VOLUME 8: 2013

# California Legal History

Journal of the
California Supreme Court
Historical Society

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VOLUME 8

2013

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California Supreme Court
Historical Society

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# HERMA HILL KAY

HERMA HILL KAY
DEAN, BOALT HALL SCHOOL OF LAW, UC BERKELEY, 1992–2000

*Oral History of*

# HERMA HILL KAY

ELEANOR SWIFT*

## INTRODUCTION

Professor and former Dean Herma Hill Kay was celebrated a few years ago for completing her fiftieth year of teaching at Boalt Hall, the School of Law at UC Berkeley. Her commitment to our law school, and to legal academia, is remarkable. She was selected by the faculty, and appointed by the chancellor, to be the school's first woman dean; she has served on boards and committees for almost every significant legal academic institution in the country; and she has been honored many times for her many contributions.

Herma's commitment to Boalt continues to this day — in the classroom, at faculty meetings, and in her office, where she is finishing a book on the first fourteen women law professors in the U.S. and is still mentoring our junior faculty members.

What has struck me about Herma in the thirty-four years I have been her colleague at Boalt is her remarkable generosity of spirit. This generosity has inspired her, throughout her career, to create opportunities for others, especially for women, to thrive in legal academia and beyond. The creation of these opportunities for others is, I think, one of her most significant and

* Professor of Law, School of Law, UC Berkeley.

enduring contributions to the law and to legal education. I want to describe briefly only four examples.

First, as chronicled in her oral history (pages 83–93), Herma was an active participant in the substantive revolution in women's rights that swept through California and the nation in the late 1960s and 1970s. Based on her stated conviction that "women ought to be free and conscious actors . . . [who] ought to determine their own role in this world," she engaged in both academic and political work to promote women's opportunities for self-realization. She participated in the enactment of no-fault divorce laws through her appointment to Governor Pat Brown's Commission on the Family. The commission's report paved the way for California's adoption of a no-fault divorce statute in 1969, which in turn prompted Herma's appointment as co-reporter of the Uniform Marriage and Divorce Act, a law reform project which had nation-wide impact. Women's equality was then addressed directly by the American Law Institute's Family Dissolution Project, for which Herma served on the Advisory Group, to ensure that upon divorce women would get equitable support and property awards. She also testified in favor of California's ratification of the Equal Rights Amendment by the California Legislature.

Second, through her inspiration, active encouragement and concrete support, Herma generated opportunities for generations of Boalt graduates, men as well as women, to engage in legal activism on behalf of women and other underrepresented groups. Throughout her oral history, the names of Herma's former law students appear consistently, as academics, judges, public servants and public interest lawyers.

Just before joining the Boalt faculty in 1979, I attended a national conference on Women and the Law. It was an exciting venture for me, as I was introduced there to many women law professors and legal activists engaged with the legal issues outlined above. At the conference, Herma was often surrounded by friends and admirers. I met many former students of hers who spoke warmly of the inspiration and encouragement she had given them.

My third example is an opportunity that Herma opened to me personally, and to future generations of Boalt students. In 1992, when Herma became dean at the law school, she asked me to take the leadership role in formulating a proposal to bring live client clinical education into the halls of Boalt. At that time, Steve Sugarman and I were co-teaching a class for students engaged in clinical work at the Berkeley Community Law Center,

which had been founded by Boalt students in 1988. I was more than thrilled to have this chance to put into practice one of my principal motivations for entering law teaching — to support students interested in public interest legal work. Clinics in the law school would give all students, and those interested in public interest careers in particular, the opportunity to work with real clients, under the supervision of clinical faculty. Such clinical work would train them to reflect on the skills they developed and the insights they gained about the role of law in promoting social justice.

The plan put forward by the Clinical Committee that I chaired, fully endorsed and supported by Herma (pages 137–141), was gradually approved by the faculty over the course of more than ten years. The live client clinics, the field placement program, and a full professional skills curriculum now flourish at Boalt. There is no doubt that this success was grounded on Herma's own commitment to develop these important clinical opportunities for our students.

Finally, I want to celebrate the special generosity with which Herma has embraced two of our younger law faculty colleagues who teach and write in her own fields of specialization — family law and conflict of laws. Some of Herma's work in the family law field is discussed above, and her introduction to, and abiding interest in, conflict of laws is described in the oral history (pages 43–57). These colleagues describe their ongoing relationship with Herma:

> Herma invited me to sit in on her Conflicts class when I arrived last fall and invited me to guest lecture twice. We've also had lunch many times, and she's allowed me to pick her brain on issues large and small. She's been unfailingly encouraging of my work and teaching, and she's steered me back to the right track in my research when I have been discouraged. Perhaps most importantly, she's made me feel like my ideas are interesting and worthwhile, and that is invaluable coming from someone who has played such a large role in the development of the field.

> Since I came to Berkeley, Herma has been my stalwart champion and mentor, relentlessly encouraging and extraordinarily generous. She has shepherded me through to tenure, insisting that she would not retire until I received tenure (though she warned me not to take too long in going about it!). I am enormously grateful for her kindness, friendship, and example.

Of course such interest in, and mentorship of, one's very own successors in teaching and research should be the norm for law faculty, but I fear it is not. This aspect of Herma's character, and of her commitment to the future of our law school, deserves to be celebrated and emulated.

One explanation of Herma's ongoing commitment to creating opportunities for others — for her students, her colleagues, and the less powerful who seek justice through law — may be the mentoring she herself received at home from her father (page 38), in college (pages 28–34), in law school (pages 43–48) and, in her career, from California Supreme Court Justice Roger Traynor (pages 60–61) and Professor Barbara Armstrong (pages 67–68). She appreciated the riches she received, and she has devoted much of her career to passing these riches on to others.

* * *

## EDITOR'S NOTE

The oral history of Professor and former Dean Herma Hill Kay was recorded in eight interviews by Germaine LaBerge, senior interviewer of the Regional Oral History Office at UC Berkeley, from June to September 2003. It is presented here in its entirety and has received minor copyediting for publication. Insertions in square brackets were added by Professor Kay shortly after the interviews concluded. She has generously assisted the present publication by reviewing the text and providing illustrations from her personal scrapbooks. Additional illustrations appear by courtesy of the UC Berkeley Law Library and the efforts of Archivist William Benemann.

The oral history is reprinted by permission of The Bancroft Library at UC Berkeley. The sound recording may be accessed at the Library, and the original transcription may be viewed at the Library and at the UCLA Department of Special Collections or online at http://digitalassets.lib.berkeley.edu/roho/ucb/text/kay_herma_hill.pdf.

In LaBerge's introduction to the original transcription, she acknowledged the assistance of four professors in providing background information for the interviews: Eleanor Swift, Jesse Choper, Earl F. Cheit, and Robert H. Cole.

The Curriculum Vitae and Bibliography following the oral history have been updated to late 2013 by Professor Kay for publication in this volume.

— SELMA MOIDEL SMITH

## TOPICAL SUMMARY

*Oral History of*

# HERMA HILL KAY

## INTERVIEW 1: JUNE 2, 2003

LaBerge: I'm in Professor Herma Hill Kay's office at Boalt [Hall]. It's June 2, 2003, and this is our first interview. We always like to start at the beginning, so why don't you tell me the circumstances of your birth that you have been told.

Kay: You don't think I remember?

LaBerge: I doubt it. [laughs]

Kay: Well, I'm told that I was born on the eighteenth of August, 1934, and that my father, who was a Methodist minister but also an avid sportsman and deer hunter, was terribly nervous because the deer hunting season had opened on the fifteenth of August, and here he was hanging around waiting for me to be born.

LaBerge: [laughs] And this is in South Carolina?

Kay: South Carolina.

LaBerge: Okay.

KAY: So finally I appeared, and he went off to his deer hunt. That is all I have been told about the surroundings of my birth.

LABERGE: Do you have siblings?

KAY: No, I'm the only child. My father, whose name is Charles Esdorn Hill, had twelve people in his family — brothers and sisters — and my mother, Herma Lee Crawford, had ten in her family. I can only assume that they decided that was too many on both sides. [laughs]

LABERGE: What do you know about your grandparents on either side?

KAY: I actually only knew one on each side. The other on both sides had died before I was born. I knew my mother's mother, whose name was Molly Crawford. I think her true birth name was Margaret Lee Fraser; they called her Molly. My grandfather Benjamin Hawkins Crawford, my mother's father, died the year I was born, in 1934, but Grandmother Molly made a habit after her husband died of visiting all her many children, and she would come and spend three/four weeks a month at everybody's house. So I got to know her quite well. My father's father, whose first name I do not remember, I only called him Grandfather Hill — I can probably find that out from one of my many cousins — was a farmer in the lower part of South Carolina. His wife had died before I was born, and he was living with a companion who we all called Miss Minnie. I had no idea what Miss Minnie's last name was.

LABERGE: Do you know your grandmother's name on that side?

KAY: No.

LABERGE: Okay. How far away from you did either of your grandparents live?

KAY: We lived in various places because my dad was a Methodist preacher, and in South Carolina in those days you — what they called "rode circuit" — you had four churches at a time. You preached at two of them every Sunday, and you lived in wherever the main parsonage was and you just went to the other churches. We moved every four years — at least that's the way they did it. But we stayed in South Carolina except when he became a chaplain in World War II, and then Mother and I went with him to Texas where he was stationed. That would have been roughly between 1942–1945, somewhere around there. After he was discharged we came back to South Carolina and resumed all this again. And everybody else was in

# HERMA HILL KAY

## CURRICULUM VITAE

### PRESENT POSITION

Barbara Nachtrieb Armstrong Professor of Law, School of Law, University of California, Berkeley.

### EDUCATION

B.A., Southern Methodist University, Dallas, Texas, 1956.
Phi Beta Kappa; Magna Cum Laude; Departmental Distinction in English.

J.D., The University of Chicago Law School, 1959.
Member, Order of the Coif; Book Review Editor, *Chicago Law Review*.

### HONORARY DEGREES

LL.D. (Honoris Causa), Southern Methodist University, 1992.
LL.D. (Honoris Causa), Mills College, 2000.

### PROFESSIONAL EXPERIENCE

University of California, Berkeley:
Barbara Nachtrieb Armstrong Professor of Law, 1996–.
Dean, 1992–2000.
Richard W. Jennings Professor of Law, 1987–1996.
Professor of Law, 1963–1987.
Associate Professor of Law, 1962–1963.
Assistant Professor of Law, 1960–1962.

Hamline University School of Law:
Bush Foundation Distinguished Visitor, September 1985.

Northwestern School of Law, Lewis & Clark College:
Distinguished Higgins Visitor, October 1984.

Harvard Law School:
Visiting Professor, Fall 1976.

University of Manchester, England:
Visiting Simon Professor, 1972.

National Conference on Uniform State Laws:
Uniform Marriage and Divorce Act, Co-Reporter, 1968–1970.

# HERMA HILL KAY

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Text, Cases and Materials on Sex-Based Discrimination (with Tristin K. Green) (7th Ed., 2012; West Group).

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"Same-Sex Marriage in the Conflict of Laws: A Critique of the Proposed 'Defense of Marriage Act'," in The Civil Law in the 21st Century: Festschrift in Honor of Koji Ono on the Occasion of his Sixtieth Birthday 831–843, (Hougakushoin, 1996).

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"Reproductive Technology and Child Custody," in (A. Skolnick & J. Skolnick, eds.) Family in Transition 405–419 (6th Ed. 1989).

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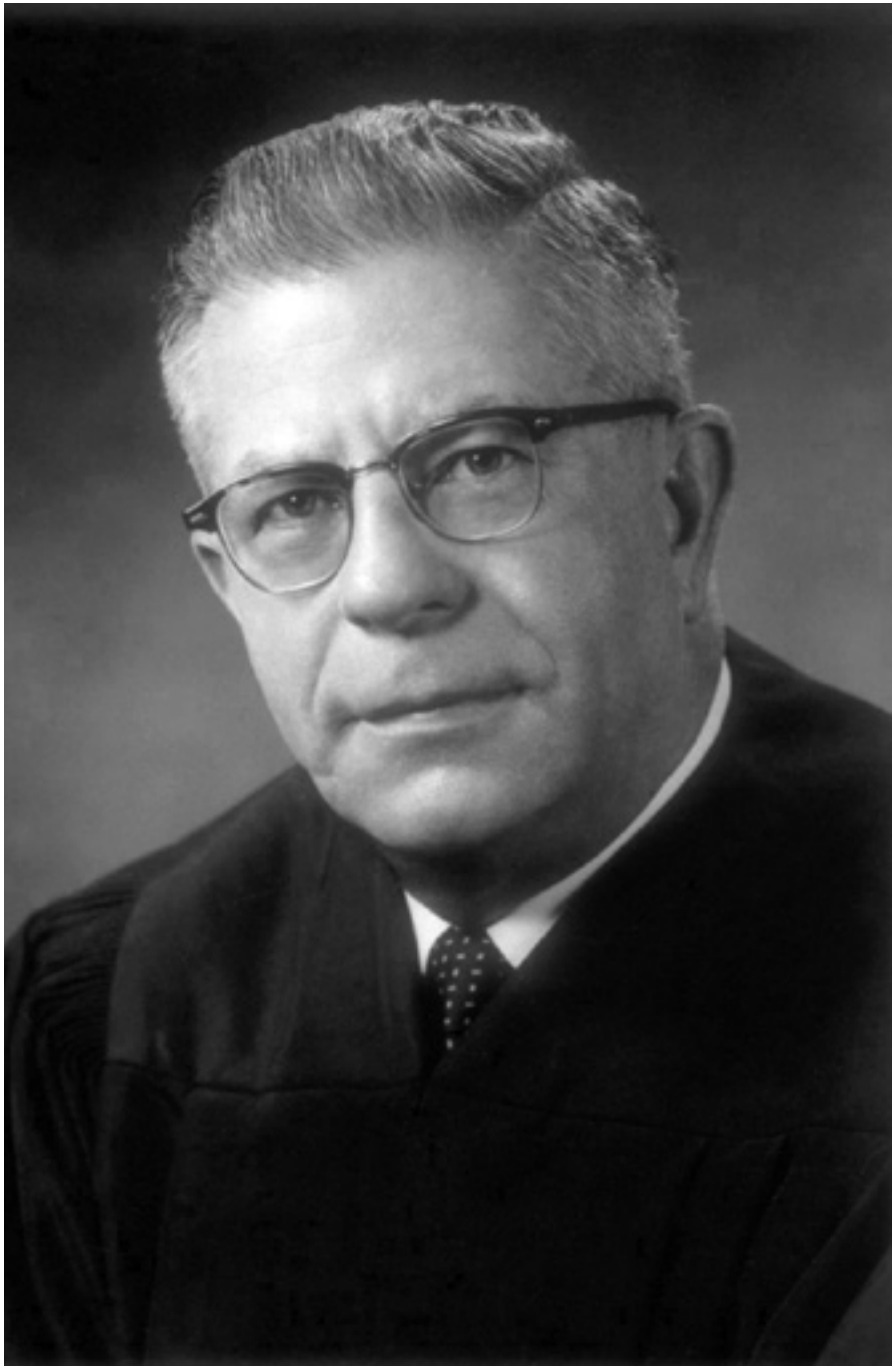
# SPECIAL SECTION

## NINE SPEECHES BY JUSTICE ROGER J. TRAYNOR



Justice Roger J. Traynor

# NINE SPEECHES BY JUSTICE ROGER J. TRAYNOR

## PREFACE

HARRY N. SCHEIBER*

In any list of the most admired and influential state judges in the nation's history, Roger Traynor stands at the very top level. Perhaps more than any other state judge of his day, Traynor sought explicitly to bring the law into line with the realities of mass (and diverse) society in the modern industrial world. Traynor did so under the banner of "judicial creativity." He believed that for courts always to defer passively and mechanically to doctrinal precedent was inconsistent with the great common law tradition, whose essence was the capacity for adaptation, change, and growth. Equally, he believed that it was inconsistent with American ideals regarding democratic governance for the courts to fail in their role as full partners in the process of legal ordering.

Where the court moved in an "activist" mode to institute change, as in the tort revolution that his decisions led — an area of the law in which "creativity" required innovation and doctrinal departures — Traynor built on the great Anglo-American judicial tradition of adaptation rather than perpetuating a mindless faithfulness to rules that no longer were responsive

* Chancellor's Emeritus Professor; Riesenfeld Professor of Law and History, Emeritus; Director, Institute for Legal Research; and Director, Law of the Sea Institute, School of Law, UC Berkeley.

to the realities of modern California society, or doctrines that had produced manifest unfairness. In such instances, the court's innovations could be turned back in a day by a legislature determined to follow a different course of policy. With respect to constitutional decisions, too, Traynor did fearlessly what American courts must do if they are to be effective: Perhaps more than any state judge of his day, Traynor as a scholar and Traynor as a working jurist undertook fearlessly the reconsideration of the central concepts of constitutional law and their adaptation to the realities of the modern world.

In taxation (Traynor's teaching field at Boalt Hall before he went on the bench), in land law, and in conflict of laws, he was brilliant in the ways he applied conventional legal reasoning to produce practical consequences that did not offend modern notions of efficiency, justice, and legality. In family law, race relations, and the processes of the criminal justice system, Traynor's innovations blazed the path that other courts, and ultimately the U.S. Supreme Court, would follow. In tort reform, Traynor was of truly unique importance both for his basic jurisprudential methodology and for the results. And yet, for all his contempt for "judicial lethargy," and despite the boldness with which he sought to demonstrate the obsolescence of established but unfair or outmoded (or ridiculous) rules of law, Traynor's pragmatism extended to supporting in a sympathetic way what he saw as the legitimate activities and methods of the executive branch, not least the law enforcement agencies and officers. He did not reject wholesale the conservative activism of an earlier generation of judges, nor indeed that of some of his own colleagues on the Court; like others of the best "activist" judges, whether in a conservative or liberal mode, or still other "activists" who were simply difficult to label, Traynor was willing to acknowledge explicitly his penchant for creativity. Still, he was faithful — perhaps without peer in his day — to the requirement that a judge provide a carefully reasoned and clearly crafted opinion in reaching an innovative conclusion. Moreover, he was ever mindful of the heavy responsibility for assuring fairness, for maintaining the health of the law, and for protecting the integrity of the judicial branch.

Not least important, historically, is that with able fellow justices who served with him during his long tenure, the California Supreme Court was widely recognized as the most distinguished state bench in America. It was influential in shaping the direction of the law in many other state courts, as well as pointing the way to some major U.S. Supreme Court decisions.

This raises the most interesting question of all: the question of how, why, and in what ways, a state high court has truly and accurately lived up to the "bellwether" and "great exception" titles, has produced the kind of law — and innovations — that have come forward in a particular period of its history.

There is no simple answer. Rather than taking the posture of having a full and persuasive solution to that historical puzzle, I take courage in concluding with a recollection from an early occasion in my career: It happened at a panel at a UC Davis–sponsored meeting on the subject of legal innovation and agricultural development in the history of the Far West.[1] I had the great honor of being introduced as speaker by Roger Traynor, recently retired as chief justice and then a professor at UC Hastings College of the Law. In light of Chief Justice Traynor's reputation for oratory, which was no smaller than his reputation for erudition, all of us historians and others in that room were looking forward to what he would say in his assigned ten-minute slot as panel chair. We were certain he would provide an exposition offering important guidance on the approach we should be taking in analyzing the historical dynamics of legal change and innovation.

Roger Traynor did indeed give us his views — but to our amazement he took only about twenty seconds to do it. Let me quote his words. The papers in that panel, he said, "confront questions much like the one I was once called upon to unriddle: How does law evolve?" He paused . . . then continued, "Well, how does a garden grow?" Another pause, . . . and then he ended with, "How does agriculture in the West evolve?"[2] That was it. He sat down and graciously turned the podium over to us.

I have reflected many times on Chief Justice Traynor's statement of the question over the years, and I am still at a loss to come up with a better description of what is involved when we give our own best efforts at "unriddling," to use his word, the processes of legal evolution, including the dynamics of legal innovation.

★ ★ ★

[1] Symposium on Agriculture in the Development of the Far West, UC Davis, June 19–21, 1974. *See* Harry N. Scheiber and Charles W. McCurdy, *Eminent-Domain Law and Western Agriculture, 1849–1900*, 49 Agricultural History 112 (1975).

[2] Roger J. Traynor, *Law and Government Policy for Agriculture: An Introduction,* 49 Agricultural History 111 (1975).

# NINE SPEECHES BY JUSTICE ROGER J. TRAYNOR

## EDITOR'S NOTE

Well known today for his legacy of legal writings, both in opinions and essays,[1] Justice Roger Traynor was equally well known by his contemporaries for the eloquent, yet direct and vivid, style of his oral communications. He was a frequent speaker at legal events during his years as an associate justice of the California Supreme Court (1940–1964), chief justice (1964–1970), and after his retirement from the Court. But rarely have the unmediated words of his spoken voice been transmitted to posterity. This volume of *California Legal History* is fortunate to present a group of speeches by Justice Traynor, ranging in date from 1940 to 1974. They have been graciously made available for publication by the UC Hastings College of the Law Library from the Roger J. Traynor Collection in their Special Collections. These are reproduced from the preserved manuscripts of his speeches, with minor copyediting for publication and the addition of necessary citations, footnotes and a short introduction to each group of speeches.

—SELMA MOIDEL SMITH

[1] *See,* for example, The Traynor Reader: Nous verrons: A collection of essays by the Honorable Roger J. Traynor (San Francisco: The Hastings Law Journal, 1987), which includes his major essays, a bibliography, and biographical appraisals.

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# ON LAWYERS AND JUDGES

The first of the speeches presented here was delivered in September 1940 at the Lawyers' Club of Los Angeles, one month after Justice Traynor's appointment to the California Supreme Court. The subject is the role of the American lawyer in combating the danger to American liberty posed by the successes of totalitarian regimes at the start of World War II. Of special note — at this early date — is his line of reasoning that traces the spirit of personal liberty from the American tradition of democratic lawmaking to a lawyer's duty for legal innovation: "The law is not an encyclopedia to which lawyers may rush," he claims, but rather, it thrives on "conflict and fresh interpretation." This demand for legal innovation prefigures the recurring theme of much of his later writing — his insistence on legal innovation by judges — and it is the topic of the second speech presented here, "Stare Decisis versus Social Change" of 1963. The third speech contrasts the roles of lawyers and judges, and highlights the need for specialized training of judges, at the opening session of the California College of Trial Court Judges in 1967. (S.M.S.)

* * *

## I. ON LAWYERS AS GUARDIANS OF DEMOCRACY AGAINST TOTALITARIANISM (1940)[1]

I have been looking forward to this meeting, for now I can think aloud with you about one of the questions that has been haunting me since I undertook a job where one must eventually answer whatever query arises. While dive-bombers blow up the earth with a speed that leaves us with a sense of terrible impermanence, it is difficult to hold fast to values which are dancing on their foundations, and I should like to consider the question whether you and I, as lawyers, stand to gain more from that easy democratic way of life which is now everywhere on the defensive than from the rigorous submergence of individuals in a single-minded group.

[1] Address to the Lawyers' Club of Los Angeles, September 23, 1940.

It thrives on that conflict and fresh interpretation which has enabled our democratic judicial processes to grind out with amazing steadiness legal principles and justice.

A country is only as democratic as its legal processes. It is proper that the lawyers and judges who have always played so large a part in our democratic government now constitute its first line of defense. Theirs is a two-fold obligation. They must by their own work preserve the whole-hearted respect of their communities for the law, and they must of their own efforts preserve the vital force of a democratic law against any other force in their communities. When people have free access to legal redress of their wrongs, and confidence in the integrity of their lawyers and their courts, they will not easily turn away in bitterness from democratic methods. The stillness of a ruthless totalitarian order need never descend upon us if we carry on alertly that endlessly exciting search for the legal principles which may best reflect the activities and aspirations of free men.

## II. STARE DECISIS VERSUS SOCIAL CHANGE (1963)[2]

It is common knowledge that lawyers base their everyday advice to clients on stare decisis. It Is also common knowledge that stare decisis dominates in the adjudication of the exceptional controversies that reach a court. Surprisingly enough there are pockets of resistance to the common knowledge that among the exceptional controversies that reach a court there are some so extraordinary that they cannot be laid at rest within the ordinary confines of stare decisis. Even today, some forty years after Justice Cardozo's revealing commentary on the judicial process, occasional lawyers cling to the notion that it is for judges to state, restate, and even expand established precedents, but that they go beyond the bounds of the Judicial process when they create new ones. These mystics avoid the blunt fact that all precedents had once to be created by an obscure thought process that apparently equates the creativeness of ancient judges with divination and then equates divination with antiquity. Those befogged by such double

[2] Dedication of the new Law Building, Duke University, April 26–27, 1963. Portions are drawn from his article, *La Rude Vita, La Dolce Guistizia; Or Hard Cases Can Make Good Law*, 29 U. Chi. L. Rev. 223 (1962).

is to do more good than harm, there must also be construction of new rules of such scope that only the legislature with its freedom and resources for wholesale inquiry can effectively formulate them. For all the widespread dissatisfaction with contributory negligence, for example, a court would be reluctant to substitute some alternative such as comparative negligence, which would involve spelling out the details of apportionment, and would also affect the structure of liability insurance. There are comparable problems, as in the field of creditors' remedies that are better left to the legislature because their solution entails extensive study or detailed regulation or administration.

In sum, stare decisis serves us best when we recognize that precedents are here to stay but not to overstay.

## III. OPENING ADDRESS, CALIFORNIA COLLEGE OF TRIAL JUDGES (1967)[4]

This is a proud and memorable occasion for the California judiciary and I am delighted to be able to share it with you. In bringing its dream of a college for trial judges to fruition the Conference of California Judges, true to our state's pioneering tradition, puts California in the vanguard of states that are trying to improve the administration of justice by providing specialized instruction for members of the bench.

When I addressed the Conference at its 1965 annual meeting I commented on the excellent job that the Conference was then doing with its seminar program and exhorted it to continue and to expand its efforts in the field of judicial education. This evening's assembly shows that my exhortation has been heeded — or perhaps it was unnecessary. At that time I stated that it is a tribute to the unselfish devotion of our judiciary that you were able to find the time in your busy lives to do this fine work. I can only repeat that tribute tonight.

The successful launching of the College of Trial Judges has required the efforts of many judges and I shall not attempt to name them. The guiding impetus, however, has been the Conference's College Committee, formerly the Education Committee, and I do pay tribute to the two men who have

[4] UC Berkeley School of Law, August 20, 1967; now known as the Center for Judiciary Education and Research.

# ON THE PUBLIC DEFENDER

A lesser-known interest of Justice Traynor's was his concern for provision of effective counsel to indigent defendants, particularly in state appellate proceedings. Two speeches delivered at the 1969 National Defender Conference in Washington, D.C., offer his perspective as the state's chief judicial officer. In the first, as moderator, he contrasts conditions in California with those discussed by speakers from other states. In the second, his own address focusing on California, he traces the origins and history of the public defender movement (at a time shortly before the widespread rediscovery of Clara Shortridge Foltz's role as inventor of the public defender). The second speech concludes with his arguments for creation of a state public defender's office to serve state appellate defendants, an office created by the state legislature in 1976. (S.M.S.)

* * *

## I. REMARKS AS MODERATOR, NATIONAL DEFENDER CONFERENCE (1969)[5]

President Marden,[6] General Decker,[7] and friends of the National Defender Project:

When I left San Francisco, I thought I would briefly review the public defender development in California, but we've had such splendid representation from California, beginning with President Toll,[8] and then the remarkably fine talks yesterday by Mr. Portman, Mr. Steward, and Judge Chapman,[9] that I decided to spend the few minutes that I'm going to steal

[5] International Conference Room, Department of State, Friday, May 16, 1969.

[6] Orison S. Marden, president, National Defender Project of the National Legal Aid and Defender Association, and past president, American Bar Association.

[7] General Charles Lowman Decker, director, National Defender Project, and former judge advocate general, U.S. Army.

[8] Maynard J. Toll, president, National Legal Aid and Defender Association.

[9] Donald Chapman, Merced Superior Court; Sheldon Portman, public defender, Santa Clara County; and Harry Steward, founding executive director, Federal Defenders, Inc.

of that very powerful and important committee of the American Bar Association — the Committee on the Administration of Justice.

It's a pleasure to present to you Justice William McAllister of the Oregon Supreme Court.

(Hon. William M. McAllister speaks)

Thank you very much, Bill, for your very stimulating account of the developments in Oregon.

It must be most encouraging and heartening to you, President Marden and General Decker, to hear these reports of the progress that has been made as a result of your devoted efforts. Your accomplishments have been tremendous, and we have only begun to reap the benefits of the great contributions you have made to the administration of criminal justice throughout this country. We deeply appreciate all that you have done and are most grateful to you for the splendid success of the National Defender Project.

## II. ADDRESS, NATIONAL DEFENDER CONFERENCE (1969)[15]

As we approach the close of the National Defender Project I am delighted to join with you in this conference designed to take our present bearings and to set our future course. For years many of us on the appellate bench have been concerned about the adequacy of legal representation being afforded to the poor who are charged with crime. In extreme cases we have reversed judgments and returned the matters for new trials. Our action, however, could not guarantee effective representation — that could come only from the other side of the bench, and unfortunately in many areas neither the bar nor the public shared our concern.

The National Defender Project, by focusing attention on this problem and by utilizing the resources and talent at its disposal in pressing for a solution, has rendered a service of tremendous social significance. Hopefully, the termination of the Project will not result in a cessation of our interest because, although we have established some substantial beachheads, the major battle remains to be won.

[15] Washington, D.C., May 16, 1969.

## ON CONSTITUTIONAL RIGHTS

A topic that appears with special prominence in Justice Traynor's speeches — more so perhaps than in his essays — is the Fourth Amendment's protection against unreasonable search and seizure. An early instance is his radio address of November 1941 in which he presents the history of abuses in England and colonial America that led to the Fourth Amendment. This address was delivered as part of the patriotic effort then in progress (often supported by the American Bar Association) to mobilize public opinion for the Bill of Rights as a symbol of democratic ideals in the period leading to America's entry into World War II. But, at this early stage of his judicial career, Justice Traynor stopped short of providing a judge's perspective of the Fourth Amendment.

Such a perspective would come twenty years later, in two speeches from 1962 and 1964, that discuss the evolution of his own thinking that came to favor the exclusionary rule. The prohibition on the use of evidence discovered or taken in contravention of the Fourth Amendment was adopted by the California Supreme Court in an opinion by Justice Traynor in 1955, seven years before the U.S. Supreme Court's decision in *People v. Mapp* extended the federal exclusionary rule to the states. The consequences of the *Mapp* decision for state court judges are the center point of these two speeches. The first of the two provides a revealing view of the discussions between chief justices of other states and Justice Traynor following his remarks. The second was delivered immediately after the announcement of his appointment to serve as chief justice.

The last, and latest, of the speeches to be presented here is one delivered in 1974 (after Justice Traynor's retirement as chief justice in 1970), in which he turns to the subject of the First Amendment and its guarantee of freedom of the press. His topic is the attempt by the State of Florida to enforce a statute providing for a right of reply to negative political newspaper coverage. Of particular interest is Justice Traynor's presentation of arguments from both sides of the case in a speech delivered during its appeal to the U.S. Supreme Court. (S.M.S.)

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## I. THE RIGHT OF THE PEOPLE AGAINST UNREASONABLE SEARCH AND SEIZURE (1941)[19]

A sesquicentennial marks the passing of one hundred and fifty years and of five generations of men. It marks this year the one hundred and fiftieth anniversary of the American Bill of Rights, immortalized in the Constitution as the first ten amendments. It is easy to forget their dramatic beginnings. The Oakland Post No. 5 of the American Legion under the able leadership of Commander Homer W. Buckley[20] has appropriately undertaken this radio series on a Bill of Rights that should never be taken for granted.

I speak to you tonight of the Fourth Amendment which might well be called the guardian of our private lives. In simple forceful language it declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Here is the law at its best — deep-rooted in human experience, precise in language, clear in purpose. The Fourth Amendment sprang from a long history of arbitrary invasions of privacy through the device of the general warrant, which subjected all persons and property to search and seizure by specifying none. Long before the Revolution, there were notable abuses of the power symbolized by the general warrant. During the reign of Charles the First, in 1629, the Privy Council issued warrants for the search and seizure of the private papers of such men as John Selden and Sir John Elliot, outstanding members of Parliament, because of their speeches against taxation without the consent of Parliament. Even Sir Edward Coke, the great authority on the common law, witnessed the invasion of his home in 1634 as he lay on his deathbed. Angered by his forceful opposition to the crown, the Privy Council sent a messenger to search for his so-called "seditious

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[19] Radio station KLX, Oakland, California, November 14, 1941.

[20] At that time, assistant city attorney of Oakland; later, presiding judge of the Oakland Municipal Court.

themselves in a democratic country. The individual voluntarily subordinates himself to his country in critical times, but he remains a free citizen in a democratic state as he could not in a totalitarian one, by virtue of such privileges as those set forth in the Bill of Rights. In the stronghold of his own home he is secure, knowing that his threshold cannot be crossed without specific warrant. In that security men are bound together in a community not by fear of one another and the government above them but by respect for one another and the government that is a part of them.

## II. ON *MAPP V. OHIO* AT THE CONFERENCE OF CHIEF JUSTICES (1962)[31]

Chief Justice Wilkins:[32] The chair recognizes Justice Traynor.

Justice Traynor:[33] I will talk first about Professor Packer's presentation because it was the last one.[34] On this problem of retroactivity, I am a little puzzled by all the "to do" on whether *Mapp*[35] was retroactive. It applied retroactively to *Mapp* itself, and it would apply retroactively to any other case on appeal.

The questions are different as to cases on appeal tried before *Mapp* and those where the judgments have become final. We had those problems in California after we decided the *Cahan*[36] case. It would be silly to require the defendant to have objected to the admission of evidence before he could raise the question when it was futile to do so, since the law was that the evidence was admissible. We handled that problem this way: If the record showed a prima facie case of illegal seizure of the evidence, he was permitted to raise the question even though he had not objected before. If a scrutiny of the record gave no indication of illegal search and seizure, we presumed it lawful, and he couldn't raise it. That may be rough justice, but it worked out well. You couldn't expect the defendant to object to evidence

[31] August 4, 1962, Hotel Mark Hopkins, San Francisco, during the Annual Meeting of the American Bar Association.

[32] Raymond Sanger Wilkins, Massachusetts.

[33] At that time, associate justice, California Supreme Court.

[34] Herbert L. Packer, Stanford University School of Law.

[35] Mapp v. Ohio, 367 U.S. 643 (1961).

[36] People v. Cahan, 44 Cal.2d 434 (1955).

Chief Justice Arteburn:[64] We have a condition resulting from a radical change of precedent, and now we have the right to collaterally attack judgments when those judgments at some time should become final.

Chief Justice Wilkins: I want to acknowledge our debt of gratitude to Judge Traynor. I now declare this matter adjourned but not finished.

## III. *MAPP V. OHIO* STILL AT LARGE IN THE FIFTY STATES (1964)[65]

Mr. Chairman,[66] Mr. Justice Brennan, ladies and gentlemen:

Of all the two-faced problems in the law, there is none more tormenting than the admissibility of illegally obtained evidence. Whichever face one turns to the wall remains a haunting one because there is always that haunting fear that the court has impinged too far on one or the other of the two great interests involved: first, effective law enforcement, without which there can be no liberty; and second, security of one's privacy against arbitrary intrusion by the police, which Justice Frankfurter stated in *Wolf v. Colorado*,[67] is implicit in the concept of ordered liberty.

This concern has always been present in the development of the law on search and seizure, but since James Otis made his impassioned plea against the writs of assistance, I don't think there has been so much sensitivity in this area as there is today. The holding in *Mapp v. Ohio*,[68] which is still at large in the fifty states — and some fear, possibly, that *Escobedo v. Illinois*[69] will also go on a rampage — leaves the courts with the high responsibility of

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64 Apparently Judge Norman F. Arteburn of the Indiana Supreme Court, later chief justice.

65 Transcription of the speech delivered at the inaugural meeting of the Appellate Judges' Conference, during the Annual Meeting of the American Bar Association, August 9, 1964, Waldorf-Astoria Hotel, New York City. The title refers to the speech delivered two years earlier by Justice Traynor at Duke University Law School, published as "Mapp v. Ohio at Large in the Fifty States," 1962 Duke L.J. 319. Apart from the opening sentences, the latter talk does not duplicate the former, but offers a further development of his thinking on the subject of illegal searches.

66 Gerald A. Flood of the Superior Court of Pennsylvania.

67 338 U.S. 25 (1949).

68 367 U.S. 643 (1961).

69 378 U.S. 478 (1964).

Nevertheless, I think that we must have intelligent, effective police officers; we must have respect for them; we must pay them adequately, and we must have more of them. Thank you.

## IV. THE FIRST AMENDMENT'S MOBILE TRIANGLE: MEDIA, PUBLIC AND GOVERNMENT (1974)[89]

Lawyers have been jolted by the news that in many a household the first ten Amendments are not household words. Though the Bill of Rights is doing reasonably well for its age, despite recurring assaults from right and left, it continues to suffer from lack of public understanding. Even lawyers need continuing education in the expanding context of such seemingly simple texts as the First Amendment. Plain words, like plain people, may be ridden with complications.

One of the most complicated problems now besetting the First Amendment is that of access to the news media. Getting down to cases, we find in them less than a clear reading of the meaning and portent of access. Much depends upon who demands access to the media and why. Something may depend on how tightly a journal or broadcasting station controls access to the public and how significant that public is. Something may also depend on who the beggar for access is. Can the beggar address a plea only to some metropolitan megaphone, or also to some provincial journal or some trade publication or scholarly bulletin? Does he seek vindication in consequence of an attack upon him, or does he seek equal time on some controversial issue, or does he simply demand an exclusive easement for some crusade of his own? Does it matter whether the beggar outside publication gates is in public or private life, a leading citizen or an obscure one, a well-tempered spokesman or a zealot with the gleam of half-truth in his eye? On an issue such as women's liberation would it matter whether

[89] Remarks before The Association of the Bar of the City of New York, January 29, 1974 (as former chief justice of California and chairman of the National News Council). The same or similar address was delivered to the New England Society of Newspapers Editors in Worcester, Massachusetts, November 9, 1973, and an expanded and annotated version was published as *Speech Impediments & Hurricane Flo: The implications of a right-of-reply to newspapers*, 43 U. Cin. L. Rev. 247 (1974).

# HISTORICAL DOCUMENTS

# BURIED TREASURES:

## *California Legal History Research at UC Hastings College of the Law Library*

JUSTIN M. EDGAR, TRAVIS L. EMICK, AND MARLENE BUBRICK*

Had it not been for a minor section in the California legislative act that created and funded the UC Hastings College of the Law,[1] this first legal academy west of the Missouri River might have been located in present-day Berkeley, rather than neighboring San Francisco. Founded out of need for a law school in the rapidly maturing American West — the then-nearest law school being nearly 2,000 miles away in Des Moines, Iowa — the school was a brand-new endeavor. As the newly created University of California did not have a research collection capable of supporting a law school, section 12 of the founding act compelled the Law Library Association of the City of San Francisco to provide UC Hastings students access to their library. Even though the college outgrew this library quickly, it cemented the close relationship that Hastings would share with the institutions in the Civic Center, leading to the 1901 residence of the college in the magnificent new City Hall of San Francisco. Five years later, after the great earthquake

* Travis L. Emick is the Digital Projects Librarian, Justin M. Edgar is the Special Collections and Documents Manager, and Marlene Bubrick is the Technical Services and Special Collections Librarian at UC Hastings College of the Law.

[1] "An Act to create 'Hastings' College of the Law' in the University of the State of California" (Stats. 1878, ch. CCCLI, at p. 533), adopted March 26, 1878.

and resulting conflagration, the college, and nearly all documents and records of the first twenty-eight years would be ashes under the ruined dome of City Hall. In a fortunate twist of fate, one document survived.

The following years were characterized by recovery and rebuilding, with Special Collections at UC Hastings College of the Law Library being developed under the care of various librarians. Currently, portions of the collections are being added to our new Digital Repository. This article highlights some of the items that constitute our "buried treasures."

## 1. THE UC HASTINGS ORIGINAL MINUTE BOOK

Removed from City Hall shortly before the earthquake, this book of minutes of the Board of Directors, the aforementioned sole document to survive the destruction of City Hall, reveals much about the administrative requirements of founding, staffing, and running a law school. Early entries deal with the appointments of deans and professors, the setting of salaries ($300 for the first professor to be hired), establishment of curricula, and the number of lecture hours required of each professor. On January 10, 1879, the Board unanimously voted not to admit women to the college after considering the application of Clara Shortridge Foltz — who would promptly sue and gain admission with a ruling by the California Supreme Court.[2] The hiring of John Norton Pomeroy, who would later develop the "Pomeroy System" of instruction that was used at the college, is described.[3] In 1878 Pomeroy accepted the position of professor of municipal law at Hastings College of the Law and was responsible for teaching most, if not all, of the students who studied at the college during its first four years. During this time Professor Pomeroy not only wrote a significant treatise on equity jurisprudence, he edited (with one of his sons) the West Coast Reporter, and contributed a number of essays and book reviews to this publication.

The minute book proved to be an important source of information for Thomas G. Barnes in the research and writing of his history of the college, *Hastings College of the Law: The First Century*.[4]

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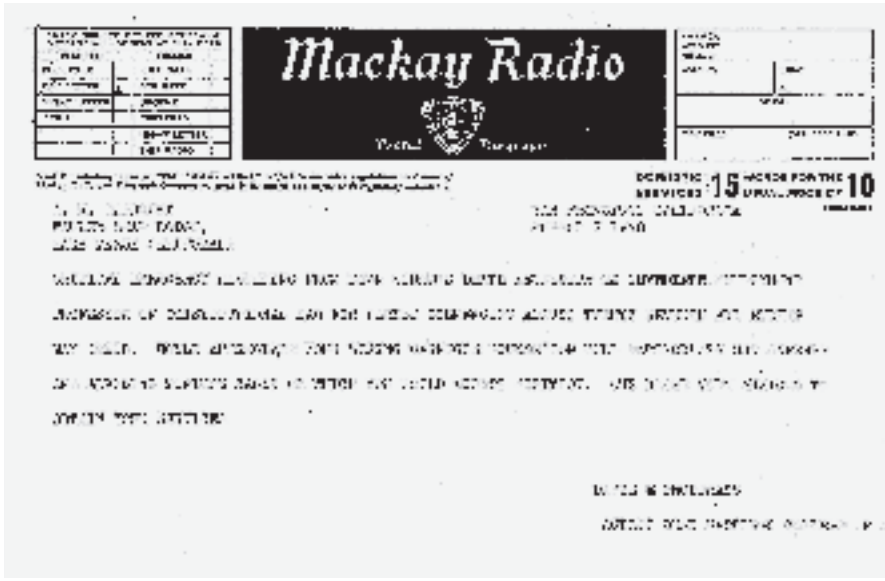
[2] Foltz v. Hoge, 54 Cal. 28 (1879).

[3] Thomas Garden Barnes, *Hastings College of the Law: The First Century* (University of California, Hastings College of the Law Press, 1978), pp. 104–105.

[4] Barnes, op. cit.

## 2. THE 65 CLUB COLLECTION

The 65 Club at UC Hastings was created out of crisis.[5] On July 25, 1940, Dean William M. Simmons died unexpectedly from complications of surgery. Dean Simmons was not only the dean of the college, but he also taught three courses that were to begin in August of 1940. Acting Dean David E. Snodgrass, who subsequently served as dean from 1940 to 1963, did not have time to vet younger instructors and the college did not have a pension plan with which to attract them. At this time across the country, many colleges and universities had mandatory retirement at the age of 65. Not all prospective retirees were ready to retire.




TELEGRAM FROM ACTING DEAN DAVID E. SNODGRASS OF HASTINGS COLLEGE OF THE LAW TO A. M. CATHCART, RECENTLY RETIRED FROM STANFORD LAW SCHOOL, THEN VACATIONING AT FALLEN LEAF LODGE, LAKE TAHOE, AUGUST 7, 1940 —

"CRITICAL EMERGENCY RESULTING FROM DEAN SIMMONS DEATH NECESSITATES IMMEDIATE EMPLOYMENT PROFESSOR OF CONSTITUTIONAL LAW FOR PERIOD COMMENCING AUGUST TWENTY SEVENTH AND ENDING MAY TENTH. WOULD APPRECIATE YOUR WIRING CARNEGIE FOUNDATION FULL PARTICULARS OUR EXPENSE AND ADVISING MINIMUM BASIS ON WHICH YOU WOULD ACCEPT POSITION. OUR BOARD VERY ANXIOUS TO OBTAIN YOUR SERVICES."

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[5] See "The 65 Club" at http://library.uchastings.edu/research/special-collections/65-club.php (accessed November 26, 2013).

# APPENDIX:

## MEMBERS OF THE 65 CLUB FACULTY

(Dates indicate the years in which each professor was associated with Hastings after reaching the age of 65. An asterisk indicates "visiting professor.")

Ralph Aigler, 1955–1956
Edward S. Bade, 1962–1963
Paul E. Basye, 1966–1985
William W. Blume, 1963–1971
George G. Bogert, 1949–1959
Benjamin F. Boyer, 1969–1975
John S. Bradway, 1960–1965
Millard S. Breckenridge, 1963–1965
William E. Britton, 1954–1963
John U. Calkins, 1957–1959
Richard V. Carpenter, 1967–1975
Arthur M. Cathcart, 1940–1949
Elliot E. Cheatham, 1959–1960
Albert Brooks Cox, 1951–1972
Judson A. Crane, 1954–1964
Stephen R. Curtis, 1964–1971
Miguel De Capriles, 1974–1981
Augustin Derby, 1947–1952
Edwin D. Dickinson, 1957–1959
Allison Dunham, 1979*
Laurence H. Eldredge, 1971–1979
Judson F. Falknor, 1966–1972
Merton L. Ferson, 1956–1961
William Ray Forrester, 1975–2001
Everett Fraser, 1949–1964
George W. Goble, 1956–1963
Arthur J. Goldberg, 1974–1975
Leon Green, 1958–1959
Milton D. Green, 1966–1978
William G. Hale, 1949–1952
Jerome Hall, 1970–1989
Moffatt Hancock, 1976–1979
Albert J. Harno, 1958–1965
Dan Fenno Henderson, 1992–2000
John B. Hurlbut, 1970–1975
Adrian A. Kragen, 1974–1983
Norman D. Lattin, 1963–1973
Julian H. Levi, 1980–1996
William B. Lockhart, 1977–1994
Ernest G. Lorenzen, 1948–1951
James P. McBaine, 1952–1957
Oliver L. McCaskill, 1946–1953
Dudley O. McGovney, 1948–1949
Orrin Kip McMurray, 1940–1941
James A. MacLachlan, 1960–1963
Joseph Warren Madden, 1961–1971
Calvert Magruder, 1959–1960
Frederick J. Moreau, 1964–1973

Ralph A. Newman, 1964–1973
Russell D. Niles, 1972–1985
Rudolph H. Nottelmann, 1961–1967
Charles B. Nutting, 1974–1977
George E. Osborne, 1958–1973
William B. Owens, 1953–1956
Rollin M. Perkins, 1957–1973
Harold G. Pickering, 1954–1963
Richard R. B. Powell, 1963–1973
William L. Prosser, 1963–1972
Max Radin, 1948–1949
John W. Richards, 1966–1968
Stefan A. Riesenfeld, 1975–1999
Rudolf B. Schlesinger, 1975–1994
Louis B. Schwartz, 1984–1996
Warren A. Seavey, 1961–1962
Warren A. Shattuck, 1974–1995
Arthur H. Sherry, 1975–1985
Lewis M. Simes, 1959–1972
Theodore A. Smedley, 1980–1984
David E. Snodgrass, 1959–1963
Roscoe T. Steffen, 1961–1973
Julius Stone, 1974–1980
Frank R. Strong, 1973–1974*
Raymond Sullivan, 1977–1994
Russell N. Sullivan, 1967–1978
Joseph M. Sweeney, 1988–1996
Sheldon Tefft, 1969–1978
Samuel D. Thurman, 1986–1992
Edward S. Thurston, 1943–1948
Roger J. Traynor, 1971–1983
Clarence M. Updegraff, 1964–1972
Chester G. Vernier, 1946–1949
Harold E. Verrall, 1970–1978
Lawrence Vold, 1948–1965
John B. Waite, 1952–1955

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# PERSONAL REMINISCENCES OF THREE STATE BAR LEADERS

## EDITOR'S NOTE

In 1989 the former State Bar Committee on the History of Law in California recorded the reminiscences of twenty-three past presidents of the State Bar, spanning the years 1937 to 1988. They appeared in a limited-circulation booklet titled, *The Story of the State Bar of California*, prepared under the chairmanship of John K. Hanft. Three of these have been selected for presentation here. They appear with the permission of the State Bar of California and have received light copyediting for publication. The first discusses a special occasion in State Bar history, the second highlights the founding of the California Appellate Project, and the third offers a first-hand account of the Bar's origins and early years.

— SELMA MOIDEL SMITH

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## WILLIAM P. GRAY[1]
### *President of the State Bar, 1962–1963*

The highlight of 1963 was the annual meeting in San Francisco when we had the members of the Supreme Court of the United States in attendance as our guests.

As we began to plan for the meeting, in the spring of 1963, we became aware that the meeting would occur at just about the tenth anniversary of Earl Warren's becoming chief justice of the United States. With the approval of the board, I wrote to the chief justice and invited him and Mrs. Warren to come to the annual meeting and join with us in celebrating this anniversary. We were delighted to receive his prompt acceptance, and we set about to plan the program.

In the previous summer, the American Bar Association had its annual convention in San Francisco. At one of the general sessions, the president of the ABA, John Satterfield of Mississippi, had two members of the Supreme Court on the stage and took that occasion to excoriate the Supreme Court for some of its recent decisions in the field of civil rights and desegregation.

[1] Born, Los Angeles, 1912; B.A., UCLA, 1934; LL.B., Harvard; President, Los Angeles County Bar Association, 1956; U.S. District Judge 1966–1991; died, Los Angeles 1992.

All of us felt that this was an insulting performance and we determined that the theme of our convention would be to do honor to the Supreme Court of the United States and the Supreme Court of California and to the other members of the federal and state judiciary. We visualized this as an opportunity to give a response by the members of the State Bar to the "impeach Earl Warren" campaign that was then at its height through the efforts of the John Birch Society.

The Board of Governors concluded that the lawyers of California would be delighted to contribute the money that would make it possible for us to invite all of the members of the Supreme Court, with their wives, to come to San Francisco, enjoy the facilities of the Fairmont Hotel during the week of the convention, and participate in all of the activities of the convention as the guests of the members of the bar. Arthur Connolly, one of our third-year members from San Francisco, was designated chairman of the Arrangements Committee for the convention, and he and I were sent by the board to Washington to meet with the chief justice, describe our plans to him, obtain his approval, and ascertain his own desires with respect to the meeting. On March 26, 1963, Art and I found ourselves in the Supreme Court Building. In the morning, we went through the memorable ceremony of being sworn in as members of the bar of the Supreme Court, and in the early afternoon we had our meeting with the chief justice. He readily agreed to the program that we presented, which included his making a major address at a general session. He embraced our plan to invite his colleagues to attend, and he also agreed to share honors with Chief Justice Gibson and the members of the California Supreme Court. That afternoon, Art and I went to the nearby Senate Office Building where we met with Senators [Thomas] Kuchel and [Clair] Engel and invited them to participate in the anticipated celebration. They readily agreed to come.

Upon my return to Los Angeles, I set about to prepare letters to the associate justices of the Supreme Court which would tell them of our plan and invite their participation. I worked rather hard on the letter, going into some detail as to what would occur on each of the days, in order that the justices would know what to expect and be attracted accordingly. Inasmuch as I had been acquainted previously with Justice Brennan, I directed the first letter to him and then simply told my secretary to prepare similar letters to each of the other justices. The letters were prepared and signed

and mailed. The next day, I looked over the office copies and almost fell out of my chair. One of the letters was addressed to Honorable John M. Harlan, Supreme Court of the United States. And then in about the second paragraph it read, "and we of the State Bar of California would very much like to have you and Mrs. Brennan come to San Francisco and spend a week at the Fairmont Hotel."!! I telephoned Justice Harlan's chambers and asked his secretary if she had heard from me in the morning's mail. I told her that she would receive a letter shortly and advised her as to what it contained. She laughed and asked if I wanted her to destroy it. I said, "No, tell the justice that we would like to have him bring his own wife and that Mrs. Brennan would otherwise be taken care of."

When the time for the annual meeting came, all of the justices and their wives came to San Francisco, with the exception of Justice Harlan, who expressed his sincere regrets but was obliged to attend a meeting of the Judicial Conference of the Second Circuit. A member of the Board of Governors had previously been assigned as individual host to each of the justices, and specially picked members of the San Francisco bar were given similar assignments as local hosts. Rule number one that we imposed upon the justices was that they were to do whatever they wanted to do and were not to do anything that they would prefer not to do. With that qualification they were invited to, and did, sit in on the meetings of the Conference of Delegates, were present throughout the general session of the bar on Wednesday [September 24], attended the various law school luncheons, went shopping, played golf and tennis, attended Kelly's (Justices Brennan and Stewart proved to be very good assistant bartenders), and had a good time in general.

On Thursday evening there was a general session to which the public was invited. It began with several musical renditions by the Men's Glee Club of the University of California at Berkeley. As they left the stage, they disclosed, seated behind them, Chief Justice Warren, seven of his active colleagues (and retired Justices Reed and Whitaker), Chief Justice Gibson and each of his six colleagues of the California Supreme Court, and the five officers of the State Bar. Each of the justices was introduced, along with his wife who was sitting in the audience with the local host. Welcoming remarks were made by Governor Pat Brown and formal speeches were presented by Chief Justices Warren and Gibson.

At the end of the meeting, my wife and I walked back to the Fairmont Hotel with Chief Justice and Mrs. Warren. As we emerged from the auditorium, members of the John Birch Society were marching up and down the sidewalk carrying "impeach Earl Warren" signs. The chief justice approached one of the women and said, "Why do you want to impeach me; what do you have against me?" The woman got a rather puzzled look on her face and finally responded, "Well, if you don't know, I'm not going to tell you!"

On Thursday evening there was a black-tie dinner attended by the justices and their wives, Governor and Mrs. Brown, and the members of the Board of Governors and the local hosts and their respective wives. This was followed by a formal reception in the ballroom of the Fairmont Hotel, where each of the justices and his wife were presented at an individual receiving line, which was followed by dancing. On Friday evening the justices and wives were taken by their hosts to a performance by the San Francisco Opera in which Leontyne Price sang the leading role.

We believe that the entire affair was worthwhile because it caused the justices to realize that the members of the State Bar of California had great respect for the institution of the Supreme Court and had regard for the individual members as warm human beings.

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## ANTHONY MURRAY[2]

### *President of the State Bar, 1982–1983*

### PRESIDENTIAL OUTREACH

Throughout the year, I made approximately one hundred speeches up and down California on a variety of subjects, principally judicial independence and legal services for the poor. I spoke to as many local bar associations as I could reach. Many speeches were made to small county bar associations where a State Bar president had never spoken. In addition to bar associations, I spoke in numerous public forums such as Town Hall in

[2] Partner, Loeb & Loeb LLP; President, California Appellate Project (1983 to present); Fellow, American College of Trial Lawyers; Life Fellow, American Bar Foundation.

Los Angeles, the World Affairs Council in Los Angeles, and service groups such as Rotary clubs. Coupled with speaking engagements were dozens of press conferences and radio and television appearances to maximize the effectiveness of the outreach program.

## CALIFORNIA APPELLATE PROJECT

In 1983, the governor [George Deukmejian], over opposition of the State Bar, the Supreme Court and most Courts of Appeal in California, reduced by 50 percent the budget of the State Public Defender. The reduction threatened to create a crisis in the representation of indigents in capital appeals before the Supreme Court. The Supreme Court asked the State Bar for help. The president's committee, consisting of the members of the third-year class on the board, convened and discussed a solution.

The result was formation of the California Appellate Project (CAP), a nonprofit corporation designed to recruit and train competent lawyers to handle capital appeals. CAP has been an outstanding success. It has been heralded in California and other states as an innovative and effective model that can be emulated across the nation. In 1984, CAP received the Harrison Tweed Award from the National Legal Aid and Defender Association and the Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association. The award recognized and commended CAP for its public service in providing competent legal representation to indigent persons accused of capital crimes.

Today [1988], CAP operates an eight-lawyer office in San Francisco and an eight-lawyer office in Los Angeles that will soon expand to thirteen or fourteen lawyers. The lawyers in both offices recruit and assist lawyers from the private bar in representing indigents. The work of the San Francisco office is limited to handling cases before the Supreme Court. The Los Angeles office works with cases in the Second District Court of Appeal; in 1988, it will handle approximately 75 percent of the Second District appeals, some 1300–1400 cases.

I am the president of CAP. The other members of the board of directors are the other four members of my class on the Board of Governors and Herbert Rosenthal, executive director of the State Bar.

### PRIVATE CLUBS

In May of 1983, the board adopted a resolution to sponsor federal legislation prohibiting discrimination based on race, religion, color or national origin in private clubs which derive substantial income from business sources. The board's position has since been vindicated by decisions of the United States Supreme Court.

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## GILFORD G. ROWLAND[3]

## *President of the State Bar, 1937–1938*

### ADMISSION TO THE BAR

Prior to 1927, the qualifications for admission were minimal. Anyone who was a citizen of the United States, a resident of California, twenty-one years of age, of good moral character, and had studied law for at least three years in the manner and subjects prescribed by the Supreme Court could be admitted. Until 1919, the examination was oral by the justices of a district court of appeal. Attorneys who were admitted under that system have told me that the examination by the justices was brief and quite inadequate to ascertain the legal ability of the applicant. One attorney who had been examined by the justices of the third district court of appeal told me that there were twelve or fifteen in the group, lined up before the justices. He was fourth or fifth in the line. Justice Hart asked the applicant next to him "What is a negative pregnant?" The applicant did not know and the question was repeated down the line and back to my friend who was able to answer the question because he had accidentally stumbled upon it when he had opened his Blackstone the night before. This was the only question asked of him. In 1919, the Legislature authorized the Supreme Court to appoint a board of bar examiners consisting of three attorneys who were directed to conduct the examination, which could be wholly or in part

[3] Born, Sheraton, Iowa, 1899; A.B. Stanford 1923; J.D. Stanford Law School, 1925; admitted August, 1925; private practice (retired 1985); dean, McGeorge College of Law (1933–1937); died, Sacramento, 1989.

written. By 1925 when I took the examination, there was a brief oral interview followed by two days of written examination.

## CREATION OF AN INTEGRATED BAR

Prior to the State Bar, about the only time that an attorney was ever disbarred or suspended followed a conviction of a crime. By statute, an attorney could be removed or suspended after conviction of a crime involving moral turpitude, for willfully disobeying an order of court involving his duties as an attorney or willfully and without authority appearing as an attorney for a party or lending his name to be used as an attorney by a person not admitted, and for the commission of any act involving moral turpitude, dishonesty or corruption. The procedure for enforcement of these rules required a verified accusation held by a trial in and conviction by a court.

The inadequacy of existing laws and procedures to enable the bar to meet the problems facing the profession led the leaders of the legal profession in California to rally behind the movement for the establishment of an integrated bar, and the State Bar Act was enacted in 1927. The tasks facing the first Boards of Governors were monumental but they wasted no time. The Committee of Bar Examiners was appointed and directed to conduct the bar examinations. Rules of professional conduct were adopted and for the first time violation of these rules could lead to discipline. Local administrative committees were appointed and the procedure for discipline was publicized. And last but not least in importance, the sections and committees of the State Bar to study and promote the science of jurisprudence and the improvement of administration of justice were appointed and directed to proceed.

## DISCIPLINE

The inadequacies of the old system were demonstrated quickly after the local administrative committees were ready to receive complaints. The dedication of the bar to the weeding out of the unfit in its ranks was amply demonstrated by the many volunteers who spent untold hours in performing the unwelcome task of hearing and investigating these complaints.

Joseph J. Webb, the first president of the State Bar, declaring that a license to practice law is intended to be and should be a guarantee that

the lawyer is qualified as to learning — but of more importance — that he is an honest man, urged the disciplinary committees to weed out the dishonest practitioners. I was told by members of the earlier boards that often the calendar of disciplinary matters consumed almost all of the time of the monthly meetings. A large proportion of the complaints were without merit and were dismissed. The records will show that as many as forty-five to fifty disciplinary recommendations would be on a single board meeting calendar. By the time I went on the board the backlog had been reduced and the board had more time to consider other pressing matters.

## UNAUTHORIZED PRACTICE

In the late 1920s, the unlawful practice of law was rampant. Banks and trust companies advertised that they would prepare wills and trust instruments, would probate estates and administer trusts. Title companies and real estate companies advertised that they would prepare deeds, mortgages, deeds of trust, contracts of sale, and all other title documents. Adjusters licensed by the state to represent insurance companies in the settlement of fire and other casualty matters claimed that their license entitled them to solicit and represent personal injury and property damage claimants. Actions were filed to enjoin the unlawful practice of law, but it was soon found that the required litigation would be beyond the resources of the State Bar. Separate committees were appointed to enter into negotiations with banks and trust companies, with title companies, with the adjusters' organizations, and with other groups engaged in the unlawful practice of law. They tried to agree upon the legitimate activities of the banks, trust companies, title companies, and others, and reduce the unlawful practice of law. Before my term as president began, agreements were reached with these various groups and the unlawful practice of law was substantially eliminated.

## ATTEMPT TO ABOLISH THE INTEGRATED BAR

During the first decade, there were numerous attempts to curtail the functions of the State Bar or to destroy it. Assemblyman William Hornblower of San Francisco gutted any increase in the educational qualifications for admission to the bar by securing the passage of a bill which prohibited the

Supreme Court or the State Bar from imposing any educational qualifications. James Brennan, an assemblyman from San Francisco, was elected to the Board of Governors and worked on the board and in the Legislature to repeal the State Bar Act. He and Assemblyman Hornblower were able to induce the Assembly to create a committee to conduct a plebiscite of the attorneys on the question, "Do you favor repeal of the State Bar Act?" The plebiscite was conducted in April, 1935, and resulted in the overwhelming approval of the State Bar by the attorneys. There were 1,899 yes votes and 5,457 no votes.

The State Bar was enthusiastically supported by a vast majority of the attorneys. The Legislature sought its advice and help with legislation involving procedural matters, court reform and matters involving the administration of justice. Alfred L. Bartlett, the tenth president of the State Bar, was able to report in his last message that the State Bar and the act which formed it had weathered every kind of storm. All phases of the act had been subjected to the scrutiny of the courts. The State Bar itself has been the subject of legislative investigation. Two years ago [1986], a committee of the Legislature took a plebiscite of all lawyers of the state to determine their attitude, and the vote overwhelmingly endorsed the State Bar.

## BAR EXAMINATION

In 1933, the son of one of the justices of the Supreme Court flunked the bar examination and this triggered a full scale investigation of the bar examination procedures and content by the Supreme Court. I am happy to report that the Committee of Bar Examiners came through this investigation with flying colors. I wish that I could adequately express my admiration for the giants of the legal profession who preceded me and for the diligence and intelligence which they devoted to the solution of the problems which confronted them.

## CONFERENCE OF DELEGATES

The first meeting of the. Conference of Delegates was in 1934. It gained popularity as attorneys and local associations recognized that it provided the means by which they could secure consideration of their ideas and

programs. When it created the conference, the board feared that as time went on, the conference would seek to make its action on resolutions binding on the board. During its brief existence, these fears had begun to be realized and the board, during my regime, felt compelled to remind the conference officers that the board considered resolutions adopted by the conference in the nature of recommendations only.

## LAWYER EDUCATION

The Committee for Cooperation Between Law Schools and the State Bar presented to the 1937 convention at Del Monte a proposal that the State Bar assume the responsibility for referring the newly-admitted lawyers to a system of postgraduate instruction. For a number of years, the Stanford Law Society had sponsored such a program for the newly-admitted Stanford graduates. The board enthusiastically approved and authorized me to appoint a committee to work out a plan. I appointed a committee composed of representatives from the law schools and attorneys who had experience in the bar examination procedures and in legal education. This committee worked out the plan which was the forerunner of the present Continuing Education of the Bar program.

## JUDICIAL APPOINTMENTS

The election of supreme and appellate court justices became history when our present system of appointment and confirmation was adopted. The board, during my tenure and for some time afterwards, advocated the adoption of the so-called Missouri Plan, under which a committee composed of lawyers, judges, and laymen would select three qualified attorneys for each vacancy and the governor would be required to appoint one of these three candidates.

## PUBLIC RELATIONS

In an address to the Long Beach Bar Association in the fall of 1934, President Norman Bailey pointed out that public relations was a job of every lawyer. His concluding remarks were:

> Let us be our own publicity agents for a while. We must sell the bar to ourselves before we can sell it to anyone else. We must live our ideals twenty-four hours a day, 365 days in the year. We must, one and all, become active parts in the civic life of our several communities. We must preach the State Bar of California and its work throughout the length and breadth of this state. When we live and do these things, we need have no worry about public relations, but until we do that, all the publicity agents in the world will do us no good.

Those who favored a State Bar public relations program continued their efforts, and resolutions demanding action by the board were adopted by the annual conventions.

President Alfred Bartlett, my immediate predecessor, appointed a committee on public relations and it recommended that the State Bar create a department of public relations. The advocates of State Bar action on this subject never presented a concrete proposal. Some wanted group advertising, some wanted radio programs explaining the role of attorneys in the administration of justice, and others wanted to promote favorable publicity in the news programs of newspapers and the radio. The board authorized me to appoint a committee to make recommendations on the subject.

Ewell D. Moore of Los Angeles was appointed chairman. The members of the committee were appointed from the principal geographical locations of the state. While this committee was deliberating, the board created a department of public relations, with the secretary of the State Bar as its administrative head. At that time, our dues were $5 per year and our budget was about $130,000 annually. These funds were barely enough to pay for our mandated activities. Nothing could be spared for new programs. The Moore Committee presented a resolution to the 1938 annual meeting requesting that dues be increased from $5 to $10 per year and $2.50 of that be earmarked to finance a public relations department. The resolution was not adopted and the next year the board changed the name of the public relations department to the Committee on Bar Activities but, without a budget, it withered.

## LEGISLATION

In those days, the Committee on Administration of Justice determined what matters would be put on the legislative program of the State Bar, and

that committee was instructed that legislation should be confined to procedural matters and that substantive legislation, particularly that involving social or political issues, should be avoided.

By the time I was elected to the Board of Governors, the State Bar had gained the respect and confidence of the legislators, and its program was generally successful. The Legislature did not meet during my term as president. We spent a great deal of time on the consideration of the measures which would be a part of the State Bar's legislative program at the 1939 session. We were very careful to avoid involving the State Bar in political and social issues and so long as it followed that policy, it was respected and its opinion was given due consideration. However, when it became involved in such social and political issues, as evidenced by advocacy of no-fault insurance, legalization of prostitution, legalization of marijuana, and sanctions against South Africa, the bar lost respect and invited attacks by those who held opposing views.

In my opinion, the difficulties which the State Bar has encountered in the Legislature in the 1980s are almost entirely due to the fact that it has not confined its legislative program to procedural matters. Having said that, I must say that I have no regard for the attorneys in the Legislature who have attempted to change State Bar policy by holding it hostage on its dues bill.

## LOCAL BAR ACTIVITIES

During my tenure, I visited all of the local bar associations in my district and urged bar members to attend the annual meetings and become interested in State Bar affairs. During my term as president, I notified all of the local bar associations that my successor on the Board of Governors would be elected at the election in 1937 and urged them to canvass their membership to ascertain whether there was anyone interested in becoming a candidate. Sacramento has the largest lawyer population of any community in our district and there is a tendency for attorneys in the smaller communities to feel that they would have no chance against a candidate from Sacramento. Unfortunately, we have had very few governors from other cities in this district and I feel that that has lessened the interest in the State Bar in the outlying communities. It is unfortunate that there have not been more governors from such communities as Stockton, Vallejo, Napa, Santa Rosa, and Woodland.

I feel that each governor should canvass the sentiment in all communities of his district and try to get more widespread interest in State Bar affairs.

In the early days, each *State Bar Journal* reported local bar association activities. I believe it would be helpful if the *California Lawyer* would devote the required space to report local bar association activities.

## SACRAMENTO BAR ASSOCIATION

It has been suggested that I might tell about the history of my involvement with the State Bar and how I happened to become president. I will do so, not because it will reflect credit upon me, but because I believe it reveals a weakness in the method of selection of members of the Board of Governors. I have given considerable thought to possible changes but have been unable to come up with any that I thought would be satisfactory.

When I started to practice in Sacramento in 1925, the Sacramento County Bar Association was an organization in name only. The annual meeting was held in a justice's courtroom in the basement of the courthouse, and the old officers would suggest a slate of new officers and they would be elected. Nothing would happen until the next annual meeting when the process would be repeated. Shortly after I began to practice, the president refused to call a meeting to elect his successor. A small group of the younger practitioners thought they might breathe some life in the Sacramento County Bar Association and formed an organization called the Sacramento Inns of Court. This group was finally able to unearth a copy of the constitution and bylaws of the Sacramento County Bar Association and was able to call a special meeting and oust the old president. No one could understand why the old president wanted to continue. In Sacramento County, the president of the bar association is chairman of the county library committee, and when this president passed away, it was discovered that his library was made up mostly of county library publications.

## ELECTION TO THE BOARD

Arch Bailey, from Woodland, was the member of the Board of Governors from our district. He announced that he would not seek another term as he would run for judge of the Superior Court of Yolo County. The younger

attorneys in the Inns of Court thought that an attorney from Sacramento should succeed Mr. Bailey. Several of us were appointed to a committee to inquire of the older and more prominent attorneys in Sacramento whether they would be interested in running for election to the office and we made inquiries through friends in Stockton, Vallejo, Santa Rosa, and other communities, and found that no one appeared to be interested.

At a meeting of the board of directors of the Inns of Court, we reported that we had been unable to find any of the older attorneys who were interested. Finally, one of the other attorneys on the committee said, "Gil, why don't you run?" After discussing the situation with my wife and determining that we could scrimp by financially, I agreed to make the effort. I was elected to the board in the fall of 1934. At the time of my tenure on the board, rivalry between San Francisco and Los Angeles was deep-seated and the board had adopted a policy that the presidency would be alternated between the north and south. And when the election in 1937 approached, it was the north's term to have the presidency. Most all of us on the board wanted Webster Clark of San Francisco to run for president but he positively refused. Other than Webster, it developed that I was the only northern member, and I was elected president at the board meeting at Del Monte in 1937. This was the greatest honor that was ever bestowed upon me during my sixty-odd years of practice.

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# ARTICLES

# BUILDING THE NEW SUPREMACY:

## *California's "Chinese Question" and the Fate of Reconstruction*

ROMAN J. HOYOS*

The so-called "Chinese question" was one of the most important and consequential political and constitutional issues facing California in its first half-century as a state.[1] The Chinese were one of the fastest growing populations in the state in the second half of the nineteenth century. Their presence and status within California drove most of the bedrock political issues of the day: capital versus labor, race and gender, citizenship and nation, and the nature of local, state, and federal power, not to mention international relations. The Chinese worked in the most important economic industries in the state, including mining, railroads, and agriculture. Their willingness to work for low wages for large, often corporate, employers was viewed as a threat to the political, economic, and cultural status of white laborers.

* Associate Professor, Southwestern Law School (Los Angeles). I would like to thank John Tehranian, Timothy Mulvaney, Ken Stahl, Priya Gupta, Arthur McEvoy, Annie Decker, and the participants at the 2013 Local Government Law Conference for their comments, suggestions, and discussions of an earlier draft of this article.

[1] I treat the "Chinese" people here as a singular people because this is how they were treated by the legal and political actors who are the focus of this paper. It is not to suggest, however, that they were in fact a singular people. Eve Armentrout-Ma, "Urban Chinese at the Sinitic Frontier: Social Organizations in United States' Chinatowns, 1849–1898," *Modern Asian Studies* 17 (1983): 107.

Ultimately, they became an "indispensable enemy" in the formation and consolidation of California's labor movement. Their inscrutable foreignness also made them appear to be a threat to the public at large, especially their "opium dens" and brothels. Ultimately, the Chinese became an indispensable outlet for the economic frustrations of communities throughout the West. Massacres and "roundups" of Chinese people became a regular occurrence in the late nineteenth century in California and the West.[2]

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[2] There is a substantial and ever-growing literature on the Chinese experience in California and the United States in the nineteenth and early twentieth centuries. On legal history, see Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995); Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1994); David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891–1941* (Berkeley: University of California Press, 1994): ch. 3; Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891* (University of Nebraska Press, 1991); Gordon Morris Bakken, "Constitutional Convention Debates in the West: Racism, Religion, and Gender," *Western Legal History: The Journal of the Ninth Judicial Circuit Historical Society* 3 (1990): 213; Harry N. Scheiber, "Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution," *Hastings Constitutional Law Quarterly* 17 (1989): 35; Christian G. Fritz, "A Nineteenth Century 'Habeas Corpus Mill': The Chinese Before the Federal Courts in California," *The American Journal of Legal History* 32 (1988): 347.

On labor history, see Stacey L. Smith, *Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction* (Chapel Hill: The University of North Carolina Press, 2013); Moon-Ho Jung, *Coolies and Cane: Race, Labor, and Sugar in the Age of Emancipation* (Baltimore: Johns Hopkins University Press, 2006); Peter Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor* (New York: New Press: distributed by W.W. Norton, 1997); Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley: University of California Press, 1995); Chris Friday, *Organizing Asian American Labor: The Pacific Coast Canned-Salmon Industry, 1870–1942* (Philadelphia: Temple University Press, 1994); Sucheng Chan, *This Bittersweet Soil: The Chinese in California Agriculture, 1860–1910* (Berkeley: University of California Press, 1986).

On local and urban history, see Benson Tong, *Unsubmissive Women: Chinese Prostitutes in Nineteenth-Century San Francisco* (Norman: University of Oklahoma Press, 1994); Natalia Molina, *Fit to be Citizens?: Public Health and Race in Los Angeles, 1879–1939* (Berkeley: University of California Press, 2006); Nayan Shah, *Contagious Divides: Epidemics and Race in San Francisco's Chinatown* (Berkeley: University of California Press, 2001); Yong Chen, *Chinese San Francisco, 1850–1943: A Trans-Pacific Community* (Stanford: Stanford University Press, 2000). On immigration history, see Sucheng Chan, *Entry Denied: Exclusion and the Chinese Community in America, 1882–1943*

The "Chinese question" was not, however, solely a question about economic competition. It was also a discursive device through which Californians worked out their ideas about slavery, freedom, law, constitutionalism, and the state. As Moon-Ho Jung has shown, for example, the Chinese question helped Americans navigate the transition from a slave to a post-emancipation society. In California, the degraded Chinese "coolie" laborer became a symbol of slavery, and exclusion the means by which Californians could remain a "free" state. Even though Chinese laborers entered into contracts to work, the hallmark of free labor ideology, the contracts were often seen as a form of indentured servitude. "Chinese" and "coolie" were often used synonymously in political and constitutional discourse to emphasize the foreignness of the Chinese and their threat, as a race, to new American ideas about freedom and free labor.[3]

The Chinese were also seen as a threat to the welfare of local, state, and eventually to the national communities and governments. As a threat, they came under intense scrutiny and regulation by state and local governments. They were often blamed for the social and moral ills of the community. As Nayan Shah has explained, "The medical knowledge of Chinese deviance and danger emerged in the context of a fervent anti-Chinese political culture and escalating class confrontations generated by the social tumult of industrialization, rapid urbanization, and tremendous migration into San Francisco."[4]

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(Philadelphia: Temple University Press, 1991); Grace Delgado, *Making the Chinese Mexican: Global Migration, Localism, and Exclusion in the U.S.–Mexico Borderlands* (Stanford, California: Stanford University Press, 2012); Erika Lee, *At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943* (Chapel Hill: University of North Carolina Press, 2003); Erika Lee and Judy Yung, *Angel Island: Immigrant Gateway to America* (New York: Oxford University Press, 2010).

On race, class, and gender, see Najia Aarim-Heriot, *Chinese Immigrants, African Americans, and Racial Anxiety in the United States, 1848–82* (Urbana: University of Illinois Press, 2003); D. Michael Bottoms, *An Aristocracy of Color: Race and Reconstruction in California and the West, 1850–1890* (Norman: University of Oklahoma Press, 2013); John Hayakawa Torok, "Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws," *Asian Law Journal* 3 (1994): 55. See also Jean Pfaelzer, *Driven Out: The Forgotten War Against Chinese Americans* (Berkeley: University of California Press, 2008).

[3] Jung, *Coolies and Cane*; see also Bottoms, *An Aristocracy of Color*; Smith, *Freedom's Frontier*.

[4] Shah, *Contagious Divides*, 4.

# THE VINE VOTE:

## *Why California Went Dry*

JONATHAN MAYER*

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* This paper was awarded first place in the California Supreme Court Historical Society's 2013 Student Writing Competition. Jonathan Mayer received his J.D. in June, 2013 from Stanford Law School and is currently completing a Ph.D. at Stanford University's Department of Computer Science. He thanks Professor Lawrence Friedman for his invaluable research guidance and feedback.

## I. INTRODUCTION: VOLSTEAD, CALIFORNIA

Prohibition imperiled George F. Covell's livelihood. Born into an enterprising family in 1865, Covell joined his father's grape growing business at an early age.[1] By the 1910s he was a leader in California viticulture, earning positions of authority within trade groups[2] and collaborating with University of California researchers to advance farming technology.[3] Covell championed grape grower efforts to stave off prohibition at both the federal and state levels, including a last-minute compromise that would ban saloons throughout California.[4] He failed. On January 16, 1919, Nebraska provided the final vote required to ratify the Eighteenth Amendment. National prohibition under the Volstead Act began on January 17, 1920.[5] Grape growers were despondent; many dug up their vines, and one even committed suicide.[6]

But then, something unexpected happened: national prohibition proved profitable for Covell. As the 1921 harvest came to a close, he packed over 150 railcars with his wine grapes.[7] Covell wrote to Western Pacific, tongue-in-cheek, suggesting a name for his new and suddenly bustling cargo stop: Volstead.[8]

At the same time that Covell's fortunes took an unanticipated turn, California voters were deciding on prohibition as a matter of state law. Prohibition appeared as a statewide ballot measure five times between

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[1] George H. Tinkham, History of San Joaquin County 1583 (1923).

[2] Cal. Grape Protective Ass'n, *Grape Growers to Discuss the Wine Industry*, S.F. Chron., July 1, 1917, at C7; *State Grape Meeting to Oppose Prohibition*, Cal. Fruit News, Sept. 7, 1918, at 13; *Exports from San Francisco for December*, Cal. Fruit News, Mar. 4, 1922, at 4–5.

[3] Ernest B. Babcock, *Studies in Juglans* I, 2 Univ. Cal. Publications Agric. Sci. 1, 64–65 (1913).

[4] Cal. Grape Protective Ass'n, *supra* note 2.

[5] Wartime prohibition had gone into effect in 1919, but grape growers and wineries largely ignored the law pending resolution of constitutional challenges. *Injunction Against Dry Act Denied State Grape Men*, S.F. Chron., Sept. 20, 1919, at 13.

[6] Daniel Okrent, Last Call: The Rise and Fall of Prohibition 1 (2011) ("Up in the Napa Valley . . . an editor wrote, 'What was a few years ago deemed the impossible has happened.'"); Gilman Ostrander, The Prohibition Movement in California, 1848–1933, 177–78 (1957).

[7] Eddie Boyden, *Grape Grower Puts Volstead on California Map*, S.F. Chron., Sept. 8, 1921, at 15.

[8] *Id.*

1914 and 1920.[9] It never passed. State law remained deeply controversial even after federal prohibition: The Eighteenth Amendment contemplated concurrent state enforcement, and Congress had established initial "police arrangements" that were somewhat "superficial" owing to inadequate funding and primary responsibility located within a sub-sub-unit of the Treasury Department.[10] While scholars have long debated the effectiveness of prohibition enforcement,[11] contemporaries certainly perceived state "mini" or "baby" Volstead Acts to be critical battlegrounds between the "dries" and the "wets." In the 1922 California election, after nearly a decade of campaigning, the dries finally won out.

This essay posits an explanation for California's sudden flip-flop on prohibition: federal law generated windfall profits for the state's grape growers, causing them to temper their opposition. The argument proceeds in five phases. Part II details the strategic politics of prohibition in California, especially on the part of grape growers, and how 1922 departed from prior elections. The following Part III explains how federal law under national prohibition both tolerated and subsidized home winemaking. Part IV analyzes statistics on grape growing under prohibition, which reveal a sudden surge in fruit production and price. Part V recounts how grape growers recognized prohibition as the cause of their good fortune. Finally, a Conclusion completes the argument: California went dry because prohibition was so profitable.

## II. PROHIBITION POLITICS IN CALIFORNIA

Prohibition was an incremental initiative in California. A state chapter of the Woman's Christian Temperance Union was incorporated in 1879,[12]

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[9] *See infra* Part II.

[10] Thomas Pinney, A History of Wine in America: From the Beginnings to Prohibition 435 (1989); *see* Mark Thornton, The Economics of Prohibition 100 (1991) (discussing federal and state expenditures on prohibition); *Peril in Dry Repeal Shown*, L.A. Daily Times, Oct. 30, 1926, at 1 (claiming that without state, municipal, or local authorities, there would only be about seventy prohibition enforcement officers in all of California).

[11] *See* Thornton, *supra* note 10, at 100–01.

[12] Ernest H. Cherrington, The Evolution of Prohibition in the United States of America 204 (1920); Ostrander, *supra* note 6, at 58 ("The state W.C.T.U. took its place almost at once as the most effective temperance organization in California.").

# CALIFORNIA'S IMPLAUSIBLE CRIME OF ASSAULT

MIGUEL A. MÉNDEZ*

## I. INTRODUCTION: *PEOPLE V. WILLIAMS*

Williams and King were competing for the affections of King's former wife. King drove to his former wife's home to persuade her to accompany him and his two sons on an outing. When King knocked on the door, Williams opened it and told King to stay away from his former wife.

> [Williams] then walked to his own truck and removed a shotgun, which he loaded with two 12 gauge shotgun rounds. [Williams] walked back toward the house and fired, in his words, a "warning shot" directly into the rear passenger side wheel well of King's truck. [Williams] testified that, at the time he fired the shot, King's truck was parked between him and King, and that he saw King crouched approximately a foot and a

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> half away from the rear fender well of the truck. [Williams] further testified that he never saw King's sons before he fired and only noticed them afterwards standing on a curb outside the immediate vicinity of King's truck. King, however, testified that both of his sons were getting into the truck when [Williams] fired.
>
> Although [Williams] did not hit King or King's sons, he did hit the rear tire of King's truck. The shotgun pellets also left marks on the truck's rear wheel well, its undercarriage, and its gas tank.[1]

Williams was charged with one count of shooting at an occupied motor vehicle and three counts of assault with a firearm, one count each for King and his two sons.[2] The trial judge instructed the jury that the crime of assault requires proof of the following elements:

> 1. A person willfully and unlawfully committed an act that by its nature would probably and directly result in the application of physical force on another person; and 2. At the time the act was committed, such person had the present ability to apply physical force to the person of another.[3]

The jury convicted Williams of assaulting King with a firearm, but deadlocked on the remaining counts.[4] Williams appealed on the ground that the instruction failed to correctly define the mental state of assault. The Court of Appeal agreed and reversed his conviction, holding that the instruction was erroneous because it described the mental state as negligence instead of requiring the jury to find that at the time Williams fired the shotgun either his goal was to apply physical force or he was substantially certain that firing the gun could result in applying physical force.[5]

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[1] People v. Williams, 26 Cal. 4th 779, 782–83, 29 P.3d 197, 199, 111 Cal. Rptr. 2d 114, 116–17 (2001).

[2] *Id.* at 783, 29 P.3d at 199, 111 Cal. Rptr. 2d at 117.

[3] *Id.*

[4] *Id.* California law also punishes a "person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel." Cal. Penal Code § 417(a)(2) (Deering 2008 & Supp. 2013). If the firearm is not capable of being concealed, the offense is a misdemeanor punishable in the county jail for not less than three months. *Id.* § 417(a)(2)(B). Williams used a shotgun.

[5] *Williams*, 29 Cal. 4th at 783–84, 29 P.3d at 200, 111 Cal. Rptr. 2d at 117.

# CALIFORNIA LAWYER:

## *Aaron Sapiro and the Progressive-Era Vision of Law as Public Service*

VICTORIA SAKER WOESTE*

Much scholarly attention has been paid to the lawyers who established the profession in California during the nineteenth century. By following the migration of Midwesterners and former Confederate officers to the West after the 1860s, historians have reconstructed the lives and work of the legal and judicial professions in California after statehood. During the Progressive Era, California's lawyers took up the concerns of Progressives nationwide, sanding the sharp corners of industrialism and the economic inequalities that resulted from it. The rights of workers, small-scale entrepreneurs, children, women laborers, and women's right to vote all became central focus points of California politics after 1900. The stories of many lawyers who played a part in transitioning California to this new era of public policy and the new areas of law practice that came with it have gone largely untold. With the founding of the state's first law schools, a generation of home-grown and — trained

* Research Professor, American Bar Foundation. This article is derived substantially from material included in chapters 4, 6, and 9 of Victoria Saker Woeste, *Henry Ford's War on Jews and the Legal Battle Against Hate Speech* (Stanford, Cal.: Stanford University Press, 2012), and is republished here with the permission of the Press.

lawyers were positioned to become the foundation of Progressive Era California.[1]

One such lawyer was Aaron Sapiro, who typified several salient characteristics of this new generation of lawyers. Sapiro is best known as the man who sued Henry Ford for libel in 1927. The case ended in mistrial and an out-of-court settlement; as a result, few people understand not only what the trial was about but what Sapiro had done in his legal career to draw Ford's ire in the first place. For more than a dozen years, Sapiro organized farmers' marketing cooperatives that were designed to provide farmers with the same economic advantages as those enjoyed by labor unions and corporations. Sapiro saw law as a tool to reshape society and to make economic institutions behave rationally. His determination to use law to achieve social change stemmed from an awareness of his own talent as well as an undeniable ability to seize the moment. As he told an interviewer in 1923, "[T]he gift of leadership is not so much a matter of brains as of *intensity*. If you are so completely saturated with anything that you think it and dream it and live it, to the exclusion of all distracting influences, nothing on earth can stop you from being a leader in that particular movement." For Sapiro, what mattered was to have a vision of the world as it ought to be; persuading others was merely a matter of insisting on his vision as against "all distracting influences."[2] This article, in telling Sapiro's life story, reconnects him to his intellectual roots in California's tradition of legal progressivism.

Sapiro's career followed an unlikely route. He was born in San Francisco to Polish immigrants who raised him and seven siblings in desperate

[1] A good example of work on this topic is Molly Selvin, "The Loeb Firm and the Origins of Entertainment Law Practice in Los Angeles, 1908–1940" (unpublished paper on file with author). On nineteenth-century developments in California legal history and the establishment of the legal profession, see, e.g., Gordon Bakken, *Practicing Law in Frontier California* (Lincoln: University of Nebraska Press, 1991); Bakken, *The Development of Law in Frontier California: Civil Law and Society, 1850–1890* (Westport, Conn.: Greenwood Press, 1985); Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891* (Lincoln: University of Nebraska Press, 1991); Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995).

[2] Merle Crowell, "Nothing Could Keep This Boy Down," *American Magazine* (Apr. 1923), 16–17, 136–46, 146.

poverty. His father died in a train accident when Aaron was nine, forcing his mother to send him and most of the Sapiro children to a San Francisco orphanage. After six wretched years, Aaron escaped to Hebrew Union College in Cincinnati, where he attended college and studied for the rabbinate. His orphanage experience seared into him a thorough distrust for authority. Spending time in seminary hardened in him the conviction that organized religion was useless if he were going to change the world. And so with one year left before ordination, he returned to California to enroll at Hastings College of the Law.[3]

During his seminary years, Sapiro encountered new friends who influenced his life in lasting ways. On his summer breaks, he returned to Northern California to visit his mother and teach in synagogues. One assignment placed him in a children's bible class in Stockton, up the Sacramento River Delta from Oakland. Sapiro's teaching position brought him in contact with one of Stockton's most prominent Jewish families, Michael and Rose Arndt. The Arndts had two children: Stanley, a studious boy, and Janet, a girl who was barely ten in 1905 when her parents enrolled her in Aaron's scripture class.[4] Rose Arndt took more than a passing interest in the serious seminarian. She introduced him to Stockton society, broadening his circle beyond the families he met at the synagogue. Soon she invited him to accompany the family on day trips around Northern California. Before long an understanding emerged: Aaron and Janet were betrothed. In 1913, the couple married and settled in San Francisco.[5]

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[3] Victoria Saker Woeste, "Sapiro, Aaron," *American National Biography Online*, April 2004 update, accessed 8 Nov. 2013, http://www.anb.org/articles/11/11-01215.html.

[4] Jeannette Arndt Anderson, interview by author, tape recording, Palo Alto, Cal., 31 Mar. 2005, p. 14 (transcript on file); Janet Sapiro, Certificate of Death, County of Los Angeles, State of California, Department of Public Health, 4 June 1936, no. 7502. Stanley Arndt became a lawyer who wrote an article on agricultural cooperation and practiced law for a time with his brother-in-law. Anderson interview, 7; Stanley Arndt, "The Law of California Co-operative Marketing Associations," *California Law Review* 8 (1920): 281–94.

[5] Anderson interview, 13–14; Linda Sapiro Moon, interview by author, tape recording, Huntington Beach, Cal., 23 Sept. 2002, pp. 4–5 (transcript on file). On the practice of Jewish families betrothing their young daughters through the late nineteenth century, see Sydney Stahl Weinberg, *The World of Our Mothers: The Lives of Jewish Immigrant Women* (Chapel Hill: University of North Carolina Press, 1988), 23–24.

# BOOK REVIEWS

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## *AFTER THE GRIZZLY: Endangered Species and the Politics of Place in California*

PETER S. ALAGONA

Berkeley: University of California Press, 2013. viii, 323 pp.
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Professor Alagona sets the endangered species debate in California in a broad context fleshed out with specific reference to the California Condor, the San Joaquin Kit Fox, the Mojave Desert Tortoise and the Delta Smelt. He persuasively argues that endangered species debates transcend conservation biology and focus on governmental intervention in our market economy, issues of federalism, the role of science in public policy development, and the political economy of regionalism. In the historic process of discourse, habitat was the connective tissue between endangered species and contested places. Habitat was a key concept in conservation biology, law, and politics. In terms of federalism, endangered species illustrated the

expansion of federal governmental intrusion into the wildlife business of the states.

Professor Alagona contextualizes his analysis with the grizzly bear and its demise as well as the rise of conservation biology at the University of California, Berkeley under Joseph Grinnell. Grinnell's Berkeley circle did much to create the profession of wildlife management and the science of conservation biology. Science and policy worked to improve habitat and species preservation until the Endangered Species Act of 1973. Habitat was a means to conservation until environmental activists turned it on its head via litigation. In the hands of the Clinton Administration, "a new model of flexible, collaborative, and proactive management focused on the conservation of ecosystems and habitats." Then, "environmental organizations launched hundreds of lawsuits to force more aggressive implementation." These "lawsuits were beginning to drive natural resources management policy, and endangered species debates that once seemed contained had begun to proliferate and reverberate around the country" (p. 106). One example was the Defenders of Wildlife, Natural Resources Defense Council and the Environmental Defense Fund petition to the U.S. Fish and Wildlife Service to list the desert tortoise as endangered, albeit none of the organizations had participated in The Bureau of Land Management study of the tortoise (p. 162).

Beyond the California endangered species, the listing and delisting process has made national news. The U.S. Fish and Wildlife Service may take steps to remove a species from the list with standards and procedures akin to the listing process. Such actions are fraught with politics, much like the listing process. Most recently, the Rocky Mountain grey wolf was a contested delisting.

Professor Alagona does not explore the reasons for such intervention. They were free riders on the tortoise as were many green organizations on wolves. Many were anxious to cash in on Environmental Species Act litigation under the Equal Access to Justice Act, part of the litigation matrix left unexplored.

Why do lawsuits proliferate? Lowell Baier, President of the Boone and Crockett Club, explained to Wayne van Zwoll, one of America's most visible hunter-conservation advocates, that the Equal Access to Justice Act of 1980 has made it possible for "wealthy nonprofit groups to file round-robin

lawsuits against natural-resource agencies, impeding their work. A dozen such groups have filed more than 3,300 lawsuits in the last decade and recovered over $37 million in litigation costs." Who pays? "The awards come directly from agency budgets. Litigants and their attorneys profit, perpetuating the cycle." Wayne van Zwoll correctly concluded, "Keeping the wolf in court enriches the people responsible for increased wolf predation of big game."[1]

Clearly, litigation had impact beyond the courts and the administrative agencies. Although wolves were not part of Professor Alagona's study, their fate helps explain the mass of litigation in California. For example, the Natural Resources Defense Council, using Earthjustice attorneys, collected $1,906,500 in attorney fees in the delta smelt cases.[2]

Given California's record, Professor Alagona concludes with the prescient wisdom of Aldo Leopold, the wildlife conservation biologist of the University of Wisconsin. Leopold believed "that it takes entire land communities, working together, to achieve a just, prosperous, and sustainable future" (p. 231). California needs "to move beyond the preservation of lands in protected areas to the integration of habitats in shared land communities" (p. 232). This book is a substantial contribution to our understanding of endangered species politics and forms a foundation for future research beyond the state's boundaries.

— *Gordon Morris Bakken*
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[1] Wayne van Zwoll, "Wolf War III: Issue is Cash Cow for Enviros," *Petersen's Hunting* 39:5 (August 2011), 13–15, 15. Bills to change the matrix are already in the congressional hopper. Representative Cynthia Lummis introduced The Government Litigation Savings Act or H. R. 1996 and Senator John Barasso introduced S. 1061 to get the legislative process started in July 2011.

[2] Lowell E. Baier, "Reforming the Equal Access to Justice Act," 38 University of Notre Dame *Journal of Legislation* 1, 44 (2012).

# *FREEDOM'S FRONTIER: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction*

STACEY L. SMITH

Chapel Hill: University of North Carolina Press, 2013. xiv, 324 pp.
Index. Bibliography.
ISBN: 978-1-4696-0768-9

In 1850, as California was being compromised into the Union as a "free" state, the California Legislature passed an Act for the Government and Protection of Indians. The act created a system for indenturing Indian children within the state to white families, compromising California's status as a "free" state. Over the subsequent decade, Californians created a variety of race- and gender-based unfree labor relations. Stacey Smith examines this "history of the unfree West" involving African-American, American Indian, Latin American, and Chinese laborers. In doing so, she challenges many prevailing interpretations of both California and the West in the Civil War era.

California's gold rush turned the state into "an international labor borderlands" (p. 16). Laborers from all over the world migrated to California to mine the potential rewards from California's veins. But the need for labor along with the ease of desertion from employers led to the emergence of a multitude of bound labor systems. Debt servitude, indentured labor, tenant labor, concubinage, and apprentice systems were some of the various forms of unfree labor in California. There was even a brief effort to bring Black slavery to California in the 1850s. California experimented with a fugitive slave law that allowed slaves brought to California before statehood to be taken back to the South. The rise of the California Republican Party by the end of the decade, though, ultimately halted the entrenchment of slavery in the state.

Other forms of unfree labor posed greater problems, both politically and ideologically. Mexican "peones" and Chinese "coolies" were particularly troubling. Largely imagined categories, they "became vehicles through which white Californians interrogated the troubling inequities of

the emerging capitalist economy and the unfreedoms of wage labor." Not only did they represent what wage work could become, but by working for low wages, they could undermine the "rough economic democracy" of white miners (p. 81).

The domestic labor provided by women and children tended to escape the notice of free labor ideology. But Californians attempted to meet the demand for domestic labor in a variety of ways, including capturing, kidnapping, indenturing, and apprenticing Black, Indian, and Chinese children and women. As captured and apprenticed women and children were brought within the household, their exploitation was subsumed under "family relations" instead of labor relations, where male authority was at its apex under law.

Reconstruction affected these relationships in disparate ways. Slavery, of course, was ended with the Reconstruction Amendments. Indian apprenticeship was ended in 1863, although vagrants and convicts remained subject to forced labor regimes. The impact on the Chinese was more ambiguous. Chinese exclusion emerged out of California's Reconstruction experience. Both the Page Act of 1875 and the Chinese Exclusion Act of 1882 grew out of antislavery ideology as they sought to exclude degraded forms of labor like prostitution and "coolieism," which "helps explain how the Republican Party, ostensibly dedicated to equality before the law, could become a major force for Chinese restriction" (p. 229).

Smith's study challenges the portrayal of the American West as a "free-labor landscape" (p. 3), and in doing so makes California's history central to the story of emancipation. California's diversity in the nineteenth century is what the rest of the nation would become in the twentieth, and its experiences a proving ground. One of the forms of labor left out of her story, though, is worth pursuing in more detail: exploration labor. Explorers in the West used a variety of militaristic labor forms, largely for security purposes. Given the inchoate nature of its government, and its official connections to railroads, agriculture, and slavery, the control of labor would seem to have been central to California's state-building process.

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