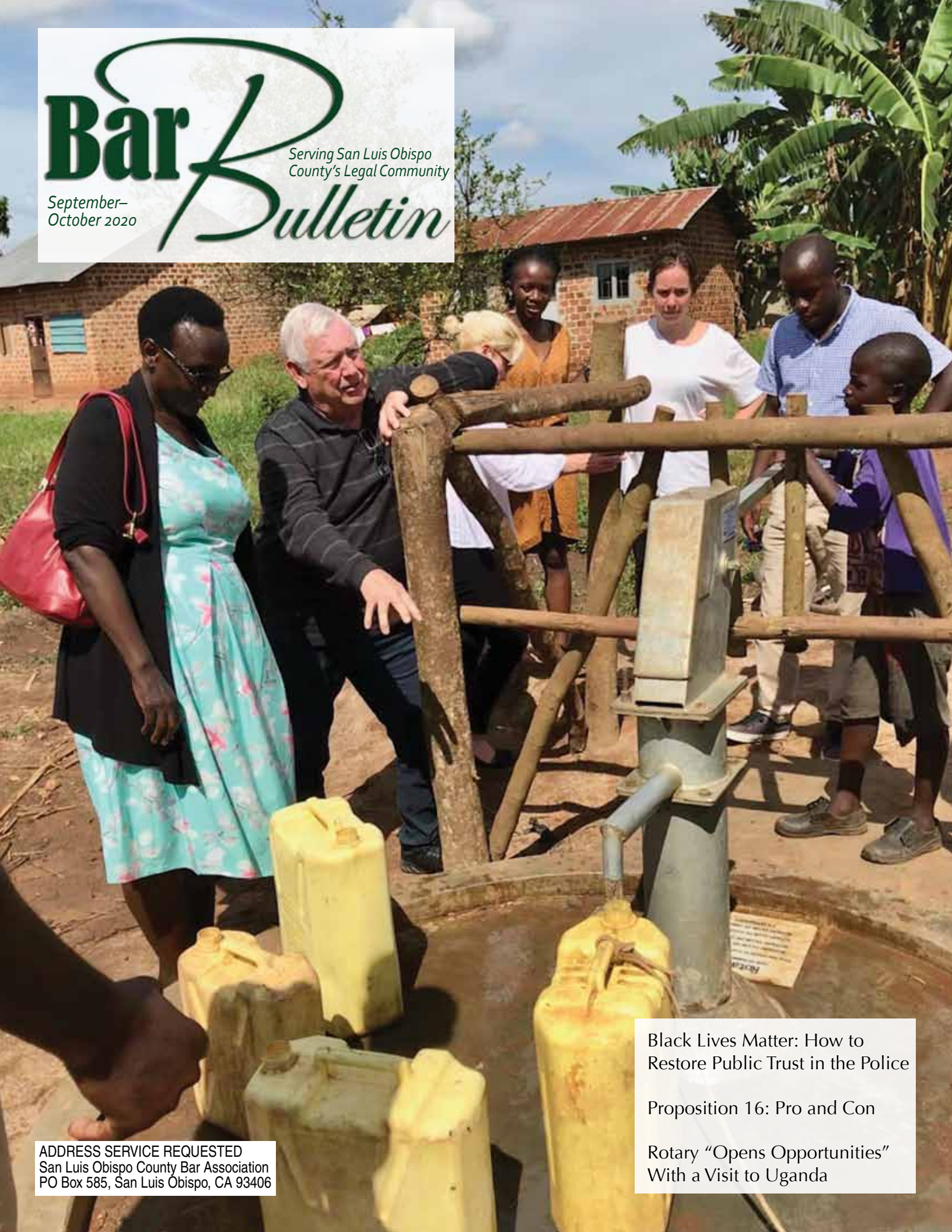

Bar Bulletin

Serving San Luis Obispo County's Legal Community

September–October 2020

Black Lives Matter: How to Restore Public Trust in the Police

Proposition 16: Pro and Con

Rotary "Opens Opportunities" With a Visit to Uganda

ADDRESS SERVICE REQUESTED
San Luis Obispo County Bar Association
PO Box 585, San Luis Obispo, CA 93406

San Luis Obispo County
Bar Bulletin

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Cover: At Shared Blessing Junior School at the Makukuba Village, students pump water by hand. From left, Sophie Bamwoyeraki, a Rotarian from the Kasangati Club that supports two schools, Tom Bormes, Jennifer Alton, Julian Nyaddga, Kelly Main, James Ahabyon and student. Photo by Charlie Main.

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President's MESSAGE

by Stephanie Barclay

The Value of Attending Bar Events

I recently read an opinion piece in the *New York Times* that said the last time our economy was this troubled, it led to Franklin D. Roosevelt's election, which resulted in the New Deal, Social Security and a 35-year burst of growth. It gave me hope. Surely as our nation struggles with a global pandemic, racial injustice and an economic recession, huge change and growth must be on the horizon. Thank you to the contributors of this *Bar Bulletin* for tackling some of these difficult subjects in this issue.

When I began my tenure as President of the San Luis Obispo County Bar Association, I wanted to get newer attorneys more involved in the bar. I had learned that emerging lawyers did not (generally speaking) see the value in joining a bar association. This notion baffled me. I intended to try to convince younger lawyers of the value of attending our fabulous bar events.

And then COVID hit. After losing the ability to see my co-workers and colleagues in person for the last four months, I am more convinced than ever of the value of attending bar events. Even our most introverted colleagues must be missing our gatherings by now.

Don't get me wrong. I am not complaining. I am grateful to be able to work from home. I love seeing my kids 24 hours a day and watching them play Fortnite while I am on a work Zoom conference call.

Most of us in the legal profession have learned to adjust our practices to COVID-19. We are lucky we can meet with clients and colleagues virtually, e-file court documents, email letters and correspondence and generally do our work pretty well either from our office or our home. But something is missing. There is something enriching and inspiring about working together in person, bouncing ideas off of each other, and sharing frustrations and accomplishments.

Unfortunately, we had to cancel our annual Bar Summer Social, and we intend to host the rest of our MCLE's this year over Zoom. On a positive note, we have had an excellent turnout for our Zoom MCLE events. In July, Western Center on Law & Poverty's Senior Housing Attorney Madeline Howard provided us with a summary of the new housing laws in 2020, and 75 people attended by Zoom.

We are still confirming dates for the rest of the year, but please check out our events calendar on www.slobar.org and sign up for our MCLE events. We will be offering Ethics, Elimination of Bias, and Competency credits before the end of the year.

To our newer lawyers, I wish I had been able to personally welcome you into the bar association and the legal community this year. As lawyers, we are part of the larger social, political and economic tapestry. There is value to understanding the interconnections.

Please reach out to me directly at President@slobar.org. I want to hear how the bar association can help support you. I hope we can all meet again in person soon. ■

THE JOHN L. SEITZ AWARD
NOMINATION FORM

The John L. Seitz Award is given each year to honor an attorney or judicial officer who has made a significant contribution to the community through his or her community activities and involvement.

The Award

The award is $1,000.00, which is given in the name of the recipient to a charity, community non-profit organization or law school scholarship fund, selected by the recipient. The name of the recipient is also placed on a permanent plaque. The award will be presented at the San Luis Obispo County Bar Association December meeting.

Selection

We need your help in selecting an attorney or judicial officer in San Luis Obispo County who has exemplified the spirit of our profession through his or her service to the community. Please use the form below to make your nomination.

The 2020
JOHN L. SEITZ COMMUNITY SERVICE AWARD

_____
Name of Nominator

_____
Name of Nominee

Nominee's Address and Phone

_____

_____

_____

INSTRUCTIONS

On a separate sheet of paper, describe the Nominee's qualifications for the 2020 John L. Seitz Award. Attach your comments to this form and mail to:

Seitz Award Nomination
San Luis Obispo County Bar Association
Post Office Box 585
San Luis Obispo CA 93406

Nominations must be received no later than November 1, 2020. Thank you.

Editor's Update

In the March–April edition of the *Bar Bulletin*, local attorney Alan Meyer wrote an article regarding *New York Rifle and Pistol Association v. the City of New York.* The article explained that the United States Supreme Court (USSC) took up the case, Meyer believed, to adjust the level of scrutiny to be applied to Second Amendment cases.

Instead, the Court deemed the issue moot. The respondent, City of New York, had already conceded that their law, which prohibited transportation of guns and rifles to shooting ranges, was unconstitutional and repealed same.

The USSC ruled that an injunction was no longer necessary and sent the case back to the Circuit Court to ascertain whether there were any money damages that needed to be awarded to plaintiffs. There was a lengthy dissent by four justices who wished to rule on the merits.

According to Meyer, as of June 4, 2020, 12 cases involving the Second Amendment were requesting a writ of certiorari from the Supreme Court. On June 15, 2020, however, the USSC denied all 12 writs. Thus, there are currently no Second Amendment cases before the Supreme Court. ■

Correction

In the July–August issue of the *Bar Bulletin*, an incorrect caption was used for Dean Jan Howell Marx's article, "Then & Now—The Battle for Legal Equality." The caption on page 19 should read, "This campaign material helped to elect Jan Howell Marx's grandmother County Clerk in 1924."

BLACK LIVES MATTER : HOW TO RESTORE PUBLIC TRUST IN THE POLICE

by Scott Taylor

SAN LUIS OBISPO, JUNE 2, 2020: Tonight, America's cities are burning again. We all watched the video of George Floyd's death. More specifically, his murder. He was slowly and deliberately murdered for almost nine minutes by a uniformed police officer while three of his fellow uniformed police officers watched and did nothing.

The protests around the world are clear evidence that America has abdicated its moral leadership. The protests around this country are about more than George Floyd; it goes deeper than that. This is about the rule of law.

For decades, our African American friends and colleagues have been telling us that the police are above the law, that there are a different set of rules for the police than for the rest of us. We should have listened, because they were absolutely right. Our willful ignorance is why our cities now burn. There are specific ways we can address this, and we should start work now to honor the sacrifices being made.

I have had a dispassionate front row seat for years, working within the legal system to curb systemic racism and systemic abuses, and am convinced the only solution is systemic change. We need concrete ideas, not just buzzwords or sound bites. As I discussed the problem with fellow attorneys amidst millions of "Facebook scholars," I became more and more convinced I needed to speak out because of my experience and privilege.

I have been an attorney for 15 years. I worked as a public defender for years in Kansas City, Missouri, where I saw clients arrested for the crime of driving while black, and saw firsthand the way African Americans are treated in the criminal justice system. I am also a military lawyer. I am a Major in the United States Air Force (here is where the Department of Defense would like me to tell you that these are my views and should not be attributed to the DoD or any of its components), who has taught military justice as an instructor at the Judge Advocate General's school. I am also an adjunct professor at the San Luis Obispo College of Law. If I won't speak up, who will? If not now, then when?

I would also preface this by saying I like law enforcement. I have friends who are on the front lines of these protests right now, and I pray for their safety. I know there are great cops out there, but this is not about individuals, this is about systemic change. I know the job of a police officer is difficult and dangerous. I have seen dash-cams and body-cams of my clients doing terrible things to police officers. Those are the cases that can make my job defending people heart-wrenching because I publicly defend them while privately condemning their actions.

As much as I love my law enforcement friends, there is an inescapable truth, that there are a different set of rules for them. The law shields and protects them for their actions in public service in ways that your average citizen can only dream about.

As I see the police response around the country, I see police with military weaponry but without military accountability. When a 19-year-old recent high school graduate goes to Iraq or Afghanistan to battle Al-Qaeda or ISIS, he has Rules of Engagement that he is briefed on before every mission. He has been trained in de-escalation before performing police actions in an active war zone because we do not want international incidents. We know that casualties hurt our

Continued on page 8

BLACK LIVES MATTER continued

relationships in the communities where we are attempting to earn trust and, ultimately, hurt our efforts to accomplish the mission.

You better believe when a soldier performs his duties, he is scared every second he is there because there are enemy combatants hiding in plain sight amongst the civilian populace, and every second could be his last. He, however, is professional. He does not lose his temper when he is disrespected. He does not respond to civil disobedience with force. He de-escalates, and he follows the Rules of Engagement.

If he does not, he is held accountable. Military justice, by design, is swift, public, progressive discipline in order to rehabilitate the offender. Progressive discipline means we handle offenses at the lowest level given the nature of the transgression, but then escalate for repeated violations until we get to the point where we pass a threshold and you are not welcome to serve in the military anymore. People who do not have the temperament for the job are removed from the service to find other employment. Civilian police could learn a lot from this model if they are going to earn the public trust again as they protect and serve.

Here are five ideas that I believe we can institute to make systemic change to re-earn that public trust, to not let this moment pass us by with inaction.

1. Create a System of Accountability

Derek Chauvin, the murderer of George Floyd, reportedly had 18 prior complaints against him. That seems incredible. There are approximately 18,000 law enforcement agencies. It is difficult to imagine an officer keeping his job after repeated transgressions, substantiated complaints, or criminal violations. To further exacerbate the problem, an officer can relocate to another agency and start with a clean slate.

There must be a clear threshold for when an individual is no longer permitted to serve. We need to demand our local governments conduct comprehensive background checks to include disciplinary records before employing an officer. Fundamentally, this needs to be handled at the State and Federal level to ensure accountability.

Right now, in California, as in most states, officers have a right to privacy. If I have a case where I believe an officer violated my client's rights, I can file a motion to try and access misconduct records. Those records of misconduct should be transparent and available to the public. If you take a public service job, the taxpayers are paying for you to do a job, and you should not have the right to hide how you perform your job from the taxpayers. Particularly with law enforcement officers, it is a position of public trust, and there must be transparency to ensure that trust is deserved.

As an attorney, if the Bar Association finds I committed misconduct, they advertise that to protect the public. Law enforcement should be held to the same standard. For example, I have caught police officers lying before. When you type one thing in a report, and we find the opposite in the video, that is a black-and-white issue. However, when that happens, suddenly I get a better plea offer in my case, or the case gets dismissed. Good for my client,

On the afternoon of Saturday, July 28, 1917, nearly 10,000 Black people marched down New York City's Fifth Avenue to protest racial violence and white supremacy in the United States. Throughout the parade, the marchers remained silent. Called the "Silent Protest Parade," it was the first mass demonstration of its kind and marked a pivotal moment in civil rights history. (Text excerpt from Yes! Magazine July 28, 2017; historical photo in public domain.)

but bad for the rest of us, because nothing forces the police department to create or maintain a record of that misconduct. We need a mechanism for citizens to petition a Judge to order that record be created and maintained. We need to keep records on misconduct transparent and available to the public, and we need clear rules that if you continue to engage in substantiated misconduct, it is time to find another line of work.

2. Oversight

Who do you call when the police are committing misconduct? Self-regulation is not enough. Internal investigations, however competently carried out by well-meaning officers, are insufficient. We cannot rely on prosecutors to carry out this function. Law enforcement works incredibly close with district attorneys. When the district attorney runs for office, the most reliable group to come out and vote is always going to be the police union. The vast majority of Judges are former prosecutors.

We need an elected board to make determinations if misconduct allegations are substantiated or not, and then maintain those substantiated allegations in a central repository. I am not saying one mistake should follow an officer forever (depending on the mistake), but those judgment calls need to be made by elected citizens and not members of law enforcement. When an officer crosses a threshold of misconduct, they need to be barred from the profession.

Military members who commit misconduct can get to the point where they are involuntarily discharged, lose their retirement benefits, and are unable to serve again. If they have been serving for more than five years, they have the right to an administrative board hearing where the standard of proof is preponderance of the evidence, meaning more likely than not. That is how we in the military enforce discipline to keep a professional fighting force capable of responding to any threat. Police should be held to the same standard.

3. Qualified Immunity Needs to End

When I spoke with my law school class about this last night, none of them were aware of qualified immunity before law school began. Your average citizen cannot sue the government or government officials because they are effectively challenging their sovereign. Over the years, the government has permitted specific areas where they waive that immunity to allow citizens to make claims. The modern doctrine of qualified immunity comes from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which stated that government officials, operating in their official capacity, are generally shielded from liability so long as their conduct does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known.

The "clearly established" language has led to some extraordinarily absurd and Orwellian results. For example, the Ninth Circuit decided in 2019 that Fresno police officers stealing $151,380 in cash and $125,000 in rare coins when they were at a property executing a search warrant did not violate an established law, so the property owner could not sue. *Jessop v. City of Fresno*, 936 F.3d 937 (2019).

Qualified Immunity was a judicially created doctrine that has led to incredible abuses and absurd results. It shields law enforcement officers to a degree that is shocking. Consider a Sixth Circuit Court case that has been appealed to the Supreme Court where a man had surrendered on the ground and still had a police dog ordered to attack him. The Court said that "it is not enough that the rule is suggested by then existing precedent—it must be beyond debate and settled law," then proceeded to explain that because the dog was well trained, the officers were not on sufficient notice that releasing a dog to attack a suspect who had already surrendered was unlawful. *Baxter v. Bracey*, 751 Fed.Appx 869 (2018).

Attacking unarmed people who have surrendered is clearly against the Geneva Convention, which governs the use of military force, and a young Marine in Afghanistan would surely be disciplined for such misconduct. Here in America, that officer is shielded from any liability and not held accountable. It is time for qualified immunity to end and for public servants who abuse their power to be held liable for their misconduct.

4. The Default Response Should Be to De-escalate

If the police want to have and use military weapons (which they frankly should not have, but I digress), they should adopt military procedures too. Every military member, before being placed in harm's way, is briefed on the Rules of Engagement. As an Air Force JAG, part of my military duties have been to advise Airmen on the Rules of Engagement and the law of armed conflict.

The default Rules of Engagement require that, if possible, before engaging in the use of deadly force, we employ verbal warnings, we

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show weapons, and we exhaust all non-lethal physical options before deadly force. We have all seen civilian police officers looking all too ready to employ deadly force, shooting first and asking questions later, then justifying their use of force because they "feared for their lives."

You know who else fears for their lives? Our military members deployed overseas engaging enemy combatants hidden amongst the populace they are policing. At a very minimum, we should demand the same level of trigger discipline and rules of engagement on United States soil.

Rules of engagement only go so far though. What we need is a culture change. I have seen over the years that if you disrespect the police, run from them, resist or do anything other than immediately submit to their authority, there is a price to pay. Sometimes that price is your life. When I get an initial plea offer in a case that involves resisting arrest or running from the police, it almost always involves significant jail time even for first-time offenders because of the relationship between the District Attorney and police agencies.

With the videos flooding the internet from the front lines of protests, what jumps out is the reaction by police who feel disrespected. If you do not immediately submit, you will face a consequence. This is not how we should treat American citizens. Civil disobedience should not be met with force. Arresting leaders while calmly ordering dispersal is appropriate. Using tear gas, pepper spray, batons and tasers on journalists and non-violent protestors is un-American.

We are a country built out of a revolution, supporting the right to peaceably assemble, and honoring civil disobedience. Real power comes from restraint, and officers reacting with physical force on peaceful protestors who are kneeling, look frightened, cowardly and weak. Their job is to serve and protect, and their actions ratchet up the tension and place other officers in harm's way.

Make no mistake, there are times when police need to respond with physical and sometimes deadly force, but we need a police culture where that is the exception and not the rule. We need police leaders who exemplify restraint and create that culture. Look no further than Chris Swanson, the Sheriff of Flint Michigan. When faced with protestors, he took off his riot gear, took a knee and listened. Then he marched with the protestors, acknowledging that he was a part of his community and not above it.

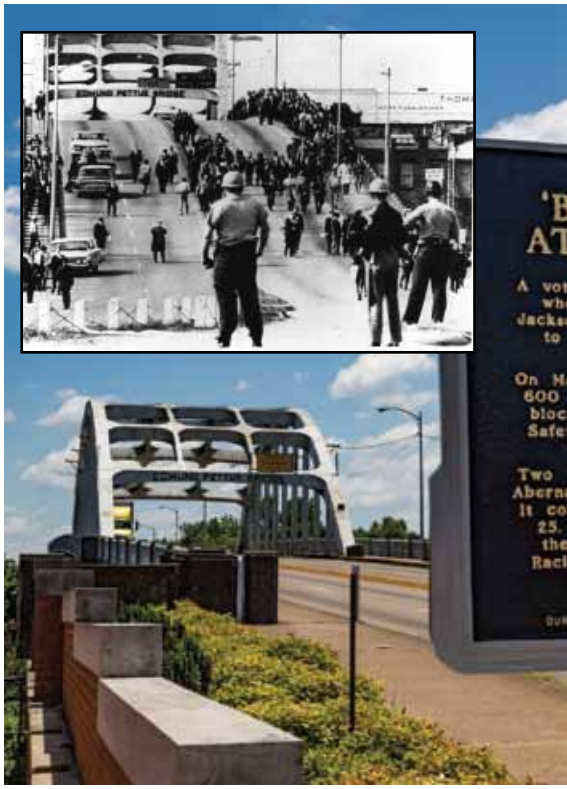
5. Stop the Use of Tear Gas

Tear gas is a chemical weapon banned in warfare under the Chemical Weapons Convention in 1993, which was ratified in 1997 after at least 65 countries agreed to ban its use in warfare. The exception is that domestic law enforcement, including for riot control purposes, is not prohibited from using it. While it is not illegal, the use of chemical weapons on our own citizens is reprehensible and should be banned, or at a minimum, reserved for the most extreme circumstances and authorized well above a city level. Instead, what we are witnessing in cities across the country is tear gas being used as a weapon of first resort when peaceful protestors do not submit to authority.

The reason tear gas is banned under the Geneva Conventions and the Chemical Weapons Convention is because its effects are indiscriminate. Under the law of armed conflict, the following are principles that combatants must employ.

a) Necessity—Is this action permitted under applicable international law and required to quickly and efficiently defeat the enemy?

b) Humanity—Will the use of a particular weapon for its normal or expected use cause unnecessary suffering?



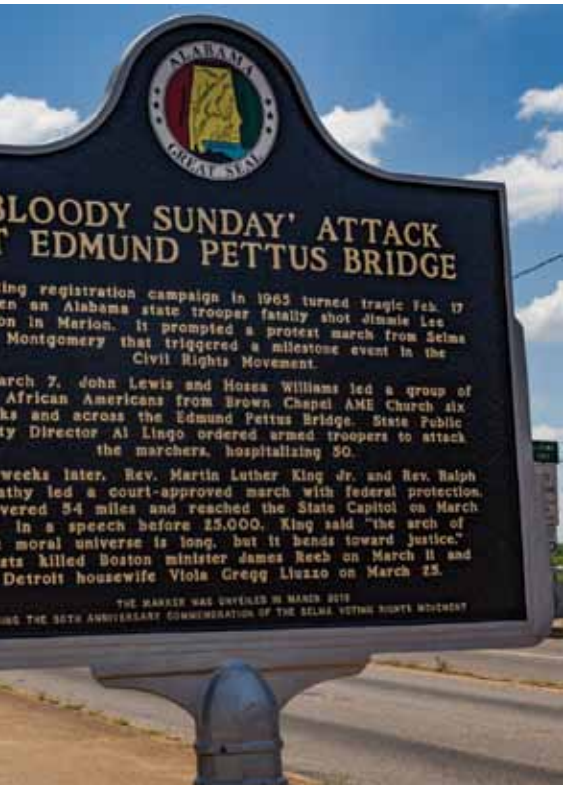
In Selma, Alabama, a sign marks the historic 'B Edmund Pettus Bridge, March 7, 1965. On that group of 600 African Americans from Brown Ch Edmund Pettus Bridge. State Public Safety Dire the marchers, hospitalizing 50." Bridge and sign BY-SA 2.0). Inset image of the bridge on Bloody Sun

c) Proportionality—Does the advantage to be gained from striking a target outweigh the anticipated incidental civilian loss of life and property if this target is struck?

d) Discrimination—Have we distinguished between combatants and non-combatants?

e) Honor—Is this a means of warfare or a type of conduct that would be unfair or constitute a breach of trust with the enemy?

The United States has spent close to a century leading the charge defending human rights and prosecuting war crimes. Yet here in 2020, we are using chemical weapons on our own citizens on a routine basis, whether that is the use of tear gas on peaceful crowds, or the generous intentional use of pepper spray on citizens engaged in civil disobedience. Those chemical weapons may be necessary to disperse a crowd quickly and efficiently, but they cause unnecessary suffering, are too often a disproportionate response, and do not discriminate between those who the police need to keep in line and those peacefully protesting.



loody Sunday' attack that took place at the t day, "John Lewis and Hosea Williams led a hapel AME Church six blocks and across the ector Al Lingo ordered armed troopers to attack image by Tony Webster via Creative Commons (CC day via Wikimedia Commons.

Last night while I was discussing this with my law students, the San Luis Obispo Police used chemical weapons on its own citizens. San Luis Obispo has not seen rioting, property damage above the vandalism level or looting. That use caused immense short-term suffering for everyone at the scene, not just individuals that officers perceived as a threat. It did not discriminate between protestors, children who live in the neighborhood or journalists present to document the scene.

We are seeing videos around the country of officers ripping face masks off protestors to ensure they got hit with chemical weapons, destroying water bottles and supplies for protestors, and firing tear gas canisters and rubber bullets directly at the heads of peaceful protestors. When police take such actions, they have more in common with the war criminals we have prosecuted overseas than with the American citizens they are there to serve and protect.

The use of non-lethal weapons that indiscriminately cause suffering demonstrates weakness, not strength. The use of chemical weapons on our own citizens emboldens that desire to protest and stiffens the resolve of those taking to the streets. When I see a fog over the streets of San Luis Obispo, I never thought in a million years it would be chemical weapons deployed. That is a stain on every city that employs its use.

In the short term, we need to stop the violence. We cannot forget that we are in the middle of a pandemic and should be socially distancing and not spreading disease. The violence and unrest, however, are not going to stop until those aggrieved with genuine and heartfelt concerns are heard. We cannot allow a small number of police officers to represent all police. We cannot allow a small number of violent people to speak for all protestors. We need cooler heads to prevail right now, coupled with a commitment to make specific systemic changes to address the underlying issues.

My message to my students last night was based primarily upon the rule of law. We must show a commitment to the rule of law, both for the governed and the government. If we fail to speak up for the rule of law, we are no different from any other regime that we have condemned in the past. ■

Editor's Note: The views expressed in this article do not necessarily represent the opinions of the San Luis Obispo County Bar Association, its Board of Directors, the staff of the Bar Bulletin *or its advertisers. On the other hand, the* Bar Bulletin *is extremely grateful to Scott Taylor for having the courage to put his opinions on paper.*

As always, differing opinions are welcome. Please provide articles to raymondinsf@yahoo.com.

Yes on Proposition 16

Repeal Proposition 209 & Reinstate Affirmative Action

by Dean Jan Howell Marx

Images courtesy of Dean Marx

As a law school intern for Santa Clara County Counsel back in 1986, my first "real case" improbably turned out to be the landmark United States Supreme Court case, *Johnson v Transportation Agency, Santa Clara County* 480 U.S. 616 (1987) ("*Johnson*"). It was a resounding victory for affirmative action, which is one tool to integrate women or racial minorities into a predominately male or white workforce and fight systemic sexism or racism.

Even though *Johnson* is arguably the "gold standard" for voluntary public entity affirmative action programs everywhere else in the country, in California it has sat on the shelf gathering dust, ever since the passage of Proposition 209 outlawed affirmative action in 1996. *Johnson's* legal authority in its home state may be given new life in November, however, if the voters approve Proposition 16, which repeals Proposition 209.

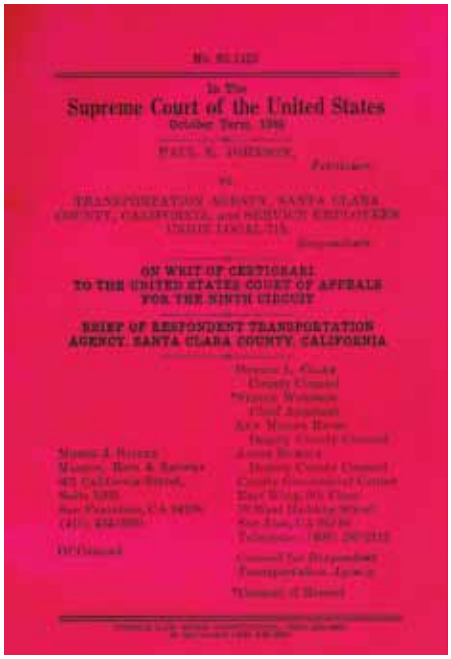
I will summarize the legal reasoning and factual context of the *Johnson* case[1] as illustrative of some of the issues likely to play out during the upcoming campaign and then present a few of the arguments in favor of Proposition 16.

Johnson is a "reverse discrimination" case. It was brought by Paul Johnson, a male applicant for promotion to the position of dispatcher for the county road crew, after Diane Joyce, an equally qualified female applicant, got the job, pursuant to the county's affirmative action plan.

At the time the affirmative action plan was adopted, there was not one woman among the 328 employees in the relevant job category. The case held that an affirmative action plan instituted by a public employer ("the Agency") to remedy a severe statistical imbalance of women in its traditionally segregated work force, even without a showing of prior discrimination, did not violate Title VII of the Civil Rights Act of 1964 42 U.S.C.S. § 2000e et seq.

Where there are equally qualified candidates for a position in a job category with a significant imbalance of women, the Court found gender to be a viable "plus factor" in a job decision pursuant to an affirmative action plan. Furthermore, it noted that the agency's plan represented a moderate, flexible, case-by-case approach effecting a gradual improvement in the representation of minorities and women in the agency's work force, without unnecessarily trammeling the rights of men.

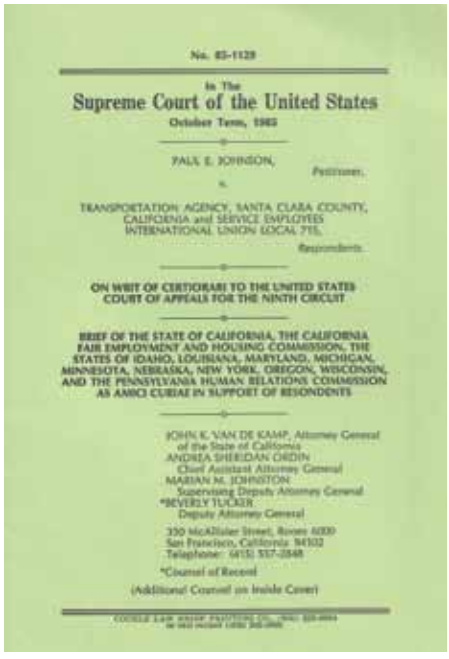
The background story of *Johnson* illustrates the case for affirmative action on the human level. In conversations with Diane Joyce, I learned that she had been an accounting clerk for Santa Clara County's Transportation Agency, when she suddenly found herself a single parent after her husband died. She struggled to support four children, including a son with special needs, on her meager salary. She had to earn more money, so she looked for higher-paying job openings that would utilize her skills. She found one as dispatcher for the road crew, but it had a prerequisite of working on the road crew for at least two years. From 1975 to 1979, she did that work, which required using a jack hammer, shoveling asphalt and


In The
Supreme Court of the United States
October Term, 1986

PAUL E. JOHNSON,
Petitioner,
v.
TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEES UNION LOCAL 715,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA


No. 85-1129

In The
Supreme Court of the United States
October Term, 1985

PAUL E. JOHNSON,
Petitioner,
v.
TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA, THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION, THE STATES OF IDAHO, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, NEBRASKA, NEW YORK, OREGON, WISCONSIN, AND THE PENNSYLVANIA HUMAN RELATIONS COMMISSION AS AMICI CURIAE IN SUPPORT OF RESONDENTS

JOHN K. VAN DE KAMP, Attorney General of the State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
MARIAN M. JOHNSTON
Supervising Deputy Attorney General
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Deputy Attorney General
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San Francisco, California 94102
Telephone: (415) 557-2848
*Counsel of Record
(Additional Counsel on Inside Cover)

other hard physical exertion, and stood her ground despite a lot of offensive guff from male co-workers.

When another dispatcher job came open in 1979, 12 people applied for the promotional position. Diane Joyce and Paul Johnson emerged as the top two equally qualified candidates. Paul Johnson got the job. Diane Joyce filed a complaint with Human Resources, asserting that she had been passed over because of her gender and should have been promoted because there were no women at all in the dispatcher job category.

Human Resources followed the county affirmative action plan, reversed the hiring decision, and directed the Transportation Agency ("Agency") to promote Joyce. She started work as dispatcher, and an angry Paul Johnson filed a claim against the county arguing that by giving Diane Joyce "his job," the Agency had discriminated against him on the basis of gender.

After the county rejected Paul Johnson's claim, he engaged a local Santa Clara lawyer and sued the county for "reverse discrimination" in violation of Title VII of the Civil Rights Act of 1964. The Federal District Court ruled in his favor, so the county appealed to the 9th Circuit, which ruled in favor of the county. Johnson, represented by new, nationally prominent lawyers funded by the Rocky Mountain Foundation, then appealed to the U.S. Supreme Court. The Warren Burger Court denied *certiorari*. This meant the 9th Circuit decision was affirmed, and Diane Joyce could keep her job.

I had just been hired as an intern at Santa Clara County Counsel and remember the attorneys celebrating that the case had been resolved in the county's favor. However, they celebrated too soon. In July 1986, Justice William Rehnquist, the new Chief Justice of the Supreme Court, in a rare move, reached down into the pile of rejected cases and set the *Johnson* case for hearing November 12, 1986.

As a law student intern with Santa Clara County in 1986, Jan Howell Marx assisted Deputy County Counsel Stephen Woodside with the Johnson *case, which went to the Supreme Court and won a victory for affirmative action.*

This gave Santa Clara County Counsel only six weeks to write and serve the respondents' brief. There was no money in the county budget to hire outside attorneys, so all the initial research, legal analysis and writing had to be done in-house before pro-bono attorneys could be found. As the only one on the team trained in "new-fangled" computer research, I threw myself into identifying the controlling cases as quickly as possible.

The Dean of Santa Clara Law School, Gerald Ullman, exempted me from a few required classes and gave me independent study credit, so that I could devote the necessary time to the case and stay in law school at the same time. I was tasked to organize a mock court for my boss, Deputy County Counsel Stephen Woodside, and prepare him to argue the case. I cast my law professors as Supreme Court Justices to grill him with the hard questions I had prepared. Many organizations wrote amicus briefs supporting the county's affirmative action plan and Diane Joyce's promotion.

I was honored to attend the hearing before the U.S. Supreme Court. I remember waiting to enter the building next to Diane Joyce and her reading out loud the inscription carved above the entrance, "Equal Justice Under Law." She commented cynically, "No way—I can't believe I will win." I responded, "I can't believe we WON'T win." As we learned on March 25, 1987, the Court ruled 6-3 in the county's favor and, for the first time, determined that women were legally protected by affirmative action. Diane Joyce told the Associated Press, "I'm not a heroine. I'm not a pioneer. I went in it for the money."[2]

The Court held that Johnson's rights had not been trammeled by the application of the affirmative action plan, since he retained his salary and seniority and could apply for other promotional opportunities as they came open.

Continued on page 14

Repeal Proposition 209 continued

As Justice Brennan wrote in his opinion at page 23: "We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position.The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible case-by-case approach to affecting a gradual improvement in the representation of minorities and women in the Agency's workforce. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace. Accordingly, the judgment of the Court of Appeals is affirmed."

As it turned out, years before the U.S. Supreme Court heard Paul Johnson's case, another road crew dispatcher position had opened up. He applied for and got the promotion. She and Paul Johnson worked a few doors down the hall from each other for the next few years. In 1985, Paul Johnson retired with a good government pension. Later, Diane Joyce retired likewise. Absent affirmative action, and the positive outcome of the *Johnson* case, such a secure retirement never would have been possible for Diane Joyce. And after she broke the gender barrier, a number of more women were hired on the road crew.

Equal justice is the overarching goal when it comes to integrating women or people of color into a workforce or institution steeped in systemic sexism or racism. But the chance for previously excluded populations to earn decent pay is at the heart of the matter, as Diane Joyce bluntly pointed out. People who have been systematically denied access to well-paying government contracts or jobs or admission to high-quality public educational institutions—in the words of Proposition 209—"on the basis of race, sex, color, ethnicity or national origin in public employment, public education or public contracting" deserve a chance for access and the opportunity to prove themselves. That is why I am in favor of repealing Proposition 209 by voting in favor of Proposition 16 in November.

As stated in a March 16, 2020, *San Francisco Chronicle* editorial, "Nearly a quarter of a century ago, California voters passed the deceptively named California Civil Rights Initiative. But Proposition 209 was not about advancing civil rights. It was about prohibiting the consideration of race and gender in public education, employment and contracting…. It was just about shutting the door on efforts to overcome those institutional barriers to the full participation of women and minorities. It was wrong in 1996, when it was passed by 55 percent of California voters, and it is wrong now. It should be repealed."

Affirmative action is a tool California needs right now in this "Black Lives Matter" and "Me Too" era if we are serious about over-coming systemic racism and sexism and if we are serious in establishing a fairer and more just California. It is high time to repeal Proposition 209. Vote yes on Proposition 16. ■

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High Court Backs Job Preference for Women

Previous Bias Not Needed to Justify Action

By DAVID G. SAVAGE
Times Staff Writer

WASHINGTON—The Supreme Court, expanding the grounds for affirmative action in the workplace, ruled Wednesday that an employer may promote a woman over a better qualified man to remedy a "statistical imbalance" in its work force.

The landmark 6-3 decision upholds an affirmative action plan in Santa Clara County, Calif., intended to move more women into higher-paying jobs, even though no court found that the county had discriminated against women or minority members.

Women's groups hailed the decision as the first ruling that has specifically upheld job preferences for females, as opposed to minority members. More significantly, civil rights attorneys said, the decision allows the use of affirmative action programs even in the absence of proven discrimination.

Past Discrimination

In its earlier rulings, the high court upheld affirmative action in cases in which an employer or union had discriminated against minority members in the past.

In writing for the court, Justice William J. Brennan Jr. cited the

Diane Joyce, winner in Supreme Court case, gets a hug from Rina Rosenberg of the Santa Clara Woman's Program in Gilroy, Calif.

The March 26, 1987, edition of the Los Angeles Times *led with the Johnson case. Image used by permission of LAT.*

Footnotes

[1]*The Transportation Agency of Santa Clara County, California and Service Employees Union Local 715 Respondents' Brief* is the source of facts of the case cited herein, unless otherwise indicated.

[2] *Affirmative Action on Trial, Sex Dis-crimination in Johnson v. Santa Clara* by Melvin I. Urosky, University of Kansas Press (1997) page 167.

[3] Neither side of the case argued that it was moot. Therefore, that issue did not arise at Court.

This is the third in a series of articles by Jan Howell Marx that focuses on the achievements of women in the legal profession. You will recall Marx wrote a review of Barbara Babcock's book Woman Lawyer: The Trials of Clara Foltz and a tribute to the groundbreaking career of Judge Teresa Estrada-Mullaney. Marx is the Campus Dean at San Luis Obispo College of Law.

Editor's Note: Views in this article do not necessarily reflect the opinions of the San Luis Obispo County Bar Association, its Board of Directors, or the staff of the Bar Bulletin or its advertisers. *Opposing thoughts regarding opinions in this or in any article are welcome.*

No on Proposition 16

The Attempt to Repeal Proposition 209: Is Anti-Discrimination Now Racist or Sexist?

by Raymond Allen, Esq.

Images via Wiki Commons

Ward Connerly is one-fourth black and half white, with the rest a mix of Irish, French and Choctaw American Indian. As a child in rural Louisiana, he was simply deemed "colored." In 1994, Connerly began the fight to end affirmative action. Connerly had been a University of California Regent. He saw the discriminatory impact of affirmative action on deserving students. He wanted to end college admissions based on race. Social and economic factors should still be considered to help those who were economically disadvantaged.

In the wake of the landmark case *Regents of University of California v. Allan Bakke* (1978) 438 US 265, 57 L.Ed.2 750, 98 S.Ct. 2733, the people of California passed Proposition 209 and ended affirmative action. The language of the proposition, and now the language of our state Constitution, is simple and clear: "the state shall not discriminate against or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting." (Article I, section 31 of the California Constitution.) All decisions in these three areas of public life must be race-neutral.

At the beginning of 2019, several members of the California State Assembly, led by Dr. Shirley Weber, drafted Assembly Constitutional Amendment 5 (ACA 5). In June 2020, Weber announced and filed the amendment with the Secretary of State so that the amendment could be placed on the November ballot. ACA 5 (Proposition 16) intends to repeal Proposition 209.

The resolution explains that race-based preferences are necessary to increase the proportion of women and minorities in public employment, public contracting and public education. It further contends that Proposition 209 has had a "devastating impact" on women and minority access to higher education. Gender, race and ethnicity should be permitted to address the issue of diversity in college admissions, public employment and public contracting. Finally, the amendment seeks to "transcend a legacy of unequal treatment of marginalized groups" and "promote fairness."

What is "fair" is often in the eye of the beholder. That is because "fairness" is a subjective concept. To the person being discriminated against, race-based factors may not seem "fair." To the person being favored by the discrimination, race-based factors are also unfair. The favored person is often ill-prepared for the rigors of an elite school, job or contract. Unfortunately, too, the favored person is often stigmatized and stereotyped by the perceived favor. Most unfortunately, the favored person is denied the opportunity to succeed on their merits and is denied an opportunity for self-actualization on their own terms. It is also unfair to society in general.

Allan Bakke (left) took his claim of discrimination as a result of affirmative action to the U.S. Supreme Court and won.

Communities bear the burden when unqualified employees, businesses and students are given preference. Race and gender based discrimination seems fair to social engineers who wish to do "good." The laudable goal of diversity in higher education is to foster learning, improve scholarship and encourage mutual respect. The goal in public hiring and contracting is to increase the numbers and success rates of minority owned businesses. No one should argue with these goals. However, it is not legitimate to use racial or gender discrimination to correct historical inequities.

Race-based factoring in hiring, contracting and education has been repeatedly taken up by the United States Supreme Court. In the aforementioned *Bakke* decision, a white male applied to the UC Davis Medical School. Although he had good objective metrics, he was passed over. He sued and argued the university had violated the Equal Protection Clause of the Constitution.

Continued on page 16

Anti-Discrimination continued

Justice Lewis Powell Jr. wrote the majority opinion. He held that if the court applied strict scrutiny and found that the state had a compelling interest, then it could use factors like race to create "diversity." However, he specifically held that the state has no compelling interest in "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession." Obviously, that would apply to any institution of higher education. Second, the state has no compelling interest in "remedying societal discrimination" because that would injure third parties. Third, the state had no compelling interest in "increasing the number of physicians who will practice in communities currently underserved." (*Regents of University of California v. Bakke* , 438 US 265 at 323.) Thus, as it applies to education, race-based admissions cannot be for the purpose of correcting 400 years of racial injustice. The only permissible goal is diversity on campus.

The insidious nature of race-based discrimination has been a concern of many for many years. From *Plessy v. Ferguson* (1896) 163 U.S. 537, 16 S. Ct. 1138; 41 L. Ed. 256; 1896 U.S. LEXIS 3390 through *Brown v. Board of Education* (1954) 163 U.S. 537, 16 S. Ct. 1138; 41 L. Ed. 256; 1896 U.S. LEXIS 3390, America has struggled to reconcile Constitutional parameters with contemporary views on racial inequality.

In 1989, Adarand Constructors were the lowest bidders on a federal highway project. They did not get the job because the general contractor received an incentive payment to subcontract with Gonzalez, whose company was certified as a small disadvantaged business. (*Adarand Constructors, Inc. v. Pena* (1995) 515 US 200 240, 132 L Ed 2d 158, 115 S Ct 2097.) In his concurrence, Justice Clarence Thomas wrote, "I believe that there is a moral [and] constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law." People of every persuasion should be appalled that the government would presume to define all minority businesses as "disadvantaged" solely because they are minority owned businesses.

In *Grutter v. Bollinger* (2003) 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304, a white woman sued the University of Michigan Law School because she had been denied admission. The majority held race was an acceptable factor in admissions, assuming there was a compelling state interest. In dissent, Thomas quoted Frederick Douglas, who told Boston abolitionists in 1865,

Protestors march for affirmative action during the Bakke *case.*

"In regard to the colored people, there is always more that is *benevolent*, I perceive, than *just*, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice. The American people have always been anxious to know what they shall do with us….I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall!….And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone!… Your interference is doing him positive injury." (*Grutter v. Bollinger*, 539 U.S. 306 at 350. Italics added.)

In *Grutter*, Thomas made an interesting point. The law school created its high admissions standards. It did so for its own benefit. The school wanted to be elite. The compelling interest for the state university was to maintain its elite status, add on "classroom aesthetics" through diversity, and achieve an ambiguous "educational benefit." The racial disparity of which the university complained was of its own making. The school set the standards that impacted its admissions. The Constitution, argued Thomas, should not be implicated in racial discrimination to alleviate the school's self-inflicted wound.[1]

Although *Bakke* and its progeny rejected the notion that the state has a compelling interest in "remedying societal discrimination," many seek to do just that, including those who wish to repeal Proposition 209. However, as Juan Williams wrote, "Once you say that we can violate somebody else's rights in order to make up for what happened to blacks or other races or other groups in history, then you are setting a precedent for having certain circumstances in which you can overlook another person's rights."[2]

"That these programs may have been motivated, in part, by good intentions," wrote Thomas, "cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. (Thomas concurrence, *Adarand Constructors, Inc. v. Pena*, 515 US 200 at 240.)

The Declaration of Independence establishes our American ethos: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." Thomas Jefferson, Benjamin Franklin, John Adams and the other signatories understood that equality under the law is not the same as equality of outcome. As Americans we are forever trying to live up to our ideals and to perfect our union. It is a work in progress. However, repealing our state's anti-discrimination law is not a step toward perfection. ■

Footnotes

[1]Subsequent to this Supreme Court ruling, Ward Connerly was invited to Michigan where he provided support to a referendum measure similar to Proposition 209. The Michigan Civil Rights Initiative appeared on the November 2006 Michigan ballot and was passed 58% to 42%. State Proposal 2006-2: Constitutional Amendment: Ban Affirmative Action Programs". Department of State website. State of Michigan. May 10, 2007. Archived from the original on April 10, 2009. Retrieved 2009-04-28.
[2] Juan Williams, "A Question of Fairness," *The Atlantic*, February 1987.

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Rotary Opens Opportunities

Students at Shared Blessing School welcomed the visitors with songs and clapping.

by Charlie Main and Jennifer Alton, Esq.
Photographs by Charlie Main

Into Africa

It was a humid day when we landed at the small Entebbe Airport. Pandemic was spreading, but Rotary projects in central Uganda awaited our attention.

My name is Charlie Main, and with my wife, Terri, I own a local construction company. I am a Rotarian. In March 2020, I went to Uganda with Jennifer Alton, an attorney and our club's current International Director, and Tom Bormes, who preceded Alton as International Director and possesses Rotary institutional knowledge.

Rotary International

Rotary is an international service club whose members believe we have a shared responsibility to take action on our world's most persistent issues. Our clubs, which number more than 35,000, work together to promote peace; fight disease; provide clean water, sanitation and hygiene; save mothers and children; support education; and grow local economies. Our mission is to provide service to others, promote integrity and advance world understanding, goodwill and peace through our fellowship of business, professional and community leaders.[1]

Rotary was founded by Paul Harris, an attorney. After graduating from law school at University of Iowa, Harris moved to Chicago but found it difficult to assimilate into the big city. One day, around 1900, while on a walk with a fellow attorney, Bob Frank, Harris noticed how many people Frank would chat with along the walk. This inspired the idea for a club that would encourage camaraderie among professional men.[2]

Rotary was a local club until 1910. With Harris as its international ambassador, Rotary began to spread into other states and countries.[3] In 1947, when Harris

died, he asked that in lieu of flowers donations be given to establish a foundation for charitable work. The first charitable gift from the Rotary Foundation was given to students to study abroad. Rotary has long understood that the solution to most problems is proximity. If you get close enough to the stranger, he is no longer a stranger.

Half a World Away

Early Friday, March 6, 2020, Alton, Bormes and I drove south from the Central Coast on US 101 to Los Angeles International Airport. From there, we flew 16 hours to Dubai in the United Arab Emirates. We spent the night, then traveled to central Uganda. We were eager to see if we could do some good.

As we left Dubai, the world was on the edge of a pandemic, a new virus the World Health Organization (WHO) had designated Covid–19. As a group, we talked about the situation. Alton, Bormes and I agreed that we needed to be concerned and aware. Because we believe strongly in the work of Rotary International, we chose to continue our journey. Our vaccines were complete, our visas approved. And our agendas with leaders in the community were confirmed.

Entebbe, Uganda

On Monday March 9, 2020, we landed in Entebbe, a small city of about 80,000 people. Our driver, Christopher Tamuzzade, met us at the airport. Alton sat up front with Tamuzzade and, over the week, they shared many meaningful conversations about his life in Uganda. Alton noted later, "Tamuzzade is a gentle, wise, kind man who deeply loves his wife, family and community."

I asked Tamuzzade to give us a tour of Entebbe. He turned left, then right and voila! It took five minutes. With the extra time, we decided to leave Entebbe and drive southwest to the Equator. "There is a place nearby," Tamuzzade said, "where you can place one foot in the Northern Hemisphere and the other in the Southern."

From my back seat, I was struck by the poverty. My excitement for this new experience began to turn into a dull ache in my stomach. We drove through one small village after another. I tried to make sense of the scenes and garbage strewn everywhere. The people seemingly had nothing to do, gathering in groups around shanty shops that were six-by-six-foot spaces, assembled with what appeared to be tree branches or garbage wood for walls and metal scraps for a roof. They had next to nothing to sell—a few avocados or local fruits. This scene was not an anomaly; thousands of small shanty shops, pieced together with discarded flotsam and jetsam—Ugandan capitalism held together with wire and string. I still cannot understand how purchases or exchanges

Left, Charlie Main (left), Jennifer Alton and Tom Bormes at the Equator. Below, a small Ugandan village.

happen at these small businesses on a scale that allows for existence. As I looked out the window, I grew dark and sad. I could see my thoughts reflected in the eyes of Alton. She, too, held a heavy heart.

At dinner that night, we asked Tamuzzade to order local cuisine. We ate and enjoyed the company of our new friend and each other. After, we headed back northward to Kampala, the Ugandan capital. As we drove, Tamuzzade shared what he knew. He told us the Chinese government had invested in the Ugandan roads. He estimated that the Chinese had spent roughly $44 billion to replace and repair roads. "The roads we are on," he said, "were most recently graded two years ago."

Closer to the capital, the roads became wider and filled with Boda-Boda, the ever-present motorcycles favored by Ugandans. Boda-Boda are used as taxis, as transport vehicles for goods and for personal travel. Nightfall came and traffic grew heavy. We slowed as we neared Kampala. Cars and trucks and people were congregating closer to the road. Cars and motorcycles drove on the shoulders, honking. Tamuzzade knew

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exactly when to move. There were close calls where we felt we must crash, but we were all in the flow. Inhale. Exhale. Trust in Tamuzzade. And we did.

Finally, Tamuzzade announced that we were near our hotel, the three-story Mak-Queen with perimeter walls and a big rolling gate that was pushed back by an armed security guard. Our late night entrance was, as Alton suggested, "a sacred arrival." We bid farewell to the gentle Tamuzzade. He was a most gracious host and a wonderful introduction to this interesting country.

Boda-Boda motorcycles transport goods and serve as taxis and personal vehicles on often crowded roads.

Kampala, eMI and the Kyasira Orphanage

After a good night's sleep, all three of us were in better spirits. It did not take us long to appreciate that the people of Uganda are special. They are happy, humble and helpful.

I began to reflect and compare. In Dubai, it felt like there were beautiful buildings without people. In Uganda, there are beautiful people with crumpled buildings. I struggled with the obvious: the wealth and prosperity of one contrasted with the bone-jarring poverty of another. I was in the uncomfortable place thoughtful people must quietly go. I forged a prayer for the wisdom to know what to do and when to do it.

On Tuesday, March 10, 2020, we drove to Engineering Ministries International (eMi) Uganda. eMi is a global organization that uses their skills in architecture and engineering to lift up local economies through direct assistance and support. They assist with buildings, agriculture, disaster relief, ministry, education, healthcare, residential and infrastructure. My good friend Phillip Greene (Cal Poly, 2005) is the Deputy Director of eMi Uganda. We have known each other for years.

eMi Uganda provides another contrast. The building is beautiful and the staff is full of energy. We see that workers use the clay-based soil to make bricks by hand

Above, eMi Uganda builds a large workshop for their projects. Below, Jennifer Alton with Phillip Greene at the eMi office.

and hand tools to cut complex mortise and tenon joints in the indigenous mazusi wood. They currently are building a large workshop for their many projects.

We return to Kampala for the night. The streets moved like water, the Boda-Boda River. The cars and the Boda-Boda move quickly in rhythm. No lanes, no lines, no laws. Yet, no hesitations and no collisions either.

The next day, Wednesday, March 11, 2020, Tamuzzade drove us to see a tree project sponsored by the Makindye West-Kampala Rotary Club. There we met Rotarian Lucy Gaudie, an arborist; Rotarian Richard Lukwango; and Sister Mary from Kyasira Orphanage, also known as the House of Hope.

Sister Mary walked us over to her orphanage. There we met the other sisters and the children. On our arrival, the children began to sing and we clapped along in happy unison. After their singing, aided by the sisters who drummed on the back of a plastic container, we gave the children the school supplies.

We made friends. We got proximate. We were in the presence of Third World poverty. We were taken by the realization that no person ever asked us for anything but friendship in Rotary. We returned to our hotel and watched the moon rise above Lake Victoria.

At Kyasira Orphanage (House of Hope), Sister Mary introduced the other sisters and the children, who sang for the visitors' arrrial and received school supplies.

From left, name unknown, Sister Mary from Kyasira Orphanage, Charlie Main, Tom Bormes, name unknown, Jennifer Alton, Rotarian Lucy Gaudie, Rotarian Richard Lukwango.

Walking to the orphanage.

The Forgotten Children and Makerere University

On Thursday morning, March 12, 2020, Christopher Tamuzzade drove us back to eMi for briefing on a new project to design and build a compound for "The Forgotten Children," those children who were orphaned or endangered as a consequence of human trafficking in central Africa. The plan consists of buildings, playgrounds and residences, and also ministry, trauma counseling, and business and vocational training. eMi and its adjunct staff, including my daughter Kelly Main, created a holistic, rational-based solution to manmade evil. I was proud of the work and proud of my daughter.

Next, we drove to Makerere University in Kampala, which has a Peace and Conflict Program, College of Humanities and Social Sciences, and an Environmental Law School. Alton met and conferred with Dr. Christopher Mbazira about the differences between the Constitutions of Uganda and the United States. She was invited back as a visiting professor to teach a comparative constitutional law course.

Alton had seen the university's Peace Center in *Rotarian* magazine and determined months ago to visit. "I was," she said, "disheartened by the chains locking the gates and the barbed wire surrounding the top of the shuttered Peace Center." The mood was made darker by uniformed soldiers with heavy rifles patrolling the campus.

We began hearing that travel was being disrupted by the virus. We spoke among ourselves about whether we should go to the U.S. Embassy in Kampala and try to return home. Alton thought we should stay in Uganda. "We are Rotarians," she said. "We should stay because we are 'Service Above Self.'"

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Opportunities continued

Sir Apollo Maggwa School and Makukuba Village

Near Makerere University is one of many Sir Apollo Maggwa elementary schools near Kampala. I called it the 'Purple School' because of the uniforms. Alton learned the purple was purposeful: "it is the color of royalty."

Julian Nyaddga, an intelligent young woman who is destined to change Uganda for the better, joined us there. Sophie Bamwoyeraki, from Kasangati Rotary Club, invited us to visit two schools supported by her club. The first had about 700 children, ages 7 to 12. They needed desks, and we were shown to the one room that had them. The other classrooms were only walls and roof—no doors or windows, no floors or lights, nothing but a place to gather.

The children raced to our van and greeted us with smiles and laughter and high fives. Jennifer Alton held them. I could sense that she needed to hold the children as much as they needed to hold her. There was an unspoken universal maternal bond. We talked with the director and a teacher. Nyaddga made a call to learn a desk would cost $30 per unit.

From this school, Tamuzzade drove us to the Shared Blessing Junior School at the Makukuba Village. We were expected by the teaching staff and led to a classroom where about 50 children immediately broke into song and rhythmically clapped their hands.

As at Sir Apollo Maggwa, some of the classrooms had roofs, others did not. Some had floors and desks, others did not. The kitchen was a handmade wood-fired stone oven. The students pumped water by hand. As Rotarians, we could easily partner with the Rotarians of the Kasangati Club. For a relatively small amount of money, we could provide desks, floors, walls and roofs. The immediate impact on the lives of these beautiful and happy Ugandan children would be profound.[4]

Above, children at a Sir Apollo Maggwa elementary school meet with Jennifer Alton and Julian Nyaddga. Right, Alton greets children at Shared Blessing Junior School. Many schools lack desks, floors, walls and roofs. Rotary is working to provide those and more.

Mackindye West Country Club Rotary Meeting

That evening we were guests of honor at the Mackindye West Country Club. President Daniel Nsibambi and the Mackindye West Rotarians gave us a genuine and heartfelt welcome. Both the assistant District Governor and the current District Governor were present. All seats were filled. We celebrated their Rotary meeting and shared our Ugandan journey with them. Both groups agreed to lead Rotarians in the formation of 8000 Rotary Climate Action Teams around the world. The Mackindye West Country Club was already doing important work with a program called "Mission Green."

After the meeting, a small group stayed around to break bread and share fellowship. We were amazed when they rolled out their Master Plan to develop a vocational school at the Kyasira Orphanage we had visited on Wednesday. With complete command of the plan, Julian Nyaddga and Kelly Main took us through the vision of the club. These young women made a call to Rotarians and volunteers to come together to improve the Kyasira Orphanage property. It was a thrilling night. I had a difficult time sleeping because I was so excited about what could be if we worked together.

Left, Charlie Main, Tom Bormes and Jennifer Alton at Mackindye West Country Club Rotary discuss joint projects.

Amazima School and Stella Kyozira

Friday morning, March 13, 2020, we joined Phil Greene at Amazima School, a project he and eMi started years ago. We toured the grounds in hard hats and "gum boots" to stay out of the sticky red mud. Shop areas, the school kitchen and chapel were built using cast concrete and local red mud bricks with a heavy layer of clear coating. The open-air chapel had a raised stage and locally made pews. An expansion was underway to accommodate more people wanting to attend.

Next, we visited Stella Kyozira, a strong Ugandan woman, 24, who already runs four businesses. Her main concern is Grace Baptist School, which also lacked floors, walls, roofs and desks. Kyozira is kind, fierce and persistent. In addition to the seminary, she also has a brick farm, a taro farm and delivers eggs. Her businesses employ her male relatives, including her father.

Stella Kyozira raises money to support young women at risk to drop out of school.

She also raises money to support young women in her community who are at risk of dropping out of school at the onset of puberty. Young Ugandan women are often neglected, trafficked or forced into marriage. Because their families cannot afford sanitary napkins and basic school supplies, the family makes a choice. Kyozira spoke honestly about the tragic realities. She is committed to doing something about this injustice.

I was impressed with Kyozira's grit and determination. As we listened to her speak, I felt the proximity. She is an inspiration. Bormes and Alton agreed that Kyozira is a force for good. As Rotarians, we must partner with and invest in her vision.

Headwaters of the Nile

Friday afternoon, March 13, we sailed the Nile River. Our group also included Phil Greene, Kelly Main and Julian Nyaddga. We watched for birds. We saw where the water swirled in a circle because a spring fed into the great river. We watched men in a row boat fish with nets. We went up-river to a new suspension bridge towering above the old. As we traveled under it, the setting sun peeked in between the stanchions.

We dined together and then played a card game called "Up and Down the Nile River." We laughed and drank and celebrated. That night, we stayed in beautiful bungalows overlooking the Nile.

The Road Home

Saturday, March 14, 2020, we returned to Dubai, where we spent a few days decompressing in a beautiful hotel near the Burj Khalifa[5] before flying home. Flying from the dirt and poverty of Uganda to the wealth of Dubai was a shock to the conscience.

We began to hear rumors that the U.S. was preventing travel into its airports. Alton messaged her husband, who assured us that we would be permitted back in because we are citizens. At 4 a.m., Tuesday, March 17, 2020, we began the 16-hour flight back to Los Angeles, where we arrived to an empty airport. When the customs man handed Alton back her passport, he said, "Welcome home, Ms. Alton." I could see her tearing up. Then Bormes and I began to cry. Finally we simply gave into whatever this emotion was and cried and hugged.

Postscript

Congratulations to Julian Nyaddga, a woman destined to change Uganda for the better, who was inducted into Rotary after we returned home. ■

Footnotes

[1] https://www.rotary.org/en/about-rotary

[2] On May 28, 1987, Sylvia Whitlock from Duarte, California, became the first woman Rotarian. https://www.rotary.org/en/history-women-rotary#:~:text=Rotary%20issues%20a%20policy%20statement,have%20women%20as%20charter%20members.

[3] https://www.rotary.org/en/history-paul-harris-rotary-founder

[4] Since our return, San Luis Obispo Rotarians have partnered with the Kasangati Club and provided funds to construct roofs, floors and walls for the Makukuba Village School.

[5] The Burj Khalifa, the tallest building on Earth at 829.8 meters, or 2,722 feet, it is approximately twice the height of the Empire State Building.

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Proposition 25

SB10: What Happened to the End of California's Cash Bail System?

by Raymond Allen, Esq.

You will recall that in the July–August 2019 issue of the *Bar Bulletin*, I explained that the California bail bond system was about to undergo major, radical changes. On August 28, 2018, Governor Jerry Brown had signed into law Senate Bill 10. That bill was to take effect in October 2019. SB 10 was designed to end the bail bond system in California. In its place, there was to be a multi-tiered assessment program. That program would be administered by the probation department.

So, what happened? Why do we still have a bail bond system in California?

According to Greg Sullivan, of ABC Bail Bonds, a group of bail bondsmen were able to put the legislation on hold. The day after Governor Brown signed SB 10, a national coalition of bail agency groups launched a referendum drive. They raised millions of dollars and collected hundreds of thousands of signatures to get the referendum on this November's ballot. A vote in favor of Proposition 25 is a vote to end the cash bail system; a vote against the proposition is a vote to return to the cash bail system.

Sullivan makes two valid points for keeping a cash bail system. First, he says, bail bondsmen "help those who have been charged with an alleged crime. We get them back home and back to work so they can get their lives back to normal after a mistake or false arrest. We work with family members of those accused (who I refer to as their support team) to secure release."

Second, continued Sullivan, "we offer a wonderful service to the taxpayers of this community by assuring that the criminal defendant makes every single court appearance until they are sentenced or acquitted. If the criminal defendant does not show for an appearance, the bond is forfeited. The bondsman then has six months to return the criminal defendant to custody or pay the court the full amount of that bond. If the client fails to appear at court, the bondman uses his own money and resources to capture them and return them to custody."

It appears many disparate groups agree that the bail bond system, in some form, should be retained. Groups like the California Judges Association (CJA) oppose the no-money bail legislation because they fear too many dangerous criminal defendants will be released. Civil rights groups like the American Civil Liberties Union (ACLU) oppose the legislation because they fear it grants too much power to probation departments, district attorneys and judges. Placing the discretion of pre-trial release into the hands of organizations that find pre-trial release anathema is contraindicated, they believe.

According to Scott Roberts of JusticeLA Coalition, "replacing money bail with a new system of incarceration is not progress; it's the status quo masquerading as reform." Of course, bail industry groups oppose the legislation because it is an existential threat to their businesses.

On the other side of the issue are the governmental officials that passed the legislation. State Senator Bob Hertzberg (D–Van Nuys), co-author of the legislation, told the *Los Angeles Times* last year that he fully expected the legislation to remain the law of the land. In alliance with the Democrat-controlled legislature is the California Supreme Court.

Chief Justice Tani Cantril-Sakauye has long proposed bail reform. In her 2016 State of the Judiciary Address, she told the Legislature it cannot continue to ignore "the question whether or not bail effectively serves its purpose, or does it in fact penalize the poor." In October 2016, the chief justice formed the Pretrial Detention Reform Workgroup to study the current system and develop recommendations for reform. When SB 10 was signed, she said that the legislation was a positive development. According to Cantril-Sakauye, the legislation was drafted to ensure courts "do not judge a person based on the size of their wallet or what they have access to in someone else's wallet."

There are, however, two bail experiments that the voters should look at before November.

The first experiment occurred in the state of New York. On January 1, 2020, New York passed a bail reform bill. Sullivan believes the reform measure was a failure. "Just Google 'New York Bail Reform' and you will get article after article on how poorly it performed. The results were so frustrating to law enforcement, legislators and the citizens, that New York tweaked the law and reinstated commercial bail again."

The second experiment has been occurring in California as a direct consequence of the coronavirus epidemic. With the global pandemic, the California Judicial Council issued Emergency Rule 4, which became mandatory at 5 p.m. on April 13, 2020. The rule required each superior court to implement the Emergency Bail Schedule.

In essence, the Emergency Bail Schedule held that criminal defendants facing misdemeanor charges or nonviolent felony charges, except for 13 specific violent or dangerous offenses, would have their bail set at zero dollars ($0). This was to reduce the stress on the county jails and the court system. Voters should look to see if the zero dollar bail (from April 13, 2020 to its terminus) caused an increase in reported crime.

I believe, however, that an argument could be made that the current bail system has merit. It accounts for dangerousness and likelihood to reappear. It makes nuanced assessments based upon the known characteristics of the individual defendant. Bail can be adjusted upward or downward based upon known risk factors. The system has incentivized gatekeepers who monitor the defendant after release.

I believe further that judges should simply apply the law as it currently exists under *In re Humphrey*. Under *Humphrey*, if the criminal defendant is not dangerous, then he should be released. If the defendant is dangerous, then terms and conditions should be imposed. If terms and conditions are insufficient to address the danger, then a bail amount should be set. That bail amount, however, should be reasonable for the individual defendant. That seems fair.

Sullivan tends to agree. "When I first started, I would post 25 to 30 bails a week, with an average bail being about $5,000 to $7,500." Prior to the emergency zero dollar bail system, our county bail schedule had set most bail amounts 10, 20, sometimes 100, times that amount. And the poor languished in jail and the rich walked free.

No-money bail or a money bail system? Let the facts drive your decision. Has crime gone up during the Emergency Bail Schedule? Did crime go down under the county's draconian money bail schedule? Have the courts honestly applied the rules from *In re Humphrey*? There is much to discuss and ponder. ■

Editor's Note: Opinions presented in this article do not necessarily reflect the opinions of the San Luis Obispo County Bar Association, its Board of Directors, or the staff of the Bar Bulletin. Opposing thoughts on this or any opinion contained within any article are welcome.

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My Halloween Treat—

Stop, Look, Choose, Vote and Practice Self-Kindness

by Kara Stein-Conaway

On the night before Halloween last year, I realized I'd forgotten to buy pumpkins for my kids to carve. I arrived at the grocery store at 8:30 p.m. after a long day of work, only to find all the regular-sized pumpkins had already been sold.

Disappointment hit me like a sledgehammer. I thought of my kids, then ages 3 and 6, sad and disheartened. What would I tell them? Mommy had a long day at work and forgot to go to the store? I took a deep breath and I tried to focus on finding a solution. That's when I saw a bin filled with mini pumpkins. I grabbed a few, deciding that arriving with mini pumpkins seemed better than arriving home with no pumpkins at all.

I pulled up into our driveway and sat in my car. I took a deep breath in and I exhaled. As I exhaled, I released the disappointment that I had in myself for arriving home late. As I exhaled, I released the frustration that I felt over the fact that the pumpkins I had wanted to purchase were sold out. The past had come and gone, and this was the one moment that I had right now. I let the weight of those things leave my heart and I opened my heart to opportunities for joy and connection that awaited me just inside my home.

My little ones gave me welcome home hugs and kisses and then we jumped into pumpkin coloring and carving action. I expressed excitement in telling them that they each got three pumpkins, instead of just one, to carve. Since I was excited about these little pumpkins, they were excited about them too.

illustration: zucca-architetto-frances via openclipart.org

This is the magic that awaits us when we're kind to ourselves.

Instead of feeling so defeated about the lack of normal-sized pumpkins, I opened my eyes to other possibilities. I looked for a workable alternative and found one. Instead of electing to wallow in my disappointment or beating myself up emotionally for failing to get to the store earlier, I chose to feel grateful that I remembered to get pumpkins for my kids after a very demanding day. Instead of hurrying the kids since it was getting late, I chose to enjoy being with them in all their decorating glory, marker-covered hands and all. I cherished being with them as they worked at their natural pace. In my view, an occasional late night while making a special memory together is worth the lost sleep.

Every day we have opportunities to be cruel to ourselves, but we get to decide whether to take those opportunities or instead if we will choose to practice self-kindness. I believe that when we have a practice of being loving and kind to ourselves, that naturally

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My Halloween Treat continued

overflows into the way we interact with others.

I actually think it's really not possible to truly love yourself and simultaneously feel hate in your heart for another person. So, one thing you can do to change the world in a positive way, is to start by being kinder to yourself.

As a mother, I see helping my sons learn to practice self-kindness as one of my most important roles.

I watch each of my sons make many mistakes as they learn. I encourage them to learn from their mistakes and to keep trying. When I see the tears well up in their eyes or their shoulders slouch forward in disappointment, it pains me to see how hard they are on themselves already at their young ages. As parents, we want our children to keep trying so they will learn that they can do hard things, and we want them to love themselves even when they make mistakes.

Yet, when we make mistakes, like forgetting to buy the pumpkins to carve before the grocery store sells out, our default setting is to come down very harshly on ourselves. But treating ourselves with harshness and criticism does little to motivate us to improve.

Instead, it causes needless feelings of guilt and disappointment. It uses up precious energy to feel guilty and disappointed. That same energy has the potential to be channeled into creating an opportunity for fun and connection.

Some people believe criticism is a great motivator and that if we're not self-critical, then we won't succeed at the highest levels. Research, however, shows that self-criticism might not be the motivating factor many believe it to be.

In Michelle McQuaid's article, "3 Ways to Turn Self-Criticism Into Self-Compassion," published in *Psychology Today*, she writes about the harms of self-criticism and cites one study where a Stanford University professor found that the more people criticized themselves, the less likely they were to meet their goals, whether they be weight loss, academic success, or job performance.

"In fact, neuroscientists suggest that self-criticism actually shifts the brain into a state of self-inhibition and self-punishment that causes us to *disengage* from our goals," McQuaid writes. "Leaving us feeling threatened and demoralized, this self-criticism seems to put the brakes on our plans to take action, leaving us stuck in a cycle of rumination, procrastination and self-loathing."

Treating yourself with self-kindness rather than self-criticism is good for your well-being and it's good for your productivity too. Years ago at a seminar, I was introduced to using the framework of stop, look, choose and vote to gain consciousness regarding my thoughts and my decisions. I've recently implemented the stop, look, choose and vote framework to develop a process for shifting from a habit of self-criticism into developing a habit of practicing self-kindness.

Stop

If you're starting to go down a bad road of self-criticism (e.g., the "I suck for not buying pumpkins earlier" road), the first thing you need to do is to stop going down that road. So, pause and take note of your mental space. Is this where you want to be? If not, then stop. Taking deep breaths is a great way to help yourself press the brakes. One deep breath may not be enough, but after you take five deep breaths in a row, you're already well on your way to slowing down.

Look

Now that you've stopped, look around. What are the options you have in front of you? Consider available options. Look for other paths.

Choose

Now that you've considered your options, you get to choose which option you will select. Going back to the sold-out carving pumpkin situation, one option was that I could have bought a bottle of hard liquor, gone home with my head down, put the kids to bed with an air of total disappointment, and then after they were in bed, I could have drank myself into a place of forgetting or not caring about how I disappointed myself and them. Alcohol, drugs, endless numbing with TV or social media scrolling all can be used to try to escape from the self-critical feelings that we do not want to feel anymore.

A slightly less dramatic choice, but a still a self-harming choice, would be that after seeing that the regular-sized pumpkins were gone, I could have stormed out of the grocery store cussing under my breath that life sucks for me as working mom who doesn't have enough time to prepare for Halloween in the way my kids deserve. This route likely would not have been as self-destructive as the hard alcohol drinking option, but it still would have left me feeling like crap and would have caused me to stop looking for opportunities to make things better, because of the story I was choosing to tell myself.

Another option is the option to make the most of what I have before me: mini-pumpkins and little kids who are happy to have quality time with me doing something fun.

Vote

I chose to make the most of the night with the mini-pumpkins, and I chose to vote to focus on the fun and the connection that I had the opportunity to create with my boys.

Life will constantly present us with opportunities to tear ourselves down and to see life both as something we are failing at and something that "others" are messing up for us. But, when instead, we stop, look, choose and vote to do the things that are kind to ourselves, we show up and we create so much beauty in the world.

On the night before Halloween, I chose to be kind to myself. That choice felt nourishing to me then and now, in reflecting on that night, I know that modeling self-kindness is something I want my boys to learn to do for themselves and there's no better way than practicing on myself to show them how. The results were a magical Halloween eve with my boys. I believe that this magic awaits us all if we allow it into our lives by voting for kindness moment after moment and day after day.

I fully believe that as lawyers, when we are taking care of ourselves, our families, and those we love, it's from that space that we contribute most meaningfully to the world and to the lives of our clients. ■

Kara Stein-Conaway practices criminal defense with her father, Jeff Stein, at the Stein-Conaway Law Firm, P.C. This is the fifth in a series of articles Stein-Conaway has written for the Bar Bulletin. *Her articles explore the intersection of women, business, law and family.*

Work Cited

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Have you met?

Jeffrey W. Curcio

A partner with the Corporate and Securities Team and Chair of the Tax Law Team at Murphy Austin Adams Schoenfeld LLP, Jeffrey Curcio represents clients before the Examination, Appeals and Collection Divisions of the IRS. His primary emphasis is on income tax matters for all types of taxpayers.

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Contributions to the *Bar Bulletin* must be submitted electronically in Microsoft Word format directly to the Editor at:

raymondinsf@yahoo.com

Footnotes will not be published; any essential notes or citations should be incorporated into the body of the article. Contributors are encouraged to limit the length of their submitted articles to 2,500 words or less, unless the article can be published in two parts in successive issues.

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- March–April
- May–June
- July–August
- September–October
- November–December

To ensure consideration for inclusion in the next scheduled edition, articles, advertisements and payments must be received by the deadines noted at right.

The *Bar Bulletin* reserves the right to reject or edit any contributions. By submitting contributions for publication, contributors consent under this policy to the editing of their work, the publication of their work and the posting of their work online. Contributors must include an e-mail address and/or telephone number, as they may be contacted during the editorial process.

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January–February issue deadline	11/25
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