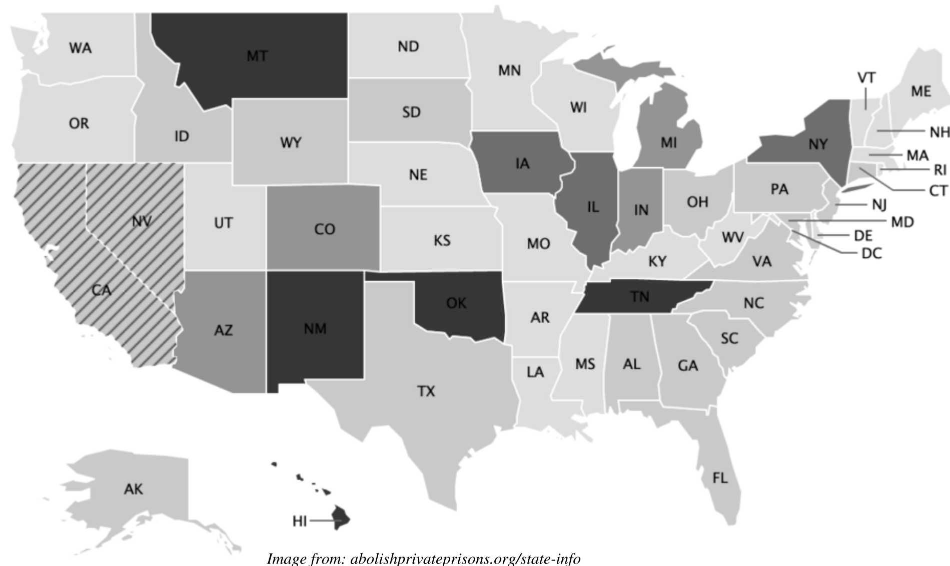
SANTA CLARA UNIVERSITY SCHOOL OF LAW // VOLUME 50 //ISSUE 3//MARCH 2020

THE ADVOCATE



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CA's Ban on Private Prisons Challenged in Court

By: Patricio Muñoz-Hernandez

On January 1, 2020, California became the fourth state to ban the use of private, for-profit detention facilities, including prisons. New York, Illinois and Nevada adopted similar bans on private prisons, and nearly half of all states have no such facilities, according to the Bureau of Justice Statistics (BJS).

Governor Gavin Newsom signed Assembly Bill 32 (AB 32) into law last October, which prohibits new private detention contracts in California and adopts changes to current contracts, including phasing out existing facilities entirely by 2028.

Roughly five percent of California's total prison population, or 7,000 inmates, were locked up as recently as 2016, according to the BJS. However, in recent years, thousands of people in private prisons have been transferred back into state-run facilities. As of June 2019, private prisons held 2,222 people, representing a roughly 68 percent decrease over three years.

AB 32 sets the stage for the three remaining private prisons in California, collectively housing about 1,400 inmates, to close four years from now, when their contracts expire with the State's Department of Corrections and Rehabilitation.

Meanwhile, the federal Immigration and Customs Enforcement (ICE) agency will lose four privately-run detention facilities in California next year that hold roughly 4,000 people, according to Reuters. ICE said in an official statement that detainees would be relocated to facilities outside California. The average daily population in those facilities accounts for under 10 percent of the 52,000 detainees ICE holds nationwide, according to the statement.

When asked about the motivation behind the bill, Rob Bonta, California Assemblymember representing the 18th District and author of AB 32, said that "[private prisons] were profiteering on the backs of Californians. People are not commodities." Bonta explained that "the message was being sent that we needed to end mass incarceration; the for-profit prison industries' values do not align with ours in California."

However, the bill contains exceptions that will allow private prison companies to continue to do business in California. Specifically, AB 32 does not apply to "any facility providing educational, vocational, medical, or other ancillary services to an inmate," or "any privately owned property or facility that is leased and operated" by a law enforcement agency or any private, for-profit prison facility "to provide housing for state prison inmates in order to comply with the requirements of any court-ordered population cap."

The exceptions are noteworthy because they could allow companies like GEO Group, a Florida-based security firm that operates dozens of private prisons and detainment centers across the U.S., to continue running prisons in the state. For example, the "housing" exception to could allow the state to use out-of-state private prisons.

Nevertheless, GEO Group sued California on December 30, 2019 over AB 32. The security firm currently manages seven of the 10 privately managed prison and immigrant detention facilities in California. GEO Group alleged in the complaint that AB 32's total prohibition on private detention facilities violates the Supremacy Clause of the U.S. Constitution, citing the federal government's inability to contract with private security companies to run such facilities inside California.

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Santa Clara County Makes Strides Toward Combatting Human Trafficking

By: Chris Vu

In the latest effort to stop sex trafficking, the Santa Clara County Law Enforcement to Investigate Human Trafficking (LEIHT) Task Force rescued five victims, arrested 16 'johns' and one exploiter for human trafficking between January 26 and February 1, 2020, during Operation Reclaim and Rebuild.

The alleged exploiter, Issac Lee, was arrested for trafficking a victim from out of state and bringing her to the Bay Area for the purpose of prostitution. The victim thought Lee was going to help her get back to her family. During the investigation, two other women with ties to Lee were identified and contacted. Investigators believe the victims were targeted based on their narcotics dependency and that it was used as a method of control, according to a Santa Clara County Sheriff's Department press release. LEIHT, with assistance from their advocate partners, Community Solutions and YWCA, was able to safely return the victim back to her family.

A total of 518 arrests were made statewide during the weeklong Operation Reclaim and Rebuild, which involved 70 other participating federal, state and local law enforcement agencies, and task forces from across California. The Operation's focus ranged from sidewalk prostitution to the cyber world of trafficking. Law enforcement authorities were able to rescue 76 adults and 11 minors, with 266 male arrests for the charge of solicitation, and 27 suspected traffickers and exploiters arrested.

The Santa Clara County LEIHT Task Force was formed in 2014 to reintegrate victims of human trafficking and prosecute suspected pimps and abusers. The task force consists of investigators from the Santa Clara County Sheriff's Office, the District Attorney's Office and a prosecuting Deputy District Attorney. Some larger cities, like San Jose and Los Angeles, have their own task forces.

The San Jose Police Department's (SJPD) Human Trafficking Task Force arrested four people in early January 2020 for alleged crimes related to human trafficking and rescued six survivors, ranging from ages 25 to 54, according to an SJPD press release.

"The only way to fight human trafficking is to collaborate with each other," said Detective Ana Perez, with the SJPD's Human Trafficking Task Force. "Human trafficking is a huge problem all over the world but it is a problem close to home. It is around us more than we would like to believe."

There's two areas of human trafficking, explained Perez — labor and sex trafficking.

"Trafficking occurs by force, fraud, or coercion. Sex trafficking specifically occurs when a person's liberty is deprived with the intent to assist, aid, or entice that person into prostitution and the trafficker is benefiting in one way or another from the earnings (in partial or in full)," said Perez.

"For labor trafficking, the person is made to perform labor or services by force, fraud, or coercion. During an investigation, the totality of the circumstances come in play to distinguish between labor exploitation and labor trafficking ...

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EVENTS CALENDAR:

The following are some of the upcoming events hosted by Santa Clara University School of Law clubs and affiliated organizations.

March 17 - President of the ACLU, Professor Susan Herman, is coming to speak about civil liberties in the Trump era. 12pm-1pm @ Charney Hall, SCU Law, Room 101. *This event is hosted by the ACLU NorCal SCU Law Club.*

March 18 - *Google v. Oracle* presentation by Professor Tyler Ochoa, Copyright law expert. 1pm-2pm @ Charney Hall SCU Law, Room 101. This event is hosted by the Internet Law Student Association.

March 20 - Santa Clara Law Review Symposium: Major Directions in Sports Law and Policy. 8am-5pm @ Charney Hall, SCU Law, Room 103. This symposium will qualify for 7.5 hours of MCLE credit.

March 26 - Father of the Internet, Vint Cerf, is coming to speak about the future of the decentralized web. Mixer to follow. 6pm-9pm @ Charney Hall, SCU Law, Room 102. This event is hosted by the Internet Law Student Association.

April 23 - Northern California Innocence Project 2020 Justice For All Awards Gala. 6pm-9pm @ Julia Morgan Ballroom, 465 CA Street, San Francisco, CA 94104.

Email us at lawadvocate@scu.edu and visit our website at thescuadvocate.com

Big Challenges Ahead as Student-Athletes Can Now be Paid

By: Casey Yang

Starting in 2023, student-athletes attending schools in California will have the legal right to be compensated for the commercial use of their name, image and likeness (NIL) under the Fair Pay to Play Act (SB 206). Since the September 2019 signing of the bill, reactions to SB 206 have been mixed. But, stakeholders say the discussions going forward will center on measuring the value of a student-athlete's NIL and protecting their interests.

Although SB 206 guarantees student-athletes a right to profit from their identities, compensation is limited. The bill does not create a right for student-athletes to be paid by their schools. Instead, it focuses on addressing payments by third-party businesses to use student-athletes' identities. A contract between a business and a student-athlete is expressly prohibited under SB 206 "if a provision of the contract is in conflict with a provision of the athlete's team contract." Subject to specific licensing requirements, student-athletes can hire agents and other representatives in negotiating and securing commercial opportunities.

"The application of SB 206 is challenging as it does not provide any limitations on or does not have what I would call guard rails or limitations on how it would apply," said Patrick Dunkley, Deputy Athletics Director at Stanford, who spoke in a personal capacity and not as a representative of the school.

Even with the current limitations, outside influences pose significant challenges that are not addressed in the bill.

"One of the challenges becomes how does one value a student-athlete's name, image and likeness?" said Dunkley. "How do you prevent a market that then overvalues the name, image and likeness as a means of recruiting or retaining student-athletes? It becomes a means of compensating student-athletes for either signing on at a school or playing for a school, as opposed to [compensating] for their name, image and likeness. That's where I think it gets very complicated."

David Rasmussen, Senior Associate Athletic Director for Compliance at San Jose State University, personally believes schools should be completely "hands-off" when it comes to third-party compensation.

"The more the institution gets involved, the more concerns you have with equity. But if you are completely hands off, the market dictates the values of a specific student-athlete," said Rasmussen. "Once schools

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California Leads the Nation in Stopping Hair Discrimination

By: Shyam Rajan

Alexandra Sepolen vividly remembers being told at work that her hair looked "extremely unprofessional" and that she needed to "keep up certain appearances." The statements were made by a member of management while she was working as a research assistant at a New York hospital in 2016.

Sepolen at the time had a "teeny weeny afro, or TWA," hairstyle, which she described as a transitional natural hairstyle worn by some black women when curly hair is cut short.

"Anyone, regardless of their race or ethnicity or aspect of their identity, would be offended if they were reduced to a certain feature," said Sepolen, a second-year student at the Santa Clara University School of Law and board member of the school's Black Law Students Association. "Being able to have hair that doesn't necessarily conform to this Western standard of beauty, but makes you unique, is something that is so special and is held dearly to a lot of women, including myself."

She filed a complaint with the human resources department on the basis of racial workplace discrimination. They responded that based on their current policies and existing state laws, they didn't believe it rose to an actionable level because it was related to her hair as opposed to her skin tone.

> **"Anyone, regardless of their race or ethnicity or aspect of their identity, would be offended if they were reduced to a certain feature.**
>
> *- Alexandra Sepolen, board member of the Santa Clara Law School Chapter of the Black Law Students Association.*

Beginning this year, the CROWN, or Creating a Respectful and Open World for Natural Hair, Act went into effect in California, making it the first state to ban discrimination based on hair texture and style. The bill prohibits discrimination under the Fair Employment and Housing Act and the state Education Code. The law has been paving the way for other states to follow, with New York and New Jersey already adopting similar laws.

The CROWN Act, which was passed unanimously by California lawmakers, reads, "despite the great strides American society and laws have made to reverse the racist ideology that Black traits are inferior, hair remains a rampant source of racial discrimination," and "physical traits [like] dark skin, kinky and curly hair [are equated with] a badge of inferiority."

Kelli Richardson Lawson, CEO of the marketing company Joy Collective, said they have been supporting CROWN Acts across the country by working with organizations including Dove and the National Urban League, Color of Change and the Western Center of Law and Poverty. These groups co-founded the CROWN Coalition, which petitioned for the passage of the CROWN Act to widen those standards of beauty whose constraints unfairly fall upon African American women.

"We know for sure that black women are 80 percent more likely to change their natural hair to meet social norms or expectations at work. Black women are 1.5 times more likely to be sent home or know of black women who were sent home because of their hair," Richardson Lawson said.

According to the CROWN Act's website, at least 20 other states are currently considering similar laws.

"Hair discrimination is a form of policing culture that is unnecessary and unkind," said Margaret Russell, University Interim Associate Provost for Diversity and Inclusion. "Discrimination against locks and dreads and braids have fallen disproportionately on people of color."

Jazzalyn Livingston, National Program Manager of the NAACP Youth and College Division, said there have been several high-profile incidents of hair discrimination that have helped bring the issue into the spotlight. For example, in 2018, a high school wrestler in New Jersey was forced by a referee to cut his dreadlocks before a match, not because of the length of his hair, but because his hair was "unnatural." Incidentally, the CROWN Act protects against discrimination based on locks, which are considered natural hair, alongside "afros, braids [and] twists."

"He had to remove his hair and if he did not, he was going to be disqualified," said Livingston. "The barrier preventing them from [participating] is based on a disagreement with the way their hair is arranged and growing out of their scalp."

U.S. Senator Cory Booker, of New Jersey, is the lead sponsor of the federal version of the Act. Richardson Lawson hopes for a vote in the House of Representatives in 2020.

"The goal is ultimately to end hair discrimination in the U.S., and that means all 50 states and also at the federal level," said Richardson Lawson.

Livingston said the CROWN Act extends beyond protecting only natural hair and wigs also may be protected. "They could be struggling with health issues, such as cancer and they have lost their natural hair, and wigs are a way for them to reclaim a sense of power," Livingston said.

However, Richardson Lawson believes otherwise.

"[The CROWN Act] does not include wigs," said Richard Lawson. "It includes protective hairstyles, including locks, braids and twists."

However, Russell said legal protections exist for people to express themselves in many different ways, even if the CROWN Act does not explicitly cover them.

"There has already been a stronger legal basis for protecting wearing a hijab or wearing anything that does not fit the mainstream culture. It could be a hijab, it could be a bindi, it could be skin markings," said Russell.

Russell said these laws are simply recognizing that society is diverse.

"There is no such thing as the typical worker, or the typical student, in terms of looks," Russell said.

Govenor Gavin Newsom signing the CROWN Act.
Photo By: Maya Darasaw

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CA Ban on Private Prisons

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...In the complaint, GEO Group said the bill is an effort to subvert the power of the federal government and "undermine the United States government in the exercise of sovereign powers undoubtedly within the supreme sphere of federal action."

The following month, the U.S. Attorney's Office sued the State of California, also citing the Supremacy Clause. The lawsuit asked the judge to ban the enforcement of the law against the federal government, stating that "California, of course, is free to decide that it will no longer use private detention facilities for its state prisoners and detainees." But, the complaint continued, "it cannot dictate that choice for the federal government, especially in a manner that discriminates against the federal government and those with whom it contracts."

AB 32 has been praised by some, including Abolish Private Prisons, a non-profit organization dedicated to ending for-profit private prisons in the United States. "The prisoners' mere presence in a cell becomes slavish to corporate profits. In our view, this violates the United States Constitution," said John Dacey, the Executive Director of Abolish Private Prisons. Dacey continued, "I think you have to start the conversation by asking — why does anyone think that incarcerating people for-profit is constitutional in the first instance? If private prisons are not constitutional, you don't then get to the other conversations about [whether] they save the taxpayers money."

About 3,200 federal inmates in California are currently housed in private detention facilities, according to the U.S. Attorney's Office complaint, which said that ICE has contracted with private companies to house about 5,000 detainees in California, accounting for 96 percent of the agency's total detention space in the state.

The Immigrant Defense Project and Immigrant Legal Resource Center joined with other immigration advocacy groups to denounce the federal government's lawsuit in a statement that argues the state has the right to keep inmates and detained immigrants out of private prisons.

"It is outrageous, though not surprising, that the Trump Administration is colluding with the for-profit prison industry to guard the immoral profits reaped from mass incarceration," said the immigration advocacy coalition's statement.

The United States District Court for the Southern District of California is hearing both lawsuits against the State of California. In the case involving GEO Group, Judge Sammartino has scheduled a hearing for joint motions to dismiss and for preliminary injunctions. In the case involving the federal government, the docket has not developed beyond the original filings at this time.

> **"The message was being sent that we needed to end mass incarceration; the for-profit prison industries' values do not align with ours in California.**
>
> *- Rob Bonta, CA Assemblymember*

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New CA "Gig-Work" Law Experiences Speed Bumps

By: Hassan Said

California's Assembly Bill 5 (AB 5), a codification of the California Supreme Court's decision in *Dynamex Operations West, Inc. v. The Superior Court*, went into effect on January 1, 2020. It was drafted with the intent to protect worker's rights by forcing companies to recognize their independent contractors as full-fledged employees. In its ideal form, AB 5 means that those contractors are guaranteed health benefits, proper working hours, and minimum wage and unemployment protections.

But, it seems that the wheels of AB 5 are threatening to come off as many of the bill's opponents fight back, demanding a halt to AB 5's enforcement amid the hundreds of lawsuits accusing the new "gig-workers' bill" of violating the California Constitution and harming the flexibility of the workers the bill was intended to protect.

The judicial response to these cases seems equally varied. On New Year's Eve, a judge in the Southern District of California granted the California Truckers' Association's request for a temporary stay of AB 5 for motor carrier services. But, Uber and Postmates did not fare as well in February when a Los Angeles federal judge denied their request that the law be enjoined.

"We are working to defend independent contractors' right to earn a living," said Caleb Trotter, a Pacific Legal Foundation (PLF) attorney suing the California Attorney General on behalf of the American Society of Journalists and Authors, as well as the National Press Photographers Association.

For Trotter, the concern is that AB 5 imposes "selective and unequal treatment" for members of "speaking professions" in violation of one's right to earn an honest living free from irrational government interference and regulation based solely on the type of speech those jobs require.

"You get a limited exemption if you're a freelance writer or journalist, unlike the graphic designers and grant writers who get a full exemption," Trotter said. "But if you're doing video, then you get no exception at all."

The Rideshare Drivers United (RDU), an independent association of Uber and Lyft drivers based in Los Angeles, on its website, insists that "[AB 5] opens up real possibilities for drivers to achieve our aims in the Driver's Bill of Rights: fair pay, transparency, a voice on the job and community standards."

The RDU urges its constituents to continue supporting AB 5 in an effort to curb alleged attempts by Uber and Lyft to create exemptions to the law that would allow the rideshare

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Questions Linger Over Enforcement of the California Consumer Privacy Act

By: William Kingwell Bliss

Businesses are beginning to comply with the California Consumer Privacy Act (CCPA), even though it won't be fully enforced until July 2020. The CCPA is intended to provide California consumers more protection and control over their data, but some professors and advocacy groups are concerned it may not be as strong as it seems.

Under the CCPA, Californians have the right to know what data is collected from them, to have their data deleted upon request and to opt-out of the sale of their data to third parties. However, not every business needs to comply with the law. Companies are subject to the requirements of the law only if they operate in California and have either $25 million in revenue, collect data from at least 50,000 California residents or devices owned by residents, or make 50 percent of their income from the collection of data.

"We are not a small state. It's a pretty big market to lose access to if you don't want to comply, or the liability is quite significant if you do business and don't comply," said Mike Shapiro, Chief Privacy Officer of the Santa Clara County Privacy Office.

While the law gives consumers the right to bring class action lawsuits in the event of a breach, violations of the CCPA will be enforced by the state's Attorney General. If found in breach, businesses will have 30 days to bring themselves back into compliance. Otherwise, they may be on the hook for fines of $2,500 per violation or $7,500 per intentional violation.

"The problem, from the business perspective, is that they might have 50 different privacy regimes to comply with," said Shapiro.

Shapiro said the United States privacy regulation can best be described as a "patchwork" since there is no federal privacy law and every state has its own laws.

"From the advocate's perspective, you would want your consumers or constituents to be treated fairly in Arkansas, Massachusetts, or Texas, and not have to figure out a different approach for each state," said Shapiro.

Shapiro pointed out that other states are passing laws similar to the CCPA.

"What happens in California suggests what will happen in the future, and we've seen that in other state legislatures which have passed bills since the CCPA has passed," said Shapiro.

However, Lydia de la Torre, privacy law fellow and co-Director of the Data Privacy Certificate program at Santa Clara University School of Law, said she sees the CCPA as the first step toward a national privacy framework.

"The more states act, the more pressure [Washington] D.C. will feel in terms of harmonizing those regulations because that is what happened in Europe," said de la Torre.

In May 2018, the European Union passed the General Data Protection Regulation (GDPR), a sweeping privacy law which, among other things, required websites to disclose that they use cookies and collect data.

Comparing the CCPA to the GDPR, de la Torre said, "What we've seen so far is a little bit of a copy-paste from Europe, but it's not an easy transplant into the U.S. because our constitutional values are set differently. We treat speech differently because of the First Amendment. The U.S. should look to Europe, learn, but ultimately enact something that fits within the U.S. framework and address the concerns for the U.S."

Enforcement is being delayed until July 2020 because the Attorney General's office is currently working to finalize the regulations. The second round of draft regulations was released on February 10 and the comment period just closed on February 25. Nobody is quite certain when the final regulations will be complete, nor what enforcement will look like come July, but California Attorney General Xavier Becerra has said that the effort companies take to comply would factor in to how his office would handle possible infringements.

Becerra told Reuters in December, "Given that we are an agency with limited resources, we will look kindly on those [companies] that demonstrate an effort to comply." But if they do not, he will "descend upon them and make an example of them."

Equal Rights Amendment Moves to Courts After Virginia's Passage

By: Sami Elamad

Critics of the Equal Rights Amendment (ERA) acquired an unlikely ally last month in Supreme Court Justice Ruth Bader Ginsburg, albeit for unexpected reasons. Ginsburg opined last month that she would prefer the ERA "see a new beginning" and for "it to start over" given the controversy surrounding its adoption.

Last month, Virginia became the 38th state to approve the ERA. While the U.S. Constitution provides for an amendment's adoption after three-fourths, or 38, state legislatures approve it, the ERA's adoption is far from certain. First introduced in 1923, the ERA would guarantee a legal right of equality on the basis of sex. "Equality of rights under the law," one of its operative clauses reads, "shall not be denied or abridged ... on account of sex."

By 1972, both chambers of Congress adopted the resolution to propose the ERA to the states. That resolution included, in its preamble, a seven-year deadline for ratification. In 1977, Indiana became the 35th state to ratify the ERA. Afterward, however, the ratification process stalled. Recently, however, Nevada passed the ERA in 2017 and Illinois followed suit in 2018. Thereafter, the discourse raged anew.

The ERA's ultimate adoption is beset by many obstacles, both legally and politically, which could hinder the process for years. Among other things, ERA supporters need to overcome a legal battle about the propriety of its adoption and several states, including Alabama, Louisiana and South Dakota, are attempting to rescind their initial approval. If these three states are successful, the ERA's fate could be doomed.

Virginia, Nevada and Illinois are looking to the courts for help concerning the ERA's enactment. The states filed a legal challenge against the Archivist of the United States, David Ferriero, who oversees the operation of the National Archives and Records Administration, in a D.C. federal district court last month. Ferriero is responsible for publishing and certifying constitutional amendments upon their proper adoption. Ferriero declined to comment to The Advocate, citing pending litigation.

Virginia and its sister plaintiffs make two key arguments in support of their position.

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Human Trafficking

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... Some key factors to pay attention to in a labor trafficking case include deprivation of liberty, threats or use of violence, intimidation and control, deception of consequences, use or threats to use law," she said.

The Santa Clara County Board of Supervisors voted on January 31 to create a Human Trafficking Commission, which will coordinate government and community efforts to eliminate human trafficking.

Commenting on the action, Supervisor Cindy Chavez said in a press release, "Human trafficking denies many County residents basic human dignities and strains the County's safety net by increasing the need for law enforcement to combat the issue." Chavez further noted, "Innovative solutions and improved collaboration between governmental entities and the community are sorely needed."

Lynette Parker, an associate clinical professor at Santa Clara University School of Law, who is on the Executive Committee of the South Bay Coaltion to End Human Trafficking, wants people to understand that human trafficking spans many industries.

Many times, traffickers trick victims with false promises of stable employment and good pay, when in reality they are coerced to provide commercial sex or exploitative labor, she explained. Traffickers often take most, if not all, of their wages.

"No one industry should be thought of as 'this is where labor trafficking is.' If there is an employer or someone in one of the industries who is willing to exploit people, to use them and their services to make money off of them, it will happen," said Parker.

The South Bay Coalition to End Human Trafficking (SBCEHT), which is comprised of service providers, law enforcement, and government agencies, uses a victim-centered approach to tackle trafficking in the county. In 2018, alone, the Coalition's victim service providers, such as Asian Americans for Community Involvement, Community Solutions and YWCA Silicon Valley provided 219 human trafficking survivors with crisis intervention services and comprehensive services. At least 76 survivors were foreign-born and 155 were born in the U.S, including commercial sex exploited children (CSEC) and at-risk CSEC.

In the same, year, county legal service agencies, such as Asian Law Alliance, Bay Area Legal Aid, Katharine & George Alexander Community Law Center, Legal Advocates for Children and Youth (LACY), Step Foward Foundation and Justice at Last reported working on 203 human trafficking cases. This data may include a small number of duplicated clients who received legal services from multiple agencies in 2018.

Since 2015, there have been 47 arrests related to human trafficking in Santa Clara County, according to data compiled from Santa Clara County police departments, excluding Gilroy, which did not provide data to The Advocate. All of the reported victims were female. Statewide, 1,656 trafficking cases were reported through the National Hotline in the latest report from 2018, up from 1,336 in 2017, according to a 2019 report by SBCEHT. Of these, 1,226 related to sex trafficking, and an additional 110 related to sex and labor trafficking, representing over 80 percent of trafficking reports in the state. There were 1,315 calls from survivors or victims to the National Hotline in 2018, up from 1,057 calls in 2017.

Human traffickers are "often times people that you would think can be trustworthy and they turn out not to be at all," said Parker.

For example, in labor trafficking, it could be someone seen as a benefactor in the community who donates a lot of money to local schools and hospitals, she explained. "To the public, they are wonderful, generous people who give opportunities, but often times are exploiting the people that they are supposedly helping," said Parker.

As local and county officials seek to address the seemingly growing problem of human trafficking, Parker said it is important for people to report what they see if a situation does not seem right.

"We need to say something and not be quiet about it. If we don't, then many times people who are stuck in situations don't know how to get out of it," Parker said.

(If you or someone you suspect is a victim of human trafficking, contact the National Hotline at 1-888-373-7888. For your safety, never do independent investigations.)

CA Leads the Way in Regulating Amateur use of Gene-Editing Therapy

By: Emily Chen

While the scientific world buzzed about the December conviction of Chinese scientist He Jiankui for gene-editing human embryos, California quietly and unanimously passed Senate Bill 180 (SB 180) on July 30, 2019 — the first U.S. bill to expressly regulate the amateur use of gene-editing therapy.

SB 180, authored by Senator Ling Ling Chang, seeks to protect consumers by requiring companies that sell gene-therapy kits, known as "Do-It-Yourself (DIY) CRISPR Kits," to include a conspicuous notice stating that these kits are not to be used for self-administration. Sellers must display such notices on their websites where consumers can see them prior to the point of sale as well as on a label on the kits' packaging.

CRISPR, formally known as "Clustered Regularly Interspaced Short Palindromic Repeats," are specialized sequences of DNA that enable microorganisms, like bacteria, to "remember" prior viruses and fight off future attacks. Since its discovery in 1987, CRISPR has been harnessed for many other uses — most commonly, to research treatment for diseases.

However, a recent uptick in the amateur use of CRISPR techniques has caused concern for the state legislature. In May 2018, the New York Times published an article chronicling the rise in genetic coding across the country, including Josiah Zayner, founder and CEO of The Odin, a biohacking startup in Oakland. In 2017, Zayner famously injected himself with DNA encoding CRISPR in his garage and livestreamed the event.

"The technology is moving faster than regulations," Senator Chang said in a July 2019 press release for SB 180. "So, it's important to be proactive about preventing safety mishaps by amateur users of CRISPR kits."

SB 180 comes on the heels of an investigation by California's Department of Consumer Affairs (DCA) into DIY CRISPR kits sold by The Odin, whose company tagline reads: "Making Science and Genetic Engineering Accessible and Affordable." In a May 8, 2019 letter, the DCA accused Zayner of practicing medicine without a license. The DCA declined to comment for this story.

Zayner, who posted the letter on his Instagram page, maintained that he had "never given anyone anything to inject or use, never sold any material meant to treat a disease and never claimed to provide treatments or cures."

Indeed, the product description for The Odin's DIY CRISPR Kits, sold directly on its website, only claims to include "everything you need to make precision genome edits in bacteria at home, including Cas9, gRNA and Template DNA template for an example experiment."

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"The law is pretty nonsensical," Zayner said of SB 180. "Human gene therapy products are already regulated by the [Food and Drug Administration] and can't be sold for human use without FDA approval. I don't see how this bill does anything other than making something illegal, more illegal."

Hank T. Greely, a Stanford University law professor and bioethicist, agrees that the statutory framework provided by the FDA is sufficient for ensuring that gene-editing research remains within necessary legal and moral boundaries. Under federal law, experiments using gene-editing on non-reproductive cells are generally allowed with prior FDA approval. But not on germline ones, like egg cells, sperm cells, embryos and mitochondria.

"What people mainly worry about is when [gene-editing] is used as an enhancement to make X-Men and so on," Greely said.

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Paying College Athletes

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... insert themselves in that process they have to make sure it is equitable and make sure that opportunity is available to everybody equally."

Kimberlee Giggey, a member of SJSU's women's swim team and President of the Student-Athlete Advisory Committee (SAAC) for both SJSU and the Mountain West Conference, agrees, but forecasted some gender inequality issues arising from the "hands-off" approach.

"There is not much you can do about it if you're not approached [about compensation to use your NIL]," said Giggey.

Even though student-athletes will have the right to profit from their personal value, there is no guarantee all student-athletes of varying sports will receive any benefits.

"It's like a job opportunity, so if you put it in that same way, not everybody is going to get that job opportunity," she explained. Giggey believes "women are just as qualified as men to be earning the same pay," but "having been given this opportunity is one step in the right direction."

Overall, Giggey and other student-athletes are excited about the opportunity, but in terms of understanding SB 206 and the developments at the NCAA level, like most student-athletes she only knows the bare minimum.

The National Collegiate Athletic Association (NCAA) is a nonprofit organization that regulates student-athletes from affiliated institutions and conferences. Before the passage of SB 206, the NCAA did not allow student-athletes to benefit from their NIL, but it intends to modify its rules soon.

"We must embrace change to provide the best possible experience for college athletes. Additional flexibility in this area can and must continue to support college sports as a part of higher education," said Michael Drake, Chair of the NCAA Board of Governors and President of The Ohio State University, in a press release on the NCAA's website. The NCAA declined to comment when contacted by The Advocate.

At SJSU, Rasmussen said he tries to "make sure [coaches] are well informed as to what [SB 206] actually means. It's just a lot of guessing at this point and so we are all in a holding pattern to wait and see how it turns out."

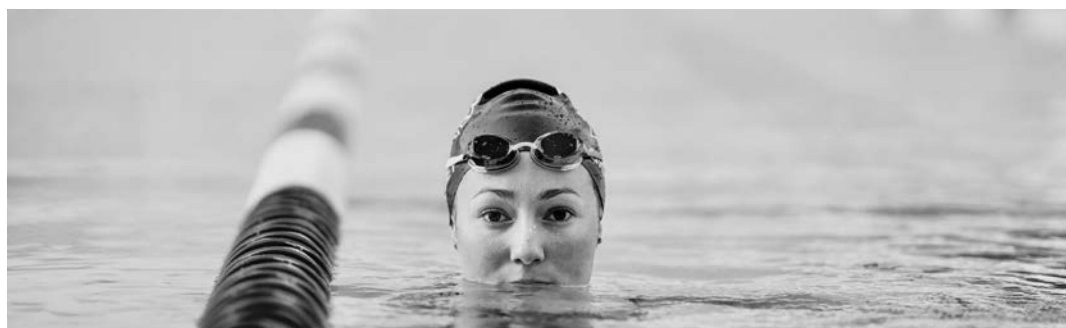
Similarly, Dunkley said he is communicating with his staff as developments arise at the NCAA level.

"We've had conversations with student-athletes about the issue in general, but I wouldn't say anywhere as detailed as the internal discussions among staff," Dunkley said. "I think right now, unfortunately, there is not a lot to report."

Both agree that once the rules become more concrete either at the NCAA or federal level, universities should provide student-athletes with sufficient education to make informed decisions when it comes to agents, finances and negotiations.

"Having representation to help make an informed decision is positive," Rasmussen said. However, Rasmussen expressed concern about agents or runners who are less concerned with the best interests of the student-athlete, but are instead focused on making money.

"We would try to do as much education as possible to ensure [student-athletes] have people in their corner who have their best interests at mind," Rasmussen said. "This calendar year is going to be crucial because [the NCAA working group] is discussing some concepts and there will be new rules proposed this year and voted on next January."



Kimberlee Giggey, a member of SJSU's women's swim team and President of the Student-Athlete Advisory Committee (SAAC) for both SJSU and the Mountain West Conference.

Photo By: San Jose State Athletics

Q&A: Trump's Middle East Peace Plan Explained by International Law Expert

Professor David Sloss teaches Constitutional and International Law at the SCU School of Law. He is an internationally renowned scholar who focuses on the relationship between domestic law and international affairs.

By: Pedro Naveiras

In January, President Trump formally unveiled his Middle East Peace Plan during a press conference alongside Israeli Prime Minister Benjamin Netanyahu. Palestinian representatives were not invited, having pre-emptively rejected the proposal, citing flagrant bias in the drafting of the peace agreement. In short, the plan calls for a Palestinian state in the West Bank and Gaza, a four year moratorium on the construction of Israeli settlements, for Jerusalem to be the undivided capital of Israel, and for Israel to annex all settlements as well as the Jordan Valley. Opponents of a two-state solution celebrated the deal as the definitive end of the possibility for an independent Palestinian state, while supporters condemned the plan, calling it the final nail in the coffin of the two-state solution.

Q: What are the most important things to know about the plan?

Sloss: My impression is that the plan is designed primarily to boost reelection chances for both Trump and Netanyahu. This is not a serious proposal to solve problems in the Middle East. It is essentially asking the Palestinians to give up everything that is important to them and giving Israelis everything they want. That's not a good formula for solving a problem; basically saying one side capitulates, and the other side gets what it wants.

Q: Are there any aspects of the plan you see as positive?

Sloss: In defense of the U.S. government, all they are doing is putting a proposal on the table. The U.S. government is not going to the Palestinians and saying you must accept this. They are saying here's a proposal, use this as a basis for discussion.

Q: Have you seen any repercussions since the announcement of the plan, either in the U.S. or abroad?

Sloss: The Gulf States have been pretty muted in their criticisms and in fact have made some noises that they are willing to go along with this. And part of that is for exactly what you say. There is a common enemy of Iran, they see that their interests align with Israel and the United States fighting against Iran, so that makes them more willing to go along. But officially, the Arab League and the Organisation of Islamic Cooperation have denounced it. The Palestinians have basically said this is dead on arrival.

One thing I thought you might have been asking about, I don't think, at least so far, that there's been any violent protests in response to this. So, you might have anticipated that, but we haven't seen that, at least so far.

But, the broader implication is that this is killing the two-state solution. For the last 70 years or so, the governing assumption has been the ultimate solution to this problem is there has to be a two-state solution — a viable Palestinian state and a viable Israeli state. And this agreement makes a Palestinian state almost impossible.

Q: Do you see any issues with the fact that the Palestinians were not part of the negotiations?

Sloss: Yes, that's a huge issue. If you want to really solve the problem you have to bring the Israelis and the Palestinians together. Get them talking to each other and get them trying to come up with a solution. For an outside party to basically say here's the solution and we're laying it down and essentially consulting with only one side, but not the other side, it's not a serious effort. Anyone who has ever done any international negotiation will tell you that is a recipe for failure.

Q: How do you think this plan compares with previous administrations' attempts at making a peace deal?

Sloss: This goes back to Kissinger, at least. The assumption of every administration, since Nixon or Ford, has been the U.S. role is to be a neutral mediator in which we help the Israelis and the Palestinians to work out an agreement between themselves. Every [prior] administration has stuck with the idea that the way we can be most helpful is if we are a neutral mediator who has the trust of both sides. Trump has basically ditched that idea. He has not and does not pretend to be a neutral mediator and neither does the administration.

Clearly, the U.S has come down on the side of the Israelis, specifically the hardline faction within the Israeli government, which has been the governing group in Israel for years.

One other thing, I think the likely consequence, in the short term, is we're going to see some escalation of violence in Gaza, in the West Bank. And we're going to see Israelis getting killed as a result of that because you make the Palestinians sufficiently desperate and they have no choice but to resort to violence. And I think that's where this is headed.

Q: What do you think is going to happen next?

Sloss: I think that if a Democratic president is elected in November they are going to scrap this deal. If Trump is reelected, that puts more pressure on the Palestinians to at least think about coming to the table and trying to negotiate off of this. Use this as a jumping off point for negotiations. I don't think the Palestinians at this point have any incentive to deal with this proposal from the Trump administration as a serious proposal. But at this point, the Palestinians don't seem to want to negotiate and that's probably fine at least until we get to the next election and see what happens.

Q&A: Voting Law Expert Promotes Ranked Choice Voting

Pedro Hernandez is the Senior Policy Coordinator for FairVote, where he protects voting rights and promotes ranked choice voting. He helped implement the first use of Proportional Representation as a remedy under the Federal Voting Rights Act.

By: Robert Sisco

Q: In basic terms for the general population, what is single-seat Ranked Choice Voting (RCV) and what would it look like if implemented in the Democratic Primary Process?

Hernandez: Ranked choice voting (RCV) makes it easier for voters to express a preference not only for one candidate but also other candidates they might support. Under RCV, if no candidate receives a majority (50%+1) of first choice votes, the candidate with the fewest votes is defeated, and votes for that candidate are counted for those voter's next choices until someone receives a majority of votes. It's a proven approach -- it's been used in Australia and Ireland for nearly a century, and has been adopted by over 20 jurisdictions in the U.S. including San Francisco, Oakland, Minneapolis, and just recently New York. Ranked choice voting is advancing to other cities and states, too. Maine now holds RCV elections for federal elections, and five states are using ranked ballots as part of the democratic primary process.

In the states using RCV for the democratic primary, the rules look a little different. The Democratic National Committee has a 15% threshold for delegate allocation. Under RCV, candidates below that threshold are eliminated, and votes for those eliminated candidates are counted for the next viable choice. This realignment of votes is familiar to state voters who participate in caucuses. In Nevada, voters were allowed to participate in the caucus by casting an early vote with a ranked ballot. This makes it possible for more voters to participate without having to attend an all day Saturday caucus.

Q: The Democratic Primary Process in the 72 hours before Super Tuesday was quite the roller coaster. Joe Biden propelled into the frontrunner position as Buttigieg and Klobuchar dropping out and endorsed him. How does that compare with RCV?

Hernandez: If we had RCV in all state primaries, campaigns would campaign differently. Under RCV, candidates would be striving to court the second choice votes of other candidates. Thus, less negative attacks. Voters don't like negative campaigns. Interestingly, we saw a lot of campaigns engage with supporters of other campaigns in Nevada, which made the discourse much more civil.RCV also accommodates more candidates in the race because it mitigates the possibility of vote splits. Under RCV, it's possible that voters would have been able to continue to learn about these candidates' ideas and values.

Q: Several, if not most people now mail in their ballot days before election day. With Buttigieg and Klobuchar dropping out only days before Super Tuesday, anyone who voted for them by mail has essentially become a wasted vote. If RCV was on the ballot, what would've happened to their votes?

Hernandez: The impact of candidates suspending their campaigns before Super Tuesday is that many voters had already voted and were not afforded an opportunity to cast a ballot for a different viable candidate. If an early voter supported Buttigieg, their vote stopped being relevant as soon as Buttigieg dropped out of the race. In fact, over a million votes on Super Tuesday will be effectively wasted. If that Buttigieg supporter had been able to use RCV, then their vote could have counted for their next viable choice and still have a voice in the election.

Q: Delegates are currently split among top candidates that get over 15% of the votes. Would RCV in this process maintain the delegate system or replace it?

Hernandez: The Democratic Party has used ranked ballots to continue to allocate delegates. It's not much different in how the caucuses function -- except votes could participate without having to attend an all day event. Making democracy more accessible for all, is something that improves the system generally.

Q: Buttigieg previously won Iowa. What happens to his delegates now? What would happen under RCV?

Hernandez: The Democratic Party has its own rules for handling delegates of suspended campaigns. Ranked Choice Voting is only one aspect of that process, where we're able to get more information on what voters would prefer as their next choice.

Q: There was a form of RCV used in Nevada's primary. What can we learn from that?

Hernandez: Ranked ballots and early voting allowed more people to participate in the state caucus. It encouraged voters to support the candidates they support, since many voters felt divided about who to support. It was the first time Nevada used ranked ballots statewide, and while there were some issues around what voters could and could not do on their ballots, we saw very few voter errors and votes being thrown out. More people being able to participate in outcomes is a good thing for democracy, and I think people are looking at the experience in a positive light.

Q: In Oct. 2019, CA Senate and Assembly overwhelmingly passed a bill that would've allowed RCV through the state. Gov. Gavin Newsom vetoed saying, "Ranked choice is an experiment that has been tried in several charter cities in California. Where it has been implemented, I am concerned that it has often led to voter confusion and that the promise that ranked-choice voting leads to greater democracy is not necessarily fulfilled." What is your response to that?

Hernandez: While we were disappointed by the Governor Newsom's veto, we are confident that the reform will continue to pick up momentum. As more jurisdictions adopt RCV, both locally and statewide, we hope Governor Newsom gives RCV a second look. Studies and election results show that voters understand how to rank a ballot. There were six times as many ballot errors in the top-two race for Governor than in the RCV election for Mayor in San Francisco, and we continue to see that voters like ranking their ballots. In that mayoral election 86.8% of voters indicated at least two different candidates, and 70% of voters indicated three.

San Francisco also used to hold runoff elections where only three in five voters would return to the December runoff. With RCV, we see many more voters count in a decisive high-turnout election. I believe that deciding elections when turnout is highest is a much more democratic way of holding elections.

OPINION: Section 412 of the Patriot Act & Indefinite Detention: An Ongoing Moral & Constitutional Failure

By: Dustin Weber

Any presidential declaration of authority to indefinitely detain an individual should be treated as a manifest violation of our founding principles and self-evident right to liberty. President Trump's historic assertions of executive power continue to stretch the bounds of constitutionality and reason. Despite his barely cogent statements to the contrary, people do talk about Article II and every law professor will support the claim that Article II of the U.S. Constitution does not confer unlimited power upon the President.

Since the terrorist attacks on September 11, 2001 (9/11), a number of laws and regulations have been enacted that expanded the already long reach of the Executive. One of those laws was the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT Act). While it was understandable to many people that Congress granted broad powers to the war-waging branch of government following the 9/11 attacks, for nearly two decades the Executive Branch has consistently abused the authority it was granted.

In late November 2019, the Trump administration claimed authority under Section 412 of the PATRIOT Act to indefinitely detain a stateless man, Adham Amin Hassoun, after he finished serving a fifteen-year prison sentence. While Hassoun should have been released in 2017, he remains in custody in Buffalo, New York. The administration's rationale supporting Hassoun's continued detention amounts to little more than logically deficient goalpost-shifting.

Months after the 9/11 attacks, Hassoun was convicted for writing checks to Muslim charities the U.S. government declared arms of extremist groups. All of the checks written by Hassoun, except one, predated 9/11. Additionally, the government alleged that Hassoun established an office of a charitable organization, Benevolence International, that operated as a front for al-Qaeda. In 2002, Hassoun was sentenced to 15 years in prison for conspiracy and material support of overseas terrorist groups.

Following the completion of Hassoun's sentence, the government tried to deport him. However, his status as a stateless individual made deportation difficult. Hassoun remained in immigration detention for an additional 18 months. Like many laws enacted in the aftermath of 9/11, Section 412 is being used to mount a frontal assault on the right to due process.

Section 412 is one of the many odious parts of the PATRIOT Act. In subsections (1)-(6), the law states that "[t]he Attorney General shall take into custody any alien who . . . the Attorney General has reasonable grounds to believe . . . endangers the national security of the United States."

This staggeringly broad language is supplemented by subsection (6), which reads, "[a]n alien . . . whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person."

It is questionable whether the use of the plural, "periods," grants the government the right to indefinitely renew Hassoun's detention in six-month increments. Moreover, after 18 years in detention, it is difficult to imagine how the administration retains sufficiently "reasonable grounds" to argue Hassoun is a national security threat.

Section 412's very language made governmental abuse inevitable. Its abuse demands the conclusion that Section 412 must be eradicated from the law.

Due process is a vital and foundational right upon which the legitimacy of our democracy rests. Due process, *inter alia*, is implicated, when the government exercises the authority to indefinitely detain an individual who should be, and has been adjudicated as, free from state confinement.

Guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, the right to due process was defined by Justice Story as the "law in its regular course of administration through courts of justice." Thus, the right to due process allows the government to deprive individuals of liberty assuming the government has satisfactorily followed the law through its regular course of administration. Unsurprisingly, there has been nothing regular about the administration of Hassoun's deprivation of freedom.

A claim by the government to indefinitely detain an individual should shock the American conscience. It is untenable to argue that a government, which derives its power from the consent of the governed, possesses the power to summarily erase those rights explicitly retained by the very people providing the consent. If we endeavor to reclaim our identity as the world's moral authority and realize our constitution's most precious ideals, we cannot condone this exercise of authority.

> **A claim by the government to indefinitely detain an individual should shock the American conscience.**
>
> \- Dustin Weber

Mr. Hassoun, regardless of his crimes, is entitled to the guarantee of due process. It is imperative for us to determine why the erosion of such vital rights produces little more than furrowed brows and Twitter posts indicating we are "deeply troubled" by profoundly unjust government action. We must perform this evaluation because inevitably, stateless Arab men will not be the only ones upon which the government attempts to exercise egregious and unconstitutional claims of authority.

Mercifully, in December 2019, the United States District Court for the Western District of New York scheduled an evidentiary hearing for April 28, 2020 to determine whether it is lawful to continually detain Hassoun under Section 412. If the government is granted the power to indefinitely detain an individual, the promise of freedom this country so liberally evokes, both inside and outside its borders, will prove hollow.

In the U.S., freedom is our default setting. Freedom means many things, but any definition unquestionably includes the freedom from government intrusion into our lives. It is entirely irreconcilable for a country to claim authority to indefinitely incarcerate individuals without due process, while also professing to be the world's beacon of rectitude and freedom.

Equal Rights Amendment

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First, they argue that, as a textual matter, the seven-year deadline is not part of the proposed amendment. When Congress passed the resolution in 1972, its preamble provided that the ERA "shall be valid ... when ratified ... within seven years." Thus, since the deadline is only in the resolution's preamble, it has no legal effect.

Second, the states argue that Article V of the U.S. Constitution does not contemplate any constraints on a "state's decision about whether or when to ratify a proposed amendment." Given the absence of any explicit requirement in Article V, the plaintiffs suggest that "reading additional requirements … would upset the important balance the Framers struck." Therefore, the states have broad discretion to determine whether, and when, to consider or ratify a proposed amendment. More precisely, in the absence of any outright prerogative to articulate deadlines for ratification, Congress cannot impose deadlines on the states.

In December 2018, in the wake of mounting pressure from the ERA's impending ratification, the Archivist solicited guidance from the Justice Department's Office of Legal Counsel (OLC). In response, the OLC authored an opinion, concluding that the ERA deadline "came and went," saying, "Congress may not revive a proposed amendment after the deadline has expired."

Garrett Epps, a University of Baltimore Constitutional Law professor and The Atlantic Online's Supreme Court correspondent, said the OLC opinion certainly possesses merit. Epps said the OLC opinion is "trying to convince us that this is not because of a change in leadership."

Epps further noted the opinion's conclusion was insupportable, insofar as it asserts that any power to determine the validity of a constitutional amendment, after ratification, is wholly vested with the United States Archivist.

"There is some chance that if things happen a certain way, the ERA will enter the Constitution," said Epps.

Epps indicated the enactment of the ERA, and the plaintiff states' accompanying litigation, is not necessarily frivolous litigation.

"This is an issue that probably needs to be settled [by the courts]," said Epps.

Epps also pointed to the recent presidential impeachment proceedings, which illustrated a need to resolve this issue by way of judicial determination.

"There are very strong political incentives," Epps said. It's important, he added, to sincerely examine both arguments. The OLC opinion was trying to "grapple with all these issues." But, Epps cautioned, the need to weigh the balance of information is imperative, especially in light of widespread doubts about the credibility of the OLC's boss, Attorney General William Barr, the country's chief law enforcement officer.

A final resolution may require disposition from the United States Supreme Court. Even then, what the final resolution would look like is far from clear.

OPINION: Advice from an Exoneree Who Spent Thirty-Four Years in Prison

By: Jack Sagin

On October 11, 2019, I walked out of prison a free man after 34 years of wrongful incarceration. In 1986, a Monterey County jury convicted me of murder, even though the only evidence against me was the claims of two jailhouse informants. After many years of fighting on my own, or trying to work with lawyers appointed by different courts, the Northern California Innocence Project (NCIP) took up my case. Through the work of NCIP, evidence collected from the victim's body was DNA-tested, revealing the DNA of five possible perpetrators on that evidence. My DNA was on nothing. On August 30, 2019, the Sixth District Court of Appeal reversed my conviction.

Jack Sagin with his sister shortly after being released
Photo By:Michele Canny

Over the many, many years I spent in prison, and the thousands of hours I spent talking about my case with my lawyers and discussing the legal system with my fellow prisoners, I have some advice for those attorneys and law students who don't want to be responsible for helping to send an innocent person to prison.

First, if you choose to be a lawyer and represent people, you need to represent them to the best of your abilities. Your client's life is in your hands. People accused of crimes are presumed innocent until proven guilty. Please don't take that away from us by treating defendants differently, based on what they have been charged with. From a traffic ticket to a mass murder charge, we are all relying on you to help us and no matter how hard your job might be, the job of an innocent person who has to serve time for someone else's crime is much, much harder. Don't give up on them even if they tell you that they are guilty! They are still depending on you to do your best to protect them because you are the only person who can.

Second, please don't accept what is in the police reports as the truth, without further investigation. Everyone, including police, tells their story in the way that they want others to hear it. If you just rely on what law enforcement says, you are only hearing one side of the story. If you are a prosecutor, send your investigator out to speak with people again, make sure that you have been diligent in your investigation before you ask a jury to send a defendant away from his family and children to die in prison, no matter how bad the crime is that he is accused of committing. If you are a defense attorney, send an investigator out to talk to witnesses and investigate the crime scene — you need to do your job.

Third, be truthful. For prosecutors, charge people with what you think that the person has done, not what you think you might be able to convince a jury that he or she did. Serving time for something you actually did is one thing. Serving time for something either that didn't happen or that someone else did should not happen.

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Q&A: Civil Rights Icon Discusses The Future of American Democracy

By: Robert Sisco

Civil rights attorney Daniel Sheehan has worked on dozens of historically significant cases during his 40-year legal career, including the Pentagon Papers Case, the Watergate burglary case, and the Iran-Contra scandal. Today, he is the President of the Romero Institute, an interfaith, non-profit law and policy center based in Santa Cruz, California. Sheehan and the Romero Institute are now setting their sights on climate change and environmental degradation, in an effort to address what he calls "the biggest threat facing humanity today."

Q: You've worked on two significant cases that defended the rights of journalists and newspapers, In re Pappas and the Pentagon Papers case, what is your take on President Trump's lawsuits against the New York Times and the Washington Post for libel?

A: I think that presents an extraordinarily positive opportunity for the New York Times and the Post to get after him. Because in Times v. Sullivan, a major US Supreme Court case that stated any kind of suit for libel against a major news media outlet requires a public person, such as the President of the United States, to prove not only that something was false, but also that the organization knew it was false and that they, did so with the intention of damaging the financial status of the person they were talking about.

I think the New York Times and Post have a great opportunity because the charges all relate to them asserting his campaign was colluding with Russia. Trump is trying to take advantage of the misrepresentation about the findings of the special prosecutor with regard to that. All he's said is that he did not think he could get access to important, admissible evidence to establish beyond a reasonable doubt to a criminal standard. That in fact, there was a specific agreement made between Trump and Putin or the campaign and Russia to collude in getting Trump elected.

Finally, not to state the obvious, they could take his deposition. They could take the deposition of all the different people around him — the people that were withheld from Congress to testify in the impeachment proceedings. I think it's a golden opportunity for the New York Times and Post to really carve into this guy and take him to the cleaners. At which point, of course, Trump would withdraw the case. They have to do this in a careful way, because if you expose [your strategy] to the Trump side that you're going to carve him up on this thing, he'll just dismiss the case.

Then, the question is whether or not they could also file a SLAPP suit. They've got this strategic litigation theory going now to show that the plaintiff who's filing this libel suit is just trying to chill the media. There's a whole range of options they have at their disposal but the actual public interest thing to do is to go after Trump and subpoena him, since he filed the lawsuit for theatrical purposes.

Just go after him and get him into a deposition, start issuing subpoenas for depositions of all the people that knew perfectly well they were colluding. Get at these guys. Especially the guys who are being convicted. There's nothing to prevent them from taking civil depositions from those guys. I'm not at all sanguine about the fact that they're going to take advantage of it cause somehow they don't see themselves as being devoted to the actual public interest of the people as distinct from the financial best interests of their corporation, the newspaper.

Q: Can you explain *New York Times v. Sullivan* for our readers?

A: *Times v. Sullivan* is the Supreme Court case that established the principle, that if a public person files a lawsuit against a media outlet, like the New York Times, under the standards of libel, they have to prove more than the fact that what was said was erroneous or untrue. They have the burden of showing it was untrue, the burden of proving that the person who published it knew it was untrue, and that they did it for the specific purpose of spite and malice - actual malice toward the person referred to in the article to try to destroy their financial reputation.

None of those things are established by Trump in this case. What they want to do is use Times v. Sullivan as a wedge, not just to get the case dismissed, but to go after him. They should eschew these technical grounds for getting the case dismissed as quickly as possible. They should set those aside and go after him and take advantage of the case himself and get the depositions of Trump and all of his campaign people and go after these people. That's what they need to do.

Q: You worked on the Watergate burglary case, and that scandal resulted in Nixon's impeachment. President Trump called his impeachment a Democratic witch-hunt and hoax, while his opponents denounced the trial as being rigged in Trump's favor. What do you make of the impeachment and what it means for American democracy?

A: It was essential on the part of the House of Representatives to confront what was going on. The impeachment veered off into this narrow line focusing on the call with the President of Ukraine and withholding of the finances for the military equipment. I thought that was a mistake on the part of the Democratic Party. It provided a simple, targetable, and provable set of facts, but given the fact that all they had to do was withhold the witnesses that had firsthand knowledge, they were gonna fall flat.

They had to rely on third-hand hearsay. And the fact that the Congress was unable to effectively assert its authority to bring these people in under subpoena, given the fact that the courts are now stacked by the administration against everybody except Trump and the executive branch.

I think they should have gone after the information about the collusion with Russia. 86 percent of them are lawyers, they knew thoroughly well that the special prosecutor just simply saying he wasn't certain he was in possession of court-admissible evidence to be able to establish beyond a reasonable doubt every single essential element of the crime of conspiracy on the part of Russia, in the Administration's campaign. That's a completely different standard than being able to establish that it was true.

The challenge that we have with the Republican-controlled Senate, it was always inevitable that they were going to refuse to convict him. Democrats managed to get one person, Senator Romney, to vote to convict on one of the two counts, but they knew from the beginning that they were not going to be able to get two-thirds of the Senate, which is controlled by the Republican Party, to convict Trump. They should've used the impeachment process in the House to draw out all of that information about the collusion — the actual collusion that went on between the Trump campaign, Manafort, and these other fellows. The coordination and collusion. And they should've brought all that information out into the public view.

They underestimated the intelligence of the American people, which they do all the time. Figuring it would sound too complicated. They needed to have one simple thing, like one phone call, he's lying about it, and he withheld our military equipment and Ukraine was being attacked by Russia. They went right for the lowest common denominator and they still failed. I think that the entire reliance on Congress to do any kind of effective investigation was mistaken.

Q: You represented the alleged "ring-leader" of the Dakota Access Pipeline protests, the grassroots movement that opposed the construction of the oil pipeline through Lakota land in North Dakota. That movement resulted in nearly 20 states passing laws restricting people's right to protest. Are you concerned about the future of protesting in the United States?

A: Absolutely. Kristi Noem, the rightwing Republican Governor of South Dakota has led that charge, but it was ALEC, the hardcore rightwing legislative drafting group, that drafted this so called riot-boosting statute. This is a subset of the fundamental problem of the hardcore shifts to the right of the Republican Party at the end of the Cold War and the Democratic Party following them to the right and wanting to have a right of center Democratic Party to take on the hardcore right of center Republican Party. In a dialect of that nature, you always come out somewhere right of center.

The States are moving in to try to crush protesting because the progressive community has had to resort to these types of protests in order to do anything. You've lost access to an effective court system. We don't have any allies in the Democratic Party. The Obama administration didn't cut off the Dakota Access pipeline until after Hillary Clinton had been beaten by Donald Trump. Donald Trump had already been elected in November and it wasn't until December 4th that the Obama administration and the new, more moderate Democratic Party actually upheld the Environmental Protection Act to protect the environment. He did order the cutting off of XL, and I'm sure that either Bernie or Biden, whichever wins the nomination, if they're elected, they'll shut off the XL pipeline.

In that sense, we're relying upon an elite theory of social change. Relying upon the Democratic Party to do anything right. I think we have to have a mass of citizens movement which is similar to what's going on with Bernie Sanders to actually reestablish a forward leaning protection of our fundamental rights.

We're not going to be able to rely on the courts to strike down these kinds of statutes because even if we get a good federal district court, it's gonna go up to the Court of Appeals, which are all being stacked with hardcore, rightwing people. The Trump administration is gonna end up, before the end of its first term here, appointing 236 federal judges. Virtually every single one of them is from the Federalist Society, which is a hardcore, rightwing fundamentalist group of people that are a danger to the democracy.

We're going to have to go through a difficult period here in the next few years unless Bernie Sanders wins, and it's not looking that good for him as of this morning (March 4, 2020). If Joe Biden wins, he's a good guy and he's a liberal guy, but that type of an administration is not really equipped to take on and suppress this hardcore, right wing ascendency stirred up by Trump. We're gonna have to get a stronger administration in and slowly work our way back into getting progressive people back onto the court.

Regulating Gene-Editing

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This is what led Jiankui, who used gene-editing in order to protect the embryos of twin girls against HIV, to a three-year prison sentence and approximately $429,000 in fines, according to NPR News.

Congress has even barred the FDA from acknowledging receipt of an application to conduct clinical trials involving modified gametes or embryos since 2016, Santa Clara University law professor, Kerry Macintosh, explained.

"In effect, Congress has imposed a temporary moratorium," said Macintosh, who is the author of Enhanced Beings: Human Germline Modification and the Law, which analyzes and critiques the objections to human germline editing on biological and political grounds.

> **"What people mainly worry about is when [gene-editing] is used as an enhancement to make X-Men and so on.**
>
> *- Hank Greely, Stanford Law Professor and Bioethicist*

"Congress may eventually relent and allow the FDA to receive such applications," Macintosh added. "But even then, the FDA will not allow such trials to proceed until it is confident that the technology is safe."

However, Greely believes that the legislative concerns around germline gene-editing are premature.

"We're not going to make super babies because we don't know how," Greely said. "I don't think the enhancement fear which is driving a lot of people's concerns is going to be realistic for the next several decades, at least."

Advice from Exoneree

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At any of the many prisons where I served time, I was not the only innocent prisoner. You have a lot of power and you should use that power to make us all safer, not just because you can.

Photo By:Michele Canny

> **Respect your clients enough to tell them the truth when you give advice about their case.**
>
> - Jack Sagin

For defense attorneys, don't just pat your client on the head and tell him everything will be okay! Respect your clients enough to tell them the truth when you give advice about their case. Some of my attorneys told me that they were working on things when they weren't. Some of them told me that I had nothing to worry about when I had everything to worry about. Some told me that things would happen a certain way and when they didn't work out that way, it was really hard to get over.

Give your clients the truth, even when you think that the client doesn't want to hear it. In the long run, it is much easier to deal with something hard and disappointing before you get your hopes up.

Photo By:Michele Canny

CA Apologizes for Incarcerating Japanese-Americans During WWII and Urges Schools to Teach About it

By: Erik Perez

Just over a decade after California first declared January 30 as the "Fred Korematsu Day of Civil Liberties and the Constitution," the State Assembly finally issued a unanimous apology, via House Resolution 77 (HR 77), to Japanese-Americans incarcerated during World War II under Executive Order 9066 (EO 9066).

EO 9066, signed by then-President Franklin Delano Roosevelt in 1942, empowered the U.S. government to relocate more than 120,000 persons of Japanese ancestry to 10 concentration camps scattered throughout the country's west coast.

Fred Korematsu was one of a handful of interned Japanese-Americans who sued the government in 1944, arguing that EO 9066 violated the Fourteenth Amendment's Equal Protection Clause by targeting Korematsu because of his race. The U.S. Supreme Court affirmed Korematsu's conviction and effectively legalized the prosecution of people based on their race, if the government was facing a legitimate national emergency. The decision was not vacated until 1983.

"This apology is long overdue," said Assemblymember Albert Muratsuchi, in his February 20, 2020 introduction of HR 77 to the State Assembly, in front of a few internment survivors and their families, including Korematsu's grand-nephew, Allen Korematsu. "Most of the survivors of Japanese-American internment have already passed away."

Indeed, California's legislative apology comes 78 years after EO 9066 was signed and 32 years after the U.S. government issued its own apology. This may be why some of the survivors are not exactly moved by the state's resolution.

"For California to do this now, it doesn't really mean much to me," said Mits Kawamoto in an interview with NBC San Diego.

Kawamoto, who was only nine years old when her family was relocated to a camp in Arizona, said she would prefer that the State focus on making sure that atrocities like this are never repeated.

Muratsuchi, who has been introducing a resolution to establish a Day of Remembrance since he was first elected in 2014, has concerns like Kawamoto's in mind. The apology that he authored specifically acknowledges California's crucial role in facilitating the Japanese-American internment.

"California led the nation in fanning the flames of racism and immigrant scapegoating against Japanese-Americans," said Muratsuchi.

> **California led the nation in fanning the flames of racism and immigrant scapegoating against Japanese-Americans.**
>
> - Albert Muratsuchi, CA Assemblyman

Among other things, HR 77 details how, after Pearl Harbor, the State Assembly approved legislation that questioned Japanese-American loyalty, fired state employees who "may be proved to be disloyal" to the U.S. and urged Congress to strip the U.S. citizenship of Japanese-Americans holding dual citizenship in the U.S. and Japan.

But, Muratsuchi insists that the public recognition of California's "past mistakes" is necessary because of a current political climate that is reminiscent of the one that existed during the establishment of Japanese-American internment camps. Muratsuchi specifically cited the migrant children detained at a former WWII Japanese-American camp at Fort Sill, Oklahoma and the "sweeping" ban on people traveling from predominantly Muslim countries.

In an effort to further facilitate this learning, the State Assembly also passed House Resolution 76 (HR 76), encouraging all public schools and educational institutions to conduct exercises each year on January 30 to remember Korematsu's fight to preserve civil liberties.

But this kind of celebration is not new to California. Several schools across the state, including Santa Clara University's School of Law, and others named after Korematsu, planned days of remembrance prior to the passing of HR 76.

At one of its two Korematsu Day events, Santa Clara University's Law School hosted Karen Korematsu, the Executive Director of The Korematsu Institute and Fred Korematsu's daughter, to weigh in on a mock trial of the Korematsu case. Following oral arguments, Korematsu's public conversation with SCU's Professor, Margaret Russell, seemed hopeful for the future of civil rights in the U.S., even under a conservative Supreme Court.

"[We] need creative thinking in the areas of restorative justice and in the areas of political organization," said Russell. "We should remain optimistic."

The Tule Lake Isolation Center in California in 1945. (Jack and Peggy Iwata / Japanese American National Museum)

New CA "Gig-Work" Law

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... service giants to treat drivers differently from the rest of its workforce. RDU has declined to respond to The Advocate's requests for comment.

According to Stanford Law Professor William B. Gould, IV, a former Chairman of the National Labor Relations Board and a powerful voice for labor rights spanning several decades, AB 5's current form is not the final product and concerns like those shared by PLF's clients could well be addressed as the state continues to wrestle with implementing AB 5. "It's possible that the law could be modified to allow more flexibility for freelancers," Gould said. "The legislature is going to be considering a number of amendments — that may be one of them."

Gould notes that at least some of AB 5's potential flexibility issues, on which companies like Uber and Lyft rest their opposition, have yet to be seen. "This lawsuit is rooted in hot air," Gould said. "It purports to be on behalf of workers who say that they lose their flexibility as a result of this legislation, [but] Uber hasn't announced that." Gould argues that Uber "simply propagandized" that workers will lose flexibility, using that as a vehicle to attack the exemptions or failures of the legislature to create exemptions, within AB 5.

> **I think we need regulation given the increasing inequality in our society.**
>
> Stanford Law Professor, William B. Gould, IV

Other service providers that were required to switch from an independent-contractor structure to a more traditional employee structure seem to be at the onset of balancing flexibility and more substantial workers' rights. For example, Eaze, a San Francisco-based on-demand cannabis delivery service, was required to make this change in employment structure when marijuana was legalized.

As a result, Eaze's partner depots and dispensaries now allow workers to sign-up for shifts and tasks.

"One of the great benefits of switching to [AB 5], is that drivers that do come in and start in that position have a much easier and more clear matriculation and job growth opportunity within the company," said

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David Mack, Senior Vice President of Public Affairs for Eaze. He added that "it is certainly a much better entry point."

Ultimately, Gould believes that some version of AB 5 is necessary to move the needle on a fair employment system. "It's a move towards regulation," he says. "I think we need regulation given the increasing inequality in our society, given the way with which so many employers have been able to exploit workers as independent contractors."

On February 18, Judge Taylor in the Superior Court of California in San Diego, granted a preliminary injunction against the grocery delivery service, Instacart, for misclassifying its San Diego employees as contract workers. The court's order stated, "the People have demonstrated a probability of success on the merits of their claims," making "a very plausible showing of improper classification under the ABC test." While this is not a final judgement on the merits, it does represent the first instance of AB 5 enforcement in California.

RUMOR MILL

BY: SUSAN ERWIN - Senior Assistant Dean for Student Services

What's everyone talking about right now? I've been told it is barristers and the alcohol policy. Let's talk about it:

RUMOR:

Nothing happened at Barristers 2020 beyond a few people getting tipsy.

DEAN ERWIN:

Not true. A few students were too drunk to even stand up or remember where they lived and had to be escorted home by sober friends. The Fairmont reported having to clean up after sick students in numerous areas. Security reported having to turn away visibly inebriated students. Students were sneaking in water bottles full of alcohol. Students got into inappropriate arguments with bartenders, security, and staff. Students stole food. The last time we talked to the Fairmont folks, they weren't sure if we would be allowed back. And please remember, each of these students signed their names to documents agreeing to abide by the law school's alcohol policy. (Maybe a good topic for your Professional Responsibility class?)

RUMOR:

SBA money comes from student tuition, so all students should have access.

DEAN ERWIN:

True. All students will have access – during their last year of law school.

RUMOR:

There is no good reason for banning first and second year students from barristers.

DEAN ERWIN:

Not true, for three reasons:

First, the rule limiting Barristers Ball to third years was part of the original Alcohol Policy. The first and second year students were allowed this year only because the deans made an exception based on representations made to us from your SBA. Given that opportunity, many of your student leaders put in countless hours before and during the event to ensure the event remained professional so that they could request another exemption for next year's class. It is disappointing for all of us that so many students made so many bad choices.

Second, we have been to more than 25 Barristers Balls – some of us were attending the Barristers Balls before some of you were even born. For a quarter of a century, we have been responsible for assisting our students as they dealt with police, injuries, the California Bar Association and other complications arising from drunken behavior. This makes us uniquely qualified to tell you that almost all of the major issues we have following Barristers Ball involve first years.

Third, we also know from years of experience, that once students get to their third year and start preparing for their future careers and submitting their moral character applications, they are much more attentive to the importance of their reputations. Limiting attendance to graduating students will hopefully ensure that the majority of the students attending will behave professionally. This might also encourage more faculty to attend!

RUMOR:

The administration was out to get us at Barristers.

DEAN ERWIN:

Not true. How could this be true? So many of us put so much work into helping you succeed. There is no way that we would want to harm your future. It's the opposite. The first thing we do every year, is to talk with security and management staff to let them know that law school staff are there to help deal with issues and to request that they NOT call police to deal with problems involving law students. The last time the staff left the ball early, there were six police reports about student behavior (and the event site banned us for life). Since then, we hang out until the event is over. Our purpose is to make sure you all are safe and don't do anything you will regret. We put a lot of hours into turning you into lawyers, we want to see that happen!

RUMOR:

Dean Erwin led the police on a raid of a hotel room full of law students!

DEAN ERWIN:

Not True. But, honestly, this is by far the best rumor I have heard in 25+ years! I'm thinking about making a poster to commemorate my first ever SWAT raid at the Fairmont! If anyone got a picture, please send it to me!

Heard any rumors lately? Tell me about it - serwin@scu.edu.

JUDGE'S CORNER

THE VALUE OF MENTORSHIP AND HOW TO FIND ONE

By: Judge Eugene Hyman

Judge Eugene M. Hyman retired from the Superior Court of California, County of Santa Clara (San Jose) where, for 20 years, he presided over cases in the criminal, civil, probate, family, and delinquency divisions of the court. He has presided over an adult domestic violence court and in 1999 presided over the first juvenile domestic violence and family violence court in the United States.

Judge Hyman has spoken to both national and international audiences and has published articles on issues surrounding domestic violence in the criminal and family courts--especially with co-occurring issues of substance abuse and mental health. He has a special interest in domestic violence as it affects children in the home and in the family court setting. He has special understanding of sexual abuse, stalking, and strangulation, as they intersect with domestic violence. On June 23, 2008, Judge Hyman was honored with the United Nations Public Service Award. Read more here.

He taught as a Lecturer in Law at the Santa Clara University School of Law for over 30 years where he has taught a course "Domestic Violence Law Seminar" for the past several years.

The first article in this series dealt with the beginning of your law career, the first day of law school. Now I'll discuss goal-setting and mentorships.

It's important, in starting and later building a legal career, to develop consistently positive and helpful habits. When you do so, success becomes a habit. Good habits will serve you during your entire career.

In the first article, I mentioned Brian Tracy and his work on goal-setting. I can't overemphasize this: Goal-setting is a vital habit. Successful people set written goals and review them constantly.

Goals must be written for purposes of consistency and ease of review. For one thing, it is difficult to remember something that is not written down. For another, you will need to update your goals, based upon experience, reflection, and education.

Goals are achieved by consciously and unconsciously working on them. Including while you sleep! Goals are precious; be careful who you share them with. You will find that not everyone in your circle wants you to achieve them, for any number of reasons.

The next step in your exploration is to find a mentor. In fact, I recommend having at least two. You aren't limited in the number of mentors that you may have. Mentors are a little like goals, and as your goals change, the skills you need in a mentor will as well.

It is generally not a good idea to view a mentor as a job source. Their function should be more to help challenge you and help you identify strategies – in other words, help move you forward toward your goals, improve your goals, or more clearly define them.

How does one obtain a mentor? To a certain extent, it depends upon the purpose of the mentor. If you need to talk to someone about understanding coursework that you should take to be a criminal lawyer, many faculty members can easily serve this purpose. However, if you are interested in getting a job in a particular practice or geographic area, it might be more helpful to have a mentor who is already working at a law firm where you may have an interest ultimately to practice.

Your first step in this process, therefore, is to go to the alumni office and find graduates of your school who are practicing in the subject area that's of interest to you. Next, of course, you need to contact this person, either by email or by phone. For many people, cold calling is very stressful; an email will allow you to express yourself precisely without the necessity of thinking under pressure.

Regardless of your approach, your goal is the same: invite the person to have coffee with you to discuss what practicing in their firm and subject area is like. Explain that you aren't looking for a job at this point – you're simply looking for information in order to prepare yourself to be a more qualified candidate when the time comes to actually apply. The average meeting is about fifteen minutes, a very short time period to make a great impression and a connection. Try to find out: 1) what working in the particular law firm might be like; 2) what qualifications will assist you in obtaining a job at the firm or a similar one; and 3) what the subject practice area might be like as a career. Ideally, you have established a connection that will provide an opportunity to have an ongoing contact and a true mentoring relationship.

Finally, ask for an opportunity to shadow the prospective mentor and spend one or more days observing them. You will know if things are not going well on the attorney's end if you suggest getting together in, say, a month or so and they don't seem warm to the idea. Conversely, if you sense a bad fit on your end, you can simply not ask to meet again.

Every "coffee" is a learning experience. Afterwards, it is important to reflect upon what you have learned about the attorney as a potential mentor, about the firm as a potential source of a summer associate's position, and the practice area as a future career choice.

It is rare for a law student to contact a legal professional while in law school, outside of a summer associateship. The average lawyer is going to be surprised by your efforts. Most will welcome your inquiries: It's flattering to be asked to be a mentor.

Do as much research about your potential mentor as possible. Use traditional search engines to find out as much as you can about the firm, the practice area, and the attorney. This will assist you in asking questions and will also demonstrate to the prospective mentor that you are serious about your interests and about establishing a mentorship.

You may have to contact several persons before you find someone who is willing to assist you. Do not view this as rejection but rather as an opportunity to practice your contacting skills and to also realize that not everyone is a good fit for your needs.