VOLUME 5: 2010

# California Legal History

Journal of the
California Supreme Court
Historical Society

# California Legal History

VOLUME 5

2010

Journal of the
California Supreme Court
Historical Society

*California Legal History* is published annually by the California Supreme Court Historical Society, a non-profit corporation dedicated to recovering, preserving, and promoting California's legal and judicial history, with particular emphasis on the California Supreme Court.

## SUBSCRIPTION INFORMATION:

Membership in the Society is open to individuals at the rate of $50 or more per year, which includes the journal as a member benefit. For individual membership, please visit www.cschs.org, or contact the Society at (800) 353-7357 or 4747 North First Street, Fresno, CA 93726.

Libraries may subscribe at the same rate through William S. Hein & Co. Please visit http://www.wshein.com or telephone (800) 828-7571.

Back issues are available to individuals and libraries through William S. Hein & Co. at http://www.wshein.com or (800) 828-7571. Please note that issues prior to 2006 were published as *California Supreme Court Historical Society Yearbook*. (4 vols., 1994 to 1998–1999).

## SUBMISSION INFORMATION:

Submissions of articles and book reviews are welcome on any aspect of California legal history, broadly construed. Unsolicited manuscripts are welcome as are prior inquiries. Submissions are reviewed by independent scholarly referees.

In recognition of the hybrid nature of legal history, manuscripts will be accepted in both standard legal style (Bluebook) or standard academic style (Chicago Manual). Citations of cases and law review articles should generally be in Bluebook style. Manuscripts should be sent by email as MS Word or WordPerfect files.

Submissions and other editorial correspondence should be addressed to:

Selma Moidel Smith, Esq.
Editor-in-Chief, *California Legal History*
Telephone: (818) 345-9922
Email: smsth@aol.com


ISSN:1930-4943

*California Legal History* is indexed in *The Index to Legal Periodicals*.

Design and Production: E. M. Holland

Cover Photo: Chief Justice Phil. S. Gibson. *Courtesy California Judicial Center Library.*

# EDITORIAL BOARD

# TABLE OF CONTENTS

## ORAL HISTORY I



## ORAL HISTORY II



## ORAL HISTORY REVISITED



CONTINUED ON NEXT PAGE

## ARTICLES



## BOOKS

## BOOKS, CONTINUED

# ORAL HISTORY I

# PHIL S. GIBSON

## CHIEF JUSTICE OF CALIFORNIA
## (1940–1964)

*Oral History of*

# CHIEF JUSTICE PHIL S. GIBSON

## INTRODUCTION

JOSEPH R. GRODIN*

When I first saw the chief justice's chambers at the California Supreme Court, someone — it may have been Chief Justice Bird — pointed to an indentation in the ceiling tile and said it was caused by the cork from a champagne bottle opened by Chief Justice Phil Gibson, then age 70, in celebration of the birth of his son Blaine. Somehow that image captured for me the spirit of a man whom I had come to admire and respect — a spirit that combined enormous dedication and *gravitas* with a perennial youthfulness and ebullience and (the consumption of alcoholic beverages inside the State Building being a bit questionable) just a touch of irreverence.

Phil Gibson was appointed to the Supreme Court by Governor Olson in 1939. I think it is fair to say that his appointment, along with that of Jesse Carter earlier in the year and of Roger Traynor the year following, marked the transformation of the California Supreme Court from mediocrity to excellence, and its emergence as one of the preeminent courts in the nation. In large part this was the product of what turned out to be Gibson's genius for judicial administration, and his extraordinary accomplishments

* Associate Justice of the California Supreme Court, 1982–87; Professor of Law, UC Hastings College of the Law.

*Oral History of*

# CHIEF JUSTICE PHIL S. GIBSON

## TABLE OF CONTENTS

## INTERVIEW HISTORY[1]

The Regional Oral History Office sought to interview the Honorable Phil S. Gibson for the Knight-Brown Era Oral History Project with some trepidation, due to a layman's hesitation about imposing on the dignity of the state Supreme Court and because we had heard that he preferred not to be disturbed in his retirement. Although he pleaded ignorance of politics due to his years on the bench, Chief Justice Gibson was cordial in inviting the interviewer to his home to discuss general observations on his years in state service (1939–1964).

Age 88 at the time of the interview (May 12, 1977), Gibson was of medium height and build, white-haired, and well-tailored. Seated in his pleasant living room overlooking the Carmel Valley, he chatted a while to test the interviewer's questions and intent and then agreed to record some of his personal recollections of California governors from Frank Merriam to Jerry Brown.

What emerges is an informal portrait of a man who was appointed to what many feel is the number two spot in state government, director of Finance, after brief and almost casual acquaintance with Governor Culbert Olson, who shortly thereafter appointed him an associate justice and then chief justice of the state Supreme Court. With remarkable objectivity, Gibson skips over highly political events, mentioning instead lasting administrative reforms he introduced, based on his business and legal experience.

During the 1950s and '60s, Gibson's insistence on improvements in procedures for judicial qualifications review, assignment of judges, and getting cases through the courts are credited by knowledgeable observers with setting standards for the nation. They may, indeed, have provided guidelines later followed by fellow Californian Earl Warren as chief justice for the U.S. Supreme Court.

---

[1] Editor's Note: The oral history is printed by permission of The Bancroft Library at UC Berkeley. It is presented here in its entirety, and it has been reedited for publication. The original transcript is a portion of "Governmental History Documentation Project : Goodwin Knight / Edmund Brown, Sr. Era : California Constitutional Officers : Phil S. Gibson, 'Recollections of a Chief Justice of the California Supreme Court,' an Interview Conducted by Gabrielle Morris in 1977: oral history transcript and related material, 1977–1980" and may be viewed at the Library or online at http://www.archive.org/details/caliconstitutoff00morrrich.

In the interview Gibson also refers briefly to the close working relationship between attorneys general and chief justices and acknowledges that upon occasion governors confer with a chief justice about judicial appointments. There must be many occasions on which those seeking to govern well would seek the benefit of the experience and wisdom of the state's highest court.

The interview concludes with useful brief summaries of governors Gibson has known. Although the fullest comments are on Culbert Olson and Pat Brown, there are also useful insights on Earl Warren and Goodwin Knight. It is hoped that at a later date Chief Justice Gibson will discuss some cases of importance that came before the Supreme Court in his day.

— GABRIELLE MORRIS, INTERVIEWER

*Regional Oral History Office, July 15, 1977*
*The Bancroft Library*
*University of California, Berkeley*

## FROM MISSOURI TO LOS ANGELES

MORRIS: I was asking why you decided to come to California and how you got interested in government and public service.

GIBSON: Do you want a little background?

MORRIS: Yes, please.

GIBSON: I was born in Grant City, Missouri, a small town, 1,400 people in the northwestern part of the state near St. Joe. My father was a lawyer. He was born in Indiana, served in the Union army in the Civil War, came to Missouri from Indiana, had a small newspaper. He had a good education. He was educated in Indiana. He had six daughters by his first wife. She died. He married my mother while some of those girls in his first family were still in the house. My mother brought up some of them and then she had five children, three boys and two girls.

MORRIS: Was your mother also a Missouri girl born and raised?

GIBSON: Well, she was born in Missouri, but her childhood after the Civil War was spent in Mississippi. She came back to Missouri. She had little education, very little. She educated herself. My father was supposed to be a rather prominent man in that area; I think she was smarter than he was.

MORRIS: How did she go about educating herself?

GIBSON: Reading.

MORRIS: Would she help him with the newspaper at all?

GIBSON: No, he didn't have the newspaper then. I think he owned part of it, but he never had anything to do with it. He had a farm, and the law office — quite successful. His three boys all graduated from the University of Missouri, myself and my two brothers.

MORRIS: Were you the oldest?

GIBSON: No. The oldest became a lawyer and a very successful one. My younger brother, Blaine, studied journalism, became a newspaperman. He was the editor of the Pasadena paper when he died. He died quite young of Hodgkin's disease. He died in his early 30s. Our son, Blaine, now 20, who is a student at the University of Bordeaux, is named after my brother.

MORRIS: He accomplished a lot in that short time.

GIBSON: Yes, he did, a great deal. I graduated from the University of Missouri in 1914. I went to my home town and ran for prosecuting attorney, and was elected.

MORRIS: Before you'd been to law school?

GIBSON: No, just after I graduated from law school. Then the war came. I went to the first officer's training camp and was kicked out because I couldn't pass the physical examination. I enlisted in the National Guard in Kansas City, the same outfit as Harry Truman.

MORRIS: I was thinking about that driving down. It really was the same unit?

GIBSON: Yes.

MORRIS: That's marvelous.

GIBSON: Except he was in the artillery and I was in the infantry. I saw very little of him. Of course, I was soon commissioned and sent to France. I served for a time with the British, and then was returned to my old outfit.

It was the old 35th Division that Truman was in; but I didn't see much of him. Saw him a time or two. One of my schoolmates at the University of Missouri was Bennett Clark, the son of Champ Clark who had a great deal to do with Harry Truman's political career. Another one was Tuck Milligan, Jacob Milligan nicknamed Tuck, who also had a great deal to do with Truman's political career. Both of them served in France in the 35th Division; Milligan was a congressman and ran against Truman in the Democratic primary nomination for senator. Truman beat him. Clark was then a senator.

MORRIS: Yes, and early in the century hadn't he been a candidate for the Democratic presidential nomination?

GIBSON: His father had, Champ.

MORRIS: Champ was who I was thinking of.

GIBSON: Champ Clark ran against Wilson. Bryan helped Wilson at a critical point or Champ Clark would have probably been nominated. Charles Evans Hughes won the Republican nomination, but he was defeated because he didn't carry California. He didn't carry California because Hiram Johnson didn't give him the support that he should have. Wilson was elected.

# PHIL GIBSON:

*Conversation with Edward L. Lascher*

## EDITOR'S NOTE

Phil S. Gibson (1888–1984) was appointed to the California Supreme Court in 1939 by Governor Culbert Olson and served as chief justice from 1940 until his retirement in 1964. He was interviewed in 1973 by the well-known attorney and legal columnist Edward L. Lascher. The interview was intended for publication in the *California State Bar Journal*, but it did not appear. This was explained by Lascher at the time of Gibson's death in 1984:

> The legal world, as well it should, mourned the passing of Chief Justice Phil Gibson last month. The encomiums regarding his matchless impact on the California judicial scene were less than adequate for such an incandescent life and person. Despite enormous respect for his achievements, however, my favorite picture is not of a judge in a robe, but of a host in an easy chair in a gracious Carmel home, plying my secretary, Hilda, and me with better champagne than our palates deserved and discoursing on how the juice of the grape was obtained during Prohibition, not to mention the merits of the various cheeses and caviars we were downing.

> We had gone to do an interview for a special issue of the late, lamented State Bar *Journal*. We got a witty, candid, wide ranging commentary on four decades of California legal history and personalities, from the perspective of someone who not only had the best of all views, but also applied the "Show Me" mindset of his native state. Everything was gentle, kind, modest — and incredibly perceptive and penetrating.
>
> The two hours were more than enough to add enormous fondness to my preexisting admiration — and to make Hilda an unabashed cheerleader for that gentleman. They also produced a priceless text which would have been the most informative, original and avidly read thing regarding courts, judges and lawyers to appear in a month of blue-mooned Sundays — because of what he had to say, obviously, not any contribution by the interviewer.
>
> How come you never read it? As agreed in advance, I sent a draft and, a few days later, got a call. "I don't want you to print it at all, Ed."
>
> Why? "Those are just the ramblings of an old man. Nobody wants to hear about that stuff nowadays. You should be writing about today, not bothering with reminiscences." That was tantamount to Einstein's telling an interviewer nobody would be interested in hearing about some penny ante theories. But he was adamant, and I had made a deal, so it never saw light of day, anywhere, and I was even more in awe.[1]

The interview did finally see the light of day in 2006, when it appeared for the first time in the Newsletter of the California Supreme Court Historical Society.[2]

As prepared for publication by Lascher, the interview opens with a brief introduction, followed by questions and answers. It will be noted that the first "answer" by Gibson continues an ongoing conversation. The

---

[1] Edward L. Lascher, "Lascher at Large — The Untold Story: A Priceless Interview with the Chief; Jurist Phil Gibson, in Two-Hour Session, Left a Lasting Impression," *Los Angeles Daily Journal* (June 6, 1984).

[2] Edward L. Lascher, "An Interview with Phil Gibson," *California Supreme Court Historical Society Newsletter* (Autumn/Winter 2006), 1, 8-14 (by permission of Wendy C. Lascher). The year of the interview was stated there incorrectly as 1963.

interview appears to have begun with a discussion of Lascher's work in the field of appellate practice, in which he was an early specialist. The published portion of the interview then turns to Gibson's observations about appellate practice in general and to his career on the Court. The interview is reprinted here in full.

— SELMA MOIDEL SMITH

# PHIL GIBSON:

## *Conversation with Edward L. Lascher*

## INTRODUCTION

EDWARD L. LASCHER

During his introduction to the second edition of his much-noted *California Courts and Judges Handbook,* lawyer-author Kenneth James Arnolds observed:

> Among the giants who loom large in recent history is a remarkable man who spent a quarter of a century on the California Supreme Court — 24 years as chief justice. Judicial reform was his personal crusade. He was the driving force of the court reorganization program. He fathered pre-trial procedure and non-publication of judicial opinions. He regenerated the Judicial Council and improved the administration of justice in countless ways. His long and fervent advocacy of penal reform is hopefully nearing fruition. Judged by his accomplishments, he must be 208 years old; judged by his vigor, Phil S. Gibson may outlive us all.[3]

[3] Kenneth James Arnolds, *California Courts and Judges Handbook* (San Francisco: Law Book Service Co., 2nd ed., 1973), xxxiv.

True words, indeed, about the man who personified the title: "The Chief." In view of current interest in judicial reform, particularly at the level where Chief Justice Gibson's impact was most immediately felt, the State Bar *Journal* sought his views on some aspects of the contemporary appellate scene.

The Chief's response to our request for an interview was negative, for a characteristic reason: "Nobody wants to hear what I've got to say; talk to those who are on the scene." Perhaps the *Journal* never convinced him, but we did wear down his resistance, and our interviewer spent as delightful a mid-day as one is likely to encounter, chatting with The Chief and the vivacious Mrs. Gibson (herself a lawyer) in their lovely Carmel home. It provided a heady brew of good company, good conversation, pointed insight, vintage anecdote and fine Champagne — all of it too much for the recollective and reportorial capacities of an awed lawyer. The *Journal* must, therefore, apologize for the shortcomings of its recounting of the provocative and evocative conversation.

## CONVERSATION

GIBSON: Well, it certainly is an important subject you're working on, something I'm glad to see people thinking about. It takes real talent and effort to do a good job of handling an appeal.

LASCHER: I think there are a lot of us who think that if you're a good trial lawyer, you're automatically going to be a good appellate lawyer.

GIBSON: No, that's not true. You take Jerry Giesler, for example. He was one of the best trial lawyers I ever knew, specialized in criminal practice and studied the whole law, but he wasn't an outstanding appellate lawyer. He didn't present his points on appeal nearly as well as he did in trial practice.

One of the best appellate lawyers in my experience, in the criminal field, was a deputy attorney general in Los Angeles some years ago. He was particularly good in oral argument. He never tried to kid the court; he laid it right on the line. If the case was against him, he said so; if he thought it could be distinguished, he tried to distinguish it, and if he didn't do that, he said it should be overruled because it was wrong — and he told us why.

# REMEMBERING CHIEF JUSTICE GIBSON

ELLIS HORVITZ*

It is nearly 60 years since I was a law clerk for Chief Justice Gibson, but my memories of the Chief remain as strong as if it had been yesterday. In this brief note, I would like to recall some memories of the Chief as teacher and friend.

I still remember our first working conference. I was quite unprepared for the Chief's robust critique. As I left the meeting with Vicki Glennon, the senior staff attorney who mentored my first effort (later Mrs. Gibson), she said cheerfully, "That was a wonderful meeting. He likes you." I don't recall if I said it or only thought it, but I wondered what it would have been like if he hadn't liked me. I soon learned this was the Chief's teaching style. It was my good fortune to experience it.

From the first day, he set the bar high. Praise was measured. There was no room for complacency. In short, he provided a master class in judicial analysis and clear writing. I didn't know it then, but the relatively short time I worked for the Chief, less than two years, would determine the course of my career as an appellate lawyer.

---

* The author was one of Chief Justice Gibson's law clerks from 1951 to 1953. This article is an expanded version of his "A Personal Note," *California Law Review* 72:4 (1984), 503-505.

# ORAL HISTORY II

# JUSTICE MILDRED L. LILLIE

## CALIFORNIA COURT OF APPEAL (1958–2002)

*Oral History of*

# JUSTICE MILDRED L. LILLIE

## INTRODUCTION

EARL JOHNSON, JR.*

When Justice Lillie completed the oral history below, she still had another dozen years of life and service to the California legal community ahead of her. As someone who worked closely with her for that dozen years (as well as a half dozen years before that), the most useful thing I probably can do is cover some of the highlights of her life after the interview and also convey what it was like to be a member of the appellate division she headed.

But before I move on to the years after those Justice Lillie spoke of in her interview, I will begin with an event that happened years earlier that had a profound influence on her life, but which she had no way of knowing and hence wasn't mentioned in her oral history. It happened in 1984 when Division Seven was just in its second year of operation. The first presiding justice, Richard Schauer, had announced he was retiring from the judiciary. This meant Justice Leon Thompson and I, both of us selected by Governor Jerry Brown, were facing the prospect of working under a new P.J., one selected by Republican governor George Deukmejian. It didn't take us

* Associate Justice (ret.), California Court of Appeal, Second Appellate District, Division Seven.

*Oral History of*

# JUSTICE MILDRED L. LILLIE

CALIFORNIA COURT OF APPEAL

## EDITOR'S NOTE

The oral history of Justice Lillie was recorded by attorney Mary Louise Blackstone of the former State Bar Committee on History of Law in California, in two sessions: November 20, 1989, and July 26, 1990, in which she taped and later transcribed the narrative presented by Justice Lillie.

The provenance of the oral history is provided by Carol Hicke of the Regional Oral History Office (ROHO) at The Bancroft Library, UC Berkeley, in a prefatory note dated December 5, 1997: "In 1991, the interviewer gave a copy of the transcript and tapes to The Bancroft Library. . . . The Bancroft Library sent the transcript and tapes to the Regional Oral History Office. I sent a copy to Justice Lillie and asked her to review it, which she did, making a few minor corrections."

The oral history is presented here in its entirety, incorporating Justice Lillie's corrections, and reedited for publication. It is printed by permission of the State Bar of California. The original transcript may be viewed at the Library or online at http://digitalassets.lib.berkeley.edu/roho/ucb/text/lillie_mildred.pdf (last visited Dec. 1, 2010).

— SELMA MOIDEL SMITH

# TABLE OF CONTENTS

## HUSBAND: A.V. FALCONE

My immediate family consists of my husband, A.V. Falcone, who is a lawyer. We were married in 1966. My husband has two adult children who have families of their own; I have no children.

My husband is a fine lawyer. He is by far the best lawyer I know. Prior to our marriage, he appeared before me on numerous occasions when I was on the municipal and superior courts, so I know his ability. I also know his knowledge, experience, intellect and dedication to the law and to justice. He is one of the few lawyers who, in his case is adequately prepared on the facts and on the law. There is no question you could ever ask him about his case to which he would not know the answer. He has a running knowledge of civil and criminal law, which is due primarily to his phenomenal memory, the fact that he reads constantly, his long experience and his active practice. He presently [November 20, 1989] is involved in filing a petition for certiorari in the United States Supreme Court. He is very tenacious and fights for the rights of his client. He is also a person who projects well and speaks well. He participated in a great many landmark cases. One case involved a boundary dispute, *Daluiso v. Boone*, and the California Supreme Court established that there was no self-help in California. He represented a man who had been approached by four men on horseback who had shotguns at their, sides. They claimed his fence went over the boundary line; and when the client refused to move it, they tore down the fence. My husband sued on his behalf and prevailed. Another case was *Los Angeles v. Frew* wherein, through the Supreme Court, he established that an owner of property had a right to testify to the value of that property. *Aetna v. West*, was a case wherein an employee had quit his job and the customers followed the employee; the plaintiff ran a janitorial service. My husband was able to establish for his client, the employee, that as long as it's fair, the employee can accept former customers of the employer — that is, if it's done fairly and the employee doesn't go out and solicit. He established the doctrine that it is unfair competition that is illegal, not fair competition. And there are a variety of others. I am very proud of him.

I like to talk to him about the law, but we have an agreement: he doesn't tell me anything about his cases and I don't tell him anything about mine. So unless it's a general rule of law or issue or a publicized matter, we do not

discuss the law. I remember one time he was in superior court and between the time the court took his case under submission and he returned for the court's decision, I had filed an opinion that was not in his favor. The attorney on the other side could hardly wait to advise the court, "Your Honor, his wife just wrote an opinion . . ." and when I got home, I heard about that. He didn't lose the case, however, because he was able, after a short recess, to distinguish his case.

He is a well-adjusted person who is very, very supportive of me. He is loyal, considerate and understanding and, am I lucky! He says I can do anything, and he has given me a tremendous feeling of self-confidence. He has convinced me I can do whatever I want to do, and has encouraged and helped me. For example, when we were married in 1966, I continued to sign my name "Mildred L. Lillie." It was before the days when a woman retained her maiden name. He said, "You know, I think that I should change your name to 'Mildred L. Lillie' and, further, legally. Because you have to run for retention, and the public knows you as Mildred Lillie, I think to avoid any question about whether it is your legal name on the ballot, we should change it." So, he filed a petition in superior court for change of name. And the judge who heard it was Jackie Weiss. Notices were published in the *Daily Journal*. There was no objection. It was interesting because just prior to that time, Ivy Baker Priest had remarried and was running for State Treasurer. She wanted to change her name to Ivy Baker Priest for the ballot. So she did the same thing, but I think there was some objection voiced to her change of name. But, I had no problem, and so my name was changed legally to Mildred L. Lillie.

## BIRTH, CHILDHOOD, AND FAMILY, 1915-31

My maiden name was Kluckhohn; my father's family came from Germany. The family originally was named von Kluckhohn, but there was a schism in the family and one branch stayed where they were and my father's branch came to America and dropped the "von" and became known as Kluckhohn. The other branch of the family changed its name to von Kluck and produced the General von Kluck of World War I fame.

I have only been to Germany once, but I was there in such a hurry that I was unable to try to go back and see who my antecedents were. I hope

# ORAL HISTORY REVISITED

# JUSTICE JESSE W. CARTER:

## *Grandfather and Role Model*

J. SCOTT CARTER

## EDITOR'S NOTE

As an epilogue to the oral history of Associate Justice Jesse W. Carter of the California Supreme Court, which appeared in the previous issue of *California Legal History* (vol. 4, 2009), we present the following reminiscence by Justice Carter's grandson, J. Scott Carter. These remarks were delivered orally and in printed form on November 10, 2010, at Golden Gate University School of Law, from which Justice Carter graduated in 1913 when it was the YMCA School of Law. The occasion was the annual induction of new members of the school's legal honor society, the Jesse W. Carter Society.

The Jesse Carter Collection at the Golden Gate University law library includes copies of Justice Carter's speeches, photographs, newspaper clippings, case files, and a painted portrait, received primarily from J. Scott Carter. Mr. Carter is a retired instructor of history at Shasta College and a former mayor of Redding, California. He kindly provided photographs to illustrate the publication of Justice Carter's oral history, and he has provided the photographs that appear here.

Golden Gate University is also the birthplace of the new book on Justice Carter, *The Great Dissents of the "Lone Dissenter": Justice Jesse W. Carter's*

*Twenty Tumultuous Years on the California Supreme Court* (2010). Co-editor David B. Oppenheimer (now professor at Berkeley Law) served until 2009 as professor of law and associate dean at Golden Gate University; co-editor Allan Brotsky is emeritus professor of law at the university; and the authors of substantive chapters include thirteen current and former faculty members, as well as two lawyer graduates. The book is the subject of a review essay by Michael Traynor in this volume of *California Legal History*.

— SELMA MOIDEL SMITH

My grandfather, Jesse Washington Carter, was born in a log cabin. He was raised in rural Trinity County, California, and his strong work ethic was forged as a young man who was required to contribute for many years to the hard labor and responsibility of living apart from the conveniences and conventions that most of us enjoy today.

I was born in 1939, the year he was appointed to the California Supreme Court. I understood, even as a child, that he was a highly unusual and gifted man. To amuse family members, he often recited lengthy passages of poetry around the table at Thanksgiving. His colorful stories, some centered on his experiences as a young lawyer in Redding, were told to us in the long evenings around campfires at our summer retreats in the Trinity Alps. In his later years, even despite his busy schedule, he managed to keep in touch with us through letters — a forgotten art, it seems.

His life as an attorney has been well documented and you may be quite familiar with the more prominent cases he has tried, particularly the

**July 1946 (left to right): J. Scott Carter at the age of six, Justice Carter with an axe over his shoulder, and Scott's late brother Kent Carter, as the foundation logs were being set for Justice Carter's cabin in the Trinity Alps of California.**

*Courtesy J. Scott Carter*

dissenting opinions he submitted as a member of the California Supreme Court. Yet you may not be as well informed about his personal philosophy about his life's work.

He opened his first law practice on February 5, 1914, at age 24. In the beginning, he had very few clients — primarily those the older attorneys didn't want. But, as he stated in his oral history:

> I followed the advice of my friend Edward Hohfeld, a very able lawyer, to outwork the other fellow, put in more time, prepare cases better. So I would get down to my office at seven o'clock in the morning and I would make a very thorough study of every case that I had, even though it was of very minor importance. I would go into court well prepared and I took a lot of the older lawyers by surprise who were resting on their laurels of long experience and recognized legal ability and who expected to win their cases on their ability to speak without preparation. It wasn't very long before I won some cases that surprised not only the lawyers, but a lot of people in the county.[1]

As a result of his hard work, he was elected as the Shasta County District Attorney in 1918 and reelected in 1922. He tried a multitude of cases, ranging from prohibition to prostitution and was regarded as a very "vigorous" prosecutor. He chose to return to private practice in 1928 because of the poor pay (he made only $175 or so a month). He estimated that he lost $15,000 to $20,000 per year working for the county.

By 1931, his private practice had grown to seven lawyers, and they were quite busy, mostly with cases involving water rights and numerous lawsuits against one of California's private utilities. In 1938, they tried 52 cases and won 50 of them. The remaining two were won on appeal. His reputation, by that time, had spread throughout the state.

He entered the arena of politics in 1939 and was elected to the California State Senate. In that same year, a vacancy occurred on the California Supreme Court, a position that he enthusiastically sought. His appointment by then Governor Olson was confirmed, and so began his "twenty tumultuous years" as a member of this judicial body.

---

[1] "Oral History of Justice Jesse W. Carter," 4 *California Legal History* (2009), 213.

If there was a consistent theme while he was on the Court, it embraced the concept of due process of law and the protection of individual liberty for all citizens. Underlying this theme was his view that restraints should be placed on government officials who overreach their powers and authority, and that large corporations who pursue abusive policies should also be restrained.

I can recall one special case where my grandfather's principles and character were tested by a very controversial and sensational event that took place in the 1950s dealing with a notorious criminal, Caryl Chessman. It is difficult to describe the tension and negative atmosphere caused by press reports of Chessman's scheduled execution date on July 30, 1954. The case was mired in controversy and my grandfather believed that both the trial court and California Supreme Court had erred in not upholding Chessman's due process claims. Certain appeals had failed and the die was cast for Chessman's execution on that date.

Jesse and I were working at his cabin in the Trinity Alps wilderness when, on July 29, 1954, two exhausted men appeared at the outskirts of his property. They had driven over eight hours from the Bay Area and walked four miles through the wilderness to plead Chessman's case before Justice Carter. One of the two strangers was Ben Rice, Chessman's chief attorney. Mr. Rice was seeking a stay of execution so that the Supreme Court of the United States could review Chessman's due process claims.

I was only l4 years old but quickly understood the gravity of the claim and, since time was of the essence, it was a life or death issue. I remember my grandfather sitting down on a tree stump and, in longhand, writing out the details of the stay of execution. I learned many years later that he was quite concerned about criticism from his six fellow justices on the Court but felt he had no choice in the matter but to follow the Constitution and do the right thing.

Even more dramatic for me was my presence with Jesse in mid-June of 1957 when he was visiting Redding to give a commencement speech at the local college. On the following day, I believe it was on a Saturday, he asked me to drive down to the local newspaper office as he was expecting a teletype report. To this day I can remember the news item as it appeared from Washington, D.C., stating that the Supreme Court of the United States had essentially vindicated his position on the due process issue. I know,

J. Scott Carter with Dean Drucilla Ramey of Golden Gate University School of Law, November 10, 2010.
*Courtesy J. Scott Carter*

and this is an understatement, that he was elated by the Supreme Court's decision.

Jesse never backed away from critical public opinion or doubts about his actions. Throughout the several years of the Chessman controversy, it became apparent to me that he had gone through some emotionally difficult times. In his later public statements, he indicated that he had been roundly criticized by those in the press, not to mention those members of the Court who disagreed with his position.

I can remember many other examples of Jesse's rock solid character and fortitude. I was always inspired by his word, his actions on the bench and his focus on promoting and protecting the concepts outlined in the Bill of Rights.

For my part, Jesse's actions have profoundly influenced my life, my day-to-day conduct and my teaching. On some occasions, when answers to current events and controversies have not been clear, I've sometimes re-read his oral history to gain perspective and direction, as well as his letters and the mimeographed copies of his speeches that he had sent to me over the years. Toward the end of this history is one of my favorite passages summarizing his judicial philosophy:

> The soundness of a decision must be tested by the reasons given as its basis. The thing that means more to me than anything else is being able to transmit to posterity through my decisions, both majority and dissent, something that will be a guide to the future. If I depart from logic and reason and common sense in writing my decisions, either majority or dissents, those decisions are not going to be accepted; they are going to be repudiated. If I get any satisfaction out of doing this work, it is in the thought that what I say is going to receive not only contemporary approval but what it will mean in the future. A decision that stands for all time means something. If a hundred years from now a lawyer gets up in court and says, "This very lucid and illuminating decision was written by Mr. Justice Carter in 1955," well, I won't be there to hear it, but it is the thought that a hundred years after I am dead and forgotten, men will be moving to the measure of my thoughts.[2]

[The printed text of J. Scott Carter's remarks ends with the note: "If you are interested in learning more about Justice Carter, please refer to the following excellent texts that can be found in the Golden Gate University School of Law Library," and he cites Justice Carter's oral history in *California Legal History* and Oppenheimer and Brotsky's *Great Dissents*.] ✯

[2] Ibid., 298-299.

*A Retrospective of*

# THE COMMITTEE ON HISTORY OF LAW IN CALIFORNIA

## EDITOR'S NOTE

The oral history of Justice Mildred Lillie was the final oral history of a California Supreme Court or Court of Appeal justice to be undertaken by the former State Bar Committee on History of Law in California, and it is the only one that remained unpublished when the committee was retired by the State Bar in 1992. Its publication now provides the occasion for a review of the committee's work.

### *The Early Years*

The committee was first appointed on November 18, 1948 by the State Bar Board of Governors.[1] This occurred during the presidency of F. M. McAuliffe of San Francisco, who was appointed to chair the new committee.[2] The committee's original charge — as reflected in its initial name, the "Committee on the History of the Bench and Bar in California" — was to plan and organize the "publication of a history of the accomplishments and contributions of the profession to the progress of California."[3] Such

[1] *Journal of the State Bar of California* 34:4 (July–Aug. 1959), 452.

[2] Florence M. McAuliffe became a partner of Heller, Ehrman, White & McAuliffe in 1921.

[3] *Journal of the State Bar of California* 23:6 (Nov.–Dec. 1948), 383.

a charge would have placed the committee's output within the long line of "bench and bar" biographical works published throughout the United States since the late nineteenth century.

By the mid-twentieth century, however, a new direction had also begun to emerge in the United States, namely, the organized study of American legal history in all its aspects. For both practical and theoretical reasons, the committee chose to align itself with this new movement. They recognized that the funding required for a project of statewide scope could more easily be attracted if their topic was not limited to biographies of leading lawyers and judges. In addition, they were attracted to the broader concept of California legal history envisioned by committee member Lawrence A. Harper, who was also a professor of history at UC Berkeley.

In May of 1953, the committee submitted to the Board of Governors an outline prepared by Harper for a comprehensive "Introduction to the History of Law in California."[4] Of its sixteen proposed chapters, only the last deals with personalities in the legal profession. The preceding chapters are grouped into four broad topics: the history of law and administration in "Earlier Eras"; the "Modern Institutional Structure" created by the Constitution and codes — as seen in the functioning of courts, the organized bar, and administrative agencies; the "Development of Modern Legal Concepts" reflected by the history and theory of the law itself; and "Today's Achievements and Tomorrow's Challenges," in which California's position as a national trendsetter is given early recognition.

As both a historian and attorney, the author emphasized the importance of "Introducing the Historian to Legal Data and Sources" commonly used by lawyers but unfamiliar to the academic historian. The outline also provided a wide-reaching guide to published and unpublished materials likely to be useful in researching the proposed work.

The formal transformation of the committee's charge occurred the following year. In August 1954, Chair McAuliffe requested Board of Governors' approval of a change in name to either the "Committee on the History of Law in California" or "Committee on California Legal History."[5] The former name was adopted (with the word "the" before "History" variously

[4] The complete outline is available in *Journal of the State Bar of California* 29:6 (Nov.–Dec. 1954), 486-495.

[5] Ibid., 486.

present or absent throughout the committee's existence). In his request, he informed the Board that, having previously undertaken the "necessary but tedious work of amassing historical data and bibliographical references," the committee had devoted the current year to "preparing an introduction to the legal history of California." He further explained that the work was necessary because "the need for paying greater attention to legal history has become more apparent," but attorneys "are too busy practicing and scholars shy away because they believe the subject too difficult."[6]

Three years later, McAuliffe announced that the committee's *Introduction and Guide to the History of Law in California* was available in mimeographed form at the State Bar office in San Francisco.[7] The guide itself indicates that its more than 200 pages were being duplicated as quickly as possible for distribution to attendees of the 1956 State Bar Convention.

McAuliffe's 1957 report to the Board of Governors places the work of the committee in national context. He notes the founding of the American Society for Legal History in 1955 and the creation of the *American Journal of Legal History* at Temple University School of Law in January of 1957. He says that this new society and new journal "offer an outlet for the initiated," but that "California seeks to lure others into the field." He then asks assistance from California lawyers in distributing the *Guide*, and offers a brief overview to stimulate interest.[8]

McAuliffe's successor, Presiding Justice A. Frank Bray of the First District Court of Appeal,[9] stated in 1958 that the *Guide*'s purpose was "to introduce the scholar to legal data and the lawyer to the standard sources of the social scientist and historian." Like McAuliffe, he noted the growth nationally of interest in legal history, and he proposed a five-year plan for promoting interest in the legal history of California — "not so much to

6 Ibid., 485.

7 This consists of two separate works, the *Introduction* and the *Guide to Material on the History of Law in California* by Lawrence A. Harper, 1956. McAuliffe indicates that "Dr. W. N. Davis, Jr." (State Historian William Newell Davis, Jr.) was coauthor of the *Guide*. Copies are at present available in at least three California libraries: UC Berkeley Law Library, UCLA Law Library, and Stanford University Crown Library.

8 *Journal of the State Bar of California* 32:4 (July–Aug. 1957), 394.

9 Bray served from 1951 to 1981 as founding president of the Contra Costa Historical Society.

prepare legal histories as to stimulate others to work in the field."[10] Thereafter, the committee undertook a single major project of its own.

The final publishing project of the committee's early years was the preparation of the two-volume *History of the Supreme Court Justices of California*, edited by J. Edward Johnson. Volume I, covering 1850–1900, appeared in 1963, and Volume II, covering 1900–1950, appeared in 1966.[11] Both are large-format, illustrated books with biographies of the Court's justices from those periods. Most were written by Johnson and had appeared during prior years in the *State Bar Journal*.

The publisher's introduction to the first volume states that the committee's manuscript "made it clearly apparent to the publisher that this work was an important literary contribution," and that it was not a work of fleeting importance, "but one that will endure for generations as an honest appraisal of a group of men who exerted major influence on the development of California jurisprudence." The introduction to the second volume states that the work resulted from Johnson's lifelong interest in judicial biographies: "For more than 35 years he has collected clippings, sought family papers and interviewed those who could add to our knowledge of California's Supreme Court Justices." A note indicates that the materials collected by Johnson remained in his own possession at that time, but that he had willed them to the Bancroft Library at UC Berkeley (where they are now located).[12]

During the late 1960s and early 1970s, the committee published a series of approximately fifty articles in the *Los Angeles Daily Journal* on historic California courthouses and jails.

### *The Later Years*

The committee's most recent period of productivity extended from the early to late 1980s. During this period, the committee described its charge

---

[10] *Journal of the State Bar of California* 33:4 (July–Aug. 1958), 456-458.

[11] J. Edward Johnson, *History of Supreme Court Justices of California*, vol. I, 1850–1900, San Francisco: Bender-Moss, 1963; vol. II, 1900–1950, San Francisco: Bancroft-Whitney, 1966.

[12] At present, the Bancroft Library catalogue states that its collection of "J. Edward Johnson Papers" consist of 14 cartons of material, not yet arranged for use, and that inquiries "should be directed, in writing, to the Head of the Manuscripts Division." It also indicates that Johnson's album of photographs of 53 early Supreme Court justices has been transferred to the Bancroft Pictorial Collections.

as follows: "Works with the State Bar and its members to promote the study and preservation of legal history; conducts oral history interviews and programs; makes public presentations; and prepares publications in the field."[13] The notable addition to its earlier charge is in the area of oral history. Here, again, the committee's evolution parallels that of society at large, in which the collecting of oral histories received increasing emphasis during the second half of the twentieth century.

The committee's most ambitious project was the creation of a guide to the California legal history manuscripts held by the Huntington Library in San Marino. The project was initiated in 1983 under the chairmanship of Eric Chiappinelli and was pursued to completion by five succeeding chairs. Legal historian Gordon Morris Bakken was engaged to prepare the work, and the committee secured funding from foundations and law firms. The completed book was published in 1989,[14] during the term of committee chair Rosalyn Zakheim. The occasion was marked by the appearance of an illustrated feature article in the *Los Angeles Daily Journal*, subtitled "A Scrappy State Bar Committee Chronicles the Development of California Law."[15]

One outgrowth of the book project was a bibliographic essay by Fritz and Bakken on materials in the field of California legal history, published in 1988.[16] Another — and the most recent — is the article by Peter L. Reich in the present volume of *California Legal History* that surveys additions to the Huntington collection in the years following publication of the committee's book.[17]

In the area of oral history, the committee pursued three separate projects. The first was the recording of audiotaped oral interviews of leading lawyers and judges in 1987. Four such interviews were conducted, of which

---

13 "State Bar Report," California Lawyer 8:11 (Dec. 1988),

14 Henry E. Huntington Library and Art Gallery. *California Legal History Manuscripts in the Huntington Library : a guide / by the Committee on History of Law in California of the State Bar of California*. San Marino, Calif.: The Library, 1989.

15 Arlene Silberman, "Our Story, Her Story, History," *Los Angeles Daily Journal*, May 11, 1989.

16 Christian Fritz and Gordon Bakken, "California Legal History: A Bibliographic Essay," *Southern California Quarterly* 70 (1988), 203-222.

17 Peter L. Reich, "California Legal History in the Huntington Library: An Update," 5 *California Legal History* (2010), 323-336.

audiotapes and transcripts were deposited in research institutions for public use.[18] The interviews were as follows:

Sharp Whitmore,[19] interviewed by Ray Roberts,[20] January 9, 1987.

Leon T. David,[21] interviewed by Ray Roberts, January 16, 1987.

George Yonehiro,[22] interviewed by Ray Roberts, January 21, 1987.

Ruth Church Gupta,[23] interviewed by Rosalyn Zakheim,[24] Sept. 28, 1987.

A second project in the area of oral history was the creation of a booklet titled, "The Story of the State Bar of California" (1989) which consisted primarily of excerpts of audiotaped recollections by past State Bar presidents solicited by the committee. It included statements from twenty-three past presidents, ranging in years of service from 1937 to 1988, on the history of the State Bar and their terms in office.

The committee's third, and best known, oral history project was the recording of videotaped interviews of leading California Supreme Court and Court of Appeal justices. Four such interviews were conducted. Transcripts of the first three were published in the *Hastings Constitutional Law Quarterly* in 1987 and 1988, and the fourth — of Justice Mildred Lillie — remained unpublished until its inclusion in the present volume of *California Legal History*. The first three were published as follows:

---

18 These were deposited in the State Bar Archives in San Francisco, the Bancroft Library at UC Berkeley, and the Department of Special Collections at the UCLA Research Library.

19 Whitmore served as president of the Los Angeles County Bar Association and was a member of the Board of Governors of both the American Bar Association and the California State Bar.

20 Roberts was a retired judge of the Los Angeles Superior Court.

21 The interview of David commences with his playing an audiotaped self-interview recorded on July 31, 1977, in which he says he was serving at that time as chair of the Committee on History of Law in California. He was a retired judge of the Municipal and Superior Courts in Los Angeles County.

22 Yonehiro was then serving as a Superior Court judge in Placer County.

23 Gupta was the first woman president of the Lawyers Club of San Francisco (1975–1976).

24 Zakheim conducted the interview on behalf of the committee and also the Women Lawyers' Association of Los Angeles (of which she was president, 1983–1984.)

"Oral History: Justice Bernard S. Jefferson," *Hastings Constitutional Law Quarterly* 14 (Winter 1987), 225-287.

"Oral History: Justice Otto Kaus," *Hastings Constitutional Law Quarterly* 15 (Winter 1988), 193-268.

"Oral History: Justice Joseph R. Grodin," *Hastings Constitutional Law Quarterly* 16 (Fall 1988), 7-68.

### *Personal Accounts*

The theme of oral history also provides the concluding section of this review of the committee's work. By good fortune, four of the later chairs of the committee agreed to share recollections of their periods of service on the committee. Personal accounts by past chairs Kenneth Crews (1985–1986), Laurene Wu McClain (1986–87), John Hanft (1987–1988), and Rosalyn Zakheim (1988–1989) are presented below.

Following these four accounts, further good fortune provides a final narrative by David C. Long, formerly director of research for the State Bar, who agreed to describe the creation in 1989 of the California Supreme Court Historical Society. As early as 1954, Chair McAuliffe had proposed seeking a foundation grant for the committee's activities, and thereafter to "establish a legal history society which can continue the activities after the foundation grant has expired."[25] A grant does not appear to have been secured, and formation of the society was not pursued. In the late 1980s, when societies for legal history had become well established in other jurisdictions, the State Bar proposed such a society for California. The realization of this proposal is the subject of the concluding narrative by David Long.

— SELMA MOIDEL SMITH

[25] *Journal of the State Bar of California* 29:6 (Nov.–Dec. 1954), 486.

## BUSY YEARS FOR THE HISTORY COMMITTEE

### KENNETH D. CREWS,[26] CHAIR, 1985–1986

Without question I was privileged and challenged to have been surrounded by an extraordinarily fine and productive run of leaders. As chair during the year 1985–1986, I was in a mix with Eric Chiappinelli, Christian Fritz, and Laurene Wu McClain. We were active lawyers, but each with a strong and serious penchant for academia. Indeed, all four of us ultimately pursued careers in research and law teaching. With our studious inclinations and our scholarly zeal, we tended to seek out exciting projects — never satisfied with tasks that were handed to us.

We did attend to the committee's central mission to preserve the history of law in California. We addressed multiple concerns in that spirit. Professor Lawrence Friedman of Stanford Law School brought to our attention that the records of the Alameda County courts were at risk of destruction. We learned that the Federal Archives in San Bruno offered little realistic place for researchers to use the collections. We reached out to administrators, managers, and archivist to foster an open flow of historical resources.

Our committee, however, was too restless to be merely responsive. We wanted to shape our own projects. We wanted to create and capture resources that would facilitate new insights into California law. The first major self-imposed undertaking of our era was the oral history interview of Justice Bernard Jefferson. One member of the committee deserves most of the credit for getting the project underway. David Doyle, an attorney from Fresno, had come to know and admire Justice Jefferson and insisted that an oral history interview would be a valuable resource for future scholars. At first we did not realize how right he was.

We academics on the committee hesitated and analyzed. We pondered the proper methodology for oral history and enlisted support from professionals at the Regional Oral History Office of the Bancroft Library at UC Berkeley. We tried to nurture a clear vision of where this project might take us. At one meeting we pursued questions about the ownership of rights in

[26] Director, Copyright Advisory Office and faculty member, Columbia Law School.

the finished interviews and what we might do with any funds that the work could generate. Silly us. While we investigated, David Doyle would be neither deterred nor delayed. He pressed ahead with logistics and scheduling. Fortunately, he prevailed.

We booked a committee meeting at McGeorge School of Law in December 1984, invited the justice, and David conducted the interview. McGeorge kindly provided the rooms and the videorecording staff and equipment. We came away with an original product of the committee. David had done his work well, and he handed the finished recording to the committee. We were determined to get it into the hands of anyone interested in the subject. Justice Jefferson helped us prepare a clean transcript. I wrote an introduction and fired a roster of letters to law reviews in quest of a publication outlet. We found strong interest with the *Hastings Constitutional Law Quarterly*, which began a constructive friendship. The *Law Quarterly* published the Jefferson project as well as subsequent interviews.

The projects were also a means to connect with the wider legal community. Donald Wright, former chief justice of California, joined the committee. Loyola Law School in Los Angeles hosted an interview with Justice Otto Kaus, supplying the essential talent and equipment for videorecording. No accomplishment is without detractors. Even interviews of prominent jurists could not escape some controversy. Before we had barely started in 1984, our chair Chris Fritz reported that some officials of the bar had conveyed their concerns "with regard to the project's political ramifications," although Chris added that "the project's historical and educational origins would appear to safeguard it from any such criticism." The committee moved ahead with its plans, and the political concerns never materialized.

As we learned more about the needs of researchers, we found a wealth of relatively undiscovered materials in archives, libraries, and other repositories throughout the state. We were eager to expand awareness of these resources and invested the better part of a year in exploring possibilities for one more even more ambitious undertaking. A few committee members made the rounds of different archival collections, looking with an open mind for the right project for the committee to sponsor. We spent many days visiting repositories of court records and libraries of archival collections.

One prospect clearly captured our attention as early as 1983. The Huntington Library in San Marino was interested in developing an innovative inventory of its legal history collections. A meeting with Martin Ridge, the Huntington's director, allowed us to see that the Huntington was the right project. The collection was rich and little used by legal historians. A few scholars, such as John Phillip Reid of New York University, helped reveal the strength of the materials, but many more possibilities for historical discovery remained. The Huntington was ready to lend its support in many ways, from providing a work space for the researchers to publishing the finished study.

We knew that the project was enormous and it would require inventing a new form of guide through historical collections. We also knew that no one on the committee was prepared to actually complete the book-length study. We embarked on a diligent quest for funding to retain a professional historian. With contributions from foundations, firms, and individual attorneys, we were able to retain the skilled services of Professor Gordon Morris Bakken of California State University, Fullerton. Professor Bakken approached the Huntington collection with determination and élan. He knew that our committee project was groundbreaking. He also knew that perusing the collections would likely yield fodder for years of his own historical writings.

I always suspect that I was Bakken's least favorite collaborator. I was chair of the committee as the project came to completion. I wanted to see the effort at or near publication before I handed the committee to Laurie McClain. I spent many days and weeks scrutinizing drafts and making substantial suggestions for changes and rewrites. I typed letters of several pages and proposed restructured layouts. Gordon probably wisely picked what he liked from all of my words — and he brought a complex project to completion.

The resulting book — which demanded steady attention until finally published in 1989 — was warmly received by the Huntington and by scholars throughout the country. It offered detailed glimpses of the many different materials in one library that are certainly of interest to legal historians — documents ranging from property claims to litigation papers and criminal records. We also earned good press coverage, especially in the legal newspapers throughout the state. The Huntington set the stage. Gordon Bakken did the work. The committee used its good offices to conceive and support the project and prod it along the path to completion.

Service on the history committee in those years was an outlet for ambitious members who took seriously the study of legal history and who wanted to make a difference for other scholars who could benefit from our efforts. We also simply liked our work. We were ready to invest our time and skills. We gave heartily, but we also gained delightfully.

---

## PRESERVING AND PROMOTING CALIFORNIA'S LEGAL HISTORY

### LAURENE WU McCLAIN,[27] CHAIR, 1986–1987

I entered Boalt Hall School of Law in 1979 after having pursued an academic career at several colleges in Virginia and California. While taking courses at Boalt, I continued to teach college-level American and Chinese history. I graduated with a law degree in 1982 and began to pursue legal practice with a well-known San Francisco law firm. I left teaching. However, I found that the daily responsibilities of being a litigator required total focus on pragmatics with the goal of winning or at least settling cases for clients. While I worked with some of the best attorneys in San Francisco, the firm was so involved in doing its best job for clients that there was little time for reflective thinking about law as an intellectual discipline. I felt a need to join a group which could devote more time to the large questions of how our law had evolved, who were the major players in shaping that law, what were the myriad ramifications of decisions made by our courts, and how could the development of California law be best preserved and promoted. By 1983, the State Bar of California appointed me as a member of the Committee on History of Law in California. I had found a niche with colleagues who shared many of the same intellectual interests that I had.

Practicing attorney Eric A. Chiappinelli chaired the committee in 1983–1984. Christian G. Fritz who already had a law degree but was pursuing a Ph.D. at the University of California, Berkeley, succeeded Eric in 1984–1985, and lawyer Kenny Crews became chair in 1985–1986. I then

[27] Attorney and professor of history, City College of San Francisco.

served as head of the committee in 1986–1987, followed by law book editor John K. Hanft in 1987–1988.

The committee delved into several projects which fulfilled our goal of preserving and promoting California legal history. We were never paid for our work. We volunteered our time. We met in San Francisco, Sacramento, or Los Angeles, for meetings that lasted several hours, and in between those meetings, we conferred by telephone or by memos. Of course, we had no access to e-mail.

The committee launched "The California Bar Oral History Series," which received the endorsement of several California law schools and firms. We received valuable advice from career oral historians Carol Hicke and Sarah L. Sharpe of the Regional Oral History Office at the University of California, regarding how to prepare for oral histories and how to edit transcripts for publication. We chose Justice Bernard S. Jefferson of the California Court of Appeal as our first oral history subject, and Otto Kaus, an associate justice of the California Supreme Court from 1981 to 1985 as our next interviewee. Both men gave generously of their time, and in turn, individual committee members did copious research on the justices and their opinions so that questions addressed to the justices at their interviews would be cogent, accurate, and thorough. To give the interviewer and each justice an environment that would be conducive to contemplation and an accurate account of experiences on the bench, only the questioner, the justice, and a cameraman were allowed in the interview room. The *Hastings Constitutional Law Quarterly* published both oral histories. Videotapes of the interviews were then lodged with law schools and the archives of the State Bar of California.

Since the Huntington Library in San Marino, California, had an extensive and valuable legal collection, but lacked a subject access guide, the committee decided to publish a legal manuscript resource guide for the library. This volume would provide easier access to Huntington's materials, publicize the depth of Huntington's collection, and further understanding of the development of California's legal history. Dr. Martin Ridge, head of research at the Huntington, immediately endorsed the project and guaranteed partial funding from the Huntington. The committee solicited the remainder of the funds necessary to complete the project from attorneys, foundations, and law firms. The State Bar of California paid only for administrative expenses. The committee then hired legal historian Gordon

Bakken to prepare the guide. This volume entitled, *California Legal History Manuscripts in the Huntington Library: A Guide*, was published in 1989 by the Henry E. Huntington Library and Art Gallery, San Marino, California.

The committee was concerned about the loss of original documents in California courts, as many of those courts had limited storage space for case files, and had decided to preserve them only through microfilm or microfiche. Scholars complained to the committee that this trend left them with spotty research documents, as microfilm and microfiche often did not duplicate the originals completely or were full of extraneous spots and other markings. The committee did contact several county courts about this issue, but the trend of putting documents on microfiche or microfilm still remains a major problem for researchers today.

My term on the committee ended around 1988. I returned to college teaching but continued to practice law on a part-time basis. In the meantime, my colleagues Chris Fritz and Kenny Crews decided to pursue academic careers. Chris became a prominent legal historian and professor at the law school at the University of New Mexico, and Kenny decided to move from practicing law to pursuing advanced degrees at the Graduate School of Library and Information Science at the University of California in Los Angeles. Today, Kenny is the director of the Copyright Advisory Office at Columbia University in New York City.

---

## RECOLLECTIONS OF THE COMMITTEE ON HISTORY OF LAW IN CALIFORNIA

### JOHN HANFT,[28] CHAIR, 1987–1988

I served a three-year term with the Committee on History of Law in California and was fortunate to stay on for an additional year after my regular term ended. Serving on the committee was exceptionally rewarding, both because of the good work we were able to accomplish and the long friendships I established with some of my colleagues. The highlights of my time with the committee were (1) taking and publishing the oral histories

[28] Director, Witkin Legal Institute, West Group, San Francisco.

of Justices Otto Kaus and Joseph Grodin, and (2) a fascinating behind the scenes tour of the conservation facilities at the Huntington Library (in conjunction with the 1989 publication of *California Legal History Manuscripts in the Huntington Library: A Guide,* compiled by the committee).

At the request of David Long, the director of research at the State Bar, the committee investigated and drafted a proposal for the formation of a California Supreme Court Historical Society, similar to existing societies in the federal court system.

In my last year on the committee, we spent a considerable amount of time editing and compiling *The Story of the State Bar in California*, which was distributed at a dinner in January 1989 honoring past presidents of the State Bar. The publication included a brief history of the struggle to create a unified bar in California, excerpts from the published annual reports of past presidents, and personal reminiscences from living past presidents. Twenty-three past presidents prepared oral or written statements discussing the events, issues, activities, and personalities that were most significant during their respective terms as president. This project gave us the opportunity to collect and preserve information and insights, especially about the early days of the State Bar, which assuredly would have been lost otherwise. I feel very lucky to have been part of that endeavor.

---

## REFLECTIONS ON THE HISTORY OF LAW IN CALIFORNIA COMMITTEE

**ROSALYN ZAKHEIM,[29] CHAIR, 1988–1989**

Serving on the History of Law in California Committee and chairing the committee in 1988–1989 was one of the most fulfilling volunteer activities of my thirty-five-year legal career, both at the time and in retrospect. My undergraduate degree at Smith College was in American Studies, and my interest in the subject did not wane over the years. Before my tenure on the committee, I had helped begin the Oral History Project for the Women Lawyers Association of Los Angeles (WLALA). Serving on

[29] Senior Judicial Attorney (ret.), California Court of Appeal, Los Angeles.

the committee allowed me to further my interest in history and to utilize lessons learned from the WLALA project. Special thanks to John Hanft, my predecessor, for his support and encouragement as well as for his many contributions to the committee.

The committee worked with other groups to accomplish mutual goals. We tried to have an impact on the preservation of court records, a project passed to the 1989–1990 committee. Reaching out to other groups, the committee continued to provide assistance and encouragement to local and minority bar associations to encourage initiation of their own oral history projects.

We held our first annual meeting with the Ninth Judicial Circuit Historical Society. The society's executive director, Chet Orloff, arranged for us to meet and tour the Ninth Circuit courthouse in Pasadena. We discussed possible joint projects, including a legal history award to be given for an essay of interest to western legal historians.

For the first time, the committee presented a program at the State Bar Annual Meeting, a short play written by GeriAnne Johnson and Rick Walden, based on a lawsuit involving Jack London and the right to intellectual property. The room was packed, and the feedback was very favorable.

In addition to new projects, we continued the work of our predecessors. Under John Hanft's leadership, the committee had compiled and edited tapes from the State Bar's past presidents. John and Leigh Shields continued with that work in 1988–1989 and conducted further research that resulted in the informative manuscript, "The Story of the State Bar of California," which was distributed to those attending the State Bar's past presidents' dinner on January 21, 1989, in San Francisco.

The committee also accomplished final editing and publication of *California Legal History Manuscripts in the Huntington Library: A Guide*, a project begun in the term of Eric A. Chiappinelli (1983–1984) and continued through chairs Christian G. Fritz, Kenneth D, Crews, Laurene Wu McClain, and John K Hanft. Professor Gordon Bakken compiled information for the *Guide* and provided its introduction. The Huntington celebrated publication of the *Guide* with a reception on the afternoon of our visit to the Ninth Circuit and included an insiders' tour of the preservation facilities at the Huntington Library. *The Daily Journal* and other publications wrote articles about the event and the committee's accomplishments.

The committee's program of video oral histories added a transcript of the interview of Justice Joseph Grodin to those of Justice Bernard Jefferson, published in 1987, and Justice Otto Kaus, published in February 1988, all in the *Hastings Constitutional Law Quarterly*. We conducted an excellent entire day session with Hon. Shirley Hufstedler in July 1988, but the audio reception on the videotapes forced us to reschedule the session. Justice Mildred Lillie agreed to an oral history to be commenced during the 1989–1990 committee year.

The committee's audio oral history interviews also continued. Thanks to committee members Ray Roberts and John Hanft, the transcriptions of interviews with George Yonehiro and Sharp Whitmore were completed.

Finally, past work by the committee and current efforts by Frank Winston [Board of Governors liaison to the committee] produced the incorporation of a California Supreme Court Historical Society in 1989. I am grateful that the Society's journal is interested in a committee that has not existed for two decades. For those of us involved, the committee was very productive and made significant contributions to legal history in California.

---

## THE CREATION OF THE CALIFORNIA SUPREME COURT HISTORICAL SOCIETY

DAVID C. LONG[30]

In the late 1980s, when I was Director of Research for the State Bar of California, Herbert Rosenthal, the State Bar's Executive Director, suggested that California was giving short shrift to its legal history because, unlike many states, it lacked an organization devoted to the history of the state's judicial branch.

The State Bar itself had a Committee on History of Law in California, which was focused primarily on preserving oral histories of prominent members of the bench and bar. However, in contrast to supreme court historical societies in other states and jurisdictions, that committee lacked a

[30] California attorney, now in private practice.

nexus to the state courts and had less ability to involve both judges and lawyers in preserving judicial branch history.

Herb asked that I take on the project of laying the foundation for a supreme court historical society in California. We asked the State Bar's Committee on History of Law in California to consider recommending the creation of a California Supreme Court Historical Society, which the committee did. My office conducted research on the structure and functions of judicial branch historical societies in other states and jurisdictions; for example, both the United States Supreme Court and the Ninth Circuit Court of Appeals have active historical societies. We found that Chief Justice Malcolm Lucas and other members of the California Supreme Court were enthusiastic about the possibility of an historical society, and we offered to prepare draft articles of incorporation and initial bylaws for a new California Supreme Court Historical Society. This led to the formation of the Society in 1989.

Since the functions of the new California Supreme Court Historical Society included all those which the State Bar's Committee on the History of Law in California had performed, the State Bar discontinued that committee and encouraged committee members to become involved in the CSCHS. ★

# ARTICLES

# THE CALIFORNIA PUBLIC DEFENDER:

## *Its Origins, Evolution and Decline*

LAURENCE A. BENNER*

> "It is still the duty of the State and of the court, its instrument, quite as much to protect the innocent as to punish the guilty. Honest administration of justice is the end sought . . ."[1]
>
> — Clara Shortridge Foltz, 1897

## INTRODUCTION

As California approaches the centennial of the birth of the first Public Defender office in the state and the nation, it is perhaps appropriate to reflect upon the reasons for establishing an institutional Public Defender as part of government and make an appraisal of the institution's current

* Laurence A. Benner is Professor of Law and Managing Director of Criminal Justice Programs at California Western School of Law in San Diego, California, where he directs the San Diego Search Warrant Project, the Bail Project and the Center for the Advanced Study of Criminal Justice. He is co-founder of the Institute for Criminal Defense Advocacy, which operates the California Innocence Project. He is coauthor of L. Benner and B. Neary, The Other Face of Justice, NLADA (1973) [hereinafter The Other Face of Justice].

[1] Clara Shortridge Foltz, *Public Defenders*, 31 Am. L. Rev. 393, 395 (1897) [Foltz, *Public Defenders*].

health in California today. The concept of the Public Defender, considered radical at the time of its inception, was initially the brainchild of Clara Shortridge Foltz. A champion of women's rights and the first woman admitted to practice law in California, she spearheaded a national movement to create an elected office known as the Public Defender. The County of Los Angeles became the first government to establish a Public Defender office, which began providing representation in both criminal and certain civil cases in 1914. What would Clara Foltz think of the Public Defender system as it has evolved in California today? How does our present system differ from what she envisioned?

Sadly, while the road has been marked with many successes, and fortified by U.S. Supreme Court decisions establishing the right to the effective assistance of counsel under the Sixth Amendment, if Clara Foltz were to return today she would find a criminal justice system that has broken faith with one of its fundamental underlying premises: the presumption of innocence. Instead, as a consequence of local funding and control over indigent defense services, many counties have chosen to operate under a presumption of guilt, resulting in a system where processing the "presumed guilty" as cheaply as possible has been made a higher priority than investigating the possibility of their innocence.

This should not be surprising. Members of a county board of supervisors, many of whom are not lawyers, can easily be persuaded by political pressures arising from the competition for scarce tax dollars to provide only minimal resources for the defense of those who are accused of crime. That translates into just enough funding to facilitate the plea bargaining regime upon which the entire system relies, as no county has the resources to have trials in all cases. This may seem logical because many defendants are in fact guilty. But the system is based upon a false premise. It is assumed that those who are providing defense representation will somehow be able to distinguish between the many who are guilty and the few who are innocent. It also further assumes that the indigent defense system will be able to provide an effective defense for the innocent by managing to triage the limited resources available. This cannot be done, however, if the system does not ensure adequate defense investigation into the possibility of innocence in the first place. Yet recent empirical research conducted for the California Commission on the Fair Administration of Justice has

# THE CASE OF THE BLACK-GLOVED RAPIST:

## *Defining the Public Defender's Role in the California Courts, 1913–1948*

SARA MAYEUX*

For seven months, an assailant that the San Francisco newspapers had nicknamed the "Black-Gloved Rapist" terrorized the city, breaking into his victims' homes at midnight wearing black gloves and carrying a pencil flashlight. Finally, the police nabbed their man. Frank Avilez was arrested on Saturday morning, July 12, 1947, "and for many hours questioned by police inspectors and assistant district attorneys" until he confessed to everything: fourteen rapes and attempted rapes.[1] Avilez was 24 years old — with a 17-year-old wife — but had, according to his psychiatric records, the "mental age" of a 10-year-old, an IQ in the 70s, and a possible

---

* [Editor's note: Sara Mayeux is a JD Candidate at Stanford Law School and a PhD Candidate in American history at Stanford University. This article was the winning entry in the California Supreme Court Historical Society's 2010 Student Writing Competition.]

I am grateful for the helpful suggestions I have received on this paper and related research from professors Barbara Babcock, Bob Gordon, Amalia Kessler, Norm Spaulding, and Bob Weisberg. Thanks also to my classmates in the 2009 Legal History Workshop and the 2008–09 Legal Studies Workshop at Stanford Law School, and the San Francisco public defenders who inspired my interest in the topic when I was an intern in 2008.

[1] People v. Avilez, 86 Cal.App.2d 289, 292 (Cal.App. 1st Dist. 1948); *Rapist Confesses*, S. F. Chronicle, July 13, 1947, at 1.

diagnosis of "sexual psychopathy."[2] "My married life was all right," he told the *San Francisco Chronicle*, when asked about his motive. "I just didn't like staying home nights."[3]

After his bail hearing on Monday morning, July 14, Avilez's family sought the help of Melvin Belli, a young trial lawyer who would soon win national fame and fortune as the flamboyant "King of Torts."[4] Belli agreed to take the case, and contacted the district attorney's office to announce that he had been retained to represent Avilez. He also mentioned that the defendant's family was planning to attend the next day's arraignment, and asked that the case be held over until the family arrived.

The next morning in court, there was some confusion in the courtroom as to who was representing Avilez. The D.A. told the judge about his conversation with Belli, but no one told the defendant or the public defender about it. According to a police inspector, Avilez was unhappy because Belli had visited him in jail the night before and proposed an insanity plea; he said that "he was sane and guilty and wanted to get this over as soon as possible."[5] Meanwhile, not knowing the family had retained Belli, Avilez's wife had visited the public defender's office at some point to discuss the case.[6]

In light of all this, and since he was never told that Belli and Avilez's family were on the way, Gerald Kenny, the public defender, assumed Avilez to be his client. Kenny looked over the complaint, then went over to the cage and spent "a matter of seconds" conversing with Avilez through

---

[2] Appellant's Opening Brief at 12-13, People v. Avilez, 1 Crim. 2506 (Cal.App. 1st Dist. 1948). Avilez's older brother had been committed to the Sonoma State Home for the Feeble-Minded since 1936. *Id.* All court documents related to *Avilez* cited in this essay are available at the California State Archives by requesting the file for California case number 1 Crim. 2506.

[3] *Confessed Rapist in Jail*, S. F. Chronicle, July 14, 1947, at 3.

[4] Belli was dubbed the "King of Torts" by *Time* magazine in 1954. In addition to being credited with pioneering modern products liability law, he grabbed headlines with his glamorous clientele, which included Mae West, Errol Flynn, the Rolling Stones, Jack Ruby, and Zsa Zsa Gabor. *See* Jim Herron Zamora, "'King of Torts' Belli dead at 88," S.F. Examiner, July 10, 1996. A somewhat fawning biography of Belli is Mark Shaw, Melvin Belli: King of the Courtroom (1976).

[5] *Avilez*, 86 Cal.App.2d at 292.

[6] Appellant's Opening Brief, *supra* note 2, at 19.

# THE CALIFORNIA SUPREME COURT AND THE FELONY MURDER RULE:

## *A Sisyphean Challenge?*

MIGUEL A. MÉNDEZ*

## INTRODUCTION

This article examines the California Supreme Court's major encounters with the felony murder rule. In its unvarnished version, this rule allows a prosecutor to convict a defendant of murder without having to prove the mental states of murder as defined in the California Penal Code. The prosecutor, however, must prove that the homicide occurred during the commission or attempted commission of a felony. As will be explained, under California law the homicide will constitute first degree murder if the felony underlying the homicide is among the felonies enumerated in Section 189 of the Penal Code.[1] It will constitute second degree murder if the underlying felony is not among those felonies.

To appreciate the effects of the felony murder rule, it is necessary to understand how California law defines and punishes various homicides.

* Professor of Law and Martin Luther King. Jr. Scholar, UC Davis School of Law; Adelbert H. Sweet Professor of Law, Emeritus, Stanford University. I want to thank my colleagues, Floyd Feeney, Elizabeth Joh, Donna Shestowsky, and Robert Weisberg, for their helpful comments. I alone, however, am responsible for any errors.

[1] *See* California Penal Code § 189 (West's 2010 Desktop Edition) [hereinafter Cal. Penal Code].

Part A provides this overview. Differentiating among the various homicides in turn requires an understanding of different homicidal mental states. Part B presents the classification of different homicidal mental states. Part C introduces the core doctrine surrounding the felony murder rule in California. It is followed by Part D which describes the major limitations the California Supreme Court has imposed on the doctrine. Part E traces the statutory roots of the second degree felony murder rule, as described by the California Supreme Court. Part F examines potential problems with the Court's explanation of the rule's roots. Part G explores the Court's construction of the Penal Code provisions setting out the first degree felony murder rule and questions whether it was necessary for the Court to rely on legislative history in construing the provisions. Part H presents a critique of the Court's felony murder jurisprudence by examining the felony murder rule's place in California's law of murder. Part I attempts to shed some light on why the Court has taken extraordinary measures to preserve the felony murder rule and concludes with a call on the California Legislature to reconsider the wisdom of retaining the rule.

## A. AN OVERVIEW OF HOMICIDE IN CALIFORNIA

As a review of any standard criminal law casebook will attest, homicide is considered the most "graded" offense. This means that both the Common Law and statutory treatment of homicide focuses on the circumstances that differentiate one form of homicide (e.g., murder) from another (e.g., negligent homicide). Since the harm is the same in all cases — the death of a human being — the judicial and statutory focus has been on the mental state of the offender. If the offender, for example, intended to bring about the death of the victim, the offender will be deemed guilty of murder;[2] if on the other hand, the offender did not even contemplate the death of the victim, the offender may be guilty only of negligent homicide.[3]

---

[2] *See, e.g.,* California Penal Code §§ 187-188. That would be the case unless, of course, the offender acted within the parameters of such doctrines as self-defense or defense of others, s*ee, e.g.,* Cal. Penal Code § 197(1), or heat of passion. *See* Cal. Penal Code § 192(a).

[3] *See* Cal. Penal Code § 192(b).

# CALIFORNIA'S ROLE IN THE MID-TWENTIETH CENTURY CONTROVERSY OVER PAIN AND SUFFERING DAMAGES:

## *The NACCA, Melvin Belli, and the Crusade for "The Adequate Award"*

PHILIP L. MERKEL*

## INTRODUCTION

During a thirty-year period starting roughly at the end of World War II, California became the nation's most plaintiff-friendly state in personal injury cases. The California Supreme Court used its lawmaking power under the common law to revolutionize tort law. In a series of decisions, the Supreme Court created a strict liability cause of action in products liability cases,[1] replaced contributory negligence with pure comparative fault,[2] abolished the common law classifications for injuries caused by conditions on land,[3] loosened requirements for establishing causation,[4] expanded the application of res ipsa loquitur,[5] abrogated sovereign immunity

* Professor of Law, Western State University College of Law. The author thanks librarians Judy Andresen and Anne Rimmer for research assistance. He also thanks Christine and Quigley Loewe for their encouragement and support.

1 Greenman v. Yuba Power Products, 377 P.2d 897 (Cal. 1962).

2 Li v. Yellow Cab, 532 P.2d 1226 (Cal. 1975).

3 Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

4 Summers v. Tice, 199 P.2d 1 (Cal. 1948).

5 Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944); Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944).

for public entities,[6] created duties of care in new situations,[7] and allowed plaintiffs to recover for purely emotional injuries in new contexts.[8] For injured plaintiffs and their lawyers, this was the golden era of California tort law. The Supreme Court developed a national reputation as the leader in court-instigated changes to tort law.[9]

In the mid-1970s, California again took a leadership role in modifying tort law, but this time the Legislature was the instigator and the change was not plaintiff-friendly. In 1975, the governor called the Legislature into special session to address the problem of rising medical liability insurance costs.[10] Medical professionals and their insurers claimed that large judgments in medical malpractice cases were limiting the availability of liability insurance and driving health care providers from the state. The special session enacted a series of laws in 1975 known collectively as the Medical Injury Comprehensive Reform Act (MICRA). MICRA changed California tort law in medical negligence cases by limiting the contingent fees of plaintiffs' attorneys,[11] abolishing the collateral source rule,[12] and allowing for periodic payment of future damages.[13]

---

6 Muskopf v. Corning Hospital District, 359 P.2d 457 (Cal. 1961). The case was overruled by statute.

7 Tarasoff v. Regents, 551 P.2d 334 (Cal. 1976) (duty of psychiatrist to warn potential victim of threat posed by patient); Vesely v. Sager, 486 P.2d 151 (Cal. 1971) (duty owed by dram shop owner to victim of intoxicated patron); Coulter v. Superior Court, 577 P.2d. 669 (Cal. 1978) (duty owed by host to victim of intoxicated guest). Vesely and Coulter were abrogated by legislation.

8 State Rubbish Collectors Association v. Siliznoff, 240 P.2d 282 (Cal. 1952); Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

9 For a discussion of how California Supreme Court justices rationalized making significant changes to the common law during the period, see G. Edward White, The American Judicial Tradition 292-301 (1976). White focuses on the views of Roger Traynor, the Court's most influential member.

10 "The cost of medical malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the people of this State and threatens the closing of many hospitals. . . . It is critical that the Legislature enact laws which will change the relationship between the people and the medical profession, the legal profession and the insurance industry, and thereby reduce the costs which underlie these high insurance premiums." Proclamation by the Governor, 1975 Cal. Stat. 2d Ex. Sess. 3947.

11 Cal. Bus. & Prof. Code § 6146.

12 Cal. Civ. Code § 3333.1.

13 Cal. Civ. Proc. Code § 667.7.

# CALIFORNIA LEGAL HISTORY MANUSCRIPTS IN THE HUNTINGTON LIBRARY:

## *An Update*

PETER L. REICH*

## INTRODUCTION

The Huntington Library in San Marino, California, is one of the two primary repositories of California history manuscripts, along with UC Berkeley's Bancroft Library.[1] A key component of the Huntington collection is its materials on California legal history, which have been used for numerous scholarly publications.[2] In 1989, the Huntington published

* Professor of Law and Sumner Scholar, Whittier Law School; J.D., UC Berkeley, Ph.D, UCLA; past chair of the Legal History Section of the Association of American Law Schools; and past vice-chair of the California State Bar Committee on History of Law in California. This survey could not have been completed without the assistance of the wonderful Huntington Library staff, particularly Bill Frank, Curator of Hispanic, Cartographic, and Western Historical Manuscripts, Associate Curator Jennifer Goldman, and Chief Cataloger Brooke Black. The author dedicates the essay to the memory of Martin Ridge, late Director of Research at the Huntington and tireless supporter of California legal historical scholarship.

1 *See* John C. Parish, *California Books and Manuscripts in the Huntington Library,* 7 Huntington Libr. Bull. 1 (1935); Archibald Hanna, *Western Americana Collectors and Collections,* 2 W. Hist. Q. 401 (1971).

2 *See* Gordon M. Bakken, Practicing Law in Frontier California (1991); Miroslava Chávez-García, Negotiating Conquest: Gender and Power in California, 1770s to 1880s (2004); David J. Langum, Law and Community on the

*California Legal History Manuscripts in the Huntington Library: A Guide*, compiled and edited by legal historian Gordon M. Bakken (hereinafter *Guide*). The current essay updates the *Guide* by including materials catalogued or acquired since its production, as well as some that were omitted due to the definition of "legal history" it employed.

Before discussing specific materials, a few words regarding the role of legal historical theory and organization are in order. A recent study of legal history's disciplinary development divides the field into "classical," "liberal," and "critical" approaches.[3] The first focuses on the intellectual history of doctrine and institutions, the second emphasizes the integration of law with society and the economy, and the third asserts law's contingency and inconsistency over time.[4] Assuming that scholars applying such different methodologies may conduct research in the Huntington, I did not want to restrict excessively the parameters of legal historical materials, and have thus attempted to capture as broad a range of sources as might conceivably be useful.

In terms of organization, the *Guide* categorized manuscripts into twenty-six subject areas, with additional subdivisions, and summarized the collections in alphabetical order. Many of the categories were extremely narrow, and some then-extant collections were omitted, such as the Frank Latta materials, because they were "not specifically law related."[5] In the interests of inclusiveness, as well as of providing latitude for a wider use of documents, I have created six groupings: Business Enterprises, Courts and Judges, Government Offices, Land, Natural Resources (mining, oil, and water), and Law Firms and Lawyers. Each entry includes a brief description of the person(s) or institution generating the manuscripts, the types of materials included, their quantity, and whether there is a finding aid. It should be noted that a number of these collections are only semi-catalogued; for further information the researcher should consult one of the Huntington's superlative curators.

---

Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821–1846 (1987); John Phillip Reid, Law for the Elephant: Property and Social Behavior on the Overland Trail (1997). *See also* the author's modest contribution to this literature, Peter L. Reich, *Dismantling the Pueblo: Hispanic Municipal Land Rights in California Since 1850*, 45 Amer. J. Legal Hist. 353 (2001).

[3] Jonathan Rose, *Studying the Past: The Nature and Development of Legal History as an Academic Discipline*, 31 J. Legal Hist. 101, 117 (2010).

[4] *Id. a*t 118, 120, 121.

[5] Guide at 2.

# BOOKS

# *WOMAN LAWYER:*
## *The Trials of Clara Foltz*

BARBARA BABCOCK

Stanford: Stanford University Press, 2011
392 pp., ills.

REVIEW ESSAY BY MARY JANE MOSSMAN*

> In trying to sort out the reasons for professional women's successes or failures, it is far too facile to say that there were prejudices against women that they had to overcome. The ways in which the prejudice manifested itself were extremely complex and insidious. . . . As determined, aspiring professionals, women were not easily deterred. They found a variety of ways to respond to the discrimination they faced. . . .[1]

Although their study of late nineteenth and early twentieth century women professionals in the United States did not include a review of

* Professor of Law at Osgoode Hall Law School, York University, Toronto, Canada. She has written extensively about the history of women in law, including The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions (London and Portland, Oregon: Hart Publishing, 2006) [hereinafter The First Women Lawyers]; and a recent study of women lawyers at the Chicago World's Fair in 1893, *Le Féminisme and Professionalism in Law: Reflections on the History of Women in Law* in Martha Fineman, ed., Transcending the Boundaries of Law: Generations of Feminism and Legal Theory (Abingdon, Oxon; and New York: Routledge, 2011) [hereinafter *Reflections*].

[1] Penina Migdal Glazer and Miriam Slater, Unequal Colleagues: The Entrance of Women into the Professions, 1890–1940 (New Brunswick and London: Rutgers University Press, 1987) at 12.

the first women who gained admission to the legal profession, Glazer and Slater's assessment of the experiences of women professionals (above) is equally appropriate to understanding the lives of "first" women lawyers, such as Clara Shortridge Foltz (1849–1934). Certainly, prejudices about Foltz were manifested in a variety of different ways. But, like other women who chose to become lawyers in the late nineteenth century, Foltz was not easily deterred — indeed, she was both astute and creative in finding ways to respond, and often to overcome, the discrimination she faced.

As Barbara Babcock's new biography reveals, Foltz had great ambitions: to be "an inspiring movement leader, a successful lawyer and legal reformer, a glamorous and socially prominent woman, an influential public thinker, and a good mother"; perhaps not surprisingly in this context, she suffered not a few setbacks in a life that was often "frantic and scattered."[2] Yet, as Babcock's careful scholarship demonstrates, the story of Foltz's life and contributions as one of America's first women lawyers offers important insights about the history of gender and professionalism in law. Moreover, Babcock's biography is particularly important for two reasons. First, it provides both a detailed "story" about Foltz and a sustained assessment of her accomplishments, rounding out many aspects of Babcock's earlier writing about Foltz.[3] Perhaps more significantly, the biography is also augmented by an online supplement with essays and bibliographic notes that extends the documentation in the printed book — part of Babcock's unique Women's Legal History Web site at Stanford Law School, which has become a primary source for scholars interested in the history of women in law, particularly in the United States.[4] This review focuses on the published biography, an authoritative and sensitive biographical interpretation of Foltz's life. Indeed, in answer to Babcock's

---

2 Barbara Babcock, Woman Lawyer: The Trials of Clara Foltz (Stanford: Stanford University Press, 2011) at x [hereinafter Woman Lawyer].

3 Barbara Babcock, *Reconstructing the Person: The Case of Clara Shortridge Foltz* (1989) Biography 5; reproduced in Susan Groag Bell and Marilyn Yalom, eds., Revealing Lives: Autobiography, Biography and Gender (Albany: State University of New York Press, 1990) 131; and Babcock, *Clara Shortridge Foltz: Constitution-Maker* (1991) 66 Indiana Law Journal 849.

4 *See* www.law.stanford.edu/library/womenslegalhistory.

# *RESISTING McCARTHYISM:*
## *To Sign or Not to Sign California's Loyalty Oath*

**BOB BLAUNER**

Stanford: Stanford University Press, 2009
328 pp.

**REVIEW ESSAY BY GLEN GENDZEL***

Imagine the University of California, the nation's top public university system, mired in crisis. Its renowned faculty are demoralized and depleted by waves of layoffs, resignations, and forced retirements. Promising young scholars turn down UC job offers; established academic superstars depart for more hospitable employment elsewhere. So many classes are cancelled that already crowded classrooms get jammed beyond capacity and UC students are unable to finish their degrees on time. Politicians in Sacramento gleefully pander to the public by attacking UC professors as elitist, out of touch, and morally suspect. The university's prestige suffers, the value of a UC degree declines, and a miasma of mistrust poisons campus life. Things get so bad that the UC Academic Senate officially declares the university "a place unfit for scholars to inhabit" because it has embarked on "a tragic course toward bankruptcy" (p. 202).

Imagine this crisis happening to the University of California — not today, but in 1950. The crisis came not from budget cuts but from a self-inflicted wound: the so-called "loyalty oath." Starting in 1949, the UC Board of Regents, on its own initiative, required all UC employees to sign

* Professor, Department of History, San José State University.

an oath declaring that they did not belong to the Communist Party. No UC professors were even accused of being communists, but the penalty for not signing the Regents' oath was automatic dismissal from the university regardless of rank, tenure, or job performance. Actual membership (or non-membership) in the Communist Party had no bearing on whether faculty could keep their jobs; what mattered was whether they signed the oath. UC professors objected to the loyalty oath because it was coercive, it violated academic freedom, it imposed a political test for employment, and perhaps worst of all, it abrogated tenure. Most faculty members eventually signed under extreme duress, but a substantial minority chose to fight the oath. The result was nearly two years of agitation, recrimination, controversy, moral anguish, bureaucratic wrangling, political grandstanding, financial hardship, interrupted careers, several heart attacks, and the firing of over thirty eminent scholars and teachers. Ultimately the issue was resolved by the intervention of the governor, an act of the state Legislature, and a ruling of the state Supreme Court — all of which left no one satisfied but everyone relieved that at least the ordeal was over.

There was nothing new about a mandatory oath of loyalty for UC faculty. Since 1942, all California state employees had been required to swear allegiance to the state and federal constitutions. But in 1949, as the Cold War intensified, as Communism spread across Europe and Asia, and as revelations of Soviet espionage in the United States began to emerge, UC employees were singled out for a special anti-communist oath. Strong opposition arose immediately, though the ranks of non-signing professors dwindled as it became clear that they really would lose their jobs. Non-signers insisted that Communist Party membership alone should not disqualify anyone from university employment. Only demonstrably disloyal professors who advocated violent overthrow of the United States government in their teaching or their scholarship should be subject to dismissal — and even then, they should only be disciplined by the faculty itself through its own self-governing committees after a proper evidentiary hearing, not by the administration. To dismiss a professor merely for presumed membership in the Communist Party, rather than for any actual act of disloyalty, constituted guilt by association and denial of due process. Even worse, the non-signers protested, it violated academic freedom

# *AFTER THE TAX REVOLT:*
## *California's Proposition 13 Turns 30*

JACK CITRIN AND ISAAC WILLIAM MARTIN, EDITORS

Berkeley: Institute of Governmental Studies, 2009
169 pp.

REVIEW ESSAY BY DANIEL H. LOWENSTEIN*

In my more than forty years of living in California, I have never seen the public as exercised as they were during the months leading up to the election on Proposition 13 in the June 1978 primary. I recall a lunch debate on Proposition 13 — I believe it was held by the Commonwealth Club in Sacramento — where I was seated at a table with several farmers. The image persists in my mind of the muscles in the neck of one of these men, strained to the limit by the emotions he was feeling. That image has been my personal emblem of how highly charged were the political passions in that season. I have never again seen their like.

As any reader of this journal must be aware, Proposition 13 was approved by a large majority and has had a major influence on California's subsequent history. To paint with a broad brush, the proposition limited property taxes to one percent of assessed value, rolled assessed values back to the levels of 1975–76 (a significant reduction in those inflationary days), limited subsequent assessment increases to two percent per year even if the market value increased by a much greater amount, and

* Director, UCLA Center for the Liberal Arts and Free Institutions. Professor Emeritus, UCLA School of Law.

made it more difficult to raise taxes by requiring voter approval at the local level and requiring a two-thirds vote for tax increases in the state legislature.

No one doubts that Proposition 13 was one of the major events of the late twentieth century in California. Whether it was for good or bad or both continues to be a lively subject of public debate. In addition, a sophisticated corps of scholars has scrutinized Proposition 13 from almost every angle.

The Institute of Governmental Studies is ideally situated to contribute to the study of Proposition 13. Located at the University of California, Berkeley, it provides to its students and to the public a combination of academic work at the highest level and a close, hands-on association with practical government and politics that includes frequent participation by officials, journalists, activists, and just about anyone else with first-hand knowledge of government and politics, whether international, national, or California-oriented. Thus it is no surprise that the present director of IGS, Jack Citrin, together with sociologist Isaac William Martin, on the thirtieth anniversary of enactment (June 6, 2008), convened some of the best of the scholars who have studied Proposition 13, together with activists and other knowledgeable people, to assess the proposition's legacy. The resulting papers make up the book under review.

According to Martin, the participants' mandate "was a simple one: assess what we have learned about the political, economic, and fiscal consequences of Proposition 13 over the last 30 years." Some of the essays reflect original research and fresh thinking. However, the book's intended audience is not primarily the small group of specialists who are familiar with the scholarly literature on Proposition 13. Instead, the book is directed to a general audience, which can include but should not be limited to students in courses on California government or finance. It can be recommended to anyone seeking either balanced and broad information on Proposition 13 in one short volume or an introduction to the measure with references facilitating future research.

The book contains some annoying though minor flaws. It is short, and most of the contributions are concise, but still a general index would

# *RACIAL PROPOSITIONS:*
## *Ballot Initiatives and the Making of Postwar California*

DANIEL MARTINEZ HoSANG

Berkeley: University of California Press, 2010
372 pp.

REVIEW ESSAY BY ETHAN J. LEIB*

There are obviously many ways to write a history of the American struggle toward racial equality after World War II. Our battle against the Nazis and their most malignant form of racism set the stage for much that followed in the history of race relations in the U.S. Professor HoSang's innovative approach in writing this history in *Racial Propositions* is not to focus on the U.S. experience at large — but to focus on its most populous state: California. More innovative still, HoSang tries to understand political developments about race in the postwar period through the processes of direct democracy in California, where the people of the state get to issue relatively unmediated expressions of their preferences and affinities. What he is able to reveal is that the presumed bastion of progressivism hasn't been especially impressive at addressing racism in its territory; no longer can we only think of the South as racially retrograde in the postwar period. California often gets associated with a certain kind of liberalism (though it isn't nearly as univocally "Blue"

* Professor of Law, UC Hastings College of the Law. Thanks to Kevin Johnson, Aaron Rappaport, Reuel Schiller, Darien Shanske, Rogers Smith, and Frank Wu for their comments and thoughts about this review and its themes.

in the postwar period as some might assume) — but Professor HoSang helpfully reminds us that California's direct democracy is a forum in which that liberalism facilitates racialized ballot measures that often hinder racial integration in the state. The measures and the campaigns surrounding them, HoSang argues, help redefine race and racial equality in the process.

Although his method can have limitations — the story of race in California cannot really be fully isolated from the nation's as a whole, and the politics of race in the state surely cannot be limited to direct democracy when so much else happens in legislatures, courts, and executive offices — HoSang reasonably tries to narrow his scope and pick a lens into this otherwise dauntingly large subject area. His methodological choices are always fully transparent and, ultimately, the historical narrative he tells in his book is a truly engaging, well-written, and provocative account of how certain liberal theories of racial equality produce an arsenal of arguments for the opponents of many efforts at achieving racial justice. Moreover, HoSang charts how reigning theories of racial equality actually can hamstring civil rights activists in how they make their cases in the courts of public opinion and elsewhere. In a way, the consensus commitment to racial equality can serve to limit what the champions of racial justice can realistically say and accomplish. This is a subtle and often underappreciated way to think about racial politics and how they play out before the electorate.

The book is organized as a set of careful case studies about how certain propositions got onto the ballot in California, how certain propositions failed to qualify, how certain propositions were defeated, and how certain propositions succeeded. The aim in each chapter is to focus on the rhetorical campaigns opponents and proponents waged, with the purpose of revealing which accounts of racial equality proved themselves to have swayed the populace. There are chapters on the failed Prop. 11 in 1946, which would have created a Fair Employment Practices Commission (chapter 2); the successful Prop. 14 in 1964, which exempted many real estate transactions from fair housing legislation (chapter 3); the successful Prop. 21 in 1972 and Prop. 1 in 1979, which took aim at mandatory desegregation orders in California school districts (chapter

# *THE GREAT DISSENTS OF THE "LONE DISSENTER":*

## *Justice Jesse W. Carter's Twenty Tumultuous Years on the California Supreme Court*

DAVID B. OPPENHEIMER AND ALLAN BROTSKY, EDITORS

Durham: Carolina Academic Press, 2010
lvi, 225 pp.

REVIEW ESSAY BY MICHAEL TRAYNOR*

"The thing that means more to me than anything else is being able to transmit to posterity through my decisions, both majority and dissenting, something that will be a guide to the future. . . . A decision that stands for all time means something. If a hundred years from now a lawyer gets up in court and says, 'This very lucid and illuminating decision was written by Mr. Justice Carter in 1955,' well, I won't be there to hear it, but it is the thought that a hundred years after I am dead and forgotten, men will be moving to the measure of my thoughts."[1] So spoke Jesse W. Carter, associate justice of the Supreme Court of California for twenty years (1939–1959), in his oral history, conducted by Corinne Lathrop Gilb.[2]

---

* Member of the State Bar of California: Fellow, American Academy of Appellate Lawyers and California Academy of Appellate Lawyers; President Emeritus and Chair of the Council, American Law Institute; Senior Counsel, Cobalt LLP, Berkeley, California.

1 Oral History of Jesse W. Carter, 4 California Legal History 298-299 (2009).

2 *See* Corinne Lathrop Gilb, *Justice Jesse W. Carter, An American Individualist*, 29 Pacific Historical Review 145, 157 (1960). Justice Carter's oral history was conducted in 1955.

In his essay on dissenting opinions,[3] Justice Carter stated, "The right to dissent is the essence of democracy — the will to dissent is an effective safeguard against judicial lethargy — the effect of a dissent is the essence of progress. . . . The majority opinion is, in form and substance, the collective, composed and edited view of the majority. In a dissenting opinion, however, the judge is on his own, and can express his personality, his philosophy and his uncensored convictions."[4]

Justice Carter was understandably proud of his opinions and their treatment in the Supreme Court of the United States, saying in his oral history that "I've had more of mine upheld than any other member of the Supreme Court of California. Not as many as I would like to have had upheld, but more than any of the rest of them."[5] He also furnished for his oral history a "List of Cases in which I Have Dissented Where the Supreme Court of the United States Has Agreed with My Dissent and Reversed the Supreme Court of California."[6]

In their new book, *The Great Dissents of the "Lone Dissenter": Justice Jesse W. Carter's Twenty Tumultuous Years on the California Supreme*

---

3 Jesse W. Carter, *Dissenting Opinions*, 4 HASTINGS L.J. 118 (1952).

4 *Id.* at 118-119. His contemporary on the Supreme Court of Pennsylvania, Justice Michael A. Musmanno, also wrote an essay on dissenting opinions, stating, "Once it is proclaimed officially that a majority cannot err, you begin to encourage absolutism. And it has been demonstrated beyond all imagining of contradiction that when criticism is gagged, opposition suppressed, and constructive advice silenced, absolutism sprouts, for power feeds upon power, — and the tree of tyranny will soon bear its poisonous fruit of oppression." Michael A. Musmanno, *Dissenting Opinions*, 6 KAN. L. REV. 407, 416 (1958). *See also* Abraham E. Freedman, *The Dissenting Opinions of Justice Musmanno*, 30 TEMPLE L. Q. 253 (1957); Melvin M. Belli, *Book Review*, 4 U.C.L.A. L. REV. 164 (1956) (reviewing *Justice Musmanno Dissents, by Michael A. Musmanno, with introduction by Dean Roscoe Pound*, 1956).

5 Oral History, *supra* note 1, at 331.

6 The eight cases listed are Gospel Army v. City of Los Angeles, 331 U.S. 543 (1947); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Rochin v. California, 342 U.S. 165 (1952); Anderson v. Atchison, Topeka & S.F. Ry. Co., 333 U.S. 821 (1948); Garmon v. Building Trades Counsel [sic] [Council] of San Diego, 353 U.S. 26 (1957); California v. Taylor, 353 U.S. 553 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); and Chessman v. Teets, 354 U.S. 156 (1957). He added, "In only one case has the Supreme Court of the United States reversed the Supreme Court of California where I prepared the majority opinion. This was *Richfield Oil Corp. v. St. Bd. Equalization*, 329 U.S. 69 (1946). . . ." Oral History, *supra* note 1, at 332-333.

# *A LEGAL HISTORY OF SANTA CRUZ COUNTY:*

## *An Account of the Local Bench and Bar Through the End of the Twentieth Century*

ALYCE E. PRUDDEN, EDITOR

Santa Cruz: The Museum of Art & History
@ the McPherson Center, 2006
xiv, 161 pp., ills.

REVIEW ESSAY BY LARRY E. BURGESS*

For those seeking a detailed account of Santa Cruz County's legal history from the Bear Flag Republic through 2006, they have no further to look than to the exhaustive work of eight authors consisting of five attorneys, two librarians, and one judge. Their combined efforts provide insights into the people, cases, court structure, legal environment, and social issues that took place in the county during 160 years.

Reflective of similar themes in California's original counties, the law as practiced before statehood was rooted in Spanish and Mexican tradition. With the onset of the Gold Rush, the legal traditions of Spain and Mexico — adapted over the years by the *Californios* — and the laws of the United States began to conflict. This continued until the time of the Civil War when Santa Cruz County, the authors note, experienced sweeping changes in the procedures and practice of law reflective of the imposition of American legal tradition. "Momentous change" was to follow in the second half of the twentieth century.

---

* Adjunct Professor of History, University of California, Riverside; Director, A.K. Smiley Public Library, Redlands.

In presenting their research about people, judicial structure, and major trials, the authors set the context of each chapter with a discussion of the social, economic, and political issues confronting America. Such a construct serves well to understand the local events in Santa Cruz County. Their usage of oral history from participants in the legal world provides testimony not otherwise obtainable. The authors began their book in mid-1998. They are quick to add that their effort must also be seen as a challenge to others in the legal community to encourage and create further documentation of the unfolding chapters in the legal history of Santa Cruz County.

A survey of the decades covered reveals a diverse picture of the law. Santa Cruz County harbored many pioneers of distinction who served as *alcalde*, the single most important civil officer in early California before statehood. The *alcalde* played a "critical role in the Mexican system of colonial government, carrying out executive, legislative, and judicial functions." A few qualifications were indispensible — honesty, ability, and literacy. Among those serving as *alcaldes* were Joaquín Castro in the 1830s (a member of the De Anza party in 1776); Walter Colton in 1846 (who introduced the jury system in the county and helped form the California Constitution); and José Antonio Bolcoff in the 1840s (a Russian who married one of Castro's daughters).

Noting the unsettled conditions in California during the aftermath of the war with Mexico, 1846–1848, and especially before statehood in 1850, the authors quote historian Sandy Lydon who wrote, "The Americans rode in on their law books and used their guns in the meantime."

An excellent illustration of justice in those times is that of Judge William Blackburn who found a young man guilty of cutting off a horse's tail. After consulting his law books to no avail, he decided to apply the old biblical law of "an eye for an eye" and ordered the man to have his head shaved, to the delight and cheers of an assembled crowd.

Local history is often personal history, embracing the great events and massive social upheavals of the times. It is in local history where frequently someone may be directly connected to a historical event or person. The authors navigate these waters well, not avoiding discussion of success and failure in the history of law in Santa Cruz County. They

# *HISTORY OF THE BENCH AND BAR OF CALIFORNIA:*

## *Being Biographies of Many Remarkable Men, A Store of Humorous and Pathetic Recollections, Accounts of Important Legislation and Extraordinary Cases*

OSCAR T. SHUCK, EDITOR

Los Angeles: Commercial Printing House, 1901
Clark, NJ: The Lawbook Exchange, Ltd., 2007
xxiv, 1152 pp., ills.

REVIEW ESSAY BY CHARLES J. McCLAIN*

## I. PROLOGUE

### *Background to the Work*

This year marks the hundred and tenth anniversary of the publication of Oscar T. Shuck's mammoth survey of the California legal profession at the dawn of the twentieth century and look back into its pioneer past. His book is once again available in print, and the full text is also available online via Google Books. Consisting of some 620 biographical sketches of California lawyers and judges, living and dead, and of essays on aspects of California legal history, his *History of the Bench and Bar of California*[1] runs to over 1100 pages, most double-columned,

* Vice Chair (Emeritus), Jurisprudence and Social Policy Program, Lecturer in Residence, School of Law, University of California, Berkeley.

[1] Hereinafter, *History of the Bench and Bar.*

closely printed. Sprawling in structure, generally uncritical in tone (the sketches are almost all complimentary), the book, nonetheless, offers us abundant and valuable information on the California legal profession in its formative periods and as it moved into modernity.

Shuck was not the originator of the work nor its first editor. M.M. Miller, a San Francisco lawyer, conceived the idea in 1899, found a publisher and was well into the task of collecting material when he was called to Hawaii to, as Shuck puts it, "take part in the transformation of the Hawaiian Islands into a portion of the American Union."[2] Shuck was well suited to take over the project. A little over a decade earlier he had brought out a work entitled, *Bench and Bar of California: History, Anecdotes, Reminiscences,*[3] a compilation of sketches of prominent California lawyers and judges, published in three volumes between 1887 and 1889.

Works similar to Shuck's 1887–89 *Bench and Bar* had appeared before. New York led the way in 1870 with its *Bench and Bar of New York*.[4] Missouri weighed in with its own publication eight years later, followed by Mississippi (1881), Wisconsin (1882) and Texas (1885). The structure of all of these publications, Shuck's included, was similar. They consist of profiles of leading members of the bench and bar, compiled by the author/editor, or possibly with the assistance of the subjects themselves (Shuck's, however, were entirely his own work), recollections of famous cases, humorous anecdotes. The profiles are for the most part adulatory, intended, as the New York volume put it, to hold up the lives of those sketched "as examples to those in the upcoming generation of lawyers."[5] The project that

---

[2] *Id.* Preface. Miller is otherwise unidentified, and his profile does not appear in the work, nor for that matter does Shuck's.

[3] Oscar T. Shuck, *Bench and Bar of California: History, Anecdotes, Reminiscences* (San Francisco: The Occident Printing House, 3 vols., 1887–89). Shuck is more accurately characterized as the author of the earlier work, the editor of the latter.

[4] L.B. Proctor, *The Bench and Bar of New York: Containing Biographical Sketches of Famous Men, Incidents of the Important Trials in Which They Were Engaged, and Anecdotes Connected with their Professional, Political and Judicial Careers* (New York: Diossy, 1870). The Mississippi publication dealt almost entirely with deceased lawyers. Tennessee, Michigan, Indiana and Ohio issued their own "Bench and Bar" volumes in the 1890s.

[5] *Id.,* 1.

# BOOK REVIEWS

## *WOMEN WHO KILL MEN: California Courts, Gender, and the Press*

GORDON MORRIS BAKKEN
AND BRENDA FARRINGTON

Lincoln: University of Nebraska Press, 2009
xi, 272 pp.

In *Women Who Kill Men*, the authors discuss the interesting cases of a number of women who went on trial for killing men in California, from the late nineteenth century until just before the 1960s. Laura Fair was the defendant in the first of these trials; she had shot Alexander Crittenden to death on a ferry boat in San Francisco Bay in 1870. The last in the series is the sensational case arising out of the death in 1958 of Johnny Stompanato, the thuggish boyfriend of Lana Turner, the movie star. Cheryl Crane, Lana's daughter, killed him, supposedly to protect her mother.

Each of the cases has its own fascination. The authors try to use these cases to examine changing gender roles and changing norms in society. And, indeed, trials of women for killing men do have a special interest. For one thing, they are comparatively rare. Most killers are men; and so are most of their victims. Women rarely kill; and they kill in ways and under circumstances that differentiate them sharply from men who commit homicide. Women, for example, do not kill in barroom brawls. They do not kill in the course of armed robbery. When they kill, they almost always do so in the context of intimate relationships. Some women do kill for money — but it is usually family money. Gertrude Gibbons was accused of poisoning her husband in 1918; according to the prosecution, she did the bloody deed in order to collect an insurance policy (and also to "get rid of an invalid," p. 72). A grand jury failed to indict her.

Gertrude Gibbons escaped trial. Others of the women defendants were acquitted; or, if convicted, won their case on appeal. Other studies, in other jurisdictions, have confirmed the impression that women defendants had a better chance at trial than men. These studies have shown that judges and juries were often quite sympathetic to women accused of murder in the late nineteenth and early twentieth centuries. Today, we hear a great deal about the battered woman syndrome. From a formal and doctrinal standpoint, this defense has emerged fairly recently. But some juries, long before the development of this doctrine, seemed willing to give a good deal of slack to women who killed abusive husbands or lovers. Bakken and Farrington point to a number of instances in which women "resorted to murder to defend themselves and family members," and in which juries "judged these defendants' actions as justifiable homicide" (p. 78).

The cases described in this book were chosen in part because they were quite sensational; they were the stuff of front page news. What is it that makes a crime and its punishment sensational?: There are, in fact, quite a few reasons. The simplest reason is that the public is attracted to the lurid, and cases that appeal to the rather prurient interests of the public are extremely likely to make headlines. The public, particularly in the last few generations, has an almost morbid curiosity about the lifestyles of the rich and famous. Trials become media events when they

seem to open a window into the world of prominent people — especially Hollywood stars — and which expose a world that is both glittering and morally repellent at once. This was true of the notorious trials of Roscoe ("Fatty") Arbuckle in the 1930s; and it was true in the case of Lana Turner and her daughter. The media, to be sure, play an important role in the process of creating sensational news; and in publicizing and magnifying headline trials. The newspapers, and later television, greatly expanded the salience of many of these trials. The swarms of reporters who infested the trials of Dr. Sam Sheppard and O. J. Simpson, certainly contributed to the notoriety of these cases. The O. J. Simpson case was televised, which brought it to the attention of millions of people. The media do not and cannot invent these headline cases and headline trials; but they are clearly responsible for inflating their importance.

Another factor may be particularly salient in trials of women for murder. Such trials sometimes tested norms and ideas about gender roles. Well into the twentieth century, the conventional picture of respectable women was completely inconsistent with any notion that such women could be murderers. Murder was not, supposedly, in their nature. If they killed, there must have been a good reason. Of course, prosecutors tended to take a quite different view; they tended to describe the women in much less glowing terms. In the trial of Laura Fair, the prosecution described her as "an immoral seductress, a money-hungry opportunist, and an exploiter of male weakness." The defense argued that Laura suffered "maniacal spells due to delayed menstruation"; that this "female complaint" led to an "irresistible impulse to kill" (p. 19). The jury found her guilty. She appealed, and won a new trial. At this second trial, in 1872, a jury found her "not guilty by reason of insanity" (p. 37).

Perhaps the most famous criminal trial (other than political trials) in American history was the trial of a woman: Lizzie Borden. This was the sensation of the 1890s. It has given rise to an enormous literature; not many criminal trials have provided the inspiration for an opera and a ballet. Lizzie Borden was accused of murdering her father and stepmother, quite brutally, with an axe. The Bordens were leading citizens of Fall River, Massachusetts. Lizzie was unmarried, in her 30s — the very picture of a respectable, upper middle-class, church-going woman. There

was considerable evidence against her. But the jury acquitted her. The twelve men in the box apparently could not imagine that a woman of her stamp could be in fact a savage killer, someone capable of bashing in her own father's head with an axe.

Arguably, then, in the trial of Lizzie Borden, it was not just one woman who was on trial, but well-to-do women in general, or, perhaps bourgeois society itself was on trial. The case would tap into quite different norms, concepts, and intuitions today; and the trial might have come out differently. Bakken and Farrington, as we said, try to use these cases as examples of the way norms and ideas (mostly about women and crime) have changed in California during the period they studied. No doubt these norms and ideas are still evolving.

*Lawrence M. Friedman*
*Stanford University School of Law*

---

## *TESTIMONIOS: Early California through the Eyes of Women, 1815–1848*

**TRANSLATED WITH INTRODUCTION AND COMMENTARY BY ROSE MARIE BEEBE AND ROBERT M. SENKEWICZ**

Berkeley: Heyday Books, 2006
xxxvii, 470 pp.

The authors translated interviews of thirteen women done in the nineteenth century that provide historians of California with a gendered window into Mexican society and law. The periodization is important because far too much of our knowledge of early California is burdened with class and culture. Further, the authors point out that the documents were "marred by actual mistranslations." In returning to the original transcripts of the interviews, the authors found "that sentences, even entire paragraphs, of the women's words have been left out of some English translations" (p. xxxi). The authors have translated from the original interviews and, most importantly, given readers a precise explanation of the methodology of the interviewers and their personal

histories. Clearly, cultural bias had infiltrated the process in the nineteenth century.

What was on the minds of these women? Crime was a significant aspect of life. Rosalía de Leese remembered on June 27, 1874, "Frémont and his ring of thieves were in Sonoma, robberies were very common" (p. 29). Teresa de la Guerra de Hartnell reflected on March 12, 1875 that the Americans were not the only enemy deviants; Mexican "governors and officials . . . were men of very bad principles . . . very bad individuals . . . cowards and bad people" (p. 62). Catarina Avila de Ríos remembered on June 20, 1877, "three or four Irishmen . . . murdered the children with the hatchet while they were sleeping . . . and killed a black man who worked as a cook" (pp. 90-1). Angustias de la Guerra told Thomas Savage in 1878 that around 1829 "a ship from Mexico arrived in Santa Bárbara with two hundred or more men. All of them were convicts and the majority of them had committed very serious crimes" (p. 213). She also thought Mexican "soldiers were consummate thieves who committed all sorts of crimes every day" (p. 259).

Women also reflected upon land titles. Dorotea Valdez of Monterey on June 27, 1874 looked to the future, saying that "as soon as the railroad begins to operate, many foreigners will come to settle here. Rest assured, that is when Señor Jacks will receive the punishment he deserves. All we want is for some clever lawyer to take the pueblo land away from him" (p. 38). The Mexicans of Monterey were convinced that David Jacks had stolen their pueblo lands from them. Valdez gave a reason: "This is land that nobody had the right to give away, because it rightfully belongs to every man, woman, and child who was born in our town" (p. 38). Jacks had constructed fences to keep Mexican cattle and horses off his land and was "a natural-born enemy" (p. 38). Linda Heidenreich's "*This Land Was Mexican Once*": *Histories of Resistance from Northern California* (2007) recounted similar tales of stolen lands, mostly in Napa. Rosaura Sanchez's *Telling Identities: The California Testimonios* (1995) gave the oral histories gendered, ideological, and protonational interpretations. As we know from Gordon Morris Bakken's *The Development of Law in Frontier California: Civil Law and Society, 1850–1890* (1985) David Jacks successfully defended his title and encroachments on his pueblo lands.

The bulk of remembrances regarding land focused on American lawyers, bankers, and squatters stealing Mexican land. Yet María Antonia Rodríguez saw it in a world history context. "[S]he replied that though the Americans had taken away from her nearly the whole of her lands, she had no grudge against them — for, she said, 'It is the law of nature that the poor should steal from the rich. We Californians in 1846 owned every inch of soil in this country, and our conquerors took away from us the greater part. The same thing, I suppose, has happened over and over again in every conquered nation'" (pp. 45-6). She was not a victim as so many others remembered themselves.

This volume is an outstanding contribution to California legal history, providing researchers with correctly translated oral histories. The authors must be commended for taking on such a daunting task.

*Gordon Morris Bakken*
*California State University, Fullerton*

---

## *WATER AND THE WEST: The Colorado River Compact and the Politics of Water in the American West*

NORRIS HUNDLEY, JR.

Berkeley: University of California Press, 2nd. ed., 2009
xv, 415 pp., bibl., index, maps, notes.

The most important stream in the American West, the Colorado River flows through or past parts of seven states (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming), as well as a small portion of Mexico, before its depleted flows drain into the Gulf of California. The Colorado is not the largest river in the United States in terms of volume (it ranks sixth), but the Colorado provides life-giving water to much of the southwest quarter of the United States, sustaining a significant amount of the area's economy as well as generating hydroelectric power for the nation's energy grid. Thus, the Colorado River has

— and has had — an enormous impact on the United States that goes well beyond the river's regional geography.

Norris Hundley's *Water and the West* traces the history of that influence, particularly the struggles over the Colorado's water supplies — conflicts that continue to this day. This is the second edition of Hundley's book, the first having been published in 1975. Nonetheless, this book is still essential reading for water planners, lawyers, environmentalists, historians, and others concerned with water in the American West. Indeed, copies of the first edition of this book appear outside academic libraries on the shelves of countless attorneys and government officials throughout the entire American West.

And for good reason. Hundley's book surveys the history of the "Law of the River" — the legislation, regulations, court decisions, and administrative rulings that have shaped the uses of the Colorado River over the past century and a half — all of which clearly show that water allocation and control issues involving the Colorado were highly complex and involved multitudes of interested parties at all levels of government as well as in business and other aspects of society as a whole. Hundley begins with a review of late nineteenth- and early twentieth-century attempts to control the highly irregular and erratic flows of this stream to supply nascent irrigation communities and speculative land development schemes in southern California, and he carefully documents how what initially was a localized water question evolved into a regional contest of enormous consequences over how the Colorado River would be tamed and simultaneously allocated among the seven basin states. It is this part of the story that occupies most of Hundley's narrative. Here, he demonstrates how the newly formed Reclamation Service and growing demands for water supplies up and down the Colorado River, as well as increasing needs for hydroelectric power, laid the foundation for the negotiation of the Colorado River Compact of 1922 — the first such use of the Constitution's authorization for states to form agreements among themselves to solve any interstate water conflict. Hundley carries the narrative through the long and difficult attempts to have that accord ratified by the seven Colorado River Basin states, the 1928 Boulder Canyon Act (which authorized the construction of Hoover Dam), and the

interstate litigation between Arizona and California over the following few decades leading to the U.S. Supreme Court's landmark 1963 decision in *Arizona v. California*, which, according to the Court, established that Congress had intended to apportion the stream when the federal legislators had passed the Boulder Canyon Act.

For the second edition of *Water and the West*, Hundley has brought the Colorado River history down to the present by offering a lengthy epilogue on various issues now affecting the stream. These include: how modern water measurement techniques (notably tree-ring analysis) have shown that the original assumptions about the Colorado's flows were probably overestimated; how global warming and greenhouse gases are affecting (and will continue to affect) water use and control; how more recent water-conservation attitudes will play a role in future Colorado River planning; how concerns over wildlife have become more influential on water allocation; and how recognizing Native American interests in water and the environment will play a major role in future Colorado River planning.

Most notably, however, Hundley's book remains fundamentally the bedrock foundation to understanding the background to Colorado River water issues as well as the multitude of forces shaping water use and control. This is due to Hundley's thorough grasp of documentary sources relating to his topic as well as to his careful footnoting and attention to detail in organization and writing. This is an exceptional book. It should continue to be at the top of anyone's list who truly wants to grasp the complexities of water and the American West.

*Douglas R. Littlefield*
*Littlefield Historical Research*

✯ ✯ ✯