# California Policy Options

# 2021

UCLA Luskin
School of Public Affairs

# 2021

**California**

**Policy**

**Options**

## Edited by Daniel J.B. Mitchell

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Editor: Daniel J.B. Mitchell

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# Preface

The 2021 publication of *California Policy Options* represents a wide range of statewide issues and those that affect cities, local communities and individuals. Once again, it features an in-depth look at California's budget and economic outlook. This year's collection also examines a variety of important topics including voting by mail in California, which played a key role in this year's historic 2020 election, and bond financing in the state. Other state and regional issues include reduction of plastic waste, a look back at California's medfly infestation in 1981, sex education in Los Angeles Schools and DNA collection from arrestees under California law.

UCLA Professor Daniel J.B. Mitchell has again brought together a timely collection of California-focused articles that add to a long list of important readings for policy and law makers as well as for students at the UCLA Luskin School of Public Affairs.

This edition *of California Policy Options* continues a long-established tradition of providing analysis of the state's public policy challenges from a variety of viewpoints as well as their political, economic and historic contexts. For more than two decades, *California Policy Options* has informed researchers and journalists, as well as leaders and lawmakers, with up-to-date research and public policy recommendations on issues and opportunities in the state.

**Gary Segura**

Dean, UCLA Luskin School of Public Affairs

# Introduction

The year 2020 proved to be an unusual one, to say the least. Not only was there an historic presidential election, but a worldwide "pandemic" quickly threw an economy with strikingly low unemployment into reverse. At the state level, there were major repercussions on the ordinary flow of life, repercussions still being felt as this edition of *California Policy Options* goes to press.

While California has not had experience with a pandemic since the so-called "Spanish" flu of 1918, it did suffer from another form of infestation. In chapter 1 of this volume, Daniel J.B. Mitchell discusses the political impact of the Mediterranean Fruit Fly which threatened state agriculture in the early 1980s. The medfly forced then-Governor Jerry Brown to face what he perceived as a trade-off between the economy and the environment. Trying to balance the two didn't go well. Perhaps contemporary public officials in the midst of the coronavirus crisis who are considering the health-vs.-economy political pressures at this writing might draw some lessons.

The environment issue also arises in chapter 2 by Daniel Coffee. He examines state efforts to deal with plastic waste pollution. As Coffee points out, progress toward recycling and reducing single-use plastic items was impeded by the coronavirus situation. But presumably, the effort will resume once vaccines become widely available and the virus' impact subsides.

In the March 2020 presidential primary in California, politics and the coronavirus came together early on in the area of voting and election processes. Michael Barreto, Michael Cohen, and Sonni Waknin, in chapter 3, examine the difficulties encountered. But they also note that California – with its earlier history of voting by mail – was better positioned than many other states to conduct the November 2020 general election. Even so, the authors suggest improvements that could be made for future elections.

In the 2018 edition of this series, Mitchell described the 1961 election of Los Angeles Mayor Sam Yorty, the candidate who wasn't supposed to win given what might be loosely described as his populist and negative campaign against the downtown city elites. But he did win then. To the extent he is remembered, Yorty is best known for his third and fourth election campaigns during which he made racial attacks on opposing candidate Tom Bradley who, after Yorty's unsuccessful bid in election number 4, became the city's first African American mayor. In chapter 4, Mitchell reviews Yorty's second election in 1965 – the forgotten election in which he seemed to have won over the downtown elites. But that bid for reelection was followed not long after by another event that wasn't supposed to happen, the Watts Riot (or Uprising, depending on your predilections).

The coronavirus crisis jolted education at all levels with most in-person teaching discontinued. One of the programs at the K-12 level that was impeded was implementation of a state mandate regarding

sexual health education. In chapter 5, Devon Schechinger and Keara Pina consider the efforts of the Los Angeles Unified School District to foster healthy sexual education. They note the need for "compliance tracking" to determine whether the mandated program is being appropriately carried out.

New forms of technology are increasingly posing issues regarding privacy, be they drones, security cameras, or other means of tracking public behavior. Chapter 6 by Stanley M. Paul considers the civil liberties challenges posed by DNA collection in California from individuals arrested – but not convicted or tried. As with other technologies, a combination of legislation and court litigation is defining the appropriate boundaries.

Whenever the state's economy is depressed, so – too – is its government's financial situation. Tax receipts tend to reflect the ups and down of the business cycle. In chapter 7, Mitchell describes the upending of the normal California state budget process and condition by the coronavirus crisis and the resultant economic downturn. One asset that Governor Gavin Newsom had during the 2020 coronavirus recession that it lacked in the 2008 Great Recession was a substantial pre-virus build-up of reserves, largely due to prior governorship of Jerry Brown. Large reserves allow a cushioning of the state budget against sudden losses of revenue.

At the federal level, one way to stimulate a depressed economy is to finance increased infrastructure spending. However, the federal government has far more latitude to enact countercyclical fiscal policies than do state and local governments. In chapter 8, Leila Bengali and Jerry Nickelsburg consider what scope California as a state does have in this area. In California, as in other jurisdictions, infrastructure projects are often financed through issuance of bonds. Of course, any bond that is floated subsequently requires the payment of debt service (interest plus the loan itself). Nonetheless, the authors believe there is some scope for state countercyclical infrastructure spending provided that the projects are truly ready to go quickly, i.e., that they are "shovel ready."

Finally, in chapter 9, Christopher Thornberg of Beacon Economics discusses California's economic outlook in light of the coronavirus crisis that precipitated an abrupt economic decline in the state. Thornberg argues that both the U.S. and California economies have shown more resilience than early forecasts made early in the crisis were too pessimistic. While preliminary data indicate California had a more pronounced downturn than the U.S. as a whole, it is poised for rapid recovery in 2021.

My thanks go especially to Stan Paul for his assistance in preparing this volume, and previous volumes of *California Policy Options*, for publication.

**Daniel J.B. Mitchell**
Professor Emeritus, UCLA Anderson Graduate School of Management
and UCLA Luskin School of Public Affairs

# Chapter 1

# The Governor vs. the Fly: The Insect that Bugged Jerry Brown in 1981

**Daniel J.B Mitchell**

Professor-Emeritus, UCLA Anderson School of Management
and UCLA Luskin School of Public Affairs

*"A miniscule bug caused an ecological nightmare… nearly 40 years ago. When searching through the (San Francisco) Chronicle's archive, I came across a story about the Mediterranean fruit fly invasion of 1980-81. My interest piqued, I dug up more photos and articles about… the mass spraying of pesticides…"*

Bill Van Nierkerken, Library Director of the *San Francisco Chronicle*, November 25, 2018[1]

As the quote above suggests, only old timers and aficionados of California politics still recall the "Medfly" incident of the early 1980s. Yet, at the time, the Medfly managed to trip up then-Governor Jerry Brown who until that point had shown a remarkable ability to sidestep controversy. Brown's environmental leanings predisposed him against a widespread pesticide-based approach to the Medfly problem. Before the Medfly, Brown had either stepped away from controversies or flip-flopped to more popular positions with little cost. But just as elected officials in 2020 had to deal with the coronavirus challenge one way or another, Brown had to deal with the Medfly in 1981.

The Medfly affair was something of a turning point for Governor Brown. When a state attempt to install Diamond lanes on the Santa Monica freeway blew up in 1976, Brown managed to stay aloof and leave a subordinate to deal with the backlash.[2] When Prop 13 – which drastically cut local property taxes - was on the ballot in 1978, Brown managed to oppose it and then flip over and become a born again tax cut enthusiast. But the Medfly challenge, and particularly Brown's flip-flop on it, proved harder to evade.

What finally derailed Brown's campaign for the U.S. Senate in 1982 was a growing state budget dilemma combined with general voter Brown-fatigue. By the time of the 1982 general election, voters – apart from those folks closely connected to agriculture – were not preoccupied with Medflies of the year before. But the Medfly affair reinforced the idea that California's unorthodox governor was not well equipped to make tough decisions and good policy choices.

With his loss in 1982, Brown fell into years of political obscurity. Brown's eventual political comeback and his reelection as governor in 2010 was thus all the more remarkable. In 2010, he ran as the candidate best equipped to make the tough decisions needed to solve the state's budget crisis spawned by the Great Recession. No one mentioned Brown's problem with Medflies in the election of 2010. A new generation of voters knew little about the Medflies of 1981 or, for that matter, Brown's budget crisis of 1982.

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[1]Bill Van Nierkerken, "The medfly invasion: How a tiny insect upended Bay Area life decades ago," *San Francisco Chronicle*, November 25, 2018. Available at https://www.sfchronicle.com/chronicle_vault/article/The-medfly-invasion-How-a-tiny-insect-upended-12205233.php.

[2]Daniel J.B Mitchell, "The Conflict Diamonds of Adriana Gianturco," *California Policy Options 2019* (UCLA Luskin School of Public Affairs, 2019), pp. 7-32. Available at https://www.anderson.ucla.edu/documents/areas/fac/management/diamondPDF.pdf.

**Young Jerry Brown**

"*The Mediterranean fruit fly, without the slightest political animosity toward the governor, trapped Brown in a situation that is a nightmare for any politician. Whatever he did was bound to stir up the wrath of one group or another*."

Columnist Phil Kerby[3]

Jerry Brown (Edmund G. Brown, Jr.), son of former California Governor Edmund G. "Pat" Brown, became one of California's youngest governors in January 1975 after winning the 1974 gubernatorial election. He came from a family immersed in Democratic politics and, after initially training to become a Jesuit priest, changed course, attended UC-Berkeley, and obtained a law degree from Yale. His first elected office was to the Los Angeles Community College District. From there, he moved to a statewide elected position as California's Secretary of State. And from there, he moved to the governorship.

Brown nowadays is remembered less for the two terms he served as governor starting in 1975 and more for his second set of two terms beginning in January 2011. In his second iteration as governor, Brown – older and wiser - inherited a major budget crisis triggered by the Great Recession of 2008 from Republican Arnold Schwarzenegger. The Jerry Brown that is remembered today is the one who repaired state finances and who built up state reserves to cushion whatever future economic and fiscal crises that might come along. That buildup of cash, of course, came in handy when Brown's successor, Gavin Newsom, had to deal with the budget crisis of 2020-21 produced by the coronavirus pandemic, a challenge produced by a "bug" very different from the Medfly.

Dealing with the Great Recession's budget crisis during his second gubernatorial iteration was obviously a demanding problem for Jerry Brown. But Brown – as noted – had faced fiscal challenges in his first iteration and had learned something from that experience. During his first term, a combination of general inflation and a housing bubble had led to large jumps in local property taxes. At the time, the property tax system in California, as in the rest of the country, was based on assessed property values that were regularly marked to market. If property values escalated, so did tax bills to homeowners and property owners more generally.

In June 1978, a homeowner property tax revolt led to the passage of Proposition 13 which drastically cut and capped the tax. Brown, and much of the state's political establishment at the time, had opposed Prop 13 and seemed caught unawares by the revolt. But when Prop 13 passed, Brown bowed to the will of the voters and somehow turned himself into a dedicated Prop 13 enthusiast. He won reelection in November against a Republican opponent who might have been expected to capitalize on anti-tax sentiment. However, the state had to bail out local governments – especially school districts – now deprived of much of their property tax revenue.

[3]Phil Kerby, "Residue of Medfly Spraying Contains Some Doubts," *Los Angeles Times*, August 6, 1981. Much of what follows in this chapter is based on accounts from the *Los Angeles Times* available from ProQuest Historical Newspapers.

That bailout drain on the state treasury, combined with two back-to-back recessions, led to a major state budget crisis in the early 1980s that Brown ultimately left to his successor – Republican George Deukmejian – to work through.

During his first iteration as governor, Brown had positioned himself as a kind of New Age politician with a liberal social outlook but a bent toward fiscal conservatism. He viewed the notions of Big Government solutions that liberals of his father's generation had championed as no longer relevant (or at least not what voters wanted). He had seen his father – a New Deal-type Democrat – defeated in 1966 for reelection as governor by conservative Republican Ronald Reagan. In a way, Jerry Brown had adopted bits of Reagan's economic outlook and combined it with bits of social liberalism.

Before the Medfly affair, Brown had twice (unsuccessfully) sought the Democratic nomination for president in the hopes that national voters would share the attitudes of Californians. It turned out they didn't. But even Californians had apparently had enough of Brown by November 1982. The Medfly affair was not THE issue that defeated him back in 1982. But it did mark a turning point in the perception of Brown by voters and journalists.

**The Mediterranean Fruit Fly (Medfly)**

"*You know how they talk about the shark being a beautifully designed machine. The Medfly is the shark of the insect world*."

California Food and Agriculture Department official[4]

"*The fly is a beautiful creature for being so destructive*."

Governor Jerry Brown[5]

California's economic history after the Gold Rush was for decades dominated by agriculture. Moreover, because legislative districts – until the Supreme Court's "one man/one vote" 1962 decision – overrepresented rural areas, agricultural interests had a disproportionate influence on the state's political history. The state featured the sunshine and good weather favorable to agriculture, but many areas lacked a critical ingredient, water. Hence, water allocation procedures and big water projects were major features of state politics. For many years, anyone who drove into California would be stopped at inspection stations to see if they were bringing in fruit that might contain pests that could damage state agriculture.

One such pest was the Mediterranean fruit fly that, as the name suggests, had made itself a home in the Mediterranean area and from there had spread to other parts of the world.[6] The

[4]Dick Thompson, estimation officer for the state Department of Food and Agriculture quoted in Tracy Wood, "CUTE: Old Blue Eyes Casts Nasty Shadow," *Los Angeles Times*, July 13, 1981.
[5]Quoted in Miriam Pawel, *The Browns of California* (New York: Bloomsbury Publishing, 2018-2019), p. 282.
[6]The information in this section is based on University of Arizona, College of Agriculture and Life Sciences, "The Mediterranean Fruit Fly," undated. Available at https://cals.arizona.edu/crops/insects/fruitfly.pdf.

Medfly lays its eggs in vulnerable fruits, vegetables, and nuts. The eggs hatch and the maggots eat the interior, damaging the host in both appearance and content. Larval tunnels in the host also produce vulnerability to bacterial infection. The lifecycle of the fly is short so, once established, it can multiply quickly in areas where there are hosts.

An infestation doesn't have to start in an agricultural area. Urban homeowners in California often have vulnerable fruit trees on their properties. But once established, infestations become progressively harder to control. Control mechanisms include quarantining infected areas, stripping fruit off trees where Medflies are spotted, introduction of large numbers of sterile Medflies, and insecticides.

Of course, today there is often public and consumer resistance to the use of insecticides on environmental and health grounds. While the term "organic" can be somewhat vague, it generally suggests an absence of pesticide use.[7] Back in the 1970s, however, public sensibilities toward such matters were just developing. For many years, the development of pesticides such as DDT was widely viewed as a miracle of modern science. DDT was widely spread in urban areas to control mosquitos and other insects. In that climate, pesticide use generally was taken as a norm in farm production.

**Medfly I**

"*I can think of no pest that sends chills down my spine as this one does*."

Paul Engler, Los Angeles County Agricultural Commissioner
October 1975.[8]

California had avoided an infestation of the Medfly until 1975 – early in Jerry Brown's first term as governor – when one began in Los Angeles County. However, although the event attracted public attention, it didn't become a major issue. The authorities used quarantining and sterile flies to combat the problem. By August 1976, the U.S. Department of Agriculture declared the Medfly threat in California to have been eradicated. The Medfly had seemingly come and gone without involving the governor.

Eradicated in the opinion of some officials, however, did not mean that the Medfly would never appear again in California. The Medfly was endemic in Hawaii and other parts of the world. There was always the possibility that it could be inadvertently imported. And the next time the Medfly appeared in the state, much more attention was ultimately paid to it. Part of the reason for the increased attention was that the governor chose to step in and make dealing with the Medfly his issue. Part of the reason was growing environmentalism, particularly in urban areas.

[7]U.S. Department of Agriculture, "Organic 101: Allowed and Prohibited Substances," August 16, 2018. Available at https://www.usda.gov/media/blog/2012/01/25/organic-101-allowed-and-prohibited-substances.
[8]Quoted in Robert A. Jones, "L.A. County Hit by Fruit Fly Infestation," *Los Angeles Times*, October 28, 1975.

**Medfly II – Part 1**

"*I've got good news and bad news," Paul Engler explained. The good news, he said, is that the dread Mediterranean fruit fly, which made its second appearance in the county last June 5 (1980) has been eradicated. "The bad news… is that the chances are good we'll have a re-infestation…*"

Paul Engler, Los Angeles County Agricultural Commissioner,
December 1980[9]

California's second Medfly infestation popped up in multiple locations starting in June 1980. Flies were found in the San Fernando Valley and were treated again with quarantining and release of sterile male flies. Traps were set in various Valley locations which contained chemicals that both attracted Medflies and poisoned them.

While the flies were declared eradicated in LA County by late December 1980, infestations had also been found in the Bay Area in Santa Clara County in June of that year. A report recommended aerial spraying of the insecticide Malathion, a chemical agent that attacks the nervous system of the Medfly. But local officials in Santa Clara County rejected the idea on grounds that Malathion, a suspected carcinogen, should not be sprayed over residential areas.

With no complete eradication in the Bay Area, LA County officials feared that local residents might bring back infected fruit from up north. Moreover, word of the lack of eradication had spread across the country and even abroad. Authorities in Florida and Texas were reportedly considering a ban on all California fruit. Taiwan embargoed produce from the Bay Area. In late January 1981, California Agriculture Director Richard Rominger sought to dissuade Florida from enacting an embargo by declaring that "*everyone understands eradication is the only option and we will eradicate the fly no matter what it takes to do the job*."[10] However, "*everyone*" was an exaggeration of reality.

Agricultural interests were united in pushing for aerial spraying. Urban residents were only willing to go along with stripping fruit off local trees and burying it and other measures short of spraying. They were not assuaged by official statements that the Malathion that would be sprayed would be in a low dosage that "*precludes the possibility of acute toxic effects… unless unforeseen accidents occur*…"[11] Without eradication, Texas announced a ban on California produce that was not fumigated to begin March 1. Effectively, that step was at least a temporary total ban since California had no large-scale fumigation facilities immediately in place.

[9]Excerpt from Bruce Keppel, "the Med Is Dead – But Don't Bet on It," *Los Angeles Times*, December 20, 1980.
[10]Quoted in Tracy Wood, "Florida Puts Off Proposed Ban on California Crops," *Los Angeles Times*, January 28, 1981.
[11]Statement of the California Department of Health Services quoted in Bruce Keppel, "Last of Fruit Buried in Bid to Kill Medflies," *Los Angeles Times*, February 8, 1981.

California Attorney General George Deukmejian announced he would contest the *de facto* Texas ban at the U.S. Supreme Court.[12] Apart from the legal issues, Deukmejian's entrance into the dispute gave it a political aspect. Statewide elected officials such as the Attorney General often have their eye on a higher prize, the governorship. Deukmejian was a likely Republican candidate for governor in 1982 against whoever the Democratic candidate might be. (And, in fact, he turned out to be Jerry Brown's successor as governor.) Agricultural areas in California have tended to lean Republican, just as urban areas have leaned Democratic.

By March, when the Texas ban went into effect, the various constituencies had mobilized. Agricultural interests noted that recalcitrant local governments had no jurisdiction over flights for aerial spraying above 1,000 feet. Regulation at that height was in the hands of federal authorities, i.e., the friendly (Republican) Reagan administration. And, indeed, the U.S. Department of Justice filed a friend-of-the-court brief supporting the Deukmejian appeal at the Supreme Court. At the same time, California agricultural interests filed a separate suit in a federal district court in Texas seeking to block the ban.

Given the legal threat, Texas temporarily lifted its ban, shortly before the Supreme Court enjoined it. In April, given the Texas retreat, the Court dismissed the California case, but allowed California to refile if a ruling again became necessary. Against this background, action moved to the California legislature.

Within the  legislature, there was bipartisan agreement that something should be done to eradicate the Medfly, but not necessarily on what steps should be allowed. The Assembly Agricultural Committee approved funding for the fight unanimously in early March. But what was to be allowed in the fight was not determined. And complicating the matter, some farmers in Santa Clara County resisted stripping their own trees of fruit, fearing the economic cost, and were threatened with jail time if they didn't. The farmers wanted the fly to be eradicated, but not at their expense.

Urban dwellers did not favor aerial spraying. Apart from the health concerns, it had been revealed that Malathion could damage automobile paint, if not washed off. Environmental groups noted that Malathion would not just kill Medflies but would also harm predators of other agricultural pests. If the predators were killed off, more Malathion would be needed to eliminate still more insects.

By late April, however, the conflict was momentarily seen as fading away because few flies were being discovered. A Stanford expert declared that California was "*dealing with a very small population of flies, one that is having very great trouble reproducing itself*."[13] The problem was that there is a seasonality to Medflies. They tend to proliferate during the warmer summer

[12]When states take legal action against one another, the case goes directly to the U.S. Supreme Court and is not heard by lower courts.

[13]Quoted in Bruce Keppel, "Medfly Infestation Appears to Be on Verge of Ending," *Los Angeles Times*, April 26, 1981.

months. It was too early in April to declare victory. What seemed instead to have developed was a low level, whack-a-mole process. Flies would be discovered, steps would be taken, then more flies would appear somewhere else.

Governor Brown signed a bill providing $1.1 million for the detection of Medflies in early May 1981, a period in which the budget situation was already deteriorating. That month, while optimism about eradicating the Medfly reigned in Santa Clara County, sterile flies were found in Sonoma County. Although the sterile flies were not a threat, they had likely been released in Santa Clara which meant that fertile flies might also make the journey. In June, after a finding of a non-sterile female Medfly in San Mateo County, sterile flies were released there. As the summer began it became clear that the Medfly had survived the prior winter and was proliferating. Talk began again about aerial spraying as the remedy.

**Medfly II – Part 2**

"…*The Medfly nightmare of 1981 tested the governor's ability to make, and stick to decisions*."

Chuck McFadden, Brown biographer[14]

Up until summer, Governor Brown's role in the Medfly invasion was mainly confined to signing legislation to fund eradication. But by early July 1981, the Medfly situation was said to be out of control. The state's Food and Agriculture Department planned to challenge local ordinances banning aerial spraying in court and had rented helicopters to do the spraying. However, the helicopters were kept in hidden locations after local authorities had received letters threatening to destroy them. Ultimately, however, the governor could order plans for spraying halted. And local residents were pulling Brown into the controversy, waving signs at protests declaring that "*if Brown sprays, Brown pays*."[15] Attorneys for the local jurisdictions seeking to block spraying argued that the state could not drop Malathion on residents without preparing an environmental impact statement.

Agricultural interests seemed to be dominant in the legislature. The state senate passed a resolution demanding Brown permit aerial spraying on a 33-2 vote. The assembly was somewhat less supportive urging the governor to spray by 53 to 16, but only if an advisory panel that had been created supported spraying. Apart from the state legislature, action moved to Washington, DC, where the U.S. Department of Agriculture ordered a federal quarantine on certain produce from California.

Despite the political and economic pressure – or maybe because of a negative reaction to the pressure – Brown refused to order aerial spraying. He announced on July 8th that he was "*confident that we can mount a large-scale ground operation that will equal the effectiveness of aerial spraying without the unacceptable health, human welfare and environmental risks…*"

[14]Chuck McFadden, *Trailblazer: A Biography of Jerry Brown* (Berkeley: University of California Press, 1913), p. 98.
[15]Quoted in Robert Fairbanks and William Endicott, "Aerial Spraying Opposed in Medfly Battle," *Los Angeles Times*, July 8, 1981.

Furthermore, he declared he would not *"go the route of technology over the opposition of this enormous group of (local residents). I don't think (it) is right. And I'm not going to do it*."[16]

Moves were made in the legislature to enact a bill compelling aerial spraying in response. However, the governor painted a picture of local residents "*waking up in the middle of the night to these helicopters spraying the garden, the streetlight, the roof, the child's bicycle, the swimming pool and the pond*…"[17] The state withdrew its legal challenge to the local ordinances banning spraying.

Despite his strong rhetoric, Brown gave himself some wiggle room to reverse. There would be intensive work on the ground (which would include ground spraying). After ten days, he said, he would look for signs of success. However, Brown's decision not to spray immediately revived threats from Texas to impose a ban on California produce. And it produced a series of statements from experts saying risks from Malathion were minimal. Aerial spraying would be done at night when few people were outside. It was argued that ground spraying would produce a greater danger.

Apart from the scientific issues, Brown was having a difficult summer. Some of his staff were being investigated for use of state computers for political purposes. He was pushing his controversial Peripheral Canal water project proposal (eventually defeated by voters). A program of annual auto inspections he wanted to put in place was defeated in the state senate. Brown was already a declared candidate for the U.S. Senate in 1982, and his stance against spraying guaranteed financial support from the agricultural sector to his opponent.[18] And there was the worsening budget situation.

Even Brown's on-the-ground battle with the Medfly wasn't going well. As it turned out, one batch of supposedly sterile flies that had been released may not have all been sterile. The local director of the eradication effort in Santa Clara blamed the problem on a Peruvian lab that hadn't sufficiently eradiated the flies before export to the U.S. But like everything else about the Medfly, there was controversy over whether there really had been a non-sterile Peruvian fly, or whether the fly in question was a homegrown native. Peruvian or not, the notion of the authorities accidentally introducing fertile flies they were trying to get rid of became the target of national humor.[19]

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[16]Quoted in Robert Fairbanks, "Brown Bars Aerial Spraying of Medfly," *Los Angeles Times*, July 9, 1981.
[17]Op. cit.
[18]The Senate seat was held by Republican Sam Hayakawa who was seen as a potentially weak candidate for reelection. Pete Wilson, who eventually was Brown's Republican opponent in the Senate race, was at this point campaigning for governor. Hayakawa eventually dropped out of the race for the Senate.
[19]Nationally-syndicated columnist Art Buchwald, a prominent humorist of the period, dedicated a column to the Peruvian fly. See Art Buchwald, "Something Rotten With Fruit Flies," *Los Angeles Times*, August 13, 1981.

**Flip-Flop**

In any case, having momentarily won the support of local urban residents and environmentalists, Brown flip-flopped two days later when threatened with a more intensive federal quarantine. Brown couched his reversal in environmental terms. He noted that a federal quarantine would require California produce to be fumigated and that the fumigation process would result in a health risk to workers. And he defended his prior decision saying there was conflicting advice from experts and "*it was very hard… as a layman to sort things out*."[20] But it was hard to have been on both sides of the aerial spraying issue. Moreover, once the spraying decision was made, the news media began interviewing scientists who suggested that Malathion was potentially more harmful than its agricultural supporters had made it out to be.

There was a brief delay when opponents sought to block aerial spraying in state court. But by July 15, after a state Supreme Court decision, all legal recourse had ended. An attorney for the losing side urged pregnant women to "*leave the county or at least take every possible precaution*…"[21] Reports appeared of protesters in gas masks as spraying began. Governor Brown announced he would spend the night in a residence that would be subject to spraying "*to assure people what's good for them is good for their chief executive*." But he wasn't totally reassuring. "*I'm not going to walk around and look up and open my mouth; I'll tell you that*."[22]

In contrast, California Conservation Corps Director B.T. Collins, a colorful official who had lost an arm and a leg in the Vietnam War, was braver than Brown. He drank a glass of Malathion saying, "*I am firmly convinced that the stuff is not bad for you*."[23] Reportedly, however, he threw up a half hour later.[24] At the other end of the spectrum, one of the local county supervisors, Zoe Lofgren, announced she would leave the area during the spraying.

Meanwhile, although spraying had been ok'd, the ground operation continued with roadblocks and inspections, requirements that homeowners strip fruit from backyard trees, and confiscations of crops. So local residents had both the aerial spraying and the on-the-ground inconvenience to endure. One grandmother, trying to strip her trees, fell off a ladder and broke three ribs. A local beekeeper, moving his hives out of harm's way, accidentally split one open and suffered numerous bites.

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[20]Quoted in Richard O'Reilly, "Brown Orders Aerial Spraying of Fruit Flies," *Los Angeles Times*, July 12, 1981.
[21]Attorney Alfred Baldwin quote in William Endicott and Tracy Wood, "Courts OK Spraying of Medfly Pest," *Los Angeles Times*, July 14, 1981.
[22]Quoted in op. cit.
[23]Quoted in Claudia Luther, "Official Drinks Glass of Malathion to Prove Safety," *Los Angeles Times*, July 15, 1981. Some enrollees in the Corps had gotten sick after stripping fruit from trees. Doctors said the cause was some other chemical, not Malathion.
[24]Anecdote reported by KQED reporter Guy Marzorati in "Jerry Brown: A Life in California Politics," Oral History Project, Bancroft Library, University of California-Berkeley, 2020, p. 355. Available at http://digitalassets.lib.berkeley.edu/roho/ucb/text/brown_jerry_2020.pdf.

Even within the Reagan administration, there appeared to be a split. The U.S. Department of Agriculture, of course, was pushing for spraying. It announced that any federal quarantine would be done on a county-by-county basis and not statewide after Brown reversed course. Within that Department, the debate was whether the concentration of Malathion being sprayed was strong enough. But when the state wanted to use a local military base to house the helicopters after the above-mentioned threats, Secretary of Defense Caspar Weinberger refused; he didn't want the military involved in a local political conflict. If Brown did the first flip-flop in July, Secretary Weinberger did the second. Only a few days after refusing the helicopters access to the base, he reversed and allowed base usage. Unlike Brown, however, Weinberger didn't have to worry about what voters might think.

**The Blame Game**

Brown's flip-flop on the Medfly in some ways resembled his earlier flip on Prop 13. Having reversed course, he now emphasized the threat the fly represented to California agriculture. "*As a result of the infestation," he said, "California faces an economic disaster of unprecedented proportions*…" He sent a telegram (yes, there were still telegrams back in 1981) to President Reagan. Brown warned that "*the increasing magnitude of the infestation constitutes a disaster which is now beyond the control of the services, personnel, equipment and facilities of the counties of Alameda, Santa Clara and San Mateo as well as the state of California*."[25] In essence, he was asking for federal money to support the eradication program. At the same time, Brown was trying to share the blame with the federal government which had pressured him into allowing aerial spraying.

The Reagan administration was not keen on taking the blame, however. A high official in the U.S. Department of Agriculture publicly opined that "*everything may be served better for a few days if the governor wouldn't make so many statements*" and indicated that Brown should have been working more closely with his own state agricultural authorities.[26] Brown replied that he was "*disappointed*" at being told to keep quiet and indicated that the phrase "*out of control*" in his telegram was used only to qualify for federal aid. He indicated that the state had spent $20 million on the eradication effort and that another $73 million might be needed.

Brown stated that he didn't want "*politics*" to become involved in the fight against the Medfly. But such involvement was inevitable. Barry Goldwater, Jr., son of the famous conservative U.S. senator and 1964 GOP presidential candidate, was part of the California Republican delegation in Congress. Goldwater, who was planning a run for the Republican nomination for the Senate in 1982, would have Jerry Brown as his opponent if he won the nomination. (He later lost the

[25]The two quotations are from Tracy Wood and Richard O'Reilly, "Brown Asks U.S. to Help on Medfly," *Los Angeles Times*, July 16, 1981.
[26]The quote is of Richard Lyng and is from Tracy Wood, "Brown Advised to Fight Medfly and Keep Quiet," *Los Angeles Times*, July 17, 1981.

nomination to Pete Wilson.) Goldwater announced that the "*sole blame*" for the infestation lay with Brown because he delayed aerial spraying.[27]

Incumbent GOP Senator Hayakawa, who had not yet dropped out of the race, was also critical, leading Brown to declare defensively that his initial actions were aimed at avoiding an "*ecological holocaust*."[28] But there was a problem. If spraying would cause an "ecological holocaust," why did Brown flip and allow it?

And it wasn't just Republicans doing the criticism. Democratic Assemblyman Leo McCarthy said he was considering opposing Brown's quest for the nomination in the upcoming primary because of Brown's mishandling of the Medfly. Based on the record so far, McCarthy said, Brown "*can't be counted on to make the tough decision early on and stick with it*."[29]

Fresno Mayor Daniel Whitehurst, another Democratic candidate running for the Senate seat, declared that Brown had a pattern of "*letting problems fester and showing indifference to matters of administration.*"[30] When Brown spoke at a meeting in Fresno in late July, local Democrats were notably absent. Brown mocked their absence as "*Medfly politics*."[31]

The criticism of Brown was not confined to politicians, residents, and farmers. Well-known physicist Edward Teller, often billed as the father of the U.S. H-bomb for his work during and after the Manhattan Project, got into the act. He penned an anti-Brown/pro-spraying op ed. In it he characterized Brown's initial opposition to aerial spraying as unscientific.[32]

Within the state Department of Food and Agriculture, there was also a blame game in progress. An entomologist declared he had been demoted for criticizing the Department's eradication program as inadequate. "*The fight is lost... It is so far gone that even if they throw everything at it, they're not going to eradicate (the Medfly)*."[33] The head of the eradication program naturally disagreed with that assessment. Meanwhile, the Department seemed to be having problems getting its full fleet of helicopters into the air. Weather problems, technical issues with the aircraft, and problems with a contractor were cited as excuses.

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[27]Quoted in Richard Bergholz, "Goldwater Blames Brown for 'Fiasco,'" *Los Angeles Times*, July 17, 1981.
[28]Quoted in "Brown Assails Medfly Critics," *Los Angeles Times*, July 21, 1981. Brown may have been attracted to the Senate race because the incumbent Hayakawa was seen as a weak candidate for reelection and was polling poorly.
[29]Quoted in Tracy Wood and Richard O'Reilly, "California May Sue to Bar Southern Blockade of Fruit," *Los Angeles Times*, July 18, 1981.
[30]Quoted in Kenneth Reich, "Two Potential Brown Opponents Gearing Up for Senate Race," *Los Angeles Times*, July 23, 1981. Whitehurst referred to both the Medfly affair and a scandal involving use of a state computer for political purposes.
[31]Quoted in Claudia Luther, "Officials, Unhappy About Medfly Issue, Snub Brown," *Los Angeles Times*, July 30, 1981.
[32]Edward Teller, "But the Governor Himself Is a Posturer, Not a Protector," *Los Angeles Times*, July 23, 1981. Teller at the time was a senior research fellow at the Hoover Institution at Stanford. He had earlier directed the Lawrence Livermore National Lab.
[33]Terrance M. Allen quoted in Douglas Shuit, "Medfly Battle 'Lost,' Scientist Says," *Los Angeles Times*, July 17, 1981.

The various controversies naturally attracted increased attention to the Medfly situation. Soon, it wasn't just Texas that was threatening to block shipments of California fruit. Alabama, Florida, Mississippi, and South Carolina were openly considering doing the same.

Brown declared the Texas threat to be illegal and immoral and simply the action of a competitor seeking to interfere with interstate commerce. He threatened a new lawsuit. "*They just don't have the right to do that*," he said.[34] Texas then softened its threat. It would not stop sealed shipments of California produce from the areas of infestation from passing through the state, but it would bar unloading of produce within Texas. Brown welcomed the clarification from Texas officials as a "*good move on their part*."[35] An attempt by Florida to impose its own blockade was overturned in a federal district court decision.

Brown's blame-shift to the Reagan administration also seemed to have some effect. The U.S. Department of Agriculture offered to split the cost of aerial spraying 50-50 with the state (but not the expense of efforts on the ground). Secretary of Agriculture John Block also supported California's legal position with regard to blockades. Only the federal government had jurisdiction over interstate commerce, he said. "*This is our jurisdiction, not theirs*."[36] On the other hand, President Reagan refused Brown's request for a federal disaster declaration which would have triggered more funding, a decision Brown complained had a "*political smell*."[37]

Still there were reports of trucks from California being stopped in southern states. California won a temporary restraining order in federal court to halt such blockades. But despite the legal victory, agricultural interests in California were not forgiving. One spokesperson said, "*Governor Brown has created an absolutely unnecessary climate of panic, first with the residents of Santa Clara County, then with the agricultural community, and now with 49 other states*."[38] Some growers began fumigating their produce to avoid conflicts with jurisdictions outside California.

**The Spread**

Because of his high-profile flip-flop, any developments with regard to the Medfly were inevitably tied to Brown. In particular, any time a new fly was found anywhere in California, the governor was open to the charge that had he not temporarily blocked aerial spraying, the problem would have been contained and eliminated. Although the Medfly problem was initially concentrated in the Bay Area, traps for flies had been set around the state including in southern

[34]Quoted in Tracy Wood and Richard O'Reilly, "California May Sue to Bar Southern Blockade of Fruit," *Los Angeles Times*, July 18, 1981.
[35]Quoted in Robert Welkos and Tracy Wood, "Texas Softens Blockade of State Produce," *Los Angeles Times*, July 19, 1981.
[36]Quoted in Bob Sector and Tracy Wood, "U.S. to Help Pay Medfly Cost," *Los Angeles Times*, July 20, 1981.
[37]Quoted in Ellen Hume and Jerry Belcher, "Brown's Medfly Plea Rejected," *Los Angeles Times*, July 23, 1981.
[38]Bruce Obblink, president of the California Table Grape Commission, quoted in Jerry Belcher and Claudia Luther, "Court Orders Texas to Lift Produce Ban," *Los Angeles Times*, July 21, 1981. (The Commission is a quasi-official entity allowed under state law and paid for by commercial growers as a marketing tool.)

California. By early August 1981, citizens were regularly calling the Medfly control authorities with suspicious fly sightings. Workers were employed to inspect the traps.

Brown's handling (or mishandling) of the situation became a staple of the news media. Brown conceded that his flip-flop had caused "*a fair amount of negative publicity*," but he indicated that he would not concede error. Eventually, people would be grateful that he had brought attention to "*chemicals in our lives.*"[39] Brown declared he was "*not going to sit back and be defensive about the issue*."[40] But realistically, there was little else he could do.

In any case, retrospective analysis suggested that Brown had initially been aloof from the Medfly issue and had relied on his chief of staff, Gray Davis, to follow the matter. Davis, in turn, passed the blame saying that state Food and Agriculture officials had not alerted him to the possibility that aerial spraying would be needed. Davis complained that "*I did not get a sense of urgency at all*" from them.[41] And the issue of health impacts of Malathion spraying continued to be debated.

Individual residents testified at a legislative hearing that they had experienced adverse health effects. But a state health official reported on a survey of residents in the sprayed area that found symptoms such as headaches *declined* after the spraying. It was noted (again) that if the Medflies weren't contained, California produce would need fumigation. Fumigation would require treatment with chemicals linked to cancer and birth defects, potentially an issue for workers doing the fumigating.[42] Meanwhile, Medflies were discovered in Florida and Florida's governor stated that "*the first suspicion is that (they) came from California*."[43] California officials pointed to infestations endemic on Caribbean Islands as a more likely source of Florida's problem.

But apart from out-of-state developments, the Medfly was showing signs of spreading outside the original quarantine area within California. A fly was trapped eight miles from the quarantine zone, then twelve miles. The area of the zone was expanded. A fly was discovered in Santa Cruz County. Another in Livermore in Alameda County and aerial spraying began there. Jerry Scribner, the director of the state's anti-Medfly effort, conceded that "*we've completely underestimated the fly's capability...*"[44] By mid-August, fear was growing that the infestation could spread into the Central Valley. Southern California at first seemed to be spared, although there, officials were concerned with a find of Oriental fruit flies, a different species.

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[39]Richard Bergholz, "Brown Maps Attack on President," *Los Angeles Times*, August 8, 1981.
[40]Richard Bergholz, "Brown Hopes to Head Party's Governors," *Los Angeles Times*, August 8, 1981.
[41]Quoted in Tracy Wood, "Brown's Handling of the Medfly Case: The Politics of Judging a Scientific Debate," *Los Angeles Times*, August 3, 1981.
[42]"Medfly Spray Health Survey Data a Surprise," *Los Angeles Times*, August 5, 1981.
[43]Governor Bob Graham quoted in Ted Thackery, Jr., "3 Medflies Discovered in Florida Trap," *Los Angeles Times*, August 6, 1981.
[44]Tracy Wood, "Medfly Moves Closer to Central Valley Farmlands," *Los Angeles Times*, August 11, 1981.

With a little more than a year to go before gubernatorial and Senate elections, Republicans continued to tie Brown to the Medfly problem. One GOP assemblyman compared Brown's handling of the Medfly to former-President Johnson's mishandling of the Vietnam War; "*reactive escalation*," he called it.[45] And there was an escalation in reaction to each new fly. By mid-August, Director Scribner began to muse that helicopter might not be enough and that airplanes might be necessary. Use of planes would require daytime flights, unlike the nighttime flights of the helicopters. And during the day, residents would be out and about and thus targets for spraying.

In any event, spraying was soon expanded to the San Joaquin Valley (Central Valley), considered the heartland of California agriculture. As one local official noted, "*once the Medfly is in the Central Valley, there are no barriers. It can move up and down the Valley*."[46] Flies were indeed found in the Valley. Brown insisted that the state was "*doing everything humanly and technologically possible*" in response.[47] Officials expressed optimism that the infestation had been caught early enough to remove it. It was "*no big deal*," said Scribner, and just "*a little area*."[48]

Farmers, however, were concerned that their capacity to fumigate produce to avoid embargoes was limited. The quarantine area was extended into the Valley. And there were ripple effects in areas of California where no flies had been found because there were still suspicions about any produce from the state. A Merced County peach grower, for example, complained that although no flies had been found in peach orchards in Merced County, "*buyers… are worried and the chains are skirting away from California peaches.*" Buyer fear was leading to a substantial drop in prices.[49]

Although there was no harm to human health in consuming infected fruit, all the negative publicity scared consumers. Farmers blamed Brown for the Medfly affair. A Central Valley café posted a sign reading "*Eradicate Brown and Keep the Medfly*."[50]

California Republicans called for a federal takeover of the eradication program, but the feds decided in mid-August to leave the effort in the hands of the state. The political logic was clear. Why not let Brown continue to be the villain? Let him take the blame. GOP leaders in the state assembly even called for Brown to be impeached, something that was not going to happen.[51]

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[45]Gilbert Marguth, Jr. quoted in Carl Ingram and Tracy Wood, "State Weighs Expansion of War on Medfly," *Los Angeles Times*, August 13, 1981.
[46]Stanislaus County Supervisor Roland Starn quoted in Ronald B. Taylor, "Irate Farmers Scrambling to Avert Chaos," *Los Angeles Times*, August 15, 1981.
[47]Quoted in Tracy Wood, "San Joaquin Valley Hit by Medfly Infestation," *Los Angeles Times*, August 15, 1981.
[48]Quoted in Tracy Wood, "Quarantine Extended to Stanislaus County Area," *Los Angeles Times*, August 16, 1981.
[49]James Wood quoted in Ronald B. Taylor, "Peach Market Hurt by Medfly Concern," *Los Angeles Times*, August 16, 1981.
[50]Reported in Claudia Luther, "Governor Rates With Farmers – as Pest," *Los Angeles Times*, August 16, 1981.
[51]At the time, the Lieutenant Governor who would take over if Brown were impeached and removed was Mike Curb, a Republican. Legislative Democrats were unlikely to turn the governorship to Curb, who was a possible

For his part, Brown was now blaming the U.S. Department of Agriculture for the Medfly problem. His dad, former Governor Pat Brown, opined that in view of opinion poll data, while he hoped son Jerry could make a political "*comeback, … anybody would be crazy not to say that Jerry's been wounded*."[52] Los Angeles Mayor Tom Bradley, who eventually became the (losing) Democratic candidate to succeed Brown as governor said he would have been faster than Brown in undertaking aerial spraying.[53]

Bradley, of course, came from California's biggest urban area where agricultural interests played no part in his mayoral and – earlier city council – career. Although Bradley now needed rural support, urban Democrats from his home base were not especially interested in the Medfly issue, except for aerial spraying. Governor Brown hosted a local radio program in the LA area and fielded questions about the eradication program. But in late August, the issue became more pressing to southern California residents.

Medflies were found in Baldwin Park, a city in Los Angeles County. Aerial spraying was announced for Baldwin Park, Irwindale, and West Covina. By that point, Japan was now insisting on an embargo of all non-fumigated fruit from California. Spraying was OK'd for Orange County since Medflies were unlikely to respect county lines. Farmers in San Diego County started to worry.

There were fears that apart from agriculture, the logistics industry related to the Ports of LA and Long Beach which handled export of California produce could be adversely affected. The spraying area in LA County kept expanding. As had occurred to the north, officials kept issuing optimistic statements that the problem was localized, would soon be controlled, and that aerial spraying was not harmful to residents. Nonetheless, residents noted that there was an unpleasant smell after the spraying.

The Medfly issue dominated statewide news. Two individuals were arrested for making threats to shoot down the helicopters. Texas sued the federal government demanding the right to embargo California produce. Japan asked the U.S. to prevent shipments of various California fruits to that country, although it agreed to limit the ban just to areas of known infestation. The state's budget situation continued to worsen while the estimated cost of the eradication effort was estimated to be somewhere between $70 million and $100 million. It was announced that airplane spraying would replace helicopter spraying in some areas to see if the public would resist. New flies were found in the Bay Area city of Newark. Spraying was extended to San Benito County.

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candidate for governor in the 1982 elections. Although dealing with the Medfly was clearly in the interest of GOP agricultural constituents, Republicans in the state assembly boycotted a vote on a bill to fund the Medfly program, hoping to pressure Democrats on the unrelated topic of redistricting after the 1980 Census of Population.

[52]Quoted in Kenneth Reich, "Brown's Popularity at One of Lowest Points, Poll Shows," *Los Angeles Times*, August 21, 1981.

[53]Bill Boyarsky, "Bradley Critical of Brown Over Medfly Delays," *Los Angeles Times*, August 24, 1981.

**Not to Worry?**

By the end of August, Brown had become a rather blasé Medfly fighter despite the expansion of the aerial spraying which he had initially opposed. At a news conference in El Monte, he advised people to stop obsessing about the Medfly. "*If there are more (flies), don't worry about it. The Medfly people will go out there and get those flies*," Brown said.[54]

But there were things to worry about. New flies kept appearing in Baldwin Park where the southern California Medfly problem began and where spraying had continued. A farmers' market in the area had to be shut down. Homeowners kept being annoyed by fruit stripping operations in backyards. It appeared that there had been another problem of supposedly-sterile Peruvian flies that turned out to be fertile.

Reports of depressed produce prices continued. Japan was unwilling to relax its embargo unless produced was fumigated. But fumigation involved a chemical known to be a carcinogen and some longshore workers refused to handle it. Gunshots were fired at a helicopter during a spraying. Controversy continued over the health effects of Malathion.

Just as new flies were found in southern California, they were being found in the north. A spray plane got lost in a fog and sprayed an area outside the designated zone. The state budget situation continued to worsen, even as more money had to be spent on Medfly eradication. Concerns arose that Labor Day motorists would carry infected fruit outside the quarantine area.

Roadblocks were set up to find the forbidden fruit, but many cars were waved through as inspectors became overloaded. In one mishap, roadside Medfly inspectors were sickened by fumes emanating from a leak on a tanker truck. The ongoing conflict with Texas continued. The Texas agricultural commissioner referred to Brown as "*that moonbeam, that idiot out there they've got for a governor*."[55]

Officials would make optimistic statements, but then be contradicted by facts on the ground. One official declared that "*the inexorable march of the fly has run its course"* and that "*things look real good.*" But at virtually the same time, new Medflies were found in the Bay Area in what was described as a "*satellite infestation*."[56] Medflies were discovered around the Los Angeles Airport. They ultimately turned out to be sterile flies that had escaped from a shipment as part of the Medfly eradication program.

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[54]Quoted in Eric Malnic, "Stop Worrying About Medfly, Brown Advises," *Los Angeles Times*, August 31, 1981.
[55]Quoted in "Texas Farm Official Calls Brown 'Idiot,'" *Los Angeles Times*, September 8, 1981. Brown had acquired the unflattering appellation "Governor Moonbeam" from Mike Royko, a well-known Chicago newspaper columnist. Some reports attribute Royko's use of Moonbeam to Brown's then-girlfriend, pop singer Linda Ronstadt, who called him "Moonbeam" affectionately.

[56]Jerry Scribner quoted in Robert A. Jones, "Medfly War: Commanders Differ on Its Progress," *Los Angeles Times*, September 10, 1981.

Even though Brown was not planning to run for governor, the Medfly issue was entangled in the upcoming gubernatorial contest. Attorney General George Deukmejian had defended California's anti-Medfly program in a brief filed with the U.S. Supreme Court aimed at preventing other states from embargoing state produce. Brown taunted Deukmejian – a Republican candidate for governor (and the eventual victor) – of trying to "*wiggle out*" of statements in the brief supportive of the (Brown) program.[57] Eventually, however, Brown implicitly admitted a problem with his attempt to delay aerial spraying. He formed a taskforce to study pest control in the future and stated that in the future "*we won't repeat the slow beginning*…"[58]

**The Medfly Issue Fades**

With all the publicity it was receiving, the Medfly became a part of popular culture. The UCLA Marching Band formed itself into a Medfly at a football game. A board game was developed similar to Monopoly in which Brown himself appeared with a Pinocchio nose. Children wore Medfly costumes for Halloween. And the Medfly began to appear as an analogy in news items that were completely unrelated. Busing of school children was a highly controversial issue in the 1970s and early 1980s, for example. In an article on use of busing for racial balance, the San Fernando Valley was described as a place "*where busing advocates are as welcome as Medflies*."[59] Everyone back then would have understood the reference.

As noted earlier, just as there was controversy about the health effects of Malathion, so, too, there was controversy about ethylene dibromide which was used for fumigation. Some supermarket chains refused to sell fumigated produce because they would have to monitor exposure level to employees. Growers sued Cal-OSHA, the state agency that enforces workplace safety standards. The Medfly may have been bad for farmers, but it was good for lawyers.

Eradication officials had hoped that autumn would see a diminution in the Medfly problem, given all the spraying and other efforts. But more flies were discovered in the San Gabriel Valley and more areas were added into the aerial spray zones in the L.A. area. California was unable to get the U.S. Supreme Court immediately to bar other states from banning California produce. However, most states had backed off from strict embargoes by the time the Court declined to involve itself. In addition, there were moves in Congress to give the federal government greater authority over the anti-Medfly program. The state's program by that time had suffered a fatality when an aerial spraying helicopter crashed, killing the pilot, and injuring four others.

Nonetheless, despite the problems, time was on the side of the eradicators in one respect as the fall progressed. When temperatures drop, the Medflies' reproductive cycle slows. The flies

[57]Quoted in William Endicott, "Deukmejian 'Wiggling' on Medfly Issue," *Los Angeles Times*, September 24, 1981.
[58]Quoted in William Endicott, "Brown Forms Pest-Control Task Force," *Los Angeles Times*, October 9, 1981.
[59]Mike Littwin, "Closing the Books on L.A. Schools," *Los Angeles Times*, October 8, 1981.

aren't necessarily gone permanently. But they aren't flying around, and aerial spraying becomes less effective on those that remain.

Brown – in a move typical of his unusual approach to administrative hires – made B.T. Collins, the man who drank Malathion in an effort to show it was harmless, his chief of staff, succeeding Gray Davis. Collins was a Republican who openly told reporters that he thought Brown was a poor governor who was "*out in Uranus half the time*," a statement Brown dismissed as Collins' "*Irish humor*."[60] Collins had a pragmatic approach to governing focused on getting things done; he was the type of chief of staff who would not let his boss flip-flop again on whatever challenges the Medfly problem might bring.

Polling by the LA Times in November 1981 suggested the Medfly issue had receded as a matter of voter attention. Brown was blamed by those polled for the Medfly roughly equally with the federal government and almost a fourth thought that really no one was to blame.[61] Aerial spraying in LA County was scheduled to end by December, it was announced, although, as it turned out, spraying continued in the San Gabriel Valley until April 1982. There was a brief brouhaha when Brown's new Medfly task force met behind closed doors, but it was quickly announced that future sessions would be public. In any event, the ongoing California budget problem was attracting more attention than the fading fly.

Republicans in the legislature moved to link the Medfly to the deteriorating budget and asked for an audit of spending on the eradication program. The audit resulted in a finding that the full cost of the program couldn't be known because spending had been spread out among various departments. An estimate of $100 million was made and the auditor faulted the state's accounting system which had inhibited requests for federal support.

And other developments kept it in the news at a low level. China, which was still in an early stage of its rise as an economic power, banned imports of California produce. Japan – a much more important market at the time – came under increasing pressure to relax its restrictions on California produce, in part due to threats of a counter-boycott of Japanese products in the U.S. Most Japanese restrictions were lifted in May 1982.

**The End That Never Came**

"*The invasion is complete and it's irreversible*."

James Carey, Professor of Entomology, UC-Davis[62]

Agricultural interests – still angry over the fly – sought to defeat Brown in his race for the U.S. Senate and continued to raise the Medfly issue as part of those efforts. And, in the end, Brown

[60]Both quoted in Bella Stumbo, "B.T. Collins: A Cannon on the Loose," *Los Angeles Times*, November 1, 1981. Gray Davis, the previous chief of staff, won election to the state assembly, then state controller, and finally governor (until recalled and replaced by Arnold Schwarzenegger).
[61]William Endicott, "Brown, Goldwater Clear Favorites in Senate Races," *Los Angeles Times*, November 8, 1981.
[62]Quoted in Monte Morin, "Medfly entrenched in California, study finds," *Los Angeles Times*, August 6, 2013.

was defeated – although such matters as the state budget crisis and public weariness with his oddball style of governance had more to do with the result than the fly. The Medfly became a background symbol of indecision and lack of competence.

Brown's career and the Medfly ultimately followed similar paths of disappearance and reappearance. When he was defeated in his Senate race in the 1982 election, Brown disappeared for years from California politics and public consciousness. He reappeared in the late 1980s, elected as chair of the state Democratic Party. But in that role, Brown oversaw the defeat of Democratic gubernatorial candidate Dianne Feinstein by Pete Wilson, the man who had defeated him for the Senate back in 1982.

Brown disappeared again after a 1992 failed primary run for the Democratic nomination for president. Brown reappeared subsequently as mayor of Oakland, then as state attorney general, and finally – in the election of 2010 – as governor again (for two more terms). In an interview with biographer Jim Newton toward the end of his final term, Brown looked back at the Medfly affair and declared, "*I should have sprayed immediately*."[63] When his term ended, he retired to his family ranch but reappeared from time to time to promote Big Ideas such as the need to deal with climate change and the threat of nuclear war.

In Brown's second iteration as governor, there was no counterpart to the Medfly affair and its flip-flopping. Brown might change course in strategy in the second iteration, but he remained focused. For example, he came into office in 2011 with the main goal of dealing with the state's budget crisis. He tried during his first six months to put a tax proposition on the ballot through the legislature, a process that required a few Republican votes. When it became apparent that there would be no GOP votes, he went the initiative route to a ballot proposition in the following year. And he persuaded voters to pass it.

Brown could be inconsistent in his second iteration, but mainly when it suited him. When he wanted to push responsibility for some task down to local governments, Brown cited the principle of *subsidiarity.* Subsidiarity was a concept from his Catholic training involving centering responsibility at the lowest possible level. But locally-run redevelopment agencies, which he saw as indirectly affecting the state budget adversely, were ultimately abolished under Brown.

Some saw Brown's greater focus during his second iteration as the product of age and experience. Some saw it as the influence of his wife, Anne Gust Brown, a former corporate executive he had married in 2005. In short, Brown remained a different kind of politician in his second iteration, but the Moonbeam epithet was no longer applied to him. No one declared Brown to be "*out in Uranus*."

The Medfly, like Brown, staged disappearances and reappearances, although the periodic reappearances were never as dramatic as what occurred in 1981. There were Medfly finds and

[63]Jim Newton, *Man of Tomorrow: The Relentless Life of Jerry Brown* (New York: Little Brown and Co., 2020), p. 218.

eradication programs in the summer of 1982. And thereafter, and as late as 2019 (at this writing), there would be periodic local finds and eradication programs. It is now recognized by experts that permanent extermination is not possible. All that can be done is to watch for new flies and then get rid of them.

Medflies are endemic in various parts of the world and one way or another, even if temporarily eradicated in the state, they will find their way back to California. Indeed, they will likely be in California long after Jerry Brown. They will likely be in California long after the author. And, dear reader, they will even likely be in California long after you.

# Chapter 2

# Policy Principles to Address Plastic Waste and the Throwaway Economy in California

**Daniel Coffee**

Daniel Coffee authored this chapter based on an Applied Policy Project (APP) written by Coffee, Lee Milani (who produced the figures for this chapter), Maggie Faigen, and Candice Richardson as part of the Master of Public Policy Program (MPP) at the UCLA Luskin School of Public Affairs. Faigen and Richardson reviewed the chapter. Coffee expresses special thanks to all the MPP team members.

The first plastic—a cellulose-based substance developed in 1869 by John Wesley Hyatt—was hailed as an environmental boon that would allow synthetic materials to be substituted for products like horn and ivory.[1] Unfortunately, the fossil-fuel based polymers that succeeded this material have become one of the world's most plentiful and ubiquitous sources of pollution. Plastic detritus now contaminates virtually every part of the globe, from the Arctic Circle to Antarctica, to the oceans and the atmosphere, and even to our own bodies.[2] Were it not for the failure of the global community to address climate change in the last half-century adequately, plastic pollution could very well have been the world's foremost environmental concern in 2020.

In the last few decades, over one hundred and thirty Californian municipalities have taken action to reduce plastic waste. However, these solutions are constrained by their narrow geographic scope and the challenges of a complex, highly interconnected economy. Addressing the plastic waste crisis will require ambitious action on the State and Federal levels. The disheartening lack of such action is well-illustrated by the recent failure of the Democratic-dominated California legislature to pass the California Circular Economy and Plastic Pollution Reduction Act in the 2020 session. There has also been a lack of action on the Break Free From Plastic Pollution Act of 2020 since its introduction in the U.S. Congress in February 2020. Although California's AB 793 was signed into law in late September 2020, this act focuses predominantly on tightening standards for recycled content in plastic products. That strategy delivers short-term benefits, but it fails to discourage plastic production and the throwaway consumerism that drives the market for single-use plastics over the long term.[3]

In this chapter we begin by providing a brief overview of plastics and the myriad impacts generated through their production and use. We then discuss the practice of recycling and its limitations as a viable avenue for reducing plastic waste. Finally, we discuss the pros and cons of potential alternatives to single-use plastics and outline some key principles for future California policy action.

**What are Plastics?**

Plastics encompass an array of synthetic polymers that are, by and large, derived from petroleum. Most of the plastics consumers encounter day to day are thermoplastics—substances that can be heated and reshaped multiple times—as opposed to thermosets, which can only produce one final form. The versatility offered by thermoplastic resins, combined with their durability and low cost, make them attractive options across a multitude of consumer goods markets. These traits are particularly useful for producing large quantities of cheap, disposable products meant to be discarded after a single use.

**Table 1: Types of plastic resins.**

| RIC | RESIN TYPE | PROPERTIES | USES |
|---|---|---|---|
| PET | **Polyethylene Terephtalate** | Lightweight; strong; resistant to bacteria; can be clear or color-matched | Water bottles; soda bottles; jars for spreads/jams; clamshells |
| HDPE | **High Density Polyethylene** | Inexpensive; easy to form; strong; durable; resistant to chemicals and moisture; permeable to gas | Milk bottles; juice bottles; detergent/shampoo bottles; plastic grocery and retail bags |
| PVC | **Polyvinyl Chloride** | (Rigid) PVC: strong; stiff; non-corrosive<br>(Flexible) PVC: softened with plasticizers | (Rigid) PVC: construction applications<br>(Flexible) PVC: cling wrap; medical packaging; cosmetics packaging |
| LDPE | **Low Density Polyethylene** | Flexible; soft; moisture-resistant; chemical-resistant | Plastic film; trash bags; dry cleaning bags; produce bags<br>(Rigid) LDPE: lids; caps; toy products |
| PP | **Polypropylene** | Heat and moisture resistant; stiff | Yogurt containers; ice cream containers; microwavable food containers; automotive parts; carpeting |
| PS | **Polystyrene** | (PS): hard; brittle; low heat resistance; inexpensive<br>(EPS): lightweight; thermal insulation; impact protection | (PS): disposable cutlery; smoke detector cases<br>(EPS): clamshells; cups; plates; trays; egg cartons; coolers; cushioning |
| OTHER | **Other** | Mixed resins: acrylic, nylon; bioplastics (PLA) | Bottles; multi-layer packaging |

Existing plastics are categorized by a resin code, 1-7, which is typically printed on the product (see Table 1). Two of these—polyethylene teraphthalate (PET/PETE, Code 1) and high-density polyethylene (HDPE, Code 2)—are worth highlighting. These two resins are the most commonly used in the manufacture of single-use plastic items; beverage bottles and cups, throwaway food containers, and packaging for goods like electronics are typically made of PET, while everyday items like laundry detergent are sold in HDPE containers. As will be discussed further below, these two plastics are also the only resins that are consistently recycled and enjoy robust markets for recovered material.

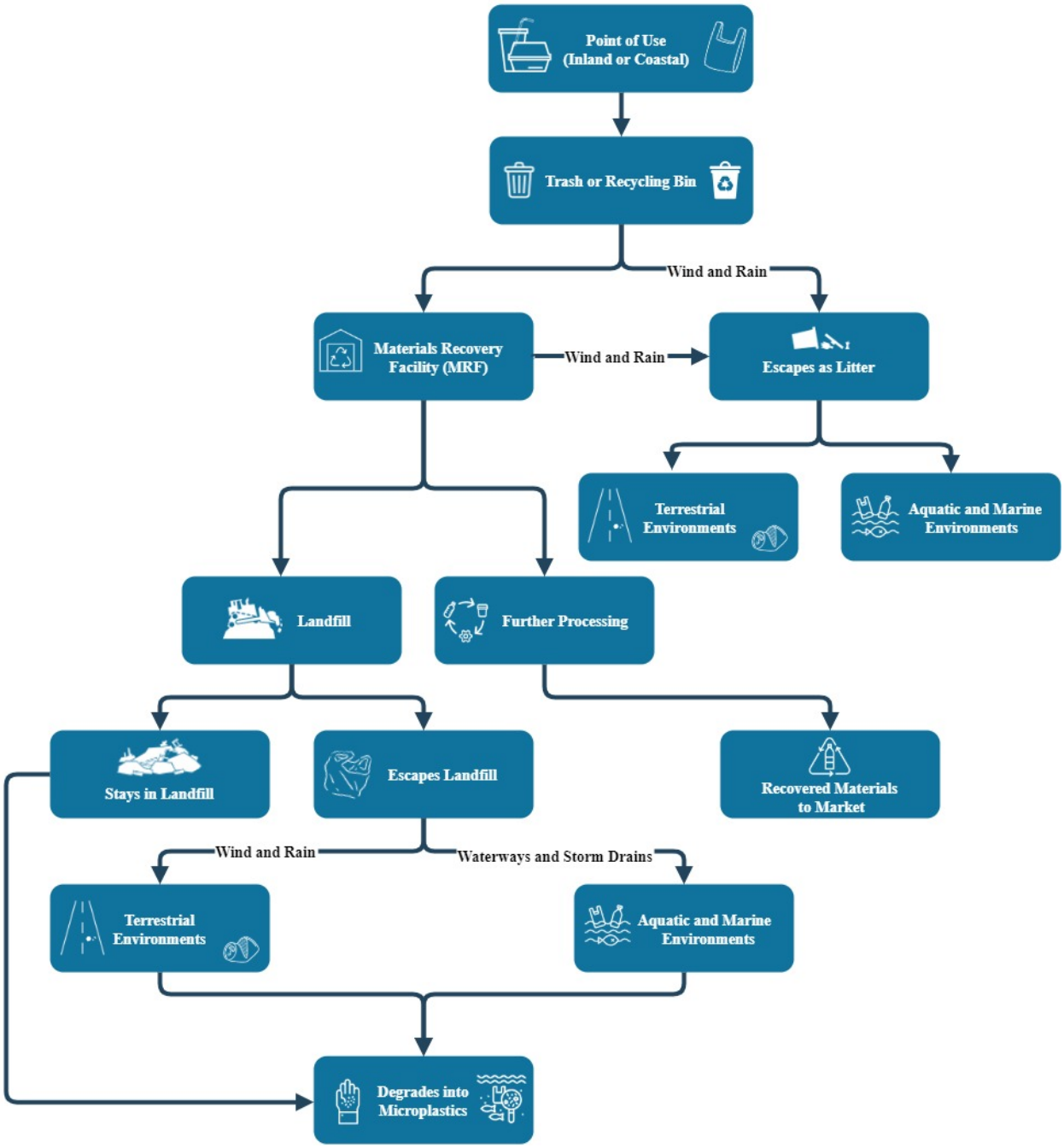
**Impacts of Plastics**

The ubiquity of plastics in everyday consumption has generated a multitude of harms across various sectors. While interconnected, we categorize these impacts into four general areas: ecological (especially to marine and aquatic ecosystems), economic and community, energy (including climate-related impacts), and human health. Underpinning plastics' negative effects in all these areas is the sheer volume of material being produced and consumed. The negative impacts are driven by an almost-entirely linear economic model wherein plastics are produced from nonrenewable fossil fuel feedstocks that are used to manufacture products with short lifespans, and then discarded (and rarely recycled).

*Ecological Impacts*

All streams lead to the ocean, and they carry with them the plastic detritus people generate every day. Even when discarded far inland, plastic waste material—especially small, lightweight disposable items such as bags and food containers—can be blown by wind or washed by rainfall into waterways or storm drainage systems, eventually carrying these items to the sea (Figure 1). Once there, the properties of a water environment—including the ability for even large plastic items to be suspended in the water column and for various processes to degrade such items into tiny fragments, called microplastics—make the negative effects of plastic pollution particularly acute. Thus, the ecological effects of plastic pollution are most pronounced in aquatic and marine environments, despite only 5% of global plastic production entering the ocean versus 14% remaining on land.[4] While 5% may seem low, that translates to 11 million tons of plastic entering the oceans each year.[5]

**Figure 1**: **Disposal tracks for plastic waste. There are many mechanisms by which plastic waste can enter the natural environment.**



Additional harms are possible once the fragmenting process produces large amounts of microplastics, which are five mm or less in size. These can be ingested by a wide variety of wildlife, causing internal injury, starvation, and death.[6] Chemicals from these plastics may also leach into the water, exposing both humans and wildlife to potentially harmful substances.[7]

It is worth noting that many of these same risks exist in a terrestrial setting as well. However, the characteristics of land environments make the environmental hazard posed by plastics less potent, despite the larger portion of plastic waste that is deposited there.

*Economic and Community Impacts*

The plastics industry is estimated to impose $350 billion in negative externalities on the global community each year.[8] In California, the clearest form of these costs is the sizeable fiscal burden borne by the state's residents. In terms of direct costs, Californians have collectively spent nearly $420 million annually on beach cleanup and waste prevention efforts in recent years, according to the California legislature. As noted, a large proportion of litter consists of plastic items. Many California municipalities also incur additional costs for street sweeping and land litter cleanup, which can be millions of dollars annually in larger communities.

Additionally, plastic waste imposes indirect costs through ecosystem degradation and damage to tourism industries. In 2019, researchers estimated that each ton of plastic results in environmental damages equivalent to $33,000.[9] Regarding tourism—a sector of importance to California—litter density discourages tourism-related economic activity, harming local business. Polluted beaches also incentivize local or frequent visitors to travel greater distances to alternate locations. In Orange County alone, the National Oceanic and Atmospheric Administration estimated that a 25% reduction in marine litter would result in nearly $32 million dollars in saved travel time.[10]

*Energy Impacts*

Plastics are an inherent source of greenhouse gas emissions, a major environmental concern for California, as they are dependent on nonrenewable, petroleum-derived inputs. In addition to the impacts inherent to the extraction and refining of the necessary raw materials to create plastics, the manufacturing process itself also consumes large amounts of energy. Overall, of the estimated $350 billion global external cost of plastics, the largest component categories are carbon emissions—five tons of carbon per ton of plastic produced—and air pollution.[11]

Exact figures are difficult to come by, but recent U.S. Energy Information Administration estimates peg plastic production as accounting for 4% of global oil production.[12] Prior to the COVID-19 pandemic, this portion was estimated to reach 20% by 2050.[13] However, the global public health crisis has caused massive shocks to demand for fossil fuels, resulting in significant

declines in demand for oil and other nonrenewable energy resources.[14] This drop may mean that 2019 was, in fact, the year of peak oil consumption—a positive data point regarding efforts to curb worldwide emissions.

In response, the fossil fuel industry is planning an even greater expansion of plastic production to compensate.[15] Such an expansion—though it has been criticized as highly unrealistic—would result in the plastics industry monopolizing nearly a fifth of the *global* carbon budget in 2040 under a plan for 1.5 degrees Celsius of global warming.[16] This scenario would be antithetical to California's climate goals, as well as those of the global community.

*Health Impacts*

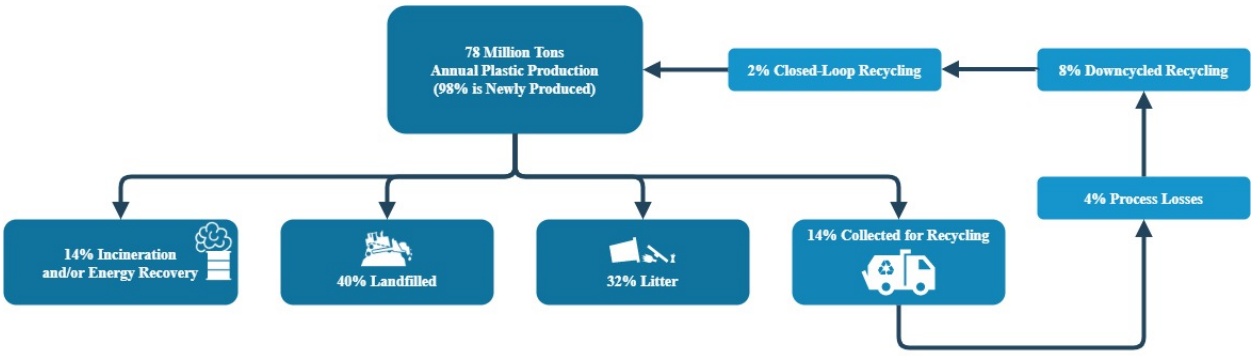
Negative human health impacts from plastics have been most thoroughly studied in the case of styrene, a precursor chemical used to manufacture polystyrene plastic. Individuals commonly working with styrene have been found to suffer from a variety of health conditions, most notably increased risk of several different types of cancers.[17] There is also concern that these risks could extend, to a lesser extent, to consumers that utilize polystyrene or expanded polystyrene food service ware products, as styrene can contaminate exposed food at high temperatures.[18] Along with styrene, several other chemicals used in plastic goods—notably BPA and DEHP—carry potential health risks as endocrine disruptors.[19] However, the risk from these substances is muted by their decreasing usage rates.

Of increasing concern are the as-yet-unknown impacts of constant plastic exposure via ingestion and inhalation of microplastic particles. Recent research published by the World Wildlife Fund suggests that humans could be consuming about five grams of plastic—approximately the same mass as a credit card—each week.[20] The primary source of this plastic ingestion is drinking water; in the United States, 94.4% of drinking water was found to contain plastic fibers.[21] Unfortunately, epidemiological study of these impacts is in its nascent stages, meaning that the long-term health consequences of continued plastic exposure are still uncertain.

**Recyclability of Plastics**

On the margin and in the short-term, recycling is an environmentally beneficial practice for dealing with plastic waste.[22] However, this practice is only in comparison to other, more wasteful and polluting options like burning or landfilling. When considering aggregate impacts, recycling—as it is currently practiced—is incapable of addressing the global plastic waste crisis. Its shortcomings are driven by fundamental issues with the process itself and practical and economic limitations regarding the ability to recover and utilize particular types of plastic resins and products. The result is that only 10% of plastic is currently recycled, while 14% is incinerated and 40% is landfilled (Figure 2).[23]

**Figure 2: End-of-life destinations for plastic waste.**




*Only a small portion of plastic is recycled each year, the majority of this into downcycled uses. Based on work appearing in The New Plastics Economy published in 2017 by Ellen MacArthur Foundation and New Plastics Economy, accessible at [https://www.ellenmacarthurfoundation.org/assets/downloads/publications/NPEC-Hybrid_English_22-11-17_Digital.pdf](https://www.ellenmacarthurfoundation.org/assets/downloads/publications/NPEC-Hybrid_English_22-11-17_Digital.pdf).*

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THE ISSUE OF DOWNCYCLING

Current recycling practices involve physically breaking down recovered plastic material—typically by shredding or grinding—followed by melting the material into pellets which can be used as precursors for new products.[24] However, this process shortens the polymer chains within the plastics and invariably suffers from contamination, degrading the quality of the resulting material and limiting the applications for recycled plastic. The result is that recycled plastic is generally incapable of being utilized to produce goods of equal or better quality than the original item—a phenomenon termed "downcycling."

There are two important implications of downcycling regarding the role of recycling in alleviating the impacts of plastic production and usage:

1. Goods made with recycled plastic still depend on continued production of new, virgin plastic. As a result, recycling merely delays new plastic production and, in the long-term, is not capable of eliminating the negative impacts of said production.[25]

2. Recycled plastic does not displace newly produced plastic on a one-to-one basis, contrary to the assumption of many previous assessments of recycling benefits.[26]

Therefore, even in a perfect scenario where 100% of disposable plastic items were recovered and recycled, there would still be sizeable harms done by plastics via production-related effects. Moreover, the degradation that occurs each time plastic is recycled imposes a finite lifetime on a given piece of material; eventually, its polymers will be shortened to the point

where the plastic is essentially unusable and must be disposed of. However, there are still short-term benefits to recycling for California jurisdictions to consider, given that aforementioned alternative disposal options for plastic waste—such as incineration and landfilling—are worse in terms of overall impacts.[27]

### Other Recycling Limitations: Economics, Uses, and Consumer Behavior

In addition to the fundamental issue of downcycling and the challenges it presents, recycling is further limited in its utility by a number of other factors:

#### *Economics*

Recycling plastic is expensive. Separating useable material from the slew of other wastes with which it is mixed takes significant investments of labor and capital, and results in a product that is worse in terms of performance than virgin material. As recent investigative reporting has revealed, the plastics industry has been aware of this for decades, and chose to promote plastic recycling as a public relations strategy despite the fact that there was "serious doubt that it can ever be made viable on an economic basis."[28]

For decades, the U.S. recycling industry was propped up by the ability to ship large amounts of recovered material overseas, often through California seaports and especially to China and other East Asian countries. Much of this plastic was not, in fact, being recycled, and was instead contributing to an ongoing pollution crisis that went relatively unnoticed by everyday Americans. With the advent of China's stringent National Sword policy in 2018—which tightened regulations regarding recovered plastic that could be shipped into the country—this outlet was unexpectedly closed, upending global recycling markets. Currently, only PET (Code 1) plastic bottles and HDPE (Code 2) (and, in some cases, Polypropylene, Code 5) plastics are profitable for material recovery operators to isolate and sell in California. All other types are usually landfilled.

#### *Uses*

Compounding issues related to material, many plastic items are difficult to recycle, even when manufactured from otherwise economically viable material such as PET or HDPE. The two most impactful factors in this respect are the small size of many plastic products (e.g., disposable utensils, straws, and packaging) and particular product uses that often result in contamination of plastic material.

Generally, the smaller a plastic item, the less viable it is for recovery and recycling. This fact is primarily due to two driving factors. Firstly, there are practical limitations of recovery processes that make it difficult to isolate small, lightweight plastic items. Automated equipment such as optical sorters and robotics are not effective at separating such items, nor is it realistic to

perform such processes with human laborers. Secondly, small items containing miniscule amounts of material offer less value per unit of effort expended in their recovery. Thus, even if a facility had the means to install equipment or hire additional employees such that they had the capacity to consistently recover even small plastic items, the costs of such upgrades would almost certainly outweigh the relatively meager amount of additional revenue generated.

With respect to contamination, plastic products that become coated in non-plastic residues in the course of their use are difficult to recycle. This problem is especially likely to be encountered in the case of single-use plastic food service-ware items.

The first challenge comes with initially recognizing and separating the product from other waste. Coatings of grease, oil, or other contaminants can prevent automated equipment like optical sorters—currently the most efficient recovery option on the market—from recognizing the item as a targeted plastic type. The scanner will let the item pass through instead of separating it for recycling, most likely condemning it to a landfill. Furthermore, even when such an item is successfully separated, foreign residues damage the value and integrity of the recovered material. High levels of contamination can also render entire bales of recovered plastic worthless; since the enactment of National Sword, acceptable contamination levels have plunged worldwide. A bale of recovered material that is tested and found to exceed these new, stricter standards will often be discarded in its entirety.

*Consumer Behavior*

The concerns with recycling presented above are only applicable when plastic enters the intended waste stream. Unfortunately, a sizeable fraction of plastic packaging—32%—is neither recovered for recycling nor landfilled.[29] Instead, it escapes the existing waste collection infrastructure through illegal dumping, littering, or other mismanagement, with the vast majority (87%) entering nature as plastic pollution.[30]

While the existing waste management infrastructure bears responsibility for some of this mismanagement, the impact of consumer behavior cannot be ignored. Consumer-facing information (e.g., recycling labels) is often confusing and does not adequately inform users as to what constitutes proper disposal of a plastic product. Additionally, consumption of on-the-go food and beverages has become ubiquitous, resulting in disproportionate representation of plastic food service-ware items in Californian coastal litter inventories. Rather than enable this deleterious consumption by simply providing greater access to disposal infrastructure, California policy makers should look for opportunities to shift consumer demand away from single-use items and phase out the throwaway economy (discussed further in “Policy Principles” below).

**Alternatives to Plastic**

Having identified the key reasons for concern related to the ongoing plastic pollution crisis and the major underlying factors that undermine the effectiveness of recycling as a means of addressing plastic pollution, we must consider what possible substitutes exist for plastic. While an overall reduction in the amount of packaging and single-use products Californians consume must be a priority in any serious policy strategy (discussed further below), there will be a need for short-term and some long-term alternatives. The benefits and drawbacks of these alternatives must be considered carefully and holistically to ensure that a policy strategy incentivizing them actually achieves its goal of overall harm reduction, taking each material's entire life-cycle impact into account.

*Reusable Alternatives*

From a life-cycle impacts perspective, reusable substitutes are unequivocally preferable to single-use packaging and products. Displacing single-use products with reusables generally results in lower greenhouse gas emissions, fewer ecosystem impacts, and less solid waste generation. The advantages in the latter category are particularly noteworthy, with some studies suggesting that reusable adoption can reduce solid waste generation by 99% in certain contexts.[31]

These impacts are higher for reusables on a per-unit basis, largely due to the greater inputs of raw materials and energy required for the manufacturing process. Common reusable materials such as ceramic, steel, and aluminum tend to be more energy-intensive to work with, and reusable items are typically more massive than disposable counterparts. However, when the lifetime uses of a reusable item are considered, they constitute a lower overall impact than a commensurate number of equivalent single-use products. The exact break-even point varies when comparing different types of materials, but typically does not exceed a few hundred uses and in some cases may be as low as 18 (comparing ceramic mugs versus paper hot beverage cups).[32] For comparison, reusable items in the food service industry often see thousands of uses.[33] These usage figures have been most heavily studied in the food service sector, but it is reasonable to assume that implementation of reusables in other industries would see similar break-even points and lifetime uses that exceed those points.

However, reusables represent a fundamental shift in operating model for many industries and businesses into which they can be introduced. We therefore highlight two of the most salient challenges that may arise from this shift:

1. *Capital Investment*: Businesses utilizing single-use, disposable packaging or items incur low-magnitude but constant and ongoing costs. In contrast, reusable items require significantly higher upfront investment but are less costly in terms of ongoing

operations. In the food service sector—where these tradeoffs have been most studied—these investment costs may also include additional equipment for sanitizing reusable food service ware between uses.

The total capital required for a business to transition is highly variable, depending on the exact nature and size of the business, but can exceed thousands of dollars for food vendors. However, the savings experienced on an ongoing basis offset these costs in a relatively short time period. In the food service sector, businesses that adopt reusable items tend to break even fiscally within the first year. Other use cases (e.g., return and reuse packaging for grocery items) have not been sufficiently studied to make valid estimates on capital requirements.

2. *Off-Site Consumption*: Logistically, reusable adoption is fairly straightforward in contexts when the customer uses the product on-site and can immediately return the reusable item to the vendor. The most obvious example of such a model is a dine-in restaurant utilizing reusable food service-ware. However, a number of challenges present themselves in cases where consumers would need to remove a reusable item from the premises. Such cases include takeout and delivery food service, grocery foods, and other consumer goods.

   The potential for consumers to use personal reusable containers is limited to the takeout food service context and some niche grocery foods (e.g., bulk self-serve and butcher items). The primary concern in such cases is how vendors maintain sanitation standards while facilitating the use of containers whose cleanliness they cannot control. The COVID-19 pandemic has heightened these concerns, and some businesses that previously permitted the use of customer-owned reusable items have temporarily suspended these in the interest of public health. Further action on this front is likely to be suspended until the crisis has passed, and may require significant outreach efforts to overcome cautious consumers and businesses in the future.

   Looking ahead to a post-pandemic world, implementation problems regarding consumer-owned reusable items are minimized in the case of dispensed beverages and self-service bulk foods where customer containers never enter a food preparation area or directly come into contact with food service equipment. Other cases would require businesses in California to provide new working areas for either staff or customers to load food into customer-owned reusable containers and implementation of new sanitation practices. A reliance on consumer-owned reusable items also depends on consumers making the effort to provide the item consistently. While some consumers will do so out of magnanimous interest in reducing their personal contribution to plastic waste, incentive structures—such as surcharges on disposable items, as some California cities like Berkeley have implemented—can help make such behavior more universal.

Usage of vendor-, delivery service-, or manufacturer-owned reusable packaging opens up new possibilities for reducing plastic waste, but also presents logistical hurdles. The fundamental challenge of such models is ensuring that consumers return the reusable item at some later point. Doing so requires both a readily accessible and user-friendly system in place for consumers to return items, and incentive structures to help overcome latent reluctance to or inconvenience from doing so.

To illustrate the various tenets of such a model, we provide the following example for a grocery store setting. Goods in reusable containers (e.g., milk jugs) would be prominently labeled as "Reusable – Return to Store – $5 Refund." Along with reinforcing messages at point of checkout, such clear communications minimize the chance that a consumer does not realize the container is meant to be reusable, that they are being charged a deposit for it, and that the cost can be recouped upon return.

Return stations would be located proximate to store entrances and, if necessary, color-coded to correspond to the labels on certain products to begin sorting at point of return. Upon return of containers customers could receive either a full deposit refund or, more easily, a credit against future reusable deposits. Empty containers would be returned to the product supplier, ideally on the same vehicle that restocks a given store location.

Application of such a system in California is intuitive at retail locations where customers make regular visits, like grocery stores. Doing so for physical businesses that customers visit less frequently, or for online retailers, would require a slightly different approach to enable customers to repatriate reusable delivery packaging via the mail. One straightforward option would be providing the consumer with prepaid return labeling for the container, accompanied again by deposit charges and prominent labels explaining the fiscal incentive customers have to expend the effort to return the item.

*Compostable and Biodegradable Alternatives*

Compostable and biodegradable materials have gained increasing attention in recent years as an alternative to plastic in the manufacturing of single-use, disposable goods and packaging. This focus is especially noticeable in the food service sector, where compostable cups, plates, utensils, and straws have been touted as helping vendors become more environmentally friendly. There may be some benefits to such materials, but existing research suggests that these are rather marginal while suffering from some of the same major drawbacks that bedevil plastic disposables. Most importantly, any product that is destined to be manufactured, used once, and then discarded is inherently inefficient. Such products act as a constant source of harmful impacts related to their manufacturing and disposal.

The magnitude of these impacts and how they compare to plastic fluctuate depending on a number of factors, including the exact material in question, the source of raw inputs used to manufacture said material, and how the item is disposed of. These are complex considerations, but they can be summarized in a few general rules of thumb:

1. *Impact Balance*: The plant-derived inputs necessary for the manufacture of compostable materials tend to shift lifetime impacts more heavily towards agriculture-related areas when compared to plastic. These areas include land and soil degradation, water use, and eutrophication of waterways. Use of post-processing plant residues (e.g., molded pulp products made from the byproducts of sugar cane processing) can alleviate these marginal impacts. However, the question of whether compostable materials are "better" than plastic in terms of their environmental impacts depends on how one weights the importance of different impact categories.

2. *Waste Management*: Non-bioplastic compostable materials offer the fundamental advantage that they will break down much more readily in natural environments than plastics, such as in cases of littering or waste mismanagement. They also offer the long-term advantage of not requiring continually expanding landfill space.

3. *Food Waste Diversion*: In terms of aggregate environmental impacts, the footprint of the food a consumer purchases dwarfs that of the container in which the food is served.[34] This means that packaging designs that require more material may be more environmentally friendly if they result in even small reductions in food waste. Furthermore, some preliminary case studies have suggested that adoption of compostable materials in the food service sector leads to preferable outcomes for food waste capture.[35]

Contrary to the way the terms "compostable" and "biodegradable" are used in everyday parlance, these terms have specific, technical definitions within the packaging industry. In the United States these standards are set by the nonprofit Biodegradable Products Institute (BPI). "Compostable" is a more stringent standard than "biodegradable," as it does not allow for inorganic residues to remain at the end of the decomposition process. Additionally, compostable products must degrade into pieces smaller than 2 mm in size within 90 days and must achieve 90% chemical degradation within six months.[36] This standard assumes that the product is in an environment with appropriate temperature, moisture, and oxygen conditions.

A variety of materials are used to manufacture products that meet this certification, but there are factors unique to each that affect the overall potential benefits they could offer from replacing plastic:

1. *Fiber-Based Materials*: This category encompasses a plethora of materials derived from plant fibers. Common members of the latter category include sugarcane, sorghum, and bamboo, along with molded plant pulp and bagasse (sugar cane post-extraction pulp residue). Items in this category, while they still face some challenges (discussed below), are the best candidate for disposal in existing commercial composting models. Ideally, such items should be 100% fiber-based and devoid of contaminating chemical treatments.

   These materials also offer the advantage of being much more readily degradable in the natural environment than plastic or bioplastic. For this reason, some California municipalities such as Santa Monica are already prioritizing usage of these materials, the goal being that littered items that make their way to the ocean will be marine biodegradable.

2. *Paper*: Common and familiar, paper is used as the underlying material for a variety of items and packaging products. Many paper products are capable of degrading in a manner similar to fiber-based items, but others—notably certain types of disposable food service ware—have historically been manufactured with coatings of plastic or other chemicals. The presence of such compounds undermines the compostable nature of paper items.

3. *Bioplastics*: Although bioplastics are also derived from plant material, they are plastic resins at the chemical level and function similarly to fossil fuel-derived plastics. The most common bioplastic, polylactic acid (PLA), is virtually indistinguishable from common PET (Code 1) plastic. This is a boon in terms of product performance—bioplastic technology has advanced sufficiently in recent years such that bioplastics can withstand previously prohibitive stresses and temperatures, allowing them to be substituted in place of traditional plastics for a wide variety of applications.

   However, these traits undermine the effectiveness of bioplastic as a plastic alternative when it comes to disposal. Bioplastics are especially unattractive to Californian compost operators, given the high sustained temperatures and lengthy periods required to prompt biodegradation. Their similarity to plastic also makes it easy for operators to confuse them with traditional plastics (discussed further below). Bioplastics do not promptly break down in natural environments when littered or mismanaged, unlike their fiber-based counterparts.

   Despite these shortcomings, bioplastics may be an important option for alternative packaging in areas where reusable or fiber-based items are impractical, at least in the short term. A key example is the medical equipment industry where health reasons dictate that many items must be single-use and that packaging maintains sterile conditions.

Additionally, there are several overarching challenges currently facing compostable packaging that limit its attractiveness as a plastic alternative. As a result of these various pressures, few commercial operating facilities in the state accept compostable packaging, instead opting to screen it out and send it to landfills. These major, systemic challenges—all of which are driven in part by historic misalignment between product manufacturers and composting facility operators—are detailed below:

1. *Long Degradation Periods*: The timelines for degradation under which compostable materials are certified to break down are currently not well-aligned with the actual operating models of composting facilities. Composting sites in California operate on relatively short cycles, driven in part by economic realities where longer turnover translates into fiscal losses. These cycles average approximately 60 days, but can be as brief as five weeks. In contrast, compostable materials are certified to physically disintegrate in 90 days. Furthermore, this period can be longer when real-world environmental conditions deviate from test assumptions (e.g., varying levels of moisture, temperature, or oxygen).

   This problem is addressable through screening compostable packaging material at the output side of a composting cycle and reintroducing it. However, this process would require many facilities to install new equipment and impose an additional, costly logistical hurdle.

2. *Recognition and Contamination Issues*: A lack of consistent labeling standards makes it difficult for composting operators to readily distinguish compostable packaging—especially bioplastics—from regular plastics or other non-compostable materials. It is infeasible, for instance, for employees to individually check the small printed label on the bottom of disposable cups mid-process to assess whether the item is compostable or not. Furthermore, lack of manufacturer transparency has made composting operators wary of certain chemicals that have been used in plastic alternatives in the past. The most prominent of these are PFAS chemicals, which have been linked to a number of harmful carcinogenic and immunological impacts.[37]

3. *Organic Certification Standards*: Organic agriculture is an important market for composting operators in California. Even when compost is sold to non-organic farms, the organic certification is a valuable measure of product quality. Unfortunately, current organic certification standards—set by the Organic Materials Review Institute (OMRI)—do not cover the inclusion of compostable packaging materials in compost inputs. Accepting such materials is thus seen by operators as a risk to their certification, one that could result in significant fiscal consequences.

**Policy Principles**

We have considered the various harmful impacts of plastic production and usage and the waste they generate, the limits recycling as a means to combat these impacts, and the pros and cons of various alternatives. Below we seek to present a general set of policy principles that should undergird any policy strategy to combat plastic pollution. In many cases, these principles also work towards reducing the environmental harms caused by the rampancy of single-use, disposable products, plastic or otherwise.

While some factors (e.g., access to appropriate waste disposal infrastructure) will need to be addressed on a regional basis, these principles are meant to be applicable to a statewide or even federal strategy. They are presented hierarchically. The principles we believe to be most effective in reducing harmful plastic-related impacts are discussed first, followed by strategies with increasingly narrow applicability.

It is worth noting that some of these principles are already reflected to some degree in proposed (though not enacted) legislation at the state and federal level. Similarly, the strategies undertaken by many Californian municipalities include elements of one or more of these principles.

1. **Mandate adoption of reusable substitutes in place of single-use disposables wherever feasible**. The most important priority of any strategy should be to reduce the overall amount of waste generated, both plastic and otherwise, through minimizing the use of single-use items. While some characteristics of plastics make them uniquely harmful, alternatives create their own set of impacts and cannot realistically be substituted for plastic *en masse* in a sustainable manner.

   The sector where such a change can most readily taken place is the dine-in food service sector, where traditional restaurants have long provided a model for reusable food service ware usage to which establishments currently using disposable items can transition. Other key areas for expansion in the short-term include customer-owned reusable food containers for take-out food service and some grocery foods, and additional reusable adoption across a variety of grocery products using a deposit-return or similar model. Adoption of the latter will require coordination between product suppliers and grocery operators, a barrier that can be overcome with support, mandates, and/or incentives from government.

   In the longer-term, there may be opportunities to implement reusable packaging in some consumer goods and retail delivery contexts (e.g., electronics packaging, online retail delivery boxes). However, such applications have not been explored to the same degree as food-related applications; pilot testing of such models in a more limited capacity would be appropriate before widespread mandatory adoption.

2. **Ban the use of non-recyclable plastics and mixed materials in single-use items**. Apart from PET bottles and HDPE products generally, plastic resins are not currently economically viable to recycle. Their presence in the waste stream represents not only an ongoing source of material destined for landfill, but also a fiscal drain on material recovery operators who must sort through the valueless material.

   Mixed material single-use items—such as paper cups with a PET plastic lining—are also notoriously difficult to recycle. The component materials, though each may be technically recyclable in isolation, are not practical to separate post-manufacture. Consequently, such items are generally landfilled.

3. **Mandate business practices that reduce extraneous item usage and generate unnecessary waste material**. The clearest examples of such steps thus far in California are the statewide policies banning plastic grocery bags and imposing a surcharge on single-use paper bags, and the steps many municipalities have taken requiring food vendors to issue optional disposable items such as utensils and straws only upon customer request. However, there is room to build on both these fronts. The latter strategy can be implemented on a statewide basis, and New Jersey recently set a new bar on disposable bag policy by banning disposable grocery bags, regardless of material.[38] Such strategies, while requiring concerted public education and business outreach efforts, are relatively easy to implement in a short period of time.

4. **Issue new packaging design and labeling requirements that reduce material usage and increase favorable disposal outcomes**. The motivation for reducing the amount of material used in consumer goods packaging is the same as underlies the need for widespread reusable substitution: a reduction in the amount of material consumed, which in turn reduces impacts related to both the production and disposal of the items. Packaging design can also reduce waste by making products more easily recycled or composted. For instance, plastic packaging can be designed to avoid fragmentation into small pieces that are impractical to recycle, while compostable packaging can be designed to maximize surface area, speeding up the composting process.

   While simple in principle—set targets for proportionate decreases in the mass of material a manufacturer uses to package a given product—this strategy becomes highly complex and technical when taking into account the variety of consumer goods products sold in California and the performance requirements of packaging in these differing contexts regarding transportation, security, and breakage. Implementation of policies setting such goals would require significant consultation with affected industries regarding feasibility and allowing adequate time for manufacturers to meet the new standards, ideally with incentives for early compliance. The most sensible strategy in many cases may be to set material reduction and disposal outcome targets through

policy while leaving compliance strategy up to individual manufacturers—a type of extended producer responsibility model.

New labeling requirements, specifically for recyclable and compostable materials, are meant to increase proper disposal rates while simultaneously making it easier for composting operators to distinguish between compostable versus contaminating materials. A starting point for such a model is Washington State's HB 1569, which went into effect July 2020. On the consumer side, clear labeling accompanied by intuitive and user-friendly disposal systems (e.g., color-coded disposal bins that match the color codes on recyclable, compostable, and other items) will assist Californians in self-sorting waste appropriately and diverting recyclable or compostable materials from the landfill. In the disposal of compostable items, composting facility operators will be able to quickly distinguish desirable materials from non-biodegradable ones and separate them, removing a major barrier to upscaling of compostable packaging.

Importantly, these strategies rely on consistency for both consumers and disposal operators. A patchwork of mismatched requirements at the municipal or county level in California creates confusion for consumers attempting to identify what items are recyclable or compostable versus those that are not. Similar confusion is created for personnel at disposal facilities that often serve large regions. For these reasons, labeling and packaging requirements should be enacted at the largest geographic scale possible, ideally the state or federal level. Doing so also allows industry access to a sufficiently robust market such that they can achieve economies of scale in producing new, compliant products.

5. **Phase out plastic materials in favor of compostable alternatives where appropriate**. While it is certainly a worthy goal to transition our economy completely away from single-use, disposable items, there will be areas in the short-term and likely in the long-term where reusable items or packaging are infeasible. In such cases, efforts should be made to replace single-use plastics with compostable alternatives while simultaneously ensuring that increased use of such materials is matched by commensurate expansion of composting infrastructure.

   Given their advantages regarding degradation in both managed and unmanaged environments, chemical-free fiber-based materials are preferable. However, such materials tend to be more porous, less resilient, and less sterile than bioplastics. Bioplastics thus serve as an option in industries and applications where disposable products or packaging must be impermeable, withstand more intense environmental stressors, or maintain sterile conditions.

6. **Promote increased plastic recycling rates while avoiding the creation of stranded assets, and expand access to composting facilities**. Although suffering from severe limitations, recycling is an important tool for reducing the marginal impacts of plastic pollution in the short term. The commercial recycling industry is struggling, however, as it continues to cope with the disruption caused by National Sword since it came into effect in 2018. A number of operators have shuttered as a result, including California's largest recycling operator, RePlanet, LLC.[39] Minimizing plastic-related impacts during the transition towards less harmful alternatives will require that commercial recycling stays solvent and viable. California's recently passed AB 793 is helpful in this regard, as the required increases in recycled content usage it mandates will buoy demand for recycled material, hopefully resulting in increased revenue and a healthier fiscal situation for recycling operators.

   However, it is imperative that the primary focus of future policy remain on transitioning our economy away from single-use items—plastic and otherwise—and displacing disposable plastic with more sustainable alternatives. Recycling is a harm-reduction tool for the interim, but under an ideal scenario it should become increasingly infrequent as waste generation and plastic production decline. Therefore, it is important that policy makers be wary of incentivizing investments that will become stranded assets as they take steps to keep the commercial recycling industry solvent in the short-term.

   In contrast, displacement of plastic with compostable alternatives will require expanded access to composting facilities. Increased access is already an area of interest for the state, given the targets for organic waste disposal set forth in California's SB 1383, enacted in 2016. Creating additional composting infrastructure is therefore a priority, one where progress will hopefully be seen in the next few years. Merely having more composting capacity is insufficient regarding compostable materials, though, given the major challenges that face commercial composters in processing compostable packaging material. Fortunately, policy action and fiscal incentives have the potential to make such items economically feasible for such operators to accept, particularly when implemented in concert with other principles outlined above.

   Also worth considering is an expansion of smaller, community-based composting sites. Such facilities can be located more proximate to businesses that generate waste material, reducing emissions related to the transport of waste. More importantly, such sites face fewer economic constraints than commercial composters, allowing them the luxury of longer turnover cycles and other features that circumvent some of the challenges of processing compostable packaging materials. Creating additional community composters will primarily be the purview of local governments in California. However, state-level action can assist in reducing regulatory hurdles and providing logistical support and fiscal incentives for such projects.

## Conclusion

The bulk of the research and literature review underlying this chapter was performed in late 2019. Since then, new research and publications have added to the available information on the plastic waste crisis, and mostly paint a starker picture. Estimates on the quantity of plastic waste entering the world's oceans have increased, and research on the relatively novel issue of microplastics continues to find pervasive contamination in an ever-increasing number of environments and organisms.

Unfortunately, the COVID-19 pandemic has created unexpected new barriers to transitioning away from single-use plastics. Social distancing practices have shifted consumer preferences more in favor of online retail shopping and delivery food service, likely sparking an uptick in packaging-related waste generation (although quantitative research will be needed to verify these predictions). Simultaneously, public health concerns have prompted a regression, albeit a justified one, from businesses regarding consumer-owned reusable items.

As California makes progress in halting the spread of COVID-19 and economic activity begins to rebound, policy makers must be ambitious in revitalizing efforts to reduce the impacts of plastic waste and throwaway consumerism generally. Efforts have already been made by the plastics industry to take advantage of the crisis, making unsubstantiated claims that plastic is somehow safer than other materials as part of a fear-based public relations campaign to prop up their troubled product.[40] California's efforts to tackle the plastic problem must continue in the face of such misinformation, using a strategy grounded in facts and science, not industry propaganda and unfounded consumer concerns.

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# Chapter 3

# California Election Law and Policy: Emergency Measures and Future Reforms

**UCLA Voting Rights Project:**
**Matthew Barreto, Michael Cohen and Sonni Walkin**

The authors of this chapter are listed in alphabetical order: Dr. Matthew Barreto; Michael Cohen; and Sonni Waknin. The UCLA Voting Rights Project is directed by Matt Barreto, Ph.D., Professor of Political Science and Chicana/o Studies and Chad Dunn, J.D., Director of Litigation, Luskin School of Public Affairs. Michael Cohen is a 3L at UCLA Law and Legal Fellow at the UCLA Voting Rights Project. Sonni Waknin is the Managing Legal Fellow.

The 2020 voting landscape was defined by the COVID-19 pandemic. In some respects, California's election response stood out as the gold standard for election administration under pandemic circumstances. California's early statewide efforts to expand access to the franchise and educate voters has allowed the state to overcome numerous challenges, including the rapid transition to mostly by-mail elections.

Nevertheless, the state's election-related response to COVID-19 in 2020, from the issuance of executive orders and statewide statutes to the management of the primary election, revealed areas in which the state can still improve.[1] The March 2020 presidential primaries were the first test for many counties that transitioned from their previous electoral schemes to Voter's Choice Act counties, and in some cases counties were rolling out new voting technology for the first time. These transitions featured varying degrees of success, with many voters experiencing confusion and lengthy waiting times at the polls.

This chapter summarizes key aspects of the California voting landscape prior to the COVID-19 pandemic. It also explores the successes and challenges of the March 2020 presidential primary and the changes made to California election laws in response to COVID-19. Finally, it addresses enduring areas for improvement and key policy recommendations.

## I. California Election Law & COVID-19

In some respects, California was relatively prepared to conduct an election during a pandemic. Prior to COVID-19, California was among only ten states to feature a robust by-mail voting infrastructure. Six of those states conducted all elections by mail, while four—including California—permitted counties to opt into conducting all elections by mail. Fifteen counties in California have opted into this program so far, meaning residents receive mail ballots automatically under the Voter's Choice Act. Most voters in California have been using mail ballots to vote since 2012.[2]

[1]This chapter was written before the November 2020 general election and does not include information related to any problems encountered in that election.

[2]51.16% of California voters used mail ballots in the 2012 general election; in 2014, 60.52% of voters used mail ballots; in the 2016 general election, 57.79% of voters used mail ballots; in the 2018 general

Passed in 2016, the Voter's Choice Act allows counties to conduct elections under a new model which is intended to be more flexible and convenient for voters.[3] In theory, this new election model allows voters to choose how, when, and where to cast their ballot by mailing every voter a ballot, expanding in-person early voting, and allowing voters to cast a ballot at any Vote Center within their county. In conjunction with other forward-thinking election laws and policies, California had in place much of the infrastructure necessary to meet the pandemic moment prior to Spring 2020.

## II. The March 2020 Primary

California's primary election was held on March 3, 2020. A special election to the United States House of Representatives for California's 25th congressional district was held the same day. A host of problems marred the election. Technical issues involving check-in stations and voting machines malfunctions were not uncommon throughout the state. Some of these issues were predicted well in advance of the elections, as counties such as Los Angeles County rolled out all-new voting machine systems riddled with vulnerabilities.[4]

Separately, election workers in fifteen counties, including Fresno, Napa and Sacramento, were unable to connect to the statewide voter registration database.[5] In Sacramento County, for instance, this mishap triggered a time-consuming but necessary process to put ballots in the hands of voters at the polls. Officials had to treat everyone as a new voter and have them fill out a conditional voter registration form. Poll workers would then cross-check that information

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election, 65.31% of voters used mail ballots. Finally, during the 2020 primary election, 72.08% of voters used mail ballots. California Secretary of State, Historical Vote-By-Mail (Absentee) Ballot Use in California, https://www.sos.ca.gov/elections/historical-absentee.

[3] *See generally* California Secretary of State, Voter's Choice Act, https://www.sos.ca.gov/elections/voters-choice-act.

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[5] Janie Har & Stefanie Dazio, *Voting Problems, Long Lines Mar California Primary Voting*, NBC (March 3, 2020), https://www.nbcbayarea.com/news/california/california-braces-for-long-lines-at-super-tuesday-primary/2246792.

via phone against voter information at the county's main elections office to determine which precinct's ballot each voter needed.[6]

These issues led to hours-long delays at polling locations.[7] Vote Centers in Fresno County were shut down, and in some cases voters were told to leave because of problems at the Secretary of State's office.[8] In Los Angeles, jammed printer gear on voting machines and malfunctioning voter check-in tablets, or electronic poll books, caused substantial delays.[9]

At times, courts became involved. For instance, issues in Los Angeles County prompted two lawsuits. One suit was brought by Senator Bernie Sanders' presidential campaign to keep polling locations open for extended hours.[10] Another was brought by the city of Beverly Hills, challenging Los Angeles County for implementing an allegedly severely-flawed voting system user interface.[11] In sum, issues with the March 2020 primary amounted to a partial meltdown in large counties with an unknown impact on in-person voter turnout.

Beyond the in-person voting issues, the mail-in ballot process featured significant errors. Thousands of Californians experienced delays in their absentee ballot delivery. Los Angeles County reported that 17,000 voters did not receive their mail-in ballots as scheduled. The problem arose because an inadequately-tested script designed to identify voters eligible to cast

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[6]Stefanie Dazio & Janie Har, *Long Lines in Los Angeles County Prompt Sanders Complaint*, AP NEWS (March 3, 2020), https://apnews.com/article/cb2ce758796eb6d714c2596a8d369b4c.

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[9]*See* L.A. County, VSAP Board Report 11, 118-19, (April 27, 2020), https://lavote.net/docs/rrcc/board-correspondence/VSAP-Board-Report.pdf?v=2; *see also* Kim Zetter, *L.A. County Has Found the Cause of its Hourslong Poll Lines. It Wasn't the New Voting Machines.*, POLITICO (June 17, 2020), https://www.politico.com/news/2020/06/17/la-county-blames-voter-check-in-tablets-for-election-day-chaos-324894.

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[11]Libby Denkmann, *Beverly Hills Sues Over 'Severe Ballot Design Flaw' In LA County Voting Machines*, LAIST (Jan. 23, 2020), https://laist.com/2020/01/23/beverly-hills-files-lawsuit-sues-la-county-over-ballot-design-skip-candidates.php.

votes in the 25th Congressional district special election improperly excluded those voters from that list.[12] After the election, the state rejected a considerable number of mail-in ballots.

The California Secretary of State's election data shows 102,428 mail-in ballots were disqualified in the state's 58 counties, about 1.5% of the nearly seven million mail-in ballots returned.[13] That percentage is the highest in a primary since 2014, and the overall number is the highest in a statewide election since 2010. It is also higher than national averages, which sat around 1.4% for the 2018 general election and 1% for the 2016 presidential election.[14] The cause of these rates is discussed below.

## III. Voting Laws Enacted During COVID-19

California adopted a broad range of voting-related policies in response to COVID-19. With the pandemic threatening to transmit to voters at polling locations, interest in voting by mail soared. Interest in early voting, which promised to allow voters to visit the polls without the crowds, also rose. Yet 43 counties in the state lacked the robust vote-by-mail programs available in Voter's Choice Act counties.

Voters and election officials alike faced uncertainty. Many Californians were accustomed to going to the polls on election day instead of casting a ballot by mail. Election officials in many jurisdictions lacked the technical capacity and necessary training to conduct a mostly by-mail election. The novel coronavirus posed new problems for voters in need of assistance, from limited-English proficient voters to voters with disabilities. Furthermore, expanding early voting is costly, potentially exceeding the federal dollars already earmarked for election assistance

[12] *See* Meyers et al., *supra* note 8, at 27.
[13] *California Tosses 100,000 Botched Mailed-In Ballots for Presidential Primary*, NBC (July 14, 2020), https://www.nbcnews.com/politics/2020-election/california-tosses-100-000-botched-mailed-ballots-presidential-primary-n1233754 (hereinafter *California Tosses*).
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during the pandemic and further straining county government budgets stretched thin by public health and safety spending.[15]

On March 20, 2020, Governor Gavin Newsom issued an executive order (EO) permitting vote-by-mail procedures to be used in three then-upcoming special elections extending the canvass deadline, giving counties an additional 21 days to certify their election results.[16] EO N-34-20 meant that counties short-staffed because of the pandemic had an additional three weeks to undertake ballot counting, tabulation, and other responsibilities related to the official canvass of California's presidential primary election.[17]

It was then necessary to expand access to mail ballots for the November 3, 2020 general election. On May 8, 2020, Governor Newsom issued Executive Order N-64-20. Among other things, EO N-64-20 ordered that a vote-by-mail ballot be mailed to each voter prior to the 2020 general election in addition to offering in-person voting locations. In response, on May 21, several plaintiffs, including former congressman Darrell Issa, sued Governor Newsom and Secretary of State Alex Padilla, alleging their offices could not order and carry out a program of sending every registered voter an absentee ballot.[18] On May 24, the Republican National Committee, National Republican Congressional Committee, and California Republican Party filed a similar lawsuit to stop the mailing of ballots.[19] Both lawsuits alleged that allowing mail-in ballots to be sent to registered voters was beyond the scope of gubernatorial authority and was unconstitutional as a gateway to voter fraud.[20] The two lawsuits were voluntarily dismissed.

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[15]John Myers, Newsom Orders New California In-Person Voting Rules for November Election, L.A. TIMES (June 3, 2020), https://www.latimes.com/california/story/2020-06-03/california-in-person-voting-november-election-rules-gavin-newsom-order.

[16]Office of Governor Gavin Newsom, Governor Newsom Signs Order to Protect Public Health by Expanding Vote-by-Mail Options and Extending Deadlines for Presidential Primary Canvass (March 20, 2020), https://www.gov.ca.gov/2020/03/20/governor-newsom-signs-order-to-protect-public-health-by-expanding-vote-by-mail-options-and-extending-deadlines-for-presidential-primary-canvass.

[17]Cal. Executive Order N-34-20, available at https://www.gov.ca.gov/wp-content/uploads/2020/03/3.20.20-N-34-20.pdf.

[18]Issa et al. v. Newsom et al., Case 2:20-at-00501 (E.D. filed May 21, 2020).

[19]Republican National Committee et al. v. Newsom et al., 2:20-cv-01055-MCE-CKD (E.D. Cal. filed May 24, 2020).

[20]*See* Republication National Committee et al. v. Newsom et al., Complaint for Declaratory and Injunctive Relief, Case 2:20-cv-01055-MCE-CKD (filed May 24, 2020), available at https://www.brennancenter.org/sites/default/files/2020-06/gov.uscourts.caed_.373547.1.0.pdf; Issa et

The California Legislature moved to codify EO N-64-20 in California law. Assemblymember Marc Berman (D-Menlo Park) sponsored AB 860, an elections bill requiring, among other things, that every active California voter be sent a mail ballot for the general election. It also required that voters be able to track their ballot as it moved through the mail and processing system. Finally, it extended the deadline for county election officials to receive ballots to the 17th day after Election Day. AB 860 received bi-partisan support and was signed by Governor Newsom on June 18, 2020.

On June 3, 2020, Governor Newsom issued another executive order pertaining to the general election.[21] EO N-67-20 sought to ensure that in-person voting opportunities were available in sufficient numbers to maintain physical distancing at polling locations. It required counties that were unable to comply with current law to provide three days of early voting starting the Saturday before Election Day. It also required that ballot drop-box locations be available between October 6 and November 3, 2020, while also allowing counties to consolidate voting locations, with at least one voting location per 10,000 registered voters.[22] In other words, counties were allowed to limit their in-person voting operations for the general election as protection against the spread of the novel coronavirus—but only if they also offer three days of early voting, a potentially expensive and challenging tradeoff.

On August 6, 2020, Governor Newsom signed SB 423 into law.[23] Sponsored by Senator Tom Umberg (D - Santa Ana), SB 423 authorized counties to open their vote centers as late as the third day prior to the general election. SB 423 also permitted counties to consolidate in-person polling locations. Elections officials could establish consolidated precinct boards, located

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al. v. Newsom et al., Case 2:20-at-00501 (filed May 21, 2020), available at https://assets.documentcloud.org/documents/6923105/Issa-v-Newsom-Complaint.pdf.

[21]Office of Governor Gavin Newsom, Governor Newsom Signs Executive Order on Safe, Secure and Accessible General Election in November (June 3, 2020), https://www.gov.ca.gov/2020/06/03/governor-newsom-signs-executive-order-on-safe-secure-and-accessible-general-election-in-november.

[22]Cal. Executive Order N-67-20, available at https://www.gov.ca.gov/wp-content/uploads/2020/06/6.3.20-EO-N-67-20-text.pdf. This number is far fewer polling locations than is standard for a California election, which in most counties typically feature roughly one polling place per 1,500 voters. Ben Christopher, *California's (Mostly) All-Mail 2020 Election, Explained*, Cal Matters (June 25, 2020), https://calmatters.org/explainers/california-all-mail-election-explained-november-2020/.

[23]Office of Governor Gavin Newsom, Governor Newsom Signs Legislation 8.6.20 (August 6, 2020), https://www.gov.ca.gov/2020/08/06/governor-newsom-signs-legislation-8-6-20.

within the same physical polling place, thus serving the voters residing in multiple adjacent precincts.

On August 26, 2020, Governor Newsom issued a third executive order pertaining to the general election.[24] Executive Order N-76-20 extended the deadline for county elections officials to count and verify signatures submitted for initiative petitions seeking to qualify for the November 2022 ballot, giving election officials needed flexibility to focus on preparations for the November 2020 election.[25]

## IV. Areas for Improvement

***Deadlines.*** In the March 2020 primary election, the most common problem accounting for rejected mail ballots was missing the deadline for the ballot to be mailed and delivered.[26] To count in the primary election, ballots had to have been postmarked on or before Election Day and received within three days afterward. Statewide, 70,330 ballots missed those marks.[27] Ballot delays were likely to increase leading up to the general election as the United States Postal Service suffered internal restructuring and budget cuts.[28] Yet because of AB 860, the November 2020 general election featured an extended deadline. If a mail ballot were returned by mail, provided it bore a postmark on or before Election Day, it could be received by county election officials up to 17 days after Election Day.

While this measure was in many respects ideal, the deadlines were only as effective insofar as voters were fully aware of their responsibilities should they want their vote counted. Small measures may boost voter compliance with deadlines, which remains important even if

[24]Office of Governor Gavin Newsom, Governor Newsom Signs Executive Order on Elections (Aug. 26, 2020), https://www.gov.ca.gov/2020/08/26/governor-newsom-signs-executive-order-on-elections.
[25]Executive Order N-76-20, available at https://www.gov.ca.gov/wp-content/uploads/2020/08/8.26.20-EO-N-76-20-text.pdf.
[26]Michael R. Blood, *California Rejected 100k Mail-in Ballots Because of Mistakes*, A.P. (July 13, 2020), https://apnews.com/article/a45421048cd89938df7c882891a97db5.
[27]*California Tosses*, *supra* note 14.
[28]*See* Grace Panetta, *What You Need to Know About US Postal Service's Funding Crisis, and How it Could Impact Your Vote in the November Election*, BUS. INSIDER (Aug. 14, 2020), https://www.businessinsider.com/us-postal-service-delay-funding-crisis-mail-election-trump-explainer-2020-8.

deadlines have been extended. After all, voters needed time to cure their ballot if it was rejected before the conclusion of the curing period, which was 15 days after Election Day. For instance, local election officials might print a recommended mail-by date on envelopes in addition to a postmark deadline or receive-by date.[29] Additionally, the state should continue their widescale efforts to educate voters about the mail ballot deadline through all manners of communication, from radio to social media outreach.

***Signature matching.*** Signature matching involves election officials comparing signatures on file from a voter's registration or another government record to the signature on their mail ballot, rejecting the ballot if the signatures do not match. Signature matching is one of several identity verification measures implemented in vote-by-mail schemes. The process features two areas of possible concern: (1) the signature comparison itself, and (2) the means by which voters are notified of signature discrepancies and able to correct that error (the "curing" process).

California Election Code section 3019 governs the signature verification process for absentee ballots. Under section 3019, an election official compares the signature of the voter on the identification envelope to one of several possible signatures on file. The comparison could be to the signature appearing on the voter's affidavit of registration. It could also be to a previous affidavit of registration of the voter or the signature appearing on any form issued by an elections official that contains the voter's signature and that is part of the voter's registration record. When comparing signatures, election officials are permitted to use facsimiles of voters' signatures and may use signature verification technology, though they are not required to do so.[30] If signature verification technology reports a signature mismatch, the election official must examine the signature in person and verify that the signatures are different.[31]

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[29]This approach had already been used to reduce the number of late ballots in Davis County, Utah, where local election officials only printed recommended mail-by dates, omitting the actual deadline. This approach reportedly led to some voter confusion. *See* Taylor Stevens, Davis County Election Messaging Generates Confusion, Complaints, SALT LAKE TRIBUNE (July 6, 2020), http://www.sltrib.com/news/politics/2020/07/06/davis-county-election.

[30]Cal. Elec. Code section 3019(a)(2)(3).

[31]Cal. Elec. Code section 3019(a)(2)(3).

California's Election Code does not provide for a set of standards to verify signatures. The sole exception is related to the use of initials. Variations in a voter's signatures due to the substitution of a voter's initials for their first, middle, or both first and middle names are not grounds for determining a signature mismatch.[32] County registrars are left to determine and to create their own set of signature verification standards to determine the validity of mail ballots.

This flexibility creates a nonuniform system among California's 58 counties. Election officials tasked with verifying signatures are rarely trained in forensic handwriting. They often are not provided with any guidelines to assist in determining if two signatures were made by the same person. Many signature comparison procedures for mail-in ballots give no guidance on the questions that inevitably arise during signature comparison evaluations. There may be no guidance for determining what stylistic variations suggest that two signatures were made by different individuals. There may also be no guidance as to what threshold number of variations is required to conclude that the signature on the mail-in ballot carrier envelope has been made by a person other than the voter.

A person's signature may vary for a variety of reasons, both intentional and unintentional. Unintentional factors that can affect a person's handwriting include medical and/or physical factors such as growing old, illness, injury, symptoms from taking certain medicine, changes in eyesight, and consumption of alcohol and/or drugs. There may be mechanical factors such as pen type, ink, or signing surface.[33] Other factors are signing position, paper quality, and psychological factors such as distress, anger, fear, depression, happiness, and nervousness.[34] Moreover, a person's handwriting naturally changes over time.

Variances between signatures are more prevalent in people who are elderly, disabled, under extreme stress, or who speak English as a second language.[35] A study of signature verification in Florida during the 2012, 2016, and 2018 elections found that the procedure

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[32]*Id.*

[33]Roxana Arjon, et al., *Signature Verification and Mail Ballots: Guaranteeing Access While Preserving Integrity* 29 (2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/FINAL-Signature-Verification-Report-4-15-20.pdf.

[34]*See* Democratic Executive Committee of Florida v. Lee, 915 F.3d 1312, 1320 (11th Cir. 2019); Saucedo v. Gardner, 335 F. Supp. 3d 202, 212 (D.N.H. 2018).

[35]Saucedo, 335 F. Supp. 3d at 212.

disproportionately screened out ballots cast by young and minority voters.[36] For the most part, people may never think twice about variations in their signature.

It is only in the context of voting by mail that these variations become profoundly consequential. Finally, it is important to consider the impact of mere mistake. A survey of county clerks and registrars in California regarding signature matching reported that signature mismatches often come from those who reside in the same household. In such situations, the voter may sign the wrong ballot envelope.[37]

Unsurprisingly, verification standards may vary even within a single county.[38] Some counties in California reported reviewing ballots liberally, while another county stated that their review process was "conservative."[39] Further, some counties have a set of characteristics that they will consider when comparing signatures while other counties evaluate the signature as a whole.[40] But among counties, there is no agreement on whether to assess the possible reasons for signature variations used in their review processes.[41]

Not only are signature matching *standards* arbitrary, but *systems* or *processes* of voter signature review also vary from county to county. Some counties use automated scanners which the Secretary of State's office has not referred to in their guidelines for regulations on voting technology in California. This approach may place them outside the scope of election regulation and election-related scrutiny.[42] These automated processes are themselves set up differently.

For instance, in Sonoma County, the machine compares the sealed envelope ballot signature only to the voter's original voter registration signature.[43] In Ventura County, machines

[36]Daniel A. Smith, American Civil Liberties Union Florida, Vote-By-Mail Ballots Cast in Florida (2018), https://www.aclufl.org/sites/default/files/aclufl_-_vote_by_mail_-_report.pdf.
[37]Arjon et al., *supra* note 34.
[38]*See* Bush v. Gore, 531 U.S. 98, 106 (2000).
[39]Arjon, et al., *supra* note 34, at 30.
[40]*Id.* at 31-32.
[41]*Id.*
[42]California Secretary of State, California Voting System Standards (Oct. 2014), elections.cdn. http://www.sos.ca.gov//pdfs/california-voting-system-standards.pdf.
[43]Arjon, et al., *supra* note 34.

are not limited in terms of the comparison signatures the system can use, giving them access to an array of signatures for individual voters.[44]

All of these variations in standards amounts to voters to be treated differently due to where they cast their ballot. One study found that the use of algorithmic matching automation increased rejections when the first round did not include human review of every ballot. The result of excluding human review was a 74% increase in the average county rejection rate.[45]

Differences in ballot review procedures reach far beyond technology use. Within each county's system of ballot review, the staff responsible for making initial signature discrepancy decisions and the sources of signatures used for comparison purposes vary significantly. Most counties use an assembly-line method in which one initial reviewer determines whether there is a discrepancy and, if so, passes the ballot to a second reviewer and onward to senior department staff.[46] Typically, lower-level reviewers only have access to the signature on a voter's registration, while upper-level staff are the only staff authorized to access the full range of voter signatures on file.[47]

Other counties, such as Los Angeles and Merced, first use an automated system, and then election officials manually examine ballots flagged as mismatches by the machine.[48] In Sonoma County, signature verification machines are set to compare the absentee envelope to only the signature on a voter's original registration and only will use other signatures on file if the machine flags an envelope as a mismatch.[49] Different counties also authorize different election officials to review absentee ballots for signature mismatches. No guide from the Secretary of State's office exists prescribing the exact manner in which mail ballots must be processed. Nor is such a standard described in any legislation.

In sum, all counties have established procedures for verifying signatures, but they have little in common, practically speaking. Between systems of voter signature review, the sources

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[44] *Id.*

[45] Arjon, et al., *supra* note 34, at 39. The report did conclude that while rejection rates increased, automated signature matching that includes human review had no significant effect on rejection or mismatch rates. *Id*. at 41.

[46] *Id.* at 28.

[47] *Id.*

[48] *Id.*

[49] *Id*.

of signatures used for comparison purposes and the personnel and machines involved in the process vary significantly. Within systems of voter signature review, a lack of signature comparison standards leaves the process - at least initially - to the unfettered discretion of the relatively untrained.

Similar to lawsuits elsewhere, California's signature matching process has recently triggered a lawsuit.[50] In 2018, the American Civil Liberties Union and Cooley LLP sued California for invalidating the vote-by-mail ballots of tens of thousands of voters without warning.[51] At issue was a state law, Cal. Elec. Code section 3019(C)(2), that allowed election officials lacking any handwriting-analysis expertise to reject a vote-by-mail ballot without providing notice to the voter if they felt the signature on the ballot envelope didn't match the signature on file for the voter.[52] Nothing in the law told voters they have to sign their ballot envelopes in any particular way, and election officials did not have to inform voters that their ballots were being thrown out or give them a chance to correct the signature problem.

Plaintiffs argued that section 3019(C)(2) violated California voters' state and federal constitutional rights by disenfranchising them without providing notice or opportunity to correct or "cure" their ballot.[53] The lawsuit revealed that as many as 45,000 vote-by-mail ballots were rejected by election officials in the November 2016 general election alone. Those ballots disproportionately belonged to Asian American and Latino voters.[54]

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[50]*See, e.g.,* Plaintiffs' Original complaint, George Richardson v. Texas Secretary of State (No. 5:19-0096); Democratic Executive Committee of Florida v. Lee, 915 F.3d 1312, 1320 (11th Cir. 2019); Saucedo v. Gardner, 335 F. Supp. 3d 202, 212 (D.N.H. 2018); Plaintiffs' Original complaint, La Follette v. Padilla,. No. CPF-17-515931 (Cal. Super. Ct., Mar. 5, 2018), available at https://www.aclu.org/legal-document/la-follette-v-padilla-complaint.

[51]*Id.*

[52]La Follette v. Padilla, No. CPF-17-515931 (Cal. Super. Ct., Mar. 5, 2018).

[53]La Follette v. Padilla, No. CPF 17-515931, 2018 WL 4050727, (Cal. Super. Apr. 09, 2018). Ultimately, the ensuing appeal of the trial court's ruling in favor of plaintiffs was dismissed because, on September 17, 2018, Governor Newsom signed SB 759, which amended former section 3019(c)(2) to provide voters an opportunity to cure a mismatched signature before the certification of election results. As revised, the statute now provides the remedy sought by plaintiffs in the underlying litigation. *See* Cal. Elec. Code sections 3019, subds. (d)(1)-(2) [notice provision] & (d)(3) [cure procedure].

[54]In her supporting declaration to the complaint upon appeal, Dr. Mindy Romero declared that in the 2016 general election, "Latino voters' ballots were rejected at over twice the rate of non-Latino, non-Asian voters in 11 of the 29 counties, while Asian-Americans' ballots were rejected at over twice the rate of non-Latino, non-Asian voters in 6 counties." Court of Appeals Complaint at 31.

In response, the state legislature passed SB 759, signed into law on September 17, 2018 by then-Governor Jerry Brown. SB 759 amended Cal. Elec. Code section 3019 to require election officials to follow specified procedures to notify the voter and allow the voter an opportunity to verify his or her signature before certification of the election. The law now provides certain curing measures discussed in the following subsection.

In addition to these reforms, California should endeavor to (1) standardize and publicize signature verification methods and (2) adopt additional or alternative voter identification processes.[55] In addition to verification by signature, voter identity verification should be possible through alternatives which may be provided by a voter and relied upon if the signature cannot be verified/validated. Possible additional identity verification tools include: the last four digits of a voter's Social Security number, a voter's bank statement or utility bill, a voter's driver's license number or passport number, a digital photograph of the voter, a fingerprint affixed to the ballot, or a sworn statement.

***Curing.*** It is essential that voters have adequate opportunity to cure rejected ballots so that their vote may ultimately be counted. Curing is the second area of concern in the signature matching process. Under California law, if an election official determines that there is a discrepancy with a voter's signature, the identification envelope will not be opened and the ballot will not be counted.[56] Election officials must notify voters whose signatures were flagged a minimum of eight days before the certification of the election that there was a discrepancy with their ballot.[57] Voters then have the opportunity to correct or "cure" the signature discrepancy. In Voter's Choice Act counties, county elections officials are specifically directed to make a "reasonable effort" to inform a voter about a missing mail ballot envelope signature and how the voter can correct the missing signature.[58]

[55]For example, Colorado's Secretary of State publishes a Signature Verification Guide. *See* Co. Sec. of State, https://www.sos.state.co.us/pubs/elections/docs/SignatureVerificationGuide.pdf (last visited Mar. 22, 2020).
[56]Cal. Elec. Code section 3019(c).
[57]Cal. Elec. Code section 3019(d)(1).
[58]Cal. Elec. Code section 4006.

This curing process requires a voter to present a signed signature verification statement no later than 5 p.m. two days prior to the certification of the election, or—for the 2020 general election—15 days after election day.[59] If voters failed to sign their absentee ballot envelope, they have until 5 p.m. two days prior to the certification of the election to complete and submit an unsigned ballot statement.[60] If voters properly cure the discrepancy in this manner, their ballots are counted; if not, their ballots are rejected.[61]

The procedures for voter notification of ballot rejection lacks standardization and accountability. No guide exists prescribing how voters will be notified of discrepancies to cure their ballots. We recommend that a guide should be composed and disseminated. Additionally, California should require that voters be notified that their ballots have been rejected within 72 hours of its rejection. The current standard only requires voter notification a minimum of eight days prior to the certification of the election. With the current curing period window, voters may have to cure their ballot in six days. Many voters will fall short of this expectation.

Additional measures are also important. All communications with the voter should be recorded. The county clerk must notify a voter through multi-modal communication, including telephone, text message, email, and/or mail to inform the voter that their ballot has been rejected, recording each attempt to contact the voter. Once notified, the voter should be given the opportunity to cure the discrepancy. Instead of providing a signed ballot statement, voters should be able to verify their ballot online or telephonically, or else be provided with a replacement mail ballot and return envelope.

The least preferable method is an in-person cure. County auditors should be required to contact by phone any voters with outstanding ballots awaiting to be cured at least a week prior to the certification of the election. These efforts should also be recorded by the official. Such measures would ensure that voters are given a meaningful opportunity to correct mistakes in their mail-in ballots.

[59]Cal. Elec. Code section 3019(d)(1).
[60]Cal. Elec. Code section 3019(e)(1)(A)(ii).
[61]Cal. Elec. Code section 3019(d)(4).

***Minority Language Speaker Access.*** Limited English proficiency is a major barrier to voting for many voters, especially in a state with such language diversity as California. Voter materials like registration forms and ballots are written in complex English, and some first-time minority language-speaking voters may be unaccustomed to a democratic system of elections.[62] Voters needing ballots in languages other than English are guaranteed access to minority language ballot materials by both federal and state law. But the shift toward mail voting also means a transition away from many standard means of language assistance, from bilingual poll workers to multilingual signage. California's election laws pay close attention to language access needs for mail-in voters. The careful execution of these laws is no more important than ever.

Under Federal Voting Rights Act section 203, jurisdictions with certain minority language demographics are required to host bilingual elections. Section 203 covers jurisdictions where there are more than 10,000 or over five percent of the total citizen voting age population in a single political subdivision (usually a county) who are members of a single language minority group, have depressed literacy rates, and do not speak English very well.[63] California as a state is covered for Spanish, while 27 counties within California are covered for one to six languages.[64] Yet California's minority language communities are not always large enough to qualify for section 203 coverage, and not all language groups are covered under the Act.[65] Accordingly, the state has taken proactive steps to ensure that their language minority communities are able to equally access the voting process. Counties with limited-English proficient minority language communities comprising three percent of the residents of a voting precinct are covered by section 14201, and the Secretary of State is given the discretion to

[62]AMERICA VOTES!: CHALLENGES TO MODERN ELECTION LAW AND VOTING RIGHTS 72 (Benjamin E. Griffith & John Hardin Young eds., 4th ed., Am. Bar Ass'n 2020).
[63]*See* U.S. Census Bureau, Section 203 Language Determinations (May 5, 2017), https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/voting-rights-determination-file.html; *See also* 52 U.S.C. 10503.
[64]U.S. Census Bureau, Voting Rights Act Amendments of 2006, Determinations Under Section 203 (Dec. 5, 2016), https://www.govinfo.gov/content/pkg/FR-2016-12-05/pdf/2016-28969.pdf.
[65] Voting Rights Act section 203 applies to four language groups: Latinos, Asian Americans, American Indians, and Alaska Natives. Congress has determined that these four groups have faced and continue to face significant voting discrimination.

extend protections over minority language community groups if a "significant or substantial need is found."[66]

California's minority language voter assistance law, Elections Code section 14201, requires county elections offices to provide in-person and written voting assistance. Counties of precincts covered by section 14201 must make reasonable efforts to recruit bilingual poll workers, which is conducted in conjunction with community stakeholders.[67] The state has expanded the pool of eligible bilingual poll workers by allowing legal permanent residents to work as poll workers.[68] Section 14021 also requires county elections offices to translate copies of the ballot, called facsimile ballots, and post them in a conspicuous location at polling places. The facsimile ballot is a translated replica of an English ballot that the voter cannot vote on; the voter may only view it while voting on an English ballot. In counties which opted into California's Voter's Choice Act (under which all registered voters receive a mail ballot), voters can request translated ballots pursuant to section 203 or facsimile ballots pursuant to section 14201.[69] A higher quantity of materials must be made available at voting precincts with especially high numbers of limited-English proficient minority language communities.[70]

Many measures taken by California's counties already address minority language access needs remotely. This is in part because the Voter's Choice Act incorporated many minority language access measures into its provisions.[71] In addition to the aforementioned measures,

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[66] Cal. Elec. Code section 14201(b)(1), (a). For the most recent coverage determinations, see Alex Padilla, California Secretary of State, Letter to All County Clerks/Registrars of Voters (May 21, 2020), available at https://elections.cdn.sos.ca.gov/ccrov/pdf/2020/may/20096la.pdf.

[67] Cal. Elec. Code section 12303(c).

[68] *See* A.B. 817, 2013-2014 Reg. Sess. (Cal. 2013) and A.B. 554, 2015-2016 Reg. Sess. (Cal. 2015).

[69]The Voter's Choice Act aimed at making voting easier and more flexible for the state's 20.5 million registered voters. Counties can voluntarily opt into the system. Five did so in the 2018 election cycle, and another ten did so prior to the March 2020 primary election. Combined, they account for approximately half of California's electorate. *See generally* California Secretary of State, California Voter's Choice Act, https://www.sos.ca.gov/elections/voters-choice-act. See also Cal. Elec. Code section 4005(a)(8)(B)(III).

[70]*See* Cal Elec. Code section 14201(b)(2).

[71]The Voter's Choice Act aimed at making voting easier and more flexible for the state's 20.5 million registered voters. Counties can voluntarily opt into the system. Five did so in the 2018 election cycle, and another ten did so prior to the March 2020 primary election. Combined, they account for approximately half of California's electorate. *See generally* California Secretary of State, California

counties covered by the Act must staff election board members who speak the covered language(s) or provide alternative methods of effective language assistance.[72] The Act also requires that covered counties establish a language accessibility advisory committee composed of representatives of language minority communities.[73] Counties must also host bilingual voter education workshops and utilize ethnic media services for each language community covered by section 203.[74]

Counties also develop their own language minority voter education and outreach plans.[75] For instance, most if not all Voter's Choice Act counties maintain a translation hotline for voters, which they advertise through various media outlets.[76] Many counties also make minority language voting resources available to be disseminated by community groups to voters that the county may have trouble reaching directly.[77] But what is lost when voting moves remotely is access to bilingual poll workers and the obviousness of normally available language access resources.

Under normal circumstances, more limited-English proficient voters would be exposed to the minority language access resources at the polls. In a mostly by-mail election, many such voters may remain unaware of their county's language access resources. Voter education and community outreach is paramount under these circumstances.

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Voter's Choice Act, https://www.sos.ca.gov/elections/voters-choice-act. See also Cal. Elec. Code section 4005(a)(8)(B)(III).

[72]Cal. Elec. Code section 4005(a)(6).

[73]Cal Elec. Code section 4005(a)(9).

[74]Cal Elec. Code section 4005(a)(10)(G).

[75]*See, e.g.,* CALAVERAS COUNTY, ADOPTED ELECTION ADMINISTRATION PLAN (Aug. 14, 2020), https://elections.calaverasgov.us/Portals/Elections/Documents/VCA/Calaveras%20County%20EAP%20Adopted-Supplemental%20(003)_2.pdf?ver=1eeaqhwSo6NtExgPffXbJA%3d%3d.

[76]*See, e.g.,* AMADOR COUNTY, CALIFORNIA VOTER'S CHOICE ACT ELECTION ADMINISTRATION PLAN 7 https://www.amadorgov.org/home/showdocument?id=34376; EL DORADO COUNTY, VOTER'S CHOICE ACT ELECTION ADMINISTRATION PLAN 9-10 (Sept. 2019), https://edcgov.us/Government/Elections/Documents/EDC%202019%20English%20Final.pdf; COUNTY OF SACRAMENTO, ELECTION ADMINISTRATION PLAN 5 (Jan. 2020), https://elections.saccounty.net/Documents/EAP%20-%202019/EAP-English-2020.pdf.

[77]*See, e.g.,* BUTTE COUNTY, ELECTION ADMINISTRATION PLAN 8, https://clerk-recorder.buttecounty.net/elections/pdf/2019_eap_amended_9_18.pdf.

***Poll Worker Recruitment.*** Poll workers are typically over 60 years old.[78] These older workers are now at higher risk of contracting COVID-19 and experiencing serious symptoms. The reluctance of older poll workers to volunteer in-person at polling locations created staffing shortages nationwide during the 2020 primary election and California was no exception.[79] Although this recruitment problem may disappear once the COVID-19 crisis ends, if there are lingering effects, the state will need to attract a younger cohort of poll workers. For example, the state might create a volunteer program for students in its public universities. The state could also declare Election Day a state holiday, which would give students, government officials and others a better chance to volunteer as poll workers. There is room for creativity to boost volunteering at the polls at this critical moment and beyond.

***Uncertainty and Modeling.*** The transition toward widespread mail voting left some election officials in the state to manage election procedures with which they are unfamiliar. California should endeavor to undertake additional training for state election administrators, county election administrators, and election volunteers geared toward all or mostly by-mail election systems with limited and consolidated in-person voting. Supplemental training materials could include training documents, webinars, how-to guides, best practices, FAQs, and instructional videos. Ideally, the state would make available an on-demand phone line offering comprehensive assistance for election officials with urgent needs, especially during polling hours.

California could also undertake modeling efforts to assess future demand for mail ballots. Models could be developed to project demand for in-person voting and estimate the number of election staff necessary to conduct in-person vs. mail-in voting. Models might help estimate the number of persons who will continue to utilize in-person voting due to language or disability access issues. Modeling demand could also provide estimates for purposes of

[78]Michael Barthel and Galen Stocking, *Older People Account for Larger Share of Poll Workers and Voters in U.S. General Elections*, PEW RESEARCH CENTER (April 6, 2020), https://www.pewresearch.org/fact-tank/2020/04/06/older-people-account-for-large-shares-of-poll-workers-and-voters-in-u-s-general-elections.

[79]Allison Mollenkamp, *National Guard Assists With Primary Election*, NET NEWS (May 12, 2020), http://www.netnebraska.org/article/news/1218244/national-guard-assists-primary-election.

election material purchasing as well as provide projections for the purchase amount of materials needed for mail and in-person voting election administration. With more accurate projections, counties could avoid spending their limited resources on excess supplies.

***Public Access and State Oversight.*** Public engagement with the election should not end once voters casts their ballots. Currently, California provides voters with basic mail ballot-tracking technology, but voters and officials lack the ability to monitor election procedure compliance in real-time. The state should create a dashboard for the private and public use that will provide real-time information on election administration. In particular, the private dashboard could give special access to the Secretary of State's office for all real-time data, which might inform messaging and other initiatives.

## VI. Conclusion

California's existing elections infrastructure minimized the risk that California might experience election administration failures during the 2020 general election. In light of the March 2020 primary election, however, it is clear that orchestrating widespread, accessible and equitable mail voting during future California elections requires investment in a host of areas. California's response to COVID-19 in many ways reflected the state's role as a leader in sensible election policies. But in coming elections, and especially absent the complications of the pandemic, California can improve. Areas to examine for future reform include the deadlines for mail-in ballot receipt, standardization of signature verification processes, easier and quicker means to cure rejected mail-in ballots with enhanced official accountability, improvements in non-English balloting, addressing poll worker recruitment, modeling to predict demand for in-person and mail voting, and creating new tools for oversight of the election process by the state and voters. The state can always do more to protect the franchise.

# Chapter 4

# Before the Storm: Sam Yorty's Second Election as Mayor of Los Angeles

**Daniel J.B. Mitchell**

Professor-Emeritus, UCLA Anderson School of Management
and UCLA Luskin School of Public Affairs

A chapter in an earlier volume of *California Policy Options* dealt with the 1961 election of Sam Yorty as mayor of Los Angeles, an election he wasn't supposed to win. Or, at least, it was an election the downtown city elite led by the *Los Angeles Times* believed that he couldn't and shouldn't win.[1] The *Times* and the powers-that-were downtown had persuaded the incumbent mayor – Norris Poulson – to seek a third term, which he did reluctantly. From their viewpoint, Poulson was a good mayor who did what the downtown elite thought he should be doing.

Yorty, whom the *Times* regarded as a dangerous incompetent, won the election using lawsuits and charges against Poulson, harnessing – among other issues – a requirement that the city under Poulson had imposed on homeowners to separate trash for recycling. The Yorty campaign relied heavily on television, including creating newsworthy coverage with his charges to obtain free TV coverage. In a way, the election of Yorty was an early sign that the control of the city was shifting out of the hands of the downtown elite. When Yorty won, the *Times* despaired editorially for the fate of the city.

Despite some resemblance of Yorty's 1961 tactics to those of Donald Trump in 2016, Yorty – unlike Trump – had significant experience in government before 1961 in the state legislature and Congress. And, as it turned out during Yorty's first term in spite of the *Times*' fears, the potholes were filled, the traffic lights continued to operate, and the garbage was collected, albeit without trash separation. Reasonable and competent people administered the City.

Moreover, once elected, Yorty saw it to his advantage to win over the *Times* by engaging in the kind of civic boosterism to promote economic growth the downtown elite favored. By the time he ran successfully for reelection in 1965, the *Times* endorsed his candidacy. Shortly after his election, however, things went terribly wrong when a traffic stop in the Watts area by the California Highway Patrol led to unforeseen events.

Yorty also ran for reelection in 1969 and 1973 for a third and fourth term. Those campaigns are the ones for which he is most remembered. In both of those elections, his opponent was city council member Tom Bradley, an African American and former police officer who was castigated by Yorty as a dangerous radical black nationalist. Yorty's racially-charged tactics succeeded in 1969 in getting him reelected, but they failed in 1973. Bradley's victory in 1973, led to his long service – five terms and 20 years! – as mayor of Los Angeles, and two unsuccessful runs for governor of California. In 1969 and 1973, the *Times*, what remained of the downtown elite, and a newly-forming coalition of African Americans and the liberal Westside Jewish community, became the Bradley base.

The 1965 city election is now largely forgotten when compared with the racial drama of the contests of 1969 and 1973, and the upset nature of Yorty's first election to the mayoralty in 1961. As noted, it came shortly before a major turning point in Los Angeles history, the August 1965 Watts Riot (or Watts Uprising or Watts Rebellion as it was later termed). Post-Watts, Los Angeles history began to move in one direction and Yorty in another. Yet there was no hint of the soon-to-occur events of Watts in the mayoral election of 1965, more correctly, none that the owners of, and most readers of, the *LA Times* would have seen. That is the story we will tell below.

[1]Daniel J.B. Mitchell, "The Trash-Talking Candidate Who Wasn't Supposed to Win," *California Policy Options 2018* (UCLA Luskin School of Public Affairs, 2018), pp. 134-156. Available at https://archive.org/details/YortyCPO2018.

**Watts: McCone's Revelations**

In the aftermath of Watts, then-Governor Pat Brown appointed a commission to study the causes and implications of the disturbance and to write a report outlining remedies. The Commission did so in a little over three months.[2] What the commission had to say certainly did have the full attention of the *Times,* its readers, and the downtown establishment. No one in Los Angeles could have failed to take note of Watts after August 1965, nor of what the governor's commission had to say about it. Indeed, the episode was major national news.

**Members**

The McCone Commission, as it came to be known due to its chair, John A. McCone, a former CIA director, was put together in a political balancing act. McCone was a Republican establishment figure. In contrast, the vice chair was Warren M. Christopher, an establishment Democrat who had been a speechwriter for Governor Brown (and who went on eventually to become Secretary of State under President Bill Clinton).[3]

From the ranks of the downtown LA elite, the Commission included as a member Asa V. Call, chair of Pacific Mutual Insurance Company, who was credited as the founder of the elite's so-called Committee of 25.[4] From religion, it included the Very Reverend Charles S. Cassasa, the Jesuit chancellor of Loyola University (now Loyola Marymount) and the Reverend James Edward Jones, a Presbyterian and member (and later president) of the LA School Board. Jones was an African American. Also representing the African American community was Earl S. Broady, a judge and former Los Angeles police officer.

UCLA (and academia, apart from Loyola) was represented by Sherman M. Mellinkoff, dean of the UCLA Medical School. Only one woman served on the Commission, Marlen E. Neumann, a past president of the LA League of Women Voters. The general counsel and executive director of the McCone Commission was Thomas R. Sheridan, a former prosecutor. His deputy was Harold W. Horowitz, a former official of the federal Department of Health, Education, and Welfare, UCLA law professor (and later a long-time vice chancellor at UCLA).

It may seem surprising to modern eyes that there was no Latino representation on the Commission. Indeed, the word Latino was not in wide usage. Census data referred only to "Spanish surname" in that era and included that classification as a subdivision of white. The *Times* in the mid-1960s used either Latin (rarely) or Mexican-American as a designation.[5]

In 1965, the U.S. Bureau of the Census reported that only about a tenth of the population in the area of the disturbance fell within the Spanish surname classification and that the number and percentage in

[2]*Violence in the City – An End or a Beginning*, Report by the Governor's Commission on the Los Angeles Riots, December 2, 1965. Available at https://archive.org/details/ViolenceInCity.
[3]Christopher was later to chair his own "Christopher Commission" which wrote the official report on the Rodney King beating by police, a precipitating event of the LA Riot of 1992.
[4]Margaret Leslie Davis, *The Culture Broker: Franklin D. Murphy and the Transformation of Los* Angeles (University of California Press, 2007, p. 84.
[5]Words such as Latino and Chicano did exist at the time but were not used in the *Times*.

that area of Spanish surname individuals had fallen since 1960.[6] The mid-1960s had not yet seen the immigration surge brought about by population and economic pressures in Mexico and later military and civil conflict in Central America. For all of the LA-Long Beach SMSA, Spanish surname individuals accounted for about 9% of the population in 1960, and 80% of them were native-born. African Americans accounted for about 7%.[7] In contrast, in 2019, Census estimate for LA County was that 49% of the total population was "Hispanic or Latino," the white-non-Hispanic population was 26%, Asians accounted for 15%, and African Americans accounted for 9%.[8]

**Causal Factors**

Governor Brown's specific charge to the Commission, as noted, was to draw up a chronology of what happened in Watts, look into the causes, and make recommendations. As part of the report, the Commission estimated that the African American population of LA County had grown rapidly during and after World War II and had reached 650,000 by 1965. The basis for that estimate is not entirely clear; however, the official report indicates that "two-thirds" of the African-American community lived in the area of the disorders.

That fraction would put the African-American population there at something over 430,000. A later special report by the U.S. Bureau of the Census put the African-American population of *its* definition of South LA at just under 260,000.[9] The Commission further estimated that two percent of that population took part in the disorder, i.e., 5,200 - 8,600 individuals, depending on which estimate is accepted (although the report's introduction says it might have been as many as 10,000). It is unclear from the report where the two percent estimate and the estimate of 10,000 originated and their basis.

The McCone report noted that perhaps the events in LA in 1965 might have been foreseen in hindsight, pointing out that similar, but smaller-scale, disturbances had occurred during the previous summer in New York City, Philadelphia, Chicago, and other cities.[10] But, on the other hand, it also noted that the Watts area didn't look like the big city slums of the East Coast and the Midwest. In LA, there were small houses in neighborhoods with "*trees, parks, and playgrounds*." (p. 3) And the legal segregation of the South – which was the target of the civil rights movement in the mid-1960s – didn't exist in LA:

"*A Negro in Los Angeles has long been able to sit where he wants in a bus or a movie house, to shop where he wishes, to vote, and to use public facilities without discrimination. The opportunity to succeed is probably unequaled in any other major American City*." (p. 3)

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[6]U.S. Bureau of the Census, *Special Census Survey of the South and East Los Angeles Areas*, March 23, 1966. Available at https://www.census.gov/library/publications/1966/demo/p23-017.html. The Spanish surname population was shifting toward East Los Angeles.

[7]U.S. Bureau of the Census, Census of Population and Housing: 1960, *Census Tracts, Los Angeles-Long Beach, Calif. Standard Metropolitan Area*, Final Report PCH(1)-82, 1962. Available at https://www.census.gov/library/publications/1961/dec/population-and-housing-phc-1.html.

[8]U.S. Bureau of the Census, Quick Facts: Los Angeles County, California. Available at https://www.census.gov/quickfacts/losangelescountycalifornia.

[9]U.S. Bureau of the Census, *Special Census Survey of the South and East Los Angeles Areas*, March 23, 1966. Available at https://www.census.gov/library/publications/1966/demo/p23-017.html.

[10]These events were covered in the Times, e.g., "N.Y. Race Riot Rages Violently for 2nd Day," *Los Angeles Times*, February 19, 1964. Articles cited from this period are available in the ProQuest database.

Given this perception of LA-exceptionalism, the report tries to explain how could the events of Watts have happened? The then-new War on Poverty of the Johnson administration held out promise, but there were delays in LA due to bickering over local control of the funds in LA. So, perhaps there was disappointment in LA and the Watts community when the promise wasn't quickly fulfilled. Moreover, in 1964, California voters had passed Proposition 14 which had overturned a state-level fair housing law.[11] Thus, while Southern-style legally-mandated segregation wasn't present in California, individual homeowners could discriminate under Prop 14.

Apart from possible political disappointment, the report pointed to failure in the local educational system, although it saw the failure as stemming from a disadvantaged home life which created learning problems for the schools.

"*Unprepared and unready, he may not learn to read or write… The child becomes a discipline problem… Often, he leaves school… (and) slips into the ranks of the permanent jobless*…" (p. 5)

A byproduct of these bad outcomes was what was later termed "white flight" from the schools and neighborhoods, according to the Commission. With this diagnosis, the Commission called for job training programs, pre-school educational programs, smaller class-sizes, and remedial education. For McCone, the ultimate problem was unemployment.

Contemporary readers may note the use of "he" in the quote above to describe all children and attribute it to the (politically incorrect?) parlance of the period. It is partially that, but the Commission's language undoubtedly also reflected what became known as the "Moynihan Report" which had been put out earlier in 1965 by the U.S. Department of Labor.[12] The Moynihan Report – which generated

[11]Voters overturned the Rumford Fair Housing Act in 1964 under Proposition 14. Proposition 14 was later overturned by litigation, but that outcome came later (after the McCone report).

[12]U.S. Department of Labor, Office of Policy Planning and Research, The Negro Family: The Case for National Action, March 1965. Available at https://www.dol.gov/general/aboutdol/history/webid-moynihan. The report was attributed to Daniel Patrick Moynihan, then an assistant secretary of labor, later a U.S. senator from New York. According to the Moynihan Report [excerpts]:

"*The most difficult fact for white Americans to understand is that in these terms the circumstances of the Negro American community in recent years has probably been getting worse, not better. Indices of dollars of income, standards of living, and years of education deceive. The gap between the Negro and most other groups in American society is widening. The fundamental problem, in which this is most clearly the case, is that of family structure. The evidence — not final, but powerfully persuasive — is that the Negro family in the urban ghettos is crumbling... Nearly a quarter of Negro women living in cities who have ever married are divorced, separated, or are living apart from their husbands…*"

"*As a direct result of this high rate of divorce, separation, and desertion, a very large percent of Negro families are [sic] headed by females. While the percentage of such families among whites has been dropping since 1940, it has been rising among Negroes… The Breakdown of the Negro Family Has Led to a Startling Increase in Welfare Dependency… In essence, the Negro community has been forced into a matriarchal structure which, because it is to out of line with the rest of the American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women as well*."

"*There is, presumably, no special reason why a society in which males are dominant in family relationships is to be preferred to a matriarchal arrangement. However, it is clearly a disadvantage for a minority group to be operating on one principle, while the great majority of the population, and the one with the most advantages to begin with, is*

controversy, and thus general public knowledge of its existence at the time - put much emphasis on jobless *men*, the inability of such jobless *men* to head a family. It appeared to have a significant influence on the thinking of the McCone Commission.

**Chronology**

With this background, the report turned to the actual chronology of what set off the disturbances beginning on August 11, 1965, with a traffic stop by the California Highway Patrol. Since the details of that chronology are well known, there is no point in providing them here. But there is some material in the report on police-community relations because of the triggering event.

The Commission noted that there had been a history of complaints of police brutality. It indicated that the existing structure of oversight of the LAPD was inadequate, and suggested establishment of a civilian review board to handle complaints. Police officers should have training in "*human relations*." And there should be more minority officers. On the other hand, the Commission seemed to take the word of LA Police Chief William H. Parker that he was a fair man and that complaints directed against him personally were unwarranted.

Once violence occurred, and Chief Parker had asked for the state to intervene with the National Guard, delays occurred because Governor Brown was away from California in Greece and Lieutenant Governor Glenn Anderson – who was in Santa Barbara – seemed to dither and delay in his role as acting governor. The report puts the outcome of Watts at 34 dead. There were over 1,000 injuries, and there was damage to property at over $40 million (which would be well over $300 million in 2020 dollars).

**Underlying Influences**

As noted, the Commission saw unemployment as a key underlying factor. Training programs in job skills could address that problem. Better educational outcomes were also part of the process to make the jobless more employable. The training, according to the Commission, should involve direct job skills but also needed was "*'attitudinal training' to help the candidate develop the necessary motivation, certain basic principles of conduct, and essential communication skills…*" (p. 43) To combat discrimination in employment, the Commission proposed new state legislation.

Transportation to areas of where jobs were located needed to be addressed by improved public bus service. (The last remaining line of Los Angeles' once extensive streetcars had disappeared in the early 1960s.) Bus service, however, would need a subsidy to make fares affordable. The welfare system should be tilted towards welfare-to-work. With regard to welfare payments, the Commission mused that the "*generosity*" of payments might be attracting "*the heavy immigration of disadvantaged people*

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*operating on another. This is the present situation of the Negro. Ours is a society which presumes male leadership in private and public affairs. The arrangements of society facilitate such leadership and reward it. A subculture, such as that of the Negro American, in which this is not the pattern, is placed at a distinct disadvantage*."

The Moynihan report quickly became controversial and from time to time new controversies have arisen as historians have looked at its influence. Interested readers will find many references to the debate with a quick web search.

*to Los Angeles."* (p. 71) Health issues needed to be addressed and a local hospital should be built in the South LA area.[13]

To accomplish the Commission's remedial agenda, responsible leadership in the African American community was key, according to its report. But the Commission fretted that the rhetoric of the anti-segregation civil rights movement in the South, which the Commission regarded as inapplicable to Los Angeles, was spilling over into LA:

"*The angry exhortations and the resulting disobedience to law in many parts of our nation appear to have contributed importantly to the feeling of rage which made the Los Angeles riots possible… Although the Commission received much thoughtful and constructive testimony from Negro witnesses, we also heard statements of the most extreme and emotional nature… We firmly believe that progress towards ameliorating the current wrongs is difficult in an atmosphere pervaded by these extreme statements.*" (p. 85)

All commissioners signed the final report. However, Reverend Jones – one of the two African Americans on the Commission – dissented over two points. He argued against the suggestion that generous welfare payments in Los Angeles were attracting an influx of "*disadvantaged peoples*." And he objected to the lecturing tone about the "*extreme statements*" that had been heard at the Commission hearings. (p. 87) The Commission, he argued, was in no position to tell people what to think or say.

It might be noted that except for some off-hand remarks that problems faced by African Americans might also be faced by Mexican-Americans, the report focused almost entirely on a black-white framework. And the problem was seen as within the African American community; whites were not really part of the solution, except in the sense of legislating and funding reforms and programs.

**Consequences**

The McCone Commission reflected the perspective of the downtown elite and of the leadership of the *LA Times* of that era. They were initially shocked that Watts could have happened in their city. After all, in their view, LA wasn't the South, where state-mandated segregation was the issue, and where one might therefore expect problems to arise. But Watts had nonetheless somehow occurred, and the Commission's focus on excess unemployment seemed to be a reasonable explanation. Something had to be done, and the Commission's suggestions about training, education, health, transportation, etc., seemed like a convincing plan. In that respect, the McCone Commission report was both a revelation and a direction. Problem discovered; solution found. Now it was time for implementation.

Of course, solution found is not the same as solution actually implemented. The two most tangible legacies of McCone were the creation of a new hospital noted above and the establishment of a new public bus line from South LA that took maids to work in households along Sunset Boulevard in affluent areas of Beverly Hills and Bel Air (a line discontinued in 2004).[14] Contemporary readers may not be

[13]Ultimately, as will be noted below, the Martin Luther King, Jr. hospital was built in response. Various internal scandals closed the hospital for a time, but it now functions with assistance from UCLA.

[14]See Caitlin Lu, "MTA Puts the Brakes on the 'Nanny Express,'" *Los Angeles Times,* December 11, 2004. Available at https://www.latimes.com/archives/la-xpm-2004-dec-11-me-nanny11-story.html; Douglas P. Shuit, "Crosstown Bus Links 2 Worlds ," Los Angeles Times, July 4, 2000. Available at https://www.latimes.com/archives/la-xpm-2000-jul-04-mn-47637-story.html.

impressed with the outcome, particularly with the hindsight that a similar sequence of Watts-type events occurred again in LA in 1992.

But there was also a political legacy. The *LA Times* itself had begun a process of change under its new publisher, Otis Chandler (appointed by the Chandler family in 1960). The *Times* was becoming less a local booster of Republican causes and economic growth in LA and more a national newspaper of high standing. Moreover, the shock of Watts suggested to the local powers-that-were that maybe new municipal leadership was needed. The *LA Times* in particular eventually supported Tom Bradley over Sam Yorty in 1969 and again – this time with a Bradley victory producing the first (and only) African American mayor of Los Angeles – in 1973.

**A Political Divide Begins**

When the McCone report appeared in early December 1965, the *Times* endorsed its findings and recommendations:

"*The first thing to be said about the McCone Commission's report… is that it should be read and pondered deeply by every citizen concerned with the fate of this community and, indeed, with the condition of American society. The second thing to be said is that the proposed remedial steps in the critical areas of employment, education and police relations not only deserve but demand immediate attention and action… Until these problems are solved – and, in time, there is no reason they can't be – we shall all be weakened*."[15]

Mayor Yorty, however, had a different reaction. The City had a limited budget and couldn't finance the kinds of ambitious remedial programs the report suggested. Although the McCone report was "*very constructive,*" according to Yorty, any remedy would have to be based on federal and state funding. And he criticized the *Times* for editorializing that a recent trip he had taken to South Vietnam should have been a lower priority than dealing with the City's now-evident problems. According to Yorty:

"*It would be unfair for the federal and state governments to shirk their responsibility and encourage (movement) to cities without bearing the cost of providing jobs for those who can't find jobs in private industry and the added cost of very expensive remedial school as required when school age children come into an area where the school system is too advanced for them to keep up with regular students*."[16]

In short, the shock of Watts and the McCone report was the start of a process by which the views of the *Times* and the powers-that-were in Los Angeles began to separate from those of the mayor.

**Pre-Watts: The Yorty Reelection Campaign of 1965 Begins**

In a sense, any candidate for office who runs for reelection has been campaigning throughout the previous term of office. But campaign activities heat up once the date of the reelection approaches. The intensity especially accelerates when candidates have to announce and submit the necessary papers to be placed on the ballot. In Los Angeles in the 1960s, as is still the case, mayors were elected for four-

[15]Editorial: "McCone Commission Report: I," *Los Angeles Times*, December 7, 1965.
[16]Quoted in Erwin Baker and Dick Main, "U.S. Funds Needed to Provide Jobs – Yorty," *Los Angeles Times*, December 9, 1965.

year terms during the spring of the year following a presidential election. In effect, due to the filing requirements, campaign season begins in January of the mayoral election year.

There is first a nonpartisan municipal primary. If no candidate gets a majority in that primary, the top two vote getters compete in a subsequent runoff election. But if a candidate for mayor does receive a majority in the primary, he/she wins at that point and there is no mayoral runoff election needed. Incumbents have an advantage, assuming that the public has a perception that they are doing their jobs reasonably competently. They can simply conspicuously continue doing their job and they will receive (free) news media attention for doing so.

In the 1965 primary, ultimately eight names appeared on the ballot, but only three were considered serious candidates. Yorty, of course, was one of the three and he would surely either be one of the two emerging from the primary – or he would be elected outright at that point. His main rival was Congressional representative James Roosevelt, the eldest son of former president Franklin D. Roosevelt.

The Roosevelt name alone gave James Roosevelt a certain cache with the liberal wing of the Democratic Party. He was the contemporary local embodiment of FDR's New Deal. But Roosevelt's political record was mixed. In 1948, he had opposed the nomination of incumbent Harry Truman who had succeeded to the presidency in 1945 on the death of FDR. Roosevelt pushed instead for the Democratic Party to nominate World War II hero General Dwight Eisenhower.

Eisenhower – as it turned out – was a Republican. In fact, he was the candidate of the Republicans four years later in 1952 who won the presidency. Truman obtained the 1948 nomination despite turmoil in his party and Roosevelt's opposition and won an upset victory in the general election.[17] He did not have a warm spot in his heart for Roosevelt. Roosevelt later ran for governor of California in 1950 without tangible support from Truman and lost to incumbent Republican Earl Warren (with whom Truman had a friendly relationship in spite of their partisan differences). However, Roosevelt did later win the Congressional seat in 1954 that had been earlier held by Yorty.

The third candidate in the 1965 mayoral election was Patrick D. McGee, a former Republican state assembly representative and city council member. McGee had notably tried to hold both positions at the same time, a move that sparked substantial controversy. He eventually stepped down from the state position. Despite this unseemly attempt to hold dual elected positions, it was McGee who, back in 1961, the *LA Times* had initially considered the only potential threat to Mayor Poulson. McGee, however, came in third in the 1961 primary behind Poulson and Yorty. Still, McGee had some residual name recognition in 1965. But he was basically an also-ran in that election, occasionally making news by attacking Yorty or Roosevelt.[18]

**Unruh vs. Brown**

Basically, Roosevelt's line of attack focused on Yorty's penchant for foreign travel, Yorty's bickering with certain members of the city council, and allegations that Yorty was using city employees and resources illegally to support his campaign. State-level political power at that point was divided between Governor Pat Brown and powerful Assembly Speaker Jess ("Big Daddy") Unruh. Yorty seemed to have an alliance

[17]The Democrats split three ways in 1948 with the left-wing liberals and the segregationist "Dixiecrats" forming third parties.

[18]After his two unsuccessful races for mayor, McGee returned to the state assembly.

with Unruh which Roosevelt attacked. Although Governor Brown didn't officially take sides, he appeared to favor Roosevelt.

The state-level Unruh-Brown tension also reflected itself in an election contest for city council in which the mayor had an interest and involvement. Yorty was in periodic conflict with city council representative Rosalind ("Roz") Wiener Wyman. Wyman had first been elected to the council in 1953 at age 22, the youngest member to have served, a notable accomplishment at the time for a Jewish woman. Oddly, given the later Yorty-Wyman feud, she had been originally encouraged to run for city council in 1953 by an aide to Yorty when he was in Congress.[19]

Wyman is often credited as a key player in the effort to bring the Dodgers to LA from Brooklyn. She married a Democratic operative, Eugene Wyman, while in office. Her husband was allied with Governor Brown, an alliance that seemed to be a factor in the feud with Yorty. Yorty had on-and-off battles with Brown over such matters as control of the California delegation to the 1964 Democratic presidential convention.[20] Ultimately, Yorty unsuccessfully opposed Brown in the 1966 Democratic gubernatorial primary.

**Union Divisions**

Organized labor – which had become a significant force in local politics – was split over what to do in the 1965 mayoral campaign. From an ideological perspective, labor unions tended to be aligned with Roosevelt and were happy with his record in Congress. But they also saw value in keeping him in Congress. They had no particular beef with Yorty and generally liked his pushing for civic improvements that meant jobs for union members, especially in the building trades. Why pick a fight with a satisfactory incumbent such as Yorty, particularly since he was a nominal Democrat?

Ultimately, after much internal strife, the local AFL-CIO unions did back Roosevelt. The independent Teamsters union (not part of the AFL-CIO) endorsed both Yorty *and* Roosevelt, in effect saying either one was OK so there was no need to choose sides.[21] The problem for Roosevelt was that if your allies have a public fight as to whether or not they endorse you, their eventual endorsement is worth less than an exhibition of full and united enthusiasm from the start. It's a bit like the joke about a hospital patient receiving a card saying the folks at work have voted 5-to-4 to wish you a speedy recovery. Furthermore, some local unions within the umbrella County Federation of Labor (AFL-CIO) nonetheless supported Yorty.

**Contentious Issues**

In the early part of the campaign, Roosevelt unearthed a potential Yorty scandal linked to Unruh. It appeared that Unruh had pressured a local Democratic congressional representative to assign an individual on his federal payroll to work in the Yorty campaign. Unruh denied doing it and Yorty denied knowing about it and the scandal didn't go anywhere. Generally, the various charges made by Roosevelt

[19]Ed Ainsworth, *Maverick Mayor: A Biography of Sam Yorty, Mayor of Los Angeles* (Doubleday & Co., 1966), pp. 180-181; UCLA oral history with Samuel Yorty: "Ask the Mayor," 1987, pp. 115-117. Available at https://archive.org/stream/askmayororalhist00yort/askmayororalhist00yort_djvu.txt and https://archive.org/details/askmayororalhist00yort/mode/2up.

[20]John C. Bollens and Grant B. Geyer, *Yorty: Politics of a Constant Candidate* (Palisades Publishers, 1973), chapter 16.

[21]The national Teamsters union had been ejected from the AFL-CIO at the time on charges of corruption.

(and by McGee) failed to stick. It wasn't so much that Yorty was a Teflon mayor. It was just that nothing dramatic was going wrong in Los Angeles during the campaign, even though they were soon thereafter to go very wrong.

If there was a controversial issue during the campaign, it involved the location of a proposed municipal convention center. Yorty wanted it to be built in Elysian Park and was supported in that position by organized labor and by the local Chamber of Commerce. There were proposals to have a California World's Fair in LA at the time, and the convention center would be part of that endeavor. However, the Coliseum Commission, which would be involved in the construction, wanted it in Exposition Park. Roosevelt favored that Exposition Park location. Ultimately, a save-the-park movement kept it out of Elysian Park and – in the end – the convention center was built, but in neither park.[22]

**The Busy Mayor**

During the first two months of the mayoral campaign, what City residents would have been reading about in terms of mayoral activity is Yorty in various civic meetings and celebrations. He attended the dedication of the Venice Pier, unveiled a monument and a portrait of George Washington, attended events held by Jewish women's groups, declared Toastmistress Week, attended the dedication of the International Student Center at UCLA, attended the awards of the Directors' Guild, etc.

Announcements by Mayor Yorty were made of support for a parks bond, support for expansion of the Port of LA, support for a state park in the Santa Monica Mountains. The mayor welcomed the prime minister of Japan. He attended meetings of various charitable/fundraising groups. Yorty announced street improvements in the San Fernando Valley and attended the opening of a helicopter service from the Van Nuys airport to the Los Angeles Airport. A children's petting zoo, it was announced, would be opened by Yorty.[23]

Yorty announced cuts in electricity rates of the LA Department of Water and Power and synchronization of traffic lights to reduce congestion. He weighed in on the location of a proposed federal office building in the San Fernando Valley. And he indicated there would be a study of a proposed rapid transit system that could be constructed over freeways.

Yorty hobnobbed with the downtown elite at the exclusive California Club where a UCLA fundraiser was taking place, although he had been protesting UCLA's acquisition of an apartment house in Westwood for graduate student housing. The Club was criticized during its history for its ban on women as well as racial exclusion and antisemitism, policies later changed and outlawed. But Yorty also attended a talk by Martin Luther King, Jr. and separately set February 25th as Martin Luther King, Jr. Day.[24]

Although Yorty had in the past feuded with African American city council representative Billy Mills, now, at the request of Mills, he met with representatives of CORE (the Congress of Racial Equality) who wanted Police Chief Parker to be fired. Yorty did not have the power to fire Parker, but he promised to

[22]Echo Park Historical Society, "Grace E. Simons: The Defender of Elysian Park." Available at http://historicechopark.org/history-landmarks/people/grace-e-simons/. The Convention Center was built, and later expanded, at the intersection of the 10 and 110 freeways.
[23]The current Los Angeles Zoo was being planned and constructed in this era, but it was not opened until 1966. A smaller zoo operated in Griffith Park.
[24]Martin Luther King Jr. Day was not observed as a national holiday until 1986 (pursuant to a law enacted in 1983).

consider complaints of discrimination against city departments. Mills and two African American state assembly representatives, Mervyn Dymally and F. Douglas Ferrell, endorsed Yorty for reelection. During a ceremony saluting what was then called "Negro History Week," Yorty praised the role of African Americans in the growth of LA.

By March, the campaigns had moved into high gear. McGee tried to obtain support from Republicans, since he was a registered Republican, and Yorty was a registered Democrat. Nevertheless, Yorty appeared at local Republican clubs, taking the stance that he was really bipartisan, and reminding his audiences of his support for Nixon over Kennedy in 1960. Former Republican Governor Goodwin ("Goody") Knight endorsed Yorty, not McGee. McGee said his two principal opponents – Yorty and Roosevelt – were left-wing Democrats. But Yorty repeatedly claimed that *he* was the one being targeted by left-wingers associated with Roosevelt. Despite McGee's efforts, the race was clearly becoming Yorty vs. Roosevelt.

**The Incumbent Advantage**

Yorty continued to have the advantage of an incumbent. He was always in the news, talking to religious groups, service organizations, charitable fundraisers, etc. He visited Mexico. He proclaimed "Poison Prevention Week. He dedicated a new sewage system. He rededicated Travel Town in Griffith Park. He held a reception in his home for Mexican-American leaders. He announced street improvements in the civic center area. He greeted British World War II hero Lord Mountbatten at City Hall. And he also greeted a visiting blind Japanese musician. He gave a keynote address to a meeting of the LA Press Club. He traveled to a hearing of the House Unamerican Activities Committee in Washington, DC to denounce extreme right-wing groups and local Nazis. He pushed for more defense spending in LA.

Given all of this activity, it was hard for rivals to make news. But they tried. Yorty was attacked by Roosevelt and McGee for his tax-payer financed membership in the downtown Jonathan Club, although for different reasons. Roosevelt complained that the Jonathan Club was discriminatory and didn't admit African Americans. McGee attacked Roosevelt for injecting the racial issue about the Club into the campaign but, on the other hand, argued that taxpayers shouldn't be paying the mayor's dues.

Yorty pointed to African American appointments in his administration. Roosevelt charged that Yorty's appointments were just tokenism. While boasting of his African American appointments, Yorty nonetheless complained that "*a lot of people have come here from the South with a belligerent attitude toward police officers*." The police were doing a fine job and, in LA, "*we don't permit any beatings or brutality*."[25] Police Chief Parker made a point of noting in public that under Yorty, he experienced "*less interference*" in running his agency than under prior mayors.[26] From his point of view, and he presumed the viewpoint of most voters, that lack of intervention was a Good Thing.

**The *Times* Steps In**

Shortly before the April 1965 primary, the *LA Times* published two editorials supporting Yorty over Roosevelt. The first on March 28 had to explain the 180 degree turn in *Times* policy as compared with its stance in 1961:

[25]Quoted in "Yorty Decries 'Low-Level' Vote Appeals," *Los Angeles Times*, April 1, 1965.
[26]Quoted in Paul Beck, "Roosevelt Claims 'Deal' Between Parker, Yorty," *Los Angeles Times*, April 4, 1965.

"*It is a proven fact of political life that most men undergo a sea-change, for better or worse, once they gain public office. Many who come to power with great original promise fade into mediocrity. Others with much less potential emerge as competent executives before their first term ends. Mayor Samuel W. Yorty falls into the latter category… Since 1961… Yorty has demonstrated an aptitude for handling municipal problems which is distinctly heartening*…"

The editorial goes on to credit Yorty with such positive attributes as "*fiscal responsibility*" and support for a new zoo, for the Elysian Park convention center, and for a park in the Santa Monica Mountains. On the other hand, the *Times* noted that despite the plusses of Yorty as mayor, it opposed some of his attempts in various ways to gather more authority into the mayor's office. But it favored "*his successful fight to maintain a strong police department in the face of unreasonable demands that Chief Parker be summarily dismissed, along with his devotion to better race relations*."[27]

A second editorial on April 2 made the *Times*' case against Roosevelt. Basically, Roosevelt was depicted as having a lack of knowledge and realism about city affairs. He mistakenly opposed the Elysian Park convention center plan, he mistakenly opposed redevelopment (urban renewal) of Bunker Hill in downtown LA, and he lacked understanding of the costs of building a rapid transit system. "*In short, although Roosevelt's intentions may be the very best, …he betrays a naivete concerning the city's growth problems which casts serious doubt upon his ability to handle them*."[28] The *Times* did not explain why, given its admittedly negative misjudgment of Yorty in 1961, readers should this time trust its opinion of Roosevelt.

**The Primary Election Result and Its Aftermath**

Whether because of the *Times* support of Yorty, or just because of a perception that things in LA were OK, Yorty received 58% of the votes in the primary a few days later, thus securing reelection as mayor without a runoff. Roosevelt received 36% and McGee, 5%. Moreover, his nemesis, Rosalind Wiener Wyman, was forced into a runoff against newcomer Ed Edelman who would in fact defeat her in the second contest and go on to a long career on the city council and as a county supervisor. (The *Times* had supported Wyman.) In terms of state politics, the result is seen in hindsight as the beginning of the end for Governor Brown's career. Brown was allied with the losers Roosevelt and Wyman and would himself go on to defeat by Ronald Reagan in the gubernatorial election of 1966.

In the period between the primary and the events of Watts, there was the luck of timing from the Yorty perspective. Shortly after the primary, a scandal emerged involving bribing of city building inspectors. Such a scandal before the primary might have reduced the Yorty margin of votes, possibly forcing him into a runoff. It also became clear that the holding of a California World's Fair in LA in 1968-69, aimed at attracting tourism and economic activity, was unlikely to happen. Bickering over War on Poverty funding continued, leading eventually to a brief sit-in in the mayor's office by CORE. From a political viewpoint, it was best for Yorty that such developments had come after the primary.

Tension between Yorty and council member Tom Bradley began to take shape with regard to the police, a tension that would frame the 1969 and 1973 mayoral elections in which the two faced off. Yorty attacked Bradley for being anti-police:

[27]Quotes from Editorial: "Best for Mayor: Samuel Yorty," *Los Angeles Times*, March 28, 1965.
[28]Editorial: "Why Yorty, Not Roosevelt?" *Los Angeles Times*, April 2, 1965.

"*We have one city councilman who seems to want to make news by using the Police Department as a whipping boy to further his own political ambitions. I regard this as very serious because I've noticed since he started his attacks there has been a different tone in the Negro press. Lately, I've seen a lot of articles that give me a lot of concern. I think we should try to get straightened out with Bradley to see what's going on here*…"[29]

But for the most part, the flow of civic events continued as before the election. The Mexican ambassador and the president of South Korea visited with Yorty. Yorty attended a dinner for the departing Israeli consul general. Proclamations were issued by the mayor for Travel Week, Realtor Week, Salvation Army Week, and Be Kind to Animals Week. Some of Yorty's proclamations involved only 24 hours, not a full week, e.g., Theater Organ Day. But all of them made news and engendered goodwill from the beneficiaries.

After some debate, a new city budget was enacted, a planning group was set up for the proposed park in the Santa Monica Mountains, a new road project was announced for the San Fernando Valley, and a canal improvement project was approved for Venice. Yorty welcomed delegates of the California Federation of Women's Clubs to a conference at the Biltmore. A ceremonial shovel was turned by Yorty for a new fire station in Pacific Palisades and a new post office was dedicated in the San Fernando Valley. Yorty participated in a fundraising campaign for the private Harvard School (now Harvard-Westlake). In late July, he attended an inaugural ball for himself and others elected in the spring municipal elections. Not long after, the events of Watts occurred.

**Coverage of African American and Mexican-American Issues in the *LA Times***

In the pre-Watts period, and during the 1965 municipal election season, issues related to the Mexican-American community were covered in the *LA Times*, but in a limited fashion. Much of the coverage involved the ending of the Bracero program which had brought temporary workers from Mexico to harvest farm crops beginning in World War II. Once that program ended, farmers complained of labor shortages and the *Times* regarded these complaints sympathetically and pushed for some kind of renewed program.

Interesting and contentious as this agricultural issue was, it had little to do with Mexican-Americans residing in the urban areas served by the *Times*. Occasionally, items appeared taking note of scholarships won by local Mexican-American students. Or there might be note taken of celebratory events. For example, Mayor Yorty attended a ceremony at Olvera Street, the tourist attraction featuring historic buildings, Mexican restaurants, and Mexican-oriented retail stores. At Olvera Street, Yorty proclaimed LA to be "*an amalgam of all origins, races and creeds*."[30] (Olvera Street, it might be noted, was a creation in the 1930s of the *LA Times*, in conjunction with other promoters, as a tourist attraction.)

As pointed out in the context of the later McCone Commission report, Mexican-Americans at the time were considered to be the other minority. In part because of the very dramatic confrontations over civil rights and segregation of African Americans in the South, there was much coverage of those events in

[29]Quoted in Erwin Baker, "Yorty Raps Bradley on Police Criticism," *Los Angeles Times*, April 28, 1965. The issue at the time involved the shooting of an unarmed Hollywood carpenter after a traffic stop, discussed below.
[30]"Yorty Acclaimed as Los Angeles 'Alcalde,'" *Los Angeles Times*, May 21, 1965.

the *Times*.[31] But, of course, those events were taking place somewhere else; a connection to those events with conditions in LA was neither emphasized nor much recognized in the *Times* before Watts.

In LA, in contrast with the South, conflicts could be worked out by people of good will, in the view of the *Times*. And it provided examples. A lengthy article appeared in mid-June 1965 describing an ongoing seminar program sponsored by UCLA Extension in which people of different backgrounds read books, heard lectures, and talked about their various perspectives.[32] Reform Jewish Temples invited African American churches to participate in Passover seders.[33] An experiment with busing of children from South LA to two public elementary schools on the Westside was financed through private philanthropy.

Nonetheless, there were warnings that such kumbaya moments might not be the whole story. For example, one of UCLA's most prominent African American graduates, United Nations undersecretary general Ralph Bunche, warned at UCLA that there were those folks in the community who felt the civil rights movement was not going fast enough.[34] Despite such warnings, as far as local issues were concerned, or even protests aimed at events elsewhere, moderation was seen as the best approach according to the *Times*:

"*The moderates, better armed than ever before with new laws and governmental willingness to enforce them, urge greater reliance on political power to fulfill Negro objectives. The militants, meanwhile, (call) for stepped-up use of direct action techniques, often without regard to their possible consequences*."[35]

The *Times* did cover what local African American and Mexican-American *politicians* were doing and saying. It took note of the conflict over control of federal War on Poverty funding that was later identified in the McCone report and which involved tensions between various African American and Mexican-American groups and the mayor (and indirectly between Brown and Unruh). There were also tensions when African American city council representative Billy Mills and assembly representative Mervyn Dymally endorsed a Mexican-American candidate for the LA Board of Education, Ralph Poblano, over the Reverend James Edward Jones, an African American.[36] (Jones won and – as noted earlier - later served on the McCone Commission.)

What is now termed Black History Month – then known as Negro History Week – was the occasion for *Times* coverage of various programs around the city related to race relations; for example, at UCLA and Claremont Men's College in February 1965. Earlier, the *Times* had a front page interview with Chancellor Franklin Murphy about student unrest at UCLA; the Free Speech Movement at Berkeley was already underway and was receiving national attention. Murphy indicated that student unrest was in part tied to "*the treatment of the Negro (which) has gotten through to today's bright students as nothing else has in a long time*."[37]

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[31]For example, the marches from Selma to Montgomery, Alabama took place in March 1965.
[32]Art Seidenbaum, "The Space for Race in a Hopeful Los Angeles," *Los Angeles Times*, June 13, 1965.
[33]"Reformed Jews to Ask Negroes to Temple Rite," *Los Angeles Times,* April 3, 1965.
[34]"Bunche Assails Truman Over Blasts at King," *Los Angeles Times,* April 22, 1965.
[35]Editorial: "Excesses in the Rights Movement," *Los Angeles Times*, July 6, 1965.
[36]Poblano continued a career in education and eventually became the ombudsperson for San Jose State University. He did not make it beyond the primary, however. In the runoff that followed, Mills and Dymally switched their support to Jones.
[37]Quoted in William Trombley, "UCLA Chancellor Views Future of Restless Students," *Los Angeles Times*, January 24, 1965.

**Police Issues**

As far as relations with the police, the *Times* did report on charges against the Police Department but did not perceive incidents or complaints as symptoms of a systematic problem. When a white police officer who was a member of CORE was apparently suspended for his protest activities, a hearing was held. The officer testified that the Department was "*a bastion of bigotry*" and practice *de facto* segregation in job assignments, those opinions were reported.[38] But the reporting stopped there.

When an unarmed (white) Hollywood studio carpenter with no criminal record was shot and killed in a traffic stop in February 1965 and the event was ruled a justifiable homicide, the facts were also reported.[39] Witness testimony contradicted what the police said had occurred. Council member Tom Bradley tried unsuccessfully to have a thorough hearing on the shooting.[40] The *Times* did not look further into the details of such occurrences. It just reported what was said.

Of course, the McCone Commission – while suggesting a civilian police review board for complaints – also in the end did not put blame on Police Chief Parker. Parker had dealt with earlier police corruption and had professionalized the Department. He had supported the 1950s popular TV program, *Dragnet*, whose hero, Sargent Friday, portrayed as a kind of human Robocop, always got his man and protected the (often hapless) residents of LA from evildoers.

The downtown establishment never turned on Parker despite Watts. In June 1966, less than a year after Watts, Parker – was being honored for his service to the City at a downtown hotel banquet when he collapsed and died of a heart attack.[41] But his successors as police chief viewed him as an example to be followed. The police headquarters building was named after Parker. When events similar to Watts repeated in LA in 1992, the police chief at the time, Daryl Gates, had served as Parker's driver and bodyguard.

When the events of Watts took place, the *Times* had no African American reporters. It did have an African American messenger in the sales department who described what he had seen in Watts to the editorial staff and was quickly converted into a reporter.[42] But what that situation meant was that the *Times*, while it could cover the doings of African American political figures and celebrities, was not in a position to have any direct knowledge of the kinds of socio-economic indicators featured in the McCone report. In 2020, although much had changed, the *Times* was still wrestling with this heritage and

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[38]Howard Hertel, "Hannon Hits Police Dept. for Bigotry," *Los Angeles Times*, July 8, 1965.

[39]Grudt was identified in some much later accounts as African American. However, Census records from 1940 identify him as white. The mistake appears in Felicia Angeja Viator, *Gangster Boogie: Los Angeles and the Rise of Gangsta Rap, 1965-1992*, PhD dissertation, Department of History, University of California-Berkeley, 2012, pp. 22-23. Available at https://digitalassets.lib.berkeley.edu/etd/ucb/text/Viator_berkeley_0028E_12902.pdf. Had there been a racial element involved, the *Times* would likely have mentioned it.

[40]The City eventually settled the case in 1971 for $150,000. "$150,000 Awarded to Police Victim's Kin," *Los Angeles Times*, December 11, 1971.

[41]After the events of Watts, Parker had predicted a growing African American population in LA and warned, "*you're going to have to get in and support a strong police department. If you don't, come 1970, God help you*." Quoted in Kevin Starr, *Golden Dreams: California in an Age of Abundance, 1950-1963* (Oxford University Press, 2009), p. 188.

[42]Daina Beth Solomon and Dexter Thomas, "Urban legend about Times reporting during Watts riots conceals a sadder tale," *Los Angeles Times*, August 14, 2015. Available at https://www.latimes.com/local/wattsriots/la-me-watts-richardson-20150814-story.html.

published a review of what it viewed with hindsight as blind spots in its history with regard to racial matters.[43]

**Learning from History**

So, what do we learn from events of 1965 and Mayor Yorty's reelection campaign? With hindsight, we can see later events beginning to take shape. The fact that the events of Watts roughly repeated in 1992, and to some extent in 2020, would undoubtedly have surprised the powers-that-were in LA back in 1965. After all, the problem had been diagnosed and the solution proposed by a respected commission. Surely, with goodwill, the needed reforms would be implemented.

When it later became apparent that Mayor Yorty was not going to be the one to do the implementing, the *Times* and the downtown elite formed an alliance with local liberals, the African American community, and the Westside Jewish community to elect Tom Bradley as mayor (although it took two contests with Yorty to do it). At the same time, due in part to the changing demographics of the City, political power became diffused. It became harder for any elite to control the course of events. Thanks to the internet, the *LA Times* found its subscriber and revenue bases undermined and went through bankruptcy. It no longer has the influence over local policy that it once had.

We like to look back at history with the idea that today we are much more enlightened and prescient about what should be done than folks were in the past. This chapter was written 55 years after Yorty's reelection of 1965, the events of Watts, and the McCone report. Maybe the chief lesson is that someone looking back in time 55 years from now might well wonder how folks in our time could have been blind to whatever is yet to come and could have failed to propose and/or implement needed remedies.

[43]Editorial: "An examination of The Times' failures on race, our apology and a path forward," *Los Angeles Times*, September 27, 2020. Available at https://www.latimes.com/opinion/story/2020-09-27/los-angeles-times-apology-racism.

# Chapter 5

# Sexual Health Education Policy in the Los Angeles Unified School District

**Devon Schechinger and Keara Pina**

[1]This chapter is based on an Applied Policy Project (APP) undertaken by the authors and Katie Solomon, Zi Wang, and Ben Parnes as part of the Master of Public Policy (MPP) program at the UCLA Luskin School of Public Affairs. The project was developed for Timothy Kordic, Project Advisor, HIV/AIDs Prevention Unit in the Los Angeles Unified School District Health Education Programs Office. The authors and the other members of the APP team are all UCLA MPP graduates.

Effective and holistic comprehensive sexual health education is paramount in creating a foundation for lifelong healthy behaviors, as well as positive, consensual, and loving relationships. The 2016 California Healthy Youth Act (CHYA) affirms this claim by mandating comprehensive sexual health education that is medically accurate, unbiased to any sex, gender, sexual orientation, race or ethnicity, and age-appropriate, among other criteria outlined later in this report. CHYA promotes healthy relationships and behaviors in a framework that strives to support students in fostering healthy and positive attitudes about themselves, their relationships, and their lives.

It has been immensely challenging for California's school districts, especially those with limited resources and budgets, to achieve compliance with CHYA, an unfunded mandate. The implementation and distribution of CHYA-compliant curricula and resources is challenging due to poorly communicated policy requirements, political push-back, and the absence of a statewide compliance-tracking system. These challenges weave a nearly-impenetrable barrier to giving LAUSD students the comprehensive sexual health education that they deserve, and that is legally obligated under CHYA.

This chapter assesses the Los Angeles Unified School District's (LAUSD) approach to the implementation of the 2016 California Healthy Youth Act. We explore disparities in equitable access to sexual health information; policy change at the state, local and district levels; and teacher support and training. Through in-depth conversations and interviews with stakeholders in nonprofit sex education organizations and in other school districts, teacher surveys, and extensive data analysis, we gained an informed and analytical understanding of the sexual health education landscape in LAUSD. Guided by the provisions of CHYA and based on this research and analysis, we address the following policy question:

***"How can LAUSD draft and successfully implement a District-wide, comprehensive sex education policy to ensure all schools comply with the California Healthy Youth Act (CHYA) and its relevant amendments?"***

To address the goals in this policy question, we offer evidence-based approaches to:

1. **Draft a new, Board of Education-approved, District policy that builds on existing CHYA mandates and also addresses the specific needs of the Los Angeles Unified School District (LAUSD).**
2. **Recommend implementation and compliance tracking strategies to ensure broad policy adoption across LAUSD.**

## Implementation Recommendations

**Short-Term Recommendations**

Ensure the circulation of the CHYA-compliant curriculum.

**Long-Term Recommendations**

Collect current, district-wide data; keep and maintain records.

Move first-time sexual health educator training to weekdays.

**LAUSD or State Advocacy Recommendations**

Change the course schedule in middle school to include a one-semester block for health.

Require single-subject or multiple-subject credentials for all health educators.

## Compliance Recommendations

**Long-Term Recommendations**

Create a compliance tracking system at the school, classroom, or individual student level.

**LAUSD or State Advocacy Recommendations**

Include CHYA compliance into the Western Association of Schools and Colleges (WASC) accreditation audi

With these recommendations, LAUSD can provide equitable access to affirming and positive comprehensive sexual health education to ensure LAUSD students have the knowledge and educational support necessary to make informed decisions about their health and wellbeing, both physical and emotional.

## The Importance of Sex Education: Current Health Landscape of Youth in Los Angeles

Current youth health outcomes in Los Angeles highlight the need for a revised policy and effective sex education. Sexually transmitted infections (STIs) are increasingly prevalent in LA County.[1] In 2018, there

[1]Division of HIV and STD Programs, Los Angeles County Department of Public Health. "2017 Annual STD Surveillance Report". Los Angeles County Department of Public Health. Accessed February 27, 2020. http://publichealth.lacounty.gov/dhsp/Reports/STD/2017_STDSurveillanceReport_Final_07.29.19.pdf

were 96,342 total STI cases reported to the LA Department of Public Health.[2] For the past decade, for the 10-19 year-old age group, both chlamydia and gonorrhea were reported with a higher prevalence than at the state level, with Latinos and African-Americans disproportionately affected.[3] In 2016, 1,949 residents were reported as newly diagnosed with HIV infection in LA County, with 3% among youth under 19.[4] In addition, the rate of new diagnoses of HIV in the county is above both the state and the national level.[5] Youth and young adults represent a disproportionate number of new HIV diagnoses.[6]

LA also has a high number of teen births, reaching up to 15,922 births from females age 15-19 in 2015-2017 despite a decrease in the overall teen birth rate in the country and in California.[7] Racial and ethnic disparities in teen birth rates persist, with Hispanic/Latinx rates (2.11%) nearly eight times higher than that for White teens (0.27%), and African American/Black teen birth rates (1.72%) almost six times higher than White teens' rates.[8]

Behavior and health outcomes are linked, making the need for effective sex education clear. The Youth Risk Behavior Survey (YRBS), an annual school-based survey conducted by the Centers for Disease Control and Prevention (CDC) and local education agencies, uses a large, representative sample of middle school and high schools to assess health-related behavior.[9] According to the 2019 YRBS, 8.3% of middle school

[2]Division of HIV and STD Programs, Los Angeles County Department of Public Health. "2018 Los Angeles County STD Snapshot". Los Angeles County Department of Public Health. Accessed February 27, 2020. http://publichealth.lacounty.gov/dhsp/Reports/STD/2018_LosAngelesCounty_STD_Snapshot.pdf

[3]Los Angeles County Commission on HIV and the Los Angeles County Department of Public Health Division of HIV and STD Programs. "Los Angeles County Comprehensive HIV Plan (2017-2021)" Los Angeles County Department of Public Health. Accessed February 27, 2020. http://publichealth.lacounty.gov/dhsp/Reports/Publications/LAC-Comprehensive-HIV-Plan2017-2021.pdf

[4]Division of HIV and STD Programs, Los Angeles County Department of Public Health. "2017 Annual HIV Surveillance Report". Los Angeles County Department of Public Health. Published November 15, 2018. Accessed February 27, 2020. http://publichealth.lacounty.gov/dhsp/Reports/HIV/2017_AnnualHIVSurv_Report_FINAL_2018Nov15.pdf

[5]Centers for Disease Control and Prevention. "HIV Surveillance Report, 2018 (Preliminary); vol. 30." CDC. Accessed February 27, 2020. http://www.cdc.gov/hiv/library/reports/hiv-surveillance.html .

[6]Los Angeles County Commission on HIV and the Los Angeles County Department of Public Health Division of HIV and STD Programs. "Los Angeles County Comprehensive HIV Plan (2017-2021)" Los Angeles County Department of Public Health. Accessed February 27, 2020. http://publichealth.lacounty.gov/dhsp/Reports/Publications/LAC-Comprehensive-HIV-Plan2017-2021.pdf

[7]California Department of Public Health Center for Family Health, Maternal, Child and Adolescent Health Division Epidemiology, Surveillance, and Federal Reporting Branch. "Adolescent Birth Rates in California 2000-2017". California Department of Public Health. Accessed February 27, 2020. https://www.cdph.ca.gov/Programs/CFH/DMCAH/CDPH%20Document%20Library/Data/Adolescent/Adolescent-Birth-Rates-2017.pdf

[8]California Department of Public Health. "Birth Statistical Master Files." California Department of Public Health. Accessed February 27, 2020. https://www.kidsdata.org/topic/315/teen-births-race/table#fmt=1194&loc=364&tf=88&ch=7,11,8,507,9,73&sortColumnId=0&sortType=asc

[9]Centers for Disease Control and Prevention. "Youth Risk Behavior Surveillance System." Atlanta: Centers for Disease Control and Prevention. Accessed May 2, 2020. https://www.cdc.gov/healthyyouth/data/yrbs/index.htm

students in LAUSD have had sexual intercourse, compared to 6.7% in 2017.[10] For high school students, the percentage of sexually active students was 30.2% in 2019, compared to 30.0% in 2017. An alarming 48% of sexually active high school students in LAUSD in 2019 did not use a condom during their last sexual intercourse, while in 2015, 37.7% did not. Moreover, 24.3% of LAUSD high schoolers did not use any method to prevent pregnancy during their last sexual intercourse in 2019, compared to 15.7% in 2015.

The persistent gaps in health outcomes and associated risk behaviors point to the importance of sex education tailored to adolescent needs and an effectively implemented sex education policy that ensures students receive the required education and resources. Research shows that comprehensive sexual health education has favorable effects on health behaviors and health outcomes.[11] Still, the reality of sex education is that it is inadequate for students in LAUSD and remains mainly unchanged, even after CHYA passage in 2016.

According to the 2019 Youth Risk Behavior Surveillance System (YRBS) data, only 45.8% of middle school students and 72% of high school students in LAUSD reported they received sex education in school, compared to 70.3% of high schoolers and 46.7% of middle schoolers in 2017.[12] Moreover, the Centers for Disease Control and Prevention School Health Profiles in 2018 show only 58.5% of LAUSD middle schools, and 79.9% of LAUSD high schools report they teach all 20 sexual health topics recommended by CDC.[13] This deficiency further underscores the need for a CHYA-compliant policy and implementation process to target LAUSD teens' needs. The available data only reflect measurable outcomes, while effective comprehensive sex education tackles more amorphous and nuanced topics that are harder to measure, such as self-efficacy, rights in a relationship, and body positivity, among others.

[10]LAUSD data provided to the authors and the other team members, not available online at this writing.

[11]Kohler, Pamela K., Lisa E. Manhart, and William E. Lafferty. "Abstinence-only and comprehensive sex education and the initiation of sexual activity and teen pregnancy." Journal of adolescent Health 42, no. 4 (2008): 344-351; Kirby, Douglas B. "The impact of abstinence and comprehensive sex and STD/HIV education programs on adolescent sexual behavior." Sexuality Research & Social Policy 5, no. 3 (2008): 18; Chin, Helen B. et al. "The effectiveness of group-based comprehensive risk-reduction and abstinence education interventions to prevent or reduce the risk of adolescent pregnancy, human immunodeficiency virus, and sexually transmitted infections: two systematic reviews for the Guide to Community Preventive Services." American journal of preventive medicine 42, no. 3 (2012): 272-294.

[12]LAUSD data provided to the authors and the others on their team, not available online at this moment.

[13]Centers for Disease Control and Prevention. "School Health Profiles 2018: Characteristics of Health Programs Among Secondary Schools." Atlanta: Centers for Disease Control and Prevention. Accessed February 27, 2020. https://www.cdc.gov/healthyyouth/data/profiles/pdf/2018/CDC-Profiles-2018.pdf

## Sex Education History in the U.S. and California

In 1975, the World Health Organization defined the goal of sexual health education as the confluence of the emotional, social, and intellectual aspects of sexual being. The bedrock of that definition is the right to sexual information.[14] California has led the way on sexual health and wellness through this framework for many decades.

California rejected much of the national funding for abstinence-only education and often takes a leading role in the fight for information equity.[15] Through years of waffling federal policy based on administration and party, California held fast to an education system based on the equity in and access to information. For example, California required all public schools to teach HIV/AIDS education starting in 1992, long before state law required sex education, and before the two were braided together in a single curriculum.[16]

Over many years, the state legislature passed numerous HIV/AIDS and sex education laws, several of which were confusing for school districts, and challenging to implement due to their complex, non-requirement, and occasionally conflicting nature. In 2003, California's Senate passed the Comprehensive Sexual Health and HIV/AIDS Prevention Education Act (SB 71) to try to synthesize the multiple state pieces of legislation addressing HIV and sexual health into one streamlined bill for ease of implementation.[17] Through SB 71, California mandated schools and districts to teach HIV/AIDS prevention education to all students in 7th-12th grade, but comprehensive sex education was only "authorized" and recommended rather than mandated.[18] Additionally, SB 71 includes language for parents to opt-out of any comprehensive sex education.[19] This approach left schools to teach the comprehensive sex education curriculum of their choosing, if at all.

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[14]Planned Parenthood. "History of Sex Education in the US." Planned Parenthood. Accessed February 27, 2020. . https://www.plannedparenthood.org/uploads/filer_public/da/67/da67fd5d-631d-438a-85e8-a446d90fd1e3/20170209_sexed_d04_1.pdf

[15]Guttmacher Institute. "Sex and HIV Education." Accessed February 27, 2020. https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education

[16]Burlingame, Phyllidia. "Sex Education in California Schools". ACLU of Northern California. Accessed February 27, 2020. https://www.aclunc.org/sites/default/files/asset_upload_file829_3512.pdf

[17]Sen. Bill 71, 2003-2004Reg. Sess. (2003) https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200320040SB71; Combellick, Sarah MPH; Brindis, Claire DrPH. "Uneven Progress: Sex Education in California Schools". UCLA Bixby Center for Global Reproductive Health. ACLU of Northern California. Accessed February 27, 2020.

[18]Combellick, Sarah MPH; Brindis, Claire DrPH. "Uneven Progress: Sex Education in California Schools". UCLA Bixby Center for Global Reproductive Health. ACLU of Northern California. Accessed February 27, 2020.

[19]LegInfo. "Bill Text- SB71". California Legislature. Accessed February 27, 2020. https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200320040SB71

With changing administrations on the national level, declining teen pregnancy rates, but soaring STI rates in California, state legislators pushed an even more holistic bill in 2016 when they passed the California Healthy Youth Act (CHYA).

## What is the California Healthy Youth Act (CHYA)?

The California Legislature passed the California Healthy Youth Act (CHYA) with the purpose of "providing every student with the knowledge and skills necessary to protect their sexual and reproductive health from unintended pregnancy, human immunodeficiency virus (HIV), and sexually transmitted infections."[20] CHYA requires schools to provide medically-accurate, age-appropriate, comprehensive, and unbiased sexual health and HIV-prevention education.[21] School districts must provide such education to all students at least once in middle school and once in high school.[22] Most crucially, CHYA must affirm the message that sexuality is a normal and healthy part of adolescence; this is paramount to CHYA's goals of teaching students how to protect themselves, foster safe and positive relationships, and establish healthy attitudes around bodies, growth, and development.[23]

CHYA mandates that curricula affirm all sexual orientations and genders, and discuss relationship abuse and sex trafficking.[24] The policy also requires that curricula are appropriate for students with disabilities and accessible to English-language learners.[25] Under CHYA, parents must receive notification of instruction at least 14 days before the curriculum is taught and are allowed to opt their children out of participation, also known as passive consent.[26] Parents can opt their children out of specific sex education topics except for lessons on gender identity and inclusivity.[27] Conversely, active consent, the

[20]Torkalson, Tom. "California Health Youth Act: Sexual Health Education". California Department of Education. Accessed February 27, 2020. https://www.cde.ca.gov/nr/el/le/yr18ltr0405.asp
[21]California Sex Education Roundtable. "FAQ, CHYA." ACLU of Northern California. Accessed February 27, 2020. https://www.aclunc.org/docs/frequently_asked_questions-california_healthy_youth_act-ca_sexual_health_education_roundtable.pdf.
[22]Assem. Bill 329, 2015-2016 Reg. Sess. (2016) http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0001-0050/abx1_28_bill_20110628_enrolled.pdf
[23]California Department of Education. "The California Healthy youth Act and 2019 Health Education Curriculum Framework". San Diego County Office of Education. Accessed February 27, 2020. https://www.sdcoe.net/lls/ccr/Documents/How%20CHYA%20is%20different%20from%20Framework.pdf
[24]California Sex Education Roundtable. "FAQ, CHYA." ACLU of Northern California. Accessed February 27, 2020. https://www.aclunc.org/docs/frequently_asked_questions-california_healthy_youth_act-ca_sexual_health_education_roundtable.pdf.
[25]Assem. Bill 329, 2015-2016 Reg. Sess. (2016) http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0001-0050/abx1_28_bill_20110628_enrolled.pdf
[26]Ibid.
[27]California Department of Education. "The California Healthy youth Act and 2019 Health Education Curriculum Framework". San Diego County Office of Education. Accessed February 27, 2020. https://www.sdcoe.net/lls/ccr/Documents/How%20CHYA%20is%20different%20from%20Framework.pdf

option through which parents would have to opt their children into sex education classes, is prohibited under the current mandate.[28]

The eight curricula used throughout California have been reviewed, modified, and approved as "CHYA-compliant" by the Adolescent Sexual Health Work Group (ASHWG), a state-wide coalition of government and non-government organizations working on CHYA implementation and compliance.[29] All curricula language expresses a commitment to including all genders, sexual orientations, races, religions, abilities, and backgrounds. Most curricula are available for English Learners.

There was no appropriated funding promised to school districts or schools as CHYA is unfunded. Before 2012, California provided a Mandated Cost Reimbursement program through which districts could submit claims for costs associated with implementing specific mandates, such as SB 71, regarding HIV/AIDS prevention and education.[30] Schools quickly found the reimbursement process could take up to two years, so many districts stopped submitting reimbursement claims.[31]

To mitigate this lack of resource use, California decided to give a block grant option to districts called The Mandate Cost Block Grant in 2012, which bundled funding for 50 mandates into one block into which schools/districts could opt each year.[32] This grant, while intended to make the process easier, complicated districts' ability to parse funding streams for different mandates—for example, using the HIV/AIDS mandate funds for comprehensive sex education costs. Still, the exact amount per year, per district, is unclear.[33]

[28]California Sex Education Roundtable. "FAQ, CHYA." ACLU of Northern California. Accessed February 27, 2020. https://www.aclunc.org/docs/frequently_asked_questions-california_healthy_youth_act-ca_sexual_health_education_roundtable.pdf.

[29]Adolescent Sexual Health Work Group. "Resources to Support Implementation of the California Healthy Youth Act.". Adolescent Sexual Health Working Group. Accessed February 27, 2020. http://ashwg.org/wp-content/uploads/2019/10/Resources-to-Support-Implementation-of-the-California-Healthy-Youth-Act-100419.pdf

[30]Gould, Jefferey. "Potential Funding Sources for Sexual Health Education in California" Cardea: Training, Research and Development and Training Services." Cardea Services. Accessed February 27, 2020. http://www.cardeaservices.org/_literature_198500/Potential_Funding_Sources_for_Sexual_Health_Education_in_California

[31]Ibid.

[32]Ibid.

[33]California Department of Education. "The California Healthy Youth Act and 2019 Health Education Curriculum Framework". San Diego County Office of Education. Accessed February 27, 2020. https://www.sdcoe.net/lls/ccr/Documents/How%20CHYA%20is%20different%20from%20Framework.pdf

## Special Populations Affected by CHYA Mandates

Our implementation and compliance tracking strategies focus on the special student populations in LAUSD, whose identities or circumstances may not have been previously reflected in sexual health education content. More specifically, we address English-language learners, foster youth, special education students, the LGBTQ+ community, and minors involved in or exposed to human sex trafficking. Over 143,000 LAUSD students speak a language other than English; at least 132,500 of those students speak Spanish, which is equal to 21.3% of all students in the District.[34] Therefore, ensuring LAUSD provides all CHYA-compliant curricula in languages other than English is critical to achieving equitable access to information.

Besides the California Healthy Youth Act (CHYA, AB329), the California state legislature has passed the California Foster Youth Sex Education Act (SB89) in 2017 to serve the needs of the 4,000 foster youth in LAUSD.[35] This law requires comprehensive sex education for foster youth and new training requirements for caregivers. The most relevant part of the legislation to this chapter is the requirement that caregivers and caseworkers track if and when foster youth received CHYA-compliant sex education and develop a plan for the student to receive the education if they have not done so. This provision is the first-ever tracking system requirement in reference to CHYA, but it is restricted to foster youth.

In addition to foster youth, CHYA particularly focuses on LGBTQ+ communities. A recent study found a 34% increase in suicide among California youth in the past three years, with LGBTQ+ youth at particular risk for self-harm.[36] The LA County Center for Health Equity sums up the collective danger to such communities due to disproportionate racially- and sexually-motivated risk-factors saying that among "men who have sex with men and transgender individuals, homophobia, stigma, racism, and threats of violence lead to disproportionate disease risk."[37] This risk is "also magnified among LGBTQ youth, who experience higher rates of victimization and criminalization than their non-LGBTQ counterparts."[38]

[34]Data collected by the California Department of Education (CDE) through the California Longitudinal Pupil Achievement Data System (CALPADS). Accessed March 11,2020. http://www.cde.ca.gov/ds/sd/sd/fileselsch.asp.
[35]Data from https://www.ed-data.org/district/Los-Angeles/Los-Angeles-Unified.
[36]America's Health Rankings. "2019 Health of Women and Children Report", America's Health Rankings. Accessed February 27, 2020, https://www.americashealthrankings.org/learn/reports/2019-health-of-women-and-children-report, America's Health Rankings. "Annual Report". America's Health Rankings. Accessed February 27, 2020. https://www.americashealthrankings.org/explore/annual/measure/Suicide/state/CA
[37]Center for Health Equity, "Sexually Transmitted Infections". Los Angeles County Department of Public Health. Accessed February 27, 2020. http://publichealth.lacounty.gov/CenterForHealthEquity/PDF/Factsheet_STD.pdf
[38]Ibid.

The importance of CHYA's commitment to affirming LGBTQ+ identities and including sexual health and wellness information for these populations is thus underscored. Studies show youth whose schools and states mandate conversations about sexual orientation and gender identity, particularly in anti-bullying efforts, "report less homophobic victimization and harassment than do students who attend schools" that do not.[39]

CHYA mandates that curricula include a discussion of sex trafficking as well. The state legislature added this mandate due to the issue's prevalence, especially in Los Angeles. California is considered one of the top US locations for sex trafficking due to the international nature, size and number of ports, and proximity to the Mexican border.[40]

In 2018, there were nearly 1,700 human trafficking reports, of which 1,300 were sex trafficking, and experts acknowledge this number is severely underreported.[41] Due to the prevalence of minors in trafficking incidents, and the use of the internet to lure minors into dangerous situations, California lawmakers decided that including a conversation about sex trafficking was essential to the safety of California students. Assembly Bill 1227 (AB1227), The Human Trafficking Prevention Education and Training Act, was signed into law in 2017, adding to CHYA's training and education requirements to identify and prevent human trafficking in all forms, sex, labor, or otherwise.[42]

## The LAUSD Sex Education Policymaking Process and Current Practices

To draft a new District policy and provide an implementation strategy to achieve compliance across LAUSD, it is imperative to understand the landscape of sex education policymaking and administrative structure within the District. The Los Angeles Unified School District is the 2nd largest school district in the U.S., it spans 960 square miles, and it is divided into six local districts by region.[43]

The elected LAUSD Board of Education (BOE) must pass all policies and major decisions. LAUSD communicates policy changes through official bulletins sent to LAUSD administrative staff, local superintendents, principals, and teachers for implementation. Any new sex education policy proposals

[39]Kosciw JG, Greytak EA, Palmer NA, Boesen MJ, Palmer NA. The 2013 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools. GLSEN; New York: 2014.
[40]California Human Trafficking Fact Sheet, Compiled by the Center for Public Policy Studies, 2013. Accessed from: http://www.htcourts.org/wp-content/uploads/CA-HT-Fact-Sheet-2.27.13.pdf?Factsheet=HT-CA
[41]"What is Human Trafficking?" State of California Department of Justice, Accessed March 19, 2020 from: https://oag.ca.gov/human-trafficking/what-is
[42]Assem. Bill 1227, 2017-2018 Reg. Sess. (2017) https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1227
[43]Ibid.

will go through this official policy-approval and communication process. Following formal passage, the District maintains contact with health education teachers to communicate additional policy updates and curriculum changes and to provide them training and resources.

LAUSD has two BOE policies addressing sexual health education. First, the wellness policy requires comprehensive sexual health education as one of six units within a 90-hour semester-long required education course.[44] This health course must be separate from science and provided to students in 7th and 9th grade by a credentialed health sciences (sex education) teacher.[45]

The LAUSD BOE also approved a second sex education policy detailing what students should learn in their sex education units. This policy was passed by the LAUSD Board of Education in 2008 and required comprehensive sex education and HIV/AIDS prevention education for all 7th and 9th graders. The policy language addresses the law that preceded CHYA, the California Comprehensive Sexual Health Education and HIV/AIDS Prevention Act (SB 71). In the District policy, comprehensive sex education refers to "education regarding human development and sexuality, including education on pregnancy, family planning, and sexually transmitted diseases."[46] The lack of reference to CHYA-specific priorities and out-of-date nature indicates the need for updates.

Although the official Board policy needs updating to include CHYA requirements, the District has proactively provided access to a new CHYA-compliant curriculum, Positive Prevention Plus (2016). The Positive Prevention Plus (PPP) curriculum is one of six published curricula recommended by the Adolescent Sexual Health Work Group (ASHWG). The curriculum includes scripted lessons, parent-support materials, and other resources for teachers.[47]

For students, the curriculum consists of a pre- and post-test, take-home assignments, classroom activities, and student workbooks.[48] District teachers primarily follow this curriculum with some additional resources provided through outside speakers such as Planned Parenthood or similar reproductive health/sex-education organizations. Although the District provides these resources, without a District-wide policy and provision, uptake across schools is limited and inconsistent.

[44]LAUSD. "Health and Wellness Policy / Health Education Read More." / Health Education Read More. LAUSD. Accessed February 24, 2020. https://achieve.lausd.net/Page/6792.
[45]Ibid.
[46]LAUSD. "Complying with the California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act." Los Angeles Unified School District Bulletin, 2008.
[47]Positive Prevention Plus. "Overview & Features." Positive Prevention PLUS. Accessed February 24, 2020. https://www.positivepreventionplus.com/curriculum/overview-and-features.
[48]Ibid.

As stated in the 2008 Board of Education policy, teachers who teach sex education must be credentialed in health sciences. Teachers can pursue this credential either as a part of a multiple-subject or as a single-subject credential. The health science credential requires competence in both content and pedagogy, through completing a health science credential course and passing the credential examination (CSET) in health science.[49] Teachers may also receive special District authorization if they have completed the necessary health sciences course credits.

In addition to their credential, teachers have the opportunity to receive multiple types of training. The main training pathway is through Positive Prevention Plus and Cardea Services, which provides a two-day curriculum training to first-time teachers. LAUSD also offers in-person, online, and webinar-based topical training led by LAUSD staff or outside organizations, such as Planned Parenthood. Below we describe the realities of the sexual health education landscape within LAUSD and offer recommendations for a practical path forward for better delivery of CHYA mandates by all LAUSD health educators.

### Findings: Student, Teacher, Administrator, and Outside Organization Perspectives

We focused our data collection and analysis on four distinct perspectives on comprehensive sex education: students, teachers, administrators, and outside organizations. Each perspective is integral in examining current practices, gaps between current practices and CHYA requirements, and policy options. This information is crucial in identifying what to include in a new District-wide sex education policy, implementing said policy, and measuring compliance.

## The Student Perspective Based on the SASS Survey

As the recipients of sexual health education, students' perspectives are critical to evaluating sex education curriculum content. The student experience provides unique insights that teachers, researchers, and policymakers can use to improve the learning experience and close gaps in content delivery. To obtain these unique insights, our team used the results from the Student-Assessed Sex Education Standards (SASS) Survey, conducted in LAUSD in 2019 by the UCLA Bixby Center. This one-time research endeavor targeted LAUSD high school students (n=684) who completed sex education no earlier than six months before taking the survey, and assessed how well the current curricula met CHYA

[49]California State University Long Beach. "Health Science Credential Program." California State University, Long Beach, January 21, 2020. https://www.csulb.edu/college-of-education/health-science-credential-program.

standards and how conducive the classroom environments were to learning sex education topics.[50] Our key research findings are detailed below.

**1. Survey tools are effective.**

**2. There is variance in the CHYA requirements covered by health educators.**

**3. There are School-Level Differences in Requirements Covered by Health Educators.**

**4. Sex education classroom learning environments vary.**

With regards to our chapter topic, possible implications from the SASS project findings include the following:

**1. A student-driven, CHYA evaluation model is cost-effective and administratively feasible.**

**2. School participation is a challenge when administering a large-scale student survey.**

**3. There is a District need for increased communication around new CHYA requirements.**

**4. LAUSD needs a standardized curriculum and training for health educators.**

## The Teacher Perspective

Our health educator survey helped us establish a deeper understanding of LAUSD health educators' work and the challenges they face. Although some questions varied in the online form compared to the in-person Planned Parenthood survey, a majority of the questions were consistent across distribution methods. Due to our sample size, we recognize the limitations in making broad conclusions from our data. However, we found noticeable correlations within the survey data that were consistent with our qualitative interview responses discussed later in this report.

Using the first part of our survey, we collected data on each survey respondents' local school district location, which grade and subject they taught (in addition to health education), and additional questions specific to CHYA-approved curriculum and compliance. This information is critical in identifying and addressing local school district disparities, as well as similarities. Our survey provides useful insights into current barriers teachers face in effectively implementing CHYA-compliant sexual education. Our findings are summarized below.

[50] A research team led by Dr. Paula Tavrow identified 22 standards under 5 thematic areas for curricular content (Contraception & Consent, HIV Misconceptions, Gender & Sexual Orientation Stereotypes, Sexual Health Services & Rights, and Harassment, Rape, & Trafficking), and eight items under the classroom environment topics. The researchers administered 684 surveys across 13 schools in May and June 2019, of which 515 were eligible for final data analysis.

**1. Training, parent engagement, and credential status are strong predictors to evaluate their familiarity with CHYA and confidence in explaining District-wide policies to parents.**

**2. There are differences across local districts.**

To isolate hurdles teachers, face in implementing District policy, we asked teachers the question: **"***What resources would be most important to comply with District-wide policy changes in your classroom?"* While the question was open-ended, there were patterns in the teachers' responses:

**1. Teachers want additional training options.**

**2. District communication shortcomings are slightly associated with less knowledge of CHYA.**

**3. Teachers want improved curriculum access.**

Though further research is needed with a larger sample, our health educator survey findings may support initiatives to increase health credential rates and teacher training offerings to ensure CHYA compliance, as well as include parents in the policy implementation process. The local district-level differences suggest that gaps persist within the larger District in our survey sample. Whether the differences exist on a larger scale merits further examination. If they do, questions like how to reduce those differences and whether the gaps correlate with other demographic and performance data are also worth answering. Lastly, increased district support and accessibility of information and resources could help improve teacher knowledge and confidence in teaching CHYA-mandated topics to ensure all students in LAUSD receive equitable sexual health education.

## The Administrator Perspective

District administrators lend another invaluable perspective in examining how to create a robust district sex education policy, effectively implement the policy, and institute a compliance plan. Our information is based on conversations with a key LAUSD administrator. We augmented our analysis with administrator perspectives from other school districts in California from individuals who are working on similar CHYA policy, implementation, and compliance projects.

The district policy-making and implementation processes follow diverging chains of communication. For the official Board of Education (BOE) policy changes, the Board passes the policy and communication flow in a formal, systematic way from the BOE to schools. Following this formal policy making and communication process, the policy implementation process for a new curriculum or health education program falls within the jurisdiction of the Health Education Programs Office.

In creating a sex education policy for LAUSD, we considered communication pathways for both the written policy and implementation/compliance aspects of our policy recommendations. The policy must also have specific language to ensure administrators and schools understand CHYA requirements while addressing the unique perspectives and responsibilities of each of the groups involved. In addition to LAUSD's perspective, we gathered information on best practices for policy implementation and compliance measures from school district administrators in other large districts in California including San Francisco, San Diego, and San Juan Unified. In these interviews, several themes arose:

**1. There is a CHYA knowledge gap between administrators and educators.**

**2. There is a need for local compliance tracking.**

**3. Funding would help implementation efforts.**

## Interviews with Non-School Organizations and Government Agencies

Beyond conversations with LAUSD and other district administrators, our team sought the perspective of non-profit organizations and government agencies. These interviews helped us gain insight on how best to create a District-wide sex education policy, implement the policy, and institute a compliance plan. Through interview analysis, we identified trends around current sex education policy compliance and implementation processes to inform suggested changes. Our qualitative data analysis consists of 21 interviews, including California district administrators, government officials, non-profit organization employees. All interviewees work either directly with LAUSD, in organizations that support LAUSD efforts, or with other school districts on CHYA implementation and compliance.

Overall, the knowledge and experience of the interviewees suggest the importance of strengthening cooperation with outside organizations and other school districts to pursue the new sex education policy. It also gives more context to what we derived from our health educator survey response data. Below are our interview analysis results categorized into general findings:

**1. Sexual health education should be prioritized.**

**2. Districts need increased school resources.**

**3. Teacher training comes with challenges.**

**4. Opinions on how districts should adhere to CHYA can vary.**

**5. Curriculum compliance is challenging to assess.**

**6. There is a lack of compliance-tracking in LAUSD.**

## New District Policy and Messaging Recommendations

Given our analysis and out goal of drafting a new, District-wide sexual health education policy that is compliant with CHYA, we developed a policy proposal that includes the following components:

Language addressing all CHYA requirements

Language affirming the LGBTQIA+ experience

Language addressing Foster Youth

Language addressing student rights

Language addressing parent notifications and parent rights

Language addressing sex trafficking

Ensuring policy transparency, clarity, and language accessibility were our top three priorities for effective messaging as informed by our interviews. Transparency refers to the level in which the policy and resources are available for viewing, while clarity addresses ease of understanding for the average reader. By ensuring the LAUSD CHYA-compliant sex education policy is clear and accessible, we can promote increased effectiveness and reduce confusion. LAUSD can achieve these goals by streamlining the LAUSD Health Education Program website for ease of navigation and access to information. Finally, the policy and attachments must be available in both English and Spanish since 161,484 of LAUSD students are English learners, and 93.4% of English learners come from Spanish-speaking homes.[51]

In addition to clear messaging, we recommend LAUSD pilot a parent-curriculum review night in local districts where health educators noted no parents, or few parents, reached out to them to discuss the sex education curriculum. The intention behind this strategy is to introduce a new program in a local district that receives little to no pushback from parents. If parents and health educators approve of the pilot program, then we recommend LAUSD roll out the program to the remaining local school districts. Two school districts and one informant from the Orange County Department of Education suggested this best practice strategy.[52] Hosting a closed-door meeting, not available to the general public, would provide parents the opportunity to read the curriculum thoroughly and ask questions to the educators.

[51]"Los Angeles Unified School District." LARAEC. Accessed February 7, 2020. https://laraec.net/los-angeles-unified-school-district/.

[52]Interview #20, Susan Temple, Health Education Curriculum Leader, Long Beach Unified School District, March 2, 2020; Interview #11, District Administrator, Large CA Unified School District, February 17, 2020; Interview #19, Dareen Khatib, Administrator, Health and Wellness, Student Achievement and Wellness, Educational Services Division, Orange County Office of Education, February 28, 2020

We also found similar programs successful in Orange County school districts where review opportunities increased parent support of the curriculum and disincentivized parents from opting their children out of sex education.[53]

We approach the first goal, a new District policy, by comprehensively examining the current law and demographics of LAUSD to recommend policy language that fulfills CHYA requirements while recognizing the many unique student populations within the District. Given this proposed language required to satisfy CHYA mandates, we then identify and evaluate strategies to ensure that all students in LAUSD receive equitable CHYA-compliant education, all teachers and administrators have sufficient support to implement the policy, and all schools comply with policy requirements. Informed by our research, we evaluate and recommend the best options for short- and long-term action, and advocacy efforts to influence state implementation and compliance efforts.

# Implementation and Compliance Options for Recommended Policy

The new District policy and messaging are required by law. However, there are various ways to facilitate successful implementation and measure compliance. The following options outline strategies to ensure that all students in LAUSD receive equitable CHYA-compliant education, all teachers and administrators have sufficient support to implement the policy, and all schools comply with policy requirements. Due to the lack of data, making empirical projections regarding the effectiveness of options is not possible. Therefore, informed by our research, interviews, surveys, and student-reported data, we introduce options that could be an improvement to the status quo and could be effective relative to the current lack of action. After implementation, follow-up studies could be undertaken to determine effectiveness.

## Implementation Options for CHYA-Aligned Policy and Curricula

Implementation options refer to how LAUSD can effectively implement the new CHYA-compliant sex education policy by providing information, resources, and support to teachers and students.

**Collect current, District-wide data; keep and maintain records.**

The goal of this option is to establish a record and baseline understanding of the needs and realities of sex education teachers to inform District decision-making so schools can effectively implement CHYA. This option would require LAUSD to collect information on the number of health educators within each local district, health educator credential status, the number of curriculum binders and workbooks

[53]Interview #19, Dareen Khatib, Administrator, Health and Wellness, Student Achievement and Wellness, Educational Services Division, Orange County Office of Education, February 28, 2020

distributed to each local district, updated teacher contact information, and information on the number of training sessions that teachers attended to help LAUSD provide targeted support for each local district's needs.

**Assess availability and ensure the circulation of CHYA-compliant curriculum to teachers.**

The curriculum is the primary resource provided to teachers and the basis for every CHYA-compliant lesson that students receive. However, 30% of teachers in our survey noted they do not always have access to the Positive Prevention Plus curriculum binder and student workbook.[54] Ensuring each teacher has adequate curriculum access could help all students receive CHYA-aligned sex education.

**Move First-Time, Sexual Health Educator Training to Contracted Weekdays.**

Almost 15% of respondents from our survey sought additional paid training, ideally hosted during the week.[55] LAUSD could offer Positive Prevention Plus training to teachers during the school week rather than the current weekend training schedule. We found that other districts, such as San Juan Unified and San Diego Unified, offer a substitute so teachers can attend training sessions during the week, which increases the number of teachers who attend compared to attendance at weekend sessions.[56]

**Require Single Subject or Multiple-Subject Health Science Credentials for all Sexual Health Educators.**

Our survey revealed teachers with a health science single-subject or multiple-subject credential are more likely to be familiar with CHYA and tend to have a higher confidence level in speaking to parents about CHYA requirements. This connection suggests that requiring teachers to secure an official California Health Science Credential as opposed to special authorization could improve these outcomes.

**Change course scheduling in middle school to include a one-semester block for the health course.**

California science requirements limit time previously dedicated to health education. The 2013 California Next Generation Science Standards (NGSS) expanded science requirements to three full years of science

[54]Data were obtained from the Health Educator Survey responses. Of the 68 responses, 21 health educators mentioned needing access to the PPP curriculum binder and workbook.
[55]Data were obtained from the Health Educator Survey responses. Of the 68 responses, 10 health educators mentioned needing access to the PPP curriculum binder and workbook.
[56]Interview #15, Paula Baucom, K-12 Program Specialist, Science/Health, San Juan Unified School District, February 26, 2020; Interview #16, Sexual Health Educator, San Diego Unified School District, February 27, 2020

in middle school.[57] These requirements mean that schools must often repurpose a scheduling block previously given to health.[58] Sex education is often compressed into physical education, lunch, free-time, and sessions before and after school or erased from the schedule. If LAUSD adopted a schedule change, it might have to adjust timing in other courses or the school day. However, it could demonstrate the importance of CHYA and give educators the time and space to teach required topics.

## Options for Compliance with CHYA-Aligned Policy and Curricula

Compliance options refer to how LAUSD could track and measure CHYA compliance across schools and students to identify gaps and assess where additional resources may be required to support effective policy implementation.

**Implement a compliance tracking system at the school, classroom, or student level.**

A tracking system for compliance could be at the school, classroom, or individual student level to help LAUSD understand how well schools and teachers implement CHYA requirements and assess if additional resources are needed to ensure students receive the education the law requires. Tracking can also help LAUSD prepare for future compliance tracking efforts by the California Department of Education or the ACLU.

For a school-based compliance system, assigned administrators at each school could log which parts of the curricula students receive each year. The San Francisco Unified School District uses such a method and has reported success with the system. If LAUSD were to implement such a system and also require schools to report on CHYA topics covered, this option could provide a mechanism to track CHYA compliance.

Tracking compliance at the classroom level, as implemented in Long Beach and San Diego Unified, would require each sex education teacher to complete a form detailing the number of classes they teach, course timing, and topics covered in each class.[59] This system could help LAUSD obtain an accurate teacher count, track when students are receiving CHYA-compliant education, and incentivize teachers to teach all subjects.

[57]Next Generation Science Standards: California. Accessed from: https://www.nextgenscience.org/california
[58]California *Education Code* Section 51225.3 (a)(1)(C)
[59]Interview #15, Paula Baucom, K-12 Program Specialist, Science/Health, San Juan Unified School District, February 26, 2020; Interview #16, Sexual Health Educator, San Diego Unified School District, February 27, 2020.

Finally, seven of our interviewees suggested a student-level tracking system as the ideal solution to compliance tracking to assess any differences between what students learn in the classroom and what is planned or outlined in the curriculum.[60] LAUSD could create a codified system to track each student across LAUSD (via student ID). Individual student tracking would allow the District to follow each student's educational path regardless of which school they attend.

**Include CHYA compliance in the existing Western Association of Schools and Colleges (WASC) accreditation audit.**

Every three years, when WASC conducts school audits, it could include a CHYA compliance component to the accreditation requirements, which would remove the monitoring and reporting responsibility from LAUSD. This option shows promise, given interviews suggesting ways such as this to ease the burden on schools for compliance tracking.[61] However, the three year time period may provide challenges and a lack of detailed data for the District to be able to learn about compliance deficiencies and make the necessary updates on time.

## Evaluation of Implementation and Compliance Options

We measured implementation and compliance options against three criteria: 1) whether or not the policy option is in the LAUSD Health Education Department jurisdiction, 2) administrative feasibility, and 3) cost.

**LAUSD Jurisdiction**

This criterion assesses if the option is within the Health Education Department's scope of work, or if it would require advocacy to other LAUSD departments or state government. Because CHYA is a coordinated statewide effort and unfunded mandate, many options fall outside the District scope. However, addressing these options through advocacy efforts could help implement a CHYA-compliant policy and measure compliance.

[60]Interview #1 Staff Attorney, ACLU of Southern California, February 3, 2020; Interview #3 Representative, LA County Dept. of Children Family Health Services, February 6, 2020; Interview #4 Representative, LA County Dept. of Children Family Health Services, February 6, 2020; Interview #6 Comprehensive Sexual Health Education Specialist, Division of HIV and STD Programs , Los Angeles County Department of Public Health, February 10, 2020; Interview #15 Paula Baucom, K-12 Program Specialist, Science/Health, San Juan Unified School District, February 26, 2020; Interview #20 Susan Temple, Health Education Curriculum Leader, Long Beach Unified School District, March 2, 2020; Interview #21Gabriela Lopez, Vice President, San Francisco Board of Education, March 9, 2020

[61]Interview #11, District Administrator, large CA Unified School District, February 10, 2020.

**Administrative Feasibility**

Administrative feasibility addresses the administrative effort each policy option requires. We relied on our knowledge of the LAUSD Health Education Department scope of work to assess what options may need additional administrative support. Similar efforts in other districts also informed this measure. We assessed administrative feasibility as a binary measure in that options either can be completed with current staffing levels or require additional administrative effort or staff.

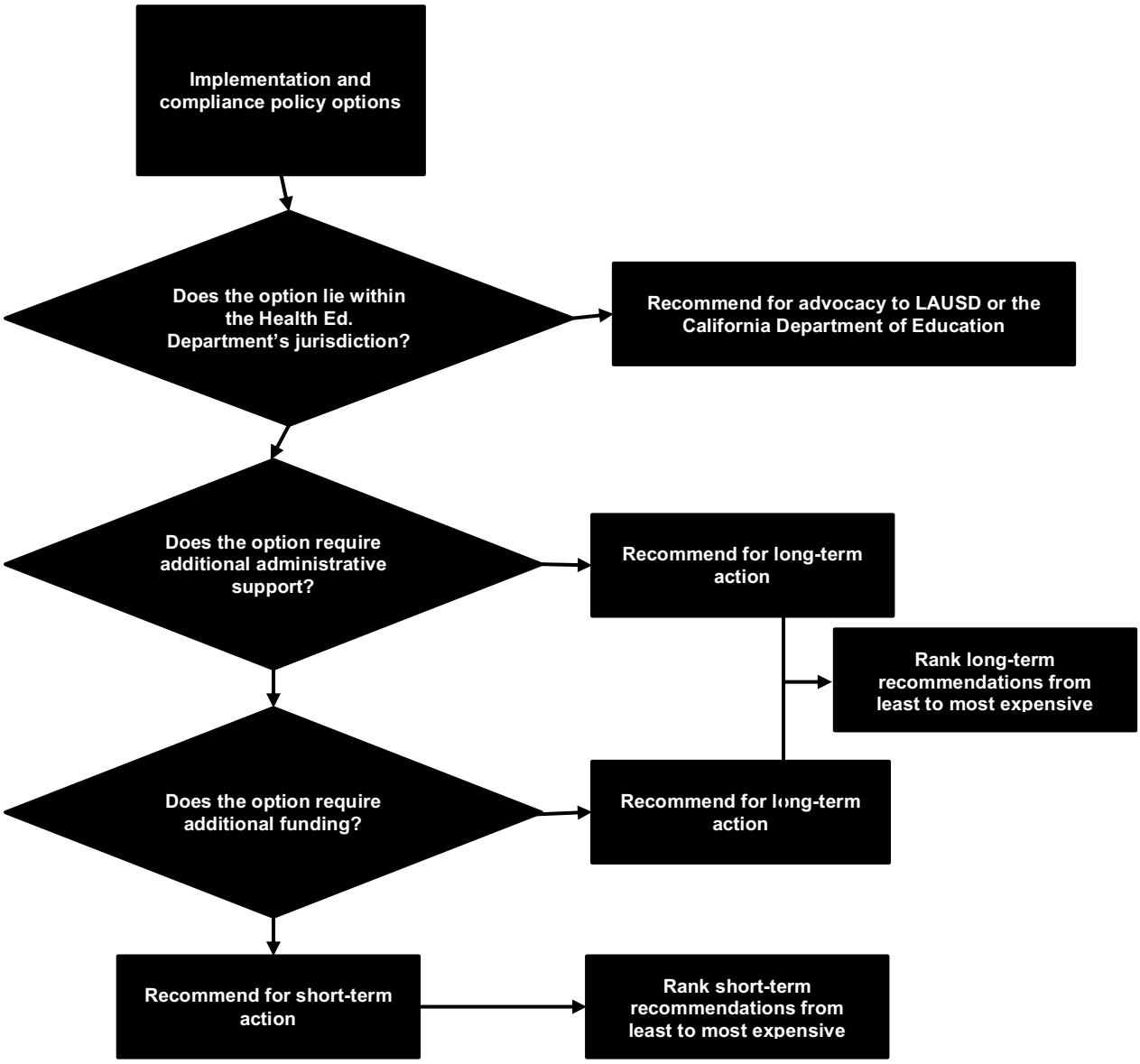
**Cost**

Cost encompasses the financial investment needed to execute policy implementation options and to create a mechanism to track school compliance with the District sex-education policy. Each cost estimate includes costs incurred by each school or the District to provide the necessary tools and resources for implementation and compliance. We also include hiring costs for additional staff in this criterion. We used cost as a binary measure for ease of evaluation by identifying if LAUSD can implement the policy option using the current health education budget or if it requires additional funding.

## Criteria Evaluation Process

Figure 1 details the decision-making process for evaluating our policy options using the above criteria to make recommendations in the short-term and long-term, and for additional advocacy efforts.

**Figure 1:** *Policy Evaluation Flowchart*



We first assessed if the option lies within the Health Education Department's jurisdiction. Those options that fall outside its scope of work are designated as recommendations to advance for consideration at the District-level or statewide at the California Department of Education. For options within the Department's jurisdiction, we determined if the option requires additional administrative staff or additional funding.

Based on these assessments, we recommend short- and long-term recommendations. Short-term options do not require additional funding or staff, while long-term options require additional funding or staff. Finally, to prioritize recommendations, we rank short-term and long-term options by cost from least expensive to most expensive. Because CHYA is an unfunded mandate, we prioritize cost to ensure LAUSD can take immediate action on our recommendations with minimal funding requirements. The following table summarizes how each option measures against our established criteria.

**Figure 2:** *Criteria Evaluation Summary*

| | Health Education Department Jurisdiction | Administrative Feasibility | Cost |
|---|---|---|---|
| **Collect current, District-wide data; keep and maintain records** | **Yes** | **Additional administrative support required** | **Additional funding required - cost of hiring additional staff** |
| **Ensure the circulation of District-adopted, CHYA-compliant curriculum to teachers** | **Yes** | **No additional administrative support required** | **No additional funding required; $43,608 - $54,510 for curricula covered by CDC grant** |
| **Move First-Time Sexual Health Educator Training to Contracted Weekdays** | **Yes** | **Additional administrative support required** | **Additional funding required; $90,240 - $188,000 annually** |
| **Require Single Subject or Multiple Subject Health Science Credentials for all Sexual Health Educators** | **No** | **No additional administrative support required** | **Additional funding required. $416 per teacher for credentialing (one-time cost)** |
| **Change course scheduling in middle school to include a one-semester block for the health course** | **No** | **No additional administrative support required** | **No additional funding required** |
| **Create a compliance tracking system at the school, classroom, or individual student level** | **Yes** | **Additional administrative support required** | **Additional funding required - low-cost options for school-level and classroom-level tracking, low- to high-cost for individual-level tracking** |
| **Include CHYA compliance into the existing Western Association of Schools and Colleges (WASC) accreditation audit** | **No** | **No additional administrative support required** | **No additional funding required - the audit is outside of LAUSD scope** |

# Implementation and Compliance Recommendations

Based on cost and administrative requirements detailed in our policy criteria evaluation, we identified our short-term, long-term, and advocacy recommendations for CHYA policy implementation and compliance ranked by cost.

## Implementation Recommendations

**Short-Term Recommendations**

Ensure the circulation of the CHYA-compliant curriculum.

**Long-Term Recommendations**

1. Collect current, District-wide data; keep and maintain records.
2. Move first-time sexual health educator training to weekdays.

**LAUSD or State Advocacy Recommendations**

1. Change the course schedule in middle school to include a one-semester block for health.
2. Require single-subject or multiple-subject credentials for all health educators.

## Compliance Recommendations

**Long-Term Recommendations**[62]

Create a compliance tracking system at the school, classroom, or individual student level.

**LAUSD or State Advocacy Recommendations**

Include CHYA compliance into the Western Association of Schools and Colleges (WASC) accreditation audit.

[62]We do not have short-term compliance recommendations as compliance tracking requires additional administrative effort and funding.

### Funding Recommendations for Long-Term Options

LAUSD would need additional funding to execute successfully any of our long-term options. Informed by interviews with government agency representatives, we offer two funding recommendations. First, our team recommends LAUSD work alongside the Adolescent Sexual Health Work Group request additional funding from the California Department of Education for sexual health education programming and policy implementation. A dedicated budget for CHYA could cover the costs associated with CHYA implementation, including circulating the curriculum, increasing the number of teacher trainings offered, and hiring additional staff.

Second, we recommend LAUSD explicitly designate funding for the development and adoption of a compliance tracking strategy. Given the small size of the LAUSD Health Education Programs Division, compliance tracking options may not be feasible without additional staff or financing.

## Conclusion

The California Healthy Youth Act (CHYA) sets ambitious requirements for schools to provide comprehensive sex education that is medically accurate, age-appropriate, and unbiased with regard to any sex, gender, sexual orientation, race, or ethnicity. Comprehensive sex education promotes healthy relationships and behaviors and supports students in fostering positive attitudes about themselves and their relationships. This chapter provides guidance for LAUSD to increase equitable access to, and distribution of, this mandated, affirming, and positive information for all students.

Through student and health educator surveys and 21 in-depth interviews with individuals heavily involved in CHYA implementation and compliance efforts, we developed a deep understanding of the challenges facing districts as they attempt to implement CHYA and become compliant with its mandates. Informed by this research, we produced a proposed new LAUSD policy that includes the changes necessitated by the 2016 California Healthy Youth Act (CHYA), and we provided suggestions to make all new adjustments and policy changes widely available to students, teachers, and parents. Our team also developed recommendations for the successful implementation of the new policy and compliance-tracking strategies that take LAUSD's unique demographics and challenges into account.

To improve current implementation efforts in the short-term, we recommend LAUSD ensures teachers have access to the most updated curriculum resources. Long-term, LAUSD can explore expanding data-collection efforts to keep and maintain records and to move sexual health educator training to weekdays. LAUSD could also alter middle school course scheduling to include a semester of health and

require all health educators to have a single-subject or multiple-subject health science credential. By providing schools and teachers with the resources necessary to implement the new CHYA-aligned policy, LAUSD can better support students' healthy development and ability to make informed decisions about their behavior and choices.

The ACLU and the California Department of Education are beginning to push for state-wide compliance with CHYA. Therefore, LAUSD should prepare for imminent changes to compliance mandates through increasing internal compliance-tracking efforts. In the long-term, LAUSD can adopt either a school-level, classroom level, or individual student compliance-tracking system. LAUSD can also work with the California Department of Education to include CHYA compliance in the Western Association of Schools and Colleges' review and request additional funding to support compliance-tracking efforts.

The California Healthy Youth Act initiates progressive changes to sexual health education, and, in the long-term, we believe it will yield positive impacts on student and community health. The existing data on the health effects of comprehensive sex education are positive, but they are still excruciatingly limited. Therefore, we believe that a district-wide effort, starting now, to collect robust data on the effectiveness of CHYA will be fundamental in evaluating the impact of this law on student health outcomes. LAUSD will be able to better understand, measure, and extrapolate this policy's broader impact on student health when District policy becomes compliant with CHYA mandates and equitable CHYA implementation occurs across schools with compliance metrics in place.

California is, and has always been, a progressive leader. We hope that, as the largest school district in California and the second largest in the nation, Los Angeles Unified School District will continue its legacy of leadership in sex education by building on existing CHYA-implementation efforts with a focus on equitable access and a commitment to inclusion. In an age of cyberbullying, sky-high STI rates, rising teen suicides, and political battles over abortion, California — and LAUSD specifically — has the opportunity to be the national leader in comprehensive sexual education and to forge a path the rest of the country can follow.

# Chapter 6

# DNA Collection from Felony Arrestees in California

**Stanley M. Paul**

Stanley M. Paul, J.D., Media Relations Manager,
UCLA Luskin School of Public Affairs

*"We wish to suggest a structure for the salt of the deoxyribose nucleic acid (D.N.A.). This structure has novel features which are of considerable biological interest."*

James D. Watson and Francis Crick (1953)[1]

California's routine collection and use of DNA from felony arrestees by law enforcement raises state and federal questions about the constitutionality and application of the practice. The practice at the least should provoke an examination of policy considerations and implications for the state's citizens if there is expansion of DNA collection to misdemeanor arrestees and others via a state proposition and/or other means.

Over the past several years, DNA technology and data have been used increasingly to crack cold criminal cases – even decades-old cases – that would have remained unsolved forever. Previously, serial perpetrators of the most brutal crimes could walk free on the streets with little chance of being caught, and for years "terrorized the state," while individuals, families and communities remained in fear and traumatized.[2] DNA has been collected and placed in databases for decades. But not until August 2020 was California's "Golden State Killer," 74-year-old Joseph James DeAngelo, whose crimes spanned the 1970s to mid-1980s, sentenced to life in prison without parole for killing 13 people and raping 50.[3]

Exactly how DNA collared DeAngelo – who garnered a number of monikers prior to and after more than three decades since his spree seemed to have ended – is just one part an ongoing discussion and debate.[4] Receiving less attention than the front-page headline stories such as

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[1]Watson, J., Crick, F. "Molecular Structure of Nucleic Acids: A Structure for Deoxyribose Nucleic Acid." *Nature* 171**,** 737–738 (1953). These are the first two sentences of Watson and Crick's famous 900-word article which can be found at: https://www.nature.com/scitable/content/Molecular-Structure-of-Nucleic-Acids-16331/
The following includes mention of their debt to others, notably Rosalind Franklin, as well as the history behind the "discovery." https://www.nature.com/scitable/topicpage/discovery-of-dna-structure-and-function-watson-397/

[2]Paige St. John and Luke Money, "Golden State Killer given life in prison for rapes, murders that terrorized a generation," *Los Angeles Times,* Aug. 21, 2020: https://www.latimes.com/california/story/2020-08-21/golden-state-killer-sentencing-justice-victims-serial-murders-rapes; Paige St. John and Luke Money, "Victims of Golden State Killer finally confront him in court with stories of pain and survival." *Los Angeles Times*, Aug. 18, 2020: https://www.latimes.com/california/story/2020-08-18/golden-state-killer-victims-impact-statements-sentencing

[3]Ibid.; Through advances in DNA technology, DeAngelo's DNA was linked to crimes throughout California by 2001, but an actual match to DeAngelo was not made until 2018 through a combination of crime scene DNA and "genealogy services to identify the killer's cousin and then, finally, DeAngelo, a former police officer." See: Paige St. John and Luke Money, "Golden State Killer pleads guilty to murders and other crimes that terrorized California," published online June 29, 2020 (print edition June 30, 2020): https://www.latimes.com/california/story/2020-06-29/golden-state-killer-serial-plea-murders-rapes

[4]DeAngelo was given the moniker Golden State Killer by the late crime blog author Michelle McNamara who became obsessed with the case and tried for years to uncover the identity of the killer who was known by a number of names including the "East Area Rapist," "Diamond Knot Killer" and "Original Night Stalker." McNamara died before DeAngelo was identified through DNA and arrested in 2018, but her research was posthumously

DeAngelo's is the push by governments, law enforcement, special-interest groups, and even financially well-positioned private citizens to initiate, back and expand DNA collection efforts.[5] These efforts to collect as much DNA as possible have been referred to as a "biological dragnet."[6]

This chapter begins where a previous *California Policy Options* chapter left off, that one dealing with data collected from license plate readers.[7]

> "On the growth of policing technology, the ongoing policy, in California and elsewhere, seems to continue to be: **'But now, aided by technology, policing is increasingly proactive, increasing its reach deep into society, and making it extremely difficult for courts to draw lines about what is permissible and what is not. And so, once again, they mostly say yes.'** "[8]

## Background

In California, and throughout the United States, DNA technology paired with DNA databases – governmental, commercial and public – is recognized and used as a powerful and accurate tool to identify the perpetrators of crimes past and present. News stories nationwide now appear with increasing frequency on the latest cold cases finally solved and guilty parties identified and brought to justice – if they are still alive – even after more than half a century.[9]

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published in the book, *I'll Be Gone in the Dark: One Woman's Obsessive Search for the Golden State Killer.* The book was subsequently made into an HBO documentary series. https://www.latimes.com/entertainment-arts/tv/story/2020-06-26/ill-be-gone-in-the-dark-hbo-michelle-mcnamara-golden-state-killer-review

[5]David Rosenzweig, *Los Angeles Times*, "Taking State's DNA Law to Rest of Nation," Dec. 24, 2004: https://www.latimes.com/archives/la-xpm-2004-dec-24-me-onthelaw24-story.html; On December 9, 2003, Bruce Harrington, an attorney and real estate developer of Newport Beach, CA, submitted a proposed ballot initiative to the California State Attorney General's Office. Also see, Simoncelli Tania, Steinhardt, Barry, "California's Proposition 69: A Dangerous Precedent for Criminal DNA Databases." Expert Testimony: Bridging Bioethics and Evidence Law, Summer 2005, *The Journal of Law, Medicine & Ethics* at: https://www.aclu.org/sites/default/files/images/asset_upload_file341_9567.pdf

[6]From California Supreme Court Justice Goodwin H. Liu's dissent in *The People v. Mark Buza* (413 P.3d 1132) at: https://www.courts.ca.gov/opinions/archive/S223698.PDF

[7]Paul, Stanley M., "Records of Investigations vs. Bulk Data Collection: Automatic License Plate Readers and the California Public Records Act," in *California Policy Options 2019* (Chapter 10, p. 185-195) may be read at: https://issuu.com/danieljbmitchell/docs/cpo_2019

[8]Friedman, Barry, *Unwarranted: Policing Without Permission,* 2017, Farrar, Straus and Giroux, New York. See also, Paul, Stanley M., Records of Investigations vs. Bulk Data Collection: Automatic License Plate Readers and the California Public Records Act, in California Policy Options 2019 (Chapter 10, p. 185-195), note 10 above.

[9]Colleen Shalby, **"**DNA solves Orange County's oldest cold case, identifying Jane Doe and suspected killer," *Los Angeles Times*, July 23, 2020 at: https://www.latimes.com/california/story/2020-07-23/dna-solves-orange-countys-oldest-cold-case-identifying-jane-doe-and-suspected-killer; Cindy Chang and James Queally, *Los Angeles Times*, "From Golden State Killer to

California, as all 50 U.S. states, does have more than a "considerable interest" in solving crimes through DNA. But the use of DNA to exonerate or exclude suspects – included among the main positive arguments by proponents of DNA collection – seems to be of lesser interest in practice.[10] Interest in exoneration does not seem to match the zeal to collect DNA from suspected felons. The widening scope of individuals from whom DNA is collected, while enlarging law enforcement databases, is mainly for investigative purposes and solving crimes.[11]

There are advocates for and against expanding the collection, use and application of DNA technology, with each side offering compelling arguments as well as some concerning agendas.[12] Seemingly well-intentioned, as well as financially well-supported, these efforts have had intended and unintended, and even ironic outcomes. Some legal arguments and opinions at the state and federal level defy, or overtly ignore, reason, – or are just missing the point – according to legal experts (including some members of the U.S. Supreme Court). Whatever the justifications given, critics point to one overriding goal: *collecting as much DNA as possible***.**

As in other California cases involving privacy issues, communications and policing technology, the balancing of individual rights is, and should be, at the core of the controversy. Like the law's symbolic blindfolded arbiter, "balancing" as a decision-making framework is often mentioned in

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Grim Sleeper, DNA helping break serial killer mysteries from 1970s and 1980s", April 29, 2018 at: https://www.latimes.com/local/lanow/la-me-serial-killers-20180429-story.html. The article includes California's "Zodiac Killer," who "operated in Northern California" and whose spree is thought to have started in 1966 with the murder of a Riverside, CA community college student, was never caught: https://www.pe.com/2013/11/30/riverside-co-ed8217s-1966-slaying-still-a-mystery/
Joseph Serna, "'Grim Sleeper' serial killer Lonnie Franklin dies on death row at San Quentin," *Los Angeles Times*, March 29, 2020: https://www.latimes.com/california/story/2020-03-29/grim-sleeper-serial-killer-lonnie-franklin-dies-death-row-san-quentin

[10]Colleen Shalby, "DNA clears imprisoned man in 1985 murder as a new suspect is identified" *Los Angeles Times*, posted Feb. 13, 2020: https://www.latimes.com/california/story/2020-02-13/a-man-was-found-innocent-after-15-years-in-custody-and-a-new-suspect-was-identified-in-the-decades-old-crime; To learn more about exonerations in general see The National Registry of Exonerations at: https://www.law.umich.edu/special/exoneration/Pages/about.aspx, and exonerations related to DNA at: https://www.law.umich.edu/special/exoneration/Pages/DNA.aspx. The registry also includes information on longest incarcerations, and exonerations by city/municipality.

[11]Scott Martelle, "A death row inmate has been waiting 18 months for DNA test results that could prove his innocence," *Los Angeles Times,* Opinion, June 18, 2020 at: https://www.latimes.com/opinion/story/2020-06-18/kevin-cooper-dna-test-murder-death-row. "Cooper was sentenced to death in 1985 after he was convicted of hacking to death four people and severely wounding a fifth person in Chino Hills two years earlier. It was not an open-and-shut case, and Cooper then, as now, proclaimed his innocence."

[12]Gina Kolata and Heather Murphy, "The Golden State Killer Is Tracked Through a Thicket of DNA, and Experts Shudder," *New York Times*, April 27, 2018, at:https://www.nytimes.com/2018/04/27/health/dna-privacy-golden-state-killer-genealogy.html?action=click&module=RelatedLinks&pgtype=Article

the making of legal opinions. Balancing is especially referenced in those opinions involving the Fourth Amendment (search and seizure).

However, the outcome has swung in favor of law enforcement over concerns for privacy, according to legal experts and scholars. In his book, *We the People*, UC-Berkeley Law School dean Erwin Chemerinsky writes, "The problem with this kind of balancing is that it can leave little left of the Fourth Amendment."[13] At the same time, the so-called "will of the people" through proposition is used to justify or support judicial decisions, as in the main case to be discussed below.

Currently, it may be argued that there is no firm policy in place in California when it comes to DNA. Rather, the policy is evolving. But, say critics, it has not kept pace, when it comes to technologies such as DNA and similar databases, not only in California, but across the nation, through legislation, ballot proposition and through the courts. In *The Bill of Rights: A User's Guide*, author Linda Monk writes that "the enforcement of the Fourth Amendment's language by the Supreme Court has often been confusing. Not all searches and seizures require warrants, and some do not even require 'probable cause.' The Court tends to rule on a case-by-case basis, balancing two competing values: protecting privacy and catching criminals. *The most recent court cases tend to give more weight to the latter*."[14] (Italics added.)

**Supreme Mutation: A Double Helical Twist Through California's DNA Policy**

*"I just took a DNA test…"*

Lizzo, from the song "Truth Hurts"[15]

The status of California's "policy" on the use of DNA in crime fighting is illuminated by the recently decided (2018) California case, *The People v. Mark Buza.*[16] This case took a tortuous journey, winding its way through California's courts to the state's highest court, crossing paths

[13]Chemerinsky, Erwin, *We the People* (subtitled, "A Progressive Reading of the Constitution for the Twenty-First Century") Picador, New York, (2018). Chemerinsky is dean of the UC Berkeley School of Law.
[14]Monk, Linda R., *The Bill of Rights: A User's Guide, 5th Ed.,* Hatchette Books, New York, Boston (2018).
[15]Released in Sept. 2017, "Truth Hurts" became a *Billboard* Hot 100 number-one single in Sept. 2019.
[16]The California Supreme Court case opinion *People v. Buza* (2018) is cited as 413 P. 3d 1132 (Case number S223698) and may be found at https://www.courts.ca.gov/opinions/archive/S223698.PDF. The narrative of facts and quotes in this case are from Supreme Court Justice Leondra R. Kruger's opinion unless otherwise indicated throughout this chapter.

and becoming intertwined with America's highest court and looping back to the California courts. It ended up looking a lot like the federal-level ruling. But that wasn't the end of it.

The California Supreme Court deemed the issues in its case (*Buza*), and a similar federal case which first arose at the state level (*Maryland v. King)*, as a match under the Fourth Amendment. *Buza* argued that the comparison was "not identical" under the DNA Act and the California Constitution. The Maryland case, which was taken up by the U.S. Supreme Court, was decided while the California case was still being considered by the California Supreme Court. The California Supreme court, following *King*, sent the case back to the California Court of Appeal to reconsider its decision in light of *King*.

The *Buza* case, following the first ruling by California Court of Appeals (2011), was cited in the U.S. Supreme Court's 2013 opinion. In fact, it was noted among cases at the state and federal levels reaching "differing conclusions as to whether the Fourth Amendment prohibits the collection and analysis of a DNA sample from persons arrested, but not yet convicted on felony charges." The disputed case, among others, provided justification for the court to grant *certiorari* (review), to address a federal question, in this case related to the Fourth Amendment.[17,18]

While the U.S. Supreme Court, and subsequently the California Supreme Court, ruled in favor of DNA collection in those cases, of special interest are the strong dissents from members of both courts following their rulings. The late U.S. Supreme Court Justice Scalia, in his dissent to the Maryland case, (joined by Justices Sotomayor, Kagan and the late Ruth Bader Ginsburg) described the 2013 Supreme Court decision as one that "*taxes the credulity of the credulous*."[19]

Ultimately, Buza's case spotlights the motivations of states and law enforcement proponents as well as advocates interested in protecting the Constitutional rights of citizens. Those rights, related to search and seizure and privacy, were developed over time and trials in California and U.S. legal history.[20]

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[17]ibid. at p. 3.

[18] Federal question jurisdiction: "One kind of original jurisdiction given to federal courts by virtue of Article III of the Constitution and enabling legislation, it allows federal courts to hear cases wherein the meaning or application of something in the Constitution, laws, or treaties of the United States is being disputed." Gifis, Steven H., *Law Dictionary, 4th ed.,* Barron's Educational Series, Inc., New York, (1996).

[19]Quote from Justice Scalia's dissent in *Maryland v. King* at page 1. Justice Scalia died in 2016 and Justice Ginsburg died in 2020.

[20]A full list of petitions and amicus briefs (and links) filed related to the California Supreme Court case may be found at the California Courts website at: https://www.courts.ca.gov/37996.htm

**The *Buza* Case and Background**

*"This is not a scheme carefully calibrated to identify felony offenders. Instead it can fairly be described as a biological dragnet."*

California State Supreme Court Justice Liu[21]

The California case cited above, *The People v. Mark Buza*, which originated in 2009, illustrates the conflicts and controversies over the collection and use of DNA evidence related to felony arrestees.[22] The case, finally decided in the California Supreme court in 2018, nearly a decade later, began when Mark Buza was arrested by police in San Francisco on suspicion of arson, a felony offense. As part of his booking procedure, Mr. Buza was required to submit to a buccal cheek swab in order to obtain a DNA sample, purportedly and for the purpose, as with other arrestees, only to "identify" him. The conflation of "identity" and criminal "investigation" will be discussed below.

The DNA cheek swab requirement (under California's Proposition 69, also known as the "DNA Fingerprint, Unsolved Crime and Innocence Protection Act,") went into effect Jan. 1, 2009, the same month that Buza was arrested, and applied to **"all adult felony arrestees,"** Buza refused, which made him subject to – in addition to the arson charge – a misdemeanor for refusing to provide the sample under California Penal Code, section 298.1, subd. (a).[23]

At trial, Buza admitted to the arson charges (setting a police car on fire) and the "misdemeanor offense of refusing to provide a specimen required by California's DNA act," an expansion of an earlier law.[24] At the same time, the Court notes, Buza moved for acquittal of the misdemeanor charge of refusing to submit the DNA sample, "arguing that the Fourth Amendment did not permit the state to compel arrestees to furnish DNA samples." The motion was denied and he was subsequently convicted and sentenced for the felony and misdemeanor charges.

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[21]From Justice Goodwin H. Liu's dissent in *The People v. Mark Buza.* For more on Justice Liu, see: https://www.courts.ca.gov/15450.htm.

[22]The narrative of this case is taken by the California Supreme Court opinion by Justice Leondra R. Kruger. See Kruger bio at: https://www.courts.ca.gov/33016.htm

[23]California Penal Code, section 298.1, subd. (a): http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=298.1.

[24]The first paragraph of the California Supreme Court Opinion outlines the DNA Act: "In 2004, California voters passed Proposition 69 (Prop. 69, as approved by voters, Gen. Elec. (Nov. 2, 2004); known as the "DNA Fingerprint, Unsolved Crime and Innocence Protection Act." (DNA Act) to expand existing requirements for the collection of DNA identification information for law enforcement purposes. The court also notes that the DNA Act that "as of Jan. 1, 2009, all adult arrestees 'shall provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to this chapter for law enforcement identification analysis."

**A note on DNA collection and placement in databases**

*"Deoxyribonucleic acid (DNA) and forensic identification analysis is a useful law enforcement tool for identifying and prosecuting criminal offenders and exonerating the innocent."*

California Penal Code, Section 295 (b)(1)[25]

Collection of DNA for identification purposes in California and other states doesn't end at the station house.[26] The California Supreme Court, Court of Appeal and U.S. Supreme Court opinions all provide descriptions on what happens to collected DNA, and California Penal Code (Section 295 et seq.) provides detailed information on DNA collection, processing and uploading to databases. Following collection, a DNA profile is created using "genetic loci that are known as 'junk' or 'noncoding' DNA (i.e., 'junk' loci have no known association with any "genetic trait, disease, or predisposition"). The DNA profile for that individual is then stored in the state's DNA Database and Databank Program which is part of the FBI's nationwide database known as CODIS (Combined DNA Index System). This system "enables law enforcement to search DNA profiles collected from federal, state and local collection programs." The California Attorney General's website also provides specifics of collection on the Bureau of Forensics Services FAQ page.[27] Topics include "collection mechanics," "retention of offender DNA samples," and "DOJ's sharing policy with DNA samples and profiles," as well as several other topics such as expungement/removal of DNA from databases as well as the state's familial search policy.

**California's Prop. 69, the "DNA Fingerprint Act"**

California's 2004 Proposition 69, which expanded DNA collection to all felony arrestees, in addition to those convicted of felony offenses, was the subject of controversy in the California Supreme Court decision in *Buza*.[28] Named the "DNA Fingerprint, Unsolved Crime and Innocence Protection Act," and "DNA Act" for short, it expanded a 1998 law enacted by the California State Legislature, the "DNA and Forensic Identification Date Base and Data Bank Act," which required collection of DNA for certain enumerated felonies only.[29] Of the more than $2 million

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[25] https://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/pc295.pdf
[26] California Penal Code, sections 295 and 295.1 (see note 23).
[27] https://oag.ca.gov/bfs/prop69/faqs
[28] https://oag.ca.gov/bfs/prop69. The proposed amendments to the 1998, expanding the law to include all felony arrestees can be seen at: https://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/sec_state_full_version_prop69.pdf and the legislative analyst's office at: https://lao.ca.gov/ballot/2004/69_11_2004.htm
[29] The text of the DNA and Forensic Identification Date Base and Data Bank Act can be found at: https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=9.&part=1.&chapter=6.&article=1; See footnote 8 above on ACLU article calling Prop. 69 "a dangerous precedent," at: https://www.aclu.org/sites/default/files/images/asset_upload_file341_9567.pdf

reportedly raised by the "Yes on 69" campaign, a single individual, who also initiated the proposition, contributed $1.98 million. No contributions were reported by any Prop. 69 opposition. [30]

The California Supreme court case opinion points out that as early as 1983, California lawmakers "enacted legislation requiring certain sex offenders to provide blood and saliva samples before their release or discharge." A California opinion piece published prior to the vote on and enactment of Prop. 69 illustrates concerns about this further incursion into DNA and privacy. That piece begins as follows:

> *Our DNA contains the most intimate details of who we are - including secrets even we don't know about ourselves. Should the government have control over our genetic information, when we have not been found guilty of any crime? Proposition 69 would do just this. Privacy advocates from across the political spectrum have begun to raise red flags about this potential expansion of government power*.[31]

**California Court of Appeals and California Supreme Court: Part I**

*"If it did, the State could take a DNA sample from every citizen and use it for investigative purposes, an Orwellian prospect."*

Revision to 2011 California Court of Appeals Opinion[32]

Following the trial court and sentencing, Buza's case advanced to the California Court of Appeal which reversed the lower court decision, ruling for appellant Buza on Fourth Amendment grounds.[33] The lower court's ruling raised red flags for the Court of Appeal, which included in its first (2011) opinion:

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[30]Bruce Harrington donated nearly $2 million to bankroll Proposition 69 as reported in ballotpedia.org. The site reports that "Campaign spending on Proposition 69 was lopsided, with only the "Yes on 69" reporting expenditures…" A wealth of information on Prop. 69 is provided at: https://ballotpedia.org/California_Proposition_69,_Required_Collection_of_DNA_Samples_from_Felons_(2004) Harrington was motivated by personal tragedy, the murder or his brother and sister-in-law by a suspected serial killer more than 30 years ago. Only decades later it was discovered that the murderer was the Golden State Killer. Read more about Harrington's quest to identify the killer through expansion of DNA collection at: https://www.sacbee.com/news/local/crime/article209834384.html

[31]Laura K. Donohue, "Proposition 69 could threaten privacy of DNA," *SFGate,* Opinion, Aug. 22, 2004 at: https://www.sfgate.com/opinion/article/Proposition-69-could-threaten-privacy-of-DNA-2699969.php

[32]The California Court of Appeals (First Appellate District, Division II) filed a single-sentence revision to its now depublished 2011 opinion: https://www.courts.ca.gov/opinions/revpub/A125542M.PDF

[33]https://scholar.google.com/scholar_case?case=13456479450720347 44&hl=en&as_sdt=6&as_vis=1&oi=scholarr

> "*Appellant [Buza] claims that the seizure of his DNA at a time when he was entitled to the presumption of innocence, and there had been no judicial determination of probable cause to believe he committed the offense for which he was arrested, violated his Fourth Amendment right to be free from unreasonable searches and seizures. We agree, and therefore reverse the judgment.*"

The Court of Appeal included a footnote in its first, and now de-published, opinion which would be addressed in later proceedings of the California Supreme Court:

> "*Appellant additionally claims the statute violates his rights under the due process clause of the Fourteenth Amendment and his right to privacy under article I, section 1, of the California Constitution. In light of our resolution of the issue under the Fourth Amendment, it is not necessary for us to address these additional claims*."

Thereafter, the California Supreme Court granted review of the case. But, as mentioned above, a similar case came before the U.S. Supreme Court and was decided while the *Buza* case was still pending in California.

**A U.S. Supreme Court case intervenes**

*"The advent of DNA technology is one of the most significant scientific advancements of our era."*

U.S. Supreme Court Justice Anthony M. Kennedy[34]

The *Buza* case was indeed intertwined with the with a U.S. Supreme Court case decided in 2013, before the California Supreme Court sent back, or remanded, it to the California Court of Appeal for reconsideration in light of the ruling in that U.S. Supreme Court case. Like *Buza*, the U.S. Supreme Court case which arose in the state courts of Maryland spoke to the following issue: **"whether the Fourth Amendment prohibits collection and analysis of a DNA sample from persons arrested, but not yet convicted, on felony charges."**[35]

In the Maryland case, that state's Court of Appeals, like California's Court of Appeal, "struck down the portions of the Act authorizing collection of DNA from felony arrestees as

[34]Anthony M. Kennedy delivered the opinion in *Maryland v. King* from which this quote is taken (p. 3). Kennedy served as an associate justice from 1988 until his retirement in 2018.
[35]*Maryland v. King*, 569 U.S. 435 (2013) at: https://www.supremecourt.gov/opinions/12pdf/12-207_d18e.pdf

unconstitutional," concluding that the DNA swab constituted "an unreasonable search in violation of the Fourth Amendment."

The Maryland case began with the arrest of suspect Alonzo King for "menacing a group of people with a shotgun." He was charged with first- and second-degree assault, which fell under enumerated "crimes of violence," under Maryland's DNA Act. The U.S. Supreme Court opinion recounts that, "As part of a routine booking procedure for serious offenses, his DNA sample was taken by applying a cotton swab or filter paper—known as a buccal swab—to the inside of his cheeks." The DNA was later found, though the state's DNA database, to match DNA taken from a rape victim and thereafter King was also convicted of that crime. The Court notes, although DNA was later obtained from King, as required, for use as evidence in his trial, that the DNA sample taken at his 2009 arrest and booking was the connection to the rape charge.

Although the Maryland Court of Appeals explained that King's "expectation of privacy is greater than the State's purported interest in using King's DNA to identify him," the U.S. Supreme Court majority did not agree. The court wrote in its conclusion and reversal of the Court of Appeals of Maryland:

> *"…DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probably cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking an analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."*[36]

**California Court of Appeals and California Supreme Court: Part II**

*"California's DNA Act intrudes too quickly and too deeply into the privacy interests of arrestees."*

*The People v. Mark Buza*, California Court of Appeal Opinion (2014)[37]

In light of the U.S. Supreme Court decision in 2013, the California Supreme Court sent the case back to the California Court of Appeal for reconsideration. The Court of Appeals was still at

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[36]California Constitution, Article I, Section 1: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Note that the California Constitution, in contrast to the U.S. Constitution, explicitly includes "privacy."
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CONS&sectionNum=SECTION%201.&article=I

[37]*The People v. Buza*, 231 Cal. App. 4th 1446-2014 (2014)
https://scholar.google.com/scholar_case?case=4487248587457099 18&hl=en&as_sdt=6&as_vis=1&oi=scholarr

odds in respect to the Fourth Amendment ruling under *King*. But, rather than haggle over whether there was some distinguishable issue between the California law and Maryland's, the Court of Appeal, while again rejecting the conviction of Buza, instead focused on provisions of California's Constitution, and asserted the following:

> *"the DNA Act, to the extent it requires felony arrestees to submit a DNA sample for law enforcement analysis and inclusion in the state and federal DNA databases, without independent suspicion, a warrant or even a judicial or grand jury determination of probably cause, unreasonably intrudes on such arrestees' expectation of privacy and is invalid under article I, section 13, of the Constitution."*[38]

They also wrote in their now depublished 2014 reversal, "Our conclusion that the DNA Act is invalid under article I, section 13, of the California Constitution renders it academic whether the Act is also invalid under the Fourth Amendment." Furthermore, they write, "As we have said, the scope of permissible searches of arrestees is one of the specific areas in which article I, section 13, has been held to provide greater protection than the Fourth Amendment.[39]

Noting that other California Courts of Appeal, after *King*, addressed the constitutionality of the California's DNA Act and concluded, "under *King*'s reasoning" that the act does not violate the Fourth Amendment, the California Supreme Court granted review of the case.[40]

**Return to the California Supreme Court**

*"The United States Supreme Court's decision in* King*…has significantly altered the terms of the debate."*

*The People v. Mark Buza*, California Supreme Court Opinion (2018)[41]

The California Supreme Court granted review to decide the following: **"Whether the collection of forensic identification DNA database samples from felony arrestees, as required by**

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[38]Ibid. Also, see notice of depublication of the 2014 California Court of Appeal by the California Attorney General at https://oag.ca.gov/sites/all/files/agweb/pdfs/info_bulletins/dle-2015-02.pdf

[39]Citing California cases *People v. Brisendine*, 13 Cal. 3d 528 (1975) and *People v. Ruggles*, 39 Cal. 3d 1 (1985)

[40]The State (Plaintiff and Respondent) (i.e., "The People's") Request for Review may be found at: https://www.courts.ca.gov/documents/1-s223698-resp-pet-rev-010915.pdf and Opening Brief on the Merits at: https://www.courts.ca.gov/documents/2-s223698-resp-opening-brief-merits-052615.pdf
For *Buza*'s arguments for the California Supreme Court review, see "Appellant's Answer Brief on the Merits," at: https://www.courts.ca.gov/documents/3-s223698-app-answer-brief-merits-082715.pdf

[41]See note 22.

**Proposition 69, violates either article I, section 13 of the California Constitution or the Fourth Amendment to the United States Constitution."**

The Court notes that *Buza* challenged the constitutionality of California's DNA Act "as it applies to various classes of felony arrestees." However, in determining whether the DNA Act is constitutional under either the Fourth Amendment or California's constitution, the Court asserted that, in Buza's particular case, the question was narrower: "Whether the statute's DNA collection requirement is valid applied to individual who, like defendant, was validly arrested on 'probable cause to hold for a serious offense.'" The Court ruled "Under the circumstances before us, we conclude the requirement is valid under both the federal and state Constitutions, and we express no view on the constitutionality of the DNA Act as it applies to other classes of arrestees."

So, while the reversal was bad for Mr. Buza, it left open the possibility that there may be other challenges to constitutionality of the DNA Act in the future.

In reviewing the case, the California Supreme Court compared both the Fourth Amendment and Article I, Section 13 of the California Constitution, which employ "essentially" identical language. The Fourth Amendment uses "shall" and the California Constitution uses "may" and includes "searches and seizures" while the California version uses "seizures and searches" (i.e., "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated.)[42]

The Court also acknowledged that the California Constitution "is, and has always been, 'a document of independent force,' that sets forth rights that are in no way 'dependent on those guaranteed by the United States Constitution," citing a 1997 case and the California Constitution.[43] In addition, the Court wrote that "although decisions of the United States Supreme Court interpreting parallel texts are not binding, we have said they are 'entitled to respectful consideration."

For purposes both Fourth Amendment and California Constitutional analysis, the Court focused on an overlapping requirement, writing, "As the Constitutional language makes plain, the 'touchstone for all issues' under both provisions is 'reasonableness.'" And, reframing the issue

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[42]California Constitution, Article I, Section 13: https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CONS&sectionNum=SEC.%2013.&article=I

[43]American Academy of Pediatrics v. Lungren (16 Cal. 4th 307, 325) and California Const., Article I, section 24): https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CONS&sectionNum=SEC.%2024.&article=I

in this light, said, "The question before us is whether it was reasonable within the meaning of one or both of these provisions to require defendant to use a cheek swab to provide a DNA sample to jail officials as part of the booking process following his arrest for arson."

Ultimately the court answered "yes" to both provisions, specifically pertaining to *Buza*. Despite *Buza*'s challenges to the DNA's effect on others whose circumstances might be different (e.g., defendant's arrested but never tried or convicted, or those found not guilty) or the contention that DNA collection is not primarily for identification purposes, but for investigative purposes and thus invalid under the Fourth Amendment, the court argued:

> *"To entertain defendant's arguments here would convert our decision in this case, which concerns only the validity of defendant's conviction for violation of Penal Code section 298.1, into the equivalent of facial constitutional review of the DNA Act as it might be applied to other arrestees. But, the DNA Act itself instructs that the validity of the Act as applied to defendant does not depend on its validity as it might apply to others."*
>
> *"In sum: Defendant raises a number of concerns about the potential application of the DNA Act in other cases, involving other, differently situated arrestees. He also raises concerns that changes in technology might open up new prospects for using DNA samples and profiles in ways that are uniquely invasive of personal privacy. We are mindful of these concerns, and we recognize that the DNA Act may raise additional constitutional questions that will require resolution in other cases."*

So, while the issue appeared settled for those similarly situated to *Buza* and *King*, not everyone was happy with the outcome of either the state or federal case.

**The Dissents**

*"I therefore dissent, and hope that today's incursion upon the Fourth Amendment…will someday be repudiated."*[44]

U.S. Supreme Court Justice Antonin Scalia

[44]From the last line of Supreme Court Justice Antonin Scalia's dissent in *Maryland v. King* 569 U.S. 435 (2013). See note 35.

In the *Buza* case, there were dissents at all levels during the appeals process as well as for the Maryland case, all with similar concerns over privacy and search and seizure. Perhaps the most vehement dissent was in *King* from U.S. Supreme Court Justice Antonin Scalia.

In his 2013 dissent, Scalia dives right into the Fourth Amendment:

> *"The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment. Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime.*
>
> *It is obvious that no such noninvestigative motive exists in this case. The Court's assertion that DNA is being taken, not to solve crimes, but to identify those in State's custody, taxes the credulity of the credulous.*
>
> *And the Court's comparison of Maryland's DNA searches to other techniques, such as fingerprinting, can seem apt only to those who know no more than today's opinion has chosen to tell them about how those DNA searches actually work."*

He goes on to note that while "privacy related concerns" in a home search "are weighty enough that that the search may require a warrant, notwithstanding the diminished expectation of privacy of the arrestee," then why "are the 'privacy-related concerns' not also 'weighty' when an intrusion into the *body* is at stake?" He also notes that "person" is first on the list of "entities" that the Fourth Amendment protects against unreasonable searches and seizures.[45]

Nevertheless, Scalia goes on to state that, "No matter the degree of invasiveness, suspicionless searches are *never* allowed if their principal end is ordinary crime solving. In addition, Scalia objected to what the *King* court elaborated "at length the ways that the search here served the special purpose of 'identifying' King." He comments, "If identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the

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[45]See case of chalking of tires ruled unconstitutional by violating the Fourth Amendment's ban on unreasonable searches and seizures. Campbell Robertson, *New York Times*, April 25, 2019, "Lose the Chalk, Officer: Court Finds Marking Tires of Parked Cars Unconstitutional" at: https://www.nytimes.com/2019/04/25/us/tire-chalk-parking-unconstitutional.html. See also, the 2012 Supreme Court decision, *United States v. Jones*, in which a man was convicted based "in part on data from a GPS tracker that the police had secretly attached to his car without obtaining a valid warrant," at: https://www.supremecourt.gov/opinions/11pdf/10-1259.pdf. The Court affirmed the lower court's ruling that there was a violation of the Fourth Amendment (joined by Scalia) was unanimous.

ordinary law-enforcement aims that have never been thought to justify a suspicionless search." He continues, "The portion of the Court's opinion that explains the identification rationale is strangely silent on the DNA search at issue here. To know those facts is to be instantly disabused of the notion that what happened had anything to do with identifying King." In short, Scalia says, "The truth, known to Maryland and increasingly to the reader: the search had nothing to do with establishing King's identity."

Scalia takes a stab at the logic of DNA collection in terms of merely identifying a suspect and its conflation with a criminal "investigation." He comments, "King was not identified by his association with the sample; rather, the sample was identified by its association with King. The Court effectively destroys its own 'identification' theory when it acknowledges that the object of this search was "to see what [was] already known about [King]."

Furthermore, Scalia calls the Court's ruling "vast (and scary)" and says that with the ruling, "*At the end of the day, logic will out*. When there comes before us the taking of DNA from an arrestee for a traffic violation, the Court will predictably (and rightly) say, 'We can find no significant difference between this case and *King*.' **Make no mistake about it: As and entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason."**

In concluding, Justice Scalia acknowledged that the judgment would "have the beneficial effect of solving more crimes." But, he adds this:

> *"…then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the 'identity' of the flying public), applies for a driver's license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."*[46]

The objections brought up in Scalia's dissent were also presented in *Buza*'s arguments to the California Supreme Court case, but they did not prevail there.

Two California Supreme Court justices also dissented in the *Buza* case. These cases are equally worth reading for the topics discussed beyond those highlighted by Justice Scalia, and perhaps for analysis in a future *California Policy Options* chapter.

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[46]An interesting article and explanation of "panopticon" may be seen at: https://en.wikipedia.org/wiki/Panopticon

**The experts weigh in**

As cited earlier, Prof. Chemerinsky writes in his book *We the People* (p. 170) that *Maryland v. King* "is a very troubling decision and fails to recognize a serious threat to privacy from new technology." In addition, he reiterates Justice Scalia's contention that the *King* opinion "does not provide any basis for limiting the taking of DNA to those arrested for serious crimes…police seemingly can take DNA from anyone arrested for any crime." He ponders that if the balance is on the side of law enforcement "Why can't government take DNA from literally everyone?" His answer is:

> *"The Fourth Amendment was meant to stop exactly that type of law enforcement action: it says that a person can only be searched to gather evidence for crimes where they are suspects. The Court surely would not allow the police to automatically search the homes of those arrested. Why, then allow their DNA to be taken and used against them?"*
>
> In sum, Chemerinsky writes:
>
> *"The majority opinion in Maryland v. King was striking for its failure to recognize that taking DNA from a person is an especially intrusive search and that there is a potentially huge threat to privacy in the government having DNA databases. The Court left great doubts as to whether it is ready to deal with the Fourth Amendment issues of the twenty-first century."*

Legal scholar Akhil Reed Amar also commented on the King case.[47] While not agreeing with Justice Scalia's take on the issues in no uncertain terms (e.g., "But, in fact, his argument is deeply flawed), he does acknowledge that "the closeness of the vote [5-4], and the unusual coalitions on either side, suggest that "the matter is far from settled."[48] Amar, in the same book reveals his hand when it comes to the Fourth (as well as Fifth Amendments). He writes, "Our Constitution was designed…to sort the innocent from the guilty; and various constitutional doctrines that suppress reliable physical evidence—exclusionary rules that modern courts have fashioned in the name of the Fourth and Fifth Amendments—were and are precisely wrong (p. 156). "On this issue, I have consistently been and still remain to the right of every member of

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[47]Akhil Reed Amar is the Sterling Professor of Law and Political Science at Yale University.

[48]From page 213 of Amar's 2013 *New York* Times opinion (with Neal Katyal), "Why the Court was Right to Allow Cheek Swabs" in Amar's book, "The Constitution Today: Timeless Lessons for the Issues of Our Era. Basic Books, New York (2016).
https://www.nytimes.com/2013/06/04/opinion/why-the-court-was-right-to-allow-cheek-swabs.html?searchResultPosition=1

the modern Supreme Court." (p. 158). He sides with the majority in King in their reliance on "reasonable," but realizes that "Reasonable minds can differ on this." He concludes:

> *"And therein lies the genius of the Fourth Amendment. Contrary to Justice Scalia's view, the framers did not answer the DNA question in 1791…*
>
> *…The words of the Fourth Amendment mean exactly what they say. Warrantless searches are unconstitutional only if they are 'unreasonable.' That rule, and no other, is the true 'heart of the Fourth Amendment."*

In her 2013 essay, "*Maryland v. King* and the Wonderful, Horrible DNA Revolution in Law Enforcement," UC Berkeley Law Professor Andrea Roth writes, "But the Court's attempt to ignore the crime-solving rationale of the law is untenable. It should have either struck down the law, admitting that arrestees' privacy rights outweigh the meager incremental benefit of adding them to a database that already includes convicts, or been willing to admit that if arrestees can be forced to submit their DNA for crime-solving purposes, the rest of us are not far behind."

She points out and tries to explain the Court's "curious logic, explains that, "while the dissent is right in pointing out the Court's revisionist view of the law, the Court might still have written a coherent opinion upholding it," and, that "drawing the line at arrestees—is the worst possible result." She suggests the following: "As long as arrestees are going to be swept up in the dragnet, the best policy choice—one that would avoid the severe racial inequalities in current databases, maximize DNA's crime-solving power, and ensure a robust privacy debate, is a universal citizen database."[49]

Like Scalia, Roth also illuminates "the majority's subterfuge" in the conflation of "identity" and "criminal history" saying the majority "parted with reality" in its "portrayal of Maryland's regime as simply a means of ensuring the accurate identification of arrestees at the time of booking and bail decisions. On the contrary, the unmistakable purpose of the law is to facilitate crime-solving through 'cold hits' to unsolved cases."

Erin E. Murphy, author of *Inside the Cell: The Dark Side of Forensic DNA*, notes in her book, published in 2015, that 42 states require that "all persons convicted of certain *misdemeanors* provide a DNA sample." She adds, "Thus, in Louisiana, throwing a hot dog at your teacher or at the umpire at your daughter's soccer game could result in a DNA registration offense." She notes that some states are even more expansive, and have comprehensive collection laws that qualify "any misdemeanor or felony must contribute a DNA sample." In addition, some states

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[49]Roth, Andrea, "Maryland v. King and the Wonderful, Horrible DNA Revolution in Law Enforcement," 11 Ohio State Journal of Criminal Law 295 (2013). https://lawcat.berkeley.edu/record/1125807

require DNA collection from juveniles for misdemeanor property crimes."[50] Murphy also writes that that there is some financial incentive, noting a 2013 federal law that "gave the attorney general the power to award grants of up to $10 million to states to offset the cost of implementing DNA collection."[51]

**And, wait for it…Proposition 20 on the 2020 California Ballot**

*"Proposition 20 is built on a package of falsehoods about critical reforms that California lawmakers and voters wisely adopted over the last nine years to curb some of the most gratuitous excesses of the state's criminal justice system."*

Los Angeles Times Editorial[52]

For voters across the nation, 2020 was and continues to memorable. But, California also had a number of state propositions on the ballot. Among these was Proposition 20. It had not taken very long for the fears of what the *King* and *Buza* rulings and that critics portended to pop up. Proposition 20, also known as the Reducing Crime and Keeping California Safe Act of 2018 was added to the 2020 California ballot.[53] Like Prop. 69, the Act was initiated by a single individual personally affected by crime, and it was supported by "prosecutors and law enforcement leaders.[54] It was ostensibly initiated to undo a number of criminal "reforms," toughen criminal sentencing and "expand the list of felonies for which the convicted are ineligible for early parole; increase penalties for repeat shoplifters; **and collect DNA samples from adults convicted of some misdemeanors**."[55] The proposition, and along with it a further extension of DNA collection, ultimately failed with California voters at the November 2020 polls.[56]

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[50] Murphy Erin E., *Inside the Cell: The Dark Side of Forensic DNA,* Nation Books, New York, (2015). From Chapter 10, "Licesnse, Registration, and Cheek Swab, Please," (p. 157). Erin Murphy is a professor at NYU School of Law.
[51] Ibid. at p. 161.
[52] Editorial Board Opinion, "Endorsement: No on Proposition 20. Don't let police unions roll back justice reforms," *Los Angeles Times,* at: https://www.latimes.com/opinion/story/2020-10-02/no-on-prop-20
[53] Proposition 20, https://lao.ca.gov/BallotAnalysis/Proposition?number=20&year=2020; Detailed information on Proposition 20 may also be found at: https://ballotpedia.org/California_Proposition_20,_Criminal_Sentencing,_Parole,_and_DNA_Collection_Initiative_(2020).
[54] https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0044%20%28Reducing%20Crime%29.pdf
[55] Patrick McGreevy, "Prop. 20 sparks debate over effects of criminal justice reform in California," *Los Angeles Times,* Oct. 16, 2020 at: https://www.latimes.com/california/story/2020-10-16/proposition-20-criminal-justice-reform-changes-california
[56] Patrick McGreevy, "Prop. 20, which would have toughened sentencing in criminal cases, is rejected by California voters," *Los Angeles Times*, Nov. 2, 2020 at: https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-20-falling-short-in-early-returns

**"Spit and Acquit," "function creeps" and your cousin**

*"Our country's databases have a long history of "function creep" – databases created for one discrete purpose, despite the initial promises of their creators, eventually take on new functions and purposes."*

Tania Simoncelli and Barry Steinhardt[57]

Critics and proponents of DNA collection, alike, can see a possible or inevitable road ahead for the practice, an incremental movement toward a DNA database panopticon. Tania Simoncelli and Barry Steinhardt in their article, "California's Proposition 69: A Dangerous Precedent for Criminal DNA Databases," discuss the concept of "function creep," and provide an examples including Social Security numbers, writing, "In the 1930s, assurances were made that the Social Security numbers would only be used as an aid for the new retirement program, but over the past sixty years they have gradually become the universal identifier that their creators claimed they would not be."[58] They continue, "In a more sinister episode in our nation's history, census records created for general statistical purposes were used during World War II to round up innocent Japanese Americans and to place them in internment camps. And since September 11, we have witnessed the private sector's sharing of information on consumers with the Department of Homeland Security."

As with other means of surveillance that are expanding, such as use of drones by law enforcement, there are proponents on either side, both possible, or not, with good intentions to aid law enforcement, protect citizens, and protect rights of citizens including privacy.[59] Meanwhile, the push to expand DNA collection goes on by a variety of new and innovative means.

In her 2019 essay, "'Spit and Acquit": Prosecutors as Surveillance Entrepreneurs," the UC-Berkeley Law professor noted above, Andrea Roth, describes a relatively new practice and strategy to obtain DNA in her in her abstract:

> *But this debate fails to account for a different, less-well-understood practice: DNA collection by prosecutors, with the alleged consent of those giving samples.*

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[57]See note 5 above.
[58]Ibid.
[59]Cade Metz, "Police Drones are Starting to Think for Themselves: In one Southern California city, flying drones with artificial intelligence are aiding investigations while presenting new civil rights questions." *New York Times*, Dec. 5, 2020 at: https://www.nytimes.com/2020/12/05/technology/police-drones.html?action=click&module=Well&pgtype=Homepage&section=Technology

> *The Orange County District Attorney's Office offers certain defendants charged with petty misdemeanors a deal: if you want a dismissal or a plea offer, give us your DNA. This innovative practice has come to be known colloquially as Spit and Acquit. So far, over 150,000 people—not otherwise required to give the state their DNA—have agreed. Their samples are then kept permanently in a prosecutorial database maintained with the aid of biotechnology companies and funded largely by federal grants and defendant fees. As the largest consent-based law enforcement DNA database in the country, Spit and Acquit is worthy of study in its own right. But it also offers a case study of prosecutorial policymaking in surveillance—an area beyond prosecutors' typical expertise.*[60]

Another relatively new practice combines free, online DNA databases with genealogy expertise to identify and track down serial criminal perpetrators. Familial DNA techniques were used in the identification and ultimate arrest of the Golden State Killer, Joseph James DeAngelo. As mentioned above, DeAngelo, a former police officer, was never in a criminal database. And, "Pursuant to its policy, California does not do familial searches of DNA database samples collected from arrestees. Only DNA database profiles from samples collected from convicted offenders are searched as part of California's familial search project."

Erin Murphy, noted above, notes that, "In 2008, California had become the first state in the nation to explicitly authorize intentional familial searches," a technique employed to help capture a serial killer who was linked to at least 10 rape-murders in the Los Angeles area in the mid-1980s. The perpetrator, later identified as Lonnie Smith, was nicknamed the "Grim Sleeper."[61] In that case, Murphy recounts that a familial DNA search conducted in 2010 registered a "hit" from an arrestee who had been required to submit a DNA sample under California law. The arrestee turned out to be the suspect's son.

For DeAngelo, familial DNA did eventually lead to him via a different route. His identification as a suspect came in part through an online genealogy site called GEDMatch.com and through genetic genealogy matching crime scene DNA to a cousin of DeAngelo's which had been uploaded to the site. Even though, as in DeAngelo's case, the DNA match came from a different source, proponents of DNA collection attribute efforts to expand the use of DNA technology and credit these efforts in bringing to the forefront DNA identification of criminals such as DeAngelo.[62] DeAngelo's capture and subsequent trial and sentencing were the subject of national news and the details on how he was captured using DNA is described in numerous

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[60]"'Spit and Acquit': Prosecutors as Surveillance Entrepreneurs," *California Law Review*, Volume 107, Issue 2, ( 405-458), 2019 at: https://lawcat.berkeley.edu/record/1128999

[61] Ibid. at p. 195. See also, Joseph Serna, "'Grim Sleeper' serial killer Lonnie Franklin dies on death row at San Quentin," *Los Angeles Times*, March 29, 2020, at: https://www.latimes.com/california/story/2020-03-29/grim-sleeper-serial-killer-lonnie-franklin-dies-death-row-san-quentin

[62]See note 5 above.

publications, including a *New York Times* article with the headline "Sooner or Later Your Cousin's DNA is Going to Solve a Murder."[63]

**Epilogue and Conclusion: DNA Collection After *Buza***

A recent case in a California Court of Appeal illustrates that, after *Buza*, the collection of DNA in California for arrestees continues to raise issues for judges to sort out.[64] In the recent case of *The People v. Daniel Joseph Marquez*, the California Court of Appeal, Fourth Appellate District, Division 3, was ordered by the California Supreme Court to re-evaluate the Marquez case in light of the 2018 ruling in *Buza*. In the Marquez case, the defendant was arrested on a drug possession offense in 2006, for which he was never charged.

The Court of Appeal's 2019 opinion notes that DNA was collected from Marquez without his consent at that time and placed in a statewide database. In 2008, DNA that turned up in a robbery in Orange County matched Marquez's 2006 DNA sample. He was later convicted to 25 years to life in addition to 15 years for a number of prior felony convictions. In their 2006 opinion (unpublished) the Court of Appeal found the collection of DNA "lawful under the Fourth Amendment." However, considering the ruling in *Buza*, the 2019 court reversed that decision, finding that the "2006 collection of Marquez's DNA sample was unlawful under the Fourth Amendment; the prosecution failed to prove that Marquez was validly arrested or that his DNA was collected as part of a routine booking procedure."

Although Marquez was one of the "differently situated arrestees" predicted by the California Supreme Court in *Buza*, the trial court ruled that it properly admitted 2008 DNA evidence (DNA which Marquez "voluntarily" provided to authorities who contacted him after getting the "cold hit" DNA match) under a well-established exception to the exclusionary rule known as the attenuation doctrine, a topic for some future chapter.

Nevertheless, it appears that new cases will arise to test California's DNA Act and that efforts will continue to be made to expand the collection of DNA, and other personal information, that will challenge courts, legislatures and the "will of the people." Courts will have to decide what is and what is not permissible use of technology in balancing society's needs and the protection of

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[63]Heather Murphy, "Sooner or Later Your Cousin's DNA is Going to Solve a Murder," (The subhead for the story is: "The Golden State Killer case was just the start. Hundreds of cold cases are hot again thanks to a new genealogy technique. The price may be everyone's genetic privacy.") *New York Times*, April 25, 2019 at: https://www.nytimes.com/2019/04/25/us/golden-state-killer-dna.html?searchResultPosition=1
For more information on use of familial DNA in California: https://oag.ca.gov/bfs/prop69/faqs#familial

[64]https://www.courts.ca.gov/opinions/archive/G048762M.PDF. More information on the case may be found at: https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=43&doc_id=2052227&doc_no=G048762&request_token=NiIwLSEmXkg9WzBRSyNdTE9JUDw7UFxbJyBeWzxTUCAgCg%3D%3D

the rights of individuals. The admonishment of the California Court of Appeal in their 2014 opinion in *Buza* is instructive:

> *"The history of DNA testing in the criminal justice system has been one of steady expansion — from initial testing only of offenders convicted of specified serious crimes of violence, to testing of all felons, and now to testing of arrestees. In evaluating the degree to which the procedure intrudes upon Californians' privacy rights, we cannot close our eyes to the obvious implications of upholding each further encroachment."*[65]

[65]See note 37.

# Chapter 7

# Gavin Newsom's Second State Budget Arrives at Jerry Brown's Cliff

**Daniel J.B. Mitchell**

Professor-Emeritus, UCLA Anderson School of Management
and UCLA Luskin School of Public Affairs.

*Detour,*
*There's a muddy road ahead,*
*Detour*
*Paid no mind to what it said*
*Detour,*
*Oh these bitter things I find,*
*Should have read*
*That detour sign.*

"Detour (There's a Muddy Road Ahead)" (Song, 1945)[1]

Former California Governor Jerry Brown was asked in 2018 what problem might confront his successor and replied the successor would be "*on the cliff*" and what lay beyond was "*darkness, uncertainty, decline and recession*."[2] It turned out to be true. During fiscal year 2019-20, the California economy, and with it the state budget, suddenly took a detour from its past Good Times trend. By July 2020, Governor Newsom made it explicit, saying "*we are walking towards the edge of a cliff*."[3] In this chapter, we examine the sudden change in the budget outlook due to the coronavirus crisis and the general political environment surrounding the state budget's adaptation to a situation that was unforeseen until early 2020.

Because of a buildup in reserves and other resources prior to the crisis by Brown, the state was initially able to adapt initially to the coronavirus crisis with a combination of budget cuts and draw-downs of reserves. However, it remains unclear at this writing as to how the coronavirus situation will evolve, an evolution that depends on factors such as the possible development and distribution of a vaccine and/or improved treatments. The budget also depends on political developments at the national level including the provision of federal financial assistance to California and the outcome of the 2020 national and state elections.

**California's State Budget**

*You make good when you make a promise*
*No, I'm not a doubting Thomas*
*But, honey, are you making any money?*
*That's all I want to know.*

"Are You Making Any Money?" (Song, 1933)[4]

[1]Paul Westmoreland. https://www.youtube.com/watch?v=MQ-M81JBYYc.
[2]The statement can be found at https://www.youtube.com/watch?v=wfhpeADKKY8.
[3]Quoted in "More executive orders likely," *CalMatters/WhatMatters* email service, July 24, 2020. Available at https://us11.campaign-archive.com/?e=cd8ca92ba1&u=5f4af3af825368013c58e4547&id=a46b0b4a85.
[4]Herman Hupfeld. https://www.youtube.com/watch?v=qjPOr5C05T8.

Before we can review the course of events that led to the enactment of the 2020-21 budget, we need to go over some budgetary basics. Things are not always what they seem when politicians and officials describe the state budget. It is not always clear what definition of "the" budget they are talking about or what period they are encompassing. Even common English words such as surplus and deficit take on varying meanings.

Often there are vague references in news accounts and even in official statements to budget "gaps," "holes," "problems," or "shortfalls," terms that are not defined in accounting textbooks and have no fixed meanings. Elected officials may sometimes find it in their interest to use words and definitions that suggest everything about the budget is under control. However, sometimes they may want to select definitions and wordings that suggest that the budget challenges are huge, but that they nonetheless have the solution.

**Budget Basics**

News accounts of state budgetary matters largely reflect what reporters are told by officials and elected leaders and information found in government news releases and documents. If you ask ordinary people what is meant when it is said that the *federal* government is running a "deficit," while few folks could give you specifics, a typical answer would be that the government is spending more than it is taking in. If you asked about a "surplus," you would probably get a reverse answer, i.e., the government is taking in more than it is spending. Surpluses and deficits are mirror opposites in common parlance. A "balanced" budget is a knife-edge position between surplus and deficit; the government is taking in what it is spending, no more and no less.

If you further asked what is meant by the national debt, you would likely get an answer that it is what the government owes. Note the distinction between deficit (or surplus) and debt. The word deficit (or surplus) involves *flows* over a time period, i.e., income flowing in and expenditure flowing out. Governments typically have a set time period for budgeting. At the federal level, it is a year – not the calendar year – but the fiscal year starting October 1 of each calendar year. California also has a fiscal year, although its fiscal year begins on July 1 of each calendar year.

Debt, in contrast, doesn't have a time duration. It is rather a snapshot *at a moment in time*. You can ask how much was owed at, say, the beginning of the fiscal year (July 1 for California) and how much was owed at the end (the next June 30). So, there is a clear distinction between debt and deficit. The former is a stock and the latter is a flow. If you want to ask about the debt, you thus need to specify a particular *date*, e.g., June 30, 2020. If you want to ask about the state deficit (or surplus), you need to specify a particular *time interval*, e.g., the fiscal year 2019-20.

The use of a fiscal year (twelve months) might seem arbitrary. Why not, say, use fifteen months or eight months? Why gear budgeting to the length of time the Earth orbits once around the

Sun? However, there is a logic to utilizing a twelve-month period. Human activity traditionally has focused on a year, well before the movement of the Earth around the Sun - and the tilt in the Earth's axis that gives rise to the seasons - were understood. People go to ski resorts in winter and beaches in summer. They do their Christmas shopping in November-December, thus raising sales tax revenue in that interval. Their income taxes are (normally) due in April, thus increasing government revenue from that source in that month. In any twelve-month period, all of these activities are captured just once.

State and local governments typically have different funds or accounts for different purposes. The General Fund is effectively the state's day-to-day spending account from which routine expenditures occur. But the legislature, in its wisdom, has created numerous "special" funds outside the General Fund to accomplish various purposes. Thus, the Graphic Design License Plate Account, which obtains its revenue from fees motor vehicle owners pay for designer license plates, supports arts education and local arts programming. The California Beverage Container Recycling Fund receives fees consumers pay when they buy products in cans and bottles which are used for recycling payments. There are hundreds of such funds, but the biggest and most recognizable ones collect gasoline and other motor vehicle-related taxes and are used for roads and other transportation purposes.

The various funds, including the General Fund, are not supposed to have negative balances – just as your checking account is not supposed to be overdrawn. So, there will be a reserve of cash in the funds at the beginning of the fiscal year and at the end. If the balance falls during the year so there is less money at the end of the year compared with the beginning, the fund must have run a deficit - since more was spent during the year than was received. If the balance rises over the course of the year, the fund must have run a surplus because more was received than spent. This simple idea shows the relationship between stocks and flows in the government accounts.

If you think of state government as a household, you can imagine it having a checking account for its daily activities, savings accounts – where money is put aside for a "rainy day" – and some special accounts for particular purposes. To know how much the state had in reserve on a particular date for some future rainy day, you would sum up the balance in the General Fund and the various related saving accounts. If the *sum total* of the savings accounts and of the balance in the General Fund fell during a fiscal year, there was a deficit that year. If the *sum total* rose, there was a surplus during that year.

Note, however, that at any point in time there is yet more cash in the special funds. The state can handle a situation in which its cash – maybe on a seasonal basis – in the General Fund and even its various savings funds is depleted. It could, in such circumstance, engage in "internal" borrowing, effectively putting IOUs into its special funds and using that cash to pay for General Fund expenditures.

Of course, if it fills up the special funds with IOUs, they cannot pay for the specialized activities they were designed to support. The state must therefore pay off those IOUs relatively quickly. If internal borrowing is insufficient, the state can go into external financial markets and engage in short-term borrowing. It does so by issuing short-term (less than one year) interest-bearing securities known as Revenue Anticipation Notes (RANs). In rare cases, the state – if it has insufficient funds at the end of the year – can issue Revenue Anticipation Warrants (RAWs) which cross from one fiscal year to the next.[5] And if the state exhausts even that option, it has – in even rarer circumstances – given its creditors IOUs known as Registered Warrants, a kind of involuntary loan by those creditors to the state.[6]

Because the state has a General Fund and numerous special funds, there are sometimes unclear references in news accounts to "the" budget. Sometimes the reference is to the General Fund alone. Sometimes the reference is to the combination of the General Fund and the special funds. However, when surpluses and deficits are discussed in the news media, the references are almost always to the General Fund alone. In what follows in this chapter, we confine ourselves to the General Fund and its associated reserve accounts.

### A Brief History

In the late 1990s under then-Governor Gray Davis, California was experiencing a boom period associated with the growth of the dot-com industry. In particular, as dot-com stock values rose rapidly, high-end taxpayers experienced capital gains and paid income taxes to the state based on those gains. Revenue poured into the state treasury and the legislature increased spending more or less in step. But when the dot-com boom turned into a bust in 2001, the revenue disappeared quickly, but reversing the new spending proved to be hard and painful. A major budget crisis thus erupted. In the end, Gray Davis was removed by voters in 2003 in a recall election and was replaced by movie personality Arnold Schwarzenegger.

Davis, before he was ejected by voters from office, had come up with a plan to float bonds (borrow) to resolve the crisis. The problem with the Davis plan was that the state constitution bans long-term borrowing for funding day-to-day activities. Such borrowing is supposed to be reserved for long-term infrastructure projects which will provide long-term benefits. The legally-shaky Davis plan would probably have failed once legal challenges were mounted, as certainly would have happened. Schwarzenegger thus took the Davis plan, enlarged it, and then went to voters to approve a constitutional exception on a one-time basis. He promised that if

[5]RANs are issued by the state treasurer, as are longer-term securities. RAWs are issued by the state controller.
[6]Some might argue that if the state can't pay all its bills on time, it is "bankrupt." However, there is no legal provision allowing a state to declare bankruptcy the way a private corporation or individual can. There *is* provision in bankruptcy law for local governments to declare bankruptcy. But the bankruptcy process is painful and costly and is something localities try to avoid. Perhaps the most famous local bankruptcy in California was that of Orange County in 1994. Other notable local bankruptcies in California were Vallejo (2010), San Bernardino (2012) and Stockton (2012).

the state was allowed this single transgression from fiscal prudence, it would thereafter "throw away the credit card" and avoid future budgetary sins.

However, in his second term, Governor Schwarzenegger found himself in much the same situation that confronted Davis at the time of the recall. For Schwarzenegger, it wasn't dot-com stock values bursting that caused his problem. Rather, it was a housing bubble that burst combined with flaky mortgages. The housing bust nationally triggered the Great Recession of 2008, but the housing bubble and the flaky mortgages had been disproportionately concentrated in California.

The state staggered along in a continual budget crisis until the 2010 election. At that point, former Governor Jerry Brown, who had left his gubernatorial office after two terms in 1983, successfully ran for a third (and later a fourth) term promising to fix the budget crisis. Luckily for Brown, voters in 2010 had forgotten or didn't know that he had left the governorship back in 1983 in the midst of a budget crisis.

Brown took office in early January 2011 during the recovery from the Great Recession, a recovery which itself helped addressed the state's revenue needs. But he also persuaded voters to enact a "temporary" income tax increase at the top bracket and a small sales tax increase. He later persuaded voters to deposit some state revenue into a "rainy day" account which had been created under Schwarzenegger, but which Schwarzenegger was never able to fund. Brown positioned himself as the adult in the room, constraining legislative incentives to spend and building up his rainy day fund and other state savings accounts.

Brown's successor, Gavin Newsom – the former lieutenant governor and former mayor of San Francisco – thus took office in January 2019 at a time when the finances of the state were much improved and with significant reserves on hand should the economy again slide. Newsom's first budget for fiscal 2019-20 (July 1, 2019 to June 30, 2020) was enacted in June 2019 during a period of prosperity. And while there were some indicators of a future slowdown of growth, Newsom's first budget was basically built on assumptions of ongoing prosperity.[7]

The coronavirus crisis was not on the horizon when that the 2019-20 budget was passed in June 2019. That crisis was what folks in the financial world sometimes call a "Black Swan event," something highly unusual that economic models are completely unsuited for predicting. After all, the last viral pandemic on the scale of the 2020 coronavirus outbreak occurred in 1918, more than a century earlier. So, Newsom's initial proposal for the 2020-21 budget made in January 2020 was not predicated on a pandemic-induced economic downturn.

[7]Daniel J.B. Mitchell, "Time for an Old Guy; Time for a Young Guy: California Fiscal Affairs Shift from Brown to Newsom," *California Policy Options 2020* (UCLA Luskin of Public Affairs, 2020), Chapter 1. Available at https://archive.org/details/budget201920.

### A Look at the Numbers

With both our budget basics in mind and our brief budgetary history, we will first take a look at the evolution of the 2020-21 budget – to this writing – through numerical tables. Our primary focus is macro, the overall flows of California state spending and revenues. We will then go back and trace the background to the 2020-21 budget, i.e., what was happening in the state as that budget was first developed, then readjusted for the crisis, and then enacted.

As will be seen when we look at the budget background, the first eight months of previous 2019-20 fiscal year were not especially budget-oriented. In Good Times, other issues come to the fore, and folks don't concentrate on fiscal affairs. Once the coronavirus crisis overwhelmed the state, with its impact on the state economy and therefore on the budget, attention became heavily focused on the crisis and many other issues of policy and politics were pushed aside.

Let's first look at what happened to the 2019-20 budget – the first budget proposed by Governor Newsom when he took office in January 2019 - as fiscal year 2019-20 progressed from boom to catastrophe. As noted in last year's chapter on the state budget, Newsom's first budget was in fact in deficit by something over a billion dollars, using the estimates available at the time of its passage.[8] In the larger scheme of things, that small deficit (small relative to the overall General Fund budget) would not have been a problem, given the size of reserves that the state had accumulated under former Governor Jerry Brown. Up until that point, the state's economy was booming and might well have been seen to be on a path to generate more revenue by the end of the fiscal year than had been anticipated at the beginning. In any case, with some reasonable frugality, the governor was likely in a position to keep reserves more or less constant.

However, as Table 1 shows, total projected end-of-year reserves for 2019-20, after jumping up in January, finished about a billion dollars *lower* than had been projected when the 2019-20 budget was enacted.[9] And that result included a significant infusion of funds provided by the U.S. Congress under the federal CARES Act to offset the coronavirus crisis. Absent that infusion, reserves would have dropped dramatically if spending had taken its actual path. Although state revenue – even with the infusion - fell, the scope for cutting spending was limited within a fiscal year that was almost three fourths finished when the crisis hit. And the coronavirus crisis put new spending demands on the state for health mitigation. Total reserves thus dropped by over $6 billion in 2019-20 as can be seen on Table 3.[10]

Table 2 shows the evolution of the 2020-21 budget, Newsom's second. As initially proposed in January 2020, it would have ramped up spending relative to a workload (no change in policy)

[8]Op. cit., p. 39.

[9]Table 1 shows that initially end-of-fiscal year reserves were projected to be $20.589 billion but actually ended with at total of $19.512 billion.

[10]Table 3 shows that using updated estimates available in June 2020, total reserves in 2019-20 dropped from $26.148 billion to $19.512 billion, a drop or deficit of $6.636 billion.

projection of the Legislative Analyst's Office (LAO). By May, however, with the coronavirus crisis underway, proposed spending for the coming fiscal year was cut dramatically.

What was enacted in June was pretty close to the May Revise in total but not in detail. Even so, the budget for 2020-21 contains a projected deficit of around $5 billion. (See Table 3.) Thus, from the time of initial coronavirus outbreak to the projected end of 2020-21, something like a pulling down of reserves by about $11 billion was projected to occur, still leaving over $14 billion in official reserves. So, at that rate, the state could likely go another year and a half or two without completely depleting its official reserves.

If more federal aid came along – something still unclear at this writing – state spending would be enhanced by automatic formulas contained within the enacted budget. If some aid were received, but less funding than hoped for, the added increment would be proportionately reduced. Whether the net effect of federal aid would end up changing the total drawing down of reserves is unclear. There are too many unknowns about the pace of the economy and how the legislature and governor will behave during 2020-21.

It is important to note that the legislature always has the option to change the budget in mid-course, depending on the economic and political outlook. Such a mid-course correction did occur in the wake of the Great Recession of 2008, for example. It is also worth noting that the June 2020 budget for 2020-21 was signed *before* income tax receipts for July could be known for sure. (The mid-April due date for the 2019 tax year had been delayed until mid-July due to the coronavirus crisis.)

An important thing to keep in mind when thinking about the short-term outlook for the state budget is the presence of the funds and accounts outside the General Fund, to which we referred in the previous section. It is possible, as we noted, to borrow internally from those outside funds. Chart 1 tracks unused borrowable resources – essentially remaining internal funds legally available as sources of such borrowing during fiscal 2019-20 and in the prior year.

The available resources for the two years (2018-19 and 2019-20) more or less move together (due to regular seasonal mismatches between tax receipts and spending) until March 2020. Thereafter, 2019-20 resources fell below the prior year and would have been substantially lower were it not for the receipt of $9.53 billion under the federal CARES Act to help with coronavirus-related expenses. The state finished fiscal year 2019-20 with over $37 billion in unused borrowable resources which included the various reserves associated with the General Fund, but also special funds available outside the General Fund. And that end-of-year balance remained despite the fact that state income taxes that should have been received in April 2020 had been deferred by law to mid-July, i.e., beyond the 2019-20 fiscal year.

With that numerical fiscal tour completed, let's examine how the budget for 2020-21 – at least as the budget stands at this writing - fell into place. The enacting of the 2019-20 budget was certainly a newsworthy event briefly. But it was a no-drama affair due to the prosperity then

prevailing and not initially a highly challenging concern as perceived by the public. That lack of drama meant that other issues were much more in the headlines – until suddenly they weren't.

**Summertime 2019, and the Living Was (Relatively) Easy**

*There's a time each year, That we always hold dear*
*Good old summertime, With the birds and the trees'es*
*And sweet scented breezes, Good old summertime*
*When your day's work is over, Then you are in clover*
*And life is one beautiful rhyme, No trouble annoying*
*Each one is enjoying, The good old summertime*

"In the Good Old Summertime" (Song, 1902)[11]

When the 2019-20 budget year got underway, there was a general calm compared with what was to come later. Of course, the political atmosphere always has conflict. There were issues of publicly-financed charter schools vs. conventional public schools. Under former-Governor Jerry Brown, legislative attempts to restrict the growth of charters generally failed. Governor Newsom was less favorable to charters, and a measure restricting charter expansion was eventually passed. There was conflict with the Trump administration concerning the high-speed rail project, a legacy of Jerry Brown about which Governor Newsom had never been an enthusiast. Newsom was willing to go ahead with a truncated version of the project but was not keen to give back federal funding that had already been received on the basis of the Brown version, leading to a fight with the Trump administration.

More pointedly in terms of conflicts with the Trump administration, the state enacted a law that seemingly would bump President Trump off the 2020 state primary ballot if he didn't produce his past tax returns. Brown had vetoed this dubiously-legal proposal during his term in office. Newsom signed it. (Not surprisingly, after litigation, Newsom's version was overturned.) The state also continued its various legal contests with the Trump administration over such matters as auto emissions and federal attempts to end DACA – the Obama-era program giving temporary status to "Dreamers."[12]

On the other hand, when it came to emergency federal aid for state disasters – especially wildfires – the federal government always seemed to come through, and Newsom would

[11]George Evans and Ren Shields. https://www.youtube.com/watch?v=ccjSC_19dP8.
[12]Dreamers are individuals brought into the U.S. by their parents as children without authorization.

express gratitude to the president or others in the Trump administration.[13] Newsom was also willing to take advantage of a Trump administration federal tax break for private investing in so-called "Opportunity Zones," designated distressed areas that were intended to attract outside investment.[14] However, the legislature would not go along with a bill for implementation.

### Unemployment Compensation, Housing, and the Safety Net

The finances of California unemployment insurance program had never quite recovered from the Great Recession of 2008-09, but until the coronavirus crisis the state was experiencing low unemployment, pushing the issue into the future.[15] Problems of public pension finance persisted, despite changes in the various pension programs enacted under Jerry Brown, but a booming stock market had dampened immediate concerns. Brown had not made new housing construction a major issue, but Newsom generally supported moves to prevent local governments from impeding new construction, although (as of this writing) he had little success pushing such policies through the legislature.

All of these matters acquired new elements after the coronavirus crisis developed, with its impact on the economy. The unemployment insurance program became a major element of federal response. Drops in the stock market as the recession developed made pension finance more difficult (although at this writing the market has recovered). The housing markets, as well as the commercial real estate and development markets, were thrown into turmoil. In the summer of 2019, the legislature approved a bill somewhat limiting rent increases in response to concerns about unaffordable housing. Once the coronavirus crisis arose, the issue became less one of future rent hikes and more a focus on preventing evictions for nonpayment of current rent.

### Recycling

Before March 2020, there were California issues with origins in Asia, but nothing like what was to come with the coronavirus. The state's recycling efforts, part of its general tilt toward environmentalism, depended in part on exporting its plastic, paper, and glass waste to China for reprocessing. But the China market for such waste was drying up, reducing the U.S. price of

[13]Newsom's willingness to say thank you for federal aid extended later to the coronavirus period. In fact, a short thank-you from Newsom to President Trump was aired at the Republican National convention in August 2020. See https://www.youtube.com/watch?v=KGfBALYs5n0.

[14]The Opportunity Zone concept is a variant of earlier "Enterprise Zones," which offered tax breaks to investors. The record for such zones has generally not been positive. However, even if the concept is flawed, there could be reasons for California not to miss out on a potential federal subsidy for local investors.

[15]Unemployment insurance is a federal-state program that dates back to the Great Depression of the 1930s. Each state, however, is responsible for collecting sufficient payroll taxes from employers to finance its component of the program and the program is administered at the state level.

waste, and leading to reductions in capacity by private state recyclers. Even with a state subsidy, the waste was ending up in landfills rather than being processed for reuse.

The future propensity of the Trump administration to blame the coronavirus on China – once it hit the US - complicated matters related to trade with that country in ways not foreseen in summer 2019. Apart from California's direct trade with China, the state's ports greatly depend on international commerce. And the volume of trade was drastically reduced by the coronavirus crisis.

### Criminal Justice Reform

The upcoming 2020 election was already affecting the political scene in 2019. The legislature had enacted a new system to replace cash bail, but private bail agencies had put a referendum on the November 2020 ballot that effectively blocked the law from taking immediate effect.[16] Nonetheless, the 2019-20 budget had some funding for pilot programs using the no-bail new system. Presumably, if the new system "worked," the success could be cited by proponents of the no-bail approach in the 2020 ballot campaign. Sacramento County was to be one of the test sites. Protests over criminal justice matters in spring 2020 would later highlight such issues as cash bail. Similarly, Governor Newsom signed a law regulating use of force by police in summer 2019, an issue that became a major political issue after the spring 2020 protests related to the killing of George Floyd in Minneapolis by police.

### Prop 13 of 1978

Another legislative effort aimed at the November 2020 election was a proposed state constitutional amendment that would lower the two-thirds vote requirement for local bonds and parcel taxes. Ultimately, that effort – which would have modified restrictions of Proposition 13, California's 1978 property tax limitation – failed. But the initiative process (as opposed to the legislative process) did succeed in putting the so-called "split-roll" system of property tax assessment on the November 2020 ballot. Under the split roll, commercial properties would receive separate treatment from residential properties, raising significant revenues for local government.[17]

The long shadow of Prop 13 showed up in another controversy, this one a requirement from the legislature that an ethnic studies course be incorporated into the high school curriculum. If

[16]The opposition is not confined to bail agencies. Some civil rights proponents have concerns about the algorithms that might be used to determine the risk of failure to show up for trial or reoffending.

[17]Proponents of the split-roll approach had gotten a version of their proposal qualified for the ballot. But after testing that version against public opinion, they decided that a more marketable plan was needed, one that had less impact on small business and other features.

it seems odd to you that the legislature would be in the business of detailed curriculum planning for local schools, the phenomenon might seem less strange if we go back to Prop 13.

Back in 1978 when Prop 13 was enacted, the state ended up as a major funder of the K-14 educational system because Prop 13 had drastically cut local property taxes. Up until then, local property tax revenue was a very important source of school finance. Prop 13 set in motion a political chain of events. First, with voters in an anti-tax mood, Prop 4 on the ballot the following year was enacted. It placed a cap on state revenue based on population growth and inflation. Prop 4 required refunds of excess revenue back to taxpayers, something that didn't occur until the cap was hit in late 1980s. Angered by refunds that might have otherwise gone to schools, the educational establishment put Prop 98 on the ballot in 1988. Prop 98 required minimum funding by the state for K-14 and gutted the Prop 4 cap. In doing so, Prop 98 cemented the state's responsibility for school funding.

There is the old adage that whoever pays the piper calls the tune. With Prop 13's indirect push of funding responsibility for K-14 up to Sacramento, the idea of the legislature involving itself in local curriculum matters became less strange. When the committee tasked with coming up with the proposed ethnic studies course unveiled its agenda, there was controversy over a variety of elements in the plan including complaints about language – unfamiliar terminology such as "cisheteropatriarchy" was cited – and there were allegations of anti-Semitism. In addition, various excluded groups wanted their histories to be included in the proposed course. The issue was kicked to the state Superintendent of Education who promised "edits" in a future revision which appeared in mid-summer 2020, still with controversy.[18]

Unforeseen events in the future – the recession related to the coronavirus lockdown and its negative impact on revenue – would intensify controversy over the split roll. Similarly, the spring protests over policing and racism would focus more attention on such matters as ethnic studies. As in other topics of controversy, the future path of events was not foreseen.

### Gig Workers

Another subject of debate was AB 5, a proposal that would codify into law a state Supreme Court decision regarding "gig" workers such as Uber and Lyft drivers. Under AB 5, such workers would be classified under state law as regular employees, not "independent contractors" and would be entitled to protections and benefits that such employees have. During the summer of 2019, with the Democratic presidential primary in full swing, candidates such as Elizabeth Warren and Bernie Sanders supported AB 5.

[18]A bill was passed and signed by the governor extending the deadline for curriculum development. See also Nina Agrawal and Howard Blume, "'Herstory' is out as California revamps K-12 ethnic studies course guide," *Los Angeles Times*, August 1, 2020. Available at https://www.latimes.com/california/story/2020-08-01/california-ethnic-studies-model-curriculum-released.

Ultimately, when it passed, key gig employers put an initiative on the November 2020 ballot that would effectively void AB 5.[19] They created a huge war chest for the coming campaign. They promised to spend anywhere from $60 million to $100 million on the ballot campaign to support their initiative. And they filed a legal challenge to AB 5 itself, arguing it was unconstitutional. As of this writing, the gig employers' litigation challenge had failed at the lower court level and is on appeal.

The issue of gig workers was to be highlighted when the coronavirus-induced recession caused mass unemployment, and the problem of gig workers not normally being eligible for unemployment compensation became apparent. As contractors, neither the employer nor the workers had paid into the system on their behalf.[20] Thus, the unemployment insurance system had no records of prior earnings history as typically exist for regular employees, complicating state implementation of a special federal coronavirus-related program for the self-employed.

### Vaccine

Governor Newsom was repeatedly criticized during his first year in office for seeming to cater to anti-vaccine groups. A bill to close loopholes in school vaccination requirements was working through the legislature, engendering opposition from anti-vaxxers. It was somewhat watered down at the governor's insistence. Newsom ultimately signed the modified bill in early September 2019, angering anti-vaxxers who thought he might veto it.[21]

The issue of public health was much more elevated later in fiscal 2019-20 by the coronavirus crisis, with the governor becoming the advocate of strict lockdown rules and personal behaviors such as mask-wearing and the like. At this writing, no vaccine for the coronavirus has been developed, although various attempts to produce one are underway. Would the governor – who in other aspects of public health during the crisis constantly cajoled Californians to avoid anything that might spread the virus – become an advocate of use of a vaccine, were it to be developed? That question remained open, given his past record.

### Paying College Athletes

The issue of paying college athletes – who are supposed to be amateurs, not professionals – has been a matter of debate and litigation for years. In response, the legislature enacted a bill that

[19]The gig companies could have filed a simple referendum on AB 5 under which voters would have voted yes or no as to whether the law should go into effect. In filing a separate initiative, they included certain benefits for gig workers so that it could be argued that they were not simply denying benefits to their contractors.

[20]The federal government created special Pandemic Unemployment Assistance (PUA) benefits for contractors as a supplement to the unemployment insurance system.

[21]Anti-vaxxers threatened they would put a referendum on the ballot to block the new law but never obtained sufficient signatures.

allowed student-athletes the right to profit from their names, likenesses, and images. The NCAA opposed the bill, but ultimately the governor signed it, and the NCAA reversed and went along with the bill's intent. Once the coronavirus crisis developed, the issue for college athletes was less one of pay and instead whether they could play at all, and if so, when and under what restrictions and precautions.

### Homelessness

Homelessness was becoming a political issue at the local level in California, with encampments and tent colonies forming, especially in San Francisco and Los Angeles. These encampments were reminiscent of the "Hoovervilles" of the Great Depression of 1930s, yet they were developing at a time of low unemployment and general prosperity. And they were highly visible.

President Trump pointed to the encampment issue and sometimes threatened that he would somehow solve it if local mayors couldn't. In response, local officials and the governor turned around and invited the Trump administration to provide federal dollars for support of homeless/housing programs. Little that was productive resulted from the political back and forth until the later coronavirus crisis. At that point, federal monies in support of coronavirus-related expenses did become available and could be used for temporarily housing the homeless. Efforts to provide housing for homeless persons could be presented as a larger matter of public health.

## The Fall

*"The falling leaves*
*Drift by the window*
*The autumn leaves*
*Of red and gold"*

Autumn Leaves (Song, 1945)[22]

As autumn got underway, the general outlook for the California economy seemed reasonably bright. Nobody was especially concerned with, or focused on, the outlook for the state budget. The UCLA Anderson Forecast projected some slowdown in the rate of state economic growth

[22]Joseph Kosma and Jacques Prévert in French, Johnny Mercer in English. https://www.youtube.com/watch?v=ZEMCeymW1Ow.

and pointed to some trouble spots, but nothing that pointed to the kind of economic catastrophe that the coronavirus would bring.

As Table 4 shows, there was a UCLA prediction in September 2019 that the unemployment rate in 2020 and in 2021 would average 4.6%, perhaps a bit above the level of 2019. By December, the forecast was revised down to 4.3% in 2020 and 4.6% in 2021. It was the kind of forecast that would suggest that with some caution, there would not be major state budgetary strains to come.

Tax revenue could be expected to arrive at more or less anticipated levels in such an economy. Nothing in the outlook suggested a recession in the immediate future. Commenting on the economy, the governor talked about a beginning of a descent, using the airplane analogy.[23] But there is a big difference between an airplane beginning to descend and sudden turbulence leading to a sharp drop in altitude.

An opinion poll taken by the Public Policy Institute of California suggested that the approval levels of the governor and legislature were stable at something under 50% - with many "don't knows" rather than strong disapprovals on the other side by one measure. Stronger ratings for the governor were indicated by another UC-Berkeley poll. In short, there was a political and economic calm – or at least stability - in Sacramento.[24]

The general public was probably more focused on the Democratic Party's ongoing campaign for the presidential nomination than on anything going on at the state level. That contest was narrowing down to a race between former vice-president Joe Biden and Vermont senator Bernie Sanders. No actual primaries or caucuses had yet taken place. But California, which had moved its primary to be earlier than in 2016, appeared to have the potential to tilt the contest one way or another.

### Higher Education

Although Governor Newsom had shown ambivalence about Jerry Brown's legacy high-speed rail project, he hadn't said much about another Brown legacy that didn't involve concrete and steel. Brown had long been convinced that public higher education was too expensive, and his remedy of choice was online education. With Brown as an *ex officio* regent, the University of California had created some online courses to appease the governor and as part of earlier

[23]Sophia Bollag, "California boom is ending, Gavin Newsom warns as 2020 budget writing begins," Capitol Alert of *Sacramento Bee*, October 3, 2019. Available at https://www.sacbee.com/news/politics-government/capitol-alert/article235759857.html.

[24]Berkeley IGS Poll, Release #2019-09 of September 30, 2019. Available at https://escholarship.org/content/qt2ns281d1/qt2ns281d1.pdf. Public Policy Institute of California, *Californians & Their Government*, *September 2019*. Available at https://www.ppic.org/wp-content/uploads/ppic-statewide-survey-californians-and-their-government-september-2019.pdf. UCLA Anderson Forecast, September 2019 and December 2019. Publications available from Forecast for subscribers.

budget deals with him. Eventually, Brown's interest in online higher education led to the creation of an online-only community college, "Calbright College," which was slated to accept its first students in October 2019 (and did).

There remained controversy about Calbright. The California Federation of Teachers (CFT), which represents instructors in the community college system, feared job displacement, and the union threatened a lawsuit. And it remained unclear, based on previous experiments with online higher education, whether there really is a cost saving. However, when the coronavirus crisis came along later in the fiscal year and pushed virtually all higher education into the online mode, Calbright College suddenly looked more like a model and less as an experiment. Regardless of cost, instruction went online. Budget issues were not the driver; the virus was.

Although CFT was not happy with Calbright, it did achieve another goal. The governor signed off on a bill that expanded aid to community college students who might experience a financial setback. There had been such funds available in the past, but they had come from private fundraising.

Other higher ed issues were percolating in the fall that later became more pressing thanks to the coronavirus and the spring protests. One was whether the SAT and ACT would continue to be a part of the admissions process at the University of California.[25] Another was whether there might be moves to put a repeal of Proposition 209 – the state's voter-approved ban on affirmative action – on the ballot. Ultimately, the legislature did put repeal of Prop 209 on the ballot for November 2020.

### Housing and Transportation

Affordable housing remained a key political issue. The governor wasn't willing to sign a bill adding more spending on affordable housing projects. But he signed a bill to promote "granny flats," i.e., secondary structures on single-family lots that could accommodate a small household. Such structures involved no state budgetary expenditure.

Another bill signed by the governor sought to bar landlords from discriminating against renters who used housing vouchers as a rent supplement. Various programs offer vouchers to low-income tenants that can be used to pay higher rents than they might otherwise be able to

[25]A report by the University of California Academic Senate for the Regents found that the use of the SAT and ACT at UC in conjunction with other admissions criteria "*protects the admission eligibility of the very populations about whom there is concern, and ensures that under-represented, low-income, historically minoritized, and other similar populations are eligible for admission at UC.*"
https://regents.universityofcalifornia.edu/regmeet/may20/b4attach2.pdf (p. 2) and
https://senate.universityofcalifornia.edu/_files/underreview/sttf-report.pdf. However, the Regents ended use of the tests for undergraduate admissions. To the extent that the tests remained in use for certain purposes at UC, a court decision in late summer blocked their continuance.

afford. When the coronavirus crisis developed, the issue of paying rents shifted from vouchers and affordability to the question of paying rent at all in the face of soaring unemployment.

In the transportation area, Newsom signed an executive order shifting more state gas tax money to go to public transit projects rather than to roads. This action set off complaints, particularly from (mainly Republican-represented) rural areas. The coronavirus crisis was to raise a new set of issues: paying for public transit when ridership – and thus passenger fares - dramatically declined because of the drop in general economic activity, stay-at-home rules, and public reluctance to use transit systems that were not designed for social distancing. Transit agencies had to deal not only with reduced fare revenue but also added expenses for intensive cleaning and disinfecting of trains and buses.

### Jerry, Not Jerry

While Governor Newsom liked to portray himself as a Jerry Brown-like figure in terms of being the adult in the room protecting the state budget from a potentially spendthrift legislature, he also wanted to differentiate himself from his predecessor. Newsom signed off on laws that Brown had vetoed in earlier iterations. He signed legislation dealing with gun control, offering abortion pills in college clinics, unionizing childcare workers, adjusting the timing of the school day, limiting charter schools, and other matters.

But in one key area Newsom continued a policy Brown had started. Part of Brown's budgetary actions to deal with the fiscal dilemma he inherited in the aftermath of the Great Recession was the abolition of local redevelopment agencies. These agencies coordinated local redevelopment projects and used the increment in property taxes when higher assessments resulted from new development.

Brown saw this increment financing as a diversion of the property tax away from K-14 which the state then had to backfill under Prop 98's funding requirements. He set in motion a process that ended with the dissolution of the redevelopment agencies.[26] Newsom vetoed a bill that would have reestablished local redevelopment, albeit in a much more restricted form than had existed before Brown's action.

Although redevelopment construction was largely carried out in partnership with the private sector, it can involve local public funds beyond the future increment in property tax receipts. Once the coronavirus crisis hit, local governments that are typically heavily dependent on sales taxes and tourism-related taxes suddenly saw a dramatic erosion of their tax bases. Thus, even

[26]Brown proposed an abolition of redevelopment agencies, but a compromise deal effectively took some of their revenue instead. The agencies went to court to challenge the loss of revenue but inadvertently triggered a court decision that abolished them.

if the governor had not vetoed the bill, not much would have come from it, at least in the near term.

The climb out of the Great Recession of 2008 meant that state workers had been limited in terms of general pay increases. Newsom inherited the task of negotiating new union contracts with various state employee groups whose previous contracts had been signed under Brown. In some categories, pay had fallen sufficiently below market so that recruitment was becoming a problem.

Newsom's administration generally followed a policy of trying to focus negotiated pay raises on such cases of labor shortage. But even signed contracts could not insulate the workforce from the later coronavirus crisis. At that point, the issue became pay reductions, either by salary cuts or through reducing work time.

While Newsom had earlier trimmed back a Jerry Brown proposal for a twin-tunnel water project to a one-tunnel project, in the case another environment-related program, he defended Brown's cap-and-trade program from a lawsuit by the Trump administration. Under cap-and-trade, a diminishing number of greenhouse gas emission permits are released and sold. These permits both provide revenue to the state and put a declining ceiling on allowed emissions. Under Brown, the California program had been connected to a larger program with other states and a Canadian province, Quebec. The Trump administration challenged in court the right of a state to sign an international agreement, arguing that such deals are appropriate only at the federal level. At this writing, the challenge to California's cap-and-trade program has been unsuccessful in blocking its operation.[27]

### Power to the People, Except When It's Not

The major electricity and gas utility in northern California, PG&E, had a history of safety problems that ultimately led to its operating in bankruptcy. First, there was a major gas line explosion that destroyed a neighborhood and that was ultimately determined to involve faulty maintenance. Then it was electrical transmission lines that ignited wildfires. To avoid further liability, PG&E adopted a policy of shutting off power when strong winds were forecast for areas in which there was wildfire danger.

Apart from the cost and inconvenience to customers of power shut-offs, there were costs imposed on local governments which had to deal with nonworking traffic lights and continued provision of public services in the absence of electricity. The 2019-20 budget provided for $75 million in aid for localities affected. But the governor also became involved in trying to find a way forward for PG&E. Should it be reconstituted in some form as a private utility? If so, might

[27]The Trump administration suffered a defeat in one court on its challenge in March 2020 and another in July 2020.

some outside group buy it? Or should it be converted into a public entity or a co-op of some type?

Whatever the solution regarding ownership, someone would have to provide funding for a major infrastructure upgrade to avoid future mishaps and safety lapses. Newsom appointed his cabinet secretary, Ana Matosantos, as the state's "energy czar" to oversee the PG&E affair and summoned the CEO of PG&E for a harsh interview. Somewhat forgotten was PG&E's past support in happier times for Newsom's various political campaigns.

Not surprisingly, dealing with PG&E was a major issue for the area in which it operated. Eventually, a $13.5 billion settlement was reached with lawyers representing wildfire victims as part of a plan to emerge from bankruptcy, a deal which the governor rejected. The bankruptcy court approved the settlement despite the governor's objections. But given political realities, negotiations with the governor were not concluded until the height of the coronavirus crisis in late March 2020. Under the deal, the state had an option to buy the utility. But in July 2020, it emerged from bankruptcy as a private company, putting aside a fund to pay those injured in wildfires. In addition, PG&E pleaded guilty to involuntary manslaughter and was fined.

The wildfires themselves were a big issue wherever they occurred and were a source of friction between California and the Trump administration. President Trump from time to time would threaten to cut off FEMA aid to California for wildfire damage on the grounds that the state wasn't properly managing its forests. But as with other issues, once the coronavirus crisis arrived, the wildfire challenge tended to be put aside even though the danger of fires would arrive (and did arrive) in the usual seasonal pattern.

### Sanctuary

Under Jerry Brown, when the Trump administration attacked undocumented individuals, including DACA recipients ("Dreamers"), California reacted in two ways. There were lawsuits by California targeting Trump policies. And the legislature moved to protect undocumented individuals in various ways including barring cooperation between police agencies and federal immigration enforcement agencies. Brown resisted terming the legislation a "sanctuary" law, arguing that the word conjured up medieval churches.[28] Whether anyone except Brown – with his one-time Jesuit training – actually made that theological connection is an open question. In the end, however, Brown saw the term as potentially inflammatory. Nonetheless, the terminology stuck.

While California was generally the initiator of lawsuits in this area, in the case of the state's "Sanctuary Law," the Trump administration sued California over its enforcement. In the fall of 2019, the administration asked the U.S. Supreme Court to invalidate the law. The Court didn't

[28]See Brown's "Meet the Press" interview of August 6, 2017: https://www.youtube.com/watch?v=_LxLLTob29U.

rule until the following June – and then, in the midst of the coronavirus crisis – it ruled for the state. By that time, however, a more pressing problem was the exclusion of undocumented individuals from the various federal programs aimed at alleviating the coronavirus-induced economic crisis.[29]

### Auto Emissions

The Trump administration sought to roll back auto emission standards. But some major car manufacturers decided to stay with tougher California standards. Other car companies approved of the federal rollback. Newsom ordered state agencies not to buy new cars from those manufacturers that failed to meet California standards.

Once the coronavirus hit, with its impact on the state budget, it was unlikely that the state would go on a buying spree for new cars. Thus, the order was unlikely to change the political calculations of the various manufacturers. But the crisis also substantially curtailed driving, producing an improvement in air quality regardless of standards.

### Universal Health Care

California was especially energetic in taking advantage of the Affordable Care Act ("Obamacare"). And Governor Newsom, while not promising a specific state plan when he ran for governor (such as single-payer), expressed the goal of universal coverage. When he was mayor of San Francisco, he oversaw the development of a citywide plan that was near-universal. Late in the fall of 2019, he established a commission to investigate alternative health plans that California might consider.

The later coronavirus crisis inherently highlighted gaps in the state's health care system. It pushed the state toward developing *ad hoc* arrangements to cover those persons without insurance since anyone could become infected and anyone – once infected – could spread the virus to others. The coronavirus was indifferent to an individual's health insurance coverage status. It just spread whenever enabled. Unfortunately, those people who lived in residences and were employed in workplaces with conditions that tend to enable infection were also those least likely to have health insurance.

### The Fall Budget Outlook

Although the governor doesn't have to produce a budget for the forthcoming year until early January, the Legislative Analyst's Office (LAO) generally releases an evaluation of the fiscal

[29]The legislature passed a bill in late August 2020 that would give certain tax credits to undocumented workers that were previously available to other workers. It is unknown at this writing whether the governor will sign it.

outlook in the previous November. The LAO assumes that no changes are enacted in spending policy or in tax policy and then projects a "workload" budget based on a forecast of economic conditions and program beneficiaries and activities. As Tables 1 and 2 show, the LAO projected somewhat higher reserves on workload assumptions at the end of the then-current 2019-20 year and significantly higher reserves in the forthcoming 2020-21 year. Such reserves could either be saved or somewhat depleted by changes in policy.

Basically, the LAO was saying to the governor and legislature that continued good economic performance, even in the face of some slowdown, could allow added spending. As noted earlier, Table 4 shows that the UCLA Anderson Forecast for 2020 released in December 2019 – and thus likely based on similar assumptions to those used by LAO - projected some slowing causing the California unemployment rate to rise slightly. (We are using the unemployment rate as a proxy for general economic conditions.) But there was no hint of anything more than a bit of deceleration.

Although the budget proposal for 2020-21 had yet to be released, the governor in late December let it be known that there would be added money in the January proposal for dealing with homelessness. Such leaking of bits of the forthcoming budget are traditional. They provide a preview of the public, test the legislative response, and heighten interest in the forthcoming budget proposal as a whole.

The key point is that in late fall of 2019, there was nothing foreseen that would have suggested a recession. Yes, the expansion since the Great Recession had gone on for an exceptionally long time. Maybe you could worry about rising housing prices as a warning of an eventual bubble inflating and bursting. Or maybe you could worry about the stock market in the same vein.

Maybe the seemingly endless imbalance in U.S. international trade and the resulting accumulation of dollars by China and other countries might someday become a problem. But these factors were all hypotheticals. They had also existed a year before, and for years before that, and nothing untoward had happened.

The first reports of a new respiratory illness in China did not appear until the end of December 2019. And even then, the initial reports did not suggest something that would translate into a drastic downward revision of the economic outlook, much less a major recession. After all, there had been other viral infections in the past including seasonal variants of the flu. None had led to much impact on the U.S. economy since 1918.

**The Winter Comes**

*All the leaves are brown, and the sky is gray*
*I've been for a walk on a winter's day*
*I'd be safe and warm if I was in L.A.*
*California dreamin' on such a winter's day.*

California Dreamin' (Song, 1965)[30]

It's hard to look at what transpired when the winter began, and Newsom's second budget was unveiled without a sense of the impending crisis that no one then saw coming. The most notable thing about the governor's budget proposal was not its content but the way it was presented. The LAO had suggested that there was latitude in the budget outlook for expansion of new programs. But, as noted earlier, the governor had previously used the analogy of a plane landing to suggest that the moderation and prudence was needed. "*Next year's state budget won't be as flush as this year's*," he had warned back in October.[31]

**Presentation**

If spending proposed for 2020-21 is compared with what was projected for 2019-20, as both were projected at the time of the January 2020 presentation, the increase was around two percent, roughly the rate of inflation. So, in real terms, there was essentially no change. It would seem there wouldn't be much to say about such a budget. But that wasn't the case, particularly for a governor who likes to reel off statistics and details, a talent which came later to the fore later during the onrushing coronavirus crisis.

Newsom had already broken with the Jerry Brown mold in presenting his first budget a year earlier. Brown typically put a few large cardboard charts on an easel and spoke for at most half an hour including questions from reporters. For details, he would then turn the podium over to his budget director. Newsom, back in January 2019, spoke for about an hour and a half using electronic charts. But in January 2020, after a warning that a long, governor-presented unveiling was about to occur, Newsom went on for close to three hours! Commentator Joe Mathews, watching this gubernatorial performance online, wrote, "*It went on so long that I wondered if I should call hostage negotiators or a SWAT team to free my journalistic friends who were stuck there*."[32]

The governor has pointed out at times that as a child he was dyslexic. Indeed, funding for dyslexia support was part of the budget proposal. He seemed to compensate as an adult by being able to memorize large volumes of information rather than rely on a written script or even notes. In any case, this style of presentation - charts and data presented at great length and seemingly without written material - foreshadowed his practice that was soon to be used in public presentations when the coronavirus crisis overwhelmed most other state issues. He

[30]John Phillips and Michelle Phillips. https://www.youtube.com/watch?v=R0ZGJRQVZeY.
[31]Quoted in Sophia Bollag, "California boom is ending, Gavin Newsom warns as 2020 budget writing begins," Capitol Alert of *Sacramento Bee*, October 17, 2019. Available at https://www.sacbee.com/news/politics-government/capitol-alert/article235759857.html.
[32]Joe Mathews, "Is the Budget Presser Over Yet?" *Fox & Hounds*, January 13, 2020. Available at https://www.foxandhoundsdaily.com/2020/01/is-the-budget-presser-over-yet/.

would speak regularly in news conferences streamed online via Facebook and other social media, always with charts and data, but without notes.

### The Normal Process

From January 2020 until early March, the budget process unfolded in a standard fashion. The LAO began to churn out reports on various fiscal issues. Some were overviews of large segments of the budget: transportation, K-12, higher education, environmental protection, Medi-Cal, and criminal justice. Some were more detailed: (chronic) problems the state had in modernizing its IT infrastructure, taxation of e-cigarettes, medical education, operation of the Student Aid Commission and the Public Utilities Commission, prison maintenance, cybersecurity plans, implementing AB 5 (the state law that sought to classify Uber, Lyft, and other gig workers as regular employees), and implementation of state reimbursements for mandates imposed on local governments. Using such information, the legislature began to hold hearings on these and other aspects of the budget.

Because there was no particular budget crisis, the degree to which public attention was focused on Sacramento's fiscal debates and other policy issues was limited. The one indication of public sentiment was the rejection of a $15 billion school bond that appeared on the March 3rd presidential primary ballot. It seemed that voters were not leaning toward whatever long-term budgetary obligations such a bond issue might entail.[33]

The defeat of added state debt occurred despite the fact that the March presidential primary was mainly of interest to Democrats, since there was no real opposition on the Republican side to re-nominating President Trump. It occurred despite the fact that voters in the Democratic primary leaned toward Bernie Sanders.[34] It might have been expected that an electorate that leaned toward the left would favor a school bond. But it didn't happen that way.

### State of the State

Normally, the governor gives his State of the State address not long after the budget presentation. But again, Newsom deviated. First, he delayed the address until February 19th, well over a month after the budget presentation. Second, while such addresses typically cover a wide range of issues facing the state, the governor devoted his address almost entirely to homelessness and the connected lack of affordable housing. Much of the address dealt with describing the problem and its history. The emphasis on homelessness seemed in part to be

[33]The school bond, which appeared as Proposition 13 on the ballot, received 47 percent of the vote. There was some talk at the time of the defeat that voters were somehow confusing this Prop 13 with the famous Prop 13 of 1978 which drastically cut property taxes. But it is not clear whether such confusion – assuming it even existed – might have swayed voters towards a yes or a no vote.

[34]Sanders received 36 percent of the vote in the Democratic primary; Joe Biden, the eventual Democratic nominee, received 28 percent.

triggered by the phenomenon of large tent camps of homeless individuals which had attracted public attention (including the criticism mentioned earlier by President Trump).

The main element in the address was additional money for dealing with the homeless problem. But on housing, although the governor had pushed localities to adopt changes in their zoning practices that would add to the housing stock, a bill to do so – SB 50 – had died in the legislature (as it had during Newsom's first year). It wasn't clear, absent legislation, how much the governor could accomplish. Other bills related to housing and zoning also died in the legislature.

By the time of Newsom's State of the State address, the coronavirus crisis was less than a month away. And dealing quickly with homelessness as part of trying to check the spread of the disease would suddenly become a concern and would open the door to some specific short-term actions. But, again, the coronavirus problem – at least as perceived by state political leaders and the general public – was still not foreseen, although the stock market had begun to decline as reports from abroad suggested there could be economic difficulties ahead. Apart from that disturbance in the financial markets, other issues tended to grab public attention.

**The Public Focus**

There were culture war issues absorbing public attention. During the coronavirus crisis, travel bans designed to stop the spread of the virus into the U.S. (and by other countries against the U.S.) were implemented. But during the winter, the travel ban issue that was in the news involved a ban on California state employees using public funds to travel to Texas and other states with conservative policies regarding abortion and LBTQ rights.

Closer to the budget was a toying by the University of California Regents with a tuition increase, possibly based on a so-called "cohort approach."[35] But that plan was killed, or at least deferred, and, eventually, the coronavirus crisis would end any talk of tuition increases. Regents Chair John Pérez and UC-Berkeley Chancellor Carol Christ had indicated that a tuition increase would eventually be needed so that cross-subsidies could be increased for low-income students.[36] But even that framing of the issue ended when the coronavirus hit. Long-term thinking was replaced by the immediate crisis.

One issue that lingered, and that could eventually be a source of difficulty in dealing with the coronavirus crisis, was the seeming sympathy of the governor for the anti-vaxxer crowd, noted earlier. There was sufficient criticism of the governor on that issue that he had subsequently

[35]Under the proposal, admitted students in a cohort would have had their tuition level frozen until graduation but tuition would go up each year for each new cohort of admitted students.

[36]Both officials' viewpoints are described in Alexandra Feldman, "'We need a hard reset': UC Berkeley hosts panel on challenges for next UC president," *Daily Californian*, February 7, 2020. Available at https://www.dailycal.org/2020/02/07/we-need-a-hard-reset-uc-berkeley-hosts-panel-on-challenges-for-next-uc-president/.

stayed away from it. But in February 2020, it was reported that "first partner" Jennifer Siebel Newsom – the governor's wife – had given some assurances to a group of anti-vax protesters.[37]

While at this writing there is no vaccine yet available for coronavirus, should one be developed, it would only be effective at ending the crisis if many people took it. Anti-vaxxers, who were prominent in demonstrations against lockdown orders, masks, and other public health policies related to the coronavirus, would surely agitate against any new vaccination. Past actions and past words of the governor and the first partner could be used in such a campaign to create public resistance.

**Crisis and The May Revise**

*What this country is coming to,*
*I sure would like to know,*
*If they don't do something by and by,*
*The rich will live and the poor will die,*
*Doggone, I mean the panic is on.*

"The Panic Is On" (Song, 1931)[38]

As March began, the coronavirus began to creep into budgetary affairs. The governor asked for an appropriation from state disaster funds of $20 million for testing and tracing of cases that were beginning to appear in the state. A few days later the governor declared a state of emergency. At the time, however, the declaration was presented as a technical matter allowing resources to be allocated to the problem. To the general public, it was an emergency that really wasn't an emergency. It was still a problem abroad in faraway places such as China and Italy, and only peripherally in California.

Indeed, if you look at issues before the legislature at around that time, they were a mix of matters ranging from whether the state should go on permanent daylight savings time (which voters had seemed to favor in a 2018 ballot proposition), ongoing funding issues of the high-speed rail, whether to revive some version of the plan to limit local zoning discretion, and whether to offer voters a chance in November 2020 to repeal Prop 209 of 1996, the voter-

[37]Melody Gutierrez, "Anti-vaccine protesters get assurances from Jennifer Siebel Newsom during impromptu chat," *Los Angeles Times*, February 24, 2020. Available at https://www.latimes.com/california/story/2020-02-24/vaccine-critics-assurances-jennifer-siebel-newsom-governor-california. The degree to which Jennifer Siebel Newsom acts independently on political matters from the governor is unclear. The governor endorsed California Senator Kamala Harris for president in the Democratic primary until she dropped out of the race. Closer to the actual California primary date, his wife endorsed Massachusetts Senator Elizabeth Warren while the governor remained silent.

[38]Hezekiah Jenkins. https://www.youtube.com/watch?v=SqEe8boort4.

approved ban on affirmative action. Other than the governor's request for some funding to deal with testing and tracing, the coronavirus was not a pressing issue.

### The Crisis Unfolds

But by the second week of March 2020, the official climate changed abruptly. The governor announced that large gatherings of 250 or more people should be avoided and that something termed "social distancing" should be adopted. Such behaviors were not being mandated, however. He requested $1.1 billion in virus-related funding which was approved.

Changes in everyday behavior began to flow from Sacramento. In-person classes at universities ended. Governors in other states began to act. Reports of coronavirus test capacity shortages and backlogs began to surface. Shelter-in-place orders were issued. Schools shut down in-person instruction and attempted to convert to online instruction with mixed results. Restaurants, bars, and non-emergency retail establishments were closed. Panic buying caused shortages of household items such as toilet paper.

The governor alerted the public that his January budget proposal was now "*inoperable*" and that something more frugal would be coming as part of the May Revise.[39] Exactly, what aid from the federal government might be available was unclear. The LAO switched gears and began turning out reports about the effect of the coronavirus on aspects of state finance.

LAO estimated in early April that the state government would receive about $8.5 billion in federal coronavirus assistance and local governments in California might receive another $6.9 billion.[40] Later reports from the state controller indicated that the general fund received $9.53 billion during April under the federal Coronavirus Aid, Relief and Economic Security (CARES) Act. Outside the state budget, the state's unemployment compensation fund received substantial federal funding.[41]

As the days went on, Governor Newsom began issuing stricter and stricter decrees and holding more and more frequent live-streamed news conferences. A typical format would involve the governor announcing a new restriction (or later the reverse), presenting large volumes of data and charts (in a style that had been previewed in his budget presentations) and then answering

[39]Quoted in Hannah Wiley and Adam Ashton, "'Beyond Crazy': Coronavirus turns California's $20 billion budget reserves into red ink," *Sacramento Bee*, April 15-16, 2020. Available at https://www.sacbee.com/news/politics-government/capitol-alert/article241906161.html.

[40]Legislative Analyst's Office, "State Budget Effects of Recent Federal Actions to Address COVID-19," April 5, 2019. Available at https://lao.ca.gov/Publications/Report/4217.

[41]The state auditor estimated in late August that the unemployment insurance fund had received $40 billion and the state's Medi-Cal (Medicaid) fund had received $10.2 billion. The total with those and other programs was $71.8 billion. https://www.auditor.ca.gov/pdfs/reports/2020-602.pdf.

questions by reporters.[42] The governor made these presentations in which he often referred to California as a "nation-state," at least until so many questions were raised about the meaning of that term that he largely dropped it.

However, Newsom didn't drop a vocabulary and speaking style apparently popular in Silicon Valley circles in his news conferences. Topics were referred to as "spaces." Important things were "foundational" whereas details were "granular." Topics (spaces?) were not just explained; instead, they were "contextualized." Policies weren't just planned; they were "intentional." Programs weren't just large enough for the job; they were "at scale" and involved "scale and scope."

**Governor Newsom-Speak**

| Phrase | Translation |
|---|---|
| Nation-state | California |
| In this space | A topic |
| Foundational | Important |
| Granular | In detail |
| Contextualize | Explain |
| Intentional | Planned |
| Scale and scope | Large |
| At scale | Large enough |
| Actionable | Doable |
| In real time | * |

***Hard to translate since all actions occur in real time. It suggests something going on now rather than in the future.**

The purpose of the many gubernatorial news conferences – which continued into the summer - seemed to be two-fold. First, there was the obvious need to inform the public and to appear to be in control of the situation and "transparent" about anti-virus policies and infection data. Second, at the time the news conferences began, President Trump was holding repeated televised news conferences and making headlines by often contradicting his own health advisors. So, the Newsom events were in part meant to be an alternative to what was happening in Washington.

The White House events continued until at one point the president seemed to suggest ingestion of bleach and ultra-violet light as a remedy for coronavirus infection. At that point, the presidential events became a subject of mirth, and they were largely discontinued. They

[42]For videos of these many news conferences, go to https://archive.org/details/@danieljbmitchell and use the search engine to search for "coronavirus Newsom."

resumed in the summer until the president referenced a doctor who reportedly had claimed that alien DNA was being used in medical treatments.[43]

In contrast to the president, Governor Newsom sought to project in his live-streamed news conferences an image of well-informed coolness and authority. A brief hiatus occurred in early August when it turned out that there had been a data system failure leading to incorrect statistics. The director of the Department of Public Health was apparently fired as a result and a week later the events resumed.[44]

In any case, Newsom wasn't the only state chief executive to hold competing news conferences in competition with the president. Governor Cuomo of New York – the New York City area was one of the early "hot spots" for the infection in the U.S. – also held repeated news conferences. So did Mayor Garcetti of Los Angeles. After the legislature was forced to stop meeting in-person because of the crisis, Governor Newsom in effect became the sole face of state government during the early stages of the crisis.

Given the decrees and the severity of the lockdown of the economy, concerns began to be raised as early as mid-March – well before the later protests about police actions in Minneapolis and elsewhere - about possible social unrest, about use of the National Guard should it occur, and even about "martial law."[45] Newsom announced that he had put the National Guard on alert, but only for humanitarian purposes. Asked if martial law might be used, Newsom said the option was there "*if we feel the necessity*." But he went on, "*I don't want to get to the point of being an alarmist*."[46]

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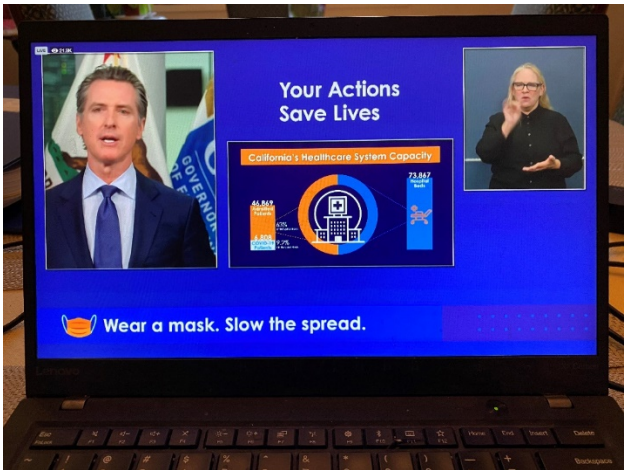
[43]"Trump halts daily briefing amid questions about support for 'alien DNA' doctor," *The Guardian*, July 28, 2020. Available at https://www.theguardian.com/world/video/2020/jul/29/trump-halts-daily-briefing-amid-questions-about-support-for-alien-dna-doctor-video.

[44]Governor Newsom refused to go into detail as to the reason for the "resignation."

[45]Martial law is a technical term involving rule by the military. Even instances in California in which the National Guard was called out in response to social unrest (Los Angeles in 1992; Watts in 1965), there was no "martial law."

[46]Quoted in Adam Beam, "Virus called unlikely to prompt martial law in California," *U.S. News* , March 18, 2020. https://www.usnews.com/news/best-states/california/articles/2020-03-18/virus-called-unlikely-to-prompt-martial-law-in-california.



*One of Governor Newsom's many live-streamed coronavirus news conferences, this one of July 17, 2020*

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**Executive Action**

A variety of policies were enacted, essentially by emergency decree. Banks were ordered to halt foreclosures. Mass layoffs that normally require a 60-days' notice were allowed without penalty if due to the coronavirus and lockdown. Restrictions on local governments' use of housing money were relaxed to facilitate moving homeless persons into hotels and motels under "Project Roomkey." Rules intended to make it easier to claim unemployment insurance benefits were put into effect, although the state's unemployment insurance system remained overwhelmed by the volume of claims resulting in long delays.

Normally, schools receive payment based on average daily attendance. During the crisis, school districts were allowed to receive continued funding even though students were not attending in-person. Steps were taken to encourage vote-by-mail in future elections. A loose form of price control was announced to prevent "price gouging" on consumer items in short supply.

Although these actions were intended to project confidence and assurance, occasionally there were slips. At one point, the governor seemed to predict that over half of California's population would soon be infected. In fact, the number was simply a projection from a particular model of infection that was based on the assumption that no preventative steps were taken.

More generally, the issue of modeling was neither well presented to, nor understood by, the public. Computer models are not magic. They depend on critical parameters. In the case of economic forecasting models, for example, such parameters are typically based on past statistical history. But for a new virus there is no past history to put into an infection model. You can plug in estimates based on experience with other viruses, but that experience may not be

relevant for the new one. The fact that a model runs on a computer seemingly gives the results an appearance of certainty, which it definitely does not have when key information is based on guestimates.

What was feared from a policy perspective was the development of an Italian-type situation. In Italy, hospitals became overwhelmed with coronavirus cases to the point that ill persons (whether from the virus or other health problems) were turned away. Sufficient equipment to meet the sudden surge in demand was not available. Demand far exceeded supply.

To avoid such a scenario in California, hospitals deferred elective procedures and prepared themselves for emergency rooms filled with coronavirus patients. Capacity was added by reopening a closed hospital, creating tent facilities, and putting beds in a sports arena. The Navy sent a hospital ship to Los Angeles. Similarly, a program was announced to increase the healthcare workforce by such steps as bringing retired workers back into service.

Efforts were made to "flatten the curve" of new cases sufficiently relative to modeled projections so that hospital capacity would not be overwhelmed. As it turned out, the curve was flattened to the degree that the added capacity wasn't needed. Given the lockdown, the projected onslaught of cases didn't arise. Hospitals, which had delayed dealing with non-coronavirus cases, were put in a difficult financial situation since the absence of normal care and procedures meant lost patient revenue. By late April, Governor Newsom announced guidelines for hospitals to return to more normal operation.

Although some Democratic governors feuded with the Trump administration, Newsom avoided making such criticism and confined himself to thank-yous for whatever aid was received. (There was, however, continued state resistance via litigation to such non-virus matters as environmental standards.) But absent federal assistance in some areas – notably procurement of ventilators and other equipment including masks for healthcare workers – the state made deals with various suppliers, circumventing standard procurement procedures. It turned out that the state at one time had put away in storage a substantial reserve of such equipment. However, under Jerry Brown, as part of Brown's efforts to deal with the budget crisis that followed the Great Recession, that capacity had been dissipated.

In any case, there were reports of state dealings with shady suppliers and the making of questionable contracts. One instance involved a state payment of $457 million to a firm, a payment that was clawed back by the state (and thus not lost) when banks alerted state officials about suspicions concerning the contract. Newsom explained such problems as the result of having to deal with "*the Wild, Wild West in the early part of this pandemic*."[47] He defended the deals by pointing to the ultimate success in procuring masks and ventilators.

[47]Quoted in Adam Elmahrek and Melody Gutierrez, "A politically connected firm gets an $800-million mask contract with California. Then it falls apart," *Los Angeles Times*, May 9, 2020. Available at https://www.latimes.com/california/story/2020-05-09/coronavirus-california-contracts-masks-bear-mountain.

Newsom's ultimate response to criticisms of decisions that had to be made quickly in the face of an unprecedented emergency was "*I'm not able to hypothesize about coulda, woulda, shoulda*."[48] That comeback was not unreasonable, given the circumstances. Nonetheless, news reporters, auditors, and historians will undoubtedly critically examine what was and wasn't done. Since at this writing the crisis is still continuing, it's hard to predict what their future verdicts will be.

Various new programs were announced, but they did not always perform at the levels promised. The newly unemployed had continuing problems simply applying for state unemployment insurance, and then actually receiving the benefits once enrolled. The huge volumes of applications were unprecedented and sudden, and the application and benefit systems were overwhelmed. In normal recessions – even those recessions which produce very high levels of unemployment – the process of economic decline is more gradual than a situation in which the government essentially orders businesses to close overnight. Other states had similar problems, but California's caseload processing was not helped by its antiquated computer systems.

Testing was not always easily available and when it was, test results often were delayed. Even in late August 2020, a news report indicated that nursing home inspectors themselves were not being regularly tested. One inspector was quoted as saying "*I think nursing homes shouldn't let us in.*"[49] Under the "Great Plates" program, otherwise vacant and economically-challenged restaurants were to supply meals to needy seniors who were confined to their homes. It happened, but not to the degree promised. Finally, despite state decrees, some local officials refused to cooperate, and – in effect – dared the governor to enforce compliance. In short, it proved easier to announce new programs and rules than to put them fully into operation.

### Demands for Reopening

Still, because the state did succeed in avoiding an Italy-type scenario and in flattening the curve of new cases to well below hospital capacity, by mid-April there was strong pressure to begin to "reopen" the economy and relax the stay-at-home rules. The governor promised he would come up with a plan but what was actually issued was a set of six general criteria which included:

- The ability to monitor and protect communities through testing, contact tracing, isolating, and supporting those who are positive or exposed.
- The ability to prevent infection in people who are at risk for more severe coronavirus.

[48]Quoted in CalMatters/WhatMatters newsletter of July 20, 2020. Available at https://calmatters.org/newsletters/whatmatters/2020/07/california-schools-closed-online-newsom/.
[49]Quoted in Jack Dolan and Brittny Mejia, "Most nursing home inspectors still haven't been tested for the coronavirus, despite Newsom pledge," *Los Angeles Times,* August 26, 2020. Available at https://www.latimes.com/california/story/2020-08-26/most-nursing-home-inspectors-still-not-tested-for-coronavirus-despite-newsom-pledge.

- The ability of the hospital and health systems to handle surges.
- The ability to develop therapeutics to meet the demand.
- The ability for businesses, schools, and childcare facilities to support physical distancing; and
- The ability to determine when to reinstitute certain measures, such as the stay-at-home orders, if necessary.[50]

Newsom said he would be "*guided by science and data*" in developing a reopening program.[51] Of course, no scientific formula existed to weigh the six considerations or directly to connect them to particular decisions. And no model existed that could precisely predict human behaviors that would occur in response to any rule relaxation. Ultimately, the direction of policy was based on a political balancing, however imperfect, of projected health effects and projected economic effects.

All of this gubernatorial executive activity created frictions. There were general complaints from rural areas of the state that the coronavirus problems were mainly concentrated in urban areas, but that rural inhabitants were being subject to statewide orders. Rural areas of the state tend to be represented by Republicans who have been marginalized at the state level. So, the opportunity to defy the governor was enticing as a political matter. In addition, President Trump was downplaying the crisis and pushing for a rapid reopening.

However, frustrations were not confined to Republicans. Democrats in the legislature were frustrated at being out of session and out of the public spotlight. They began to complain about being left out of the policy loop. A compendium – put together for a Republican assembly representative - of all of the governor's executive orders from early March 2020 through June ran over 120 pages.[52]

Legislative Democrats demanded information about questionable contracts for masks and other equipment. And there were various lawsuits, several from religious groups, challenging different aspects of Newsom's various executive orders. Generally, however, in the midst of a pandemic, courts were reluctant to overturn emergency decisions by the governor. But over time, there was more willingness to second guess the governor by courts, local officials, news commentators, and the public.

In response to growing pressure, Governor Newsom did what is sometimes done to diffuse political criticism. He created a large task force consisting of business, labor, and community leaders, legislative leaders, and others to advise on reopening. Since there was a pandemic,

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[50]Office of the Governor, "Governor Newsom Outlines Six Critical Indicators the State will Consider Before Modifying the Stay-at-Home Order and Other COVID-19 Interventions," news release of April 14, 2020. Available at https://www.gov.ca.gov/2020/04/14/governor-newsom-outlines-six-critical-indicators-the-state-will-consider-before-modifying-the-stay-at-home-order-and-other-covid-19-interventions/.

[51]Op. cit.

[52]The compendium for Assembly Representative Kevin Kiley can be found at https://blog.electkevinkiley.com/wp-content/uploads/2020/07/COVID-19-Executive-Orders-updated-06302020-1-1.pdf.

however, the group couldn't meet in person and it remains unclear what – if any – role it played in subsequent gubernatorial decisions. To date at this writing, no official reports of the task force have appeared. In any case, the real reopening occurred well after the task force was formed. It took place around the Memorial Day weekend, a weekend that featured a combination of recreation and – unforeseen until they occurred – large protest demonstrations sparked by George Floyd's death at the hands of police in Minneapolis.

While the protests could not have been predicted, the recreation response had been previewed at the end of April when a heat wave led to weekend crowds, especially on Orange County beaches. In response to news photos and videos of the crowds, Governor Newsom ordered all beaches and state parks closed. Complaints about the restrictions led to creation of an official list of allowable ways to exercise and recreate including such suggestions as walking the dog and washing the car.[53]

After the George Floyd demonstrations, there were complaints on the political right as to why large protest crowds were being allowed to assemble, but not, say, indoor church services or other activities involving large groups of people. On the political left, there seemed to be efforts to distinguish between good crowds and bad crowds. Viruses, however, have no interest in American politics or social problems and infect when given the opportunity.[54] What appeared to experts to matter were such factors as indoor vs. outdoor, crowded together vs. socially distanced, masked vs. uncovered, and loud speaking (whether chanting slogans or singing religious music) vs. normal speech.

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[53]Amy Graff, "California releases detailed list of outdoor activities allowed during shutdown," *SFGATE*, April 30, 2020. Available at https://www.sfgate.com/news/editorspicks/article/California-outdoor-activities-allowed-stay-home-15238108.php.

[54]As with other events, the issues of the severity and causation of the coronavirus crisis after the Memorial Day weekend were politicized. Absent detailed contact tracing, it was impossible to separate infections that might have resulted from recreational activities from those that might have been related to protest activities. When the question came up in one the Newsom news conferences, Dr. Sonia Angell, then-director of the California Department of Public Health, indicated that both types of gatherings likely played a role in the subsequent increase in cases but that the impacts could not be separated. See https://www.youtube.com/watch?v=tNUb1DJjPfk. The Los Angeles County Department of Public Health similarly cautioned about protests spreading the coronavirus in late August when another wave of demonstrations occurred. See http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm. Although those sympathetic to the demonstrations were anxious to show there was no effect of spreading the virus, proxy studies – just looking for a rise in infections after some event – will tend not identify an impact of a particular gathering or gatherings. For example, to take an example on the right, a National Bureau of Economic Research (NBER) study of President Trump's indoor and largely unmasked rally in Tulsa, Oklahoma was unable to find a subsequent infection impact in the local area. See Dhaval M. Dave, Andrew I. Friedson, Kyutaro Matsuzawa, Drew McNichols, Connor Redpath, and Joseph J. Sabia, "Did President Trump's Tulsa Rally Reignite COVID-19? Indoor Events and Offsetting Community Effects," NBER Working Paper No. 27522, July 2020. The authors suggested that the lack of an impact finding was possibly due to offsetting behavior by other residents of the Tulsa area who stayed home, fearing an outbreak, i.e., a confounding factor. Available at https://www.nber.org/papers/w27522.pdf. The fact is – as noted in the text - that viruses have no interest in American social and political problems or right vs. left political leanings. Indeed, they are not even classified as living organisms. They are just things that spread when enabled – for whatever reasons - by humans and other animals.

### Big Number

It is not unusual in the case of both the January budget proposal or the May Revise for bits of the plan to be leaked or previewed before the actual announcement. In the case of the May Revise for the 2020-21 budget, the preview involved information from a memo indicating that the proposal would address a "deficit" of $53.4 billion (a number which was later revised upward). As noted earlier in this chapter, California budgetary language is often sloppy. The number was not a common-parlance deficit in the sense that it did not refer to revenue less than spending in the upcoming fiscal year.

Indeed, the so-called "deficit" was sometimes alternatively referred to as a problem, a gap, or a shortfall, phrases which - we have already noted - are not defined in accounting textbooks. Nonetheless, the number was reported in news accounts without definition. There is opinion poll evidence that public concern about the budget shot up and then gradually receded in response to the shock.[55]

The big number released by the governor may have been a "shock and awe" tactic designed to ease the forthcoming May Revise's path through the legislature. Whether it had that effect in the end is unclear. At one point after the number was released, state senate Democrats began to hatch a plan to raise $25 billion by giving vouchers to taxpayers who agreed to pre-pay their income taxes, apparently an effort to circumvent a state constitution ban on borrowing via bonds for current expenses.[56] That response suggested that the legislature was shocked by the big number but not awed. It also suggested instead that legislators were anxious to find a way to avoid draconian cuts, even if the voucher scheme was a dubious approach.[57]

### The May Revise

By the time the May Revise was officially unveiled, the preliminary $53.4 billion Big Number was raised to $54.3 billion. The headlines featured stories of what was to be cut. Tables 5 and 6 give the macro outline. Compared to what was put forward in January, the governor in May had proposed cutting spending by something over $19 billion in 2020-21. But Table 5 shows his tax revenue was projected to be down by something over $33 billion when you exclude the "other" category that includes transfers. The only way to sustain the discrepancy was to pull down reserves - unless the federal government stepped in with significant aid. The May Revise

[55]Public Policy Institute of California, *Californians & Their Government*, *May 2020*, June 3, 2020, p. 6. Available at https://www.ppic.org/wp-content/uploads/ppic-statewide-survey-californians-and-their-government-may-2020.pdf.

[56]As noted earlier in this chapter, after the recall of 2003, Governor Schwarzenegger persuaded voters to amend the state constitution on a one-time basis to allow bond borrowing with the promise that having dealt with the then-prevailing budget crisis, the state would "throw away the credit card." Voters approved and he borrowed $15 billion in "Economic Recovery Bonds."

[57]The voucher idea eventually became a bill requiring a report on the idea rather than its implementation.

assumed no aid would come, but it allowed for automatic spending increases tied to federal aid should such assistance arrive.

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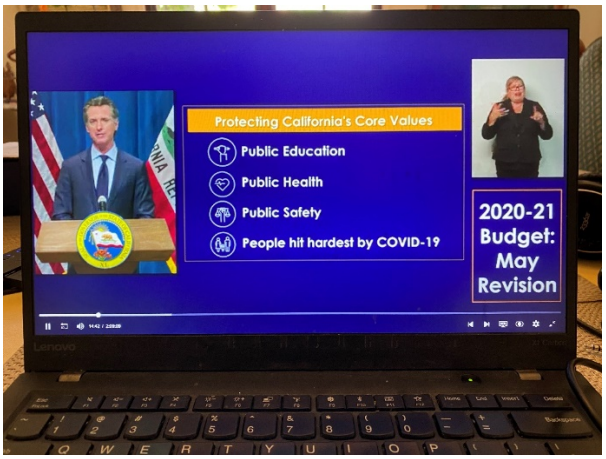

*Governor Newsom presents May Revise in live-streamed news conference: May 14, 2020.*

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The legislature, as time progressed, preferred a more optimistic view of what the federal government might do. In effect, Democratic legislators wanted to assume federal aid would come, and have cuts only if it didn't. Note that the distinction in terms of the actual budgetary effect is not sharp. In fact, the two approaches would not in concept produce different after-the-fact results. In either case, the federal aid would come, or it wouldn't. In either case, there would be bigger cuts if there were no aid and more spending if the money arrived.

Newsom's ungainly recovery committee wrote a letter to the Congressional and U.S. Senate leadership advocating for federal aid to the state. But no such aid appeared by the time the legislature was required to pass a budget (June 15) or by the time the budget year was to begin (July 1). The governor took a voluntary 10% pay cut, a form of shared pain, because his budget assumed state worker pay would be cut directly or through furloughs.[58] A news media inquiry in mid-August that the governor's pay cut hadn't happened - because of an "oversight," his office explained - and a retroactive cut was hastily ordered. As of the end of August (and this writing) no agreement had been reached at the federal level for more aid.

At the time of the May Revise, California – and particularly San Francisco – was being heralded as having responsibly shut down early and thus (perhaps) more worthy of aid and reward than New York City - which was then the infection capital. Soon after the May Revise was announced, for example, it was announced that the vacant hospital in Los Angeles that had been set up to deal with a potential surge in patients would close by the end of June. The

[58]There is a state commission that sets pay rates for the governor and legislators and others. It proposed a pay freeze for the individuals it covered, although its chair suggested voluntary cuts should be considered.

Navy's hospital ship that had been sent to the Port of Los Angeles sailed away. The feared surge in coronavirus cases, it was assumed, had been averted.

Soon, however, the image of Bad New York/Good California was to change and, indeed, to reverse. By the summer, infection rates in California began to soar. Apparently, there was a delayed response to relaxed standards and the Memorial Day weekend that had featured a mix of crowded beaches, recreation, and large protests.

If you look at expenditures on Table 6 as they appeared in the eventual June budget, the total amount enacted by the legislature agrees with the governor's May proposal. But there are variations in individual expenditures with some raised and others lowered to get to that total. However, getting to the final budget on time proved difficult. Since it is up to the legislature to define what passing a budget by the constitutional deadline actually means, there really wasn't a final resolution by June 15. Instead, the legislature passed something it defined as a budget, and the governor and the legislature continued negotiations on the specifics.

What stood out as the two houses of the legislature, and then the legislature as a whole worked on an alternative to the May Revise was the general lack of information available to the public. In past sessions, when times were good and accommodation was therefore easier, the LAO would provide publications comparing the May Revise with what the legislature was proposing in some detail. There were publications by the LAO this time, but they were incomplete – most likely because the legislature's proposals were incomplete. News reports appeared that legislators wanted less-steep cuts of this or that program than in the May Revise. However, complete tables showing revenues, expenditures, and changes in reserve accounts were not produced (for the public, at least) as the negotiations continued.

### State of Emergency

As noted earlier, large protests had arisen during the Memorial Day weekend in response to the George Floyd killing in Minneapolis, and violence erupted in conjunction with the demonstrations, particularly in the LA area. In response, the governor on May 30 declared a state of emergency in Los Angeles County based on a finding that "*local authority is inadequate to address the threat posed by the civil unrest*."[59] Pursuant to the governor's proclamation, the California National Guard was deployed to Los Angeles. Local cities in the County, including Los Angeles, invoked curfews. The governor declared that "*violent actors may be attempting to use these protests for their own agendas*."[60]

[59]Proclamation of a State of Emergency." Available at https://www.gov.ca.gov/wp-content/uploads/2020/05/5.30.20-Los-Angeles-SOE-Proclamation.pdf.

[60]*Governor Newsom Statement on Demonstrations Across California and the Passing of Federal Officer*, May 30, 2020. Available at https://www.gov.ca.gov/2020/05/30/governor-newsom-statement-on-demonstrations-across-california-and-the-passing-of-federal-officer/.

Because of the general lack of transparency around the budget negotiations, it is hard to know what impact the combination of a health crisis, a budget crisis, and a crisis of social unrest played in the ultimate outcome. Much of the direct budgetary significance of the protests was more a matter of local government finance, namely the funding of police departments, rather than state finance. However, because coronavirus infections were spreading in state prisons, there was some acceleration of prisoner releases which reduce costs. The actual *state* cost involved in protecting state buildings and activities related to the protests was estimated to be about $2 million, a negligible amount when compared to the overall budget.[61]

## The Enacted and Uncertain Budget Outlook

*And now my life has changed in oh so many ways (and now my life has changed)*
*My independence seems to vanish in the haze*
*But every now and then I feel so insecure*
*I know that I just need you like I've never done before.*

"Help" (Song, 1965)[62]

A deal between the legislature and the governor was not reached until June 22. A major element was to allow local school districts effectively to borrow to maintain their budgets against a future obligation (not an obligation that would hit the state budget in 2020-21), to cover the borrowing.[63] The compromise enacted budget followed the May Revise, although with variation on what was cut and by how much. Notably, it set the "trigger" adjusting spending based on Congressional action between July 1 and October 15, 2020. The amount of federal aid received by October 15 would determine the "final" levels of spending.

### Cloudy Political and Economic Future

A budget whose final outcome depends on a trigger creates obvious problems for planning. Those officials in charge of state programs or agencies were left having to figure what activities they could and could not undertake without knowledge of what their budgets might turn out to be. And there were implicit assumptions underlying the entire budget about the future course

[61]Matt Kristoffersen, "State spent $900,000 protecting state buildings during Black Lives Matter protests," State Worker blog of *Sacramento Bee*, June 20, 2020. Available at https://www.sacbee.com/news/politics-government/the-state-worker/article243673772.html.
[62]The Beatles. https://www.youtube.com/watch?v=2Q_ZzBGPdqE.
[63]Because a deal had been reached between the governor and the Democratic legislative leaders, there were no line-item vetoes of funding. The governor vetoed only a provision in the budget bill that appeared to block the University of California from rolling over some unspent funds into the new fiscal year. He attributed his veto to legislative intent, suggesting that a drafting error in the final bill was being corrected.

of economic activity (and thus revenue generation) which could turn out to be wrong. There was also the possibility of mid-course budget adjustments by the legislature, as had occurred during the Great Recession. That is, any aspect of the budget enacted in June 2020 could be revised by the legislature, even the terms of the trigger.

The main clue available to budget aficionados in mid-summer 2020 was the July cash statement issued by the state controller. It revealed that the June budget had underestimated the sum of corporate and personal income tax receipts in July (deferred from April), both based on calendar year 2019, i.e., pre-coronavirus. That was the Good News, since it meant – *other things equal* – reserves would be higher than projected.[64] But the Good News report was largely a reflection of the past.[65]

There was also seeming Bad News – based on figures from the state controller - in that sales tax receipts for July were well below the projected level and well below the level for July of the prior year. Sales tax receipts are a proxy for consumption, an important component of the state's economy, and the overestimate suggested an economy worse than anticipated. However, the Department of Finance and Legislative Analyst's Office claimed the controller's numbers were distorted by delays in reporting, and that sales tax receipts were in fact higher than had been projected.[66] In any event, the LAO projected that external borrowing for seasonal reasons would not be necessary in 2020-21.[67]

### Lights Out

Governor Gray Davis' term in office came to an abrupt finish in 2003, when he was recalled by voters for an ongoing budget crisis and for rolling electricity blackouts that followed a poorly-designed deregulation of power generation and distribution. Before leaving office, however, Davis had patched together a redesigned electricity system which continued thereafter. He had also used hard-pressed state budgetary resources to buy electricity for the utilities.[68] The PG&E bankruptcy already had raised the question of reformulating the electricity arrangements for the state, but – given the pandemic – that issue had dropped in priority and public attention.

As temperatures warmed in August 2020, however, rolling blackouts began to occur again as power consumption rose, especially for air conditioning. Governor Newsom – with the Davis episode clearly in mind – gave one of his live-streamed talks, terming the blackouts "*unacceptable*" and promising, amid

[64]Personal income tax receipts were above the projected level while corporate tax receipts were below. The total of the two was above.
[65]The tax payments delayed from April mainly referred to the 2019 calendar year, i.e., pre-coronavirus.
[66]Interpretation based on email exchanges between the two departments and the author. The LAO views cash at the tax receipt agency level as a better indicator of what is happening relative to budget projections than controller reports.
[67]See Legislative Analyst's Office, "An Update on California's Cash Management Situation," August 31, 2020. Available at https://lao.ca.gov/Publications/Report/4266.
[68]Ultimately, the costs to the state were passed on to electricity rate payers.

finger-pointing among regulatory agencies, to investigate who was to blame.[69] He repeatedly indicated that ultimately the governor was in charge and he would fix the problem.

Electricity is a complicated sector but one of the uncompromising rules of power supply is that at any given moment, supply *must* equal demand for power. There can be no discrepancies, especially in a state which a significant high-tech sector that depends on reliable power and has equipment that can be damaged by deviations. Before the state "deregulated" (really, alternatively-regulated) its electricity sector in the 1990s, it had relied on a longstanding monopoly/regulation model. A sole utility was assigned a geographic jurisdiction. It then was subject to price (and reliability) regulation, essentially based on its costs, to prevent monopoly exploitation of its customers. The utility was integrated, generating (or obtaining) sufficient power and then distributing it to homes and businesses.

The incentives to avoid unreliability and blackouts under such a traditional regulatory system are strong. If the utility were to have insufficient capacity leading to rolling blackouts, it would be penalized by the regulatory authority. On the other hand, the costs of building and maintaining excess capacity to avoid blackouts are simply passed along to customers through regulated pricing. So, other things equal, the utility has a strong (some might say too strong) incentive to maintain excess capacity to handle sudden heat waves or mechanical failures, and to keep power flowing without interruption.

California's electricity system, post-deregulation of the 1990s and after the Davis modifications, separated the generation and distribution functions. Utilities such as PG&E continued to provide the wires that ultimately brought power to homes and businesses. But power was generated by separate and supposedly competitive suppliers. The task of making sure that supply equaled demand was put in the hands of an Independent System Operator that policed and regulated the grid from an engineering standpoint. The distributing utilities were regulated by the California Public Utilities Commission. In short, there was diffused and complicated authority, no single entity that could be held responsible, and diminished incentive to maintain excess capacity for heat waves and other emergencies. Electricity is like the state budget; reserves are needed for emergencies. But someone needs to make sure electricity reserves are available.

Governor Newsom's instinct was to find whoever was to blame for insufficient capacity and replace the supposed culprit with someone better. In effect, that is what he had done in removing the director of the Department of Public Health when the coronavirus data gathering system had been found to be deficient. But in the electricity case, the problem seemed more one of (mis)incentives and less one of individual culpability. Moreover, in the midst of a health crisis, a related economic crisis, and a consequent budget crisis, adding electricity supply to the governor's list of priorities was something of an overload.

## What Do We Learn?

*Oh, it's a long, long while from May to December,*
*But the days grow short when you reach September.*
*When the autumn weather turns the leaves to flame,*

[69]"Newsom Calls Energy Shortages, Rolling Blackouts During Heat Wave 'Unacceptable,'" *CBS San Francisco*, August 17, 2020. Available at https://sanfrancisco.cbslocal.com/2020/08/17/newsom-calls-energy-shortage-rolling-blackouts-during-heat-wave-unacceptable/.

*One hasn't got time for the waiting game.*

September song, 1938[70]

It would be nice to draw a neat final conclusion at this writing about the fate of the California 2020-21 budget. In normal times, although no state budget works out exactly as planned, the deviations from plan that do occur are usually nothing to worry about. In coronavirus times, however, events will continue to unfold. New aid may yet flow from the federal government – or not. The November 2020 elections at the federal and state levels will have an impact.

The main lesson to be drawn (as of the end of August 2020) is that the state was well served by having significant budget reserves on hand to cushion the unanticipated shock of events. Such reserves were not on hand when former Governor Schwarzenegger had to deal with the fiscal aftermath of the housing/mortgage crisis and the resulting 2008 Great Recession. And state reserves had been burned though by the time Governor Davis had been recalled in 2003 and replaced by Schwarzenegger in the aftermath of the dot-com bust and recession of 2001.

Since leaving office, former Governor Jerry Brown, who accumulated the reserves Governor Newsom had at his disposal, has occasionally remarked on such Big Picture problems as the world nuclear threat. But – while reportedly enjoying retirement on his ranch - Brown has not made any public comments about California's budgetary situation. He has not referred to his prediction that his successor would find himself standing on a budgetary cliff. On that prediction, and on the general utility of maintaining state reserves, he has left it to others to say for him "I told you so."

[70]Maxwell Anderson, Kurt Weill. https://www.youtube.com/watch?v=a-ldVj34Sfo.

**Table 1: Evolution of the First Newsom Budget for 2019-20 ($ Millions)**

| | Governor July 2019 | LAO Nov. 2019 | Governor Jan. 2020 | Governor May 2020 | Governor June 2020 |
|---|---|---|---|---|---|
| GF reserve 7-1-2019 | $6,772 | $7,748 | $8,497 | $11,280 | $11,280 |
| Revenue & Transfers | 143,805 | 144,158 | 146,486 | 136,836 | 137,625 |
| Expenditures | 147,781 | 146,529 | 149,749 | 146,497 | 146,933 |
| GF Surplus or deficit | -3,976 | -2,371 | -3,263 | -9,661 | -9,308 |
| GF reserve 6-30-2020 | 2,796 | 5,378 | 5,234 | 1,619 | 1,972 |
| BSA 6-30-2020 | 16,516 | 16,186 | 16,018 | 16,156 | 16,116 |
| Safety Net 6-30-2020 | 900 | 900 | 900 | 900 | 900 |
| Total Reserves Excluding Prop 98 6-30-2020 | 20,212 | 22,464 | 22,152 | 18,675 | 18,988 |
| Prop 98 6-30-2020 | 377 | nab | 524 | 524 | 524 |
| Total Reserves 6-30-2020 | 20,589 | na | 22,676 | 19,199 | 19,512 |

GF = general fund
BSA = Budget Stabilization Account ("rainy day" fund)
na = not available
Source: See Table 4.

**Table 2: Evolution of the Second Newsom Budget for 2020-21 ($ Millions)**

| | Workload LAO Nov. 2019 | Governor Jan. 2020 | Governor May 2020 | Governor June 2020 |
|---|---|---|---|---|
| GF reserve 7-1-2020 | $5,378 | $5,234 | $1,619 | $1,972 |
| Revenue & Transfers | 151,367 | 151,635 | 137,417 | 137,719 |
| Expenditures | 148,628 | 153,083 | 133,901 | 133,900 |
| GF Surplus or deficit | +2,739 | -1,448 | +3,516 | +3,819 |
| GF reserve 6-31-2021 | 8,116 | 3,786 | 5,135 | 5,791 |
| BSA 6-30-2021 | 18,323 | 17,977 | 8,350 | 8,310 |
| Safety Net 6-30-2021 | 900 | 900 | 450 | 450 |
| Total Reserves Excluding Prop 98 6-30-2021 | 27,339 | 22,663 | 13,935 | 14,551 |
| Prop 98 6-30-2021 | na | 487 | 0 | 0 |
| Total Reserves 6-30-2021 | na | 22,676 | 13,935 | 14,551 |

GF = general fund
BSA = Budget Stabilization Account ("rainy day" fund)
na = not available
Source: See Table 4.

Table 3: Flow Analysis, 2019-20 and 2020-21 ($ million)

| Enacted or Proposed In: Budget Year of: | June 2020 2019-20 | June 2020 2020-21 | May 2020 2020-21 |
|---|---|---|---|
| GF Reserve | | | |
| Beginning of Year (July 1) | $11,280 | $1,972 | $1,619 |
| End of year (June 30) | 1,972 | 5,791 | 5,135 |
| Surplus or Deficit | -9,308 | +3,819 | +3,516 |
| BSA | | | |
| Beginning of Year (July 1) | 13,968 | 16,116 | 16,156 |
| End of year (June 30) | 16,116 | 8,310 | 8,350 |
| Surplus or Deficit | +2,148 | -7,806 | -7,806 |
| Safety Net | | | |
| Beginning of Year (July 1) | 900 | 900 | 900 |
| End of year (June 30) | 900 | 450 | 450 |
| Surplus or Deficit | 0 | -450 | -450 |
| Prop 98 | | | |
| Beginning of Year (July 1) | 0 | 524 | 524 |
| End of year (June 30) | 524 | 0 | 0 |
| Surplus or Deficit | +524 | -524 | -524 |
| Total Reserves Excluding Prop 98 | | | |
| Beginning of Year (July 1) | 26,148 | 18,988 | 18,675 |
| End of year (June 30) | 18,988 | 14,551 | 13,935 |
| Surplus or Deficit | -7,160 | -4,437 | -4,740 |
| Total Reserves | | | |
| Beginning of Year (July 1) | 26,148 | 19,512 | 19,199 |
| End of year (June 30) | 19,512 | 14,551 | 13,935 |
| Surplus or Deficit | -6,636 | -4,961 | -5,264 |

GF = general fund
BSA = Budget Stabilization Account ("rainy day" fund)
Source: Data from California Department of Finance website, http://dof.ca.gov/Budget/. Click on relevant budget year and document (January, May Revise, enacted). Data from Legislative Analyst's Office at https://lao.ca.gov/reports/2019/4111/fiscal-outlook-112019.pdf.

**Table 4: UCLA Anderson Forecast of California Unemployment Rate for Calendar 2020**

| Forecast of: | First Quarter | Second Quarter | Third Quarter | Fourth Quarter |
|---|---|---|---|---|
| Dec. 2019 | 4.0% | 4.2% | 4.4% | 4.5% |
| March 2020 | | | | |
| Pre-crisis | 4.1 | 4.4 | 4.6 | 4.6 |
| Crisis beginning | 4.2 | 5.3 | 6.1 | 6.3 |
| June 2020 | 4.4 | 14.6 | 12.2 | 11.0 |
| Actual | 4.4 | 15.9 | na | na |

na = not available at this writing.

Note: The coronavirus crisis disrupted the collection of unemployment statistics and distorted the results.

Source: Quarterly UCLA Anderson Forecast publications and early March 2020 revision. U.S. Bureau of Labor Statistics, simple averages of monthly figures.

**Table 5: Projected General Fund Revenue in Three Budgets for 2020-21**
**($ Millions)**

| | January | May | Enacted |
|---|---|---|---|
| Personal Income Tax | $102,878 | $76,841 | $77,567 |
| Sales & Use Tax | 28,243 | 20,613 | 20,583 |
| Corporation Tax | 16,007 | 16,577 | 16,534 |
| Insurance Tax | 3,117 | 2,986 | 2,986 |
| Alcohol Tax & Fees | 389 | 389 | 389 |
| Cigarette Tax | 58 | 56 | 56 |
| Motor Vehicle Fees | 38 | 40 | 40 |
| Other | *2,864* | *12,109* | *11,758* |
| Total | 153,594 | 129.611 | 129,913 |
| BSA | *-1,959* | *+7,806* | *+7,806* |
| Revenue & Transfers | 152,635 | 137,417 | 137,719 |

Source: Data from California Department of Finance website, http://dof.ca.gov/Budget/. Click on 2020-21 budget year and enacted document.

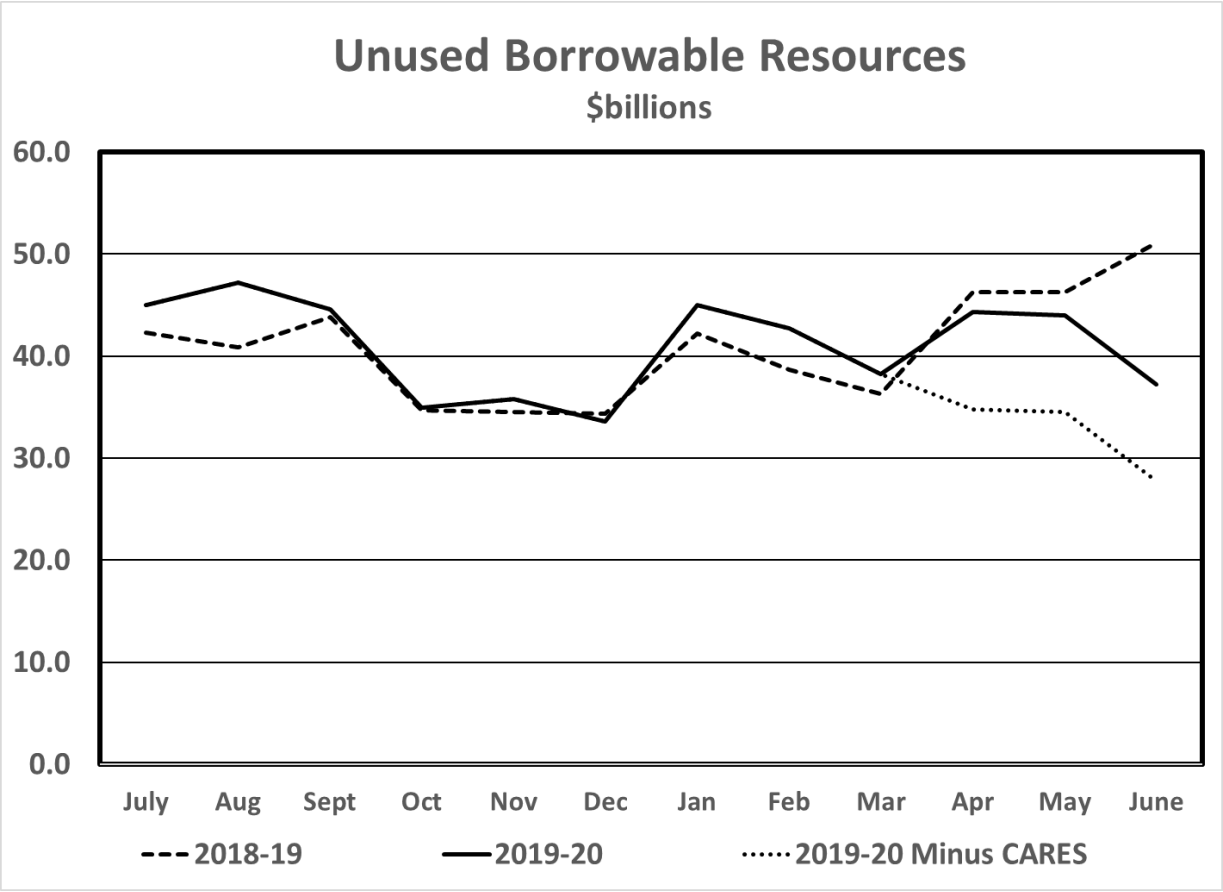
**Table 6: Projected General Fund Expenditures in Three Budgets for 2020-21**
**($ Millions)**

| | January | May | Enacted |
|---|---|---|---|
| Legislative, Judicial Executive | $4,520 | $4,144 | $4,522 |
| Business, Consumer Service, Housing | 348 | 291 | 341 |
| Transportation | 240 | 239 | 239 |
| Natural Resources | 3,812 | 3,547 | 3,616 |
| Environmental Protection | 140 | 42 | 123 |
| Health & Human Services | 47,454 | 45,275 | 44,808 |
| Corrections & Rehabilitation | 13,387 | 13,351 | 13,353 |
| K-12 Education | 59,639 | 47,689 | 48,067 |
| Higher Education | 17,509 | 15,372 | 15,795 |
| Labor & Workforce Development | 159 | 159 | 159 |
| Government Operations | 1,413 | 1,319 | 1,578 |
| General Government* | 4,462 | 2,463 | 1,299 |
| Total | 153,083 | 133,901 | 133,900 |

*Includes Non-Agency Departments, Tax Relief/Local Government, Statewide Expenditures.

Source: Data from California Department of Finance website, http://dof.ca.gov/Budget/. Click on 2020-21 budget year and enacted document.

**Chart 1**




**Source: Monthly cash statements of California State Controller.**

# Chapter 8

# The Business Cycle and Debt Financing in California

**Leila Bengali and Jerry Nickelsburg**

Leila Bengali is an Economist at the UCLA Anderson Forecast and
Jerry Nickelsburg is Director of the UCLA Anderson Forecast

From February to May 2020, employment in California fell 17.6% from 18.8 million to 15.5 million. Though the risk of a recession was discussed at the start of the 2020-21 state budget cycle, the recession itself was unanticipated. As state legislators grappled with how to formulate a final 2020-21 budget, the UCLA Anderson Forecast examined the use of debt financing as a means to help close the gap between projected revenues, which had been substantially reduced due to the effects of pandemic public health policies, and planned expenditures. In this article, we expand that work to consider debt financing as a general contra-cyclical strategy.

Contra-cyclical financing is not the only, and not the primary, reason governments issue debt, but debt issuance is a theoretically feasible source of bridge financing. We begin with a high-level overview of debt financing in California, differentiating between state and local issuers, and general obligation and revenue bonds. The majority of this article considers the normative question of the merits of contra-cyclical debt financing. Among the issues considered are the possibility that regulations governing debt issuance may hinder the ability to issue and use debt financing quickly to compensate for recession-induced revenue declines, and the fact that direct government spending (using the debt issuance proceeds) may be favorable during downturns, particularly if borrowing costs are lower.

In 2019, California governments issued about $76 billion in state and local bonds.[1] This issuance is part of their activity to obtain sufficient revenue to fund services for residents. In downturns, such as occurred during the coronavirus crisis, less money comes in, and at both the state and local levels careful thought about how to balance the coming fiscal years inflows and outflows must ensue. When less money comes in than is to be spent, or projected revenues fall short of planned expenditures, governments must cut spending, raise revenue, or borrow. One of the ways in which state and local governments can borrow is to issue debt.

The current regulatory environment limits the ability for debt financing to occur in a timely way. For example, the sharp and rapid reduction in government revenues that accompanied the 2020 recession occurred much more quickly than debt could be analyzed, formulated, approved, and issued. Certain types of debt that does not require voter approval can be authorized and issued relatively quickly. However, these instruments are generally structures designed to bridge the gap between tax collection receipts and monthly current expenditures within a fiscal year or similar period.

Also, bonds for capital projects that have an existing authorization, but have not yet been issued, can be issued with some speed. But discretionary spending bonds to make up budgetary deficiencies in the face of a recession, do not generally have existing approval. The sole exception for California, and this is unusual for any state, was the unused authority from the 2004 Economic Recovery Bonds that was available at the beginning of the 2008/2009 recession. Such authorization is no longer active.

This summary highlights the general question discussed herein on whether issuing debt is an effective way to manage revenue shortfalls during downturns. To address this question, we discuss the theory and empirical evidence in the context of four important considerations. Should a government decide in favor of debt-financed spending for this purpose, our review points to a clear policy prescription.

Our policy prescription is for *pre-approved* debt that could be issued conditional on the event of an economic downturn (perhaps only once unemployment rate thresholds are reached) to smooth

[1]Source: California State Treasurer at https://www.treasurer.ca.gov/cdiac/reports/annual/2019/annual.pdf.

revenues and to cover a pre-specified portion of the expenditure budget during the downturn. The repayment period could also be tied to the expected post-recession expansion. These specific contra-cyclical bonds would address many of the challenges raised in this article and provisions triggering thresholds for repayment would serve to impose post-recession discipline on expenditures once revenues begin to increase. Discipline is important because, eventually, debt has to be repaid and the greater the uncertainty with respect to repayment, the greater the cost of borrowing.

**State and local bond issuance in California: a brief summary**

Before turning to the feasibility of bond issuance as a contra-cyclical policy, we set the stage with a broad overview of bond issuance in California. Bonds issued by state and local governments, not just in California, are termed "municipal bonds." The municipal bond market is quite substantial with an outstanding amount by year-end 2019 for all U.S. municipal debt equaling about $3.9 trillion. For comparison, corporate debt outstanding is $9.6 trillion, and the market value of all stocks on the U.S. stock market is approximately $23.2 trillion.[2] Issuing, or selling, a bond is the principal way state government and local governments borrow money.

California state and local government bonds are like any other security, in that they are bought and sold in asset markets. They differ in that interest earned may be exempt from federal and state tax. Anyone or any entity can in principle buy and sell California state and local government bonds. Individuals and mutual funds buy and own the majority of California's municipal bonds.

The bond's yield at offering, which is set at the time of sale by market supply and demand, is affected by the issuing government's credit rating and it generally reflects how likely the government is to pay the bond holder back. Governments with better credit ratings can generally borrow at lower interest rates.[3] The State of California's credit rating was on a downward trajectory from about 1970 until about 2006, but shifted toward an upward trajectory during the recovery phase after the Great Recession of 2008/2009.[4]

Some bonds have to be approved by voters before they can be issued. This requirement is the case with general obligation (GO) bonds. Both the state and local governments can issue GO bonds.[5] When the state government wants to issue a GO bond, the voters must approve the bond by a simple majority vote. To repay the bond holder, the state can use money from almost any source (subject to certain legal restrictions). With few exceptions, when a local government wants to issue a GO bond, voters must approve by a two-thirds majority. Although some sales tax and other special revenue voter-approved programs exist, local governments generally can only use property tax revenue to repay bond holders.

[2]See http://www.msrb.org/msrb1/pdfs/MSRB-Muni-Facts.pdf and https://data.worldbank.org/indicator/CM.MKT.TRAD.CD.
[3]See https://www.treasurer.ca.gov/ratings/history.asp for a history of California state government credit ratings.
[4]California bonds are rated by three private agencies: Fitch Ratings, Standard & Poor's Rating Services, and Moody's Investors Service. Ratings are tracked by the California State Treasurer and can be found at https://www.treasurer.ca.gov/ratings/history.asp.
[5]The 'state' is not just the State of California. There are other state government bond issuers such as the University of California Regents, the California Housing Finance Agency, and the Department of Water Resources to give a few examples.

Once a bond is approved, the state or local government does not have to issue, or sell, the bonds right away. For example, as of this writing there are $31.9 billion in approved, but un-issued, GO bonds in the state.[6] One reason for this backlog is that the issuer may wait to sell the bonds for more favorable market conditions and interest rates. Another is that bonds often fund construction projects that span many years, and the full amount of approved debt is not needed immediately. For both state and local GO bonds, the ballot initiative specifies how the money raised from issuing the bonds will be used. Common uses include funding for education (both K-12 and higher education) and large infrastructure projects.

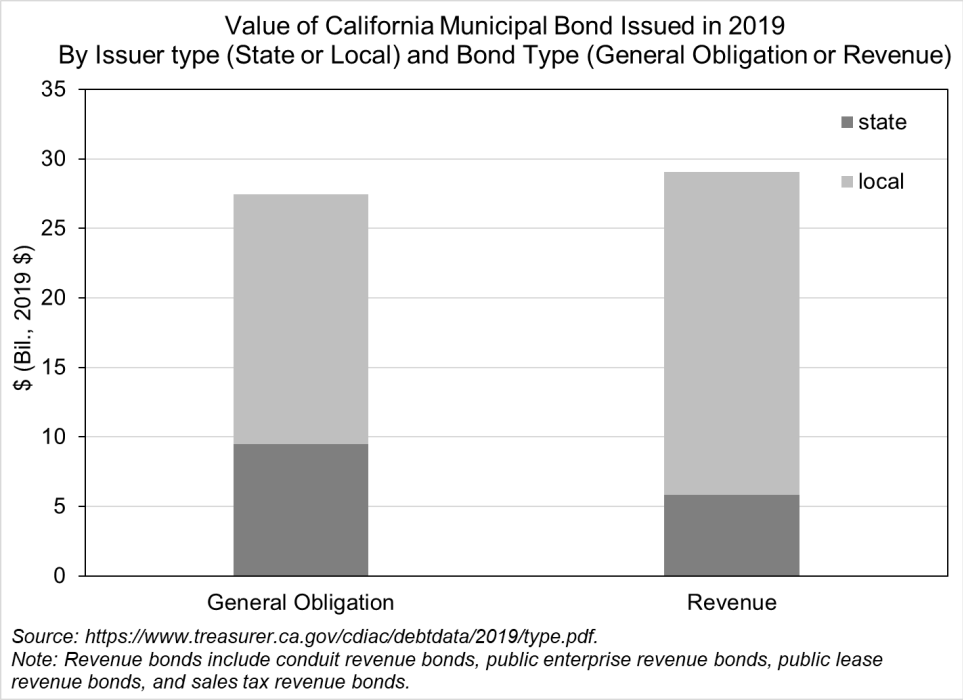
The second main type of bond that state and local governments can issue is a revenue bond. Revenue bonds generally do not require voter approval and are instead approved by the local governing authority such as by a vote of a legislative body. There are many types of revenue bonds, but generally revenue bonds are paid back using the revenues generated from the enterprise that benefitted from the funds raised by the bonds. One example of this kind of bond financing is the construction of a toll road with the tolls collected once the road opens used to repay the bond holders. Another example is California State University revenue bonds for the construction of new student housing with room-and-board fees used to repay the bond holders. Revenue bonds, like most GO bonds, are typically used for construction and infrastructure projects.

**Background Data**

For some perspective, Figure 1 shows California municipal bond issuance in 2019 by issuer type (state government or local government issuers) and bond type (general obligation or revenue bonds). The patterns in this figure reflect recent general trends. Local issuance tends to exceed state issuance for both types of bonds, and the total value of revenue bonds issued each year tends to exceed the value of GO bonds issued each year.

[6]As of August 2020. See https://www.treasurer.ca.gov/bonds/.

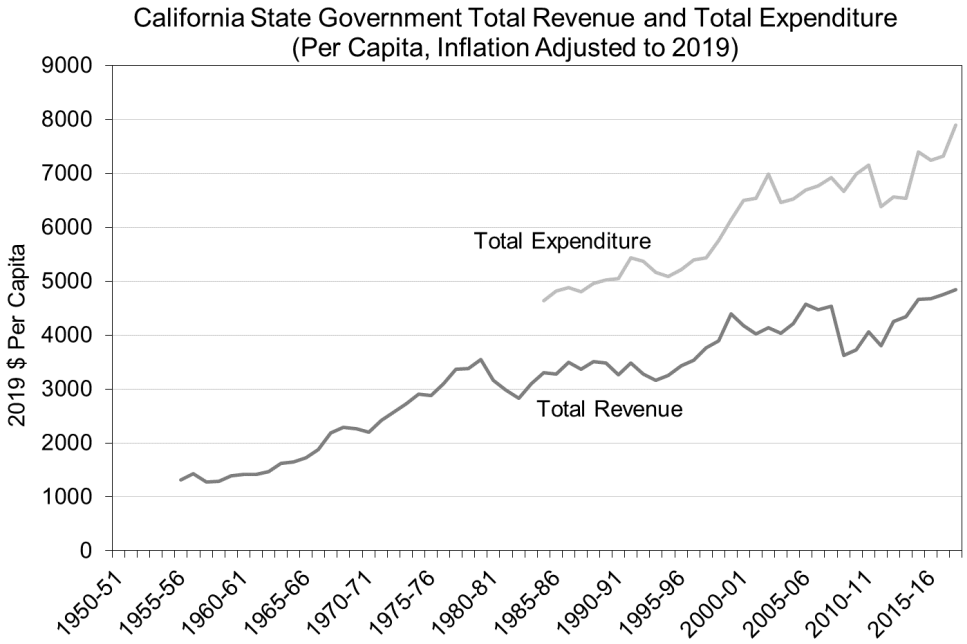
**Figure 1. Bond Issuance by Type and Issuer (2019)**




*Source: https://www.treasurer.ca.gov/cdiac/debtdata/2019/type.pdf.*
*Note: Revenue bonds include conduit revenue bonds, public enterprise revenue bonds, public lease revenue bonds, and sales tax revenue bonds.*

Figure 2 demonstrates the budgetary cyclical liquidity constraints faced at the state level. Total state government spending, while generally on an upward trend (even after adjusting for inflation and population growth), tends to rise during downturns and state government revenue, particularly revenue from personal income taxes (which over the past ten years has averaged about 45% of total state revenue), tends to fall or at least grow more slowly at the same time. This creates scope for the state to need to borrow during downturns to smooth government consumption.

**Figure 2. California Government Spending and Revenue**




*Source: https://lao.ca.gov/PolicyAreas/state-budget/historical-data, California Department of Industrial Relations (CPI), and U.S. Census Bureau (population).*

A long-run benefit of debt financing of capital improvements and new infrastructure during downturns is that market conditions may be more favorable during these times. These projects will have a higher rate of return as recessions often induce lower building and financing costs. In a typical recession, private construction decreases. Thus, construction labor markets are slack and even with fair-wage requirements, overall labor costs (workers and management) are apt to be lower. In addition, the reduction in demand for construction materials from the reduction in private construction lowers the ultimate cost of these projects. Finally, lower interest rates often accompany recessions which, provided that the state's bond ratings remain favorable, reduce borrowing costs.[7]

Credit ratings on California's general obligation bonds from all three rating agencies came up during the recovery from the 2008/2009 Great Recession, and interest rates on municipal bonds have generally come down since the 1980s.[8] Ratings are affected by the market's assessment of the ability of the state to service the future debt, and steady trends in expenditures and revenues can provide this assurance. California's Proposition 2, the Rainy Day Fund and Budget Stabilization Act of 2014, has gone a long way in that direction.

[7]Two caveats: municipal bond rates were volatile as the recession started in 2020, and credit rating agencies downgraded or put some municipal bonds and sectors on a negative rating watch, raising concern about the possibility of future downgrades. There is some evidence that financial crises adversely affect the yields on lower rated state and local bonds (Benson and Rogowski (1978), Peng, Ken and Qiushi (2014)), which could become a relevant concern if state and municipal bond downgrades become widespread prior to the issuance of new bonds.
[8]At this writing, the latest Federal Open Market Committee (FOMC) report indicates monetary policy will be accommodative for the balance of the downturn and recovery of U.S. economic activity. See https://www.federalreserve.gov/newsevents/pressreleases/monetary20200429a.htm.

**The basic economics of government debt**

An entity with stable long-term prospects facing short term liquidity constraints can issue debt to accommodate consumption in lean years complemented and balanced by higher savings in good years in order to maintain long-term budget and spending stability. A government is in principal a long-lived institution with the current and future welfare of its citizens paramount. Consequently, decisions taken today must incorporate the impact of these decisions on the future.

Intergenerational equity considerations at the margin influence the decision on whether or not to issue debt. Among the justifications can be the need to educate youth today. One potential outcome in the absence of debt financed spending on a particular education project, could be lower education levels. This situation could lead to both a personal cost to the youth and a societal cost of lower aggregate output; output that might, at least in part, be available for repayment of the bonds.

On the other hand, if the debt financed expenditure does not improve the overall welfare of the citizens taking into account future citizens, then borrowing to finance the particular project would be unwise. The fable of Nero fiddling while Rome burned is a case in point. Thus, economic theory, taking into account general market conditions during downturns, generally - but not always - supports using debt as part of a solution.

Relevant elements when considering debt financed infrastructure spending include the impact of that borrowing on current economic activity, the effect on expectations of future tax rates, and the timing of the delivery of the services provided by the expenditures (*i.e.,* how quickly the projects can be started, given regulatory and permitting requirements and the duration of construction).[9] If the infrastructure is not seen to generate sufficient economic activity to fund the bond repayment obligations through higher net revenue (higher revenues or lower costs), then one would expect this debt issuance to be viewed, at least in part, as an obligation to raise taxes in the future; one that ought to reduce consumption and investment. However, if the infrastructure were to lower future business costs, then the debt financed spending in the present could increase current and future economic activity.

Thus, an important consideration is how expectations about future effects of debt financing (*e.g.,* on tax rates) will affect business location decisions (Carlton (1983)). This analysis requires some way to compare potential investments. Unfortunately, there are no clear answers. While some infrastructure investments are easy to evaluate from a user benefit perspective (*e.g.,* Canning and Pedroni (2008)), most are not.[10]

**California contra-cyclical debt financing: the record, effectiveness, and issues**

Assuming that the government has obtained the authority to issue bonds, a question arises as to the consequences of issuing debt contra-cyclically. What are the merits and deficiencies of turning to municipal debt to counter business cycle fluctuations in government deficits? The main impediments to

[9]There is an extensive literature on the cost-benefit analysis of inter-temporal expenditures which will not be surveyed here, but which can be referenced through Glaeser (2013).

[10]For a critique of the cost/benefit analysis methodology see Ackerman and Heinzeling (2002), who argue that flaws in this type of analysis include the difficulty of assigning prices to non-market priced attributes and the reliance on assumptions about the rate at which the future should be discounted.

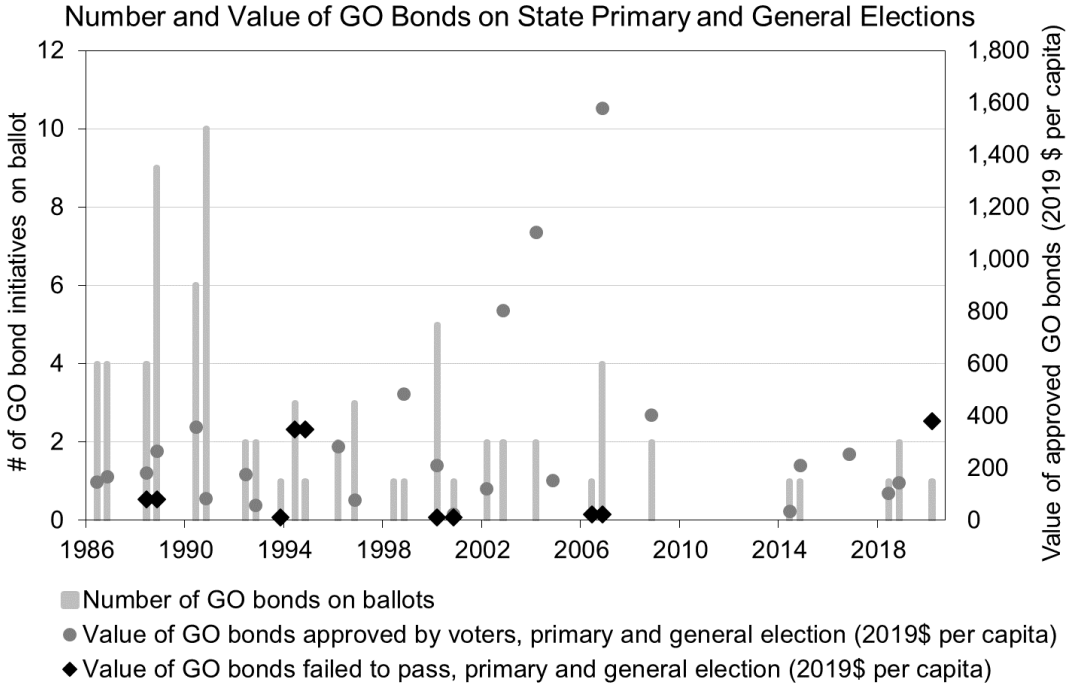
following the general path of contra-cyclical bond financing in California are legal and procedural, not economic.

First, there are strict regulations about how the money from bond sales can be used and what types of spending and projects different types of state and local governments can even propose for bond financing. (For example, a sanitation district cannot issue bonds to build a school.)

Second, bond approval and issuance require significant time. For GO bonds, which require voter approval, the process of obtaining the bond proceeds is particularly time consuming. Proposition 57, The Economic Recovery Bond Act, is a good example. The recession that prompted the Act ended in 2001, but the proposition was not put on a ballot until March 2004. This general pattern is captured by the series in Figure 3 which shows the total number of GO bonds appearing on voters' ballots and the dollar value of the bonds that were passed. The levels in these series vary over time, but that variation is not strongly tied to the business cycle. The correlations between the number of initiatives and the state's unemployment rate and between the value of GO bonds passed and the unemployment rate are negligible to moderate.

Third, voters may vote against the bond measure. Figure 3 also shows the value of bond measures on statewide ballots that passed and that failed. Voter rejection frequency is non-trivial. For revenue bonds, which generally do not require voter approval, the approval process still takes time, though much less. In both cases, the process of due diligence and creating the issuing documents adds to the delay between the identification of the need and authority to obtain the proceeds through bond issuance.

**Figure 3. GO bonds on ballots**




*Source: California Legislative Analyst's Office (https://lao.ca.gov/BallotAnalysis/Bonds). California Department of Industrial Relations (CPI), and U.S. Census Bureau (population).*

For bonds to be an effective bridge to cover recession-induced revenue shortfalls, the issuing government would need to be able to approve and issue bonds before revenues and expenditures normalize (the second and third issues). To get a sense of how relevant these timing issues might be, we examine state and local government revenues and expenditures over past business cycles, the historical length of time before revenues returned to their previous peak, and the correlation between bond issuance and unemployment rates in the state. Though historically bond issuance by states has generally been non-cyclical (see Fisher and Wassmer 2014), the recent evidence for California, particularly at the state level, shows that bond financing could in theory be responsive enough to be part of contra-cyclical policy.

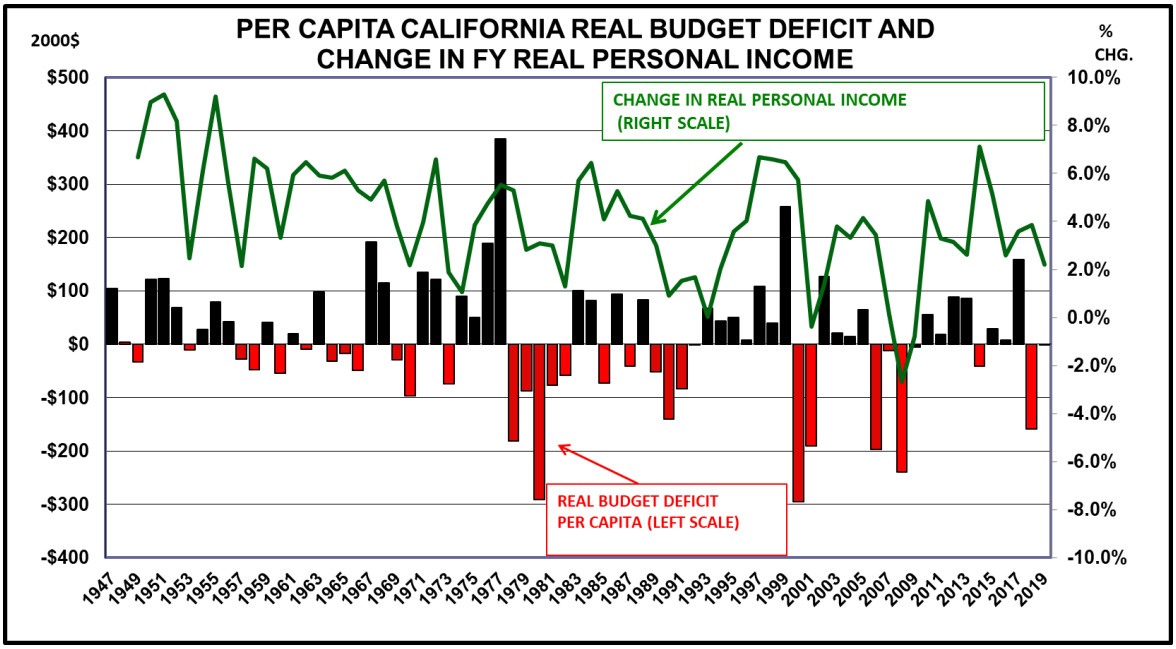
Figure 4 shows the historical pattern of ex-post general fund surplus and deficits from 1947 to 2019. Surpluses and deficits are calculated as general fund revenue less general fund expenditures exclusive of any funding provided by savings or bond issuance. The figures are adjusted for inflation and are per capita to provide a picture of the relative size of deficits over time. As is observed, the volatility in the ex-post balance increased over time as California shifted from an economy dominated by traditional manufacturing to one dominated by entrepreneurial and technology-based business, and to personal income tax revenue more heavily dependent on capital gains and the more volatile base of high-income residents.

The overlaid line is the change in real personal income. The correlation between a reduction in the rate of growth of real personal income and the ex-post general fund balance is evident. What is important for the purposes here is the equally strong correlation between an increase in the rate of growth of real personal income and the ex-post general fund balance.[11]

Notice that although the California economy does not recover immediately following the downturn of a recession and its induced budget shortfall, the *ex-post* balance does. To see this in the diagram, look, for example, to the negative bars becoming a surplus (positive) after the 1990, 2001 and 2008/2009 recessions. In each, the reversal of the fiscal deficit precedes the economy's recovery to trend. Admittedly, some of the recovery in the balance is due to cuts in spending and some to increases in tax rates, but not all of it can be attributed to those factors. However, cyclical revenue sources such as sales taxes, income taxes, and corporation taxes make up a substantial fraction of total revenue. Consequently, for bond financing to be contra-cyclical, the debt financed spending should precede the return to growth in real personal income.

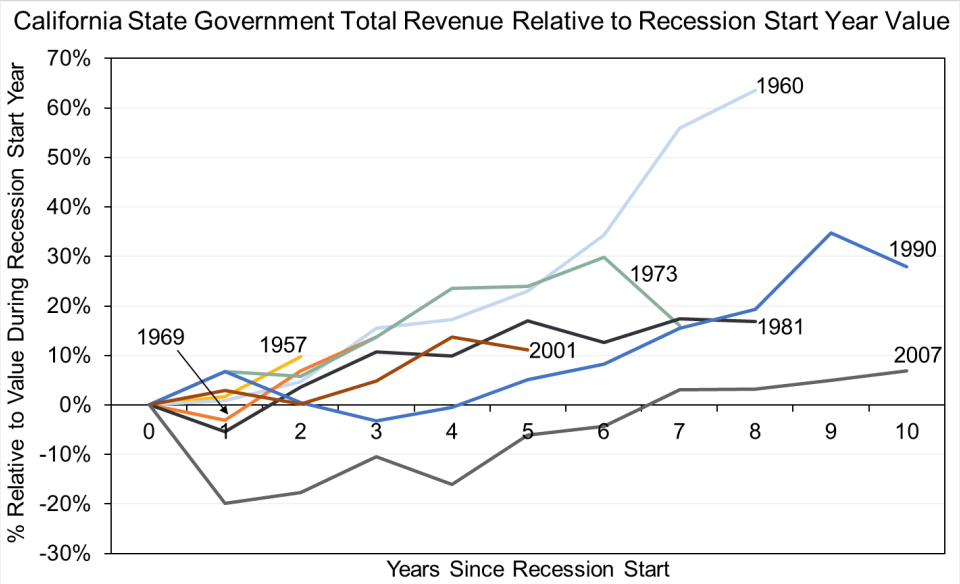
[11]For additional details and analysis see Nickelsburg (2019).

**Figure 4. Ex-Post General Fund Balance**




Another way to gauge how quickly bonds would need to be issued in order to be effective as contra-cyclical spending is to see how many years passed after the start of a recession and before government revenues returned to pre-recession levels. Figure 5 shows the percentage change in total California state government revenues since the 1950's relative to the value in the year each recession began. The series are in percentages, so, for example, five years after the 2008/2009 recession, total state revenues were about 2% below what they were in the fiscal year when the recession began. In most past recessions, revenues recovered relatively quickly. However, they took notably longer to recover in the 2008/2009 recession. Figure 5 suggests that recessions where government revenues take longer to recover may be more conducive to debt financing.

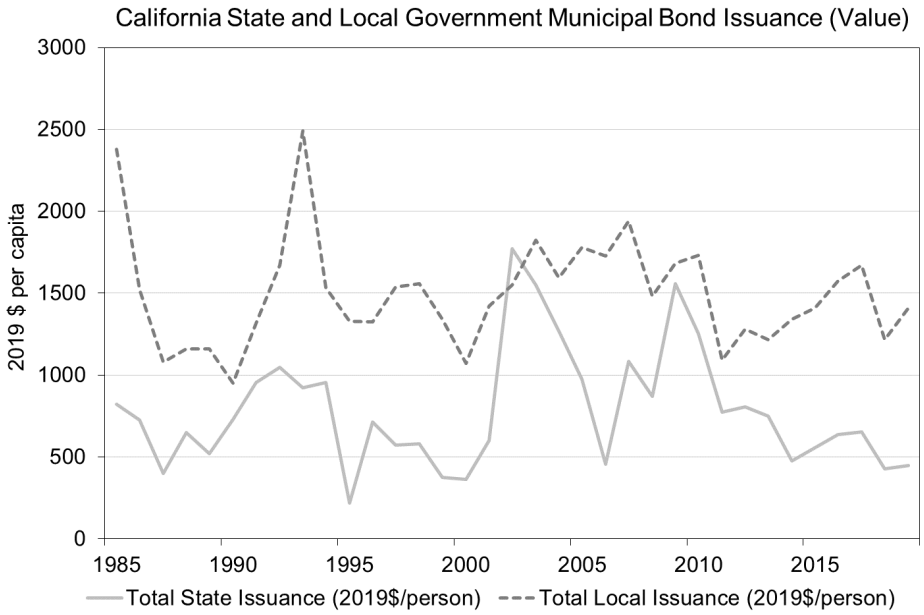
**Figure 5. Total State Revenue Trajectory, Past Recessions**




*Source: Legislative Analyst's Office, State of California Revenues, 1950-51 to 2017-18 (https://lao.ca.gov/PolicyAreas/state-budget/historical-data), California Department of Industrial Relations (CPI), and U.S. Census Bureau (population).*
*Note: Revenues are inflation adjusted to $2019 and are per capita.*

Despite these timing impediments, there is some evidence that issuance follows business cycle fluctuations, particularly at the state level. Figure 6 shows the real per capita dollar value of state and local bond issuance since the 1980s. (The values in this figure include both GO and revenue bonds.) While there is some amount of bond issuance every year, there are notable swings in both series. At first glance, spikes in issuance, particularly at the state level, have generally coincided with recessions, and a simple correlation between state issuance and the state's unemployment rate confirms that this is the case. Local government issuance is also positively correlated with the state's unemployment rate, but less so than with state government issuance.)

**Figure 6. State and Local Government Bond Issuance**




*Source: https://www.treasurer.ca.gov/cdiac/debtdata/totals.asp, California Department of Industrial Relations (CPI), and U.S. Census Bureau (population).*

The correlation is heavily dependent on the 2004 and 2009 bond issuance. Prop 57, The Economic Recovery Bond Act, was approved three years after the start of the 2001 recession and was reactive to the continued steep deficits. Indeed, the stated use for the proposed debt was to pay off accumulated general fund deficits. In response to a cash-crunch from the Great Recession of 2008/2009, additional bonds authorized under Prop 57 were issued.

These issuances were unusual and seen as extraordinary. Indeed, very few states have ever issued economic stabilization bonds. That Prop 57 was seen as a temporary fix is evidenced by the fact that it was dependent upon the passage of Prop 58, the balanced budget proposition, which disallowed any further bond issuance to finance deficits. At this time no ongoing authorization exists for anything like the Economic Recovery Bonds, as the last of these approved and issued bonds has been paid off.

Another factor driving the correlation could be bond refinancing activity, which will show up in tallies of bond issuance. Interest rates tend to be lower in recessions, and state and local governments can and do refinance debt at lower rates just like homeowners who refinance their mortgage when rates drop. Data from the California State Treasurer show that refinancing has an almost negligible correlation with the state's unemployment rate, while new money issuance has a positive correlation, so the patterns in Figure 6 are unlikely to be driven by refinancing activity.

The fourth issue is, conditional on the decision to issue debt, how the proceeds should be used. This topic is somewhat a moot point in today's regulatory environment as there are rules about the purposes for which bonds can be issued. Nevertheless, we can still consider the question.

Even without restrictions, using bond proceeds for long-term capital projects has advantages from an economic theory perspective. The economics of debt issuance generally favors bonds with a maturity that matches the lifespan of that which is funded by the bond and favors issuing bonds for projects that

generate revenue either directly (such as bridge tolls) or indirectly (such as human capital investment which generates an increased tax base through economic growth). Based on this principle, debt financing is more often used for long-term infrastructure projects. However, this choice of fund usage is at odds with contra-cyclical spending as infrastructure projects typically take years to complete and in their early stages, activity is mainly in planning and engineering.

Two alternatives would be to make direct transfers to individuals, as the federal government did in 2008 with tax rebates and stimulus checks and in 2020 with the Economic Impact Payments, or to use the proceeds to fund ongoing fiscal expenditures. Direct transfers to individuals have the benefit of allowing each person to use the money where their need is greatest. The drawback is that determining transfer amounts is complicated. Consequently, a likely outcome is that many individuals will not end up with an amount of aid that is 'right' for them (some getting too much money and some too little).

In addition, because individuals will save some fraction of the transfer, less than one dollar of each dollar transferred will immediately go back into the economy.[12] Funding ongoing current expenditures has the advantage of continuing government employment, but as with direct transfers, some of the payroll leaks into saving and is not a 1:1 increase in the demand for goods and services. Moreover, neither of these two alternatives has an associated revenue stream for debt service and retirement.

**Conclusion**

As state and local governments in California grapple with revenue declines and potentially increasing expenditures in the 2020 COVID-19 recession and in those to come, they will face inevitable difficult decisions about how to bring spending and revenue into balance. Given the patterns we see in the data and the regulations governing bond issuance, debt financing may be part of a contra-cyclical solution. The main impediment we see is in timing.

Funding projects that can be started with a minimal delay (within months) as well as projects that will start after some delay (a year or so) is one way to spread stimulative spending over time. Similarly, allowing interim deficits (caused by recessions) to be funded through a measured, short/medium term financing mechanism, balanced by fiscal discipline requirements can cushion the temporary deficit pressures. Though a cost-benefit analysis of the types of projects that would be funded by the debt needs to be performed, debt issuance could serve, in part, as a contra-cyclical stimulus to the California economy in recessions.

With respect to contra-cyclical debt financed expenditures, pre-approval of the bonds would be essential. In the case of infrastructure, projects financed must truly be "shovel ready" with potential contractors, engineering, Environmental Impact Reviews (EIRs) and other regulatory requirements in place. In the case of direct transfers, the structure of the transfer including qualifications of the recipient (resident, legal status, age, employment status) and the triggers that permit the debt to be sold for this purpose need to be in place prior to the recession. The bottom line for California is that if this tool is to be an efficacious part of the governmental tool kit for combating a recessionary increase in unemployment, it needs to be a pro-active policy creating stand-by authority rather than a reactive one.

[12]For example, a non-trivial portion of the 2008 tax rebate was saved rather than spent. Estimates vary, but see Shapiro and Slemrod (2009), for example.

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# Chapter 9

# The Economic Outlook for California: A View from Late 2020

**Christopher Thornberg**

Christopher Thornberg, Ph.D., is Founding Partner of Beacon Economics. This chapter is adapted from a news release of Beacon Economics and reflects information available as of early December 2020. Data cited in this chapter are generally seasonally-adjusted and subject to revision.

The California economy is intricately intertwined with the larger national economy through trade and investment with the rest of the U.S. It is, in effect, a member of a trade and monetary union with the other parts of the country. Thus, the ups and downs of the U.S. business cycle are inevitably reflected in California. Nonetheless, California – the largest state in the union – has its own characteristics so that its experience with any given boom or bust period may be different from that of other states.

Beyond normal business cycle behavior is the fact that the 2020 coronavirus recession was truly different from prior recessions. Consumers didn't abruptly stop going to movie theaters, restaurants, and hotels because of some intrinsic economic trends. Instead, in the midst of an economic boom in early 2020, they were suddenly ordered to stop spending on activities that risked the spread of the coronavirus in order to prevent hospital capacity from becoming overloaded and to protect lives of especially vulnerable people.

**Darkest Before the Dawn**

At this writing, – the last quarter of 2020 – the national economy is living up to the old adage that it's always darkest before the dawn. There was an ugly presidential election, even uglier post-election maneuvering by the current administration, and all against a backdrop of the largest global surge in new confirmed coronavirus cases to date. That development that has led to public health restrictions being reimplemented in many parts of the United States and around the world which restrict economic activity.

Nonetheless, there have been excessively negative headlines about a stalling economic recovery as of late 2020. But when you pull away from the miserabilism that has dominated the headlines and editorials, there is also plenty of good news which suggests that the trauma of 2020 is finally fading and that the nation is moving into better times in 2021.

- Despite the allegations of widespread voting fraud and multiple lawsuits filed by the Trump campaign post-election day, financial markets barely blinked. They clearly didn't believe there was any substance behind the legal posturing, but rather saw it as a strategic refusal to acknowledge the obvious: Biden won the U.S. presidential election. And as this report is being written, the administration is moving to begin the transition process. The markets are plainly not anticipating some kind of economy-braking political turmoil to erupt.

- The daily number of new, confirmed COVID-19 cases in the United States surpassed 500 cases per one million people (2.5 times the summer surge and five times the spring pace), and was still rising in late 2020. However, the resultant increase in the death rate has been milder than in past surges. This fact does not diminish the tragedy of the 100,000 to 120,000 additional deaths that will likely result by early 2021 - but the situation is not as dire as the headlines imply.

- The late 2020 surge appears almost assuredly to be the last such surge of the virus. As of late 2020, three statistically effective vaccines have been developed in the west, while the Chinese and Russians are also claiming their own successes. Additional successes may well be announced, given that over 37 groups were working to develop a vaccine. Vaccination of first responders could start by late December 2020, and there will likely be more widespread vaccination by March 2021. As such, the coronavirus will be coming under control by the second quarter of 2021 and effectively gone by some time in the second half of the year.

**Headline Panic**

If one is focusing only on news headlines, knowing that the pandemic's end is in sight would bring limited comfort. Those headlines suggest that we still have to deal with a 'shattered economy' that has barely avoided falling off the 'economic cliff' because of the 'bare-minimum relief efforts' by the Federal Reserve and Congress. But there again, after cutting through the apocalyptic headlines and looking into the actual data, things appear far less grim. The U.S. economy did not shatter. The nation has already seen a remarkable bounce in economic activity, and it is heading into 2021 with a good degree of economic momentum. Consider the following facts:

- Based on the data available at this writing, the last expansion (from the Great Recession of 2008) peaked in February 2020, and the economy hit bottom in April. The two-month long pandemic-driven downturn was the shortest recession in U.S. history. Recovery from it hasn't been as rapid as the downturn but has still been historically faster than ever seen before. Early estimates of real GDP *annualized* growth in the third quarter of 2020 came in at over 33 percent. So, the worst quarter for decline in U.S. economic history was followed by the best quarter for expansion. In other words, the steepest recession ever (a 31 percent *annualized* rate of decline in the second quarter of 2020) was followed by the fastest recovery ever. This was truly a business cycle like never before.

- While consumer spending growth drove the bulk of the growth in the third quarter of 2020, there was solid growth in every part of the economy with the exception of non-residential structures and government. (State and local governments were dealing with the impact of sudden tax receipt declines.) This same pattern was seen in industrial production, durable goods orders, retail sales, and other statistics, with record declines followed by record increases, a massive economic bounce.

- The U.S. economy was not, of course, fully back to normal as of late 2020, with most macro-statistics still below their pre-pandemic levels. But as of September 2020, the economy was only four percent below long-run growth trends, having recovered three-fourths of the lost output that occurred between February and April 2020. This pace is a much faster recovery than the consensus believed would occur at the start of the crisis. The most stunning difference between this cycle and past cycles is in the path of

unemployment, a data series that usually takes a long time to rise and even longer to fall. This time, unemployment rose from 3.5 percent to 14.7 percent and then fell to 6.7 percent (as of November 2020), all within eight months. The lessons of past business cycles do not apply to this one, as noted earlier. This uniqueness of 2020 is one of the reasons so many forecasters were wrong in their predictions.

- With the latest surge in COVID-19 cases, the forecasting pessimists are yet again crying wolf. One big bank recently made headlines by predicting negative growth in the first quarter of 2021 as a result of the surging virus. But there is no sign at this writing that the latest surge in cases is driving a double dip recession. The nation entered October adding 40,000 new cases per day and ended the month at 80,000 new cases per day. Yet real consumer spending and industrial production grew in October, the nation added 900,000 private sector jobs (for the third month in a row), and unemployment fell below 7 percent. In November, the number of new cases doubled again. High frequency data are generously made available by the Opportunity Insights research lab at Harvard University. According to those data, as of mid-November 2020, consumer spending had actually grown relative to the previous two weeks.

- In short, despite the recent surge in COVID-19 cases, the U.S. economy can and will continue to recover, albeit at a modestly slower pace than we might have otherwise hoped (eight percent in Beacon Economics' previous forecast). We still anticipate a five-to-six percent growth rate in the fourth quarter of 2020, followed by a strong start to next year in the four-to-five percent range. By Beacon Economics' estimate, the U.S. economy should be back on trend by the second half of 2021. This is a substantially faster recovery than the consensus forecast at the start of the pandemic indicated. At that time, most groups were suggesting the business cycle would be almost as bad as in the Great Recession, i.e., a slow and prolonged recovery.

- Given the current pace of the overall recovery, we can expect the pandemic ultimately to cost the U.S. economy roughly six percent of one year's worth of annual output. To put this in context, by the time the United States had fully recovered from the Great Recession in 2014, the nation had lost roughly 27 percent of one year's worth of annual output. The current downturn is much milder than the Great Recession despite the eye-popping numbers seen early on, and only slightly worse than the tech recession of 2001.

**Slack Labor Markets**

Our more positive read of the economy as of late 2020—that the downturn is much less severe than during the Great Recession and that the economy is quickly recovering—may seem difficult to reconcile with the fact that payroll and household employment numbers are over nine million below where they were at the start of the 2020 recession. This data point appears to be at the center of most of the handwringing about the economy. But placing that number at the center of an economic outlook mixes cause and effect. Weak aggregate demand causes slack in the labor markets.

Slack labor markets have a limited impact on aggregate demand. A large share of aggregate demand comes from trade, business, and government—which are not driven by worker earnings. And earnings themselves do not vary as much as employment. Most job losses occurred among lower paid sectors and significant income comes from sources other than employment. In October 2020, there were six percent fewer payroll jobs in the United States than a year before, yet aggregate real disposable income was up five percent and real earned income (wages and earnings for proprietors) was up three percent.

### Recovery of Aggregate Demand

The coronavirus pandemic hit a U.S. economy that was fundamentally the healthiest it had been in thirty years. As such, aggregate demand began to recover quickly – initially, through mitigation efforts that allowed businesses to operate even while the pandemic was raging and eventually with the rollout of vaccines. This improvement will in turn hasten recovery of the labor markets, including that of lower paid employees.

There will of course be lingering issues after the pandemic is officially over. A huge share of retail spending has shifted online, and the pace of 'de-retailing' in the nation will intensify. There is also an intriguing issue surrounding the demand for office space as many employers have learned that with appropriate organizational training and systems, employees can effectively work from home. It is way too soon to call an end to the office as we know it, but clearly many firms will be downsizing their floorspace. And while the predicted massive surge of bankruptcies has yet to happen, many small businesses will not reopen in 2021 after being closed for months.

There remain issues that have resulted from the short-term macro remedies implemented at the federal level to deal with the pandemic. Federal spending to mitigate the impact of the coronavirus resulted in a massive increase in federal debt. That increase in official debt comes at a point when the U.S. is increasingly dealing with the fiscal strains imposed by the actual and impending retirement of the baby boomers and its effects on Social Security and Medicare finance. The Federal Reserve has substantially increased the supply of money and credit, raising concerns about future inflation. But the immediate outlook is brighter than many forecasters had originally predicted.

**Light at the End of the Tunnel for California**

After the summer 2020 surge in coronavirus cases subsided, California became mired in another outbreak. As of this writing in late 2020, the seven-day moving average of new cases stands at well over 12,000 per day, far exceeding the July 25, 2020 peak of 9,600. But the seven-day moving average of deaths is now 68 per day, far below the previous peak of 141 reached on August 5.

Deaths are a lagging indicator, so as the number of cases in the state rises, so will deaths. But there are reasons for hope. The number of hospitalized coronavirus patients, another lagging indicator, was still far below summer levels as of late 2020. Treatment improved during the crisis, with death rates much lower toward the end of 2020 much lower than in the spring. The high potential effectiveness of vaccines provides significant light at the end of the tunnel and a hope that 2021 economic activity will start to resemble normality.

## Temporary Setback in Late 2020

Beyond the unfortunate public health effects, the spread of cases in the state means at least a temporary setback to the state's economy. On November 16, 2020, California Governor Newsom applied an "emergency brake" that halted reopening plans and put almost all of the state back under strict rules. The resulting rules halted indoor worship (being challenged in court), required most indoor business to close or operate at a fraction of their capacity, and kept most schools closed, including in the nation's second-largest school district, Los Angeles Unified.

Furthermore, on November 19, Newsom enacted a curfew in the state's 45 purple-tier counties, which are home to more than 95 percent of the state's population. The curfew, which the state called a limited stay-at-home order, stopped short of a full lockdown. The restrictions during curfew hours are similar to March's stay-at-home order. Non-essential work, movement, and gatherings was required to stop in purple-tier counties. In addition, local governments have enacted further restrictions. In Los Angeles County, outdoor dining was halted for three weeks. For the beleaguered leisure and hospitality sector, the most affected by job losses, the partial rebound in jobs will likely stall, if not reverse, in the short term. Much depends on the speed of the vaccine distribution program.

## Labor Market and Consumption Update

In October 2020, nonfarm employment in California expanded by 247,900 jobs, according to preliminary estimates. This growth was the labor market's best performance since June and suggested an end to a worrying trend of slower underlying job growth. The robust job gains were coupled with a significant drop in the state's unemployment rate, which declined to 9.3 percent in October 2020 from 11.1 percent the previous month. But the state's unemployment rate remained higher than the nation's 6.9 percent.

Perhaps the brightest part of October 2020's labor market performance was the expansion of the state's labor force (employment plus those seeking work). While the state's falling unemployment rate in recent months had been aided by a contracting labor force (the pool of people working or seeking work), the labor force expanded by an impressive 620,300 people in October. The state's labor force was still 238,200 lower than pre-pandemic levels according to preliminary data, but it had come a long way from May 2020, when it contracted by one million workers. The return of workers to the labor force is a bullish sign of underlying strength, even if the trend is temporarily interrupted by tightened lockdown regulations.

Despite this strength, only 44 percent of the nonfarm payroll jobs lost during the pandemic have been recovered, with 1.5 million fewer workers employed than in February 2020. Nonfarm employment in the state contracted 8.4 percent between February and October 2020. This decline is higher than the 6.6 percent nationwide figure for that period.

On a year-over-year basis ("YOY" on Figure 1), the biggest relative job declines have been in the Leisure and Hospitality, Other Services (which includes hairdressers and nail salons), and Educational Services sectors. With the renewed restraints on business activity in the state, as well as continued school closures, these sectors seem unlikely to see much positive movement before 2021. But if we are able to move beyond the pandemic as 2021 progresses, these sectors should see quicker-than-average employment growth as they return to normal.

Leisure and Hospitality has had the biggest drop in jobs, with over half a million fewer positions than a year earlier. Considerable losses were also sustained in Government, Other Services, Retail Trade, and Manufacturing. At the local level, lower consumption in the state has reduced sales tax revenue, and many tourist-dependent jurisdictions have been affected by a drop in transient-occupancy tax revenue collected from hotels. Retail Trade job losses continue a secular trend in the sector, which has been accelerated as more consumers buy goods online.

One key feature of the labor market recovery has been the extent to which job losses have disproportionately affected low-income workers. Employment in jobs that pay more than $60,000 per year shrank just 1.3 percent in the state through October 2020, but middle-wage jobs (annual wages of $27,000 to $60,000) and low-wage jobs (less than $27,000 per year) have been hit much harder. Middle-income jobs fell by 8.1 percent from January to October 2020, while low-wage jobs have fell by 28.1 percent. Although the best panacea for these workers in the short term is a growing economy, protections that have assisted such workers, such as extended unemployment benefits and eviction moratoriums, are due to expire at the beginning of 2021. Absent a sharp recovery in the labor market, the expiration of those programs will particularly hurt lower-income workers.

Just as California's labor market recovery lagged the nation's in 2020, the state also lagged in consumption. Consumption in California is nine percent lower at this writing than it was in January 2020, compared with a decline of 4.5 percent nationally, according to credit card data from Affinity Solutions. The reasons have to do with the state's mix of industries and a combination of more stringent restrictions and the relative reticence of Californians to engage in regular activities.

For example, time spent outside (away from home) is down 13 percent in California from January 2020 at this writing, while time spent outside is down 10 percent nationally over the period, according to data released by Google. Time spent in stores and restaurants is down 19 percent nationally but 27 percent in California. But because the recovery in California lagged the national economy as of this writing, once a vaccine is widely distributed and some normality resumes in 2021, growth in California should outpace the national figure.

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**Figure 1: Change in Nonfarm Payroll Employment, Oct. 2019 – Oct. 2020**

| Industry | Oct. 2020 | YOY number (000s) Change | YOY percent Change |
|---|---|---|---|
| Total Nonfarm | 16,134.2 | -1,369.4 | -7.8 |
| Leisure & Hospitality | 1,525.7 | -518.4 | -25.4 |
| Government | 2,433.7 | -186.4 | -7.1 |
| Other Services | 475.4 | -103.2 | -17.8 |
| Retail Trade | 1,550.5 | -99.3 | -6.0 |
| Manufacturing | 1,226.6 | -94.0 | -7.1 |
| Administrative & Support & Waste Services | 1,054.4 | -81.1 | -7.1 |
| Health Care & Social Assistance | 2,360.6 | -74.8 | -3.1 |
| Educational Services | 333.9 | -53.9 | -13.9 |
| Information | 522.4 | -44.5 | -7.8 |
| Wholesale Trade | 656.1 | -38.1 | -5.5 |
| Transportation, Warehousing, & Utilities | 688.9 | -23.5 | -3.3 |
| Construction | 869.3 | -20.6 | -2.3 |
| Management of Companies & Enterprises | 239.2 | -15.8 | -6.2 |
| Professional, Scientific, & Technical Services | 1,330.5 | -12.9 | -1.0 |
| Real Estate & Rental & Leasing | 294.3 | -11.7 | -3.8 |
| Mining and Logging | 21.3 | -1.1 | -4.9 |
| Finance & Insurance | 551.4 | 9.9 | 1.8 |

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Source: U.S. Bureau of Labor Statistics.

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## A Tale of Two Budgets

The state's budget has remained relatively healthy, with revenue coming in much higher than forecasts at the time of the governor's May Revise estimates had suggested, according to the California Department of Finance. Preliminary General Fund agency cash receipts for the first four months of the fiscal year were $11.3 billion above the 2020-21 Budget Act forecast of

$52.6 billion. Collections for March through October were down only 1.3 percent from the same period in 2019.

This relatively robust performance is due to the fact that around seventy percent of the budget comes from income and capital gains taxes with receipts heavily dependent on upper-income taxpayers. The stock market has returned to all-time highs, which is positive for state capital gains revenue. Furthermore, because job losses have fallen disproportionately on lower-income earners, the state's highest earners, through their tax payments, have helped support state revenue.

At the local level, the economic downturn has been felt more keenly by tourist-dependent cities that rely heavily on the transient occupancy tax from hotels. In Anaheim, Avalon, Carmel, Monterey, Pismo Beach, and Palm Springs, more than 25 percent of revenue comes from the tax. Furthermore, suppressed consumption affects sales tax revenue. As the economy improves in 2021, local budgets should expand significantly.

## The End of California Cities as We Know Them?

Over recent months, much has been made of telecommuting workers who have "fled" expensive cities for cheaper locales and who work from home through internet services. Indeed, rents have fallen in a number of California's highest-cost cities, including San Francisco. San Francisco's (very high) rents have declined ten percent on a year-over-year basis according to the latest data available at this writing.

This drop in rents is a sign that demand for apartments in the city has fallen. It has led many observers to imagine a new landscape in which cities become diminished centers of economic activity. According to this view, workers will seek cheaper housing in more remote locations, while they telecommute to work. But such proclamations are unrealistic. Yes, housing and commercial rents are more expensive in cities. But this is not a new phenomenon. If firms and workers considered only costs when they picked residential locations, they would not have chosen to locate cities. Yet firms and workers do locate in expensive cities, and many prefer them to cheaper small towns and rural locations.

This preference comes about because, despite the high costs of many cities, they generate great benefits for firms and workers in what are known as "agglomeration economies" (the benefits of clustering) and partly because cities offer amenities to residents not available in remote locations. Apple and Google could have built cheaper campuses where land costs are lower. The same is true for Universal Studios. But they would have lost the labor-market benefits that led them to locate in the Silicon Valley and Los Angeles in the first place.

In the Silicon Valley, Apple has access to the largest hub of tech workers in the nation. If it needs to add, say, 10,000 tech employees in a given year, it needn't engage in expensive national recruitment the way it would if it were located in Akron, Ohio, where land costs are

cheaper. Another benefit of locating in the Silicon Valley is that tech firms have access to specialized tech services, such as venture capital firms and intellectual property lawyers.

Workers, too, benefit from living near employment networking opportunities as well as having access to local consumption offerings. The advantages of cities did not disappear with the advent of the telephone, fax machines, and email, and they will not disappear with better forms of video conferencing. In short, speculation about the demise of cities is greatly exaggerated. Cities in California will return to their former glory once the worst of the pandemic is behind us.

**Conclusion**

The U.S. economy will recover faster in 2021 than many forecasts made at the height of the coronavirus crisis suggested. Overall, California's economic recovery has lagged the performance of the national economy as of late 2020. Even so, the economic effects of the coronavirus crisis on the California economy, while dramatic, have proved to be less negative than many state forecasters initially projected. The outlook for 2021 is brighter, with the distribution of vaccines on the horizon. California's underperformance in 2020 relative to the rest of the U.S. should lead the state's economy to outperform the national economy in 2021.