snail's pace" deliberations were in direct defiance

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50. *Id.* at 735. In a second penalty trial, the jury again sentenced the defendant to death. That death sentence was upheld by the Lucas Court. Frank sat on death row with appeals still pending until his death from natural causes in September 2001. *Id.*

51. *Id.*

52. CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, *What Are the Facts in Death Penalty Cases?, in* PROSECUTORS' WHITE PAPER ON THE SUPREME COURT CONFIRMATION ELECTION 14 (1985).

53. *Blocked Enforcement of the Death Penalty, supra* note 26.

54. Associated Press, *State High Court Reversed All Its 1984 Death Penalty Cases*, S.F. CHRON., Oct. 30, 1984.

55. PROSECUTORS' WORKING GROUP, PROSECUTORS' REPORT: SUPREME COURT JUSTICE CRUZ REYNOSO, THE NEW YEAR'S EVE MASSACRE: ANALYSIS OF MASS DEATH PENALTY REVERSALS BY THE BIRD COURT 35.

56. *Id.*

57. CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, *Has the Present Supreme Court Created Unconscionable Delays in Death Penalty Cases?, in* PROSECUTORS' WHITE PAPER ON THE SUPREME COURT CONFIRMATION ELECTION 7 (1985). The death penalty was only affirmed in the cases of Earl Jackson, Robert Alton Harris, and Steve Lamar Fields, none of whom was executed until much later. Robert Alton Harris was the first person to be executed in thirty years when he was put to death April 21, 1992, for the murders of two boys in San Diego County.

of a law that required decisions be reached within 150 days from the date of certification of the trial court record.[58]

In their review of cases, the California Supreme Court was accused of creating a double standard of fairness as it expressed distrust for the testimony of prosecution victims and witnesses, but expressed confidence in the testimony of defendants and their witnesses.[59] Observers claimed that the court "consistently displayed suspicion and animosity toward law enforcement" and ignored precedent.[60] They said capital defendants were given a "bottomless purse" with which to pursue appeals and that they were permitted to present virtually any evidence while prosecutors were constantly restrained.[61]

Indeed, to many, the court seemed openly hostile toward the prosecution in criminal cases. This was evident in the California Supreme Court's exercise of its power to depublish the decision of a lower court, an authority that removes the binding authority of that decision. In 1982, it depublished pro-prosecution rulings ninety percent of the time. In the same time period, it only depublished eight percent of cases with pro-defense rulings.[62]

Comments from prosecutors were similar to those of Attorney General John Van de Kamp: "The chances for reversal going in are very, very high. You think you get to the end of issues, and something else comes up. For the last seven years, prosecutors have been flying blind without guidance from the court."[63] According to a Deputy Attorney General Edmund McMurray, who litigated capital cases, "You know you're going to lose. The only question is how."[64]

In November 1986, California voters were asked to grant or deny confirmation of five Supreme Court justices: Rose Bird, Cruz Reynoso, Joseph Grodin, Stanley Mosk, and Malcolm Lucas. The election was required by a 1934 amendment to the California Constitution requiring appellate justices to go before the people every twelve years for confirmation. The California voter-pamphlet explained:

> "Under this proposed plan the ultimate control would remain in the hands of the People .... Any candidate [for justice of the Supreme Court] would either be recommended by the Governor ... or would have served some time in the office, so that the voters might observe him. The

58. *Id.*

59. CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, *Has the Present Supreme Court Set up a Double Standard of Fairness in Criminal Cases?*, *in* PROSECUTORS' WHITE PAPER ON THE SUPREME COURT CONFIRMATION ELECTION 38 (1985).

60. CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, *Has the Present Supreme Court Engaged in an Assault on Law Enforcement and Precedent?*, *in* PROSECUTORS' WHITE PAPER ON THE SUPREME COURT CONFIRMATION ELECTION 40 (1985).

61. *California Debate, supra* note 7.

62. Alan Ashby & Carol Benfell, *Esoteric Court Practice Undercuts California Prosecutors*, 16 CAL. J., 137, 138 (1985).

63. *California Debate, supra* note 7.

64. *Id.*

> issue would . . . [be] whether [the justice] had given to the People the honest, intelligent, and fearless service they have a right to expect; and the voter would have a power . . . , namely that of vetoing an appointment of the Governor and of casting a vote for or against one particular candidate on the basis of his fitness for office."[65]

Through this measure, voters gave themselves the ultimate control over who sat on the Supreme Court and the power to veto any appointment. Judicial elections are different from other elections, since justices appear on the ballot without opposition with the intent that they be "freed from political influence." To remove a justice is a drastic step. Since 1934 and the implementation of Proposition 3, no California Supreme Court justice had lost an election.[66]

What followed in 1986 was characterized as an "epic battle" that pitted prosecutors along with their allies in law enforcement, crime victims, and Republican leaders against the justices and their defenders in the legal establishment.[67] CDAA led the charge with its Board voting unanimously in February 1985—over a year and a half before the November 1986 election—to oppose the confirmation of Justices Bird, Reynoso, and Grodin.[68] CDAA subsequently published a seventy-eight page "White Paper," a bill of particulars against the Bird Court.

> Prosecutors want a return to the constitutionally mandated balance of rights between victims and criminals, a return to a court which recognizes legitimate limitations on its authority, and an end to this court's clear bias against prosecutors and their clients, the victims of crime and the law-abiding citizens of California. We ask for no unfair advantage in court and no denial of proper respect for the rights of defendants. We seek only a reestablishment of a Supreme Court which recognizes that Justice's sword is two edged because she demands that the guilty be convicted every bit as much as that the innocent be acquitted.[69]

Initially, Governor George Deukmejian chastised the Court for delays in deciding death penalty appeals but refused publicly to endorse the attempts to recall Bird.[70] As the debate over the Bird Court heated up, however, Deukmejian became increasingly vocal, and, by the time of the election he was spearheading

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65. CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, *Introduction*, *in* PROSECUTORS' WHITE PAPER ON THE SUPREME COURT CONFIRMATION ELECTION 2 (1985) [hereinafter *Introduction*].

66. John Balzar, *Few Rules to Go By: Justice Bird's Recall Becoming Epic Battle*, L.A. TIMES, Apr. 7, 1985, at 1 [hereinafter *Few Rules*].

67. *Id.*

68. *Introduction*, *supra* note 65; *Few Rules*, *supra* note 66, at 1. It was reported that Justice Mosk also would have been a target had it not been for his pledge to retire. He did not retire, however, and remained on the Supreme Court for several more years following the 1986 election.

69. *Introduction*, *supra* note 65.

70. United Press International, *Prosecutor Assails High Court's Record*, TUOLUMNE COUNTY UNION DEMOCRAT, Mar. 20, 1985 [hereinafter United Press International].

a campaign to defeat Bird, who he said had sabotaged the death penalty by giving murderers "legal rights and remedies beyond reason."[71]

Republican leaders, of one accord in opposition to Chief Justice Bird, were forthright in their attempt to saddle Democrats with an unpopular cause. In fact, many Democrats supported Bird. But others, including then-Assemblyman Gray Davis (now governor), were reluctant to support her and sought to distance themselves from the Court. One commentator summed up the politics: "Conservatives are prepared to make it a law-and-order test for Democrats. And Democrats seem divided, with some of the so-called new breed plainly unhappy at the thought of being dragged into a do-you or don't-you debate over this court and its record."[72] Democrat Attorney General Van de Kamp said that he was remaining neutral in the contest despite his critical comments of the court.[73]

Criminal defense attorneys came to the defense of the Bird court, claiming the Supreme Court was doing more than its part to battle crime.[74] They referred to the opposition as political partisans and "Republican extremists" involved in a "court-packing" scheme.[75] They launched vitriolic counterattacks, arguing that conservatives sought to politicize the Court and undermine its judicial independence.[76] The Sacramento Bee, which supported the Chief Justice, stated:

> Undoubtedly the charges will get wilder and nastier as the 1986 primary election approaches. But it's hardly too early to point out that if any political sector invites abuse, it's one where the figure being attacked has only limited means of defense. People who are only ordinary liars in most political situations can act with impunity when they attack the court and thus become even bigger liars. And the more they attack it, the more they undermine not only the justices under attack, but the independence of the institution itself.[77]

Former Governor Jerry Brown called the Republican effort a "court-packing scheme" as well.[78] Other Bird supporters also lashed out, saying the prosecutors' "White Paper" should have been called the "Red Paper," as "[r]eading it conjures up images of blood and gore."[79] Rose Bird, who remained distant and for the most part silent, at last defended her tenure, blaming the federal courts for delays

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71. *California Debate*, *supra* note 7.

72. *Few Rules*, *supra* note 66. Gray Davis failed to support Bird's attempts for reelection despite his personal friendship with Bird and her having presided over his wedding.

73. *Id.*

74. Dennis P. Riordan & Elisabeth Semel, *Rose Bird Court is No Friend of Crime*, SAN DIEGO UNION, May 5, 1985, at C4; Kenneth Jost, *Hanging on a Feeling*, L.A. DAILY J., Mar. 1985.

75. Riordan & Semel, *supra* note 74.

76. Jost, *supra* note 74.

77. *The Court-Baiting Industry*, SACRAMENTO BEE, Jan. 21, 1985.

78. *Few Rules*, *supra* note 66.

79. Gerald F. Uelmen, *D.A.s' 'White Paper' on Supreme Court Should Be 'Red Paper,'* L.A. DAILY J., June 18, 1985.

in death penalty decisions and denying that her decisions represented attacks on the death penalty.[80] In the face of the prosecutor's White Paper critique, the Committee to Conserve the Courts declared:

> We can only surmise that the authors of the White Paper hope the mud they have hurled will stick, either because of their own positions of responsibility or because of the public's unfamiliarity with the principles by which the Court is supposed to, and does, operate .... We are confident that once the facts are known, the public will prove itself much harder to fool.[81]

But opponents of the justices had grim, gripping facts to point to: dozens of horrifying murder cases that had been reversed by the Bird Court. Prosecutors pointed to the cases yet to be decided by the court. Images of criminals like Lawrence Bittaker peppered the debate. Bittaker was sentenced to death in 1981 for torturing and murdering five teens. His trial featured a tape recording of one of his victims pleading for mercy while being beaten to death with a sledgehammer.[82] Bittaker had recorded the torture so that he could listen to the recording while he masturbated. His grim moniker was "Pliers," a reference to one of the tools he used to torture his female victims.[83] The Chief Justice, it was noted, had voted to reverse all of the cases, including Bittaker's.

As the Court's record of reversing death penalty cases reached ninety percent, there was developing a public sentiment, expressed by one prosecutor following a jury recommendation for death of a convicted multiple killer: "With the backlog and the track record of [the California Supreme Court] . . . there is no hope that this death verdict will bring an execution."[84]

It was not difficult, rhetorically, to link the California Supreme Court's actions to a rising crime rate: "[A] major reason that murder and other violent crimes have reached intolerable levels," wrote a critic, "is the historic unwillingness of the California Supreme Court to follow the will of the people."[85]

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80. Committee to Conserve the Courts, *Let the Record Reflect . . . Errors, Distortions, and Convenient Omissions in the CDAA White Paper*, at 9 (on file with the *McGeorge Law Review*).

81. *Id.* at 51.

82. Niki Cervantes, *Mass Killers Often Are Objects of Female Adoration, Experts Say*, L.A. TIMES, Apr. 6, 1986, at 2.

83. Philip Hager, *Death Sentence Upheld for Killer Who Showed 'Astonishing Cruelty,'* L.A. TIMES, June 23, 1989, at 29. Bittaker's death sentence was finally upheld in 1989, but he remains on death row to this day. *Id.*

84. United Press International, *supra* note 70.

85. Parker & Hubbard, *supra* note 13, at 979 n.34 (citing CALIFORNIA DEP'T OF JUSTICE, MURDER & THE DEATH PENALTY: A SPECIAL REPORT TO THE PEOPLE (1981)).

Republicans also offered a tit-for-tat response to the court-packing allegations:

> There is something disquieting in the criticism directed at Gov. Deukmejian and others for raining political issues against Chief Justice Rose Bird and the liberal California Supreme Court. These attacks, it is argued, drag the court into partisan politics, where it does not belong. But courts are fundamentally political bodies, and in California judges are accountable to the voters. If it is a question of partisan political attack, then one must ask: Who mired this court in partisanship in the first place, the critics or the justices themselves?[86]

Defenders of the justices predicted that the "right wing" effort to remove them would fail. Their prophecy proved wrong.

In November 1986, Justices Bird, Reynoso, and Grodin were voted off the California Supreme Court bench. Chief Justice Bird lost by nearly a two-to-one margin.[87] Once again, prosecutors with strong political allies tapped into deeply felt public sentiment to achieve historic change.

In the same election, George Deukmejian was re-elected to a second term as governor of California. For conservatives, the 1986 Supreme Court Retention Election was the "mother lode." For the first time in history, a state Supreme Court was undone by the voters.

The ouster of the three justices led to a "sudden and pronounced shift in the political composition of the court."[88] "[Governor] Deukmejian, who had 'pledged to name law-and-order hard-liners' to replace the defeated justices, elevated Justice Malcolm Lucas to chief justice."[89] "In [Chief Justice] Bird's final week in office, she voted to reverse or vacate all six death sentences" before the court.[90] That brought the tally for the court to an astounding conclusion: only four death sentences affirmed and sixty-four reversed.[91] "Bird herself never voted to affirm a death sentence."[92]

### *D. Proposition 115—Crime Victims Justice Reform Act (1990)*

Unseated, these justices of the California Supreme Court permitted Governor Deukmejian to reconstitute the court. But given the way the California Supreme Court does business—one case at a time—and given how conservative justices

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86. Tony Quinn, *The Fault Lies with the Chief Justice Herself*, SACRAMENTO BEE, Feb. 28, 1985 (on file with the *McGeorge Law Review*).

87. Parker & Hubbard, *supra* note 13, at 980.

88. *Id.* at 981.

89. *Id.* (citing *The "Onion Field' Parole: Rose Bird's Parting Shot*, NEWSWEEK, Jan. 12, 1987, at 26). Lucas had won the approval of eighty percent of the electorate. The vacancies on the California Supreme Court were filled by David Eagleson, Marcus Kaufman, and John Arguelles. *Id.*

90. *Id.* at 981 n.45.

91. *Id.*

92. *Id.* Bird even voted to reverse the case of Robert Alton Harris.

cling to *stare decises*, it would take years for the new court to reverse the decisions of its predecessors. How could prosecutors and crime victims undo the damage done by the Bird Court, and do it in short order?

They could go to the people of California again with another initiative; this one, they vowed, would be even more comprehensive. Proposition 115, like Proposition 8 before it, began with recognition of the rights of crime victims. The preamble to the Proposition read in part:

> We the people of the State of California hereby find that the rights of crime victims are too often ignored by our courts and by our State Legislature, that the death penalty is a deterrent to murder, and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system.[93]

Further, the Initiative was not subtle in stating that it intended to roll back the decisions of the Supreme Court under Rose Bird and obviate that legal legacy.

> In order to address these concerns and to accomplish these goals, we the people further find that it is necessary to reform the law as developed in numerous California Supreme Court decisions and as set forth in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for truth.[94]

The authors of Proposition 115 were equally honest about the principles guiding them:

> The goals of the people in enacting this measure are to restore balance to our criminal justice system, to create a system in which justice is swift and fair, and to create a system in which violent criminals receive just punishment, 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.[95]

The underpinning for public support for Proposition 115 was unquestionably the statewide movement in 1986 to oust the California Supreme Court Justices. Deputy prosecutor Anthony J. Rackauckas (now Orange County District Attorney) stated: "The seeds of Proposition 115 were planted in the aftermath of the anti-

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93. CALIFORNIA ATTORNEY GENERAL, FULL TEXT OF PROPOSITION 115, *available at* http://holmes.vc.hastings.edu/cgi-bin/starfinder/20484/calprop.txt (last visited Nov. 3, 2002) [hereinafter FULL TEXT OF PROPOSITION 115] (copy on file with the *McGeorge Law Review*).

94. *Id.*

95. *Id.*

Bird campaign . . . . It seemed to us that it might take years to undo some of the damage of many of the Bird court rulings . . . . We decided there was still work to be done even with her gone."[96]

Proposition 115, the "Crime Victims Justice Reform Act," sought major procedural reform in the criminal justice system. As with Proposition 7, the *Briggs* Initiative, this initiative sought not only statutory change; it also sought constitutional change as well: to limit the procedural rights of defendants while increasing the rights of crime victims and the authority of District Attorneys.

For prosecutors, the measure would greatly enhance their ability to convict criminals. For example, although the United States Supreme Court encouraged reciprocal discovery between prosecutors and defendants, and the California Legislature had attempted to enact enabling legislation to do so, the California Supreme Court, during the Bird years, found that such efforts violated California's Constitution.[97] It was against this legislative and judicial history that the discovery provisions in Proposition 115 came about.

In contrast to the judicial preoccupation during the Bird Court years with due process for criminal defendants, Proposition 115 identified the function of the judicial system as a "quest for the truth."[98] Proposition 115 sought to complete what Proposition 8 had begun—to grant reciprocal rights to crime victims and to "the People" as represented by the prosecution. Drafted by CDAA, Proposition 115 sought to "re-balance the scales of justice."[99]

If adopted by California voters, Proposition 115 would reduce the number of times crime victims would have to testify and specify the length and type of examination to which they would be subjected. For the first time, the prosecution would have the right to due process and a speedy trial—rights defendants had always enjoyed.[100] To accelerate the pretrial process, the initiative allowed the use of hearsay evidence at preliminary hearings and instructed California courts that preliminary hearings no longer could be used for discovery purposes.[101]

Proposition 115 also sought to protect the voters' will from legislative or judicial usurpation. It limited the ability of lawmakers to make legislative amendments to voter changes. Judges would be prohibited from dismissing a "special circumstance" that elevated first-degree murder to a capital crime. Further, judicial involvement in the criminal discovery process was expressly curtailed.[102]

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96. Jerry Hicks, *California Elections / Proposition 115: Court Reform Measure Raises Controversy*, L.A. TIMES, May 28, 1990, at B1.

97. Wardius v. Oregon, 412 U.S. 470, 474 (1973); People v. Collie, 30 Cal. 3d 43, 56 (1981). *See* CAL. PENAL CODE § 1102.5 (West 1982 & Supp. 2002) (repealed by Prop. 115, adopted by the people June 5, 1990); *In re* Misener, 38 Cal. 3d 543, 558 (1985).

98. FULL TEXT OF PROPOSITION 115, *supra* note 94.

99. John Balzar, *Politics, Propositions: Is It Time for Change?*, L.A. TIMES, June 3, 1990, at A1.

100. *See* CAL. CONST. art. I, § 29.

101. *See* CAL. PENAL CODE § 872(b) (West 1985 & Supp. 2002).

102. *See* CAL. CONST. art. I, § 30; CAL. PENAL CODE § 1054(e) (West Supp. 2002).

The drafters of Proposition 115, prosecutors from across the state, initially attempted to gain support for the changes through the legislature, but they were unsuccessful. Consequently, they turned to the initiative process but needed help to get the measure passed. So, they once again looked to two allies: crime victims and politicians.[103]

Collene Campbell, the state chairwoman of the California Crime Victims Justice Committee, and her husband, Gary Campbell, led the way for victims. The Campbells' son, Scott, had been murdered and dropped from a private airplane flying two-thousand feet above the ground near Catalina Island. Five years of court delays followed the arrest of two of his killers. One of them won a new trial on appeal, and it was several more years before he was convicted again.[104]

During the same time period, Ms. Campbell's brother and his wife were murdered in front of their home in the Bradbury area of Los Angeles. As a result of these horrible crimes and the criminal justice system's treatment of their cases, the Campbells devoted themselves to getting people involved in this reform movement.[105]

Political leaders climbed aboard, among them was Republican U.S. Senator Edward Royce. Supporters tried to get the initiative on the ballot in 1988, fresh off the California Supreme Court election in 1986, but they were unable to do so due to lack of money. Then, in 1989, Republican U.S. Senator Pete Wilson from San Diego endorsed the measure. Wilson was a gubernatorial candidate at the time, seeking to succeed Deukmejian as the Republican governor.[106]

Proposition 115 became a "tactical centerpiece" of Wilson's campaign. It gained him identification with a popular issue, crime fighting. In support of the initiative, he sounded a familiar theme: "For better than a quarter-century the state [l]egislature . . . has refused to prosecutors, peace officers and the citizens of this state the protections they are entitled to have . . . . There is a fundamental right of all Californians not to be victims."[107] Wilson personally brought in almost a million dollars to qualify Proposition 115 for the ballot and advocate its passage.[108]

Later, supporters of the proposition said: "Without Pete Wilson, there would be no Proposition 115 . . . . It was his support that really turned it around for us."[109] Following Wilson's support, Proposition 115 gained endorsements from

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103. Hicks, *supra* note 97.

104. *Id.*

105. *Id.*

106. Daniel M. Weintraub, *California Elections / Governor: Deukmejian Backs Wilson on Crime Bill*, L.A. TIMES, Apr. 10, 1990, at A3.

107. *Id.*

108. Hicks, *supra* note 97.

109. *Id.*

Governor George Deukmejian, former President Ronald Reagan, and then-State Attorney General Candidate Dan Lungren.[110]

The ballot statement in favor of Proposition 115 included bold language, seeking to remind voters of recent shocking crimes and to remind them also of what they did to the Bird Court:

> YOUR MOST BASIC RIGHT AS AN AMERICAN IS TO BE SAFE FROM VIOLENCE AND FREE FROM FEAR. But while politicians keep talking about tougher laws, your chances of becoming a victim keep climbing. Why? For years, politicians in Sacramento have refused to enact tougher laws . . . defense lawyers love delays . . . . It took an incredible four years just to bring the "Nightstalker" to justice! . . . [Proposition 115] assures that no criminal will ever again rape a young girl and hack off her arms, and serve only a minimal punishment, such as the 7 ½ years Singleton served. Instead, Proposition 115 will send such a criminal to prison for life . . . . ITS "BIRD COURT" DEATH PENALTY PROVISIONS improve our death penalty law and overturn decisions by Rose Bird and her allies which made it nearly inoperative.[111]

A Los Angeles Times poll shortly before the June 1990 primary showed strong public support for Proposition 115.[112] Support for the measure was bi-partisan, with prominent Democrats, including Dianne Feinstein, running as a Democratic candidate for governor, and State Attorney General Candidate Arlo Smith, endorsing the measure.[113]

Opponents of the initiative were creative. Rather than debate crime issues, they argued that Proposition 115 overturned, albeit inadvertently, abortion rights. They argued that because Proposition 115 sought to amend special privacy protections in criminal cases, it threatened the right of women "to safe and legal abortions" as guaranteed by the California Constitution's privacy clause.[114] The argument was bolstered by then-Attorney General John Van de Kamp, a Democratic contender for governor, who opposed the passage of Proposition 115, citing his belief that "abortion rights" would be jeopardized if it passed.[115]

Maintaining their oblique attack, opponents also claimed that the proposition would cost taxpayers millions of dollars due to more court congestion.[116] In fact, they contended, the initiative had the support of insurance companies who saw Proposition 115 as increasing the number of criminal trials and reducing California's

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110. *Id.*; Paul Feldman, *California Elections Attorney General*, L.A. TIMES, May 3, 1990, at A29.

111. FULL TEXT OF PROPOSITION 115, *supra* note 94.

112. Hicks, *supra* note 97.

113. Hicks, *supra* note 97; Feldman, *supra* note 111.

114. FULL TEXT OF PROPOSITION 115, *supra* note 94; *Boomerang Proposition: The So-Called Speedy Trial Initiative Would Backfire on California*, L.A. TIMES, May 29, 1990, at B6 [hereinafter *Boomerang Proposition*].

115. John Balzar, *California Elections: Governor, Nuances Important as Abortion Rights Support is Affirmed*, L.A. TIMES, May 13, 1990, at A3 [hereinafter *Nuances Important*].

116. *Boomerang Proposition*, *supra* note 115.

ability to handle civil cases, thereby forcing weary plaintiffs to settle claims.[117] Criminal defense attorney opponents were more direct, stating that the measure would impair a defendant's basic right to a fair trial.[118] The arguments of the opponents sounded alarmist, with Democrat Dianne Feinstein agreeing with Senator Wilson that the abortion claim was a "smoke screen."[119] Proponents were confident of its passage. "It's going to be enacted," said one prosecutor, "[a]nd when it does, California is going to have a better court system."[120] In the primary election of June 1990, voters passed Proposition 115 by 57.3 percent of the vote.[121] Pete Wilson won the gubernatorial election that November.

The passage of Proposition 115 produced historic constitutional and statutory changes in criminal procedure in California. The genie that escaped back in 1982 was again at work: the public had gone over the heads of legislators and judges to reshape its justice system.

### *E. Proposition 184: "Three Strikes and You're Out" (1994)*

Between 1978 and 1990, twelve short years, voters turned the criminal justice system of California on its head by reinstating capital punishment, creating rights for crime victims, unseating three Supreme Court justices, and re-writing criminal procedure. What remained to be done in this system overhaul?

Again, the answer would come from the suffering of crime victims. California's Three Strikes law rose out of unspeakable tragedy. According to Michael Brian Reynolds, his eighteen-year-old sister Kimber was "the All-American girl."[122] She grew up in Fresno, California, played varsity tennis, and was president of the Fresno High School Senate.[123] Upon graduating from high school, she went away to art school in Los Angeles.

Ironically, Kimber did not become a victim in the tough urban streets of Los Angeles. In June 1992, she was in Fresno for a wedding when she left an upscale Fresno restaurant.[124] Afterwards, she and her friend Greg walked to her car. Her father, Mike Reynolds describes what happened next:

> The motorcycle arrived just in time to prevent Kimber from opening the door to her car. The driver leaned the motorcycle against Kimber, pinning her against the car. Greg leaped out of the passenger side of the car and

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117. *Id.*

118. Hicks, *supra* note 97.

119. *Nuances Important*, *supra* note 116.

120. Hicks, *supra* note 97 (quoting Anthony J. Rackauckas).

121. CALIFORNIA INITIATIVE PROCESS , *supra* note 2, at 7.

122. George Skelton, *A Father's Crusade Born From Pain*, L.A. TIMES, Dec. 9, 1993, at A3 [hereinafter *Born From Pain*].

123. *Id.* MIKE REYNOLDS, ET AL., THREE STRIKES AND YOU'RE OUT . . . A PROMISE TO KIMBER 6 (1996).

124. *Born From Pain*, *supra* note 123.

> started around the back to help her. The second man on the motorcycle jumped off and met Greg halfway with a threatening stance. The driver attempted to take Kimber's purse. She could offer only minor resistance but it was enough to provoke the driver. He pulled out his gun, stuck the barrel in her ear, and in full view of not only Greg but all the customers in [the restaurant], fired a bullet through Kimber's brain.[125]

The "All-American girl" died twenty-six hours later.[126]

Joseph Michael Davis became the prime suspect in Kimber's murder.[127] Davis was a convicted drug dealer who had been paroled two months prior to Kimber's murder despite his history of violent crime.[128] Wanted by authorities for several robberies and assaults, Davis had recently vowed never to return to prison again.[129] As it turned out, Davis never did return to prison. Less than two days after Kimber's murder, he died in a gun battle with police.[130]

Suspect number two was Douglas Walker. Like Davis, Walker was a repeat drug offender and thief. At the time of Kimber's murder, Walker was supposed to be serving time on a drug offense, but a judge allowed him to leave prison in order to visit his pregnant wife with Walker's mere promise that he would come back.[131] Instead of returning to jail, Walker participated in Kimber's murder as the "second man" on the motorcycle. Police apprehended him four days after Kimber's funeral. He was arrested, prosecuted, and convicted. He was sentenced to nine years in prison; he would be eligible for parole in half that time.[132]

The fact that Davis and Walker were out of prison, despite their long criminal history, incensed Mike Reynolds, who soon learned that Davis's and Walker's stories were not unique. Based on 1990 data, a Rand Corporation study found that average murderers in California served 4.2 years in jail, and average thieves served 2.9 years in jail.[133] Nationally, an average murderer spent 1.8 years in jail, while a rapist served sixty days.[134] According to a 1992 study by the National Center for Policy Analysis, for many "the benefits of crime outweigh the costs .... [F]or some people, a criminal career is more attractive than other career options."[135]

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125. REYNOLDS, *supra* note 124, at 12.

126. *Born From Pain*, *supra* note 123.

127. REYNOLDS, *supra* note 124, at 19.

128. *Born From Pain*, *supra* note 123.

129. REYNOLDS, *supra* note 124, at 19.

130. *Id.* at 22-23.

131. *Id.* at 11, 19.

132. *Id.* at 26-27.

133. Victor S. Sze, *A Tale of Three Strikes: Slogan Triumphs Over Substance As Our Bumper-Sticker Mentality Comes Home to Roost*, 28 LOY. L.A. L. REV. 1047, 1051-52 (1995).

134. Jerry Seper, *System Fails to Stop Repeat Offenders*, WASH. TIMES, Dec. 15, 1993, at A7 (referring to a National Center for Policy Analysis study).

135. *Id.*

Mike Reynolds' indignation turned to action. He told Governor Pete Wilson, "I'm going after these guys in a big way, the kind of people who would murder little girls this way."[136] Thirty days after Kimber's murder, Reynolds invited a number of friends, including lawyers and law enforcement officials, to a meeting around his backyard picnic table. Their goal was simple: find a way to keep repeat criminals in jail. That backyard meeting turned into a series of gatherings.[137]

The group eventually developed a "Three Strikes and You're Out" strategy that included provisions that would mandate a minimum twenty-five-years-to-life sentence for criminals convicted of a felony if the criminal had been convicted in the past of two or more violent or serious felonies. For a criminal with one such prior conviction, the measure would double this criminal sentence. The maximum allowable time off for good behavior would be reduced from fifty percent to twenty percent.[138]

Assemblymembers Bill Jones, a Republican, and Jim Costa, a Fresno Democrat, agreed to sponsor Reynolds' Three Strikes proposal in the California Legislature.[139] The measure would have to be considered and passed by the Assembly Committee on Public Safety. The Committee was legendary, labeled "The Graveyard for Criminal Justice Legislation." The initiative was just the kind of legislation routinely killed by Assembly Democrats under the leadership of Speaker of the Assembly, Willie Brown. Speaker Brown considered Three Strikes simplistic and feared that the State would have to compromise education expenditures in order to pay for it.[140] Thus, despite the fact that Reynolds arrived at the Capitol with four busloads of people from Fresno for the Bill's first hearing, Speaker Brown successfully ensured that the committee scuttled the proposal.[141]

Snubbed by the Legislature, Reynolds doggedly kept Three Strikes alive. "They figured they'd listen to me, pat me on the head, say, 'I'm sorry about your daughter,' and send me home," Reynolds later recalled.[142] Frustrated by the traditional political process, Reynolds started a campaign to bring Three Strikes directly to the voters as a ballot initiative.[143]

With support from the National Rifle Association and the California Corrections and Peace Officers Association, Reynolds wanted to place the measure in the November 1994 election.[144] But, as of October 1993, Reynolds had only collected

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136. Dan Morain, *A Father's Bittersweet Crusade*, L.A. TIMES, Mar. 7, 1994, at A1 [hereinafter *A Father's Bittersweet Crusade*].

137. REYNOLDS, *supra* note 124 at 30-31.

138. *Id.* at 39.

139. *Id.* at 35, 39.

140. JAMES RICHARDSON, WILLIE BROWN: A BIOGRAPHY 330 (1996).

141. RICHARDSON, *supra* note 141; *A Father's Bittersweet Crusade*, *supra* note 137; Dan Morain, *Lawmakers Jump on '3 Strikes' Bandwagon*, L.A. TIMES, Jan. 31, 1994, at A3 [hereinafter *'3 Strikes' Bandwagon*].

142. *A Father's Bittersweet Crusade*, *supra* note 137.

143. *Id.*

144. Tupper Hull, *A Father's Crusade to Lock Up Criminals*, S.F. EXAMINER, Dec. 8, 1993, at A1.

20,000 of the 385,000 signatures needed to get the measure on the ballot.[145] It took another horrible tragedy for Three Strikes to make it to the voters.

In October 1993, an intruder kidnapped twelve-year-old Polly Klaas from her Petaluma, California, home during a slumber party. Two months later, in the midst of frantic efforts by Polly's parents to locate her, authorities found Polly's lifeless, brutalized body in a field near Cloverdale, California. The chief suspect, Richard Allen Davis, admitted to abducting and murdering Polly, and prosecutors later alleged that Davis had sexually abused her.[146]

It became publicly known that Richard Allen Davis, like Joseph Michael Davis and Douglas Walker, was a repeat violent offender who had taken advantage of the parole system—in fact, he had once served only one year of a fifteen-year burglary sentence.[147] Had Richard Allen Davis served the entire sentence for his most recent known offense, he would have been incarcerated on the day he abducted Polly.[148]

Kimber's and Polly's murders were more than Californians could endure. The day after Polly's body was found, the Fresno area "800" system was overwhelmed due to call volume to the "Three Strikes and You're Out" hot line.[149] Within three days after authorities discovered Polly's body, Reynolds gathered fifty-thousand signatures.[150] He ultimately obtained 800,000 valid signatures, well beyond the number required to place the initiative on the November ballot.[151] Three Strikes became Proposition 184.

The rhetoric surrounding the murders and Proposition 184 was emotional and intense. Governor Pete Wilson led the way. He spoke at Polly's funeral. With extraordinary words for a child's funeral, Governor Wilson said he would fight for laws "ensuring that career criminals become career inmates" and threw his support behind Three Strikes.[152] His anger at Richard Allen Davis was palpable and undisguised. The day after the funeral his language was markedly non-gubernatorial: "I mean, when I think of that son of a bitch, you cannot help but be angered. Did you see the picture of him on the front page of the (*San Francisco*)

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145. Richard Kelly Heft, *Legislating With a Vengeance*, INDEPENDENT, Apr. 26, 1995, at 27; Louis Galvan, *"Three Strikes" Law Poses Justice Issues: Forum Hopes to Generate Discussion About Crime and Its Solutions*, FRESNO BEE, May 9, 1994, at B1.

146. REYNOLDS, *supra* note 124, at 70; Mary Curtius, *Klaas Killer Sentenced to Die, Stuns Court*, L.A. TIMES, Sept. 26, 1996 at A1.

147. REYNOLDS, *supra* note 124, at 70.

148. Richard Price, *Cruel Lesson, Why Polly Died, Town Angry at a System that Failed*, USA TODAY, Dec. 8, 1993, at 1A.

149. *'3 Strikes' Bandwagon, supra* note 142.

150. Heft, *supra* note 146.

151. Galvan, *supra* note 146. The murder of Polly Klaas fueled further public outrage due to the alleged sexual abuse involved. Governor Pete Wilson was also outraged at sentences for rape laws and he proposed a "One-Strike" statute. San Diego County Deputy District Attorney Charles Nickel drafted the statute. Wilson called a special session of the Legislature. Not wanting to be on the wrong side of the crime issue, the California Legislature passed "One Strike," which mandated that a person convicted of a single sexual offense, under certain circumstances, automatically receives a life sentence. *See* CAL. PENAL CODE § 667.61 (West 2002).

152. George Skelton, *Wilson Seizes the Day After Polly's Murder*, L.A. TIMES, Dec. 13, 1993, at A3.

*Chronicle*? Smirking? Jesus, boy. I wanted to just belt him right across the mouth."[153]

Opponents attacked Proposition 184, primarily on two grounds. First, they argued that it was too costly. According to the California Department of Corrections, Proposition 184 would incarcerate more than 100,000 long-term criminals by 2001 at a cost of $500 billion to build 20 new prisons.[154] Second, opponents claimed that Proposition 184 would incarcerate non-violent offenders. This argument gained credibility when a small-time criminal was arrested for stealing $151 from a sandwich shop in Washington,[155] which had a law similar to Three Strikes; under that law the defendant faced the possibility of life in prison.[156]

As of February 1994, more than eighty percent of likely California voters supported a Three Strikes bill.[157] This public pressure forced the Assembly to respond as Assemblymembers Jones and Costa reintroduced Reynolds' Three Strikes law while other legislators introduced four similar but competing measures.[158] Reynolds's message to the Assembly was clear: "pass [the Three Strikes law] or the voters will do it for you."[159]

All five Three Strike bills moved swiftly through committee.[160] In the end, the Assembly approved Reynolds's bill by a vote of fifty-nine to ten, and the Senate approved it twenty-nine to seven.[161] Governor Wilson signed the Bill into law on March 7, 1994, with Reynolds by his side.[162]

Despite the legislative victory, Reynolds refused to remove Proposition 184 from the ballot. Public sentiment for the law was strong, and passage as an initiative would make it less susceptible to modifications by the Legislature.[163] Polls showed that, come November, the proposition would pass.[164]

The measure became a political wedge issue. Governor Wilson used the Three Strikes initiative to distinguish himself from Democratic gubernatorial contender Kathleen Brown. Wilson television ads stated that Wilson and Brown

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153. *Id.*

154. Dan Morain, *"Three Strikes" Bill Clears State Legislature*, L.A. TIMES, Mar. 4, 1994, at A1 [hereinafter *"Three Strikes" Bill Clears State Legislature*].

155. John Balzar, *The Target: Repeat Offenders, Washington State Voters Pioneered the Three-Strikes Idea, but a $151 Robbery Case May Test if They Got the Law They Wanted*, L.A. TIMES, Mar. 24, 1994, at A5.

156. *Id.*

157. *"Three Strikes" Bill Clears State Legislature, supra* note 155.

158. *Id.*; REYNOLDS, *supra* note 124, at 86.

159. Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 412-13 (1997).

160. Sze, *supra* note 134, at 1054.

161. Greg Lucas, *Assembly Passes "3 Strikes" Bills*, S.F. CHRON., Feb. 1, 1994, at A13; Vlae Kershner, *State Senate Approve "3 Strikes" by Big Margin*, S.F. CHRON., Mar. 4, 1994, at A3.

162. Daniel M. Weintraub, *"3 Strikes" Law goes into Effect*, L.A. TIMES, Mar. 8, 1994, at A5.

163. A full two-thirds Assembly majority would be required to amend the constitutional amendment proposed by Proposition 184. CAL. CONST. art. XVIII, § 1.

164. Edward Epstein, *Poll Finds Few Voters Know About Fall Initiatives: 'Three Strikes' Measure is the Only Exception*, S.F. CHRON., July 28, 1994, at A17.

were "as different as two people can be."[165] "On crime, Pete Wilson was the force behind the tough new 'three strikes' and 'one strike' laws [and] he has enforced the death penalty. . . . Brown opposes the death penalty, is supported by criminal defense lawyers, and will appoint more lenient judges."[166]

The official voters' packet employed the catch phrase "Three Strikes and You're Out" to full advantage:

> Proposition 184 keeps rapists, murderers and child molesters behind bars where they belong. Police, taxpayer, crime victim and prosecutor organizations support Proposition 184. Let's make California safe for children, families and seniors again. 3 STRIKES SAVES LIVES AND TAXPAYER DOLLARS! Let's tell *serious/violent* career criminals "3 Strikes and You're Out!"[167]

An extraordinary seventy-two percent of the California voters approved the measure.[168]

### *F. Proposition 21: The Gang and Violence Crime Prevention Act (2000)*

In 2000, California voters were presented with the Gang Violence and Juvenile Crime Prevention Act. The measure, known as Proposition 21, proposed to increase the instances when juveniles could be tried as adults. Advocates claimed that Proposition 21 modernized the juvenile justice system by responding to increasing violent youth crime. Opponents argued that Proposition 21 sold children out to a punitive adult criminal system that failed to rehabilitate or reform. Proposition 21 signaled Californians' dissatisfaction with the juvenile justice system. It presented voters with yet another option to reshape crime and punishment in California.

The California juvenile justice system dates back to 1909, but the current configuration came about in the early 1940s after fourteen-year-old Barney Lee was sentenced to San Quentin State Prison for killing his uncle.[169] The possibility of a fourteen-year-old child doing adult time with adult criminals led to the creation of the California Youth Authority, a division of the State Department of Corrections.[170]

Until Proposition 21, the law provided that any criminal offender under eighteen years of age automatically came under the purview of the juvenile courts. If the prosecution considered the minor "unfit for treatment" in the juvenile system or accused the juvenile of an enumerated serious crime, the

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165. *California Election: Inside the Ads*, L.A. TIMES, Nov. 3, 1994, at A24.

166. *Id.*

167. CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 5 (Nov. 8, 1994).

168. *State Vote*, RIVERSIDE PRESS-ENTERPRISE, Nov. 9, 1994, at A2.

169. Mark Gladstone & James Rainey, *Abuse Reports Cloud Youth Authority*, L.A. TIMES, Dec. 24, 1999, at A1.

170. Mark Gladstone, *Proposition 21: Authorities Fear Fallout But Weigh Options*, L.A. TIMES, Mar. 9, 2000, at A3 [hereinafter *Authorities Fear Fallout*].

prosecutor could ask the court to adjudicate the minor in the adult criminal system. After an investigation and report by a probation officer, the court would consider various circumstances about the juvenile and the crime and make a decision.[171] If the court agreed with the prosecution, the minor would be adjudicated as an adult.

Like other states, California steadily lowered the age that juvenile offenders could be tried as adults. By 1995, fourteen- and fifteen-year-old minors could be tried in adult court for murder and other serious crimes. The court could still sentence a minor who was adjudicated in the adult system to the Youth Authority, unless the minor was convicted of certain serious felonies or received a sentence of over twenty-five years.[172] Proposition 21, however, would change this.

There is no question that juvenile crime increased during the twentieth century, and particularly the second half. According to a 1940 poll, teachers' top discipline concerns seemed mild: talking out of turn, making noise, cutting in line, littering, chewing gum, running in the halls, and dress code violations.[173] By 1990, teachers were complaining of illegal drug abuse, alcohol abuse, pregnancy, suicide, rape, robbery, and assault.[174] Many states responded by abandoning rehabilitation as an attainable goal and focused on straight-forward punishment.[175]

Governor Pete Wilson championed Proposition 21.[176] When a minor was accused of committing certain violent crimes or had previously been adjudicated a ward of the court, Proposition 21 would allow prosecutors to file charges against certain minors directly in a criminal court—no determination of juvenile court unfitness was required. The initiative would decrease the minimum age, from sixteen to fourteen, when a juvenile offender could be adjudged in criminal court. The initiative would also broaden the circumstances when a minor would be sent to prison instead of to the Youth Authority.[177]

The debates over Proposition 21 contained rhetoric typical of California ballot initiatives. Indeed, Governor Wilson had summed up his view of juvenile crime almost five years before Proposition 21 was presented to the California voters: "If a 14 year old punk does adult crime," Wilson declared, "he does adult time."[178]

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171. Manduley v. Superior Court, 27 Cal. 4th 537, 548 (2002).

172. *Id.*

173. Albert W. Alschuler, *Two Guns, Four Guns, Six Guns, More Guns: Does Arming the Public Reduce Crime?* 31 VAL. U. L. REV. 365, 372 n.32 (1997).

174. *Id.*

175. Sara Raymond, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California's Juvenile Justice System and Reasons to Repeal It*, 30 GOLDEN GATE U. L. REV. 233, 251 (2000).

176. *Id.* at 251-52.

177. *Manduley*, 27 Cal. 4th at 549-50.

178. Joe Battenfeld, *Wilson Talks Tough in Bay State Campaign Swing*, BOSTON HERALD, Aug. 30, 1995, at O18.

In 1998, Wilson penned an opinion article in the *San Francisco Examiner* in which he elaborated on his crime policy views. While overall crime was at its lowest level in over thirty years, Wilson wrote that, "[b]etween 1967 and 1995, arrests of juveniles in California rose 260 percent for robbery and nearly 300 percent for murder."[179] To remedy this, he asked the California Legislature to "requir[e] juvenile murderers and rapists to be tried as adults," to "classif[y] all gang-related felonies as 'strikes'" for purposes of Three Strikes, and to "mak[e] gang-related murderers eligible for the death penalty or life without the possibility of parole."[180]

Governor Wilson said that he would not stand "idly by" while the Legislature debated these reforms; instead, he would seek to place the Gang Violence and Juvenile Crime Prevention Act on the 2000 ballot.[181] In fact, a ballot initiative may have been the Governor's only option. Between 1995 and 1998, the Legislature considered many bills to reform the juvenile justice system, but most bills never made it to Wilson's desk. Proposition 21 contained many of those failed legislative efforts.[182]

When Wilson left office in 1998, a critical infrastructure of support for Proposition 21 existed. The new governor, Gray Davis, backed the measure, as did other law enforcement groups.[183] In the weeks prior to the March 2000 vote, Wilson and others argued that Proposition 21 was a modernization effort and a much-needed response to increasing juvenile crime.[184] According to Wilson, the juvenile justice system was designed in the 1940s for youths whose "offenses included truancy, curfew violations and fistfights . . . petty theft and vandalism."[185] "It was never intended or designed to handle gang murderers with semi-automatic weapons or rapists preying upon innocent women."[186] Dave LaBahn, deputy director of California District Attorney's Association (CDAA), stressed that "[t]he concept is not to throw away the system . . . the concept is to get the most violent offenders into adult court."[187]

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179. Pete Wilson, *The Governor vs. The Gangs*, S.F. EXAMINER, Aug. 2, 1998, at D7 [hereinafter *The Governor vs. The Gangs*].

180. *Id.*

181. *Id.*

182. Raymond, *supra* note 176, at 252.

183. Dan Smith, *Youth-Crime Measure Called Too Costly*, CONTRA COSTA TIMES, Feb. 2, 2000, at A9. Backers included the California League of Cities, the California District Attorney's Association, the California State Sheriff's Association, California Peace Officer's Association, California Police Chief's Association, and California Narcotic Officer's Association. Pete Wilson, *California Needs Juvenile Justice Reform*, SAN DIEGO UNION-TRIBUNE, Feb. 23, 2000, at B11 [hereinafter *Juvenile Justice Reform*].

184. Peter Y. Hong, *Law Enforcement Officers Oppose Initiative on Crime*, L.A. TIMES, Feb. 18, 2000, at B1.

185. *Juvenile Justice Reform*, *supra* note 184.

186. *Id.*

187. Mark Gladstone, *Youth Crime Crackdown Up to Voters*, L.A. TIMES, Feb. 1, 2000, at A3 [hereinafter *Youth Crime Crackdown*].

Among the notable opponents of the measure were the Reverend Jesse Jackson and Cardinal Roger M. Mahoney, the archbishop of Los Angeles.[188] Opponents estimated that Proposition 21 would require one billion dollars in new correctional facilities.[189] Mahoney argued that these added costs would be better spent on rehabilitation and prevention programs.[190] He said that: "children sent through the adult system, where there are minimal opportunities for rehabilitation and where their physical and emotional survival is constantly being threatened, are destined to come out of prison as hardened criminals."[191]

In speaking to the Los Angeles County supervisors, Jackson's tone reflected his ministerial training.

> I urge you to vote no on [Proposition] 21 because of the madness that we see taking place in our country today, which we call zero tolerance .... That's the opposite of development. It is the opposite of grace and mercy. In justice, you balance the scales because there are circumstances at the crossroads .... Do we choose the development of our youth or the degradation of them? Do we choose the development of our youth or do we reject them?[192]

The supervisors of Los Angeles agreed with Jackson by voting to oppose Proposition 21.[193]

Both sides cited statistics. Proposition 21 advocate, Ventura County District Attorney Michael Bradbury, cited California Department of Justice statistics to show between 1983 and 1998 there had been a 60.6 percent increase in juvenile murder, rape, robbery, attempted murder, and aggravated assault.[194] Meanwhile, the liberal Justice Policy Institute claimed that juvenile felony arrest rates dropped more than forty percent in California between 1978 and 1998, a statistic that defied the public's intuitive notion of reality.[195] Nevertheless, in the primary

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188. Margaret Ramirez, *Mahoney Leads Protest Against Youth Crime Initiative*, L.A. TIMES, Jan. 13, 2000, at B1; *Race Disparity*, CITY NEWS SERVICE, Feb. 3, 2000. Other opponents included California Parent Teacher Association president La Vonne McBroom, former director of the California Youth Authority Allen Breed, president of the Chief Probation Officers of California Raymond Wingert, and the *Los Angeles Times*. *Statewide Propositions*, SAN DIEGO UNION-TRIBUNE, Feb. 26, 2000, at A19; *Times Endorsements*, L.A. TIMES, Feb. 27, 2000, at M4.

189. *Youth Crime Crackdown*, *supra* note 188.

190. Ramirez, *supra* note 189.

191. *Id.*

192. *Race Disparity*, *supra* note 189.

193. Nicholas Riccardi, *Supervisors Vote to Oppose Juvenile Crime Initiative*, L.A. TIMES, Feb. 9, 2000, at B8.

194. Michael D. Bradbury, *More Tools are Needed to Curb Juvenile Crime*, L.A. TIMES, Feb. 29, 2000, at B7.

195. Bobby Cuza, *Felony Juvenile Arrest Rate Has Fallen, Group Says*, L.A. TIMES, Mar. 3, 2000, at B3.

election of March 2000, sixty-two percent of California voters approved Proposition 21, and the measure became law.[196]

### G. The Drug Propositions: Propositions 215 and 36

While the voters were busy raising the stakes for serious criminal conduct, there were other forces at work with a very different agenda—to make accessible drugs for treatment and treatment for drugs. In the past few years, California has followed the lead of a number of states in adopting alternatives to incarceration for nonviolent drug offenders.[197] The trend has tended to be more bipartisan. The course may have "been driven by a drop in crime, fiscal constraints, and waning public support for imprisoning nonviolent felons."[198]

Proposition 215 was put to the voters in November 1996. It proposed to exempt patients, their caregivers, and their physicians from criminal laws for using marijuana for medical treatment.[199] Supporters had previously gotten bills for similar efforts passed by the California Legislature, but then-Governor Wilson vetoed the legislation.

In contrast to earlier crime initiatives, medical marijuana advocates enlisted medical professionals to further their cause.[200] Proponents argued that the initiative would help ease the pain of seriously and terminally ill patients with such diseases as cancer and AIDS. They appealed to sympathy and asked voters to join them to "relieve suffering."[201] Some politicians and San Francisco District Attorney Terence Hallinan supported the measure.[202] Hallinan stated, "I support it because I don't want to send cancer patients to jail for using marijuana."

Long on sympathy, Proposition 215 was short on science. Organizations such as the American Cancer Society opposed the initiative's passage because of marijuana's harmful physical and psychological effects.[203] Meanwhile, Attorney General Dan Lungren, CDAA, and most other law enforcement agencies opposed the measure, citing the lack of written guidance and limitations of the proposal.[204]

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196. Venise Wagner, *Crime Measures Rack Up Big Wins*, S.F. EXAMINER, Mar. 8, 2000, at A23.

197. Greg Krikorian, *The Nation: Sentence Reforms Found Effective*, L.A. TIMES, Feb. 7, 2002, at A18.

198. *Id.*

199. CALIFORNIA SECRETARY OF STATE, ANALYSIS OF PROPOSITION 215, *available at* http://vote96.ss.ca.gov/Vote96/html/BP/215analysis.htm (last visited Aug. 16, 2002) (copy on file with the *McGeorge Law Review*).

200. CALIFORNIA SECRETARY OF STATE, ARGUMENT IN FAVOR OF PROPOSITION 215, *available at* http://vote96.ss.ca.gov/Vote96/html/BP/215yesarg.htm (last visited Aug. 16, 2002) (copy on file with the *McGeorge Law Review*).

201. *Id.*

202. CALIFORNIA SECRETARY OF STATE, REBUTTAL TO ARGUMENT AGAINST PROPOSITION 215, *available at* http://vote96.ss.ca.gov/Vote96/html/BP/215norbt.htm (last visited Aug. 16, 2002) (copy on file with the *McGeorge Law Review*).

203. CALIFORNIA SECRETARY OF STATE, REBUTTAL TO ARGUMENT IN FAVOR OF PROPOSITION 215, *available at* http://vote96.ss.ca.gov/vote96/html/BP/215yesrbt.htm (last visited Aug. 16, 2002) (copy on file with the *McGeorge Law Review*).

204. *Id.*; CALIFORNIA SECRETARY OF STATE, ARGUMENT AGAINST PROPOSITION 215, *available at*

They feared the proposition would protect drug dealers from prosecution, provide legal loopholes, and make it legal for people to smoke marijuana in public places—"next to your children."[205]

Despite the fears and lack of support from most law enforcement agencies, the Medical Use of Marijuana initiative passed with fifty-six percent of the vote.[206] Immediately, jokes popped up such as: "Wonder what that victory party was like" and "Now if we can just get HMOs to cover the cost of Doritos and Oreos."[207]

Not everyone was laughing. Attorney General Dan Lungren ordered a meeting of law enforcement officials and prosecutors to discuss the implications of the passage. His spokesman said: "We have legal anarchy. No one knows what this means."[208] Other law enforcement opponents expressed concern about the poor wording and lack of direction provided by the initiative. "We're not really sure what we can and can't do now. What constitutes an acceptable amount (of marijuana)? Who qualifies as a caregiver? It's going to be a big mess," stated Tom Gorman, spokesman for the California Narcotics Officers' Association.[209] In fact, the measure provided little definition as to who was exempt and what circumstances were exempt from prosecution. Today, six years after its passage, law enforcement officers and prosecutors still complain of a lack of clarity and say that the initiative is unworkable.[210]

While law enforcement seeks guidance from courts and legislators, California juries have "demonstrated a marked resistance to convicting defendants who mount a credible medical marijuana defense."[211] Advocates of the measure have "launched a political offensive against prosecutors in several California counties," including a failed attempt to recall the Marin County District Attorney in April 2001.[212]

Four years after the passage of Proposition 215, its proponents sponsored Proposition 36. This initiative proposed probation and drug treatment, rather than incarceration, for certain drug offenses.[213] Ostensibly, the proposition was limited to crimes of simple drug possession, and it made ineligible for treatment offenders with prior violent felonies or offenders charged with crimes other than a drug offense.[214]

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http://vote96.ss.ca.gov/Vote96/html/BP/215noarg.htm (last visited Aug. 16, 2002) (copy on file with the *McGeorge Law Review*).

205. *Id.*

206. Eric Bailey, *New Pot Law Brings Turmoil and Concerns*, L.A. TIMES, Nov. 7, 1996, at A3 [hereinafter *Turmoil and Concerns*].

207. *Laugh Lines; Punch Lines*, L.A. TIMES, Nov. 7, 1996, at E2.

208. *Turmoil and Concerns*, *supra* note 207.

209. *Id.*

210. Eric Bailey, *Medical Pot Bill Aims to Clarify Usage*, L.A. TIMES, May 29, 2001, at B6.

211. *Id.*

212. *Id.*

213. CALIFORNIA SECRETARY OF STATE, OFFICIAL VOTER INFORMATION GUIDE, GENERAL ELECTION 26-27 (2000).

214. *Id.*

Those supporting Proposition 36 claimed that "the war on drugs has failed." They contended that nonviolent drug users were overcrowding California jails, while violent criminals were being released.[215] Proponents repeatedly stated that it was a cost issue, the idea being to "turn addicts into productive citizens, so they pay taxes and stop committing crimes to support their habits."[216]

Opponents argued that the proposition would essentially decriminalize drugs like PCP, heroin, and "date rape" drugs—"the hard drugs behind most child abuse, domestic violence, sexual attacks and other violent and theft-related crimes in California."[217] They also said that it would hurt legitimate drug treatment programs, like the successful drug courts and potentially put violent drug abusers on the street.[218] They countered with their own cost claims, stating that it would cost over $660 million dollars to implement the provisions of the proposition.[219]

Many judges opposed Proposition 36, stating that it tied their hands and lacked sanctions. Orange County Superior Court Judge C. Robert Jameson asked: "An attorney offers a client a suspended three-year prison sentence and Drug Court, or Proposition 36, where you can get probation and attend Joe's Drive-Thru Rehab. Which do you think they'll want?"[220] "Some in law enforcement say privately it could result in fewer drug arrests. Police won't spend time on cases where the bad guys can't get punished."[221]

Party lines were blurred. Governor Gray Davis opposed Proposition 36 as did State Attorney General Bill Lockyer, both Democrats.[222] So did most Republicans. To the surprise of many, Proposition 36 passed by garnering a "whopping sixty percent" of the vote.[223]

## III. CONCLUSION

Californians have cast their criminal justice system in a mold of their own making. Their votes on major policy issues in criminal justice show their rebellious streak—a willingness to bypass the legislature and defy the courts in order to make a system that is responsive to their needs for safety and notions of justice.

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215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. Jerry Hicks, *A Proposition for Users: Try Drug Court*, L.A. TIMES, Nov. 9, 2000, at B3.
221. *Id.*
222. Dan Morain, *Davis Against Drug Diversion Plan: Announces Other Positions*, L.A. TIMES, Nov. 2, 2000, at A1.
223. *Picking and Choosing the Props.*, L.A. TIMES, Nov. 9, 2000, at B10.

California may be ahead of its time. In April 2002, President George W. Bush called for amendment to the United States Constitution to protect rights of violent crime victims. Some have criticized the attempts as "taking a roller to a Rembrandt," but Bush stated that this was "one of those rare instances when amending the Constitution is the right thing to do."[224] Attorney General John Ashcroft said, "too often in the quest for justice, the rights of these victims have been overlooked or ignored. It is time—it is past time—to balance the scales of justice, to demand fairness and judicial integrity not just for the accused but for the aggrieved as well."[225] Those statements are reminiscent of those made in California back in 1982 and 1990, when Californians put victims' rights into the law.

What has been the result of the changed system? By the end of the 1980s, California's serious crime rate declined to twenty-two percent above the national average,[226] and crime rates continued to fall dramatically throughout the 1990s. How much of the decrease is directly attributable to the reforms of Proposition 8, Proposition 115, and Proposition 184, will be debated and discussed. There are, of course, those ideological children of Rose Bird who are closed to the possibility that a system which emphasizes accountability can translate into a safer society. But for intellectually honest observers, facts matter. The system was reformed dramatically, and crime dropped precipitously. It is not all coincidence.

From a policy perspective, the last thirty years in criminal justice policy have brought a shift of power away from the legislative and judicial branches and into the hands of the executive branch. More importantly, it has also brought a shift of authority into the hands of voters. Of eight criminal justice initiatives placed on the ballot since 1978, a remarkable one-hundred percent have been approved by the voters.[227] The lesson is clear: if politicians, legislators and judges are not in step with the voters, they will be left behind.

In California, it is the electorate who is the final arbiter of criminal justice policy. At some point, the genie got out of the jar, and there is no putting it back in.

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224. Eric Lichtblau, *Victims' Bill Gets Backing*, L.A. TIMES, Apr. 17, 2002, at A10.

225. *Id.*

226. CRIME AND PUNISHMENT IN AMERICA, *supra* note 5.

227. Cal. Proposition 17 (1972); Cal. Proposition 7 (1978); Cal. Proposition 8 (1982); Cal. Proposition 115 (1990); Cal. Proposition 184 (1994); Cal. Proposition 215 (1996); Cal. Proposition 21 (2000); Cal. Proposition 36 (2000); CALIFORNIA INITIATIVE PROCESS, *supra* note 2.

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