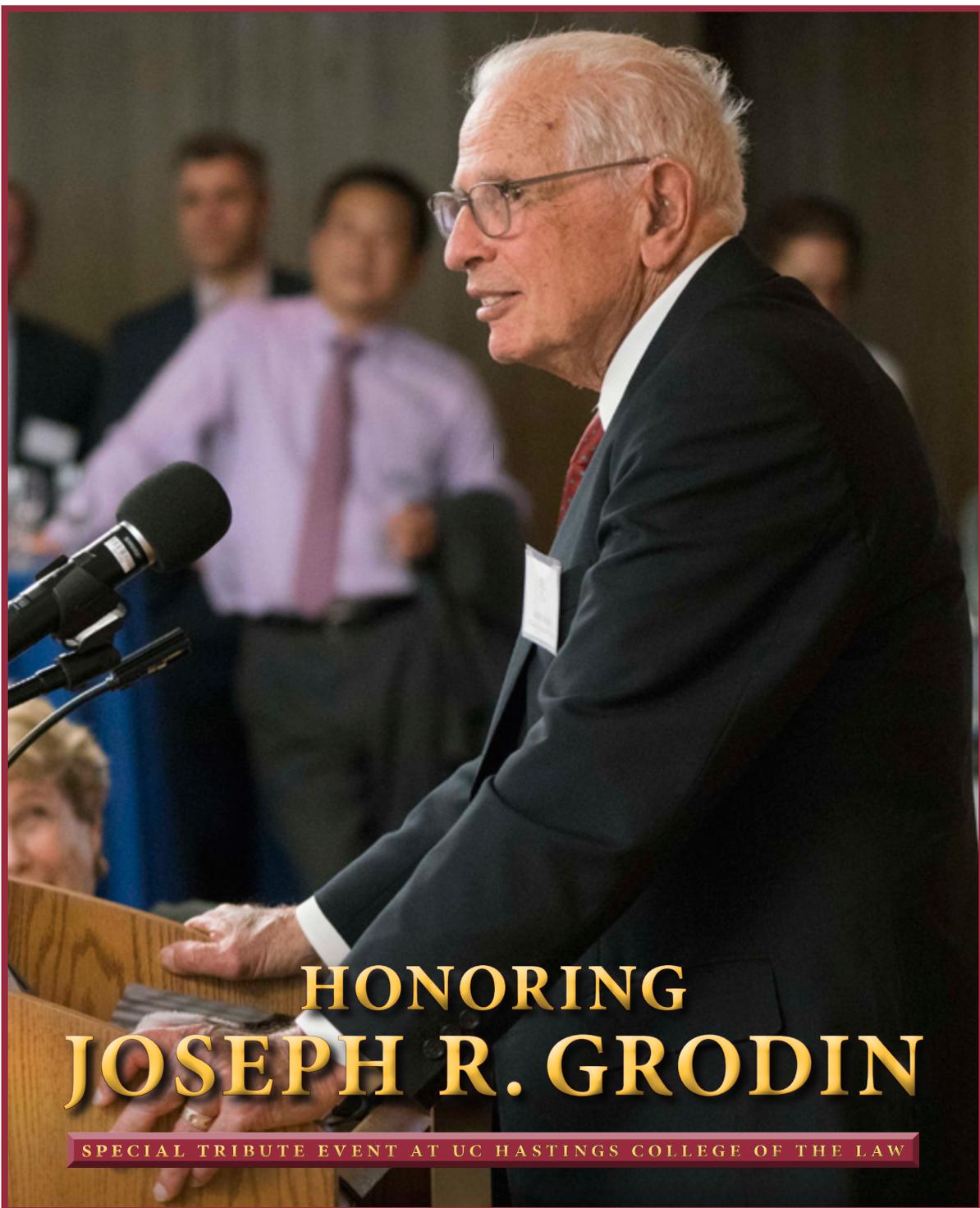




CALIFORNIA SUPREME COURT

Historical Society

NEWSLETTER • FALL/WINTER 2015



HONORING JOSEPH R. GRODIN

SPECIAL TRIBUTE EVENT AT UC HASTINGS COLLEGE OF THE LAW



The honoree speaks.

Honoring Joseph R. Grodin

SPECIAL TRIBUTE EVENT, THURSDAY, NOVEMBER 12, 2015
AT UC HASTINGS COLLEGE OF THE LAW

UC HASTINGS COLLEGE OF THE LAW honored former Associate Justice and Distinguished Professor Emeritus Joseph R. Grodin with a special Tribute event on Thursday, November 12, 2015, attended by faculty, students, friends, and family.

A special feature was the premier of the new documentary, “In Pursuit of Justice: The Life & Legacy of Joe Grodin,” by Peabody Award-winning filmmaker Abby Ginzberg (available at https://www.youtube.com/watch?v=e_ZniNMAsmY).

The California Supreme Court Historical Society was a co-sponsor of the event and the documentary. The 2015 volume of the Society’s annual journal, *California Legal History* — now available — commences with a special section of essays in tribute to Justice Grodin (please see the list of authors on page 30 of this Newsletter).

Dean Frank Wu welcomed the guests, indicating that the Tribute event marked Justice Grodin’s 85th

birthday year, the publication of the latest edition of his book on California constitutional law, and his more than 55 years as a professor and scholar at UC Hastings. The keynote speaker was Judge Marsha Berzon of the U.S. Court of Appeals for the Ninth Circuit, and greetings were given by Attorney James J. Brosnahan, senior trial counsel at Morrison & Foerster. At the conclusion of the evening, Justice Grodin responded with his own remarks. Each of their talks is presented below.

Professor and former Justice Grodin first taught as an adjunct professor at UC Hastings in the late 1950s and initially became a fulltime faculty member in 1972. During the 1970s, he also served as a member of the first Agricultural Labor Relations Board and as foreperson of the Alameda County Grand Jury. Governor Jerry Brown appointed him to the California Court of Appeal in 1979 and to the California Supreme Court in 1982. As a jurist, he authored or joined in many significant and

PHOTOS OF SPECIAL TRIBUTE EVENT: BY JIM BLOCK, COURTESY UC HASTINGS

enduring opinions. Professor Grodin returned to the UC Hastings faculty in the late 1980s and now teaches part-time as a distinguished emeritus professor of law.

At the event, the creation of the “Grodin Justice Fund” was announced. Established by Joseph and Janet Grodin, with additional funding from more than 100 colleagues, friends, and organizations, its purpose is to promote access to justice for low-wage workers. A major focus will be to use technology to enhance the participation of UC Hastings students and the availability of free legal services at the Workers’ Rights Clinic, a joint project of UC Hastings and the San Francisco Legal Aid Society’s Employment Law Center.

THE HONORABLE PROFESSOR — JOSEPH GRODIN

BY HON. MARSHA BERZON

I SUPPOSE THE REASON I’ve been asked to talk briefly today is that my professional life in the Bay Area has crossed paths with Joe Grodin’s at several junctures — as a labor lawyer, as a judge, and, perhaps most importantly for today’s gathering, as co-teacher with Joe of a seminar here at Hastings — although the class is really Joe’s, as far as I — and I think the students — are concerned. I’d like to look a bit at each of these lives of Joe — as labor lawyer, judge, and professor — adding what I can from our intersections over the years, to the film we are about to see, and the public record.

Joe and I were both lawyers representing unions for a large part of our careers, although at different times. Joe was never just a labor lawyer — being Joe, he delighted both in the real life adventures of his clients and their members, and in the theoretical legal issues raised by their questions and cases. And even after he became a full-time professor, then a justice, and then a professor again, Joe’s legacy as a labor lawyer lived on. While practicing, he wrote many articles on what must have seemed at the time relatively obscure labor law, and other, issues — some with his mentor Mat Tobriner. Those articles uncannily anticipated later developments in the field; reading one article last night, I noticed that Joe had identified over fifty years ago an unresolved issue recently decided in the Seventh Circuit and currently pending in a case in Idaho.

As far as I know, Joe was the only practicing union-side labor lawyer who made time to write a substantial number of serious, deeply grounded articles — not advocacy pieces at all, but reflective ones. Perhaps the pinnacle of Joe’s penchant for translating from the minutia of everyday legal practice to the world of legal scholarship and future development of the law was a *California Law Review* article — without Joe, it appears, the *California Law Review* would have folded in the fifteen-year period he was in practice — written with Justice Mathew



Keynote speaker Judge Marsha Berzon of the U.S. Court of Appeals for the Ninth Circuit



Joseph Grodin and Peabody Award-winning documentary filmmaker Abby Ginzberg

Tobriner and entitled, “The Individual and the Public Service Enterprise in the New Industrial State.”²¹ Not exactly the stuff of a just-cause-discharge labor arbitration, one would think, or an appellate National Labor Relations Act case — the daily grist of most labor lawyers — yet heavily influenced by his experience in dealing with the internal affairs of labor unions, early characterized by courts as what the article calls public service enterprises. And, interestingly, one sees in the public enterprise article the seeds of some of Joe’s later interests, and strengths, as a judge and a professor — principally, an appreciation of the common law and its methodology, the astute perception of large social changes likely to influence legal developments, and the ability of a nimble mind to see parallels and cross-fertilization in such diverse fields as the law of landlord-tenant relationships, the law of internal union affairs, and bad faith insurance litigation. As we shall see, Joe carried those same attributes, and even the same analogies, into his work while on the bench, as well as afterwards.



LEFT TO RIGHT: Former Justice and Professor Emeritus Cruz Reynoso, UC Davis School of Law, honoree Joseph Grodin, and Justice Mariano-Florentino Cuéllar of the California Supreme Court.

First, though, I should mention one other typically Joe contribution to the local practice of labor law. Labor law practice is famously contentious, split between union and employee attorneys, on the one hand, and management lawyers on the other. The tone of the practice tends to be no-holds-barred, in court as well as outside of it. But Joe is by nature both garrulous and committed to reasoned discourse and open discussion; he is also a dedicated outdoors person. So my understanding is that he set out, with his former partner Duane Beeson and two or three management attorneys, to establish a conference in a spectacular location, the Ahwahnee Hotel at Yosemite, where peace would be declared for two days, we would all attend panel discussions for a while, and then we would all go out hiking or skiing with our spouses and children, with the good feeling (and good information) hopefully carrying over to the rest of the year's practice, softening some of the rough edges. Joe has remained the most popular speaker at these events when he is able to attend, with the crowd hanging on his wonderful stories about past labor management squabbles as well as his trenchant analyses of current labor and employment law trends — for another Joe characteristic is the ability to integrate all of his past experience and wisdom with contemporary social and legal developments, yielding a mix that no one else I know of is able to emulate.

Moving forward in time, Joe and I were both judges, again at different times. Joe was an extraordinary justice for the relatively brief time he was permitted to serve. I am confident he would have become part of the small pantheon of non-U.S. Supreme Court justices (Learned Hand, Henry Friendly, John Minor Wisdom, Frank Johnson, Roger Traynor) widely revered for their impact on American jurisprudence, had his career not been cut short. That it was is to many of us a tragedy, but not to him — more bemused by the turn of events than angry,

he went off to write a book reflecting on his experience as a justice and on the judicial election process that, to his great surprise, ousted him, and then went back to Hastings and picked up his scholarly and teaching career, adding to the mix new interests developed during his years on the courts as well as stints as an arbitrator and as a hearing office for internal union inquiries.

Of the opinions he wrote while on the Court of Appeal and the Supreme Court, I wanted to talk a bit about *Pugh v. See's Candy*,² not so much because it may have been his single most significant contribution as a practical matter, but because it well illustrates the continuity between Joe's long-term interests and habits of inquiry and his judicial approach. *Pugh* opened up the world of implied employment contracts guaranteeing some security of employment, based on a range of factors, including longevity, oral representations made when hired or while employed, written employment policies, and so on. Joe joked once that when he wrote the opinion, he did not predict that whole law firms would spring up to litigate wrongful termination cases, but in fact they have.

What is interesting to me is that in first devising and then drafting *Pugh*, as well as a companion case, Joe went back to his intellectual and professional roots, to the common-law but eclectic mode of analysis in the public enterprise law review article, as well as to his immersion in the legal world of workplaces. First, he noted how the world had moved on in recent years, placing limits of various kinds on the employer prerogative to fire employees for any reason or no reason; second, as he explained several times in discussing the *Pugh* opinion, he recognized that common law developments in other areas — in particular, in the common law cases that created a legal network for the internal governance of labor unions, the subject of Joe's Ph.D. thesis — had modified imbalances of power through judge-made adjustments of contract and other

doctrines; and third, in his writings on the subject, he explained that he also drew on his comparative law experience — his thesis had compared British and American union law — to note that this country was far behind most of Europe with regard to security of employment for individual employees.

Joe often talked in his academic writing of his admiration for Holmes' and Cardozo's analyses of the common law process. The loss of Joe's now-unusual ability to carry forward into his judicial work that traditional process of careful yet creative jurisprudence seems to me to be the saddest part of what was lost when the electorate — as he has said, without much clue as to what it should be doing in a retention election for the California Supreme Court — turned him out.

The final major thread of Joe's professional life — I am leaving out his brief stint on the Agricultural Labor Relations Board, well covered in the film — has been his long academic career, almost all of it here at Hastings. For the last five years, I have crossed Market Street one afternoon a week each Spring to teach with Joe a class now called, "Judging the Constitution." Although I am listed as a co-teacher, I most often feel that I am a co-student, enthralled by Joe's musings and analyses about the process of judging — including the niceties of constitutional doctrines such as First Amendment "balancing" and the usefulness of the various standards of scrutiny; the importance of state constitutional independence (a favorite topic, both in class and in Joe's post-judicial writing); and the vital importance of understanding judging from a middle ground, as neither calling balls and strikes (I was amazed to discover that Joe used that analogy, quizzically, in his 1980s book, *In Pursuit of Justice*, long before Justice Roberts invoked it in his confirmation hearings) or reflecting the judge's own policy predilections, or what he or she ate for breakfast. On the last point, Joe has been consistently insistent; just last year, he repeated it, in a response to Professor Brian Leiter published in the *Hastings Law Journal*:

Most judges . . . would say that constitutional adjudication lies somewhere in the middle of a continuum between judge-as-referee and judge-as-legislator, and that judges believe (and we want them to believe) that while moral and political values undoubtedly play a role in constitutional decisionmaking, judges are constrained . . . by a variety of factors, including constitutional text and history, past decisions, their legal training, the opinions of their peers, concern for the integrity of the Court as an institution, concern for the maintenance of a rule of law, and concern for their own place in history. . . . [W]e need to find a way of talking about a middle ground that does justice to the complex judicial task.³

At Professor Grodin's suggestion, we usually begin our seminar each spring with Lon Fuller's "The Case of the Speluncean Explorers," a fanciful story — based on real life incidents — about five individuals trapped in a cave who resort to cannibalism.⁴ The piece is amusing, yet serious — its point is to consider contrasting approaches to the tasks of judging. Each year, we debate with the students whether strict constructionism (the fictional Justice Keen), creative purpose-based analysis (Justice Foster), abdication of the judicial role when the outcome dictated by legal principles is not acceptable (Justice Tattling), result-orientation resting on public opinion (Justice Handy), or purported reliance on separation of powers (Chief Justice Truepenny) is the more appropriate approach to judging the make-believe legal dilemma. We have fun with the discussion, but we also hope to set up the parameters of the discussion for the rest of the term, as the class is asked to discuss the judicial challenges lurking in particular pending cases in the U.S. and California Supreme Courts (and occasionally other appellate courts). Listening to Joe interlace philosophical discussion with a bevy of wonderful stories — Joe is the consummate storyteller, always coming up with pertinent tales — is to watch a master at his game. Incidentally, Joe never lets on which of Fuller's apocryphal justices' approaches he most sympathizes with, although I suspect it is a toned-down version of Justice Foster's attempt to find some basis in established legal principles for reaching what appears to be the most just result.



Former Justice Grodin signs a copy of the new edition of his book, *The California State Constitution*, for Associate Justice Kathryn M. Werdegard in her chambers at the California Supreme Court, December 16, 2015.

PHOTO COURTESY JAKE DEAR

One other comment on Joe's teaching: Joe had to miss one class last year because he was seriously (although temporarily) ill. He told me that as far as he could remember, that was the first class he had missed in decades teaching.

In the classroom, as behind the lawyer's podium and on the bench, Joe Grodin has transformed, and continues to transform, the various legal worlds he has encountered, bringing to every task his bounding energy, his felicity of language, his depth of thought, his good humor, and his profound commitment to shaping a better society. He has never accepted received wisdom; as in his wilderness hiking and rafting endeavors, he has been willing to take risks and confront the unknown. But also as in his outdoor activities (I suspect — I have never hiked with him) he is always well prepared, using all the available tools and staying within acceptable bounds.

Being a craftsman and a visionary, Joe Grodin has for so very many years graced this institution and this city, and continues to do so. We are all the better for it.

GREETINGS FROM JAMES BRORNAHAN

At the very end, Judge Berzon, you said that Joe is willing to take risks in the wilderness, and he's willing to have his friends take risks [laughter]. He's a teacher of extraordinary — he has all these techniques for teaching. And, I don't know how many years ago — it was some years ago — we went with some members of our family, and we camped on the west side at about 7,500 feet at Crag Lake. It's a very beautiful spot. And the next morning we get up and, of course, the Sierras is one of the wonderful places to be, out there, like that, away from clients and so forth — if I may say so. [laughter]

Joe wrote a book on the Sierras. I don't know if you all know that, but he did. He wrote a book on the



Attorney James Brosnahan

Sierras, a very good book, a scholarly book. And so, he wanted to teach me something I've never forgotten, and that is, don't ever leave the trail. And instead of just telling me, "Don't ever leave the trail," he said, "I know a shortcut." [laughter] This is a true — I would not lie to this group. We have federal judges here; we have state judges. I have to keep my credibility. So I would say, probably, twenty minutes later we cut down to the left, headed towards the highway but a long way from it, and suddenly, we're over a moraine, a flow of rocks. It's about one o'clock in the afternoon. The rocks are at a temperature of about maybe 200, and you don't want to put your hand on them because it'll burn, but you have to because they're slanted. I try not to exaggerate — I thought I was going to die. [laughter] And I knew exactly how a chicken feels in the oven. [laughter] Anyway, I'm not sure how that's pertinent.

And so we have to now regroup, and to regroup, we have a video by Abby Ginzberg. Abby Ginzberg, as I'm sure everyone here knows, goes around and makes videos of our heroes. And there are several in the room — Judge [Thelton] Henderson is here, and Cruz Reynoso is here, and she's here. What you're about to see will require a rebuttal, and that rebuttal will then be presented by Joe after we watch the video. [shows Abby Ginzberg video]

So Justice Grodin, perhaps you realize that everybody in this room wants you to understand that you did good, but most important, here you are in your 85th year and the whole time you have cared about people and you have acted on that caring. So, now it's time for rebuttal.

RESPONSE BY JOSEPH GRODIN

Jim, I've felt for a long time that, if I were ever accused of a serious crime, [laughter] you're the person I would want to represent me. And Marsha, if I ever need somebody to front for me in explaining what it is that I've written, I'll call on you. Marsha, thank you so much. This film is quite amazing. What can I say? Abby refused to permit me to see it before tonight, so it comes as a surprise. And she was right because, if I had seen it earlier, I probably would have pointed out the exaggerations and fanciful parts. But, Abby, thank you. It's really great.

And thank you all for being here — my wife Janet of 63 years, my two daughters, Sharon, and Lisa (of the Grand Canyon trip), and her husband Adam, and Sharon's husband Howard, and our wonderful granddaughter Anya, and my nephew Marshall and his wife Ann, and Judy Sapir and our niece and all our really good friends, and people I haven't seen in 40 years, here. I haven't felt this way since my bar mitzvah. [laughter]

I'm reminded, in part of what's been said, of something that Mathew Tobriner, who you heard quite a bit about [in the film], said to me when I was deciding whether I wanted to seek appointment to the Court of Appeal, and believe it or not, I was undecided. I felt



Joseph and Janet Grodin with daughters Lisa (LEFT) and Sharon

that could be a difficult decision because I was enjoying being quite content in the world of academia. He said to me as follows. “Being a judge is nice. People call you, ‘Your Honor,’ and you get to wear a black robe, but the real question is, what do you do after you get up in the morning? And what do you do when you go into the chambers? How do you spend your time?” And, of course, he was right. Being a judge is a very isolating occupation, and one that is very demanding. I found it to be very rewarding, but I also learned from what he said, that it’s not the position, it’s not the title, it’s what you do every day that counts.

I feel truly privileged to be the subject of this tribute. I’m tempted to say that I feel humbled, but Golda Meir is supposed to have said, “Don’t be humble; you’re not that great.” [laughter] Each and every one of you is entitled to a tribute as much as I am, and I hope, if you want it, you get it, someday. [laughter] I just feel extraordinarily lucky to have had all the experiences and be able to do all the things I’ve done, and have friends like all of you — and I intend to have much more of each.

I do want to add one thought, especially for the students who might be here. I once went to that law school across the Bay to hear Justice Scalia talk about legal ethics. He was addressing the question whether lawyers have any moral obligation to provide pro bono services. His answer, I was surprised to hear, was, “No. Lawyers,” he said, “are in no different position than barbers. Both are licensed by the state. Both are, in a sense, ‘professional.’ We don’t expect barbers to cut hair for free. Neither

should we expect lawyers to render their services without compensation.” I beg to differ, as I often do, from Justice Scalia. This answer seems wrong to me, and I asked myself why, what is it about lawyers that makes them different in their obligations to the public? And the answer, I think, lies in the difference in relation to civil society. Lawyers are part of the machinery of justice. They’re partners with judges in the pursuit of justice. This is why we refer to lawyers as “officers of the court.” This is why, historically, lawyers have not refused when appointed by a judge to represent an indigent person. We lawyers are privileged to play an important role in the protection and development of the rule of law, and privileges come with responsibilities. I have nothing against barbers. I just recently visited one. [laughter] They are important, too, and I understand that some of them actually do give free haircuts to prison inmates, but I hope you agree with me that it’s not the same. So, that’s the end of my sermon for this evening. Thank you all once again for being here. [applause and standing ovation] ☆

ENDNOTES

1. Mathew Tobriner and Joseph Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CAL. L. REV. 1247 (1967).
2. *Pugh v. See’s Candies, Inc.*, 116 Cal. App. 3d 311 (1981).
3. Joseph R. Grodin, *A Response to Professor Brian Leiter*, 66 HASTINGS L.J. 1617, 1618–19 (2015).
4. Lon Fuller, *The Case of the Speluncean Explorers* 62 HARV. L. REV. 616 (1949).