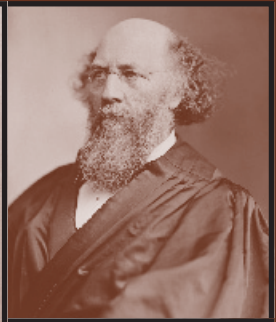


VOLUME 9: 2014

CALIFORNIA LEGAL HISTORY



JOURNAL OF THE
CALIFORNIA SUPREME COURT
HISTORICAL SOCIETY

CALIFORNIA LEGAL HISTORY

VOLUME 9
2014

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, Suite 140, 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

Copyright © 2014 by the California Supreme Court Historical Society.
 All rights reserved.
 ISSN 1930-4943

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

Design and Production: E. M. Holland

Cover Photos:

(Center): David S. Terry

(Clockwise from top right): Stephen J. Field, Sarah Althea Hill, William Sharon, David Broderick

CALIFORNIA SUPREME COURT HISTORICAL SOCIETY

BOARD OF DIRECTORS

HON. TANI CANTIL-SAKAUYE, *Chair*
 JENNIFER L. KING, ESQ., *President*
 MOLLY SELVIN, PH.D., *Vice President*
 GEORGE W. ABELE, ESQ., *Treasurer*
 JOHN S. CARAGOZIAN, ESQ., *Secretary*
 DAN GRUNFELD, ESQ., *Immediate Past President*

THEODORE J. BOUTROUS, JR., ESQ.
 JOHN F. BURNS
 JOSEPH L. CHAIREZ, ESQ.
 JOYCE COOK, ESQ.
 JAKE DEAR, ESQ.
 DAVID S. ETTINGER, ESQ.
 HON. BARRY P. GOODE
 PROF. ROMAN J. HOYOS
 ERIC H. JOSS, ESQ.
 MITCHELL KEITER, ESQ.
 PROF. KRISTINE S. KNAPLUND
 DONALD M. KOLKEY, ESQ.
 THOMAS J. McDERMOTT, JR., ESQ.
 DAVID L. McFADDEN
 FRANK A. MCGUIRE, ESQ.
 RICHARD H. RAHM, ESQ.
 EDWARD S. RENWICK, ESQ.
 KENT L. RICHLAND, ESQ.
 JASON D. RUSSELL, ESQ.
 PROF. HARRY N. SCHEIBER
 JAMES E. SHEKOYAN, ESQ.
 ROMAN M. SILBERFELD, ESQ.
 SELMA MOIDEL SMITH, ESQ.
 HON. KATHRYN MICKLE WERDEGAR
 ROBERT S. WOLFE, ESQ.

EDITORIAL BOARD

SELMA MOIDEL SMITH

Editor-in-Chief

HARRY N. SCHEIBER

University of California, Berkeley

Founding Editor (1994–2006)

BOARD MEMBERS

GORDON MORRIS BAKKEN

California State University, Fullerton

Editor-in-Chief (2007–2008)

STUART BANNER

University of California, Los Angeles

CHRISTIAN G. FRITZ

University of New Mexico

LAWRENCE M. FRIEDMAN

Stanford University

HON. JOSEPH R. GRODIN

UC Hastings College of the Law

LAURA KALMAN

University of California, Santa Barbara

REUEL E. SCHILLER

UC Hastings College of the Law

JOHN F. BURNS

(ex officio)

CSCHS Board of Directors

TABLE OF CONTENTS

ORAL HISTORY

INTRODUCTION

<i>Julian H. Levi</i>	3
---------------------------------	---

ORAL HISTORY OF DONALD R. WRIGHT,

CHIEF JUSTICE OF CALIFORNIA (1970–1977)	13
---	----

THE SPOKEN WORD

THE ARGUMENT OF AN APPEAL BEFORE THE CALIFORNIA SUPREME COURT

<i>Donald R. Wright</i>	89
-----------------------------------	----

BERNARD E. WITKIN ON HIS 80TH BIRTHDAY

<i>Raymond L. Sullivan</i>	99
--------------------------------------	----

JUSTICE RAYMOND SULLIVAN ON HIS 80TH BIRTHDAY

<i>Bernard E. Witkin</i>	103
------------------------------------	-----

APPOINTMENTS TO THE CALIFORNIA SUPREME COURT

<i>Edmund G. Brown, Sr.</i>	109
---------------------------------------	-----

ARTICLES

CHIEF JUSTICE DAVID S. TERRY AND THE LANGUAGE OF FEDERALISM

<i>Richard H. Rahm</i>	119
----------------------------------	-----

FIFTY YEARS OF THE *WASHINGTON-GILBERT* PROVOCATIVE ACT DOCTRINE: TIME FOR AN EARLY RETIREMENT?

<i>Mitchell Keiter</i>	163
----------------------------------	-----

THE JUDICIAL GIVE AND TAKE: THE RIGHT TO EQUAL EDUCATIONAL OPPORTUNITY IN CALIFORNIA

<i>Rebecca M. Abel</i>	203
----------------------------------	-----

LEGAL HISTORY IN THE MAKING

THE (F)LAW OF KARMA: IN LIGHT OF *SEDLOCK V. BAIRD*,
WOULD MEDITATION CLASSES IN PUBLIC SCHOOLS
SURVIVE A FIRST AMENDMENT ESTABLISHMENT CLAUSE
CHALLENGE?
Bradford Masters 255

CALIFORNIA’S ANTI-REVENGE PORN LEGISLATION:
GOOD INTENTIONS, UNCONSTITUTIONAL RESULT
Lauren Williams 297

VIRTUAL CLONING: TRANSFORMATION OR IMITATION?
REFORMING THE *SADERUP* COURT’S TRANSFORMATIVE
USE TEST FOR RIGHTS OF PUBLICITY
Shannon Flynn Smith 339

STUDENT SYMPOSIUM

INTRODUCTION: THE CALIFORNIA SUPREME COURT
AND JUDICIAL LAWMAKING — THE JURISPRUDENCE OF
THE CALIFORNIA SUPREME COURT
Edmund Ursin 383

EDITOR’S NOTE. 392

JUDICIAL LAWMAKING, PUBLIC POLICY, AND THE
CALIFORNIA SUPREME COURT
Evan R. Youngstrom 393

JUSTICE TRAYNOR’S “ACTIVIST” JURISPRUDENCE:
FIELD AND POSNER REVISITED
Aaron J. Schu 423

THE INFLUENCE OF JUSTICE TRAYNOR’S APPROACH
TO STATUTORY INTERPRETATION ON MODERN
AMERICAN LAW
Marissa C. Marxen 449

ORAL HISTORY

DONALD R. WRIGHT

CHIEF JUSTICE OF CALIFORNIA
(1970-1977)

Introduction to the Oral History of
DONALD R. WRIGHT

JULIAN H. LEVI*

Donald R. Wright served as chief justice of California from 1970 to 1977. As successor to Chief Justices Roger Traynor and Phil Gibson, he was the third chief justice leading and maintaining the California Supreme Court as the preeminent state supreme court in the nation for more than a half century. Such a heritage should not be cherished, but it should be analyzed to determine how such leadership came about.

At the outset, we must acknowledge that in Donald Wright we did not have a jurist with the unparalleled judicial craftsmanship or literary skills of Benjamin Cardozo, Learned Hand, or our own Roger Traynor. Among

* Remarks presented at the The Chief Justice Donald R. Wright Memorial Symposium on the California Judiciary at the University of Southern California, November 21, 1985, sponsored by the Judicial Committee of the California State Senate, et al. Published in *Proceedings and Papers*, Timothy A Hodson, ed. (Sacramento: Senate Office of Research), 15–25 (abridged); Appendix (complete). The late Julian Levi was introduced by the moderator, UCLA Professor of Law Daniel Lowenstein, as follows: “Professor Levi has had so many very distinguished careers that it would be quite tedious to recount them in any detail, but he was a successful lawyer for many years in Chicago, was a professor of urban studies at the University of Chicago for a couple of decades or so, and since 1978, has been a professor of law at the Hastings College of the Law in San Francisco.”

Judge Wright's opinions we do not find a *Meinhard v. Salmon*.¹ What we do find is a chief justice who in fact was chief by force of character, intellect and personality, and who at the same time would be referred to repeatedly by his colleagues as a "warm, compassionate, and caring human being."

Donald Wright came to the office of chief justice with superb credentials.

Following an undergraduate education at Stanford University culminating in a *cum laude* degree, he earned his law degree at Harvard and then at the University of Southern California, both with distinction.

For a decade he engaged in the general practice of law as a private practitioner in Pasadena, and then, in World War II, entering the armed services, he rose to the rank of lieutenant colonel, squadron commander, and chief of intelligence of the 11th Air Force Service Command. After World War II, he returned to the practice of law in Pasadena.

Then in 1953, he accepted appointment to the Pasadena Municipal Court and served until 1960 when he was elected to the Superior Court of Los Angeles; and in 1967 he became the presiding judge of that court.

Governor Reagan appointed him to the state court of appeal in 1968, and then in 1970 appointed him chief justice of California.

Hence, Chief Justice Wright came to the chief justiceship after twenty years of experience as a private practitioner of the law, after fourteen years of experience as a trial judge in a busy metropolitan court of general jurisdiction, and two years of full experience as an appellate judge. His opinions demonstrate that he understood the difficulties and the frustrations of private practice; that he knew at first hand the responsibilities and problems of the trial judge made evident by his own practice of laboriously reading trial court records time after time; that he understood both the limitations and opportunities of appellate and Supreme Court service.

More significantly, bench and bar as well as the general public understood that here was a chief justice who had earned that title. As one of his colleagues remarked from the very beginning of his term, "the Chief fit in well."

Chief Justice Wright, in accordance with the Constitution and statutes of California, had major responsibilities in the administration of the judicial system of the state. His skill as an administrator was a bright point of his tenure. The Chief has been described as a politically moderate justice

¹ 164 N.E. 545 (N.Y. 1928),

with high intellectual abilities, but even greater administrative skills. He was a judge's judge. Professional, quiet and undramatic in demeanor, he seemed to exude dignity, open-mindedness, fairness and compassion.

The Chief understood that he administered best by persuasion, rather than by force of will or the powers of his office. He was an experienced and tactful administrator who maintained the traditions established by Chief Justices Phil Gibson and Roger Traynor. Retired Associate Supreme Court Justice Raymond Sullivan has described Wright's administration of the judicial branch as "masterful." According to Justice Sullivan, the Chief's leadership was uniquely effective because of his warmth in dealing with his colleagues and with those outside the judiciary. Of course, the fact of years of prior skill and experience and service was all important. In most cases, the Chief was working with judges whom he knew in prior years, and who themselves knew that the "Chief had been there himself and understood their problems."

During Judge Wright's tenure, the courts of appeal were in trouble as their workload had increased repeatedly. The traditional means of dealing with a growing backlog is to add judges. With the appointment of more appellate judges, however, it is difficult to maintain the quality of appointments and uniformity among decisions. To avoid appointing numerous appellate judges, Judge Wright instituted several important administrative reforms. For example, he created a central staff which could relieve the justices of some routine work. Judge Wright introduced the use of memorandum dispositions for routine cases. The criteria for publication of opinions of courts of appeal were also changed so that less opinions would qualify for publication. The success of these reforms is demonstrated by the increased productivity of the justices and the consequent elimination of the need to add authorized positions to the courts of appeal for ten years. While the number of dispositions per judge in the courts of appeal increased by approximately three percent during Judge Wright's tenure, the percentage of published opinions dropped steadily: 39 percent were published for the 1969-70 term, and only 16 percent were published for each of the last two terms during Judge Wright's tenure. Judge Wright instituted this structural reform by quiet persuasion and coaxing his fellow judges into acceptance.

During the tenures of Chief Justices Gibson, Traynor, and Wright, the power to select judges for the appellate department of the superior court, for all practical purposes, had been transferred from the chief justice to the presiding judge of the superior court in the larger counties. Justice Wright reformed the existing process of assignment to the appellate department by meeting periodically with the presiding judges and suggesting to them that assignments to the appellate department be rotated with a new judge added each year who would serve for a total of three years and then return to other assignments.

Removing Associate Justice Marshall McComb was one of Justice Wright's most sensitive administrative accomplishments. In light of the fact that Justice McComb was conservative and the Court at the time was liberal, Justice Wright did not want his removal to appear to be politically inspired. Therefore, he helped engineer a constitutional amendment through the Legislature that provided an avenue whereby Justice McComb's removal would not appear political. The amendment provided that, if a justice of the Supreme Court was involved, the recommendations of the Commission on Judicial Performance would be referred to seven randomly selected court of appeal judges. As a result of the creation of this special tribunal, Justice McComb's removal did not appear to be politically inspired.

Justice Wright is remembered for being accessible and thoughtful. He returned phone calls from other judges and from the press. He put out a press release on every case in order to establish a public information office. He made special efforts to ensure that research attorneys were treated fairly. He made their pay comparable to civil service lawyers of equal seniority. As it has become evident, his administrative reforms were acceptable because he instituted them after consultation and in a way that was acceptable to the majority of judges and his colleagues.

With the petition for hearing system, the California Supreme Court under Chief Justice Wright retained control over its docket. From 1970 to 1977, the total number of filings increased by less than two percent. The percentage of petitions for hearing granted of cases previously decided by the courts of appeal steadily decreased during that time: 9.3 percent of the petitions for hearing filed were granted during the 1970–71 term, while only 7.9 percent of the petitions for hearing filed were granted during the 1976–77 term.

The quality and depth of opinions written by justices of the California Supreme Court are especially remarkable in the number of cases per justice on the merits. For example, during the terms of 1974–75 and 1975–76, each justice of the California Supreme Court wrote 27 opinions for cases decided on the merits. This ratio becomes more meaningful when contrasted to the fact that, during those terms, each United States Supreme Court justice wrote only 17 opinions for cases decided on the merits.

During his eight years of service, Chief Justice Wright wrote the opinion for the majority of the Court in 196 cases. These opinions throughout are remarkably consistent. There is always the meticulous and even methodical exposition of fact so carefully done that while policies or statements of law might be questioned in dissent, the accuracy of fact summaries were largely unchallenged. There is always the careful exposition of law and prior case authority plainly and clearly stated. Throughout there is the insistence on judicial duty and function expressed by the chief justice himself in his landmark opinion in *People v. Anderson*,² dealing with the constitutionality of the death penalty under the California Constitution:

(5) Our duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is at the very core of our judicial responsibility. It is a mandate of the most imperative nature. Called upon to decide whether the death penalty constitutes cruel or unusual punishment under the Constitution of this state, we face not merely a crucial and vexing issue but an awesome problem involving the lives of 104 persons under sentence of death in California, some for as long as 8 years. There can be no final disposition of the judicial proceedings in these cases unless and until this court has decided the state constitutional question, a question which cannot be avoided by deferring to any other court or to any other branch of government.³

I suspect the subsequent comment by then Governor Ronald Reagan, who had appointed the chief justice, that this was his “worst appointment” came as no surprise to the Chief. Whether a particular decision would be a

² 6 Cal. 3d 628 (1972).

³ *Id.* at 640.

popular decision or not was irrelevant when measured against the core of judicial responsibility.

Analysis of those decisions of Chief Justice Wright most widely cited reinforce these observations.

In *Vesely v. Sager*,⁴ Chief Justice Wright, speaking for a unanimous Court, permitted third persons to sue vendors of alcoholic beverages for serving alcohol to an obviously intoxicated customer who, as a result of intoxication, injured the third person. That ruling overturned prior California judicial precedents based upon concepts of proximate cause. The defendant in *Vesely* argued that in light of these precedents, changes in judicial doctrine should be left to the Legislature. The Chief responded that the precedents were judicially created and were patently unsound and totally inconsistent with the principles of proximate cause established in other areas of negligence law. *Vesely* was controversial and was eventually overturned by the California Legislature after a wave of public protest.

Similar is the opinion in *People v. Beagle*⁵ where Chief Justice Wright, again speaking for a unanimous Court, imposed severe restrictions on the ability of prosecutors to discredit a defendant by referring to prior felony convictions. Before *Beagle*, the majority view in California was that a trial judge had no discretion under the California Evidence Code to exclude evidence of a prior felony conviction offered for purposes of impeachment where the lawfulness of the conviction was established or uncontested. In a methodically written opinion, the Chief rejected the majority view and held that by reading several sections of the California Evidence Code together, the trial judge had discretion to exclude evidence of prior felony convictions where the probative value of the evidence is outweighed by risk of undue influence. This year *Beagle* was overturned by the California Supreme Court in a decision holding the 1982 Victim's Bill of Rights had introduced an easier rule for the admission of such evidence.

In 1973, in *Legislature v. Reinecke*,⁶ the chief justice led a unanimous Court in laying down a blueprint for reapportionment after then Governor Ronald Reagan and the Legislature could not agree on a single plan. The Court appointed several special masters to devise and recommend

⁴ 5 Cal. 3d 153 (1971).

⁵ 6 Cal. 3d 441 (1972).

⁶ 19 Cal. 3d 396.

a reapportionment plan, which recommendations were adopted by the Court. These recommendations avoided preserving the status quo and gave non-incumbent candidates a fair chance at election.

Finally, the chief justice in *Birkenfeld v. City of Berkeley*⁷ wrote the opinion again for a unanimous Court upholding the legality of residential rent controls.

During his eight years of service, the chief justice wrote the opinion for the majority of the Court in 196 cases. Of these 196 opinions, dissents were filed in only 54 cases. In these 54 cases, 16 of the dissents were filed by lone dissenters. Thus, in only 38 cases out of 196 was there significant disagreement among the justices.

On this data alone, it is thus clear that here was a chief justice who led his Court.

Closer examination reinforces this conclusion. Of Wright's 196 opinions, 126 were criminal cases and 70 were in other areas of the law. The latter figure may be subject to some adjustment in that some matters such as juvenile criminal issues or habeas corpus proceedings are classified as non-criminal. Of the 54 dissents, 46 were in criminal cases and only 8 were in civil cases.

During Wright's tenure as chief justice, eight justices served with him. The dissenting activity among these justices can be broken down into categories.

Justices Clark, McComb and Peters dissented along lines of ideology and broad policy.

Justices Mosk, Richardson, Sullivan and Burke, when they disagreed, did so on specific factual determinations or on narrow technical grounds.

Most remarkably, Justice Tobriner, who served throughout Wright's tenure, never wrote a dissent to an opinion authored by his chief justice. This record from a justice of Tobriner's competence and deeply felt convictions is a strong indication of how the chief justice time after time found a basis upon which he could unify the Court.

During these years Justice Clark was unique in the vehemence of the language of his dissents. Clark evidently believed that the California Supreme Court was too liberal and too favorable to defendants. He believed

⁷ 17 Cal. 3d 129 (1976).

that the California Supreme Court not only was not following the United States Supreme Court precedents as to defendants' rights, but on occasion intentionally attempted to avoid review by shifting the ground of its decision to provisions of the California state constitution rather than the federal Bill of Rights.

Justice Clark, during his years on the Wright Court (1975 to 1977), wrote 16 dissents to the 75 opinions of Chief Justice Wright on behalf of the majority of the Court. In these dissents, Justice Clark charged his colleagues with incompetence, being "altogether unreasonable," their rulings "completely unrealistic," their conclusions "inexplicable" and "[un]supported by reason or authority." On one occasion, he charged that the judiciary is "developing a messianic image of itself."

In contrast to Justice Clark, Justice Peters was more liberal than the Wright Court. He wrote six dissenting opinions; one of these dissents opposed extension of the felony-murder rule; two dissents concerned procedural rules of the Court regarding acceptance of guilty pleas; the other three dissents turned on search and seizure issues.

Justice Richardson wrote dissents in four cases. Two of the cases reflect disagreements on narrow, technical points of law. In the other two cases, he felt the majority was limiting unnecessarily the discretion of the trial court. In all four dissents, Justice Richardson was joined by Justices Clark and McComb. Additionally, Richardson concurred without opinion in the dissents in four other cases.

Justice Sullivan wrote only four dissenting opinions, all involving criminal law issues. Two of the cases concerned his disagreement with the majority's application of the exception to the hearsay rule in cases of co-conspirators charged with premeditated murders of spouses; in the third case, Justice Sullivan was outraged by police conduct which he saw as an attempt to circumvent rules of criminal procedure requiring the presence of defendant's attorney at a lineup; in the fourth case, Justice Sullivan felt the majority had unnecessarily addressed a constitutional issue. Additionally, Justice Sullivan concurred without opinion in dissents in six other cases.

With the exception of the opinions of Justice Clark, the dissents throughout were characterized by civility and respect among the justices. These justices were strong men with deeply held convictions, but their

Chief held them together in mutual respect for one another and the institution of the law which they served.

In the final analysis, the chief justice's colleague, Justice Stanley Mosk best summarized:

Perhaps his most noteworthy characteristic was a fierce independence. Don Wright bowed before no master: not the bench, the bar, the Governor, the press, or public opinion. He marched to the beat of no drummer, only to an ethical and compassionate conscience.⁸

★ ★ ★

⁸ Stanley Mosk, "Chief Justice Donald R. Wright," 65 CAL. L. REV. 224, 225 (1977).

Oral History of
**CHIEF JUSTICE
DONALD R. WRIGHT**

EDITOR'S NOTE

The oral history of former Chief Justice Donald R. Wright was recorded by Professor Harvey P. Grody of California State University, Fullerton in two interviews held at Justice Wright's home in Pasadena, California on May 12 and June 1, 1982. It is presented here in slightly condensed form, intended to focus on matters directly related to Justice Wright's life and judicial career. It has received minor copyediting for publication. Insertions in square brackets are from the original transcript.

The oral history is reprinted by courtesy of the Center for Oral History and Public History, California State University, Fullerton. The interviews were conducted for the Fullerton branch of the California Government History Documentation Project and as part of the Oral History Program sponsored by CSU Fullerton. The original transcript indicates that copies are available for research use at the CSU Fullerton Library, The Bancroft Library at UC Berkeley, the UCLA Department of Special Collections, and the State Archives in Sacramento.

— SELMA MOIDEL SMITH



DONALD R. WRIGHT
CHIEF JUSTICE OF CALIFORNIA, 1970-1977
Courtesy California Judicial Center Library

FIRST INTERVIEW: MAY 12, 1982

GRODY: Chief Justice Wright, we'd like to start with some general biographical data. You are a third generation Californian?

WRIGHT: That is correct. Yes.

GRODY: And you were born in Orange County?

WRIGHT: That is also correct.

GRODY: Would you like to take us from there?

WRIGHT: Well, I was born in what is now the city of Placentia, but it was county territory at the time of my birth back in 1907, over seventy-five years ago. My folks were orange growers in that area. One of my older uncles was the first man in the area to plant Valencia oranges and, eventually, he and his wife succeeded in getting all the relatives into the business, which was fortunate for everyone involved, frankly. In 1912, my family moved to Pasadena because of the school situation. My two oldest brothers rode horseback into the little school in Placentia, but there were four more younger children coming along and it didn't seem practical to remain out in the country. For that reason, my father, who was brought up in Pasadena back in the eighties and nineties of the last century, decided to return to Pasadena to live. So as I indicated, we moved back up here in 1912 and I have lived here ever since, excepting times when I was away at college and law school and times when I served in the Army Air Corps and times when I was on the Supreme Court sitting in San Francisco.

GRODY: That's concise. Did you go to the public schools in Pasadena?

WRIGHT: Yes. I went to the local grammar schools which were in our area and then to Pasadena High School graduating in 1925. Then I enrolled at Stanford University, entering that fall of 1925, and graduated cum laude, I might mention [chuckle], in 1929. This was at the time when the country was at its most buoyant, and it was almost promised that all you had to do was to graduate from Harvard Law School and you would be assured of a job. So in the fall of 1929, I went to Cambridge to attend the Harvard Law School. Things were not quite as they had been predicted because when I finished the law school in 1932, the situation was such that I was lucky to get a job working for almost nothing. I continued in the practice of the law here in Pasadena and, eventually, I was modestly successful.

GRODY: What kind of influence did you have toward selecting a legal career? Did you decide that before you went to Stanford?

WRIGHT: Not at all. I was not at all directed that way. In fact, in college I had been a major in the political science field and had a professor I thought a great deal of, Professor Tom Barkley, who is now in his ninety-second or ninety-third year. He had a great influence upon me and many other individuals who were at Stanford, not only then but later. At least three or four United States senators entered the political field largely because of Tom Barkley's effect on them. I had determined that I was going to go to Columbia University, which was his alma mater, secure a Ph.D. degree, and then become a professor of political science. A good friend of mine came down on July 28, 1929, and asked me why did I want to go to Columbia, and why did I want to study political science? He said, "Why don't you go to Harvard Law School? Everybody's going to law school back at Harvard," which was slightly an exaggeration [chuckle], but a goodly number were. So I said, "Well, just a minute, I never thought of it." I did give it a few moments thought, and I said, "I'll go ask my father." My father simply hated lawyers. He had several nasty experiences with some, I understand, and so when I told him what I wanted to do, he paused for a while, and he said, "Well, so far, you haven't really done too bad a job. If that's really what you want to do, why, it's all right but, personally, I would prefer that you do something more honest." [laughter] So I sent a telegram to the Harvard Law School saying, "This is my application; transcript will follow." Had I applied three days later, that is on August first or after, I would have been too late to have secured admission.

GRODY: That really was literally a last minute choice on your part.

WRIGHT: It was absolutely a last minute choice. But I might admit that once I got there and got into it, and from then on to this very day, I have never regretted my choice of profession.

GRODY: How about your father? Did he ever say anything more about it?

WRIGHT: Well, unfortunately, he died while I was at law school, after I had finished two years, and so he never had a chance to reflect on it, at least not with me. He might have reflected, but not with me. [laughter]

GRODY: What kind of practice did you have?

THE SPOKEN WORD

THE ARGUMENT OF AN APPEAL BEFORE THE CALIFORNIA SUPREME COURT

BY DONALD R. WRIGHT*

I cannot adequately express to you how honored I feel to have been selected to deliver the first lecture of the newly created Justice Lester W. Roth lectureship on advocacy in our trial and appellate courts. As many of you must know, a very generous individual who desires to remain anonymous has endowed these lectures through a donation to the Law Center of the University of Southern California, and the lectures will continue annually for the next quarter century. By the year 2004, I am inclined to the view that almost everything that can be said about the skills, duties and responsibilities of the trial and appellate advocates will have been spoken. I am indeed fortunate; I have a clean slate upon which to write; I can map out as broad or narrow a trail as I choose to travel as no one has preceded me.

But first, I cannot allow this occasion to pass into history without paying my own tribute to the great justice and gentleman in whose honor this series of lectures has been created. I was indeed fortunate, when, in 1968,

* Chief Justice of California, 1970–1977. Remarks delivered as the First Annual Lester W. Roth Lectureship on Trial and Appellate Advocacy at the University of Southern California, April 18, 1979. Unpublished typescript in the collection of the Law Library of the University of Southern California School of Law.

I was appointed to the court of appeal, to have been placed on the division presided over by Justice Roth. Never was a neophyte given a warmer welcome than I; no one could have been treated with more thoughtfulness and kindness than was I. Justice Roth did not even chide me when shortly after my arrival on the court, I foolishly fell out of an orange tree, breaking my right arm and incapacitating myself for some weeks from performing the very duties I had been appointed to undertake.

Almost immediately, we became good friends and my wife, Margo, and I cherish the warm relationship that we soon enjoyed, not only with Lester but with Gertrude, his most gracious and charming wife of over a half century.

Justice Roth has presided over Division Two of the Second Appellate District for over fourteen years with great distinction, and his many published opinions are models of legal scholarship, clarity and, generally, of brevity. I shall always be grateful that I served my apprenticeship as an appellate justice under his guidance. He was the finest boss under whom I served in the appellate structure. I say that *not* because he was the *only* boss I ever worked under, but because it would have been impossible to find a warmer, kinder and more helpful human being anywhere in the judiciary of this state. Lester, I personally thank you; I salute you, and my one wish is that the few remarks I make today will be at least partially worthy of you and of the anonymous donor who made these lectures possible.

I have discovered that the subject "Trial and Appellate Advocacy" is an *all* encompassing theme, and many lawyers, judges and professors can talk for hours and hours and even days and days upon various facets of the topic. Rather than taking a hit or miss approach or attempting to cover too broad a field, I intend to confine my remarks primarily to my most recent experiences as a member of the judiciary. It is the area with which I am most familiar, as for a period of seven years ending in 1977 I served as chief justice of California.

But having served as a judge or justice for almost two dozen years, and at every level of the judicial structure, I have, of course, been exposed to almost every type of legal legerdemain which might possibly be termed "advocacy." Therefore, this afternoon I shall confine my remarks almost exclusively to argument of an appeal before the California Supreme Court, a tribunal before whom many of you have appeared or will appear in the

days and years which lie ahead. Of necessity, of course, I will be compelled to include a few remarks on oral advocacy which would be applicable in any court, trial or appellate.

"Although appellate argument is a common occurrence and represents the culminating competitive effort in the legal contest, it is probably a fact that this is the least qualitative accomplishment of the bar as a whole."¹ That is one reason I wholeheartedly endorse the clinical programs which have been included in the curricula of this law school and of others throughout this country. And this also is the reason I strongly support the moot court programs which have become of increasing importance since I entered law school a half century ago this fall.

I cannot describe in a few words what makes successful oral advocates. I can tell you how one of our legal giants describes them. Bernard E. Witkin tells us that the successful and "[e]xperienced appellate advocates get their kicks out of winning an appeal on the merits of their clients' cases or their own skill; *and* the reversal or affirmance of a judgment, *coupled with a sizable fee*, brings all of the fulfillment which their psyches desire."² I think even the whimsical Bernie would concede that his description is slightly simplified.

Before launching into my "case in chief," I should define some of the rules or procedures which proscribe the activities of those who would present their clients' cases to the California Supreme Court. You will forgive me if in the talk I mix my tenses. Sometimes the past tense will be used as frequently as the present. It is difficult to break a habit of some years and I still think of the tribunal most fondly as "my court" or at least, "our court."

You are probably aware that throughout this nation appellate tribunals are divided between "hot" and "cold" courts. The California Supreme Court and, I believe, most of the divisions of the courts of appeal, are "hot" courts. This means quite simply that at the time argument begins on any matter all of the justices have read a rather lengthy memorandum prepared by a colleague, generally with the assistance of his or her staff. Only that particular justice who is responsible for the preparation of the

¹ Raymond Wilkins, *Argument of an Appeal*, 33 CORNELL L.Q. 44 (1947) (lecture delivered at Cornell Law School on May 2, 1947).

² Bernard E. Witkin, talk to students of Justice Friedman's class at UC Davis School of Law, November 20, 1978 on "The Joys of Appeal."

memorandum has *at that time* reviewed the briefs and supporting documents. We will all so do at a later time.

And if that justice is diligent, and almost all whom I have known possess that trait, the calendar memo, as we call it, will state the facts of the dispute in a forthright manner and will indicate how the matter reached our Court. Also contained in the memo will be found a statement of issues that are to be resolved, a résumé indicating what the justice believes the current law *is* or *should be* and a recommendation, sometimes in the alternative, as to what disposition should be made of the appeal. Briefly stated, a justice who has done his homework, who has read the memo and who has made innumerable notes on that memo addressed to himself for use at the time of argument, comes onto the bench with a pretty fair knowledge, occasionally erroneous, as to what the case is all about.

A “cold” court, on the other hand, consists of a tribunal in which the justices or judges generally have little and sometimes no knowledge of what lies ahead and will seek enlightenment from the counsel who appear for argument.

Our California Supreme Court adheres to a rather rigid time allocation, allowing each side one-half an hour to present argument of counsel. In certain instances when we had a matter before us of monumental importance, such as *People v. Anderson*,³ the first opinion in the United States outlawing the death penalty as being both cruel and unusual, or *Serrano v. Priest*,⁴ the first opinion holding that a right to an education is fundamental, or the reapportionment cases, *The Legislature of the State of California v. Reinecke*,⁵ we were more generous with time, allowing each side a full hour or more for argument. Appellants may, of course, reserve time for rebuttal, but such time must be deducted from the overall allotment and should be (but seldom is) limited to true rebuttal.

In earlier days when courts, lawyers and litigants apparently had considerable time at their disposal, a single argument might frequently extend for days and days. “It has been stated for instance, that the arguments of Webster, Luther Martin and their colleagues in *McCulloch v. Maryland* consumed six days, while in the *Girard* will case Webster, Horace Benney and others for the

³ 6 Cal.3d 628 (1972).

⁴ 3 Cal.3d 580 (1971).

⁵ 10 Cal.3d. 196 (1973).

BERNARD E. WITKIN ON HIS 80TH BIRTHDAY

BY RAYMOND L. SULLIVAN*

It was only yesterday — just ten evanescent years ago — that we honored Bernie Witkin on his seventieth birthday. The tributes were thicker than advance sheets; the applause music sweeter than a plaintiff's verdict; the laurels lavished on him a veritable halo transforming, if only for a moment, his puckish visage into a serene presence of uncommon quiescence and incredible demureness. Today he is with us again — as indefatigable and irrepressible as ever. Author and lecturer, critic and wit, doctrinaire and a man for all reasons, this chanticleer of the law — singing it clear, so to speak — now heralds a new decade of unabated vigor. What is this magic of his? What words can sum it all up? Shall we borrow those of the suave lyricist of his youth: “You’re the top! You’re the Coliseum! You’re the top! You’re the Louvre Museum,”¹ or shall we take them from his idol of an earlier era and his favorite librettist:

* Associate Justice, California Supreme Court, 1966–1977. Remarks delivered at the luncheon honoring Bernard E. Witkin on his 80th Birthday, May 22, 1984. [Editor's note: These remarks appeared in the tribute book prepared for Justice Sullivan's 80th birthday celebration by a group of his former clerks, headed by Ray E. McDevitt, now a past president of the California Supreme Court Historical Society, who graciously made them available for publication. — Selma Moidel Smith]

¹ Cole Porter, “You’re the Top,” *Anything Goes* (1934).

The law is the true embodiment
Of everything that's excellent.
It has no kind of fault or flaw,
And I, my lords, embody the law.²

It has long been our good fortune that our honoree in a large sense is the embodiment of the law. In a long love affair with it, he has composed his still unfinished symphony — *Summary of California Law*, with variations on sundry procedural themes, scored with sound harmonics and performed by him on countless lecture platforms with matchless wit, quip, paradox and interpretation. No cloying déjà vu for this artist; no abject submission to archaic rules which might become in Holmes' words: "The government of the living by the dead." His artistry exudes the tonic quality of fresh air with rolling arpeggios of raillery, staccato jabs at false idols, and with it all a melody line of ingenious subtlety, fine-tuning the mirthful mouthful of his message.

Daunted by no target too exalted, he has been known on occasion to direct his talents to this state's highest tribunal. In 1968, in the full flush of youth one might say, he was rhapsodic, suggesting that "perhaps round table would better describe this loose coalition of crusading knights errant and mildly disapproving squires. Here in this contemporaneous Camelot, under the wisdom and restraint of a latter-day King Arthur, a measure of unity is miraculously achieved." In 1974, in the serenity of senior citizenship, he was more jurisprudential: "This is a court," he said, "which is not synthesized or polarized; its collegiality is balanced by a rampant individuality and its blocs fall apart when they come up against irrefutable logic, irresistible social conscience, or individual prior conviction." How does he get away with this? What is his secret? How do we sum him up? I borrow some remarks I made ten years ago:

Few members of the California Bar have had such a pervasive influence on the profession as Bernie Witkin. Few lawyers can look back on such a record of total commitment to the scrutiny, dissection and careful crafting of legal principle. No legal writer and lecturer in our time has so captivated the admiration and respect

² W. S. Gilbert, "The law is the true embodiment," *Iolanthe; or, The Peer and the Peri* (1882).

of the profession with intelligence, sophistication and style. None has pursued with such constant ardor, a calling which, in Holmes' fine phrase, "gives such scope to realize the spontaneous energy of one's soul." Throughout all these years he never seems to change.

And so it is today, and so, we predict, it will be for many years to come. To you, Bernie, and to your lovely Alba, we offer our congratulations, our affection and our every wish for your continued happiness.

★ ★ ★

JUSTICE RAYMOND SULLIVAN ON HIS 80TH BIRTHDAY

BY BERNARD E. WITKIN*

YOU'RE THE TOP!

This is for me a day to remember and a time to reciprocate. On two separate occasions (my 70th and 80th birthdays) Ray Sullivan graciously undertook to describe my tenacious hold on life in the law, and to extol my modest talents. It is therefore both my privilege and my right to eulogize Ray Sullivan. And there is an additional reason why it is most fitting that I be chosen to speak for this select group gathered here to honor our esteemed and beloved friend:

I am the most senior ex-law clerk present; indeed, I am probably the oldest ex-law clerk alive in this state.

No one here needs to be reminded that Justice Sullivan, in his many years on the California Court of Appeal and Supreme Court, produced a steady flow of the best legal thinking that can be found in the reports

* Remarks delivered at Associate Justice Raymond L. Sullivan's 80th birthday celebration, January 31, 1987. [Editor's note: These remarks appeared in the tribute book prepared for Justice Sullivan's 80th birthday celebration by a group of his former clerks, headed by Ray E. McDevitt, now a past president of the California Supreme Court Historical Society, who graciously made them available for publication. — Selma Moidel Smith]

of American high courts. In his superbly crafted opinions, principles and rules are expounded with clarity, irreconcilable decisions are delicately reconciled, and egregious judicial errors are urbanely transformed into mere differences of viewpoint on distinguishable facts.

But there is more in Sullivan opinions than high quality judicial reasoning; and tonight I propose to offer a few extracts — perhaps familiar to some of you — which demonstrate his versatility, humanity, and emotional depth.

Needless to say, I draw my material from that vast compilation of the distilled wisdom of our creative judiciary — *Witkin's Summary of California Law*, 8th Edition in eight volumes, soon to be the 9th Edition in 13 volumes.

First, *THE ERUDITE SULLIVAN*.

For the first time in jurisprudential history, he set forth a definitive classification of the forms of that abominable product of inept opinion writers — DICTUM.

The case is *Hollister Convalescent Hospital v. Rico*,¹ in which a prior unanimous opinion of the Supreme Court — only ten years old — was scrapped in order to restore the hitherto sacrosanct doctrine that the time to appeal, as prescribed by statute or rule, is jurisdictional. How was this done? By describing what the two dissenting justices called “the spirit which animated that opinion” as “UNNECESSARY AND OVERBROAD DICTA,” “ILL-CONSIDERED DICTA,” “ERRONEOUS DICTA,” “PANORAMIC DICTA,” and “PERSISTENT DICTA.”

Second, *THE IRATE SULLIVAN*.

Is he all sweetness and light and gentle tolerance, or can this calm philosopher take umbrage and express outrage? You bet; he is, after all, an Irishman; and what could possibly arouse this cultivated Irishman's ire more than a wholly mistaken conclusion drawn by his associates on the high court?

It happened in *Fracasse v. Brent*,² where the majority held that an attorney discharged by his client without cause could not recover the fee specified in his contract of employment. Ray — an old trial lawyer — lowered

¹ 15 Cal. 3d 660 (1975).

² 6 Cal. 3d 784 (1972).

the boom, demonstrating in his dissent that the opinion had no foundation in “logic, authority or fundamental fairness.” This was his mildest castigation: “By their decision today, the majority repudiate a rule supported by an impressive array of authority and replace it with one which will reduce an attorney–client contract to a hollow and meaningless act.”³

Third, *SULLIVAN THE HUMORIST*.

This unsuspected talent of our great stylist appears in *Estate of Russell*,⁴ where the testatrix left nearly all her estate to “Chester H. Quinn and Roxy Russell.” Quinn, her close friend, survived her. Roxy, her dog, predeceased her. The deadpan opinion construes the will as an attempted disposition to Quinn and Roxy as tenants in common, with Roxy’s gift void for lack of capacity to take. But then, to avoid misconceptions as to the scope of the decision, footnote 22 adds:

As a consequence, the fact that Roxy Russell predeceased the testatrix is of no legal import. As appears, we have disposed of the issue raised by plaintiff’s frontal attack on the eligibility of the dog to take a testamentary gift and therefore need not concern ourselves with the novel question as to whether the death of the dog during the lifetime of the testatrix resulted in a lapsed gift.

Fourth, *THE EMPATHIC SULLIVAN*.

In *Castro v. State of California*,⁵ in which the English literacy voting requirement of our Constitution was held to be an unconstitutional denial of equal protection to persons literate in Spanish, the justice wound up the opinion with these words:

We cannot refrain from observing that if a contrary conclusion were compelled it would indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land . . .⁶

³ *Id.* at 798.

⁴ 69 Cal. 2d 200 (1968).

⁵ 2 Cal. 3d 223 (1970).

⁶ *Id.* at 243.

Fifth, *THE ECSTATIC SULLIVAN*.

In *Serrano v. Priest*,⁷ that our method of financing the public school system by local property taxes was an unconstitutional denial of equal protection, the opinion concludes:

By our holding today we further the cherished idea of American education that in a democratic society free public schools shall make available to all children equally the abundant gifts of learning. This was the credo of Horace Mann, which has been the heritage and the inspiration of this country. "I believe," he wrote, "in the existence of a great, immortal, immutable principle of natural law, or natural ethics, — a principle antecedent to all human institutions, and incapable of being abrogated by an ordinance of man . . . which proves the *absolute right* to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all"⁸

The departure of this gifted scholar and jurist from the Supreme Court left a void which has not been filled. Today, that Court of seven members has only one veteran on it, and the new chief justice, facing the formidable task of organizing a Court and staff to cope with an unbelievable caseload, needs all the help and support that he can possibly get. And a few nights ago, in the interlude between sleep and wakefulness, I had a vision of a super-senior *pro tem* justice — a master of the judicial craft — respected as Holmes and learned as Hand — taking his place beside the Chief and pointing the way out of the wilderness.

But what are my "Words worth" when those of the poet himself, with only the slightest emendation, are both adequate and timely?

Raymond! Thou shouldst be sitting at this hour:
Lucas hath need of thee:
The Court is a fen of stagnant waters:
with calendars clogged and boxes stalled:
While grim-faced law clerks, like lordless Samurai,

⁷ 5 Cal. 3d 584 (1971).

⁸ *Id.* at 619.

Scan the Duke's list with wild surmise.
 Your calm voice could give us hope,
 Revive collegiality, restore productivity,
 Keep the peace, and increase the pace.
 Oh raise us up, return to us again;
 And with your blithe spirit and magic pen
 Bring order out of chaos.

(For those of you who may have forgotten it, the original poem follows.)

MILTON! thou shouldst be living at this hour:
 England hath need of thee: she is a fen
 Of stagnant waters: altar, sword, and pen,
 Fireside, the heroic wealth of hall and bower,
 Have forfeited their ancient English dower
 Of inward happiness. We are selfish men;
 O raise us up, return to us again,
 And give us manners, virtue, freedom, power!
 Thy soul was like a Star, and dwelt apart;
 Thou hadst a voice whose sound was like the sea:
 Pure as the naked heavens, majestic, free,
 So didst thou travel on life's common way,
 In cheerful godliness; and yet thy heart
 The lowliest duties on herself did lay.⁹

★ ★ ★

⁹ William Wordsworth, "London, 1802" (1807).

APPOINTMENTS TO THE CALIFORNIA SUPREME COURT

EDMUND G. BROWN, SR.*

MR. LOWENSTEIN¹: When I run into students, as I occasionally do, who hold the view that successful politicians are all either crooks or sell-outs or wishy-washy or whatever, I like to hold up as one of the primary exhibits against that point of view, Pat Brown. Unfortunately, some of my students now are young enough so they don't know who I'm talking about; but for those who know anything about Pat Brown, it's a very persuasive exhibit indeed. So it is my pleasure to introduce to you the former district attorney of San Francisco, the former attorney general of California, and the former governor of California, Pat Brown.

GOV. BROWN: Thank you very, very much. I am very, very surprised to hear that there are students at the School of Law, the University of

* Governor of California, 1959–1967. Remarks delivered at the The Chief Justice Donald R. Wright Memorial Symposium on the California Judiciary at the University of Southern California, November 21, 1985, sponsored by the Judicial Committee of the California State Senate, et al. Published in *Proceedings and Papers*, Timothy A Hodson, ed. (Sacramento: Senate Office of Research), 25–33. [Editor's Note: The introductory portion of these remarks is included here in part to highlight the prescience of Gov. Pat Brown's comment about the eventual return to public office of his son, Gov. Jerry Brown, whose first two terms had ended in 1983. — Selma Moidel Smith]

¹ Daniel H. Lowenstein, Professor of Law, UCLA School of Law.

California at Los Angeles that haven't heard of Governor Edmund G. Brown, Sr.

MR. LOWENSTEIN: They're getting young enough so pretty soon they won't have heard of Jr. either [laughter].

GOV. BROWN: Oh, he'll be back — don't worry.

My remarks are going to be non-chronological.

I had the great privilege of appointing, I think, nine members to the Supreme Court of the State of California. And I'm going to quickly go over their names just so you'll get a little idea of the philosophy of a governor in making appointments to the highest court in this state.

But you have to go back a little bit with me, because I was admitted to the Bar in October of 1927. I didn't have the privilege of going to college at all. I went directly from high school into law school. I suppose it was because I was always a young man in a hurry. However, not having gone to college gave me somewhat — somewhat, I underline that — of an inferiority complex; and I always felt that there were — I'm not so sure now, but I always felt that there were people that were much smarter than I and I was willing to call upon other people for advice in legislative matters and the tremendous importance of a governor in making appointments.

But, I practiced law for a period of seventeen years before I ever held a public office of any kind. I would appear before judges in various counties around the Bay Area, and I was impressed with some who were so courteous to a young lawyer and some that were so, I'll use the term, ugly. When I became governor, I tried my level best to get a real background on the appointment of all of the judges that I made. But when you appoint, and I think any governor serving a period of eight years will appoint 700 or 800 judges, you can understand that all of the men or women that you appoint are not going to be great jurists.

The fact is, however, that I think those seventeen years of practice in the civil courts before the municipal court, the superior court, appellate courts, and occasionally in the Supreme Court of the State of California, never in the Supreme Court of the United States, and as district attorney, you would run into the many judges that you appeared before or your deputies would make reports upon them. And one of the things that impressed me very much in my appointments was Earl Warren. When I was district

attorney in San Francisco, Governor Warren appointed two young men who were extraordinarily able lawyers in my office — a man by the name of Al Weinberger and a man by the name of Charles Perry — both of whom were Democrats. Now, I mentioned that only to show you that here was a governor that had appointed judges because of their ability — not because of their political affiliation. He had to get their legal reputations from other lawyers and judges in San Francisco. And, Warren's method impressed me very much. I wanted to have a bench of able people, of able men and women. But, the Warren appointments impressed me very, very much.

You have to remember, too, that I became governor after twenty years of Republican governors; Earl Warren was governor, I think, for a period of three terms, almost twelve years. It was sixteen years — no, it was three terms of Earl Warren and a term and a half of Goodwin Knight. But before that, Governor Olson had appointed four judges. He had appointed Chief Justice Phil Gibson. He had appointed Roger Traynor. He appointed Justice Carter. And I can't think of the other judge that he appointed. So here was a Democratic governor appointing four justices. Then Earl Warren, serving eleven years, appointed only one; and Governor Knight only appointed one. And I came along — they had been in office for a long period of time, so there was a natural change in the Supreme Court in the State of California.

I'm pointing this out to you to show how the appointments of a governor, how they can change, how important they can be. I think that Governor Reagan only had two appointments. And I think Jerry — I think my son had five or six. Now, the importance of that is that I've observed in some of the discussion the question whether there should be a change in the method of the appointments to the appellate courts.

I might say, weighing it all and watching the governors going back to Culbert Olson — Olson, Warren, Knight, myself, Reagan, Jerry, and now Governor Deukmejian — I do think that governors are really trying to appoint people that will do a good job in their appointments.

And I think that the fact is that the Supreme Court of the State of California has been regarded as one of the best courts in the United States. Some of the law review writers, some of the other jurists throughout the state feel that it was during my administration that the appointments not only made by me, but the appointments made by Warren, made the

California Supreme Court the best court, even better than the Supreme Court of the United States.

I want to just name the people that I appointed so you get an idea of the kind of people I appointed and the source of the recommendations to me. The first man I appointed was Ray Peters who had been a law secretary to the Court after he left law school. In addition to that, he gave a bar review course; and, he was regarded as a truly brilliant lawyer. I might add that when I was district attorney of San Francisco, I appointed two men and someone sued me, sued me because I made these two appointments illegally. There were two war veterans. They were both San Franciscans. But they worked in the Alameda District Attorney's office. They came to me and sought an appointment and I appointed them. But they had not had two years' experience. The charter of the County of San Francisco provided that they had to have two years' experience. Well, someone sued me for making an illegal appointment and got a judgment against me for \$10,000. I can only tell you that when the salary of the district attorney of San Francisco was only \$8,000 a year and to get a judgment for \$10,000 — so after I lost it, I had to put up a bond of \$20,000 so they wouldn't execute upon my property. And then it went to the appellate court, and I'm not going to go into what happened; but Ray Peters, writing the opinion, reversed that opinion of the superior court. So the first appointment that I made to the Supreme Court of the State of California was Ray Peters.

Now, if you think that was really the motivating force, I think the lawyers will agree that Ray Peters was truly a great jurist. Now, I'm not going into all the others. Tom White had started in the justice court of Los Angeles. He's been in the municipal court; he's been in superior court, the appellate court. And I appointed him. He was an elderly man when I appointed him. I think he was 68 years of age. And when I appointed him, he agreed to resign upon reaching the age of 70.

The next ones were Matt Tobriner, Paul Peek, Stanley Mosk, Louis Burke, and Ray Sullivan. And then I had the great opportunity of appointing Roger Traynor as the chief justice of the Supreme Court of the State of California.

In all of these appointments, of course, you had to get the Qualifications Committee approval, consisting of the chief justice, the senior presiding justice, and the attorney general of the State of California. I didn't

want any jurist or any person I appointed disapproved. There was no formal way of asking for this approval. There was no formal way in the Constitution or any of the codes. So, I would call the chief justice. I would tell him that I intended to appoint blank, what do you think about it? And, going further, I would ask the chief justice for his recommendations. I can tell you that when Chief Justice Gibson resigned I spoke with him, and he highly recommended Roger Traynor to be his successor. And when Roger Traynor became the chief justice, it was my practice to call him and ask him about the appointments. He would then confer with the other members of the Qualifications Commission (the senior presiding justice and the attorney general). I knew before the appointment was announced whether there would be approval.

I really feel that the State of California has the best system of making appointments to the higher courts in the United States. The appointments, of course, to the Supreme Court of the United States must be confirmed by the Senate of the United States. But, you don't have that real Qualifications Commission of people that are working in the law every day — the chief justice, the senior presiding justice, and the attorney general. The attorney general is really the only political figure in the group. And you will observe, I'm not commenting or criticizing in any way at all, you will observe that when Governor Deukmejian was the attorney general, that he disapproved of several of my son's appointments to the Supreme Court. I can't pass on the reasons why he did. But I would call attention to the fact that in the statements made by — in the paper prepared by yourself, that you pointed out the tremendous difference between Associate Justice Clark on the Supreme Court and the other appointment made by Governor Reagan, Chief Justice Wright — two appointments by Governor Reagan, and absolutely philosophically different. And there's no way in the world you're going to avoid the philosophy of the governor in the making of the appointments to the various courts in this state. I'm not talking about the appellate court because I haven't had the time to research the appointments that were made.

I can only tell you that I was tremendously proud of my appointments. In the making of appointments, the question that I would ask was the legal ability of the lawyer. In Southern California I didn't know the ability of too many lawyers. I had a group of lawyers whom I respected and I would

ask them for recommendations. They were lawyers in large firms and individual practitioners. I think I had six Democrats and two Republicans in this group from whom I sought their opinions. They would give their recommendations very, very objectively.

I'm not trying to personalize these remarks, but you have to look at the character of the governor and his political philosophy in trying to find out whether the system that we now have is a good one or a bad one. I really wanted judges that were humane. I wanted people that knew the law but were gentle and understanding. In the seventeen years that I was in private practice, I appeared in courts all over the state. Sometimes the judges were really mean and intolerant, particularly during the first two or three years of my practice. With one of the judges before whom I appeared in a preliminary hearing in the municipal court in San Francisco, I started to put on my case and the judge said, "Counsel, I want you to put your case in this order." This was in a preliminary hearing. And I said, "If the Court pleases, I prepared this case and I'd like to put it on the way I planned." He says, "You put them on in the way that I tell you to put them on or we will not hear anything further in this case." I said, "If the Court pleases, I'm through." And I stopped the case. The person was held to answer. I might say, this man came up, recommended for appointment to the Supreme Court later on [laughter]. He had been appointed to the appellate court by another governor. He came highly recommended to me by one of my large contributors. I could not forget the mean way that he treated me when I was a young lawyer.

The other things that were important were the opinions of other lawyers. I would confer with Roger Traynor after he became the chief justice. And, I might say that he made several recommendations. I accepted every one of them. I made recommendations and he accepted mine, of course, or they wouldn't have been approved by the Qualifications Commission. But, he recommended me to Ray Sullivan, who was in San Francisco. He had been an associate of William Malone who was the Democratic chairman. And I was a little bit, a little bit afraid to, not afraid, that's not the word. I didn't want to appoint a political figure. But Roger Traynor called me, came up to Sacramento, and he told me that Ray Sullivan was a great jurist. And as a result of that, I appointed him. And I think that the bench and bar of California recognize Ray Sullivan as one of the best judges that I had the privilege of appointing.

I'm calling these things to your attention so that you'll be able to see what a governor does in trying to make good appointments. Governor Reagan, in his appointment of the chief justice, later said he was disappointed. He spoke critically of the chief justice, later said he was disappointed. But I think the bench and bar agree with Stanley Mosk's opinion of this great chief justice.

There are so many other things that I could say about the appointments to the Supreme Court, but let me conclude by saying that the appointments by the governor, with the approval of the Qualifications Commission (the chief justice, the senior presiding justice and the attorney general), resulted in excellent appointments to the appellate court and the Supreme Court. This is true, whether it happens to be a Ronald Reagan or a Jerry Brown or a Governor Deukmejian. I think we have a good system. I'm sure that any system could be improved upon. But, as I look back on the appointments to the appellate courts (and I'm not talking about the superior courts — it would take too long to get into that) — that are here today, looking at the origins of the present system of appointments that I think as an old governor that it's a good one. Thank you. [Applause]

★ ★ ★

ARTICLES

CHIEF JUSTICE DAVID S. TERRY AND THE LANGUAGE OF FEDERALISM

RICHARD H. RAHM*

I. INTRODUCTION

David S. Terry was one of California's most colorful and controversial judges, serving on the California Supreme Court from 1855 to 1859, two of those years as chief justice. And because of the events that were part of his life, Terry is easy to caricature. After all, in 1856 Terry stabbed a person in the neck with his Bowie knife in his first year on the Supreme Court, for which he was almost hanged by the Vigilance Committee; three years later he shot a U.S. senator dead in a duel; he fought for the Confederacy with the Texas Rangers in the Civil War; he returned to San Francisco and represented, and later married, the mistress of another U.S. senator — one of the wealthiest individuals in the country — in her suit for “divorce”; he knocked a tooth out of a U.S. marshal in the federal circuit court when the “divorce” decision went against his client; and he was shot dead by a deputy U.S. marshal while he was punching a sitting U.S. Supreme Court justice in the face. However, lest we think of Terry as a cartoon character, he is

* Richard H. Rahm received his J.D. and Ph.D. from UC Berkeley, his M.Litt. from Oxford University, and his B.A. from UCLA. He is a Shareholder at Littler Mendelson, P.C., residing in its San Francisco office.

also the same person who championed the rights of women at California's second constitutional convention, and who helped a single mother successfully sue a law school when it refused to admit her because she was a woman.

One way of viewing Terry in the context of his times is to look at his life through the lens of federalism — the relationship between the state governments and the federal government — particularly because Terry's life spanned the period from before the Civil War, when "states' rights" were given prominence, until a period after the Civil War, when a federal officer could be protected from state prosecution for murder so long as he was engaged in his federal duties. And while Terry never had occasion to address the concept of federalism as a jurist, federalism ran through many of the arguments he made, or those made against him, or those made about him, as exemplified in the letters, trial transcripts and court decisions discussed below. Although the primary focus of this article will be Terry's life, it will do so with an eye to federalism by looking at three separate events: (1) the attempt to free Terry from the Vigilance Committee in 1856; (2) Terry's attempt to claim state jurisdiction over federal jurisdiction in two trials in the 1880s concerning the legality of an alleged marriage contract between a U.S. senator and his mistress; and (3) the State of California's attempt in 1889 to prosecute the U.S. deputy marshal who shot and killed Terry when Terry was assaulting a U.S. Supreme Court justice. Terry was a formidable man, and the ripples he sent out into the world have had a lasting legal effect.

II. FEDERALISM AND THE ATTEMPT TO RELEASE TERRY FROM THE VIGILANCE COMMITTEE IN 1856

A. TERRY'S BACKGROUND AND HIS ELECTION TO THE CALIFORNIA SUPREME COURT

Terry was born on March 8, 1823, in what is now Christian County, Kentucky. Terry's mother left Terry's father when Terry was age 11, and his mother took him and his three brothers to live on his grandmother's plantation just outside of Houston. Terry claimed he fought in the Texas War of Independence from Mexico when he was 13, and that this was where he developed his skills with a Bowie knife. There is no documentation of Terry

actually being enrolled in any of the units that fought in that war. Whether true or not, the Bowie knife became Terry's weapon of choice, and he was known for always carrying it in his breast pocket.¹

Terry, who grew to be almost six-and-a-half feet tall, had no formal education after age 13. Instead, he was trained as a lawyer by his uncle, who had a law practice in Houston. Terry was a good apprentice, and he became a member of the Texas bar after two years. In 1846, at age 23, he served as a lieutenant of what later be-



DAVID S. TERRY, CHIEF JUSTICE
OF CALIFORNIA (1857–1859)

came known as the Texas Rangers in the war between the United States and Mexico. Terry settled in Galveston, Texas after the war. In 1847, he ran and lost the election for district attorney of Galveston. Shortly thereafter, he and his brother moved to California, with Terry settling in Stockton in 1849.²

After a brief stint as a miner, Terry opened a law office in Stockton with another lawyer from Houston in 1850. Although Terry established a good reputation as a lawyer, he also acquired a reputation for violence. In one case, Terry quarreled with a litigant, stabbing him with his Bowie knife.

¹ See A. Russell Buchanan, *David S. Terry of California: Dueling Judge* (San Marino: The Huntington Library, 1956) at 3–6; Milton S. Gould, *A Cast of Hawks, A Rowdy Tale of Greed, Violence, Scandal, and Corruption in the Early Days of San Francisco* (La Jolla: The Copley Press, 1985) at 15–19. See also A. E. Wagstaff, *Life of David S. Terry: Presenting an Authentic, Impartial and Vivid History of His Eventful Life and Tragic Death* (San Francisco: Continental Publishing Company, 1892) at 34–40.

² See Buchanan at 5–8; Gould at 16–18.

Because the judge found it was only a superficial wound, and because Terry paid to have the wound dressed, he was fined only \$50. In another incident, Terry and two friends quarreled with the editor of a Stockton newspaper about something written about Terry, and Terry struck the editor with the handle of his Bowie knife. That cost Terry a fine of \$300.³

With the collapse of the Whig Party in the 1850s, there was really only one party in California, which was the Democratic Party. The Democratic Party, however, was deeply divided on the issue of slavery. The pro-slavery “Chivalry Democrats” came primarily from the South, and they were led by Senator William Gwin. The anti-slavery Democrats came primarily from the North, and they were led in California by Senator David Broderick.⁴

During the 1850s, there was the rise of the “Know-Nothing” party in American politics, which was nativist and anti-Catholic, which also meant anti-Irish. The “Know Nothing” moniker came, not, as one might assume, from a general declaration of ignorance, but from the fact it was originally a secret society. In answer to any question about the organization, the response would be, “I know nothing.” In 1855, the Know-Nothing party dropped its cloak of secrecy, held a national convention, and presented slates of candidates. In California, many of the Chivalry Democrats defected to the pro-slavery Know-Nothing Party, including David Terry. In that same year, the Know-Nothing Party won several state offices. J. Neely Johnson, who was age 30, was elected governor. Chief Justice Hugh Campbell Murray, age 30, narrowly won re-election to the Supreme Court. (Justice Murray was first appointed to the Supreme Court when he was 26.) And David Terry, age 32, was elected to the Supreme Court as an associate justice.⁵

At the time of Terry’s election, the California Supreme Court consisted of three justices, each elected to six-year terms. California had no intermediate appellate courts. Serving with Terry and Chief Justice Murray was Solomon Heydenfeldt, who was by far the oldest justice at age 39 (having been 35 when he was appointed). Like Terry, neither Murray nor Heydenfeldt had a college education and neither had been formally educated in the

³ See Buchanan at 8–13; Gould at 19–20.

⁴ See Arthur Quinn, *The Rivals: William Gwin, David Broderick and the Birth of California* (New York: Library of the American West, Crown Publishers, Inc., 1994) at 163–74; Gould at 20–25.

⁵ See Quinn at 163–74; Gould at 20–25.

FIFTY YEARS OF THE WASHINGTON–GILBERT PROVOCATIVE ACT DOCTRINE:

Time for an Early Retirement?

MITCHELL KEITER*

The usual challenge in determining criminal liability is the age-old uncertainty: “Who done it?” But assigning blame may prove controversial even where the facts are undisputed. It may be clear that A directly inflicted the fatal wound, but in response to a wrongful action of B. For example, a bank robber’s waving a gun prompts a security guard to shoot — and inadvertently kill a customer. Should the robber or the guard be liable for the homicide? The use of civilian populations in urban warfare as human shields has highlighted the distinction between the direct or actual cause of death (the guard) and the proximate or legal cause (the robber).

Direct causation is neither necessary nor sufficient for homicide liability; proximate causation combines with a guilty mental state (*mens rea*) to produce homicide liability.¹ Whereas direct causation is a question of fact, proximate causation is a policy question, which seeks to assign liability

* Certified Appellate Law Specialist, Keiter Appellate Law, Beverly Hills, California. As a Chambers Attorney at the California Supreme Court, the author participated in the decisions of *People v. Sanchez*, 26 Cal.4th 834 (2001), and *People v. Cervantes*, 26 Cal.4th 860 (2001). The author would like to thank Sheila Tuller Keiter and Blair Hoffman.

¹ *People v. Sanchez*, 26 Cal.4th 834, 845 (2001). The more culpable the offender’s mental state, the higher the degree of homicide.

fairly and justly.² When a defendant is charged with homicide for a death directly inflicted by an intermediary, judges and juries must decide if the intermediary's response was a "dependent" or "independent" intervening variable. Intervening variables are independent if they are "unforeseeable," and "an extraordinary and abnormal occurrence."³ But the intervening variable is dependent if it is a "normal and reasonably foreseeable result of defendant's original act."⁴ Jurors may thus agree on what happened but disagree on whom to blame.

Fifty years ago, the California Supreme Court decided two cases that reshaped homicide liability. In *People v. Washington*⁵ and *People v. Gilbert*,⁶ the Court distinguished between direct proximate causation and indirect proximate causation, holding that only the former supported application of the felony-murder rule, which otherwise held felons strictly liable for all homicides committed during the felony.⁷ The decisions immunized defendants from felony-murder liability if a resisting victim or officer directly caused the death, even if the felon was the proximate cause.

In creating this exception to the felony-murder rule, the Supreme Court also created an exception to the exception: murder liability was proper even where an innocent party directly caused death so long as the defendant committed a highly dangerous act (like shooting) that proximately caused the fatal response. Such a "provocative" act would demonstrate implied malice, sufficient to support murder liability without resort to the felony-murder rule.⁸ Although *Washington* and *Gilbert* designed

² *People v. Cervantes*, 26 Cal.4th 860, 872 (2001).

³ *Id.* at 871.

⁴ *Id.*

⁵ 62 Cal.2d 777 (1965).

⁶ 63 Cal.2d 690 (1965).

⁷ Cal. Penal Code, §189; see Miguel Méndez, *The California Supreme Court and the Felony Murder Rule: A Sisyphean Challenge?*, 5 CAL. LEGAL HIST. 241 (2010) (Méndez); Mitchell Keiter, *Ireland at Forty: How to Rescue the Felony-murder Rule's Merger Limitation from Its Midlife Crisis*, 36 W. ST. L. REV. 1, 28 (2008) (Ireland at Forty).

⁸ See Part IA. In contrast to express malice, which involves a specific intent to kill, implied malice involves an intent to do an act, the natural and probable consequences of which are dangerous to life (the objective component), with conscious disregard of the danger to human life (the subjective component). *People v. Knoller*, 41 Cal.4th 139, 152–53, 156–57 (2007); see Méndez, *supra* note 7, at 244.

the provocative act doctrine as a substitute for the felony-murder rule to establish malice for homicides committed during section 189 felonies, the doctrine has become the default means for establishing murder liability for all homicides committed by an intermediary, even where there was no section 189 felony.⁹

Yet in the half-century since *Washington* and *Gilbert*, the Supreme Court has disavowed all the premises that produced those decisions, and restored the law to the status quo ante.¹⁰ The Court has recharacterized the purpose of the felony-murder rule, the requisite connection between the felony and the homicide, the definition of implied malice (and whether brandishing a weapon may reflect it), whether an unreasonable response breaks the chain of causation, and, most significantly, whether defendants may be held liable for factors beyond their control. Paradoxically, *Washington-Gilbert's* reach has expanded as its underpinnings collapsed.

This disavowal of *Washington-Gilbert's* foundation accorded with a judicial and legislative emphasis on public safety, prompted by an increase in crime in the late 1960s and 1970s. The law is now more inclined to authorize punishment for not only intended harms but also unintended ones, so long as they are reasonably foreseeable. Conduct less culpable than the *Washington* defendant's now supports murder liability in indirectly caused homicides.¹¹

But the provocative act doctrine remains, more entrenched than ever. Courts have addressed new factual circumstances by reconfiguring jury instructions (often incorrectly) — or bypassing the doctrine altogether. Although this patchwork development may achieve desired results in individual cases (or not), the law would enjoy greater consistency if courts followed the same formula for intermediary cases that applies in all others: A defendant who proximately causes death is liable for homicide in accordance with his mental state (*mens rea*).¹²

⁹ See Part I.B. The enumerated felonies of section 189 currently include arson, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, rape, and specified sex offenses.

¹⁰ See Part II.

¹¹ See Part III.

¹² See Part IV.

I. THE DEVELOPMENT OF THE PROVOCATIVE ACT DOCTRINE

For more than a century, homicide liability has required proximate, not direct, causation of death.¹³ In *People v. Lewis*,¹⁴ the defendant shot the victim in the intestines, “sending him toward a painful and inevitable death he apparently decided to hasten by slitting his own throat.”¹⁵ The victim may have been the direct cause of death, but blame, and thus proximate causation, lay with the defendant: “‘Even if the deceased did die from the effect of the knife wound alone, no doubt the defendant would be responsible . . . [if the fatal] wound was caused by the wound inflicted by the defendant in the natural course of events.’”¹⁶ Liability remained with the defendant even where the victim’s death was not inevitable, as in *Lewis*, so long as it was a natural and probable consequence of the defendant’s misconduct.¹⁷

The Supreme Court refined the intermediary causation rule in *People v. Fowler*, where Fowler struck Duree with a club, left him for dead on the roadway, and a motorist then inadvertently drove over the body.¹⁸ The Court reaffirmed the *Lewis*-derived rule that regardless of whether the club or the car inflicted the fatal wound, the defendant proximately caused Duree’s death, as it was “the natural and probable result of the defendant’s . . . leaving Duree lying helpless and unconscious in a public road, exposed to that danger.”¹⁹ Unless the driver intentionally ran over Duree, Fowler was the proximate cause.

Fowler further established that liability was the product of causation and *mens rea*. With proximate causation established, Fowler’s liability depended on the mental state with which he struck Duree: If in “self-defense, it would be justifiable. If it was felonious, it would be murder or manslaughter, according to the intent and the kind of malice with which

¹³ Cervantes, 26 Cal.4th 860, 869.

¹⁴ 124 Cal. 551 (1899).

¹⁵ Cervantes, 26 Cal.4th 860, 869.

¹⁶ *Id.*, quoting *Lewis*, 124 Cal. 551, 555.

¹⁷ *People v. Williams*, 27 Cal. App. 297, 299 (1915).

¹⁸ 178 Cal. 657, 667–69 (1918).

¹⁹ *Fowler*, 178 Cal. 657, 669.

THE JUDICIAL GIVE AND TAKE:

*The Right to Equal Educational Opportunity
in California*

REBECCA M. ABEL*

* Law Clerk, U.S. District Court, Central District of California; J.D., UCLA School of Law, 2012; B.A., Brown University, 2007.

TABLE OF CONTENTS

INTRODUCTION 205

I. THE EDUCATION CLAUSES..... 208

 A. THE EDUCATION CLAUSES OF THE CALIFORNIA
 CONSTITUTION 208

 B. LITIGATING EDUCATION RIGHTS UNDER CALIFORNIA’S
 EDUCATION CLAUSES..... 210

 1. THE UNDEFINED PROMISE OF A FREE SYSTEM OF
 COMMON SCHOOLS.....212

 2. THE LEGISLATURE’S BROAD DISCRETION TO
 PROMOTE EDUCATIONAL GOALS216

 3. THE ROLE OF THE LEGISLATURE TO EDUCATE
 ALL CALIFORNIA CHILDREN.....217

 C. LITIGATING EDUCATION RIGHTS UNDER THE
 CALIFORNIA EQUAL PROTECTION CLAUSE 220

 1. THE EQUAL PROTECTION CLAUSE, NOT THE
 EDUCATION CLAUSES, PROTECTS STUDENTS’
 FUNDAMENTAL RIGHT TO EDUCATION..... 225

 2. DECLARING STUDENTS’ MINIMUM RIGHT TO
 EDUCATION UNDER THE EQUAL PROTECTION CLAUSE .. 230

II. THE EQUAL PROTECTION CLAUSE 233

 A. THE COURTS GIVE: EXPANDING STUDENTS’ RIGHTS
 UNDER CALIFORNIA’S EQUAL PROTECTION CLAUSE 233

 B. THE COURTS TAKE AWAY: ELIMINATING STUDENTS’ RIGHTS
 FROM CALIFORNIA’S EQUAL PROTECTION CLAUSE 237

 C. WHERE DO WE GO FROM HERE? ADAPTING THE
 POSITIVE PRECEDENT TO NEW CLAIMS FOR BASIC
 EDUCATIONAL EQUITY241

CONCLUSION.....251

INTRODUCTION

After the U.S. Supreme Court held that education is not a fundamental right under the Equal Protection Clause of the U.S. Constitution in *San Antonio Independent School District v. Rodriguez*,¹ litigants turned to state Equal Protection Clauses to serve as guarantors of educational equality. In subsequent years, some state courts have expanded the content of state-level equal protection doctrine to include students' fundamental right to equal educational opportunity.² Central to this doctrine is that the principle of equal opportunity can and should be applied to areas of life where the state government provides services that are integral to the functioning of a democratic society and the opportunities of its citizens.

The California Supreme Court declared education a fundamental right under the state constitution in its 1976 decision in *Serrano v. Priest*.³ Since then, there has been a surge of state-level education litigation in California, which has shown no signs of slowing. Despite the mounting caselaw, the contours of California students' right to equal education remains unclear. Although the California Constitution creates an enforceable right to "basic educational equality,"⁴ the state courts have not succinctly stated the programs, services, resources, or funding necessary to satisfy this right.

¹ 411 U.S. 1, 33 (1973).

² In a frequently cited article on the use of state constitutions to protect individual rights, Justice Brennan encouraged state courts to provide more expansive protections for substantive individual rights than those provided by the federal constitution. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) ("Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism."); see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *The Bill of Rights and the States*] (recognizing that state courts have interpreted state constitutional provisions as providing greater protections than similar provisions, including the Equal Protection Clause, found in the federal constitution).

³ 18 Cal.3d 728 (1976) (en banc).

⁴ See *Butt v. State of California*, 4 Cal.4th 668, 681 (1992) ("[T]he state itself has broad responsibility to ensure basic educational equality under the California Constitution.").

California educates a highly diverse population of over 6.2 million students.⁵ In recent years, California students have ranked near the bottom in fourth and eighth grade math and reading scores compared to students in other states.⁶ Eighty-one percent of Californians believe educational quality is a problem in California's K–12 public schools.⁷ Californians are also very concerned about inequities among students based on income, race, and English proficiency.⁸ Given the concerns over the quality and equality of education in California, it is imperative to define the scope of the state's duty to provide an education to students. For almost forty years, students, parents, and advocacy groups have turned to California's courts for guidance on the states' educational obligation, yet the caselaw remains equivocal.⁹

This article reviews the thirty-five year history of California education equal protection litigation in an effort to identify what is contained within and excluded from students' fundamental right. This article seeks to answer the question: What constitutes "basic" educational equality in California's public schools? An in-depth review of the case history reveals that California courts oscillated between granting and taking away benefits which affect students' full enjoyment of their right to a basic education. The vacillation is ongoing. Litigants continue to bring challenges under California's Equal Protection Clause, attempting to push the courts to more concretely define the scope of students' fundamental right to education, with variable success.¹⁰ Many of the recent cases are still at the

⁵ See National Center for Education Statistics, U.S. Department of Education, NAEP State Profiles: Summary of NAEP Results for California 1990–2013 (last visited Nov. 30, 2014), <http://nces.ed.gov/nationsreportcard/states>.

⁶ See *id.*

⁷ See Mark Baldassare, et al., *PPIC Statewide Survey: Californians & Education* 20 (2014), available at http://www.ppic.org/content/pubs/survey/S_414MBS.pdf.

⁸ See *id.* at 17 (finding that a majority of Californians are concerned about teacher shortages in low-income areas, that low-income students are less likely to be ready for college, and that English language learners score lower than other students on standardized tests).

⁹ See James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 85 (2006) ("If courts are willing, as they should be, to determine whether state constitutions create a right to equal or adequate educational opportunities, they must be committed to defining the content of those opportunities.").

¹⁰ See *Vergara v. State of California*, No. BC484642 (Cal. Super. Ct. filed May 14, 2012); *Campaign for Quality Educ. v. State of California*, No. RG10524770 (Cal. Super.

LEGAL HISTORY IN THE MAKING

THE (F)LAW OF KARMA:

In Light of Sedlock v. Baird, Would Meditation Classes in Public Schools Survive a First Amendment Establishment Clause Challenge?

BRADFORD MASTERS*

This paper was awarded first place in the California Supreme Court Historical Society's 2014 CSCHS Selma Moidel Smith Law Student Writing Competition in California Legal History.

* Copyright © 2014 Bradford Masters. Articles Editor, UC Davis Law Review; J.D. Candidate, UC Davis School of Law, Class of 2015; B.A. English, Yale University, 1994. Thanks to Erin Tanimura and the other members of the UC Davis Law Review whose hard work helped bring this piece to publication. Special thanks to Professor Alan Brownstein, Professor Elizabeth Joh, Bill Goldstein, Rachael A. Smith, and the entire staff at Mabie Law Library.

TABLE OF CONTENTS

INTRODUCTION	257
I. BACKGROUND	261
A. DEFINING “RELIGION”	262
1. <i>MALNAK I</i>	264
2. <i>MALNAK II</i>	266
B. <i>LEMON TEST</i>	268
C. <i>ALVARADO v. CITY OF SAN JOSE</i>	270
II. <i>SEDLOCK v. BAIRD</i>	272
A. FACTS.	273
B. IS YOGA RELIGIOUS?	275
C. DOES YOGA PASS THE <i>LEMON TEST</i> ?	276
III. MEDITATION CLASSES IN PUBLIC SCHOOLS	280
A. WILL MINDFULNESS MEDITATION CLASSES VIOLATE THE ESTABLISHMENT CLAUSE?	282
1. IS MM RELIGIOUS?	282
2. DOES MM PASS THE <i>LEMON TEST</i> ?	283
B. WILL TRANSCENDENTAL MEDITATION CLASSES VIOLATE THE ESTABLISHMENT CLAUSE?	286
1. IS TM IN QUIET TIME RELIGIOUS?	286
2. DOES TM IN QUIET TIME PASS THE <i>LEMON TEST</i> ?	290
IV. CONCLUSION	295

INTRODUCTION

This is a boom time for meditation classes in public schools.¹ The last fifteen years have seen a growing number of schools instructing K–12 students in various kinds of meditation techniques.² Educators in at least ninety-one schools across thirteen states have implemented meditation programs for students.³ Programs include Quiet Time,⁴ Inner Kids Program,⁵ Mindful Schools,⁶ and MindUP.⁷

The benefits of meditation are widely acknowledged in the United States.⁸ A nascent but equally promising body of literature shows that

¹ *Infographic: Meditation in Schools Across America: As a Growing Body of Research Points to Positive Outcomes from Meditation in Schools, Programs are Spreading Across the Country*, EDUTOPIA, <http://www.edutopia.org/stw-student-stress-meditation-schools-infographic> (last visited Nov. 11, 2013) [hereinafter *Infographic*] (noting that at least thirteen states currently implement meditation classes in schools).

² John Meiklejohn et al., *Integrating Mindfulness Training into K–12 Education: Fostering the Resilience of Teachers and Students*, 3 MINDFULNESS 291, 292 (2012).

³ *Infographic*, *supra* note 1.

⁴ *Schools*, DAVID LYNCH FOUND., <http://www.davidlynchfoundation.org/schools.html> (last visited Nov. 11, 2013); David L. Kirp, *Meditation Transforms Roughest San Francisco Schools*, SFGATE (Jan. 12, 2014, 6:37 PM), <http://www.sfgate.com/opinion/openforum/article/Meditation-transforms-roughest-San-Francisco-5136942.php>.

⁵ *Inner Kids*, SUSAN KAISER GREENLAND, <http://www.susankaisergreenland.com/inner-kids.html> (last visited Nov. 11, 2013).

⁶ *What is Mindfulness?*, MINDFUL SCHS., <http://www.mindfulschools.org/about-mindfulness/mindfulness/> (last visited Nov. 11, 2013).

⁷ *MindUP*, HAWN FOUND., <http://thehawnfoundation.org/mindup/> (last visited Oct. 4, 2013), (explaining that MindUP is currently in 1,000 schools across the United States). Mindfulness meditation classes also appear in the burgeoning area of curriculum development called Social and Emotional Learning (“SEL”), which some call the “missing piece” in education. Maurice J. Elias, *The Connection Between Academic and Social-Emotional Learning*, in *THE EDUCATOR’S GUIDE TO EMOTIONAL INTELLIGENCE AND ACADEMIC ACHIEVEMENT* 4, 6 (Maurice J. Elias & Harriett Arnold eds., 2006).

⁸ *Meditation: An Introduction*, NAT’L CTR. FOR COMPLEMENTARY AND ALT. MED. (June 2010), available at <http://nccam.nih.gov/health/meditation/overview.htm>; Richard J. Davidson et al., *Alterations in Brain and Immune Function Produced by Mindfulness Meditation*, PSYCHOSOMATIC MED., 564, 564, 569 (2003) (linking mindfulness meditation to significant positive changes in brain and immune function); Phillip M. Keune & Dora Perczel Forintos, *Mindfulness Meditation: A Preliminary Study on Meditation Practice During Everyday Life Activities and its Association with Well-Being*, 19 PSYCHOL. TOPICS 373, 374 (2010) (documenting the salutary effect of meditation on human health); *Research: Major Research Studies and Findings*, UNIV. OF MASS. MED.

meditation benefits children by reducing test anxiety, increasing attention span, and boosting academic performance.⁹ Other studies show that meditation programs in schools reduce misbehavior and aggression between students.¹⁰ Critics, however, claim that meditation and other allegedly spiritual practices are a modern-day Trojan Horse bringing religion past the schoolhouse gate.¹¹ Given the broad discretion of a school board to select its public school curriculum,¹² what framework should guide educators considering the legality of starting or continuing a state-sponsored meditation program? The timely question now facing public school districts is whether teaching meditation techniques is a violation of the First Amendment Establishment Clause.¹³

“Meditation” is a family of techniques that focus attention on the present moment.¹⁴ This paper will focus on mindfulness meditation (“MM”)¹⁵

SCH., <http://www.umassmed.edu/Content.aspx?id=42426> (last visited Dec. 31, 2013) (discussing the work of Dr. Jon Kabat-Zinn over the past thirty-four years).

⁹ Meiklejohn, *supra* note 2, at 298; Kimberly A. Schonert-Reichl & Molly Stewart Lawlor, *The Effects of a Mindfulness-Based Education Program on Pre- and Early Adolescents’ Well-Being and Social and Emotional Competence*, 1 MINDFULNESS 137–39 (2010); THE QUIET TIME BROCHURE, DAVID LYNCH FOUND. 20–21, available at <http://www.davidlynchfoundation.org/pdf/Quiet-Time-Brochure.pdf> [hereinafter *Brochure*] (collecting research findings on the Transcendental Meditation program in schools).

¹⁰ Vanessa Vega, *Promising Research on Meditation in Schools*, EDUTOPIA (Feb. 22, 2012), <http://www.edutopia.org/stw-student-stress-meditation-schools-research> (collecting research on meditation programs in schools).

¹¹ Charles C. Haynes, *In Public Schools, Religion by Any Other Name is Still Religion*, FIRST AMENDMENT CTR. (Apr. 26, 2009), <http://www.firstamendmentcenter.org/in-public-schools-religion-by-any-other-name-is-still-religion>.

¹² *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

¹³ See U.S. CONST. amend. I. This paper does not address meditation in the context of moment-of-silence statutes. By “meditation,” this paper means to address a stand-alone classroom activity apart from the typical moment of silence observed during morning announcements. For a discussion on the latter, see Debbie Kaminer, *Bringing Organized Prayer in Through the Back Door: How Moment-of-Silence Legislation for the Public Schools Violates the Establishment Clause*, 13 STAN. L. & POL’Y REV. 267 (2002).

¹⁴ Keune & Forintos, *supra* note 8, at 374; Betsy L. Wisner et al., *School-based Meditation Practices for Adolescents: A Resource for Strengthening Self-Regulation, Emotional Coping, and Self-Esteem*, 32 CHILD. & SCHS. 150, 152 (2010); Antoine Lutz et al., *Attention Regulation and Monitoring in Meditation*, 12 TRENDS IN COGNITIVE SCI. 163, 163 (2008).

¹⁵ JON KABAT-ZINN, MINDFULNESS FOR BEGINNERS: RECLAIMING THE PRESENT MOMENT — AND YOUR LIFE 135–52 (2012) (describing the basics of mindfulness meditation techniques).

CALIFORNIA'S ANTI-REVENGE PORN LEGISLATION:

Good Intentions, Unconstitutional Result

LAUREN WILLIAMS*

This paper was awarded second place in the California Supreme Court Historical Society's 2014 CSCHS Selma Moidel Smith Law Student Writing Competition in California Legal History.

* J.D. Candidate, University of San Diego School of Law, Class of 2015; B.A., Boston College, Psychology, 2012. A sincere thank-you to my comment editors, Katie Lafferty-Cordova and Nika Antonikova, for their feedback and support.

TABLE OF CONTENTS

INTRODUCTION..... 299

I. WHY LEGISLATIVE ACTION TARGETING REVENGE
PORN IS NECESSARY 303

 A. THE INADEQUACY OF EXISTING LAWS..... 303

 B. THE HARM 307

II. CALIFORNIA’S ANTI-REVENGE PORN LEGISLATION..... 308

III. FIRST AMENDMENT JURISPRUDENCE.....310

 A. JUDICIAL STANDARDS OF REVIEW OF
 REGULATIONS ON SPEECH311

 1. DETERMINING THE APPLICABLE LEVEL
 OF SCRUTINY312

 2. STRICT SCRUTINY VS. INTERMEDIATE
 SCRUTINY313

 B. UNPROTECTED AND “LOW-LEVEL” SPEECH314

 C. SECONDARY EFFECTS316

 D. OBSCENITY AND INDECENCY, AND
 PORNOGRAPHY319

 E. THE INTERSECTION OF THE FIRST
 AMENDMENT AND THE INTERNET 324

IV. THE CONSTITUTIONALITY OF CALIFORNIA
PENAL CODE SECTION 647(4) 327

 A. APPLYING STRICT SCRUTINY 328

 B. SECONDARY EFFECTS..... 333

 C. OBSCENITY, INDECENCY, AND PORNOGRAPHY..... 334

V. LOOKING FORWARD: RECONCILING COMPETING
GOALS TO ACHIEVE CONSTITUTIONALLY-SOUND
LEGISLATION..... 336

INTRODUCTION

“In a perfect world there would be no bullying and there would be no people like me and there would be no sites like mine . . . [b]ut we don’t live in a perfect world.”

— Revenge porn website owner, Hunter Moore¹

“Revenge porn”² is a practice in which vengeful ex-lovers post photos shared in confidence during their relationships with the public via the Internet.³ Websites such as Moore’s are dedicated solely to hosting this type of content and have multiplied over the past few years.⁴ They provide platforms for users to reveal photos as well as other personal information about their former partners to the public.⁵ In fact, users often include with the photos information such as the subject’s full name, city and state, and links to their social media profiles, ensuring the photos appear high in Google search results.⁶ Some go so far as to include contact information of subjects’ family members or coworkers.⁷

Holly Jacobs⁸ experience demonstrates the devastating effects revenge porn postings have on one’s life, both personally and profes-

¹ Jessica Roy, *The Battle Over Revenge Porn: Can Hunter Moore, the Web’s Vilest Entrepreneur, Be Stopped?*, BETABEAT (Dec. 4, 2012, 7:46 PM), <http://betabeat.com/2012/12/the-battle-over-revenge-porn-can-hunter-moore-the-webs-vilest-entrepreneur-be-stopped/>.

² “Revenge porn” may also be referred to as “cyber revenge,” “cyberrape,” or “involuntary pornography.” See, e.g., *id.*; Heather Kelly, *New California ‘revenge porn’ law may miss some victims*, CNN (Oct. 3, 2013, 6:32 AM), <http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/>; Lorelei Laird, *Victims are taking on ‘revenge porn’ websites for posting photos they didn’t consent to*, ABA JOURNAL (Nov. 1, 2013 4:30 AM), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly/.

³ Laird, *supra* note 2.

⁴ *Id.*

⁵ Roy, *supra* note 1; *id.*

⁶ Laird, *supra* note 2.

⁷ *Id.*

⁸ Holly Jacobs was previously Holli Thometz and has also used the pseudonym “Sarah.” See Holly Jacobs, *A Message From Our Founder, Dr. Holly Jacobs*, END REVENGE PORN (Sept. 8, 2013), <http://www.endrevengeporn.org/?p=422/>; Roy, *supra* note 1; Jessica Roy, *A Victim Speaks: Standing Up to a Revenge Porn Tormentor*, BETABEAT

sionally.⁹ Jacobs shared nude photos with her then-boyfriend during a long-distance portion of their relationship.¹⁰ After they broke up, he posted the photos on hundreds of revenge porn websites and emailed them to all of her coworkers.¹¹ He also included personal information about Jacobs including her full name, email address, where she worked, and information about the Ph.D. program she was enrolled in.¹² She was horrified.¹³ For months, she received harassing emails from people who had seen her photos online.¹⁴ She began to worry she would be physically stalked.¹⁵ In response, she left her job, changed her name, and began carrying a stun gun with her.¹⁶

She looked to the law for relief. She hired a lawyer, begged three different police stations to file charges against her ex-boyfriend, went to the FBI, and hired an Internet specialist to take the material down.¹⁷ Unable to fund a civil suit, she filed several Digital Millennium Copyright Act takedown requests claiming copyright infringement.¹⁸ However, these attempts proved fruitless.¹⁹ To shed light on her plight and the plights of others similarly situated, Jacobs founded EndRevengePorn.org to support

(May 1, 2013, 1:04 PM), <http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case/>.

⁹ Roy, *supra* note 1. Professor of law Eric Goldman has described the effects of these types of postings as “life-altering” because “there are a lot of people who will feel like someone who is depicted naked or is recorded having sex . . . has done something wrong.” See *Revenge Porn*, YOUR WEEKLY CONSTITUTIONAL (Nov. 22, 2013) http://ywc.podomatic.com/entry/2013-11-22T13_24_26-08_00 [hereinafter *Podcast*]. Victims report being fired from their jobs or expelled from their schools, being shunned by friends, receiving sexual propositions by strangers who have seen their photos online, being subjected to physical stalking and harassment, changing their names, and some victims have even committed suicide. *Id.*

¹⁰ Roy, *supra* note 1.

¹¹ *Id.*

¹² Jacobs, *supra* note 8.

¹³ Roy, *supra* note 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; Roy, *supra* notes 8–10.

¹⁷ Jacobs, *supra* note 8.

¹⁸ Roy, *supra* note 1.

¹⁹ *Id.*; Jacobs, *supra* note 8.

VIRTUAL CLONING: TRANSFORMATION OR IMITATION?

Reforming the Saderup Court's Transformative Use Test for Rights of Publicity

SHANNON FLYNN SMITH*

INTRODUCTION

Tupac Shakur, dead nearly sixteen years, rose up slowly from beneath the stage at the 2012 Coachella Valley Music & Arts Festival in Indio, California to rouse the crowd and perform his songs *2 of Amerikaz Most Wanted* and *Hail Mary* alongside rap artists Snoop Dogg and Dr. Dre.¹ Celine Dion and Elvis Presley belted *If I Can Dream* together in a duet on the hit performance show *American Idol* in 2007,² thirty years after Presley's

This paper was awarded third place in the California Supreme Court Historical Society's 2014 CSCHS Selma Moidel Smith Law Student Writing Competition in California Legal History.

* J.D., 2014, Michigan State University College of Law; B.A. (Journalism), 2011, University of Wyoming. She is now a member of the Colorado State Bar. The author would like to thank Adam Candeub for his thoughtful assistance in developing this article.

¹ Claire Suddath, *How Tupac Became a Hologram (Is Elvis Next?)*, BUSINESSWEEK (Apr. 16, 2012), <http://www.businessweek.com/articles/2012-04-16/how-tupac-became-a-hologram-plus-is-elvis-next>; *Tupac Hologram Snoop Dogg and Dr. Dre Perform Coachella Live 2012*, YOUTUBE (Apr. 17, 2012), <http://www.youtube.com/watch?v=TGbrFmPBV0Y> [hereinafter *Tupac Live Hologram*].

² *American Idol Elvis & Celine Dion "If I Can Dream,"* YOUTUBE (Jan. 8, 2010), <http://www.youtube.com/watch?v=plHtPG6eMIO>.

death.³ In 2011, Mariah Carey performed live across five European countries — Germany, Croatia, Macedonia, Montenegro, and Poland — simultaneously.⁴ Pop artist Beyoncé performed at the Billboard Music awards in 2011; in fact several of her did: Beyoncé performed, at one point, with over forty replicas of herself.⁵ Hologram technology made all of these, and many similar performances, possible and has since transformed the entertainment industry.

The excitement of this new technology has not come without concern, however, and the legal issues it raises are many: right of publicity infringement, copyright infringement, and trademark infringement, to name a few.⁶ Not all celebrities, or their families, are thrilled with the technology. Some estates, like Marilyn Monroe's, have sought to stop digital re-creators from creating holograms of their deceased celebrities under these different legal theories.⁷ Tupac Shakur's mother consented to the use of her son's likeness in the Coachella concert, but even when a license is granted, re-creators may exceed the scope of that license, raising right-of-publicity issues.⁸

One main concern this hologram, or virtual cloning, technology presents is right-of-publicity infringement. Rights of publicity, as creatures of state law, provide a cause of action to celebrities (and sometimes their

³ Molly Ivins, *Elvis Presley Dies; Rock Singer Was 42*, N.Y. TIMES, Aug. 16, 1977, at A1, available at <https://www.nytimes.com/learning/general/onthisday/big/0816.html>.

⁴ *Mariah Carey Hologram Performs Simultaneously in Five Cities for Deutsche Telekom Campaign*, THE DRUM (Nov. 18, 2011, 12:14 PM), <http://www.thedrum.com/news/2011/11/18/mariah-carey-hologram-performs-simultaneously-five-cities-deutsche-telekom-campaign> [hereinafter *Mariah Carey Hologram*].

⁵ *Tupac's Coachella Performance and More Hologram Wins and Fails (VIDEO)*, THE DAILY BEAST (Apr. 8, 2012), <http://www.thedailybeast.com/articles/2012/04/18/tupac-s-coachella-performance-and-more-hologram-wins-fails-video.html>.

⁶ See generally Joseph J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 16 BERKELEY TECH. L.J. 1165 (2001) (describing virtual cloning techniques and dangers).

⁷ Eriq Gardner, *Marilyn Monroe Estate Threatens Legal Action over Hologram (Exclusive)*, HOLLYWOOD REP. (June 11, 2012, 12:40 PM), <http://www.hollywoodreporter.com/thr-esq/marilyn-monroe-estate-hologram-legal-334817> (displaying a cease-and-desist letter from Monroe's estate to Digicon requesting Digicon stop a concert featuring Monroe's hologram).

⁸ See *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 411 (Cal. Ct. App. 2011) (providing an example of a right-of-publicity claim for exceeding the scope of a license to use a likeness).

estates)⁹ when the celebrities' likenesses are used without permission.¹⁰ Where the celebrity is alive and able to consent to the performance, as with Mariah Carey's concert, these issues can easily be resolved through licensing.¹¹ Where a celebrity has not consented and is either alive or was domiciled at death in a state that recognizes postmortem rights of publicity, the celebrity or estate may bring a right-of-publicity infringement claim. A First Amendment defense may still defeat that claim, however, depending on the facts of the case and the jurisdiction.

States have an amalgam of different protections for rights of publicity, and as such, several different First Amendment defense tests have developed across jurisdictions to protect legitimate uses of a celebrity's likeness.¹² California, the hotbed of celebrities and celebrity right-of-publicity claims, has adopted the transformative use test to determine whether the use of a likeness is protected by the First Amendment or whether a celebrity's rights of publicity will prevail. This new virtual cloning technology and its recent right-of-publicity challenges will pose new questions when balancing First Amendment interests under the transformative use test, particularly because California and others who have adopted the test have provided several different iterations of what may constitute a transformative use, and those iterations may lead to conflicting results. As such, courts should abandon these several iterations and instead adopt a single iteration of the transformative use test to better direct courts and parties alike.

This article focuses on the transformative use test applied by California and other United States courts when analyzing the First Amendment defense to right-of-publicity infringement claims in the context of newly developing virtual-cloning technology.¹³ Part I examines this virtual-cloning

⁹ See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 9:18 (2013) (stating that twenty states have recognized postmortem rights of publicity, six by common law and fourteen by statute).

¹⁰ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2012).

¹¹ See *Mariah Carey Hologram*, *supra* note 4.

¹² See generally Andreas N. Andrews, Note, *Stop Copying Me: Rethinking Rights of Publicity Verses the First Amendment*, 32 TEMP. J. SCI. TECH. & ENVTL. L. 127 (2013).

¹³ This work is intended to extend the discussion from my previous work, which considered the implications of virtual cloning and postmortem right-of-publicity choice-of-law complications that arise under current state right-of-publicity laws. See Shannon Flynn Smith, *If It Looks like Tupac, Walks like Tupac, and Raps like Tupac, It's*

technology and the Tupac Shakur concert. Part II sets out the current state of First Amendment defenses by examining the Supreme Court precedent on the issue and the cases where courts have applied the transformative use test. Part III then applies the transformative use test to the Tupac Shakur virtual clone concert to demonstrate that the different iterations of the transformative use test can lead to conflicting results using the same set of facts. Part IV concludes, based on this analysis using the Tupac virtual clone, that because the current iterations of the transformative use test are unclear and lead to contradictory results, courts should adopt the Mere Celebrity Likeness Test as the single iteration of the transformative use test.

I. VIRTUAL CLONING TECHNOLOGY & THE TUPAC SHAKUR VIRTUAL CLONE CONCERT

The Tupac Shakur virtual clone that performed at the Coachella music festival and other virtual clones like it present a unique question in applying First Amendment defenses to this new technology. At the concert, the Tupac Shakur virtual clone performed the song *Hail Mary* for a live audience, but Tupac had never actually performed this song live during his life; re-creators enabled the virtual clone to sing this song in front of an audience for the very first time.¹⁴ The re-creators' performance enabled the Tupac virtual clone to dance and rap alongside two other rappers, Dr. Dre and Snoop Dogg.¹⁵ The re-creators also added language never before spoken by the living Tupac Shakur: "What the fuck is up, Coachella!"¹⁶ The Coachella music festival in fact did not even exist until three years after Tupac's death.¹⁷ Finally, the re-creators took out the first lines of the

Probably Tupac: Virtual Cloning and Postmortem Right-of-Publicity Implications, 2013 MICH. ST. L. REV. 1719.

¹⁴ Ewan Palmer, *Tupac Shakur Hologram 'Performs' at Coachella 2012 [Video]*, INTERNATIONAL BUSINESS TIMES (Apr. 16, 2012, 11:32 AM), <http://www.ibtimes.co.uk/tupac-shakur-2pac-performs-coachella-hologram-dr-328517>.

¹⁵ *Id.*

¹⁶ Jason Lipshutz, *Opinion: The Problem with the Tupac Hologram*, BILLBOARD (Apr. 16, 2012, 7:25 PM), <http://www.billboard.com/articles/columns/the-juice/494288/opinion-the-problem-with-the-tupac-hologram>.

¹⁷ Suddath, *supra* note 1.

STUDENT SYMPOSIUM

Introduction:

THE CALIFORNIA SUPREME COURT AND JUDICIAL LAWMAKING —

The Jurisprudence of the California Supreme Court

EDMUND URSIN*

This student symposium focuses on lawmaking by the California Supreme Court. One way to place these articles in context is to ask a fundamental question: Do judges make law? Are they lawmakers? Chief Justice Roberts in his confirmation hearings famously suggested they are not when he compared judges to umpires who call balls and strikes — but do not “legislate” the rules of baseball.¹

A similar view was prevalent when Roger Traynor was appointed to the California Supreme Court in 1940. At that time legal formalism — the view that judges apply but do not make law, and that policy has no role in judicial decision making — was the norm in judicial decisions and mainstream legal thought.² Leaving aside whether this is an accurate description

* Professor of Law, University of San Diego School of Law.

¹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

² In 1939, the year before Traynor was appointed to the bench, for example, Warren Seavey, the leading torts scholar at Harvard Law School and Reporter for the *Restatement of Torts*, wrote approvingly of judges who recognized that their task was

of the historic (or current) role of courts in America (it is not), it was a view that Traynor challenged soon after taking the bench.

In the field of torts, formalism was linked to what might be called traditional tort theory and “the fundamental proposition . . . which link[ed] liability to fault.”³ In his famous 1944 concurring opinion in *Escola v. Coca Cola Bottling Co.*,⁴ however, Traynor called on his Court not only to make new law, but to do so by adopting a strict liability rule in products liability cases — and to do this based on a policy that had recently been disdainfully dismissed by a leading torts scholar as “sentimental justice” unfit for a court of law.⁵ Traynor wrote in *Escola* that a strict liability rule was justified in products cases in part because “the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.”⁶

Nor did Traynor confine his view of judicial lawmaking to common law subjects such as torts. In 1948, for example, Traynor’s opinion for the court in *Perez v. Sharp*⁷ held California’s anti-miscegenation statute unconstitutional (thus preceding the United States Supreme Court’s similar holding by twenty years).⁸ By 1956, Traynor wrote, it was

widely, if not universally, accepted that there is no rational basis in any law for race discrimination, that it is an insidiously evil thing that deprives the community of the best of all its people as it deprives individuals and groups to give of their best.⁹

to articulate “principles deduced from the cases[,] . . . to see the plan and pattern underlying the law and to make clear the paths which had been obscured by the undergrowth of illogical reasoning.” See Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 375, 39 COLUM. L. REV. 20, 23, 48 YALE L.J. 390, 393 (1939) [hereinafter cited to HARV. L. REV.]. In Seavey’s view a judge’s “opinions of policy” had no place in this process. See *id.* at 373.

³ Ezra Ripley Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 815 (1916); see also Seavey, *supra* note 2, at 375 (noting the policy of no liability for non-negligent conduct).

⁴ 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

⁵ Seavey, *supra* note 2 at 373.

⁶ *Escola*, 150 P.2d at 441.

⁷ 198 P.2d 17 (Cal. 1948).

⁸ See *Loving v. Virginia*, 388 U.S. 1 (1967).

⁹ Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L. FORUM 230, 237.

Judge Richard Posner has written of norms that exist within the community of judges. Most judges, in his view, “derive considerable intrinsic satisfaction from their work and want to be able to regard themselves and be regarded by others as good judges,”¹⁰ And to be regarded “as a good judge requires conformity to the accepted norms of judging.”¹¹

In judging, as in art, however, “norms are contestable,”¹² and “[r]apid norm shifts are possible . . . , because the products of these activities cannot be evaluated objectively.”¹³ In law it is the innovative judges who “challenge the accepted standards of their art, . . . [and these] innovators have the greater influence on the evolution of their field.”¹⁴ Posner cites Holmes, Brandeis, Cardozo, and Hand as “examples of judges who succeeded by their example in altering the norms of opinion writing.”¹⁵ Justice Traynor could be added to this list. By his example and through his extrajudicial writings, Traynor also altered the norms of opinion writing and judicial decision making.

In a series of articles beginning in 1956, Traynor articulated the jurisprudential perspective that would guide his Court over the next decades. Stated simply, Traynor’s view was that courts are lawmakers and policy does — and should — shape their lawmaking. Thus, Traynor wrote, “Courts have a creative job to do when they find that a rule has lost touch with reality and should be abandoned or reformulated to meet new conditions and new moral values.”¹⁶ If this perspective sounds familiar it is because of its similarity to Judge Richard Posner’s legal pragmatism.¹⁷

¹⁰ RICHARD A. POSNER, *HOW JUDGES THINK* 62 (2008).

¹¹ *Id.* at 61.

¹² *Id.* at 63.

¹³ *Id.* at 64.

¹⁴ *Id.* at 12–13.

¹⁵ *Id.* at 63.

¹⁶ Traynor, *supra* note 9, at 232. This comes with the qualification that in constitutional matters judges should generally — but not always — defer to legislative judgments. *Id.* at 241.

¹⁷ Judges, Posner writes, “are rulemakers as well as rule appliers.” In a particular case, “[a]n appellate judge has to decide . . . whether to apply an old rule unmodified, modify and apply the old rule, or create and apply a new one.” RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 248–59 (1999). In this process the goal is to “mak[e] the choice that will produce the best results.” *Id.* at 249.

This jurisprudential perspective also has a distinguished pedigree. As I have recently explained, early incarnations of this view can be found in the works of four giants in American law: Justice Oliver Wendell Holmes, Judge — later Justice — Benjamin Cardozo, and the Legal Realists Leon Green and Karl Llewellyn.¹⁸

Following Traynor's lead, the California Supreme Court became the most innovative¹⁹ and influential²⁰ state supreme court in the nation — and continues to be so to this day. Four examples illustrate "Traynor-style" lawmaking by the California Supreme Court. The first, *Greenmen v. Yuba Power Products, Inc.*, is a 1963 decision in which Traynor, in an opinion for a unanimous Court, wrote his *Escola* strict liability proposal and policies into California Law.²¹ Based on these policies, the California Supreme Court, with little hesitation, then quickly extended strict liability beyond manufacturers to include retailers,²² wholesalers,²³ and lessors.²⁴ These rulings, which courts across the nation quickly followed, represented, according to Prosser, "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."²⁵

The second and third examples also involve common law subjects — the tort doctrines of contributory (and comparative) negligence and assumption of risk. Each involves lawmaking that occurred after Traynor's

¹⁸ See Edmund Ursin, *Holmes, Cardozo, and the Legal Realists: Early Incarnations of Legal Pragmatism and Enterprise Liability*, 50 SAN DIEGO L. REV. 537 (2013). See also Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial lawmaking*, 57 BUFF. L. REV. 1267 (2009).

¹⁹ See GRANT GILMORE, *THE DEATH OF CONTRACT* 91 (1974).

²⁰ Measured by decisions that have been "followed," as that term is employed by Shepard's Citations Service, "over the course of several decades, the California Supreme Court has been the most followed state high court, and that trend continues." Jake Dear & Edward W. Jessen, *"Followed Rates" and the Leading State Cases, 1940–2005*, 41 U.C. DAVIS L. REV. 683, 683, 710 (2007). Five of the six *most* followed of the "most followed" decisions are tort decisions rendered since 1960. See *id.* at 708–09.

²¹ See 377 P.2d 897, 900–01 (Cal. 1963).

²² See *Vandermark v. Ford Motor Co.*, 391 P. 2d 168, 171–72 (Cal. 1964).

²³ See *Canifax v. Hercules Powder Co.*, 46 Cal. Rptr. 552, 557 (Ct. App. 1965).

²⁴ See *Price v. Shell Oil Co.*, 466 P. 2d 722, 723, 726–27 (Cal. 1970).

²⁵ WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 97, at 654 (4th ed. 1971).

retirement, in one case by the still-liberal California Supreme Court, in the other by a Court dominated by conservative justices.

The contributory negligence rule, which as late as the 1960s was the law in most states, deprived an injured plaintiff of recovery from a negligent defendant if the plaintiff also had been negligent. The harsh effect of this rule had long been apparent.²⁶ It throws the entire loss on an injured party, even though he was only slightly negligent, and relieves a negligent defendant of liability however much he may have contributed to the injury. In contrast, a rule of comparative negligence apportions damages according to the relative negligence of the two parties.

Nevertheless, courts had consistently refused to adopt the comparative negligence principle, despite the fact that few disinterested observers had defended contributory negligence on the merits. Why did courts refuse to institute this change? The answer is that the judiciary viewed this reform as beyond their competence, as inappropriate to their institutional role. In *Maki v. Frelk*,²⁷ decided in 1968, for example, the Illinois Supreme Court explained “that such a far-reaching change, if desirable, should be made by the legislature rather than by the court.”²⁸

In 1975, five years after Traynor’s retirement, however, the California Supreme Court in *Li v. Yellow Cab Co. of California* abolished the doctrine of contributory negligence and adopted a system of pure comparative negligence.²⁹ After *Li*, plaintiff negligence no longer completely bars recovery in negligence suits; rather, damages are only “diminished in proportion to the amount of negligence attributable to the person recovering.”³⁰

Li also had a second ruling, this one involving the doctrine of assumption of risk. Under this doctrine a person who voluntarily encountered a specific known and appreciated risk (whether reasonably or unreasonably)

²⁶ See, e.g., 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 1193–1209, 1236–41 (1956).

²⁷ 239 N.E. 2d 445 (Ill. 1968).

²⁸ *Id.* at 447.

²⁹ 532 P.2d 1226 (Cal. 1975). See Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 253–59 (1981).

³⁰ *Li*, 532 P.2d at 1243.

could not recover when injured by a negligent defendant. *Li* held that the defense of assumption of risk was merged into the general scheme of assessment of liability in proportion to fault in instances in which the plaintiff unreasonably encountered a specific known risk created by a defendant's negligence.³¹ Thus it appeared, oddly enough, that a non-negligent plaintiff might still be totally barred from recovery.

In its 1992 *Knight v. Jewett* decision,³² however, the now-conservative Court, in a plurality opinion by then Justice Ronald George, rewrote the law, effectively abolishing the traditional defense of assumption of risk.³³ At the same time, however, the Court also created a policy-based new doctrine favorable to defendants who are participants in active sports. As now Chief Justice George later explained in an opinion for the majority of the Court, to "impose liability on a coparticipant for 'normal energetic conduct' while playing — even careless conduct — could chill vigorous participation in the sport" and could "alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity."³⁴ As "a matter of policy, it would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events."³⁵ Accordingly, the Court created a limited-duty rule: "[C]oparticipants breach a duty of care to each other only if they 'intentionally injure[] another player or engage[] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.'"³⁶

For our fourth example we return to constitutional law and another opinion by Chief Justice George for the majority of the Court. In the widely known *In re Marriage Cases*, the Court held that California's

³¹ *Id.* at 1240.

³² 834 P. 2d 696 (Cal. 1992). The views expressed in George's plurality *Knight* opinion were subsequently embraced by a majority of the Court. See *Kahn v. East Side Union High School District*, 75 P. 3d 30, 38 (Cal. 2003) (George, C.J.).

³³ *Knight*, 834 P. 2d at 714 (Kennard, J., dissenting). To maintain continuity with its *Li* decision, however, the *Knight* Court retained the terminology of assumption of risk. See Edmund Ursin & John N. Carter, *Clarifying Duty: California's No-Duty for Sports Regime*, 45 SAN DIEGO L. REV. 383 (2008).

³⁴ *Kahn*, 75 P.3d at 38.

³⁵ *Id.*

³⁶ *Id.* at 38–39 (quoting *Knight*, 834 P.2d at 711).

limitation of marriage to a union of a man and a woman violated the equal protection provision of the California Constitution.³⁷ Like Traynor's *Perez* decision, *In re Marriage Cases* was decided by a Court that split 4–3. Firmly grounding his opinion in *Perez*, George wrote, “The decision in *Perez*, although rendered by a deeply divided court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized.”³⁸ Only time will tell if *In re Marriage Cases* will be similarly regarded, but the spate of federal district court and courts of appeals decisions³⁹ overturning bans on same-sex marriage — including California's Proposition 8 which had (temporarily as it turns out) reinstated a ban on same-sex marriage⁴⁰ — suggests that it might well be seen as equally prescient.

³⁷ 183 P.3d 384 (Cal. 2008). The Court also — and importantly — held that the strict standard of judicial review was applicable because

(1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents — like gender, race, and religion — a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple. *Id.* at 401.

Based on this, the Court wrote that to uphold the differential treatment of opposite-sex and same-sex unions, the state had to establish “(1) that the state interest intended to be served by the differential treatment not only is a constitutionally legitimate interest, but is a *compelling* state interest, and (2) that the differential treatment not only is reasonably related to but is *necessary* to serve that compelling state interest.” *Id.* Applying this standard, the Court

conclude[d] that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California's current marriage statutes — the interest in retaining the traditional and well-established definition of marriage — cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest. *Id.*

³⁸ *Id.* at 399.

³⁹ See, e.g., *Baskin v. Bogan*, Nos. 14-2386 to 14-2388, and *Wolf v. Walker*, No. 2526 (7th Cir. September 4, 2014) (Posner, J.) (holding Indiana and Wisconsin bans on same-sex marriage unconstitutional).

⁴⁰ After the California Supreme Court held that California's limitation of marriage to a union of a man and a woman violated the Equal Protection Clause of the California Constitution, California voters approved Proposition 8, a ballot initiative

So for the past seven decades the California Supreme Court — whatever its ideological makeup — has been a lawmaking Court with policy at the heart of its lawmaking. It has embraced the lawmaking role that Traynor articulated in a series of articles in the 1950s and 1960s when he wrote that “judicial responsibility connotes . . . the recurring formulation of new roles to supplement or displace the old [and the] choice of one policy over another.”⁴¹ Guided by this jurisprudential view, the Court became the most influential state supreme court in the nation.

★ ★ ★

The three articles in this symposium focus on different aspects of the court’s lawmaking. In the first article, Evan Youngstrom notes that for several decades the California Supreme Court has been the most influential state supreme court in the nation and asks why the Court has been so influential. He concludes that this influence can be attributed to the Court’s rejection of legal formalism and its embrace of a policy-based lawmaking role. Then, after discussing examples of the Court’s innovative decisions, he explains why this type of judicial lawmaking is appropriate for a state supreme court.

Next, Aaron Schu asks whether Traynor should be considered to be an “activist” judge. He notes the definition of an activist judge offered by Ben

amending the California Constitution to define marriage as a union between a man and a woman. *See* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (upholding Proposition 8). Same-sex couples then successfully challenged in Federal District Court the constitutionality of Proposition 8 under the Due Process and Equal Protection Clauses of the Federal Constitution. *See* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal 2010).

California officials had refused to defend the law, but the initiative’s official proponents were allowed to intervene to do so. On appeal, the Ninth Circuit affirmed the District Court’s decision. *See* *Perry v. Brown*, 671 F.2d 1052, 1095 (9th Cir. 2012). In *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the United States Supreme Court held that the initiative’s proponents lacked standing, vacated the judgment of the Ninth Circuit, and remanded the case with instructions to dismiss the appeal. The District Court’s 2010 holding went into effect in June 2013 when the District Court’s previous stay was lifted.

⁴¹ R.J. Traynor, *The Courts: Interweavers in the Reformation of Law*, 32 SASK. L. REV. 201, 213 (1967).

Field, author of a book on Traynor,⁴² as one who “explicitly departs from legal precedent in favor of his or her sense of justice or social values.”⁴³ This would include a judge’s decisions involving common law subjects or statutory interpretation; and, indeed, two of Field’s principal chapters focus on just such Traynor opinions. In contrast, Judge Richard Posner defines an activist judge as one who “enlarg[es] judicial power at the expense of the power of other branches of government,”⁴⁴ as in holding legislative or executive action unconstitutional. Decisions in private law subjects, under this definition, would not be activist even if they departed from precedent. In examining Traynor’s opinions Schu concludes that, under Posner’s definition, Traynor, like Holmes, should be classified as a “mixed” activist/restrained judge, activist in some constitutional areas, but generally restrained.

Then, in the third article Marissa Marxen examines Chief Justice Traynor’s approach to statutory interpretation. She begins by explaining different theoretical approaches put forth by academics and others, including “intentionalism,” “purposivism,” “textualism,” and “dynamic interpretation.” In light of these approaches, she examines notable Traynor opinions involving statutory interpretation. She concludes that Traynor employed a blend of purposivism and dynamic interpretation in these cases.

The articles in this symposium present three perspectives on the judicial lawmaking of the California Supreme Court, with two of them focusing specifically on the work of Chief Justice Roger Traynor, one of the great judges in American history.⁴⁵ Judge Posner has written that he is “struck by how unrealistic are the conceptions of the judge held by most people,

⁴² See BEN FIELD, *ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR* (2003).

⁴³ Aaron J. Schu, *Justice Traynor’s “Activist” Jurisprudence: Field and Posner Revisited*, 9 CAL. LEGAL HIST. 423, 427 (2014), (citing FIELD, *supra* note 42, at 121).

⁴⁴ *Id.* at 431 (citing RICHARD A. POSNER, *HOW JUDGES THINK* 287 (2008)).

⁴⁵ See Henry J. Friendly, *Tribute, Ablest Judge of His Generation*, 71 CAL. L. REV. 1039, 1039 (1986). In addition to Traynor, Friendly at various times identified only Holmes, Brandeis, Cardozo, Hand, Harlan Fisk Stone, Frankfurter, Robert Jackson, Hugo Black, and Traynor as great. Traynor “was the only contemporary on Friendly’s list.” DAVID M. DORSEN, *HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA* 122 (2012).

including practical lawyers and eminent law professors who have never been judges — and even some judges.”⁴⁶ If the articles in this symposium have shed some light on judges and judicial lawmaking and suggested new areas for research,⁴⁷ they have done a valuable service.

★ ★ ★

EDITOR’S NOTE:

Among the goals of the California Supreme Court Historical Society and its journal are to encourage the study of California legal history and give exposure to new research in the field. Publication of the following “Student Symposium” furthers both of these goals.

Professor Edmund Ursin, who offers a course each year in Judicial Lawmaking at the University of San Diego School of Law, graciously agreed to propose to his Spring 2014 students that they consider writing on California aspects of the topic, with the possibility that the most promising papers might be accepted by the journal. From those provided by Professor Ursin, I have selected the three that appear on the following pages as a student symposium on the California Supreme Court and judicial lawmaking.

— SELMA MOIDEL SMITH

⁴⁶ POSNER, *supra* note 10, at 2.

⁴⁷ For example, in addition to the Traynor decisions involving statutory interpretation presented by Marxen, other Traynor decisions illustrate further aspects of Traynor’s creative use of statutes. *See. e.g.,* Clinkscates v. Carver, 136 P.2d 777, 778 (Cal. 1943) (violation of criminal statute “does not create civil liability The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court [chooses to] adopt[] in the determination of such liability.”).

JUDICIAL LAWMAKING, PUBLIC POLICY, AND THE CALIFORNIA SUPREME COURT

EVAN R. YOUNGSTROM*

* The author is a J.D. Candidate at the University of San Diego School of Law, class of 2015.

TABLE OF CONTENTS

I. INTRODUCTION.....	395
A. FOUNDATION: COURTS MAKE LAW.....	396
II. SHOULD COURTS ACTIVELY MAKE LAW?	398
A. JUSTICE TRAYNOR BELIEVED COURTS SHOULD ACTIVELY MAKE LAW.....	398
1. JUSTICE TRAYNOR'S LIMITS ON JUDICIAL LAWMAKING...	399
B. JUSTICE TRAYNOR BELIEVED COURTS SHOULD REFLECT MODERN PUBLIC POLICY TRENDS WHEN THEY MAKE LAW...	401
III. THE CALIFORNIA SUPREME COURT EMBRACES JUDICIAL LAWMAKING.....	401
A. THE CALIFORNIA SUPREME COURT AND THE CALIFORNIA STATE LEGISLATURE CO-EXIST AS LAWMAKING INSTITUTIONS ..	403
IV. THE CALIFORNIA SUPREME COURT REFLECTS THE PUBLIC'S PERCEPTION OF SOUND POLICY WHEN IT MAKES LAW	404
A. CALIFORNIANS' LIBERAL AND PROGRESSIVE PUBLIC POLICY TENDENCIES.....	406
B. THE CALIFORNIA SUPREME COURT USES MODERN PUBLIC POLICY TRENDS TO UPDATE THE COMMON LAW	407
1. PRODUCTS LIABILITY	408
2. LANDOWNERS' DUTY OF CARE	409
3. COMPARATIVE NEGLIGENCE	410
C. THE CALIFORNIA SUPREME COURT USES MODERN PUBLIC POLICY TRENDS TO UPDATE CONSTITUTIONAL DOCTRINES ...	412
V. COUNTERS TO CRITICS OF THE CALIFORNIA SUPREME COURT'S JUDICIAL LAWMAKING MODEL	416
A. CALIFORNIA SUPREME COURT JUSTICES ARE ACCOUNTABLE TO THE PEOPLE, SO THE COURT CAN LEGISLATE WITHOUT VIOLATING DEMOCRATIC PRINCIPLES.....	416
1. CALIFORNIANS HOLD THE CALIFORNIA SUPREME COURT JUSTICES ACCOUNTABLE WHEN A JUSTICE'S POLICIES DIRECTLY CONFLICT WITH CALIFORNIANS' PUBLIC POLICY ...	419
B. THE CALIFORNIA SUPREME COURT FACTORS RELIANCE INTO ITS OPINIONS	419
C. THE CALIFORNIA SUPREME COURT IS A COMPETENT LAWMAKING INSTITUTION	421
VI. CONCLUSION	422

I. INTRODUCTION

A recent study showed the California Supreme Court is the most followed state court in the nation.¹ Between 1940 and 2005, other state supreme courts followed the California Supreme Court 1,260 times,² which is twenty-five percent more than any other state high court.³ Therefore, the California Supreme Court is a unique provider of persuasive authority to the rest of the country. But, why is the California Supreme Court so influential?

The California Supreme Court is the most influential state court for two connected reasons. First, the Court embraces judicial lawmaking and rejects formalism. Formalists contend courts should not make law, use policy, exercise discretion, or explore extrinsic sources when deciding cases.⁴ Starting in the Traynor era, the California Supreme Court redefined its role as a legitimate and influential lawmaking institution⁵ that actively makes law, uses policy, exercises discretion, and explores extrinsic sources.

Second, the Court modernizes California's law to reflect the public's perception of sound policy. When the California Supreme Court faces a hard case, the Court identifies trends in public policy, and then uses its lawmaking power to align the law with that policy. In other words, the Court follows William Hurst's model of judicial lawmaking because the Court expresses the times and foretells the generation to come.⁶

¹ See Jake Dear & Edward Jessen, "Followed Rates" and Leading State Cases, 1940–2005, 41 U.C. DAVIS L. REV. 683, 694 (2007).

² *Id.*

³ *Id.* (explaining that the Washington Supreme Court was the second most followed state supreme court with 942; thus, the California Supreme Court is followed twenty-five percent more than any other state supreme court).

⁴ RICHARD POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 7–8 (1999) (explaining the formalist view that courts "do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside conventional legal texts — mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions) — for guidance in deciding new cases.").

⁵ Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267, 1276 (2009).

⁶ LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 157 (1957) (explaining that "great jurists like Shaw, who vitalize and revitalize the law so that it may fulfill its function, can channel and legitimize social change in as

As Richard Wasserstrom emphasizes, “a desirable legal system is one that succeeds in giving maximum effect to the needs, desires, interests, and aspirations of the members of society.”⁷ Thus, a democratic lawmaking institution, which reflects contemporary public policy trends, will be the most endearing and influential. This paper argues the California Supreme Court’s interpretation of its role within government, as a lawmaking institution that reflects contemporary public policy, makes it the most influential state court. Therefore, other courts should consider adopting a similar model to facilitate the evolution of the law to reflect public policy trends.

A. FOUNDATION: COURTS MAKE LAW

Although judicial lawmaking is not expressly set forth in the Constitution, courts inherently make law.⁸ In the United States, Chief Justice John Marshall fortified the judicial branch as a lawmaking institution when he established judicial review in *Marbury v. Madison*.⁹ Judicial review combined with precedent and *stare decisis* gives the judicial branch immense lawmaking powers.¹⁰ Since *Marbury*, courts have exercised their lawmaking powers to help shape America’s substantive law: constitutional and common.¹¹

Simply put, “when courts decide cases, their decisions make law because they become precedent.”¹² Many famous judges expressly recognized the judiciary’s lawmaking power. For example, Justice Oliver Wendell Holmes stated, “I recognize without hesitation that judges do and must legislate.”¹³ More recently, Justice Antonin Scalia said, “Judges in a real sense ‘make’ law.”¹⁴

reasoned a way possible. William Hurst remarked that great judges have the ability to express the times or foretell the generation to come.”).

⁷ RICHARD WASSERSTROM, *THE JUDICIAL DECISION* 10 (1961).

⁸ Adam N. Steinman, *A Constitution For Judicial Lawmaking*, 65 U. PITT. L. REV. 545, 548 (2004).

⁹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (concluding that “it is emphatically the province and duty of the judicial department to say what the law is.”).

¹⁰ H.L.A. HART, *THE CONCEPT OF LAW* 121–35 (1961) (explaining that in a *stare decisis* system, courts perform a rule-producing function, in which public policy may be taken into account).

¹¹ Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 3 (1990).

¹² *Id.*

¹³ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

¹⁴ *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

JUSTICE TRAYNOR'S “ACTIVIST” JURISPRUDENCE:

Field and Posner Revisited

AARON J. SCHU*

* The author received his J.D. in May 2014 from the University of San Diego School of Law, where he was Managing Editor of the *San Diego Law Review*, Volume 51. He is now a member of the California State Bar. In 2010, he received a B.A. in International Relations from the University of Southern California. The author thanks Professor Edmund Ursin for his guidance on this paper. The author also thanks his family for their support.

TABLE OF CONTENTS

I. INTRODUCTION425

II. BEN FIELD’S “JUDICIAL ACTIVISM”: TRAYNOR AS
AN ACTIVIST JUDGE.....427

 A. BEN FIELD’S CONCEPTION OF JUDICIAL ACTIVISM.....427

 B. BEN FIELD ON JUSTICE TRAYNOR’S “ACTIVIST”
 JURISPRUDENCE 428

III. JUDGE POSNER ON JUDICIAL ACTIVISM431

 A. JUDGE POSNER’S DEFINITION OF AN ACTIVIST JUDGE431

 B. JUDGE POSNER’S ACTIVIST/RESTRAINED SPECTRUM
 AND “MIXED” JURISTS433

IV. BEN FIELD AND JUDGE POSNER REVISITED:
JUSTICE TRAYNOR AS AN ACTIVIST JUDGE?434

 A. REVISITING BEN FIELD: JUSTICE TRAYNOR’S
 “ACTIVIST” JURISPRUDENCE.....434

 B. JUSTICE TRAYNOR REVISITED: TRAYNOR’S
 CONSTITUTIONAL JURISPRUDENCE.....436

 1. JUSTICE TRAYNOR’S RESTRAINED JURISPRUDENCE438

 2. JUSTICE TRAYNOR’S ACTIVIST JURISPRUDENCE 440

 C. JUDGE POSNER REVISITED: JUSTICE TRAYNOR’S
 PLACE ON THE ACTIVIST/RESTRAINED SPECTRUM443

V. CONCLUSION 446

I. INTRODUCTION

Justice Roger J. Traynor's reputation as a great judge is widely known.¹ Commentators and jurists alike, from Chief Justice Warren Burger and Judge Henry Friendly² to Professors Robert Keeton and G. Edward White, have recognized him as such.³ Yet commentators have long labeled Traynor an activist,⁴ a term that has developed a negative connotation⁵ and one that Traynor once referred to as "befuddled" and "misbegotten."⁶ Among them is Ben Field.⁷ And although others share Field's conception of an activist judge,⁸ by no means do commentators universally accept it,⁹ most notably, Judge Richard Posner, whose definition of activism focuses only on a judge's constitutional jurisprudence.¹⁰ In light of this disparity, this paper

¹ See, e.g., *THE TRAYNOR READER: NOUS VERRONS: A COLLECTION OF ESSAYS BY THE HONORABLE ROGER J. TRAYNOR*, at ix (San Francisco: The Hastings Law Journal, 1987); Robert E. Keeton, *In Tribute to Roger Traynor*, 2 *HOFSTRA L. REV.* 452, 452 (1974); Walter V. Schaefer, *Chief Justice Traynor and the Judicial Process*, 53 *CALIF. L. REV.* 11, 24 (1965); Edmund Ursin, *How Great Judges Think*, 57 *BUFF. L. REV.* 1267, 1271 (2009).

² See Warren E. Burger, *In Memoriam — Roger John Traynor*, *A Tribute*, 71 *CALIF. L. REV.* 1037 (1983); Henry J. Friendly, *In Memoriam — Roger John Traynor*, *Ablest Judge of His Generation*, 71 *CALIF. L. REV.* 1039 (1983).

³ See Keeton, *supra* note 1, at 452; G. Edward White, *Tribute, Roger Traynor*, 60 *VA. L. REV.* 1381, 1383 (1983).

⁴ See, e.g., Craig Green, *An Intellectual History of Judicial Activism*, 58 *EMORY L.J.* 1195, 1248 n.229 (2009).

⁵ See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 *CALIF. L. REV.* 519, 533 (2012) [hereinafter Posner, *The Rise and Fall*] ("Judicial activism' survives as a vague, all-purpose pejorative."); see also Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 50 *INDIANA L.J.* 1, 14 (1983) [hereinafter Posner, *The Meaning of Judicial Self-Restraint*] ("Although activism is respectable enough among academics today, it still is not sufficiently respectable among the general public for judges to dare to admit that they are activists . . .").

⁶ Roger J. Traynor, *The Limits of Judicial Creativity*, 63 *IOWA L. REV.* 1, 2, 5, 7 (1977).

⁷ BEN FIELD, *ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR* 121 (2003).

⁸ See, e.g., Harry N. Scheiber, *A Jurisprudence of "Pragmatic Altruism": Jon van Dyke's Legacy to Legal Scholars*, 35 *U. HAW. L. REV.* 385, 394 (2013).

⁹ See Keenan D. Kmiec, Comment, *The Origin and Current Meaning of "Judicial Activism"*, 92 *CALIF. L. REV.* 1441, 1463–76 (2004) (classifying several different definitions of judicial activism).

¹⁰ Posner, *The Meaning of Judicial Self-Restraint*, *supra* note 5, at 14; Posner, *The Rise and Fall*, *supra* note 5, at 521. As one commentator has noted, Judge Posner's definitions

first addresses whether Field's conclusion that Traynor was an activist judge remains true under Posner's definition. This paper determines that it does not. Further, because Field examined only one of Traynor's constitutional opinions, this paper delves deeper into Traynor's constitutional jurisprudence to determine whether an activist classification in Posner's terms is nevertheless appropriate. Determining that it is not, this paper turns to a discussion of the appropriate classification of Traynor's constitutional jurisprudence, concluding, based on a comparison with Justice Oliver Wendell Holmes, that Traynor belongs on Posner's list of "mixed" activist/restrained jurists.

In addressing these questions, this paper proceeds as follows: After this introduction, Part II outlines Field's definition of judicial activism and details his conclusions on Traynor. Part III turns to Posner's seminal works on judicial lawmaking, first by reviewing Posner's definition of *judicial activism* before turning to his definition of judicial restraint and concluding with an overview of his activist/restrained spectrum.

Part IV begins the analysis portion of this paper by revisiting Field's classification of Traynor and concluding that, based on Posner's definition of judicial activism, Field's conclusion is unsupported. Part IV then turns to Traynor's constitutional jurisprudence, examining Traynor's notable opinions and classifying each in Posner's terms. After establishing that Traynor's constitutional jurisprudence has both restrained and activist characteristics, this paper inquires as to how Posner would classify Traynor's constitutional approach, ultimately concluding by comparison to Holmes that Traynor's constitutional jurisprudence should be characterized as "mixed" activist/restrained. Part V concludes.

of judicial activism are slightly different. See Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579, 580 n.2 (2012). Specifically, in his book *How Judges Think*, Posner defines "the activist/restraint spectrum according to whether a decision 'expands the Court's authority relative to that of the other branches of government.'" *Id.* (quoting RICHARD A. POSNER, *HOW JUDGES THINK* 287 (2008)). For the purposes of this paper, the author utilizes activism in the sense that "courts declare 'legislative or executive action unconstitutional.'" *Id.* at 581 (quoting Posner, *The Rise and Fall*, *supra* note 5, at 521); *infra* Part III.

THE INFLUENCE OF JUSTICE TRAYNOR'S APPROACH TO STATUTORY INTERPRETATION ON MODERN AMERICAN LAW

MARISSA C. MARXEN*

I. INTRODUCTION

With the recent “statutorification” of American law, a judge’s approach to statutory interpretation has become increasingly important. Each judge’s approach can determine the outcome of his or her decision, and many judges use differing approaches. Naturally, the approach adopted by an influential judge, like Chief Justice Roger Traynor, whose widely adopted opinions changed the course of law, has the potential to influence the law of the entire nation.

* The author received her J.D. in 2014 from the University of San Diego School of Law. She is now a member of the California State Bar. In 2010, she received a B.A. in Political Science from Villanova University.

She wishes to dedicate this paper to her father, Jeffrey L. Marxen, M.D., who died during her first year of law school and always supported her educational endeavors. Additionally, she wishes to thank Professor Michael B. Rappaport of the University of San Diego School of Law for making Legislation and Administrative Law interesting enough to inspire this paper.

II. THE IMPORTANCE OF STATUTORY INTERPRETATION

Statutory interpretation plays an important role in assuring the separation of powers essential to the proper functioning of our government. As James Madison opined, “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself.”¹ The Founding Fathers obliged the government to control itself by creating a system of government based upon the separation of powers. Article I allows the legislature, consisting of the House of Representatives and the Senate, to make the law; article II vests the executive branch with the power to execute the laws; and article III empowers the judiciary to interpret and apply the laws created by the legislature.² Frequently, this interpretation involves interpreting the statutes and laws created by Congress.

Today, statutes, not common law, constitute the main source of modern American law.³ As a result, the judiciary’s interpretive role assumes great importance in “the ‘hard cases’ not clearly answered by the statutory language” because the court must apply and interpret the statutes enacted by Congress while simultaneously refraining from usurping the legislature’s lawmaking power.⁴ Thus, “any conflict between the legislative will and the judicial will must be resolved in favor of the former.”⁵ Accordingly, “statutory interpretation is not ‘an opportunity for a judge to use words as empty vessels into which he can pour anything he will.’”⁶ Rather, a judge must show deference to the legislature and its lawmaking power when interpreting statutes.

¹ The Federalist No. 51 (1787) (James Madison).

² U.S. CONST. ARTICLES I–III.

³ WILLIAM N. ESKRIDGE, JR. & PHILIP R. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 669 (3rd ed. 2001).

⁴ *Id.*

⁵ *Id.* (citing REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 8 (1975)).

⁶ *Id.* (quoting Frankfurter, J.) (internal citation omitted).

III. THEORIES OF STATUTORY INTERPRETATION

"Three different theoretical approaches have dominated the history of American judicial practice. . . ."⁷ Each approach rests upon "different versions of the role of the interpreter and the nature of our constitutional system."⁸

The first approach, *intentionalism*, mandates that the interpreter identify and then follow *the original intent* of the statute's drafters.⁹ Intentionalists look first to statutory language but also "attempt to discern the legislature's intent by perusing all available sources, including, principally, legislative history."¹⁰ Supporters of this approach, including Supreme Court Justice Stephen Breyer and former Supreme Court Chief Justice William Rehnquist, "argue that it supports the separation of powers expressed in the Constitution" because "[t]he legislative branch, not the judiciary, has the constitutional power to legislate," and "in order to avoid 'making law,' courts should strive to carry out the legislature's intent."¹¹ Thus, "[i]ntentionalists view themselves as agents of the legislature that enacted the statute, who must avoid imposing their own preferences rather than furthering the choices of the legislature."¹² Some notable criticisms of intentionalism include arguments that "the intent of a legislative body cannot be ascertained from anything less than the language of the statute approved by that body"; "judges can manipulate legislative history to support their own interpretation"; "in any major piece of legislation, the legislative history is extensive, and there is something for everyone";¹³ and finally, because the legislative history is neither approved by a legislature nor the executive, resort to legislative intent undermines the legislative process required by state and federal constitutions: "approval by the legislatures and presentment to the executive for approval or veto."¹⁴

⁷ *Id.* at 670.

⁸ *Id.*

⁹ *Id.*

¹⁰ LINDA D. JELLUM & DAVID CHARLES HRICK, *MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES* 97 (2006).

¹¹ *Id.*

¹² *Id.* at 97–98.

¹³ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (1997) ("As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends.").

¹⁴ JELLUM & HRICK, *supra* note 10, at 98.



Order through Hein!

Fill in your collection of
California Legal History

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, Suite 140, 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).*

William S. Hein & Co., Inc.

2350 North Forest Road, Getzville, NY 14068

Ph: 716.882.2600 ~ Toll-free: 1.800.828.7571

Fax: 716.883.8100

E-mail: mail@wshein.com ~ Web site: www.wshein.com

