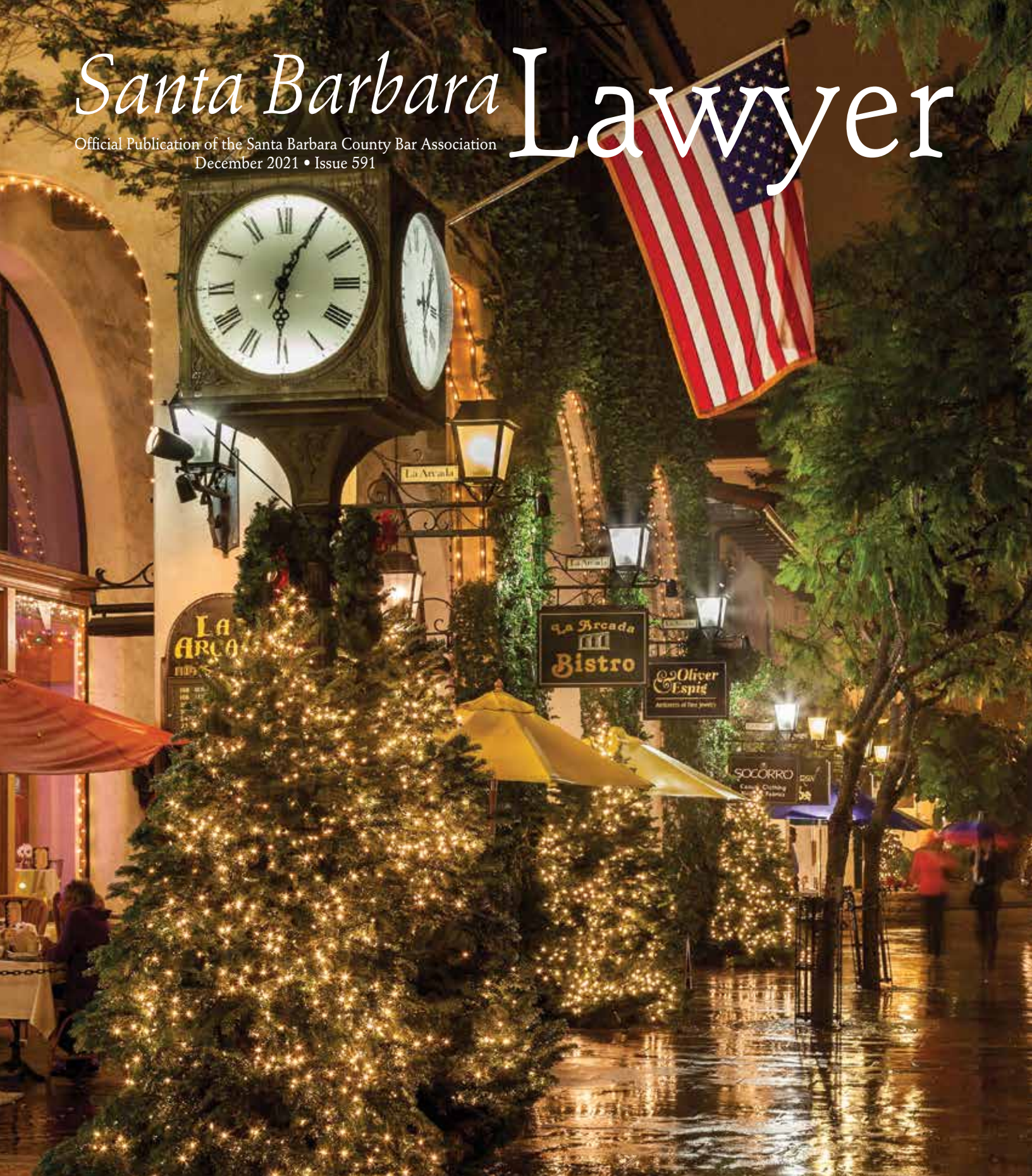


Santa Barbara Lawyer

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Mission Statement
Santa Barbara County Bar Association

The mission of the Santa Barbara County Bar Association is to preserve the integrity of the legal profession and respect for the law, to advance the professional growth and education of its members, to encourage civility and collegiality among its members, to promote equal access to justice and protect the independence of the legal profession and the judiciary.

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Santa Barbara during the Holidays by Fritz Olenberger

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Santa Barbara County Bar Association's Outgoing President's Message

BY ELIZABETH DIAZ

2022 is almost here and my time as President of the Santa Barbara County Bar Association (SBCBA) will be over at the end of this month. I will soon join the ranks of former Bar Presidents.

It was a pleasure and a privilege to be the 2020 and 2021 SBCBA President. Although we did not see each other in person this year at the traditional annual events, and my year as president was far from traditional, it was still the highlight of my legal career. The Board and I made the best of this year despite the global pandemic. We all adapted to a new way of living and slowly are returning to our normal lives. It is my hope that we will see each other in-person in the upcoming year.

Many thanks to the 2021 Board for their time and work, and I especially would like to thank the departing board members, Tara Messing, Deborah Boswell, and Amber Holderness.

This year, SBCBA continued to hold Mandatory Continuing Legal Education conferences via Zoom, and one in-person. The SBCBA also made it a priority to keep the membership informed of information from the Court, the Presiding Judge, and the Chief Justice. Thank you, Lida Sideris, for holding down the SBCBA office and ensuring the *Santa Barbara Lawyer* magazine was completed on time and the newsletters were sent out. Thank you, Christy Barkey, for your help as well.

Additionally, in 2021, SBCBA created the Diversity and Inclusion Task Force (Task Force) to promote access, diversity, and inclusion amongst professionals in the local legal community; an idea that I envisioned for years prior to becoming SBCBA President in 2020. The Task Force committee members include me, Claire K. Mitchell, Michelle Roberson, Elvia Garcia, Kate Lee, Ian Elsenheimer, Luer Yin and Jill Monthei. I would also like to acknowledge committee members who are no longer on the committee but

were instrumental in creating the Task Force, Zahra Nahar-Moore, and UCSB interns, Fatima Said and Ikenna Ojukwu.

As the Task Force took shape, the Santa Barbara Women Lawyers joined forces with the SBCBA towards the promotion of gender equality. This collaboration also led to others. Currently, the Task Force is made up of local attorneys, student interns, and representatives from the Santa Barbara Women Lawyers, Santa Barbara Barristers, Santa Barbara County Bar Foundation, and the Northern Santa Barbara County Bar Association.

The Task Force established goals that it has been diligently working on. The first goal was to provide education on diversity to the local legal community. Under this goal, the committee created a survey to determine the depth of diversity. There was a great response to the Task Force's survey which will be shared in an upcoming *Santa Barbara Lawyer* article. Be on the lookout for it.

The Task Force is planning an in-person diversity presentation in 2022. With this goal, the Task Force also created a diversity and inclusion resource guide that was sent out to the SBCBA membership. The guide links various resources such as books, articles, and videos on the topic of diversity in the workplace and in the legal profession. The Task Force plans to add to the resource guide in the upcoming year.

The Task Force's second goal was to create a mentorship and scholarship program for students. Seeing this goal come together has been exciting. The Task Force has created a program for students, in particular students of color and diverse backgrounds, to connect with legal professionals via career panels and internships. The Task Force held a career panel in October 2021 for Santa Barbara City College students. The career panel included me, attorney Monique L. Fierro with Bamieh & DeSmeth, and Santa Barbara Superior Court Judge Von Deroian, with a special appearance by Judge George Eskin. A second career panel was held in November 2021 for University of California, Santa Barbara students. The career panel included me, attorney Claire K. Mitchell with Rimon Law, and Santa Barbara Superior Court Presiding Judge Gustavo Lavayen. The career panels



Elizabeth Diaz

President's Message

were a great success, as they allowed the students to learn from the panelists' personal and professional experiences. Seeing and hearing the students' excitement was rewarding, and hopefully will lead to those students becoming future lawyers, judges, and legal professionals.

The scholarship component to the Task Force's second goal is progressing steadily. The Santa Barbara County Bar Foundation is collaborating with the Task Force to create a special scholarship to help students of diverse backgrounds with expenses related to the Law School Administration Test (LSAT) and the California State Bar examination. We are currently completing the guidelines and procedures and plan to unveil the scholarship program in 2022 in order to begin accepting donations.

The work of the Task Force has only just begun and will continue next year. My hope is that it will evolve into a permanent committee within the SBCBA and that it will continue to work on promoting diversity and inclusion in the legal profession. Thank you to the Task Force for their time, dedication, and hard work.

Being SBCBA President has taught me a lot. I hope it has inspired my nieces and nephews (pictured in this article) to take on new and challenging opportunities, to show what they can accomplish if they accept them. I am glad that I have been able to serve as President, and although it was an unorthodox presidency, I still had a good time. I am grateful that this opportunity has allowed me to create something that will last longer than my term as president. ■

Elizabeth Diaz is the Managing Attorney for the Family Violence Prevention and Immigration Program at the Legal Aid Foundation of Santa Barbara County, in Santa Barbara, focusing her practice primarily on restraining orders and other related family law and civil matters for victims of domestic violence, elder abuse, sexual abuse and human trafficking. Elizabeth was born and raised in



Elizabeth with her nieces and nephews

Santa Barbara. Spanish was her first language. Elizabeth earned her Bachelor of Arts degree in Law and Society at the University of California, Santa Barbara, and her Juris Doctor degree from the Santa Barbara College of Law. In 2017, Elizabeth received the Deborah Talmage Attorney of the Year Award, and is the first Hispanic attorney to serve as the Santa Barbara County Bar Association's President, and the first President to serve for two years instead of the traditional one-year term.

Santa Barbara Lawyer

SEEKS SETTLEMENTS, VERDICTS & DECISIONS

SBL encourages all SBCBA members to share notable non-confidential settlements, verdicts or decisions. The information is valuable to our membership.

Please submit information to Victoria Lindenauer (Lindenauer_mediation@cox.net) or R.A. Carrington (ratc@cox.net).

Texas' Senate Bill 8 is an Attack on All Constitutional Rights

BY TERESA M. MARTINEZ

On November 1, 2021, the Supreme Court of the United States (SCOTUS) heard oral argument in the cases *Whole Woman's Health v. Jackson*¹ and *U.S. v. Texas, et. al.*² regarding Texas' recently enacted Senate Bill 8 (S.B. 8). S.B. 8 bans a woman's right to obtain abortion care after a fetal heartbeat is detected³ in direct contravention of Supreme Court precedent, which established a constitutional right to abortion care up to the point at which the fetus becomes viable⁴ under *Roe v. Wade*⁵ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁶ S.B. 8 contains no exceptions for pregnancies resulting from rape or incest and provides only a limited exception for "medical emergencies" that prevent compliance with the law.⁷

The issues before SCOTUS were not to determine whether S.B. 8 was constitutional, but rather to determine how the law can be challenged. S.B. 8, which took effect on September 1, 2021, enables private individuals as opposed to state actors, to sue abortion providers or others who "aids or abets" a woman in obtaining abortion care in Texas, including paying for or reimbursing the costs of an abortion through insurance.⁸ These private attorneys general may recover no less than \$10,000 in damages for each abortion performed or induced.⁹

Additionally, if a provider prevails in an S.B. 8 suit, the law allows the provider to be sued again and again, even for the same abortion at issue in a prior case.¹⁰ There is no issue preclusion effect for a defendant unless the defendant has paid the full amount of statutory damages in a prior suit.¹¹ And while a prevailing plaintiff may be awarded attorneys' fees and costs, there is no such provision for a prevailing defendant.¹² Furthermore, a provider who performs an abortion in reliance on any court decision that invalidates the law, if that decision is subsequently overruled, would be in violation of S.B. 8 even if that court decision had not been overruled when the defendant performed the abortion.¹³

As described by Justice Sotomayor, S.B. 8 "purports to restrict constitutional and procedural defenses, limit the preclusive effect of court rulings, and impose retroactive liability for services provided while the Act is enjoined

if the injunction is later overturned."¹⁴ "The State defendants argue that they cannot be restrained from enforcing their rules because they do not enforce them in the first place."¹⁵

The questions presented to SCOTUS were (1) whether the state can insulate from federal-court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil action;¹⁶ and (2) whether the United States may bring suit in federal court and obtain injunctive or declaratory relief against the state, state court judges, state court clerks, other state officials, or all private parties to prohibit S.B. 8 from being enforced.¹⁷



Teresa M. Martinez

Whole Woman's Health v. Jackson

The first question was posed in *Whole Woman's Health v. Jackson*,¹⁸ a case brought by Texas abortion providers, abortion funds, practical support networks, doctors, health center staff, and clergy members prior to the law being enacted.¹⁹ The lawsuit named as defendants every state court trial judge and county clerk in Texas, the Texas Medical Board, the Texas Board of Nursing, the Texas Board of Pharmacy, the attorney general, and the director of Right to Life East Texas, who had openly called for people to sue their local abortion providers under S.B. 8.²⁰

After defendants' motion to dismiss was denied by the Federal District Court Judge for the Western District of Texas, defendants filed a notice of appeal with the Fifth Circuit Court of Appeal, who issued an order stopping all proceedings in the District Court including canceling a preliminary injunction hearing.²¹ The Court of Appeal also denied the plaintiffs' request to expedite the appeal of the state's motion to dismiss.²² The plaintiffs then filed for emergency relief with the Fifth Circuit, which was denied, and then filed an emergency request with SCOTUS to block the law from taking effect, which was also denied.²³

The Fifth Circuit later explained that, in its view, the claims against state officials were barred by Texas' sovereign immunity.²⁴ The court acknowledged that state officials may be sued under *Ex parte Young*'s exception to state sov-

ereign immunity,²⁵ but it found that exception inapplicable because it concluded that the executive defendants had no role in enforcing S.B. 8 and that state judges and clerks are not proper defendants under *Ex parte Young*.²⁶

U.S. v. Texas, et. al.

The second question was posed in the case brought by the Federal Government against the State of Texas in *U.S. v. Texas, et. al.*²⁷ The Government’s complaint includes three claims for relief and alleges that S.B. 8 (1) violates the Fourteenth Amendment and the Supremacy Clause; (2) that it is preempted to the extent it prohibits abortions that federal agencies are charged with facilitating, funding, or reimbursing; and (3) that it violates the federal government’s intergovernmental immunity to the extent it regulates the activities of the federal government and its contractors and grantees.²⁸

The District Court Judge issued a preliminary injunction barring enforcement of S.B. 8 by state officials including judges and clerks finding that the law “operates as a ban on pre-viability abortions” in contravention of *Roe* and *Casey*.²⁹ However, the Fifth Circuit Court of Appeal stayed the injunction and the Department of Justice asked SCOTUS to reinstate the injunction and hear the case as soon as possible.³⁰ SCOTUS deferred consideration of the Government’s application to vacate the stay pending oral argument and set oral argument for November 1, 2021.³¹

During oral argument, a majority of the Supreme Court Justices seemed inclined to allow abortion providers to pursue challenges to S.B. 8.³² Justice Kagan observed “the ‘entire point of’ S.B. 8 is to ‘find the chink in the armor’ of *Ex parte Young*, [which allowed] lawsuits in federal courts against state officials to bar them from enforcing unconstitutional laws, but prohibiting injunctions against state courts” and “dismissed the idea that the court’s hands are tied merely because ‘some geniuses came up with a way to evade the commands of that decision, as well as ... the broader principle that states are not to nullify federal constitutional rights.’”³³ Chief Justice Roberts and Justices Kavanaugh and Barrett echoed similar sentiments and challenged Texas’ argument that defendants must first violate the law and be sued in state courts in order to obtain federal court review.³⁴ Several justices cited the chilling effect that S.B. 8 has given the penalties and retroactive application.³⁵

In response to Texas’ position that no one can sue to enjoin S.B. 8, Solicitor General Elizabeth Prelogar argued that “[o]ur constitutional guarantees cannot be that fragile and the supremacy of federal law cannot be that easily subject to manipulation.”³⁶ The justices were also concerned “about the prospect that S.B. 8’s enforcement scheme could be used

to negate other constitutional rights. Kavanaugh cited a ‘friend of the court’ brief by the Firearms Policy Coalition, a gun-rights advocacy group, arguing that the scheme could [], ‘easily be replicated in other states’ to target gun rights, free speech rights, or religious rights.”³⁷

S.B. 8’s enforcement scheme is an attack on all of our constitutional rights. If allowed to stand, states will be emboldened to invalidate any federal constitutional protections that they do not agree with through similar statutory mechanisms. Decades of struggles to obtain and maintain civil rights, voting rights, women’s rights, religious freedoms and many, many other constitutional protections could be erased. Can our constitutional rights really be that fragile?

SCOTUS’ decision is expected by summer 2022. ■

Teresa M. Martinez is a Senior Deputy County Counsel with the County of Santa Barbara and serves on the Board of Directors for the Santa Barbara County Bar Association. Any opinions expressed herein are solely those of Ms. Martinez and do not express the views or opinions of her employer.

ENDNOTES

- 1 Supreme Court of the United States, Docket No. 21-463.
- 2 Supreme Court of the United States, Docket No. 21-588.
- 3 Texas Health & Safety Code sections 171.201 *et seq.*
- 4 Amy Howe, *Court seems inclined to let abortion providers pursue their challenge to Texas law*, SCOTUSblog (Nov. 1, 2021, 4:40 PM), <<https://www.scotusblog.com/2021/11/court-seems-inclined-to-let-abortion-providers-pursue-their-challenge-to-texas-law/>>.
- 5 (1973) 410 U.S. 113, holding modified by *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833.
- 6 (1992) 505 U.S. 833.
- 7 Texas Health & Safety Code sections 171.205, subdiv. (a).
- 8 Texas Health & Safety Code sections 171.208.
- 9 *Id.*
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Teaching American Criminal Law and Procedure Around the World

BY PATRICK J. MCKINLEY

This article is about teaching in Europe, and some other countries, but it is also about the helpfulness of local Bar Associations to new lawyers and law students. Decisions, and assistance, made by a local Bar Association had a lifetime ripple effect once I became a practicing lawyer, as you will see.

I grew up and went to law school at Duquesne University in Pittsburgh, Pennsylvania. Upon taking the Pennsylvania Bar it was necessary to complete a three-month clerkship with a lawyer. No one in my family knew of an attorney whom I could ask about a clerkship.¹ I contacted the local Bar Association. During my three-year daytime law school studies, the Allegheny County Bar Association granted me some interest free loans to pay my tuition.²

Second, and most important, in the long-term, the Bar Association provided me with a lawyer who allowed me to clerk with his firm; one who, it turns out, was at the top of the profession in Western Pennsylvania. Shortly after he approved my clerkship, the lawyer became a United States District Judge, and eventually went to the Federal Third Circuit.³ My classmates, on hearing who I had as a lawyer for the required clerkship, marveled at the fact that I was coupled with one of the finest and well-respected lawyers in town! I never forgot his kindness in taking me on for my required clerkship.

After my clerkship, I moved to California, studied for the bar in San Francisco, passed it, and worked as a Deputy District Attorney (DA) in Kern County for a little more than a year. I was then hired in Santa Barbara as a Deputy DA and remained in the local office for the next 38 years; twenty-four of those years as the Assistant DA under former, and now sadly deceased DA, Tom Sneddon. Again, the Allegheny County Bar Association's help was significant and had life-long ripples. I have found that many important things seem to happen in life because of plain dumb luck.

I never had a law clerk from another country until 1994, when a letter (before e-mail) came from a German law student from the University of Tübingen inquiring about doing a legal clerkship with the Santa Barbara DA's Office.

The letter was forwarded to me since my assignment then included extraditions and all matters dealing with other states and countries.⁴ I responded, and the first German law clerk came for a three-month clerkship. He was followed by 32 more German law clerks right up to my retirement in 2008. I also had law clerks from Argentina, Brazil, Chile, Jordan, Korea, Norway, Netherlands, Switzerland, Thailand, Uruguay, and the United Kingdom.

As I was approaching retirement, I was talking with my last two German law clerks from Munster. When I told them that I was worried about being bored in retirement, they both retorted in unison: "You should teach criminal law in Germany!" I never contemplated doing this but, as soon as they said it, I was keenly interested. I wrote to their professor who gave me some leads. In 2009, I went to Dresden, Munich, and Bielefeld, Germany, to teach American Criminal Law and Procedure, in English.

I produced my own teaching outline to accompany my lectures,⁵ and complimented them with numerous power point presentations from my many cases over the years. I loved it from the outset! I began my classes by explaining to my German law students that the DA works very close with the police in America, because we have to, as the exclusionary rule casts a long shadow on the investigation



Patrick J. McKinley



McKinley and wife, Esther, in Munich, Germany, in 2013

of crime.⁶ Along with the outline, I provided the students with a “Plea of Guilty” form, a complaint, an actual search warrant and affidavit, a *Faretta* waiver,⁷ and other documents that are referred to during the classes.

Some of the universities where I have taught required a test. I have prepared the tests and graded them, and at other times, I have prepared the test and a sample answer, and the university personnel graded them. I always used an essay test form; never fill-in the blanks, true/false, or multiple choice.

During my classes, I spent a lot of time discussing the enormous discretion that a DA has in America, such as: to file a complaint or not to file; to charge a felony or a misdemeanor; to issue an arrest warrant or send a letter to appear; to take the case to the Grand Jury; to not object to an “own recognizance” release; to seek the death penalty; to file a three-strikes case; to enter in to a plea bargain; and many other examples. This is why a dishonest, unethical, or more often than not, a lazy prosecutor can cause so much damage to individuals charged with a crime. I point out to them that here in America, unlike other countries, because of the 94% rate of criminal case pleas resulting from a plea bargain, that it is the DA who does most of the sentencing, not the judge!

I taught all over Germany returning six times to Munich, and had multiple teaching trips to other German universi-

ties.⁸ I also taught in other countries as well,⁹ including a teaching trip to China with the help of my former boss, retired Santa Barbara DA, Stan Roden, and one trip to Israel because of contacts made during the Hively double homicide in Montecito, resulting in a domestic prosecution in Israel of the two killers. I made five trips to Israel on that case alone, as well as to Nova Scotia for the extradition of the person who hired the hit men.

Two years ago, just before the Covid-19 pandemic began to disrupt our lives, I taught the course in Warsaw and in Lublin, Poland.¹⁰ Santa Barbara Superior Court Judge, Brian Hill, who also has taught in Bielefeld, Germany, recently, assisted me in making the Polish connection. I just completed a two-city teaching trip in October 2021, returning to Warsaw, and then to Budapest, Hungary. The arrangements for all these trips were made by me, without the intervention of any organized group.¹¹

In my classes, the students have always been fluent in English, and some are from countries other than the host country. In my recent classes in Budapest, Hungary, there were nine law students from Hungary, and eight from other countries. At times, if I slipped up and used slang terms, it did cause questioning looks. For example, in one of the murder cases I presented, I stated that the victim was dumped after the murder... “out in the boonies!” That took some explaining! Otherwise, all the students I taught had no



McKinley's Warsaw class in 2021

trouble following the lectures and the legal issues involved.

Issues like the “Exclusionary Rule,” Miranda rights, Brady,¹² and other basic California and American legal issues were all discussed in my classes. Despite being a prosecutor for my entire legal career, I tried very hard to give a neutral and balanced look at our system. Not a month goes by that a conviction is reversed; an innocent person is freed, sometimes years later, for unethical violations, or wrongful convictions resulting from faulty eye-witness identification, an informer who lied, faulty science, and often a combination of these and other factors. I tried to “cover” these issues thoroughly and fairly.

The *Santa Barbara Lawyer (SBL)*, published by our local Santa Barbara County Bar Association, has also played a key role in my classes, especially in dealing with “Brady” issues. The many articles written by Robert Sanger for *SBL* dealing with expert opinions on trace evidence, DNA, toolmarks/firearms comparisons/genetic genealogy, standards for experts to be governed by, and many other issues, have been most helpful in keeping my teaching information current and informative. Mr. Sanger’s articles were especially helpful in Warsaw, Poland, where many of the students are studying criminology.

In many countries law students study law in terms of A did this, B did that, C did such and such, and ending with what are the rights of the parties. In my classes they see a

real case, with a victim and a defendant who has a name; real examples of closing arguments and an opening statement in a multi defendant felony murder case. Opening statements are almost never shown on TV shows in the United States, or in Europe. Using actual cases that I handled worked well, and, as one German professor who attended my class told me: “Pat, the students NEED to see that this stuff we are teaching them about is....REAL!”

Since my retirement from the DA’s office, I have continued to be involved in finding clerkships for German law students, and the teaching trips have provided a steady stream of students who want to come here for an unpaid clerkship. Germany requires their law students to do a series of clerkships, and these can be done anywhere in the world. In this connection, three Santa Barbara Superior Court Judges have allowed a clerkship, as have several private civil and criminal lawyers, as well as the Public Defender’s and DA’s offices.

Except in rare cases there is no financial compensation for my teaching trips. Many of the universities in the former Eastern Bloc countries are still very underfunded. It might be possible to deduct some expenses from your Federal and State tax return as a charitable deduction, but that question is best left to your accountant. Nevertheless, the whole experience is well worth it.¹³ Plus, it gave me the chance to see places I might never have visited otherwise.¹⁴ In



Students in Beilefeld, Germany, class.

Warsaw, for example, I walked from my hotel to the university, and to the Frederic Chopin Museum, the Warsaw Uprising Museum, the Warsaw Ghetto Museum, the Museum of the History of the Polish Jews, and others. Poland and Hungary both suffered invasion, horrible destruction, and occupation during WWII and then the Soviet takeover. They love freedom. The “Chimes of Freedom” ring loud and true for them now!¹⁵

To sum up, the teaching and interaction with the students is enormously rewarding, and if you have an appreciation for history and travel, then I hope I have inspired some of you to give this a try. The teaching, the students, as well as the law clerks, have been a wonderful addition to my life here in Santa Barbara paradise! ■

Patrick J. McKinley attended Duquesne University School of Law, in Pittsburgh, Pennsylvania. He served as Deputy District Attorney, County of Kern, then Deputy District Attorney and Assistant District Attorney, in Santa Barbara County from 1970 to 2008. Mr. McKinley prosecuted numerous murders, rape, theft, bribery, robbery, and other serious felony cases, as well as countless misdemeanors. He tried over 330 jury trials that went to verdict.

ENDNOTES

- 1 My dad was a blue-collar machinist in West Homestead, Pennsylvania. In 1892, The Homestead Strike occurred where Pittsburgh steelworkers clashed with Pinkerton strike-breakers employed by Andrew Carnegie, resulting in twelve deaths.
- 2 I needed those interest free loans because I lived at home, rode the streetcar to law school, and worked as a delivery driver and soda jerk to make some money. Yes, I paid it all back!
- 3 The Honorable Joseph F. Weis, Jr., was appointed by President Nixon to the United States District Court in Pittsburgh (Western District of Pennsylvania), and in 1973 elevated to the United States Court of Appeals for the Third Circuit. The United States Courthouse in Pittsburgh, Pennsylvania is named after him. He approved my clerkship sight unseen. I will be forever grateful.



McKinley with his students

- 4 If something hinted at out-of-state legal issues it usually ended up on my desk. Not everyone knew how to prepare the Application and Order for Writs of *Habeas Corpus Ad Prosequendum / Ad Testificandum*! So, it was pure chance that the letter was routed to me, and the clerkships and my teaching around the world all stemmed from that.
- 5 My law school outlines consisted of the usual chapters found in criminal law and procedure textbooks: filing of charges, arraignment, pre-trial motions, jury trial issues, hearsay rule, spousal privilege, sentencing, appeals, *habeas corpus*, and many other legal issues.
6. *Mapp v. Ohio* (1961) 367 U.S. 643.
- 7 In *Faretta v. California* (1975) 422 U.S. 806, the United States Supreme Court held that a criminal defendant has a constitutional right to act as their own lawyer. In the *Faretta* opinion, Justice Blackmun concluded his dissent with this comment: “If there is any truth to the old proverb ‘one who is his own lawyer has a fool for a client’ the Court by its decision today now bestows a constitutional right on one to make a fool of himself.” (Id. at 846.)
- 8 Bielefeld (6 teaching trips); Dresden, Leipzig, Augsburg, Regensburg, Bremen (3 teaching trips), Hamburg, Jena, Leipzig, Wiesbaden, and Bayreuth (2 teaching trips).
- 9 Graz, Austria; Lund, Sweden; Warsaw and Lublin, Poland; Shandong, China; Haifa, Israel; Leiden, Netherlands; and Budapest, Hungary.
- 10 The law school in Lublin, Poland, John Paul Catholic University (where Pope John Paul taught), asked me to author an article about being a prosecutor in a democracy. I wrote “Prosecution in a Democracy” in May 2020, and it was published in “Review of European and Comparative Law”, Vol XLII, issue 3, pp 141-167; *Katolicki Uniwersytet Lubelski Jana Paula II*, in Lublin Poland Legal Journal. As mentioned in the body of this article, the Poles love freedom!
- 11 The Center for International Legal Studies (CILS), based in Salzburg, Austria is one such organization. It screens prospective teachers and provides introductions to teach the legal field of the applicant, not just criminal law, in countries all over Europe. See www.cils.org. A resume, two letters of reference and a video-conference interview with a CILS lawyer can be followed by an invitation to teach in many countries in the former Soviet Bloc. These lawyers go on these teaching trips without compensation, and present classes in whatever legal specialization they practice. One acquaintance of mine taught “Franchise Law” at the Russian Armenian University in Yerevan, Armenia, and another Santa Barbara attorney taught civil issues in Blagoevgrad, Bulgaria!
- 12 See *Brady v. Maryland* (1963) 373 U.S. 83, holding that the prosecution has an affirmative duty to disclose to the defense all material in its possession dealing with the issue of guilt, innocence, or punishment.
- 13 My wife, Esther, has accompanied me on some of my teaching trips, but she has only made a few visits to the class because she has heard me talk about my cases in my sleep and has essentially heard it all before!
- 14 It is so interesting to walk through Warsaw, which was destroyed in WWII, or Dresden, now beautifully rebuilt after the devastating firebombing by the Allies at the end of the war.
- 15 The “Chimes of Freedom” was released by Bob Dylan in 1964 followed by a Bruce Springsteen cover. There are other music examples, most notably The Scorpions singing “Wind of Change” at the Brandenburg Gate, with videos showing the Wall coming down! You can find it on YouTube.



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A Year in Review: Santa Barbara Legal Aid Secures Justice by Filling in the Gaps

BY JENNIFER SMITH

The past 18 months have been like no other for Santa Barbara's community. During this time, the team at Legal Aid Foundation of Santa Barbara County (LAFSBC) continued to provide critical civil legal services to those in need. The organization currently employs 21 people across the County, including 13 attorneys, 4 full-time support staff, 2 part-time support staff, a Finance Director and Executive Director/Attorney.

LAFSBC serves residents countywide with offices in Santa Barbara, Lompoc, and Santa Maria. Its core program areas are:

- Housing & Homelessness Prevention
- Foreclosure Prevention and Consumer Protection
- Family Violence Prevention & Immigration Remedies for Victims of Crime
 - Advocacy for survivors of intimate partner violence, elder abuse, sexual assault, stalking, trafficking, etc.
- Sargent Shriver Civil Counsel Program (Housing/ Probate)

Legal Resource Centers (courthouse self-help centers)

Other services include Project Outreach and the Consumer Debt & Bankruptcy Clinic, which rely on the generosity of volunteer attorneys and law students. The COVID-19 pandemic and resulting economic fallout has increased the need for civil legal aid in our community. These consequences from the pandemic have disproportionately impacted women, Latino/x/as, Black, Indigenous, and People of Color (BIPOC) communities.

Successes During Covid

Technology was used to maintain critical services to clients. Like most law firms, LAFSBC needed to pivot to provide remote access to services. While the team had to learn and adapt together, the transition was especially challenging for those without access to computers, tablets, or cell phones. Nevertheless, the team heroically became tech support experts and went above and beyond to facilitate access to services by visiting clients in their homes, scheduling

drop-offs, or otherwise accommodating the various needs of clients. Senior clients found the remote environment particularly challenging, as did those experiencing homelessness.

Spanish-speaking applicants were helped with early rental assistance programs. As early rental assistance programs emerged in 2020, the County of Santa Barbara reached out to LAFSBC for help. The intake team played a critical role in facilitating applications for rental assistance, particularly for Spanish-speaking residents. Although most of this work transitioned to other organizations as the months progressed, and programs grew beyond LAFSBC's capacity, the team helped on a short-term basis to get meaningful relief to the community.

Emerging connections between harassment, abuse, and housing were addressed. Almost immediately upon shelter-in-place, LAFSBC began to receive phone calls and inquiries about landlord and roommate harassment. In addition, some people were taking advantage of elderly relatives or friends to secure housing. Concerns about housing became especially critical for survivors of abuse. In some cases, LAFSBC provided representation in eviction matters and for restraining order protection to keep its clients safe. Both LAFSBC's Housing and Family Violence Prevention teams worked collaboratively to address the emerging needs of clients.

Important partnerships with other organizations were maintained to provide holistic services. LAFSBC maintained relationships with many non-profit organizations and government entities to address the holistic needs of clients. Formal partnerships included:

- working with Family Service Agency to provide civil legal services and social worker support to senior victims of crime;
- partnering with Domestic Violence Solutions to provide meaningful access to legal services for survivors of intimate partner violence in mid and north Santa Barbara County;
- providing regional Foreclosure Prevention services in partnership with San Luis Obispo Legal Assistance Foundation;



Jennifer Smith

- providing Fair Housing services for the County of Santa Barbara, and the cities of Lompoc and Santa Maria;
- ongoing work with the Santa Barbara Superior Court for the Sargent Shriver Civil Counsel program and Legal Resource Centers. LAFSBC has many other Memorandums of Understanding with local organizations and collaborations to facilitate referrals and to ensure that clients are connected to appropriate services.

Maintained financial stability. Thanks to the support and flexibility of LAFSBC funders and supporters, the organization maintained financial stability and continued services through the 2020-2021 fiscal year. It also recently completed an audit, and an annual report will be released on LAFSBC's website soon.

Opportunities ahead

Like many law firms, LAFSBC has been very focused on operations and adapting to the impacts of the COVID-19 pandemic. Events have been postponed and it has not done as much to connect with the legal community in the past year. LAFSBC hopes to stay better connected in the year ahead. Its building project for the historic Santa Barbara "tea house" was postponed and is just getting off the ground. Looking ahead, one of the most critical needs is the ongoing housing affordability crisis and the potential for increased homelessness due to eviction. There is still so much more LAFSBC wants to do as it tries to meet the civil "justice gap" that exists in our community. The support of Santa Barbara's legal community is needed more than ever.

Ways to Give the Gift of Justice

Thank you for your ongoing support of LAFSBC. It could not do its critical work without your support. If you are looking for ways to support LAFSBC:

- Talk to others about the importance of civil legal aid.
- Did you save money on commuting costs this year? Consider converting savings into a monthly donation.
- Donate to LAFSBC's year-end giving campaign by December 31. Visit www.lafsbc.org/donate or text the word: LAFSBC to 44-321 to donate by phone.
- Join LAFSBC's Board of Directors or volunteer at a future event. ■

Jennifer Smith is an attorney and the Executive Director of the LAFSBC. She is a graduate of the University of California, Santa Barbara, and Davis School of Law, with a certificate in Public Service. Prior to working for LAFSBC, she was appointed to the Goleta Planning Commission.

Martinez, continued from page 10

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- 31 *United States v. Texas, et al*, 595 U.S. ____ (2021), Opinion of Sotomayor, J, *supra* note 14.
- 32 Adam Liptak, Supreme Court Appears Open to Letting Providers Challenge Texas Abortion Law, *New York Times* (November 1, 2021), [nytimes.com/live/2021/11/01/us/texas-abortion-supreme-court](https://www.nytimes.com/live/2021/11/01/us/texas-abortion-supreme-court).
- 33 Amy Howe, *supra* note 4.
- 34 Id.
- 35 Id.
- 36 "No constitutional right is safe' if Texas law remains in effect, DOJ says" Ann Marimow, *The Washington Post*, November 1, 2021, available at <<https://www.washingtonpost.com/politics/2021/11/01/supreme-court-texas-abortion-live-updates/>>, last visited November 4, 2021.
- 37 Id.



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More Tax Savings for S Corporations: Bypassing the Personal SALT \$10,000 Deduction Limit

BY ROBERT W. OLSON, JR.

State and Local Tax (SALT) Deduction

Starting in 1954, Internal Revenue Code section 164 permitted full deduction of state and local taxes (“SALT”) on personal federal income tax returns.¹ SALT includes state income, real property, personal property, foreign taxes, and sales taxes. This deduction is extremely valuable to Californians, given our combination of higher income, high income tax rates, and increasing property values.

SALT Deduction Limited Since 2018

However, the federal Tax Cuts and Jobs Act of 2017 (“TCJA”) imposed a \$10,000 limit on SALT deductions.² This change put a significant tax burden on Californians that relied heavily on SALT deductions to lower their federal taxes. For example, a married California couple that earned \$250,000 as S corporation business owners, are making mortgage payments on a home assessed at \$1,000,000, and bought a car for \$50,000, paid an additional \$6,540 in 2018 federal income tax due to the \$10,000 SALT deduction limit.³

Failed State Attempts to Avoid SALT Deduction Limit

High-tax states were outraged by this aspect of the TCJA. In response, many high-tax states attempted to recast various personal SALT payments as deductible “charity” donations, but that approach was shut down by Internal Revenue Service (“IRS”) Notice 2018-54. A few high-tax states then sued the federal government for removal of the SALT deduction limit but were recently rebuffed by the United States Court of Appeals for the Second Circuit.⁴ Repeal of the SALT deduction limit has been forcefully pushed by many blue-state Democrats in Congress as necessary to their support of the Build Back Better Act, currently under consideration with the House of Representatives, but to date those efforts have been unsuccessful.⁵

An Entity-Specific Solution: IRS Notice 2020-75

Issued on November 9, 2020, IRS Notice 2020-75 (“Notice 2020-75”) announced proposed regulations “that State and local income taxes imposed on and paid by a partnership or an S corporation on its income are allowed as a deduction ...” This Notice extended to partnerships and S corporations the right to deduct all SALT paid by their business for federal income tax purposes. Nice, but partnerships do not pay any SALT, and the franchise tax payable by California corporations is minimal: 1.5% on corporate income with a minimum tax of \$800.

However, Notice 2020-75 goes on to approve a state-level solution: “Certain jurisdictions described in section 164(b) (2) have enacted, or are contemplating the enactment of, tax laws that impose either a mandatory or elective entity-level income tax on partnerships and S corporations ... [with a] corresponding or offsetting, owner-level tax benefit, such as a full or partial credit, deduction, or exclusion [emphasis added].”

Small Business Relief Act

Through September 1, 2021, nineteen states have taken advantage of the “owner-level tax benefit” affirmed by Notice 2020-75. Included in that number is California’s Small Business Relief Act.⁶ This article focuses on only one of those owner-level categories: California business owners that operate through “pass-through entities” like S corporations and partnerships (“PTE”). For PTE owners, the effect is to partially nullify the personal SALT deduction limit! This is how it works:

Elective Payment. The PTE must pay an additional entity-level elective tax (“ELET”), amounting to 9.3% of the PTE owner’s “distributive share” of “qualified net income” (i.e., S corporation and partnership distributions).⁷ The Franchise Tax Board has confirmed that proceeds from asset sales (but NOT of interest in the entity itself) are “qualified net income.”⁸

Timely Payment. For 2021 tax returns, the PTE must pay the entire ELET on or before the due date of its 2021 tax return (March 15, 2022, for a calendar year PTE). For 2022-2026 tax returns, the ELET must be paid in two installments:



Robert W. Olson, Jr.

the greater of \$1,000 or 50% of the PTE's prior tax year's ELET payment, on or before June 15 of the then-current tax year; and the balance on or before the due date of the then-current tax year's tax return.⁹

Timely Election. The PTE must make its election to pay the ELET on an original (not amended) and timely filed (not on extension) tax return and must be made annually. For tax years after 2021, that means the PTE must pay some of its ELET before it makes the formal election!

Tax Credit. Only if the PTE made both timely election and timely payment of its ELET, California grants a tax credit of 9.3% of the PTE owner's percentage share of the PTE's "qualified net income" (i.e., S corporation and partnership profit distributions).¹⁰ The Franchise Tax Board has confirmed that proceeds from asset sales (but NOT sales of interests in the PTE itself) count as "qualified net income."¹¹

Excess or Prepaid ELET. If the PTE does not make the annual election on its original and timely filed entity return, or overpays on ELET for the applicable tax year, the prepaid ELET is not refundable but may be carried forward on tax returns due and filed on or before April 30, 2027.¹²

Using our earlier example of a married California couple earning \$250,000 as PTE owners, let us assume that they paid themselves \$85,000 wages and \$165,000 as distributions (profit) in 2021.¹³ If this couple's PTE pays 9.3% of those distributions as an ELET (\$15,345), and complies with election and payment timing rules, that ELET becomes a 2021 tax deduction on the PTE federal S corporation tax return, reducing the couple's reported distributions (and personal federal taxable income) by the same \$15,345. At an assumed 24% marginal federal tax rate, they just saved an additional \$3,376 on their personal federal income tax while their overall personal and PTE California income tax remains the same as before.

This is not a complete solution to the \$10,000 SALT deduction limit, but for the couple in our example, it effectively increased their SALT deduction limit from \$10,000 to \$25,345. Your results may vary, so contact your CPA for details. ■

Robert W. Olson, Jr., has been a California licensed attorney since 1984. His practice includes professional practice transitions (purchases, sales, partnerships, and associations); corporate, business, and commercial real estate law; estate planning; and related tax considerations.

ENDNOTES

- 1 Internal Revenue Code of 1954, 26 USC §164(a); and Internal Revenue Code of 1986, 26 USC §164(b)(1).
- 2 26 USC §164(b)(6)(B).

- 3 Assuming a marginal federal income tax rate of 24%, California marginal income tax rate of 9.3%, no deductions other than SALT and \$30,000 of mortgage interest, property tax of 1% without bond measures, and a local 8% sales tax, the pre-TCJA SALT deduction would be \$37,250. The TCJA also cut marginal tax rates for this couple from 28% to 24%, reducing their federal tax by \$10,000 in 2018. Overall, this couple paid \$3,460 less in federal income tax despite reduction of its SALT deduction.
- 4 *New York v. Yellen*, No. 19-3962 (2d Cir. 2021).
- 5 Build Back Better Act, H.R. 5376, 117th Cong. (2021); Ferris, Sarah (March 30, 2021); "Blue-state Democrats demand SALT relief in Biden's next big bill." Retrieved from <<https://www.politico.com/news/2021/03/30/blue-state-democrats-salt-taxes-478556>>
- 6 Chapter 82, Statutes of 2021.
- 7 Cal. Rev. & Tax. Code §§ 17052.10(b)(2), 17053.71(h)(1), and 19900(a)(1).
- 8 Franchise Tax Board (October 1, 2021). "Help with pass-through entity elective tax." <<https://www.ftb.ca.gov/file/business/credits/pass-through-entity-elective-tax/help.html>>
- 9 Cal. Rev. & Tax. Code § 19904(a).
- 10 Cal. Rev. & Tax. Code §§ 17052.10(b)(2), 17053.71(h)(1), and 19900(a)(1).
- 11 Franchise Tax Board, *supra*.
- 12 Cal. Rev. & Tax. Code § 17059.2(e).
- 13 See Olson, Huge Tax Savings for S Corporations (May 2018) *Santa Barbara Lawyer*.

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Value, Price, and Cost—They Are Not The Same Thing

BY MICHAEL NEAL ARNOLD, MAI, MRICS

To a layperson, the terms value, price, and cost may seem to mean pretty much the same thing. However, to the professional appraiser, the terms each have a specific meaning. And the meanings are most certainly not the same thing.

Market Value is the focus of many appraisals. Market Value is an opinion. In simplest terms, it is the most probable sale price in an “arm’s length” transaction. However, simple terms rarely suffice. The definition is usually modified with certain assumed conditions. In a definition often used by professional appraisers in the United States (from the Comptroller of the Currency), the conditions assumed are very specific. Market Value is defined as the most probable sale price when the buyer and seller are typically motivated and reasonably well informed. Further, it is reflective of a typical marketing period and payment in terms of U.S. dollars with no influence from sales concessions or special financing.

There are many variations of the definition. The sources include the California Civil Code, the California State Board of Equalization, U.S. Treasury, Civil Jury Instructions, Internal Revenue Service, International Valuation Standards, and many more. As an example, the market value definition for reporting federal estate taxes is not exactly the same as the definition for local property tax assessment. In most cases, the definitions are intended to mean the same thing (or very nearly the same thing) as the definition referenced above. However, there are exceptions. In eminent domain actions (State of California), damage assessment in litigation, and a few other instances, the market value definition specifies “highest” price rather than “most probable” price. The intent is clear; the benefit of the doubt is intentionally extended to the property owner.

Finally, no discussion of Market Value would be complete without reference to the term “Fair Market Value.” The term

is often encountered when dealing with legal matters. The various definitions of Fair Market Value do not suggest that the meaning is any different from simply Market Value. In fact, the U.S. Supreme Court, in an eminent domain case (*United States v. Miller*), observed, “the term ‘fair’ hardly adds anything to the phrase ‘market value.’” Most appraisers do not use the term. It has been observed that the term “Fair Market Value” suggests that there could be an “Unfair Market Value.”

Sale Price is a fact. Sale price is the agreed upon consideration upon which a buyer and seller agree to a transfer of property. Sale prices can be reflective of value but are not necessarily so. In a situation where a seller is under pressure, the price accepted might be lower than market value. Similarly, a buyer under pressure or motivated by other considerations (e.g. owning adjacent property) might pay more than market value. A property that has to be sold quickly might sell at below market value. There are any number of things that could impact sale price.

When undertaking Data Comparison Approach valuation analyses, professional appraisers survey markets for evidence of sales of “comparable” properties. The sale price for each property needs to be analyzed to determine if it was impacted by any influence that could cause the price to be something other than market value. It is as a group that the analyzed sales data help point to an indication of market value for the subject property.

Construction Cost is the cost to build a structure or other improvement. If Construction Cost refers to numbers compiled prior to actual construction, it is an estimate. It is often prepared by a contractor or cost estimator. If Construction Cost refers to numbers put together reflecting actual costs of construction which has been completed, it is factual. In either case, it is a unique number to a specific project and prepared by a particular person. Anyone familiar with construction knows that costs can vary depending on



Michael Neal Arnold

Professional appraisers regularly deal with value, price, and cost. The concepts overlap and influence one-another, but the terms are not synonymous.

the project and the preparer.

Replacement Cost is most often used by appraisers when performing a Cost Approach valuation analysis. As such, it is an opinion. It is an estimate of costs to construct a structure comparable to the subject using current standards, materials, and practices. The Cost Approach valuation analysis is based on the premise that the cost to acquire a comparable site and construct similar improvements should be suggestive of value. However, an often-quoted mantra amongst appraisers is “cost does not equal value.” Generally, people expect that the value will exceed the estimated cost. If it were not so, things would rarely get built.

Reproduction Cost is the estimated cost to build an exact replica of the subject. It is used by appraisers when a structure has unique components that are not reflective of current materials or practices but are considered desirable and therefore could add value. It also might be appropriate when a cost evaluation is being prepared for insurance purposes.

Professional appraisers regularly deal with value, price, and cost. The concepts overlap and influence one-another, but the terms are not synonymous. ■

Michael Neal Arnold, MAI, MRICS, is a principal at Hammock, Arnold, Smith & Company, a general practice appraisal firm providing valuation and evaluation services to a variety of clients including corporations, government agencies, the legal community, financial institutions, and private individuals. Mr. Arnold's contact information is: (805) 966-0869 and mnarnold@hascosb.com.



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Desistance From Crime

BY ROBERT M. SANGER

“Desistance” gained currency as an area of study in criminology regarding “life course” choices over time relating to criminal behavior. The term has not been used consistently but has generally been employed to evaluate the results of longitudinal studies of persons convicted of serious crime.¹

To oversimplify, people who continued to commit crimes “persisted” and people who did not “desisted.” The term is useful, as discussed in this article, in that it accounts for more than an analysis of recidivism, and it also spans across the traditional goals of punishment referred to in the United States Code and the California Rules of Court.

Desistance from Crime

Neologisms are the secret handshakes of guilds and academia and are sometimes a key to obtaining public or private grants. That might be a good reason not to use “desistance” since it might obscure ideas that would be more accessible using ordinary language. The leading researchers in this area, themselves, said, “In fact, an editor of a leading journal once asked us to remove the term from our paper. He argued that “desistance” was not a word. There appears to be no agreed-upon spelling either.”²

Nevertheless, the term continues to be used and is the subject of a forthcoming six-chapter book to be published by the United States Department of Justice, National Institute of Justice (NIJ).³ The author of the first chapter, in a pre-publication release, claims that the term is relatively new, emerging in the 1970’s, but the subject has been the basis of research back to the 19th Century.⁴ Most famously, at least as fame is considered among criminologists, the “Glueck” studies, starting in the 1920’s and published from 1930 to 1968, established the fundamentals of longitudinal post-conviction research into what later would be characterized as persistence and desistance.⁵ Many others commented on the subject, worked it into their texts on criminology or, like John Loeb and Robert Sampson, evaluated new data and re-evaluated existing data.⁶ So, particularly in light of the new NIJ study, desistance is the term used.

There has been scholarly debate as to whether the population to be studied regarding desistance should be all persons in a community or across communities, and whether the population should include arrests or just convictions, and whether the population should include those who were involved in only serious crimes, all crimes, only non-serious crimes, or no crimes. There are subtle questions regarding whether the determination of crimes be self-reporting or criminal case records. Questions include whether the data to be analyzed should be based on the number of crime related events, the seriousness of those events and should this be affected by the opportunities to participate in such events or other biosocial factors. It is unsettled on an appropriate algorithm to quantify “anti-social” behavior.

Recent studies in desistance have attempted to avoid simply looking at recidivism. Simplistically, a lack of arrest could lead to a conclusion that there has been total desistance. A lapse in arrests could be considered termination where there are other factors contributing to a lapse that is not the end of crime related behavior. As a result, an attempt to make more “sophisticated” assessments have incorporated other measures to determine whether there is just a lapse in arrests and convictions or that there has been a change in underlying behavior. This leads to all the problems associated with relying on “risk assessment instruments” which have been criticized as invalidated and subject to cultural bias.

Thus, like all scientific endeavors, the study of desistance is a study that, at best, results in uncertainty. And, of course, the social sciences, which engage in studying human behavior, result in findings that are more uncertain. For lawyers and judges, as well as legislators and correctional officials, caution must be observed before using these social science findings to deprive a person of their liberty. Having said that, this article will look for lessons from these studies as they may pertain to actual punishment being imposed, particularly the punishment of incarceration.

Desistance and the Goals of Punishment

The concept of desistance figures heavily in the federal punishment scheme. Title 18 U.S.C.A. § 3553(a)(2) states



Robert M. Sanger

that the court shall impose a sentence sufficient, but not greater than necessary, to:

- “(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”

Desistance plays a role in all four factors. A positive change in behavior of the person being sentenced is consistent with promoting respect for the law, deterring criminal conduct, protecting the public from further crimes by the person sentenced and providing such person with effective training and correctional treatment. In other words, while just punishment (retribution) and respect for the law by others (general deterrence) are criteria, the remaining criteria (special deterrence, protection of the public and rehabilitation) are all served by a sentence that results in desistance.

California Rules of Court, Rule 4.410 (a), states that the general objectives of sentencing include:

- “(1) Protecting society;
- (2) Punishing the defendant;
- (3) Encouraging the defendant to lead a law-abiding life in the future and deterring him or her from future offenses;
- (4) Deterring others from criminal conduct by demonstrating its consequences;
- (5) Preventing the defendant from committing new crimes by isolating him or her for the period of incarceration;
- (6) Securing restitution for the victims of crime;
- (7) Achieving uniformity in sentencing; and
- (8) Increasing public safety by reducing recidivism through community-based corrections programs and evidence-based practices.”

Again, a positive change in behavior, that is desistance, is a significant factor in subsections 1 (protection of society), 3 (special deterrence), 5 (desistance – if, in fact, incarceration is effective), 6 (restitution), and 8 (reduction of recidivism). Only subsections 2 (retribution), 4 (general deterrence) and 7 (uniformity of sentence) are not directly affected by desistance.

Therefore, based on both federal and state laws and rules, desistance should be one of the major considerations in imposing a sentence. The fact is that our system, in practice, has depended on incarceration as the paradigm of criminal punishment at the expense of desistance. That is

why the State of California and the United States, in general, have the highest incarceration rate per capita of any of the advanced nations of the world. Lock them up is the uninformed response to being “tough” on crime. Of course, being “tough” on crime by locking people up does not make sense since it does not work. To be smart on crime is to go back to the roots – 18 U.S.C.A. § 3553(a)(2) and California Rules of Court, Rule 4.410 (a) – see how to achieve desistance as one of the primary goals of punishment.

How to Achieve Desistance

There is much to learn from the studies on desistance. More nuanced studies identify the biosocial aspects of behavior that result in criminal justice system intervention. The developmental process, particularly during the maturation period from youth through full frontal lobe development (through, at least, late twenties) is a factor. Absent other adverse environmental factors (including the toxic effect of imprisonment – more on this *infra*) and risky lifestyles, people tend to age out of criminal behavior. Other biological risk factors affecting desistance include neuropsychological functions and stress system response. Both clinicians and practitioners in the criminal justice system need to be aware of these factors and take them into consideration.⁷

There are several mechanisms that have been recognized to be effective in achieving desistance. Much has been written about them and many of them are implemented in criminal justice systems, including through the Santa Barbara courts, probation department, public defender, district attorney and mental health. Desistance-focused interventions include traditional approaches such as providing social alternatives to unsocial behavior (including recreation, employment, and education), problem-solving (the holistic approach of the Bronx Defender system),⁸ programming for young adults, mental health and medication-assisted treatment, contingency management, family counseling, therapeutic justice programs, restorative justice, and destigmatization.⁹

Incarceration is Counterproductive in Achieving Desistance

As recognized above, desistance is at the core of both the federal and California jurisprudential criteria on sentencing.¹⁰ Desistance is also a logical goal: if the criminal laws are rational, it is logical to encourage individuals to desist from violating them.¹¹ Incarceration can only be favored if it is somehow required for retribution or general deterrence – and there are certainly alternatives to incarceration that would satisfy those criteria in all but the most extreme

cases. Furthermore, in addition to incarceration not promoting the goals of punishment, it has an actual adverse effect on desistance. It turns out that research, not to mention common sense, demonstrates that incarceration is counter-productive in achieving desistance.

There is no question that we have created a monster in the United States which has extended internationally. The sociology of mass incarceration has affected families of people incarcerated and has affected communities.¹² “Prison gangs” – including what are called criminal street gangs, which arose in or are influenced by gangs in prisons – would not exist but for the ubiquitous nature of prison as a part of family and community life in some areas. Prison gangs have extended from the prisons to the streets and from one state to another in this country, and to other countries as well. For example, the 18th Street Crips not only had an effect of promoting criminal activity in the Los Angeles 18th Street community in the Pico-Union District, but they have expanded to Spain, Australia, Canada, England, France, Germany, Lebanon, Peru, the Philippines, Chile, and Ecuador. It is going to take a monumental international effort to turn this around, but it must start with removing prison culture as a dominant factor in family and community life.

In addition, the adverse psychological effect on individuals who are incarcerated is well documented even if it is slow to be acted upon.¹³ In one of the just released chapters of the forthcoming NIJ study on desistance, there is a discussion of the adverse effects of incarceration on desistance as well as some suggestions regarding incarceration and further research that is needed.¹⁴ The conclusion is that shorter terms of incarceration, or no incarceration at all, are most likely to have positive effects on desistance:

“The central findings indicated that any prison and jail incarceration, longer prison and jail incarceration, and prison and jail incarceration in a higher-security facility had, at best, no effect on the criminal activity of individuals who experienced those events and, at worst, a criminogenic effect. Because it also appears as though prison and jail incarceration have negative effects on other life-course outcomes, the literature suggests that it is highly likely that the fact, duration, and severity of prison and jail incarceration all impede the desistance process.”

Conclusion

Medical doctors generally acknowledge the aphorism, “Do no harm.” While it is not a part of the Hippocratic Oath,¹⁵ it is sound advice for all professionals and people in authority who affect the lives of other human beings. In the context of criminal sentencing, another way to put it is, “Do not make the world a worse place.” Desistance is

a major goal of punishment. It is hurt, rather than helped, by incarceration in most cases. The effect on individuals is exacerbated by lengthy terms of incarceration. And as is well documented, mass incarceration has adverse effects on families and society.¹⁶ The NIJ, a part of the United States Department of Justice, is in the process of publishing the forthcoming six-chapter book making the case to rethink incarceration as the paradigm of punishment. The authors of the book join in the scholarship of the last several decades in coming to that conclusion.

Santa Barbara is making efforts. However, local courts are still sending 20 to 30 people to prison every month.¹⁷ Santa Barbara’s County jail population is starting to rise with a total of approximately 145 people in jail who are serving sentences.¹⁸ The Sheriff is opening a new jail in the North County which, regrettably, will probably increase the custody bookings by North County Sheriffs, and Santa Maria and Guadalupe Police.¹⁹ The count is around 640 total people in jail presently, which will probably increase significantly because, in part, that is the trend, and also, in part, because the North County Branch Jail will open. Keeping people in jail or sending them to prison is not making the world a better place except in extreme circumstances. Santa Barbara, and all jurisdictions, must look at alternatives that have been well-researched and documented. Now is the time. ■

Robert Sanger is a Certified Criminal Law Specialist (California State Bar Board of Legal Specialization) and has been practicing as a litigation partner at Sanger Swysen & Dunkle in Santa Barbara for 48 years. Mr. Sanger is a Fellow of the American Academy of Forensic Sciences (AAFS). He is a Professor of Law and Forensic Science at the Santa Barbara College of Law. Mr. Sanger is an Associate Member of the Council of Forensic Science Educators (COFSE). He is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers’ organization.

ENDNOTES

- 1 For an overview of the literature as of twenty years ago, see, Laub, John H., and Robert J. Sampson, “Understanding desistance from crime,” 28 CRIME AND JUSTICE 1-69 (2001).
- 2 Id. at p. 8, n.4.
- 3 *Forthcoming*, NIJ, Department of Justice, Office of Justice Programs, DESISTANCE FROM CRIME: IMPLICATIONS FOR RESEARCH, POLICY, AND PRACTICE (NCJ 301497) to be fully released November 2021 (as of the date of this writing, four of the six chapters have been released).
- 4 Michael Rocque, “But What Does It Mean? Defining, Measuring, and Analyzing Desistance From Crime in Criminal Justice,” *forthcoming*, in DESISTANCE FROM CRIME: IMPLICATIONS FOR RESEARCH, POLICY, AND PRACTICE (2021), *supra*.

- 5 Glueck, S., & Glueck, E. T., 500 CRIMINAL CAREERS, New York: Alfred A. Knopf (1930); Glueck, S., & Glueck, E. T., LATER CRIMINAL CAREERS, New York: The Commonwealth Fund (1937); Glueck, S., & Glueck, E. T., JUVENILE DELINQUENTS GROWN UP, New York: The Commonwealth Fund (1940); Glueck, S., & Glueck, E. T., CRIMINAL CAREERS IN RETROSPECT, New York: The Commonwealth Fund (1943); Glueck, S., & Glueck, E. T., UNRAVELING JUVENILE DELINQUENCY, New York: The Commonwealth Fund (1950); Glueck, S., & Glueck, E. T., DELINQUENTS AND NONDELINQUENTS IN PERSPECTIVE, Cambridge, MA: Harvard University Press (1968).
- 6 See, Laub, John H., and Robert J. Sampson, "Understanding desistance from crime," 28 CRIME AND JUSTICE 1-69 (2001), *supra*.
- 7 For the latest summary, see, Danielle L. Boisvert, "Biosocial Factors and Their Influence on Desistance," *forthcoming*, in DESISTANCE FROM CRIME: IMPLICATIONS FOR RESEARCH, POLICY, AND PRACTICE (2021), *supra*.
- 8 James M. Anderson, Maya Buenaventura & Paul Heaton, "The Effects of Holistic Defense on Criminal Justice Outcomes," 132 Harv. L.R. 819 (2019).
- 9 Kristofer Bret Bucklen, "Desistance-Focused Criminal Justice Practice," *forthcoming*, in DESISTANCE FROM CRIME: IMPLICATIONS FOR RESEARCH, POLICY, AND PRACTICE (2021), *supra*.
- 10 18 U.S.C.A. § 3553(a)(2) and California Rule of Court 4.410 (a).
- 11 For instance, Fergus McNeill, "A desistance paradigm for offender management," 6 CRIMINOLOGY & CRIMINAL JUSTICE 39-62 (2006).
- 12 Lila Kazemian, Allyson Walker, "Effects of incarceration," in THE OXFORD HANDBOOK OF DEVELOPMENTAL AND LIFE-COURSE CRIMINOLOGY 576-599 (Oxford University Press 2018).
- 13 See, Craig Haney, "The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions," 22 WASH. U. J. L. & POL'Y 265 (2006); and see, Kazemian, *supra*, and sources therein.
- 14 Christopher Wildeman, "The Impact of Incarceration on the Desistance Process Among Individuals Who Chronically Engage in Criminal Activity," *forthcoming*, in DESISTANCE FROM CRIME: IMPLICATIONS FOR RESEARCH, POLICY, AND PRACTICE (2021), *supra*.
- 15 Daniel K Sokol, "First do no harm' revisited," 347 BMJ 16436 (2013). It is not part of the Hippocratic Oath and is a translation from Latin (not Hippocrates' Greek) meaning "above all, do not harm more that help."
- 16 Mass incarceration also costs a lot of money, but the position of this article is to do the right thing and not just because it will also save money.
- 17 Because of COVID restriction on transfers to CDCR, inmates being transferred to prison were delayed. It appears that the transfers are again being done within a couple weeks of sentencing and there are usually between 20 to 30 people who are awaiting transfer at any given time.
- 18 As of October 2, 2021, there were 143 people who are in the Santa Barbara County Jail as sentenced, and 507 who are awaiting trial or disposition. This number has been increasing slowly over the last year following a drop-off due to COVID.
- 19 Bookings dropped-off sharply after the Foster Road, Santa Maria, Sheriff's facility was closed, and they are expected to increase when the North Branch Jail is opened. When the North Branch Jail opens, it will house some of the jail population and the South County will close portions of the current jail. Under those circumstances, over crowding will likely reoccur.

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[ARTICLE NAME] 2.jpg	Attendees at the Legal Aid luncheon

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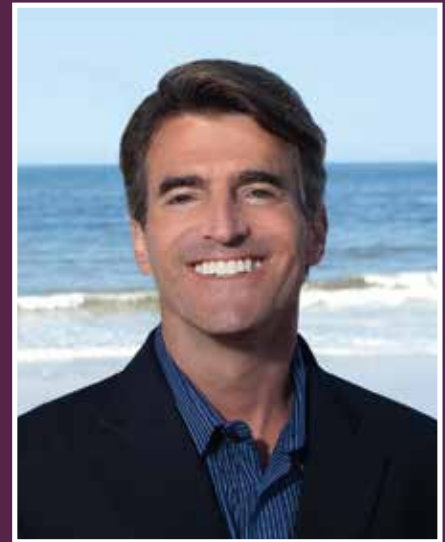
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