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VICTIMS' RIGHTS IN CALIFORNIA

GERALD F. UELMEN*

In June 1982, California voters approved an initiative measure to modify evidentiary exclusionary rules, enhance sentences, reformulate the insanity defense, and make numerous changes in the admissibility of evidence in criminal trials. The initiative measure was entitled "The Victims' Bill of Rights," but is more widely known as Proposition 8.[1] Eight years later, another initiative measure was adopted, which made even more extensive changes in the procedure governing criminal trials. It was entitled "The Crime Victims Justice Reform Act," and is generally known as Proposition 115.[2]

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[1] Initiative Measure Proposition 8 (approved June 8, 1982) (codified at CAL. CONST. art. I, §§ 12 (governing bail and release), 28 (granting rights to victims including restitution, bail, and use of prior convictions at sentencing) (West Supp. 1992), CAL. PENAL CODE §§ 25 (governing defenses of diminished capacity and insanity), 667 (enhancing sentences of habitual criminals), 1191.1 (granting victim right to speak at sentencing), 1192.7 (prohibiting plea bargaining in serious felonies), 3043 (modifying parole eligibility) (West Supp. 1992), CAL. WELF. & INST. CODE §§ 1732.5 (addressing commission of serious felony by persons 18 years of age or older), 1767 (requiring notice be provided to victim of defendant's release on parole upon request), 6331 (addressing operative effects of article on mentally disordered sex offenders) (West Supp. 1992)). *See generally* J. Clark Kelso & Brigitte A. Bass, *The Victims' Bill of Rights: Where Did It Come From and How Much Did It Do?*, 23 PAC. L.J. 843, 844 (1992) (discussing intent and results of Proposition 8).

[2] Initiative Measure Proposition 115 (approved June 5, 1990) (codified at CAL. CONST. art. I, §§ 14.1 (prohibiting post-indictment preliminary hearing in felony initiated by indictment), 24 (requiring judicial interpretation of California Constitution regarding rights of adult and juvenile criminal defendants be consistent with United States Constitution's minimal guarantees only; however, amendment of this section by Proposition 115 was held unconstitutional in Raven v. Deukmejian, 801 P.2d 1077, 1089 (Cal. 1990)), 29 (granting people of State right to due process of law and speedy and public trial in criminal case), 30 (allowing joinder of criminal cases, admitting hearsay evidence at preliminary hearings, and requiring reciprocal discovery), CAL. CIV. PROC. CODE §§ 223 (requiring court conduct jury voir dire), 223.5 (repealing former jury selection provisions) (West Supp. 1992), CAL. EVID. CODE § 1203.1 (admitting hearsay in preliminary examinations) (West Supp. 1992), CAL. PENAL CODE §§ 189 (including death resulting from kidnapping and train wrecking in first degree murder), 190.2 (expanding applicability of death penalty or life imprisonment without parole), 190.41 (removing independent corroboration requirement of proving corpus delicti in murder committed during attempted commission, or flight after commission, of various felonies), 190.5 (expanding sentence of life without parole (or, at court's discretion,

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I was a very vocal opponent of both Proposition 8 and Proposition 115, and believe both of these initiatives accomplished more harm than good. My opposition was not based on any philosophical objection against granting greater rights to victims of crime. I thought, for example, that giving victims the right to be heard at time of sentencing was a positive improvement, and I believe our experience confirms that. My real opposition was based on a commitment to "truth in labeling." I thought both Propositions were rather cynical efforts to capture public support for radical changes

25 years to life) to defendants aged 16 to 18 if enumerated special circumstances found), 206 (criminalizing torture), 206.1 (making conviction of torture punishable by life imprisonment), 859 (abolishing requirement that prosecution deliver, or make accessible, to defendant or defense counsel copies of police, arrest, and crime reports if available or otherwise deliver them within two calendar days), 866 (requiring, upon request of prosecuting attorney, that defense counsel give an offer of proof of testimony expected from any defense witness, and requiring magistrate to exclude testimony of any defense witness unless that testimony would be material and relevant), 871.6 (accelerating procedures to compel preliminary examination), 872 (removing prohibition against crime victim entering hearsay evidence at probable cause hearing, and removing right of defendant to cross examine witnesses), 954.1 (relaxing restrictions against joint trials), 987.05 (restricting court's authority to appoint defense counsel to those who represent, on the record, their readiness to timely proceed), 1049.5 (requiring trial date within 60 days of arraignment absent a showing of good cause), 1050.1 (expressing preference to not sever joint trials on the basis of continuances), 1054 (governing discovery in criminal proceedings), 1054.1 (requiring discovery by prosecution), 1054.2 (prohibiting disclosure of crime victim's address or telephone number by any attorney to criminal defendant), 1054.3 (requiring criminal defendant disclose names and addresses of witnesses to be called, their prior statements, reports or statements of experts, physical or mental examination results, any test results intended to be offered at trial), 1054.4 (allowing law enforcement or prosecuting agency to obtain nontestimonial evidence to the extent permitted by law), 1054.5 (limiting defendant's discovery in criminal cases to informal request of prosecution but making such request enforceable by the court), 1054.6 (codifying attorney work product privilege), 1054.7 (requiring completion of disclosure at least 30 days prior to trial unless good cause shown; good cause "limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement"), 1102.5 (entitling prosecution to prior statements of any defense witness after their direct testimony), 1102.7 (allowing prosecution to refrain from providing crime victim's address or telephone number to defendant unless defendant acting pro se), 1385.1 (prohibiting judge from striking or dismissing any special circumstances admitted by guilty or nolo contendere plea or found by jury or court pursuant to Sections 190.1-190.5), 1430 (repealing statutory requirement that where other than guilty plea is entered, jury trial waived, and an adjournment or change of venue was granted, court was required to proceed to try the case), 1511 (making judicial delay of trial without cause appealable by any party) (West Supp. 1992)).

For articles discussing the impact of Proposition 115, see Laura Berend, *Proposition 115 Preliminary Hearings: Sacrificing Reliability on the Altar of Expediency?*, 23 PAC. L.J. 1131, 1140-79 (1992) (discussing Proposition 115's effect on preliminary hearings in California); Hank M. Goldberg, *Proposition 115: A Prosecutor's Perspective*, 23 PAC. L.J. 947, 947 (1992) (examining the response and implementation of Proposition 115 on the California criminal justice system). Gerald F. Uelmen, *The California Constitution After Proposition 115*, 3 EMERGING ISSUES IN ST. CONST. L. 33, 34 (1990) (analyzing potential impact of Proposition 115).

in the criminal justice system, by labeling them "victims' rights" measures, when their real purpose was to shift greater power into the hands of prosecutors, while offering very little in terms of real relief for victims of crime. While I recognized the need for reform of the criminal justice system, I thought that meaningful reform required a broader base than a back-room closet of the District Attorneys Association.

We are now at a critical juncture in California, calling for some realistic reassessment of where the victims' rights movement has brought us. My candid assessment is that it has simply brought us to the point of bankruptcy—*intellectual bankruptcy*, by disguising criminal justice system complexity behind simplistic labels that actually impede us in our quest for justice; *fiscal bankruptcy*, by diverting resources which are badly needed for education and social programs into a bottomless pit of prison expansion; and *moral bankruptcy*, by creating a political climate where real reform is impossible, because political leaders are obsessed with the fear that any rational consideration of alternatives will result in their being labeled "soft on crime."

First, let me address the intellectual bankruptcy of the use of labels. Labels powerfully influence our criminal justice system. I first learned this lesson as a young prosecutor assigned to the "organized crime" division of the United States Attorney's Office. I remember how impressive it was to see the transformation in everyone's treatment of a case once it was labeled an "organized crime" case. A simple bookmaking case could be transformed into a *cause celebre*, with a visible, measurable impact upon judge, jury, and the media. We even acquired a huge rubber stamp so our files could be marked "Organized Crime Division." We always carried the files so that the rubber-stamped label was clearly visible when we marched into court. We knew the power of a label.

For a moment, just reflect on what kinds of images the label "victim" conjures up in your mind. Our immediate reaction to the word "victim" is compassionate concern for the helpless innocent and anger directed against the guilty victimizer, the "criminal." At its best, our criminal justice system should permit us to transcend these labels and sort out the complexities of human frailty. Anyone who has participated in this process should appreciate how difficult it frequently is to clearly separate victims from victimizers. Who is the "victim," for example, when a battered wife

finally summons the courage to strike back at her tormentor while his back is turned? Who were the "victims" in the McMartin[3] fiasco?

When we allow labels to serve as the measure of our compassion, we disguise this complexity. For me, the dark side of the victims' rights movement is its insistence that compassion be reserved to those we label "victims," and denied to those we label "criminals." Our prisons are also full of victims. Many inmates were victims of abuse as children.[4] Most of them are victims of the disease of addiction to alcohol or drugs.[5] I realize such diseases do not rank very high on our compassion index, but I would suggest this may have more to do with our own ignorance about their etiology than the moral failings of their victims. The banner of the victims' rights movement declares, however, that the purpose of sentencing is punishment.[6] We have transformed our correctional system into a complex of human warehouses. Over the entrance we have declared, "Abandon any hope or pretense of rehabilitation, ye who enter here." Last year, the legislature enacted a measure to permit the early release of prisoners who were terminally ill and allow them to return to their families during the final stages of their fatal disease.[7] The measure was vetoed by the governor. Apparently, enactment would have encroached on our strict reservation of compassion only for those who have been labeled "victims." Those who have been labeled "criminals" presumably deserve no compassion, even when they are dying of AIDS.

The cruelest manifestation of this labeling phenomenon is the

[3] *See Only 2 of 7 to Stand Trial in McMartin Case*, L.A. TIMES, Jan. 19, 1986, § I, at 1. In 1984, Virginia McMartin, founder of the McMartin Preschool in Manhattan Beach, California, and six family members and employees faced over 300 charges of child sexual abuse of forty-one pupils. *Id.* After four years of investigation, all charges against five defendants, and two-thirds of the charges against the remaining defendants, were dismissed. *Id.*; *Jurors Hint McMartin Case was Bungled*, NAT'L L.J., Jan. 29, 1990, at 6. On January 18, 1990, a jury acquitted the remaining defendants of 52 counts of child molesting. *Id.* The resulting investigation and trial was "[t]he longest and costliest criminal trial in U.S. history," costing an estimated $15 million and spanning seven years. *Id.*

[4] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROFILE OF JAIL INMATES, 1989, at 10 (1991). Of jail inmates surveyed by the Bureau of Justice Statistics in 1989, 44% of the females and 13% of the males reported being abused as a child. *Id.*

[5] CALIFORNIA BLUE RIBBON COMMISSION ON INMATE POPULATION MANAGEMENT, FINAL REPORT 29 (1990) [hereinafter BLUE RIBBON REPORT].

[6] *See* CAL. PENAL CODE § 1170(a)(1) (1992). "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." *Id.*

[7] S. 414, 1991-92 Leg., Reg. Sess., (1991-92).

transformation of the debate over capital punishment into a debate over victims' rights. The suggestion is heard with increasing frequency that the real reason we should execute criminals, instead of confining them for life without possibility of parole, is to provide solace and comfort to the families of their victims. I would not expect any family member of a murder victim to be objective, much less feel compassion for the perpetrator of their grief and loss. I had always thought that our system of public justice was designed to replace and transcend an outmoded system of private retribution with a more objective assessment of public costs and benefits. Making victims the ultimate arbiters of which criminals live or die is a radical transformation in our system of public justice, and one which imposes tremendous costs impacting the quality of justice we dispense in noncapital cases as well.[8]

My second charge of bankruptcy is a fiscal one. The most dramatic effect of Proposition 8[9] was the impact it has had on our prison population in California. Since 1982, we have tripled the number of prisoners confined in our penal institutions.[10] California now ranks number one in a nation that ranks number one in the world in the size of our prison population, and sixteenth in the nation in the proportion of our population confined in our prisons.[11] We have invested 6 billion dollars to build new facilities, some of which remain vacant because we cannot fund the staff to open them.[12] It has been estimated that we will have to invest another 5 billion to achieve a level of 130% of capacity by 1994.[13]

None of this has much to do with the level of crime in California, nor are California citizens much safer as a result. Most of those who are confined are inner-city minorities with drug problems.[14] The proportion of our prison population who are ethnic minorities has grown in the past decade from 64% to 70% of our prison population.[15] It now costs about $17,000 per year to keep each inmate confined, more than the annual cost of attend-

[8] *See, e.g.*, N.Y. STATE DEFENDERS ASSOCIATION, INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE, Apr. 1, 1982.
[9] *See supra* note 1 and accompanying text (discussing Proposition 8).
[10] *See* BLUE RIBBON REPORT, *supra* note 5, at 13.
[11] *Id.* at 21.
[12] *Id.* at 13-14.
[13] *Id.* at 2, 15, 17.
[14] *Id.* at 33-34.
[15] *Id.* at 30-34.

ing California's best universities.[16] To a great extent, California's prisons are the universities that will graduate future generations of violent criminals.

Three years ago, Governor Deukmejian appointed a Blue Ribbon Commission [hereinafter the "Commission"] to study the problem of inmate population management in California. The Commission was a model of how the process of reform of the criminal justice system *should* proceed, drawing on a broad cross-section of prosecutors, judges, correctional experts, law enforcement, and even a former inmate.[17] District Attorney Grover Trask of Riverside County served as the chairperson. After hearing the experts and exhaustive analysis of the data, this is the predominant conclusion upon which the commission unanimously agreed:

> The criminal justice system in California is out of balance and will remain so unless the entire state and local criminal justice system is addressed from prevention through discharge of jurisdiction. Judges and parole authorities lack sufficient intermediate sanctions to make balanced public safety decisions.[18]

What the Commission found was that too often, a sentencing judge has only two alternatives: Lock 'em up in state prison, or turn 'em loose in a system of probation supervision which is essentially meaningless because caseloads are so high. Further finding that more intermediate alternatives were needed, the Commission concluded that we could actually save money in the long run without compromising public safety.[19]

The Commission's recommendations have gone nowhere. They were greeted with deafening silence, and have generated about as much excitement as flatulence in a friary. The reason, obviously, is because implementing these recommendations would require an immediate investment, and the savings would only be realized in the long run. We no longer make decisions of public policy based on long-term investment. We can only see as far ahead as the next

[16] *See* Dan Walters, *Prison Boom Goes Bust: No One Knows Why or Whether Trend Will Last*, S.F. DAILY J., Jan. 15, 1992, at 4.
[17] *See* BLUE RIBBON REPORT, *supra* note 5, at Appendix C, C1-C10.
[18] *Id.* at 4.
[19] *Id.* at 10-11.

election.

My third charge of bankruptcy is the moral bankruptcy of our political leadership. Some call it the "Willie Horton Syndrome," where political leaders with ambitions for higher office become so obsessed with maintaining a "tough on crime" image they measure every decision in terms of the media labels that might be hung around their necks.[20] Strongest evidence of this obsession is the national decline in the exercise of the pardon and commutation power by American governors. During the ten year period of 1961-70, when we carried out 135 executions in the United States, American governors commuted 183 death sentences.[21] During the past ten years, we have executed 120, with fewer than 60 commutations, most of those granted by lame-duck governors who were not running for re-election.[22] Here in California, the "Willie Horton Syndrome"[23] is exacting a high cost indeed. The governor's power to review paroles is being implemented like a naval blockade, to prevent *any* prisoner from being released on parole. Governor Deukmejian's Blue Ribbon Commission's recommendations to provide some alternatives to prison sentences have run into a gubernatorial brick wall. On five occasions, the legislature has passed measures to implement those recommendations. On five occasions, they have been vetoed by the governor.

I return to my opening premise, the power of labels. The vic-

[20] *See* David E. Rosenbaum, *Bush Talks Tough on Crime, Criticizing Prisoner Furlough Program*, N.Y. TIMES, June 23, 1988, at B7. During the 1988 presidential campaign, Vice-President George Bush attacked a Massachusetts prison program which allowed unsupervised weekend furloughs to prisoners serving life sentences. *Id.* Mr. Bush "recounted the story of Willie Horton, a convicted murderer who was released on such a furlough in 1986, fled to Maryland, took a suburban couple hostage, tortured the man and raped his fiancee." *Id.* Responding to pressure from the case which characterized Massachusetts Governor Michael S. Dukakis as "soft on crime," Massachusetts ended the program which had been in effect for 16 years. *Id.*; T.R. Reid, *Most States Allow Furloughs from Prison; Bush Lashes Dukakis for Stance on Policy That Has Been Adopted by Much of Nation*, WASH. POST, June 24, 1988, at A6. At that time over forty states had similar furlough programs in effect. *Id.*

[21] *See* Gerald F. Uelmen, *Capital Punishment, in* ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY (Leonard W. Levy, et al. eds., 1993).

[22] *Id.*

[23] *See* David Lauter, *Dukakis Urges Bail Curbs for Massachusetts; Acts to Blunt Issue of Crime Amid Furor Over Child-Kidnaping Case*, L.A. TIMES, Aug. 3, 1988, at pt. 1, 10. In the wake of the publicity surrounding the Willie Horton case, a criminal defendant in Massachusetts, who was free on $3,000 bail on kidnaping and assault charges against a 12 year old boy, was arrested and charged with kidnaping and assault of two boys in Rhode Island. *Id.* Massachusetts Governor Michael S. Dukakis was further pressured to submit legislation to reform the Massachusetts bail system. *Id.*; *see also supra* note 20 (describing Willie Horton case).

tims' rights movement has clearly demonstrated the potent political power of labels. Labels are a great way to get elected, or to get initiatives enacted. However, when it comes to the hard choices—the rational search for solutions and the realistic assessment of costs versus benefits—labels become an impediment, and lead to intellectual, fiscal, and moral bankruptcy. And that is precisely where our system of criminal justice is today in California—bankrupt.