

## HARRY PREGERSON, THE REAL MAYOR OF LOS ANGELES

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Most Angelenos think their mayor is a trim, photogenic man who wears Armani suits to work in his cool suite at majestic City Hall nestled in downtown Los Angeles. Although there *is* a guy who fits that description, the Real Mayor of Los Angeles is built like a rock – squat and powerful – and goes to work in brown cowboy hats and black leather boots. The Real Mayor keeps his chambers in a nondescript office building near a Woodland Hills shopping mall. However, you won't find him there much, because befitting his clothing, he likes to get his hands dirty.

His name is Harry Pregerson, the Real Mayor of Los Angeles. And although the official title is United States Circuit Judge, Harry Pregerson's true calling is to be the behind-the-scenes powerhouse in Los Angeles. He cares about America's second largest city like nobody else. For thirty-five years and counting, whenever the city faces a problem public servants cannot or will not handle, the odds are that Judge Pregerson will be the one doing what any big city mayor might do: working the phones, coming up with solutions, and modestly passing the credit to others.<sup>1</sup>

The Real Mayor and the elected mayor of Los Angeles do have some things in common. Both Mayor Antonio Villaraigosa and Judge Pregerson are true Angelenos. Both were born and raised on the eastside of Los Angeles, in the City Terrace section of Boyle Heights, and educated on the westside of the city, at the University of California Los Angeles (UCLA).<sup>2</sup> Furthermore, both Mayor Villaraigosa and Judge Pregerson graduated from

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1. See, e.g., Bill Boyarsky, *A Cause Liberal L.A. Runs From*, L.A. TIMES, Mar. 2, 2003, at M3 (criticizing city leaders for embracing tree and animal rights, but not homelessness).

2. See Ajay Singh, *The Education of a Mayor*, U.C.L.A. MAGAZINE ONLINE (Jan. 1, 2006), available at [http://www.magazine.ucla.edu/features/education\\_of\\_major](http://www.magazine.ucla.edu/features/education_of_major) (describing the education and career of Antonio Villaraigosa); see Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002) (describing the education and career of Judge Pregerson).

law school before entering a lifetime of public service in Los Angeles, and along the way, gained tremendous respect for helping others realize their potential instead of helping themselves to riches.<sup>3</sup> Moreover, both Mayor Villaraigosa and Judge Pregerson serve broad constituencies of millions of people in Southern California, although the Real Mayor of Los Angeles has not been elected to public office since he served as UCLA's student body president more than sixty years ago.<sup>4</sup>

Who is this other mayor, the one most Angelenos never heard of? After his wife Dr. Bernadine Pregerson, a longtime professor of microbiology at Pierce College,<sup>5</sup> Harry's first love is the United States Marine Corps. With them he won a Purple Heart during the Battle of Okinawa, one of World War II's bloodiest fights.<sup>6</sup> He still cuts a cake every year on November 10<sup>th</sup>, the birthday of the Marine Corps. However, the military outfit currently capturing most of Judge Pregerson's time and energy is the Salvation Army. This organization operates shelters and support programs for homeless men, women, and children throughout Los Angeles County.<sup>7</sup>

Although Jewish, Judge Pregerson probably spends more time in churches than synagogues. He lives in the affluent West San Fernando Valley, but his soul lies in working class, Latino East Los Angeles. In fact, until he discovered bolo ties, Judge Pregerson sometimes wore a clip-on under his official robes. Indeed, it is hard to imagine the other mayor in such a wardrobe.

The Real Mayor of Los Angeles knows that people attracted to his considerable intelligence, charm, and networking skills might also be persuaded to follow his conscience. For this reason, Harry mingles as

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3. See Singh, *supra* note 2 (describing the education and career of Antonio Villaraigosa); see Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002) (describing the education and career of Judge Pregerson).

4. Los Angeles Business Journal Staff, *Who's Who: 25 of the Most Influential, High-Profile Judges in L.A.*, L.A. BUS. J., Jan. 31, 2000, at 9.

5. Bernadine Pregerson, Bernadine Pregerson's Microbiology Webpage, <http://www.piercecollege.edu/faculty/pregersb> (last visited Feb. 19, 2007).

6. See Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002) (describing Judge Pregerson's military career).

7. See, e.g., The Salvation Army Bell Shelter, [http://www1.salvationarmy.org/usw/www\\_usw\\_social.nsf/vw-sublinks/9DAA7E6B64BD884E88256DB4006EC244?openDocument](http://www1.salvationarmy.org/usw/www_usw_social.nsf/vw-sublinks/9DAA7E6B64BD884E88256DB4006EC244?openDocument) (last visited Feb. 19, 2007) (describing the emergency shelter services available to homeless people in Los Angeles county); The Salvation Army Westwood Transitional Village, [http://www1.salvationarmy.org/usw/www\\_usw\\_social.nsf/vw-search/4D54E40A4C879B6288256DB4006EC241?opendocument](http://www1.salvationarmy.org/usw/www_usw_social.nsf/vw-search/4D54E40A4C879B6288256DB4006EC241?opendocument) (last visited Feb. 19, 2007) (describing the housing and support services for homeless families in Los Angeles county).

easily with powerbrokers in Century City as he does with homeless veterans in the City of Bell. Of course, he is friendly with CEOs, entrepreneurs, legislators and their spouses and children too. He is on a first-name basis with not only the Sheriff of Los Angeles County, but also patrol car deputies; he says hello to not only the hotel managers, but also the chamber maids; he jokes with not only big firm law partners, but also their legal secretaries. Harry Pregerson gets to know just about everybody he meets. Because who knows? He might need their help one day to get something he wants and His Honor wants plenty: better schools for children; equal rights for women and minorities; dignity for veterans and immigrants; respect for gay people; food for the hungry and shelter for the homeless; and clean water, affordable housing, and better transportation for everyone.

What motivates him? Mainly a conscience “forged out of the Ten Commandments, the Bill of Rights, the Boy Scout oath, and the Marine Corps Hymn.”<sup>8</sup> Additionally, he is guided by the dictum of one of his judicial heroes, Chief Justice Earl Warren, who asked but one question when it came time to decide a case: “Very simple – ‘Is it fair?’ . . . That’s it. Our system has to be grounded in fairness.”<sup>9</sup>

At age eighty-three, Harry Pregerson is the nation’s oldest, active member of the United States Court of Appeals.<sup>10</sup> Long past the age when most of his contemporaries retired, or took senior status, he is almost as vigorous as the day in 1967 when President Johnson appointed him to the United States District Court for the Central District of California.<sup>11</sup> However, no other jurist comes close to having accomplished as much important work off the bench as on it.

Off the bench, Judge Pregerson has probably done more to address the problems of homelessness than any single person in the country. Thanks to Judge Pregerson’s work with the Salvation Army, U.S. Vets, the General Services Administration, the Veterans Administration, and dozens of other public and private partners, many homeless people in Los Angeles County can put a hot meal in their stomachs and a roof over their heads each night.<sup>12</sup> Almost from scratch, these groups built the Salvation Army Bell Shelter, converted from an old United States Army Air Base in the City of

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8. Patt Morrison, *Attack Will Test How Much We Believe in America*, L.A. TIMES, Sept. 12, 2001, at B3.

9. Jason Hoppin, *Judge Bucks Third-Strike Rules*, THE RECORDER, May 28, 2003, at 1 (quoting Judge Pregerson quoting Chief Justice Warren).

10. Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002).

11. Henry Weinstein, *Changed Lives Testify to Judge’s Compassion*, L.A. TIMES, Nov. 2, 2001, at B2.

12. See Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002) (discussing Judge Pregerson’s community involvement).

Bell (350 beds);<sup>13</sup> the Westside Residence Hall, operated by U.S. Vets in Inglewood (515 beds);<sup>14</sup> and the Westwood Transitional Village, operated by the Salvation Army, which assists whole families (40 units and 151 beds).<sup>15</sup> These facilities do not simply offer food and shelter, but services that give homeless men and women a chance to get back on their feet, to organize their lives, and to rejoin the community as productive citizens.<sup>16</sup> These services include case management, child care, on-site health care, mental health counseling, job training, substance abuse treatment, and when appropriate, financial assistance.<sup>17</sup>

On any given day, you can find Judge Pregerson lending his name to raise awareness of a wide variety of other charitable organizations, including after-school clubs for boys and girls, battered women's shelters, child care centers, scholarship programs for Latino law students, and assistance for veterans, just to name but a few.<sup>18</sup> Or you might also spot him cleaning lab instruments with his wife at Piece College, or buying textbooks for her pre-nursing students.<sup>19</sup> You might also find Judge Pregerson swearing in another crop of immigrants who have completed the naturalization process and are ready to pursue the American dream as United States citizens.<sup>20</sup> Certainly, Harry Pregerson is the only federal judge in the country to lend his name to a freeway interchange (where the Century 105 and Harbor 110 Freeways meet),<sup>21</sup> a wastewater treatment facility (at the Hyperion Sewage Treatment Plant near Playa del Rey),<sup>22</sup> and a day care center (in the Edward R. Roybal Federal Building downtown).<sup>23</sup>

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13. See The Salvation Army Bell Shelter, *supra* note 7 (fulfilling a key objective of the McKinney-Vento Homeless Assistance Act of 1987, Pub. L. No. 100-77, 101 Stat. 482 (codified at 42 U.S.C. §§ 11301-11489) (2000).

14. See U.S. Vets, <http://www.usvetsinc.org/locations/location.asp?id=4> (last visited Jan. 29, 2007) (describing the program and services offered).

15. See Los Angeles Homeless Services Authority, Westwood Transitional Village, <http://www.lahsa.org/contracts/transhousing/2005CDBG10.htm> (last visited Jan. 29, 2007).

16. See *supra* notes 13-14 (describing the services offered by each program).

17. See *supra* notes 13-14 (describing specific services offered by each program).

18. Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002).

19. See *supra* note 5 (showing Bernadine Pergerson's microbiology syllabus).

20. See James Ricci, *For New Citizens, It's Not the Party, It's the Drive That Got Them There*, L.A. TIMES MAG., Oct. 1, 2000, at 9 (describing swearing in ceremony for 900 new Americans – including 398 Mexicans, 5 Romanians, 67 Iranians, 2 Tongans, 79 Salvadorans, 10 Canadians, and many others – held at Montebello Golf Course's Quiet Cannon restaurant).

21. See Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002) (naming the state highway route 105 and 110 interchange the "Judge Harry Pregerson Interchange").

22. See Environmental Monitoring Division, Labs, <http://lacity.org/SAN/EMD/labs/index.htm> (last visited Jan. 29, 2007) (stating that the Harry Pregerson Technical Support Facility provides 78,000 square feet of laboratory space).

23. See U.S. General Services Administration, Pacific Rim (9) Child Care Centers,

Judge Pregerson's attitude can be infectious. "He inspires people to do good things[]," says one housing advocate.<sup>24</sup> He is a tremendous networker, which is an invaluable quality when he requisitions "turkeys, barber chairs, beds, treadmills or huge freezers for food storage," all items that can be found inside the walls built to house the aforementioned projects.<sup>25</sup>

On the bench, Judge Pregerson is the author of over 1,000 written opinions touching on every important subject in our society: civil rights, commercial law, criminal law, housing, labor and employment, the environment, transportation policy, and many others.<sup>26</sup> In some of his most important decisions, Judge Pregerson has held that:

- Aliens whose sexual orientation would subject them to violence in their homelands constitute a "particular social group" having "a well-founded fear of future persecution" entitling them to asylum in this country.<sup>27</sup>
- Rancho Los Amigos National Rehabilitation Center, which pioneered the use of the halo to support patients with head and neck injuries, should not be closed until accommodations could be made for disabled patients in accordance with the Americans With Disabilities Act.<sup>28</sup>
- El Segundo-based Unocal Corporation could be sued in federal court under the Alien Tort Claims Act for its role in aiding or abetting the military regime of Myanmar in the forced labor, murder, and rape of villagers during the construction of an overseas oil pipeline.<sup>29</sup>
- Expert opinion on Battered Women's Syndrome is admissible to overcome a now-reluctant victim's testimony that her injuries were self-inflicted.<sup>30</sup>
- UCLA's Corrine A. Seeds University Elementary School, in its role

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[http://www.gsa.gov/Portal/gsa/ep/contentView.do?P=PLCC&contentID=19635&contentType=GSA\\_OVERVIEW](http://www.gsa.gov/Portal/gsa/ep/contentView.do?P=PLCC&contentID=19635&contentType=GSA_OVERVIEW) (last visited Jan. 29, 2007) (listing various child care centers, including the Harry Pregerson Child Care Center).

24. Weinstein, *supra* note 11 (quoting Century Housing Corp. Development Director Ann Marie Hickambottom).

25. *Id.*

26. *See infra* notes 27-34 (describing Judge Pregerson's various opinions).

27. Karouni v. Gonzales, 399 F.3d 1163, 1172-78 (9th Cir. 2005).

28. Rodde v. Bonta, 357 F.3d 988, 990 (9th Cir. 2004).

29. Doe I v. Unocal Corp., 395 F.3d 932, 953-56 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *vacated and dismissed*, 403 F.3d 708 (9th Cir. 2005). Although Judge Pregerson's panel opinion was vacated by the Ninth Circuit on rehearing *en banc*, a Los Angeles County Superior Court judge, adopting the spirit of his reasoning, permitted a parallel suit to go forward under California's anti-slavery law. *See* Leslie Simmons, *Unocal Must Defend Slave Suit Under State Law, Court Rules*. L.A. DAILY J., Aug. 1, 2003, at 1.

30. Dillard v. Roe, 244 F.3d 758, 766-67 (9th Cir. 2001).

as an educational research laboratory devoted to studying the state's changing demographic makeup, may rely on race and ethnic data to admit a diverse study body.<sup>31</sup>

- A Los Angeles resident who as a young girl survived the Holocaust by being smuggled out of Poland in a coffin, but who continued to suffer serious psychological trauma, is entitled to receive Social Security disability payments even though she is receiving modest reparations from the Federal Republic of Germany.<sup>32</sup>

- The National Football League violated federal antitrust laws and should be enjoined from trying to prevent the Oakland Raiders from becoming the Los Angeles Raiders and taking up tenancy in the Los Angeles Coliseum – which they later did (before, of course, later moving back to Oakland).<sup>33</sup>

- The City of Los Angeles should be permitted to go forward with ambitious plans to build the world's most advanced sewage disposal system – by subjecting wastewater effluent to secondary treatment and reducing the discharge of sludge into Santa Monica Bay – over objections by a conservative public interest organization that those plans would cost too much.<sup>34</sup>

Despite Judge Pregerson's voluminous legal decisions, it is his work off the bench, when Judge Pregerson trades in his black robe for his signature cowboy hat and boots, that has transformed him into the Real Mayor of Los Angeles. Unlike elected mayors, His Honor serves without term limits. It was not a job he asked for; instead, the job asked for him.

It really started in 1972, when Judge Pregerson issued an injunction to halt construction of the Century Freeway until state and federal officials complied with the National Environmental Policy Act.<sup>35</sup> The lawsuit was brought by the mostly black and poor residents of the south Los Angeles neighborhoods of Watts and Willowbrook.<sup>36</sup> When Caltrans tried to seize

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31. Hunter *ex rel.* Brandt v. Regents of the Univ. of Cal., 190 F.3d 1061, 1062-63 (9th Cir. 1999).

32. Grunfeder v. Heckler, 748 F.2d 503, 504 (9th Cir. 1984).

33. L.A. Mem'l Coliseum Comm'n v. NFL, 484 F. Supp. 1274 (C.D. Cal. 1980) (granting preliminary injunction). Although the order granting a preliminary injunction was reversed, 634 F. 2d 1197, 1198 (9th Cir. 1980), Judge Pregerson's entry of judgment on the jury's eventual verdict favoring the Raiders – together with related rulings rejecting both the defendants' "single entity" defense and their motion to transfer venue – was upheld, 726 F.2d 1381, 1384 (9th Cir. 1984).

34. Pac. Legal Found. v. Quarles, 440 F. Supp. 316, 319-20 (C.D. Cal. 1977), *aff'd*, 614 F.2d 225, 226 (9th Cir.), *cert. denied*, 449 U.S. 825 (1980).

35. Keith v. Volpe, 352 F. Supp. 1324, 1328 (C.D. Cal. 1972), *aff'd*, 506 F. 2d 696, 698 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).

36. Volpe, 352 F. Supp. at 1328.

their homes to build what is now the 17.3-mile Century 105 Freeway, they refused to give up their community without a fight.<sup>37</sup> These soon to be displaced residents wanted affordable replacement housing and relocation assistance.<sup>38</sup> For this reason, they sued federal and state officials for not complying with various environmental impact laws.<sup>39</sup>

Most judges would have avoided the headaches that followed, either by leaving the parties to sort out the environmental issues on their own, or by dismissing the lawsuit altogether. But Judge Pregerson saw and seized the opportunity to address the larger social implications of a massive public works project, one which would eventually cost \$2.2 billion.<sup>40</sup> Why, he wondered, shouldn't the freeway corridor in traffic-snarled Los Angeles include a rail line for public transportation? Or a carpool lane to reduce smog? And why shouldn't some of the lucrative government contracts and high-paying jobs that it would take to build the project go to the people who actually live there? And for that matter, why shouldn't their children have day care while their parents were at work?

These questions lead to the construction of what he called "the freeway with a heart."<sup>41</sup> Thanks to the influence of Judge Pregerson, California's Department of Transportation (Caltrans) was persuaded to substitute a six- to eight-lane freeway for the traditional 10-lane superhighway that was originally planned.<sup>42</sup> The project resulted in much more than a freeway, including:

- Replacement of 3,000 demolished single-family residences with more than 4,300 affordable homes.<sup>43</sup>
- Creation of the non-profit Century Housing Corporation, which in the decade since the freeway opened, has built 8,400 more housing units, for a total of 12,700 homes.<sup>44</sup>

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37. *Id.* at 1328-29.

38. *Id.* at 1342.

39. *Id.* at 1328-39.

40. See Eddie North-Hager, *Judge Stayed With 105 Project for the Long Haul*, DAILY BREEZE, Dec. 11, 2005, at A4 (stating that the 17.3 miles of freeway cost \$127.2 million per mile to build).

41. See generally Dean W. Hestermann et al., *Public Works, the Courts, and the Consent Decree: Environmental and Social Effects of the "Freeway With a Heart"*, UNIV. OF CAL. TRANSP. CTR., <http://www.uctc.net/papers/348.pdf> (discussing the transportation planning issues addressed in building the Century Freeway).

42. *Id.*

43. Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002).

44. *Id.* Once consent decree goals were achieved, Judge Pregerson authorized Century Housing Corp. to build affordable housing units – including the 8,400 additional units built so far – outside the immediate corridor area. See *Keith v. Volpe*, 960 F. Supp. 1448, 1467-69 (C.D. Cal. 1997).

- Addition of the area's first, light-rail public transportation in the freeway median.<sup>45</sup>
- Addition of a high-occupancy vehicle lane for car and van-pools.
- Establishment of a construction industry apprenticeship program, which has trained and placed more than 4,800 people in construction jobs, including hundreds of women.<sup>46</sup>
- Awarding of substantial portions construction work to minority (65%) and female employees (7%), for a total of \$836 million in contract work (38% of all contracts award).
- Establishment of nine child care centers for commuters, freeway workers, and others.<sup>47</sup>

To be sure, Judge Pregerson did not unilaterally order that these things be done. Instead, he persuaded representatives for corridor residents, Caltrans, and other state and federal highway officials to agree to do them. It took about seven years of managing consent decree negotiations, and another twenty years of construction supervision, to get the job done.

Only a handful of public officials in this town could ever dream of persuading so contentious a group to sign onto such a deal. Mayor Villaraigosa might have pulled it off, but during the 1970s, when the job had to be done, he was still attending UCLA.<sup>48</sup> In those days, only His Honor Harry Pregerson could do it.

Henry Lozano, longtime aide to the late Congressman Ed Roybal and his successor Xavier Becerra, said it best. He once told me he had tried to persuade Harry to run for mayor – the elected position with an office in City Hall. When I asked why, Lozano said, “Because Harry’s a man of conscience. Because he gets things done. Because he’s a hard man to say no to.”<sup>49</sup>

Not everyone has praised Harry Pregerson for doing what he thought was the right thing, or for being a hard man to say no to. As the views of my colleague Professor Jim Kushner suggest, Judge Pregerson has had his

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45. Interstate 105 California, [http://www.interstate-guide.com/i-105\\_ca.html](http://www.interstate-guide.com/i-105_ca.html) (last visited Jan. 29, 2007).

46. Weinstein, *supra* note 11, at B2.

47. See U.S. General Services Administration, Pacific Rim (9) Child Care Centers, [http://www.gsa.gov/Portal/gsa/ep/contentView.do?P=PLCC&contentID=19635&contentType=GSA\\_OVERVIEW](http://www.gsa.gov/Portal/gsa/ep/contentView.do?P=PLCC&contentID=19635&contentType=GSA_OVERVIEW) (last visited Jan. 29, 2007) (listing various child care centers, including the Harry Pregerson Child Care Center).

48. Singh, *supra* note 2, available at [http://www.magazine.ucla.edu/features/education\\_of\\_major](http://www.magazine.ucla.edu/features/education_of_major) (describing the education and career of Antonio Villaraigosa).

49. See Weinstein, *supra* note 11, at B2 (quoting Salvation Army Bell Shelter Director Robert Freedman as saying, “People find it hard to say no to the judge[.]”).



share of critics.<sup>50</sup> But to his credit, he neither hid his motives before he acted, nor was he deterred by the criticism that came afterward, either in the freeway case, or in his other work.

In 1979, after twelve years as a federal district judge, Judge Pregerson was nominated by President Carter for a seat on the Ninth Circuit.<sup>51</sup> Like all candidates for the federal appellate bench, he sat before a panel of senators to answer their questions. However, in the midst of this typical exchange, something unusual happened. The nominee, Judge Pregerson, was asked what he would do if presented with a conflict between the law and his conscience, and he gave an honest answer by stating, “I would follow my conscience”.<sup>52</sup> Shortly thereafter, he was confirmed and took his seat on the United States Court of Appeals for the Ninth Circuit, the nation’s largest federal appellate court.

Almost twenty-four years after answering that question, for doing exactly what he had promised, Judge Pregerson was attacked in an op-ed piece published in the Los Angeles Times.<sup>53</sup> The reason? He refused to join a series of Ninth Circuit opinions denying appeals by three men who were sentenced to spend 25 years to life in prison following third-strike convictions for petty theft and other non-violent offenses.<sup>54</sup> One of those men, Larry Wallace, faced the possibility of life imprisonment for the third-strike offense of stealing a \$130 television set from a Lake Elsinore Wal-Mart.<sup>55</sup> As Judge Pregerson explained to one legal newspaper:

I think the Three Strikes law should only be applied to a defendant whose criminal history, including his last offense, demonstrates that he needs to be taken off the streets because he poses a realistic threat to the health and safety of the community. There are cases where a long term in prison is justified and cases where it is not.<sup>56</sup>

For this statement, Judge Pregerson was practically accused of treason.

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50. See James A. Kushner, *The Unintended Consequences of Consent Decrees and the Case of The Century Freeway Litigation: Keith v. Volpe*, 36 SW. U. L. REV. (2007) (describing the problems surrounding Judge Pregerson’s decisions in the litigation of The Century Freeway).

51. Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002).

52. Hugh Hewitt, *The Law’s Conscience: How Judge Harry Pregerson of California’s 9th Circuit Rules With His Heart Instead of His Head*, WKLY. STANDARD, Sept. 26, 2003 (quoting transcript, including questions by Sen. Alan Simpson, R-Wyo.).

53. Howard J. Bashman, ‘Conscience’ Is No Cause for Judges to Flout Laws, L.A. TIMES, June 1, 2003, at M5.

54. See *Wallace v. Castro*, No. 00-16993, 2003 U.S. App. LEXIS 9719, at \*4 (9th Cir. May 19, 2003) (Pregerson, J., dissenting); *Rico v. Terhune*, No. 01-56692, 2003 U.S. App. LEXIS 9739, at \*3 (9th Cir. May 19, 2003) (Pregerson, J., dissenting); *Turner v. Candelaria*, No. 00-15606, 2003 U.S. App. LEXIS 9735, at \*3 (9th Cir. May 19, 2003) (Pregerson, J., dissenting).

55. *Wallace*, 2003 U.S. App. LEXIS 9719, at \*4 (Pregerson, J., dissenting).

56. Hoppin, *supra* note 9.

A few months later, for authoring a panel opinion that the upcoming October 2003 election to recall Governor Gray Davis should be postponed,<sup>57</sup> at least until state officials could address the potential unfairness posed by the continued use of the type of punch-card voting that had caused so much trouble in Florida during the 2000 presidential election,<sup>58</sup> he was attacked on national television. On CNN's "Capital Gang," commentator Robert Novak called the decision "terrible" and claimed, inaccurately, that Judge Pregerson "is one of the most reversed appellate judges in America."<sup>59</sup> The attack was odd because although Judge Pregerson was a member of the three-judge panel, he didn't author the decision; it was a per curiam, or unsigned, opinion.<sup>60</sup> But the panel was indeed reversed a few weeks later following rehearing en banc by an eleven member panel of the Ninth Circuit.<sup>61</sup>

Paling in comparison to these attacks are Jim Kushner's misgivings about the Century Freeway project. Although the actions taken were "creative, heroic, and well-intentioned," Professor Kushner says Judge Pregerson mistakenly relied on consent decree litigation to carry out those actions.<sup>62</sup> He writes:

On a substantive level, consent decrees present three major problems. First, the parties and the court may ignore unresolved substantive obligations. In this case, the parties too narrowly defined the lawsuit and excluded consideration of a requirement for environmental planning. Second, the settlement may fail to effectively remedy the stipulated violation. Third, the decree may be constructed according to the goals of the parties and fail to meet the needs of stakeholders not invited to participate.<sup>63</sup>

These criticisms remind me of the story about the two elderly ladies who went to lunch. After the meal arrived, the first lady said, "The food here is terrible." And the second replied, "Yes, and such small portions!"

Although it is unclear whether Jim Kushner is upset about the freeway being built, or about if its benefits were too few, this much *is* clear: there is not much substance to the argument that "the parties too narrowly defined

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57. See *Sw. Voter Educ. Reg. Project v. Shelley*, 344 F.3d 882, 887-88 (9th Cir. 2003) (per curiam), *rev'd en banc*, 344 F.3d 914, 916 (9th Cir. 2003).

58. See generally *Bush v. Gore*, 531 U.S. 98 (2000).

59. Rush Transcript of *Capital Gang* (Cable News Network television broadcast Sept. 20, 2003), <http://transcripts.cnn.com/TRANSCRIPTS/0309/20/cg.00.html>.

60. See *Shelley*, 344 F.3d at 888 (per curiam), *rev'd en banc*, 344 F.3d 914 (9th Cir. 2003) (stating that the case was only before Judge Pregerson).

61. *Shelley*, 344 F.3d at 914.

62. Kushner, *supra* note 50, at p. 16.

63. *Id.* at p. 15-16.

the lawsuit and excluded consideration of a requirement for environmental planning.”<sup>64</sup> If anything, the consent decree, as implemented, defined the landscape broadly, and it kept getting bigger. As for environmental planning, if building 4,300 replacement homes, creating a non-profit to build 8,400 more, putting in the area’s first light rail line, adding a carpool lane, setting up affirmative action and training programs for high-wage construction jobs, and establishing child care centers isn’t good environmental planning, I do not know what is.<sup>65</sup> Certainly, with the benefit of hindsight, it’s hard to say our community would have been better off without all these things.

On an average day, over thousands of drivers traverse the Century Freeway without realizing that the “freeway with a heart” is the lasting legacy of the Real Mayor of Los Angeles. But that is okay with Harry Pregerson. He has already put on his cowboy hat and boots, rolled up his sleeves, and prepared to tackle his next project to make our lives better.

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64. *Id.* at p. 15.

65. *See supra* notes 43-49 (describing the various benefits of the freeway development).