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The Governor's Office

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THE GOVERNOR'S OFFICE

February 14, 1992

The Board of Editors
Pacific Law Journal:

As we approach the tenth anniversary of the enactment of Proposition 8, and as we contemplate the more recent enactment of Proposition 115, it is worthwhile to reflect upon the circumstances which compelled the citizens of California to make the extraordinary effort to enact these two landmark initiatives. This reflection is valuable because it provides us with a history lesson from which some might learn how to avoid the mistakes of the past.

The development and passage of Proposition 8, known as the Victims' Bill of Rights, was a direct result of the accumulated frustration and anger of a citizenry. For several years prior to the advent of Proposition 8, the people of California, along with law enforcement officials, had requested the Legislature to enact bills which would effectively deal with the problems of rising crime, multiple repeat offenders, unsafe schools, inappropriate plea bargaining, and an apparently greater concern for criminals than for their victims. Failure by the Legislature to enact much needed reforms and an over-zealous, anti-law enforcement California Supreme Court provided sufficient impetus for the campaign for Proposition 8. This effort involved thousands of volunteers across the state, and it became a vehicle for the people not only to change the law but also to send a loud message to their judges and to their representatives.

The overwhelming passage of Proposition 8 ushered in a new era in California's criminal justice system. The implementation of the provisions of Proposition 8 directly affected the safety and well-being of the people by helping to close the revolving door of our prisons, by keeping repeat offenders off the streets for longer periods of time, and by putting the rights of victims on at least an equal footing with those of the criminals. Proposition 8 went on to be upheld through several court cases. It has served the people well and will continue to do so as long as we maintain the premises upon which it was built.

Indeed, with the passage of Proposition 8, and changes in the Supreme Court, there was much hope that the people's message would influence the Legislature to take action.

GOVERNOR PETE WILSON, SACRAMENTO, CALIFORNIA 95814 (916) 445-2941

However, despite the benefits derived from Proposition 8, there was still much to be done in the Legislature to correct other inequities and to correct court rulings which continued to hamper the criminal justice system. The public was growing weary of long, protracted, and costly delays in our court processes, and they were frustrated that the death penalty was being continually thwarted. Again, the people and law enforcement asked the Legislature to take corrective action. Again, the Legislature failed to act. Faced with no other choice, the people had to choose the initiative process to implement their will, and thus, Proposition 115 was born out of the same frustration that gave birth to Proposition 8.

As with Proposition 8, the campaign for Proposition 115 also generated significant public interest and involvement, and the measure passed overwhelmingly. The benefits from Proposition 115 are already becoming evident through greatly expedited legal proceedings. In this regard, the people are obtaining their desired goal of swifter and more certain justice.

Both Proposition 8 and Proposition 115 were very good for California. They gave the people a voice in matters which literally affected their lives, they vastly improved our criminal justice system which needed repair badly, and they set the tone for the reform of how we conduct the business of government. Perhaps best of all, these two propositions gave birth to, and gave a voice to, the victims of crime movement in California. Through the dedicated and tireless efforts of people like Doris Tate, Collene Campbell, Harriet Salarno, and thousands of others, the people of California -- especially those who have been victimized -- now know that there are organizations and people out there who care about their plight and who can provide assistance. They also know that more swift justice and concern for victims is the official policy of the State of California.

Sincerely,

A handwritten signature in black ink that reads "Pete Wilson". The signature is written in a cursive, flowing style.

PETE WILSON

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February 3, 1992

To the Readers of the Pacific Law Journal:

Throughout California's long history, we have always been on the cutting edge of change and innovation.

Perhaps one of our greatest accomplishments has been the revolution our state has led in the area of deterring crime and promoting victims' rights. Certainly, two of the most important tools of this revolution have been Proposition 8 and Proposition 115.

To place things in perspective, we must remember that it was not very long ago victims were made to suffer a double injury. Not only were they the victims of crime, but they also ended up as the victims of a justice system that routinely ignored their plight and their suffering.

For years, first as a state legislator and then as state attorney general, I had argued that criminal justice reform was absolutely essential if government was to fulfill its primary duty of protecting the safety of our people. Unfortunately, many public officials failed to recognize or take seriously this important duty. This shirking of responsibility occurred at a time when only 5.5 percent of those arrested for a felony ever found their way to state prison. It was with a sense of great urgency, therefore, that I made the decision in 1982 to vigorously support Proposition 8, the aptly named "Victim's Bill of Rights."

In the ballot argument that I authored in favor of the initiative, I pointed out that the courts of our state were creating additional rights for the criminally accused and placing more restrictions on law enforcement, all of which went against common sense. Proposition 8, I wrote, would overcome these adverse decisions, create rights for victims of violent crime, and would result in more criminals being sentenced to state prison.

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In passing Proposition 8, the voters of California sent a clear message, not just to state government leaders, but to the nation as a whole, that the time had come to restore the pursuit of truth as the goal of our criminal justice system.

In the years since its passage, Proposition 8 has lived up to much of our hopes and expectations. Whereas, previously, relevant evidence was at times excluded due to court-created legal doctrines, Proposition 8 has allowed much of this evidence to now be presented in court so that judges and jurors can better determine the guilt or innocence of defendants. As a result, there is a much greater likelihood that those who have actually committed crimes will be convicted and sent to prison.

Furthermore, by lengthening the sentences of those convicted of certain felonies, limiting the use of the insanity defense, allowing prior conviction evidence to discredit witness testimony, and giving victims the right to make statements at sentencing and parole hearings, Proposition 8 has been effective in putting more criminals behind bars and keeping them there longer. Indeed, it should come as no surprise that from 1983 to 1990, the number of convicted criminals in state prison rose from 35,000 to 96,000. While this increase is the result of a number of factors, such as the many tough anti-crime laws that I signed during my tenure as Governor, it is certainly the case that Proposition 8 has contributed a great deal to our ability to remove criminals from our streets and neighborhoods.

Equally important, though, were the victims rights provisions of Proposition 8. For example, by putting into law the common sense notion that criminals must make restitution to their victims, Proposition 8 ushered in a new era of understanding regarding the needs of crime victims. With the greater awareness of the needs of victims, the state's victims compensation fund was expanded. In 1984, 13,000 victims applied for and received a total of \$14.3 million in compensation. By 1990, 65,000 crime victims received \$65 million in compensation.

Proposition 8 has proved to be not only a useful tool, but also a catalyst for other needed reforms, including Proposition 115.

Proposition 115 has continued the revolution that Proposition 8 helped start. By increasing the number of violent crimes which receive our stiffest punishment, requiring speedy trials of criminal defendants, and reforming the rules regarding the admissibility of hearsay evidence, Proposition 115 gives us the opportunity to not only increase the safety of our citizens,

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but to also make our criminal justice system more efficient and effective. And while some may argue about the criminal justice system's ability to implement Proposition 115, it should not be forgotten that California voters approved this measure despite rancorous attempts by opponents to tie the initiative to issues such as abortion. Proposition 115's approval, therefore, should serve as evidence of just how strongly Californians want our criminal justice system to be more effective.

During my eight years as Governor of our great state, I took great pride in the many successes we had in making California a better place to live. However, given my lifelong dedication to toughening our crime laws and improving our system of justice, the criminal justice reforms started by Proposition 8, and continued by new state laws and by Proposition 115, must rank as one of the most important and satisfying of all the changes that has occurred in our state. As we ponder the significance of this tenth anniversary of Proposition 8, we should remember that before any one of us can enjoy the fruits of our labor, the company of our friends and loved ones, or the freedom that our society affords, we must be safe from the predations of criminals. Without such safety, the pursuit of life, liberty and happiness becomes impossible.

Most cordially,



George Deukmejian
California Governor
1983-1991



State of California

Office of the Attorney General

Daniel E. Lungren
Attorney General

January 6, 1992

TO: The Board of Editors
Pacific Law Journal

The 1982 passage of Proposition 8, the Victims' Bill of Rights, represented a predictable citizen reaction to (1) a period of unchecked activism in the criminal law arena by the Rose Bird Supreme Court and (2) the failure of the Legislature to repair the perceived damage. Proposition 8 broke new ground for the rights of crime victims, including its provisions for restitution and for victim involvement in the sentencing process.^{1/} There were also important procedural proposals affecting subjects such as sentencing, felony impeachment, and restoration of the M'Naghten test for legal insanity.

The core procedural reform achieved in Proposition 8 was our return to federal standards with respect to searches and seizures and the admissibility of extrajudicial statements, pursuant to the initiative's "Truth-in-Evidence" provision (Cal. Const., Art. I, § 28(d)). Although a state constitutional basis for evaluating a search and seizure had first been articulated in 1955,^{2/} the independent state grounds doctrine did not gain serious momentum until the 1970's. By 1982, the body of California search and seizure law had developed in a manner that was significantly more restrictive of law enforcement operations than those federal standards imposed by the Fourth Amendment. By then, California's exclusionary rules differed from federal rules of exclusion on the complete range of search and seizure issues including standing, searches by private individuals, the showing required to quash a search warrant, and virtually all warrantless

1. It is worthy of note that in 1981 this Department, under then Attorney General George Deukmejian, first established a Victim Notification Program for its criminal caseload which was, in a very real sense, the precursor for Proposition 8's victim notification for sentencing provisions. (Penal Code, §§ 1191.1 - 1191.25)

2. People v. Cahan (1955) 44 Cal.2d 434.

searches and seizures.^{3/} At the same time, an independent state grounds rationale with respect to self-incrimination had been developed to support the exclusion of admissions and confessions that were fully admissible under federal standards.

While the state judiciary has the undoubted authority to interpret the state Constitution as a document of independent force, it must be recognized that this development of special exclusionary rules was proceeding apace despite constitutional language which parallels the Fourth and Fifth Amendments of the U.S. Constitution. Furthermore, this invocation of independent state grounds occurred on an ad hoc basis, without any indication of a litmus test that would trigger an evaluation under state rather than federal standards. At the very same time, of course, the efficacy of exclusionary remedies, utilized in absolute applications, was increasingly being called into question in California and throughout the nation. Indeed, the conclusion that our Supreme Court was occupying a legislative, rather than a judicial, role was compelling. Accordingly, repeated entreaties of both prosecutors' and victims' organizations to address this constitutional dilemma were directed to the legislative branch of state government. Unfortunately, the Legislature, with respect to virtually every subject treated by Proposition 8, repeatedly refused to respond in any manner to the sweeping procedural changes that were being wrought in California's criminal law by appellate court fiat. Voter reaction in the form of an initiative was accordingly both necessary and inevitable.

With the hindsight gained from the experience of the last eight years, I must say that Proposition 8 has been an unqualified success. Virtually every major provision of the initiative has been upheld. California's search and seizure standards have returned to the mainstream of the Fourth Amendment. California's law regarding confessions and admissions now conforms to federal guidelines, with only a few questions still remaining for appellate court resolution. Impeachment of witnesses with prior felony convictions is now occurring in the manner I believe is more faithful to the original intent of the statute, without reference to a system of court-created rules that generally kept such felonies from the trier of fact and thus

3. See e.g., People v. Krivda (1971) 5 Cal.3d 357, holding that one's trash and garbage is constitutionally protected from law enforcement intrusion until such time as it is "conglomerated" with the trash and garbage of others.

permitted witnesses to testify under "a false aura of veracity."^{4/}

In 1990 with the passage of Proposition 115, the electorate again voted to undo a system of judicially-created procedural rules in criminal proceedings that were unique to California. This time the emphasis was upon expediting the criminal process and bringing about a significant reduction in the court time spent per case.

In streamlining procedures at preliminary examinations, including the use of hearsay evidence under defined circumstances, the drafters of the initiative intended to end the use of the "prelim" as a time consuming "mini-trial." Instead, the people of California acted to return this pre-trial event to a probable cause hearing designed to screen out groundless or unsupported charges, as originally contemplated. Similarly, grand jury indictments were to be restored as a tool for appropriate use by prosecutors, after having essentially disappeared following the California Supreme Court's announcement of an entitlement to a post-indictment preliminary hearing. As a result of other provisions in the initiative, Californians have also joined other states and the federal courts, in returning to a system of reciprocal discovery. Finally, in changing the process of jury selection, Proposition 115's voters have sought to address the problem in this State of very lengthy voir dire procedures, and in particular, of the often very lengthy sequestered individual questioning of jurors in capital cases, formerly mandated by our Supreme Court.

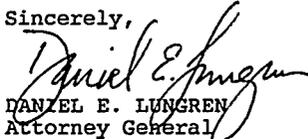
While there has been less time to judge the results of Proposition 115, all indications are that it will succeed in its objectives of making California's criminal justice system operate in a more timely and efficient manner. Several counties have now reported to this office that they have experienced dramatic courtroom economies through the use of the hearsay preliminary hearings, renewed use of the indictment, and the elimination of sequestered individual voir dire in capital cases. Growing court congestion has created crisis conditions for both the civil and the criminal justice systems, forcing litigants to resort to a variety of expedients, such as private judging structures. Proposition 115 will both improve access to justice and strip away several layers of court-created proceduralism which have succeeded in making the system of criminal law enforcement more time consuming and expensive, without making that system any more just.

4. People v. Beagle (1972) 6 Cal. 3d 441, 453.

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January 6, 1992

While Propositions 8 and 115 have thus far proven to be effective answers to the problems they were designed to correct, I believe that there is still at least one major procedural issue that remains to be addressed. There is, in my view, a clear need to streamline state habeas corpus procedures to mandate both timely petitions and, where appropriate, to create a system of unitary review with any pending direct appeal. Where properly utilized, the writ of habeas corpus is a time-honored and effective means of securing justice in our criminal justice system. Nevertheless, its distortion through systematic misuse amounts to an institutional abuse which denies that finality which is an indispensable element of establishing justice. The aforementioned reforms would hopefully parallel proposed changes to the system of federal habeas corpus to eliminate the use of collateral review as a substitute for direct appeal and eliminate repetitious abuse of the writ. I sincerely hope that these changes can be made by our Legislature, and that further resort to an initiative can be avoided.^{5/}

Sincerely,



DANIEL E. LUNGREN
Attorney General

5. Last year my proposal for comprehensive state habeas corpus reform, AB 2156, incorporating these reforms and sponsored by Assemblywoman Carol Bentley, failed passage in the Assembly Committee on Public Safety. I intend to reintroduce the measure next session.



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TO THE BOARD OF EDITORS, PACIFIC LAW JOURNAL:

Over the past decade, California's criminal justice system has experienced a revolution. This revolution, known as the Victims' Rights Movement, has changed the face of the system, and has even more radically changed the public's role in the lawmaking process.

The articles that follow examine the changes that the Victims' Rights Movement has brought to a system which affects the lives of millions of Californians as victims, witnesses, jurors, defendants, and taxpayers. But before analyzing the keystones of this movement, Propositions 8 and 115, it is important to look at its history. One cannot intelligently discuss the merits of these initiatives without also examining the state of the criminal law prior to their passage. It is also vital to ask whether the Victims' Rights Movement has led to a criminal justice system that better protects the people of California from crime.

By the late 1970's California had the most liberal criminal justice system in the nation. The law emphasized rehabilitation over punishment and public safety; it emphasized procedural benefits for the accused over other values, such as reliable and efficient truthfinding. Using the concept of "independent state grounds," first popularized by Justice Stanley Mosk, the California Supreme Court interpreted many provisions of the state constitution to create sweeping new procedural rights for criminal defendants. Many of these decisions reversed overwhelming contrary precedent, and were entirely without any statutory basis.

The system valued rehabilitation so much that it quickly released dangerous, unrepentant criminals to prey on the public. It prevented juries from hearing crucial evidence far more often than the federal or other state courts. It gave California the slowest, most expensive, and most inefficient criminal procedures in the world.

Reform through the legislative process proved nearly impossible. Despite strong public support for a swifter, less expensive procedures and an end to judicially-created advantages for defendants, the legislature

rejected almost every significant criminal law reform measure.

Out of disillusionment with both the judiciary and this legislative deadlock came the Victims' Rights Movement. Victims, prosecutors, police, and public safety-oriented political leaders were ultimately successful in two statewide initiative campaigns (Proposition 8 in 1982 and Proposition 115 in 1990), and the Bird Court election campaign of 1986.

Proposition 8 contained a number of sections, but two were of seminal importance; the "Truth-in-Evidence" provision and the provisions which established the right of crime victims to have a voice in sentencing.

The first change helped reverse a 25-year trend in California of preventing more and more probative evidence from reaching the jury. It helped reestablish the concept of a trial as a search for truth, rather than a game of chance.

The second change gave a voice in the system to those most affected by it, the victims of crime, and it helps daily to restore at least a measure of trust in our courts.

While Proposition 8 did much to reform the justice system, it did not improve California's slow and costly procedural machinery.

Proposition 115 was enacted in June of 1990 to accomplish this. It had three primary goals:

- 1) To replace the cumbersome and unfair (to victims) "mini-trial" preliminary hearing with an efficient system of determining probable cause, by either indictment or a streamlined prelim;
- 2) To cut delays by protecting the People's speedy trial rights, and by radically shortening jury selection; and
- 3) To level the playing field by requiring the defense to provide reciprocal discovery to the People.

The length and expense of preliminary hearings in California had by the 1990's become a national joke. Year-long preliminary hearings in major cases were not uncommon, and use of the preliminary hearing as an endurance contest, and to abuse victims and witnesses in a way that juries would not tolerate, were endemic problems.

Lengthy delays and months-long jury selection in major trials had also brought California's criminal law into disrepute. Speedy trial and judicial voir dire provisions addressed these problems.

Reciprocal discovery was added to provide balance to a system which had long allowed the defense to "sandbag" and to hide truthful information from the People, and thus from the jury.

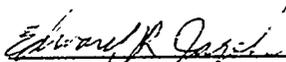
To any fair-minded observer, it is clear that Proposition 8 and 115 were necessary. Like the previous system, however, their success must be judged by how well they have worked.

Proposition 8 has succeeded in what it set out to do. Evidence in criminal trials is now excluded only in accord with federal law. The "Truth-in-Evidence" provision has resulted in more reliable evidence reaching juries, who thus render fairer verdicts. Similarly, the victim input in sentencing has given those injured by crime a stake in the process, and has forced judges, prosecutors, and probation officers to confront the realities of crime.

It is more difficult to judge the impact of Proposition 115, as its components are still being integrated into the system. But prosecutors already see shorter preliminary hearings and jury selection, while neither trial conviction rates nor the number of guilty pleas have been affected. So far, Proposition 115 seems to be working well.

What is the future of California criminal justice? There will be more litigation regarding Proposition 8 and 115; no one can predict in what forms they will finally emerge. But it is certain that the Victims' Rights Movement has created a criminal justice system which is more responsible to those most affected by it - the victims of crime.

Very truly yours,



EDWARD R. JAGELS
PRESIDENT, CDA
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ERJ:ep



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The Board of Editors Pacific Law Journal:

During the past years, California has experienced an array of social and economic ills. There has been an increase in the number of homeless, in unemployment, and crime. There has been a diminution of government services such as health care, public education, environmental regulation, and mental health services. Proposition 8, "The Victims' Rights Initiative", and Proposition 115, "The Crime Victims' Justice Reform Act" were presented to the voters as solutions to some of the problems in the criminal justice system.

Proposition 115 was drafted by the California District Attorneys Association. It encompassed provisions that regularly had been considered by the California legislature and just as regularly rejected. Its title ostensibly related to "victims" although few of its provisions had anything to do with victims' rights. The measure had voter appeal, however cynical its authorship. This proposition also had a political appeal. Governor Wilson supported and used the measure to advantage during his gubernatorial campaign. These factors provided a favorable environment for the passage of the measure. Proposition 115 was put before California voters in June, 1990. The views of this electorate probably are reflected in a California State Bar Foundation survey in 1991. One half of those polled could not identify the Bill of Rights from multiple choice answers, and nearly one half replied that the

accused in a criminal case must prove his or her innocence.

The impact of the "Crime Victims Justice Reform Act" on victims' rights is minimal. The impact on individual rights is profound. The enactment is a thinly disguised device that strikes at the core of the criminal justice system. Proposition 115 is clearly meant to enable prosecutors to secure convictions faster and easier. Speed is accomplished in such ways as eliminating post indictment preliminary hearings, permitting hearsay preliminary hearings, and providing for court conducted voir dire at trial.

The preliminary examination is a "critical stage" in the criminal process, to determine whether or not there is probable cause to bind over the accused for trial. The constitutional rights of confrontation and cross examination that attach to this hearing have been eroded by Proposition 115. With hearsay preliminary hearings, the accused may be held to answer on groundless charges that would have been exposed by cross examination of witnesses, resulting in a termination of criminal proceedings at an early stage. Furthermore, the pre Proposition 115 hearing was valued as a tool to evaluate the strengths and weaknesses of the evidence for both the prosecution and defense. This facilitated proper dispositions for cases that, after such an evaluation, probably would not go to trial. In these regards, the hearsay hearing serves to delay and prolong the criminal process. It exacerbates the very ill it is meant to cure.

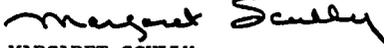
Proposition 115's provision for court conducted voir dire was another device to obtain faster convictions through quicker trials. In highly complex cases, such as those where the prosecution is seeking the death penalty, the voir dire process is necessarily lengthy. But in the majority of criminal trials, voir dire never did consume an undue amount of time. The provisions of Proposition 115 mandating court conducted voir dire have not necessarily saved time. They do however, serve to deprive counsel on both sides of the opportunity to choose a fair and unbiased jury.

In addition to speed, Proposition 115 was drafted to enable prosecutors to secure convictions more easily, by providing for prosecution discovery of the defense case, and by limiting defense discovery of the prosecution case. In courts where prosecution discovery is done, its direct result is often delay in trial by motions and hearings. Its more dangerous aspect is the provision's assault on the Fifth Amendment by compelled disclosure from the defense, thus lightening the burden of proof on the State.

The stated objectives of Propositions 8 & 115, to enhance victims' rights and ensure speedy criminal proceedings, have not been achieved. Rather the impact of these cynical and political enactments has been the erosion of the protection of the individual from the tremendous power of government. Justice Robert Jackson wrote:

"The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the Courts."

Very truly yours,



MARGARET SCULLY
President
CPDA

MS:yhp