

VOLUME 10: 2015

CALIFORNIA LEGAL HISTORY



JOURNAL OF THE
CALIFORNIA SUPREME COURT
HISTORICAL SOCIETY

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 ISSN 1930-4943

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

Design and Production: E. M. Holland

Cover Photo: Twenty Founders of the Academy of Motion Picture Arts and Sciences. Courtesy AMPAS. For complete caption, see page 163 in "The Loeb Firm and the Origins of Entertainment Law Practice in Los Angeles, 1908-1940," by Molly Selvin.

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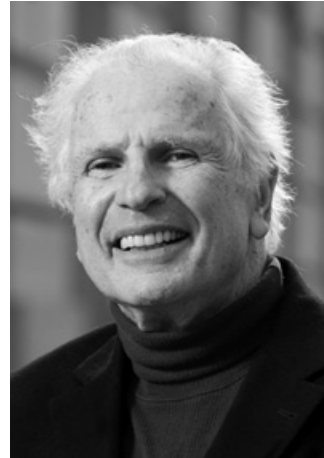
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HONORING JOSEPH R. GRODIN:

The Honoree Speaks

JOSEPH R. GRODIN*

It was the inimitable Selma Moidel Smith, longtime and amazing editor of this publication, who came up with the idea for this *festschrift*, and so when she suggested I should submit something of my own, perhaps by way of supplementing the oral history that was reproduced in these pages in 2008¹ (but based on interviews conducted for the Bancroft Library in 2004²) I could hardly refuse. Anyway, since when does a professor decline an opportunity to get something published?



* This article is one of a group published here on the occasion of the UC Hastings College of the Law Tribute Honoring Distinguished Emeritus Professor of Law and former California Supreme Court Associate Justice Joseph R. Grodin, November 12, 2015.

¹ 3 CALIFORNIA LEGAL HISTORY 1 (2008).

² Interviews were conducted by Leah McGarrigle, an oral historian and former student of mine, in five sessions conducted in the latter part of 2004. The edited transcript is available online or in hardbound manuscript at the Bancroft Public Library.

In the year following my oral history interviews, I retired from fulltime teaching, achieving thereby yet a new title, “Distinguished Emeritus Professor.” This has led to some modest expansion of time for recreational and family activity, though I am sure my wife Janet would say not enough. I continue to teach (though only part time), I continue to engage in (a minimal) amount of ADR work, and I spend, if anything, more time at the computer aggravating my back while writing a variety of things, which I will explain.

TEACHING

Teaching has been an important part of my life since I graduated from law school in 1954. While practicing in a labor law firm headed by Mat Tobriner, later a Court of Appeal and then a Supreme Court justice, I began teaching labor law at UC Hastings as an adjunct professor, and did so for several years. In 1972, after a year at University of Oregon Law School in Eugene, I became a member of the fulltime faculty at UC Hastings, and I have taught there ever since, with time off between 1979 and 1983 for the Court of Appeal and the Supreme Court. I love teaching. I love the interaction with students, and I love sharing with them my love for the law. (Too much love, my high school English teacher would say; I say, too bad!)

I have had the good fortune, over the years, to be able to select my own teaching subjects, reflecting my own interests and values. I began teaching labor law, which is what I knew best, including public sector labor law, which was then a rapidly developing field in which I had been conducting research and writing books (including casebooks) and articles. Some of what I had written seemed actually to have been read by, and had an impact upon, judges — a pleasing rarity for academics. I had always viewed labor unions as essential, not only for the wellbeing of workers, but for the effective functioning of democracy. Sadly, after I began teaching (though I trust not as a result), union organization and membership in the private sector declined precipitously. While unionization in the public sector continued to grow, that too has fallen upon bad times, as some politicians have found it convenient to blame labor for the economic woes of state and local governments. Still, it is an important subject, not only because of the continuing significance of unions and collective bargaining, but also because it lends itself to understanding of issues of federalism and the role

of administrative agencies. It grieves me that labor law is no longer taught in many law schools.

In addition to labor law, I developed and taught the first courses at Hastings in arbitration law, employment law, and employment discrimination law. A bit later I started to teach constitutional law, which had always been an interest of mine, and seminars in judicial process, law and literature, and an experimental seminar in state constitutional law, which as I recall attracted at the time all of four students. For a few years after my retirement I continued to teach constitutional and employment discrimination law, but I soon dropped those large lecture courses in favor of a seminar called, “Current Problems in Constitutional Law.”

Since I was a student in college I have been interested in questions concerning how we can debate questions of right and wrong, good and bad — the sorts of questions philosophers talk about under the heading of moral philosophy. Is there some objective anchor to such questions, or is it all a matter of subjective preferences, like those for flavors of ice cream? When I got to law school I came to see such questions through the perspective of the law. When appellate judges disagree, what is it they are disagreeing about? Is it the case, as (now Chief) Justice John Roberts famously insisted in his nomination hearing, that judges of a high court are simply referees calling balls and strikes? If not, is it appropriate to regard them as super legislators, using legal language to implement their own concepts of morality or public policy? And if neither of those metaphors is adequate to describe what it is that we expect judges to do, if the truth lies somewhere in between, then how should we talk about what they do?

The question is more than academic. The answer (if indeed we can find one) goes to the heart of how the public sees the judicial branch, and it determines (in part) how we ought to select judges, how we should evaluate their performances, and (at the state level) how we decide whether to retain them. It also has bearing upon whether we should treat judges the same as or different from legislators when it comes to campaign solicitations and contributions, attempts to influence their decisions, and limitations on unethical behavior.

Such questions became practically relevant for me when I became an appellate judge, but, like I suspect most judges, I found that the pressure of deciding particular cases left little time for introspection or philosophical

theorizing. It was not until I found myself (and two colleagues) in the midst of a retention election ostensibly aimed at the Court's decisions overturning death penalty judgments that I was forced to confront the tension between what our opponents viewed as unacceptable outcomes and what I saw as principled decision-making. During the campaign I tried to defend that distinction, but apparently without much success.

After the 1986 election I was off the Court and back in academia, with plenty of time for reflection. I began to read extensively about legal theory, to develop my own thinking through articles and a book called, "In Pursuit of Justice," and to stimulate thinking (mine and that of my students) through my teaching.

My current seminar, "Current Problems in Constitutional Law," in addition to considering current and emerging constitutional issues, addresses these sorts of problems. I co-teach the seminar with a sitting judge — for the first few years U.S. District Judge Thelton Henderson and more recently Ninth Circuit Judge Marsha Berzon. For each case we assign one of the students to read the briefs and prepare a "calendar memo" such as a real law clerk might prepare for a court in advance of oral argument. The other students are expected to reply briefly with their own thoughts. Then we discuss and "decide" the case, with the students acting as judges rather than as advocates, which is their typical law school role, and with my co-teacher and me providing questions and commentary. The class never fails to excite me, though I find that I still have more questions than answers.

OTHER ACTIVITIES: MEDIATING, LAWYERING, WRITING

For a while after I left the bench I did a good deal of arbitration and mediation, but that activity has slowed down. I still do a mediation now and then, which I enjoy. I also did some consulting on appellate briefs, but recently only for nonprofits, such as the Employment Law Center (SF Legal Aid Society) and ACLU. On occasion I have argued cases to the Supreme Court or the Court of Appeal, and authored *amicus curiae* briefs, such as in the same-sex marriage cases before the California Supreme Court.

I used to say, when asked to compare being an academic and being a judge, that there are two main differences. One is that as an academic you

get to write about anything that interests you, whereas as a judge you write mainly about the cases you have to decide. The other is that in the case of a judge's writing you can be pretty sure that someone reads it.

Despite uncertainty as to whether anyone is paying attention I have continued to write, for journals and for blogs, sometimes about legal issues that interest me (such as same-sex marriage), sometimes about the nature of judging, but mostly, in recent years, about the state constitution and its proper independent role in the consideration of constitutional claims. This journal has been kind enough to publish a number of my articles concerning the background and interpretation of provisions of the state constitution's Declaration of Rights, and just recently Oxford University Press published a second edition of a comprehensive book on the California Constitution co-authored by me and two colleagues, Professors Darien Shanske and Michael Salerno, with a Preface by Chief Justice Cantil-Sakauye. The first edition (with different co-authors) was published over twenty years ago, and since then numerous amendments and changing interpretations have rendered it virtually obsolete. And who wants to be obsolete?

THE FUTURE

“Those who have knowledge, don't predict. Those who predict, don't have knowledge.”

— Lao Tzu, 6th Century B.C. Chinese Poet

I am most grateful for what life has brought me so far, and I can't predict what it will bring in years to come, but I can say what I would like to have happen. I would like to continue teaching, so long as I am able and Hastings will let me; I would like to continue writing and to voice my opinions where I think they might have some effect; and I would like to remain close to my family and close to nature. Beyond that (oh, and age-appropriate health), I couldn't ask for anything more.

★ ★ ★

HONORING JOSEPH R. GRODIN:

A Tribute to Justice Joe Grodin

KATHRYN M. WERDEGAR*

“What makes great courts is great judges.”

(The Nation, February 19, 1973, p. 237)

The author of this perceptive observation was Joseph R. Grodin, Professor of Law at Hastings College of the Law, University of California, writing more than forty years ago. It was six years before the author himself was to be appointed to the First District Court of Appeal (1979) and, three years later (1982), to the California Supreme Court. Professor Grodin could not then have known that one day he would be among the pantheon of great judges who have made the California Supreme Court a great court.

Labor lawyer, appellate justice, supreme court justice, mentor, scholar, professor, outdoorsman, husband, father, friend — these are the roles that define Joe Grodin, and it has been my privilege to know him in a great many of them. When I was invited to write about Justice Grodin, what first came to my mind were images — visual and mental pictures of experiences

This article is one of a group published here on the occasion of the UC Hastings College of the Law Tribute Honoring Distinguished Emeritus Professor of Law and former California Supreme Court Associate Justice Joseph R. Grodin, November 12, 2015.

* Associate Justice, California Supreme Court.

we have shared that reflect some of his many roles and his personal and intellectual qualities.

Monterey (Monterey County, California), and the State Constitution — Passionate about the California Constitution and with a deep knowledge and love of its origins and history, Justice Joe Grodin swept my husband David and me away from proceedings at the State Bar Convention in Monterey and escorted us to Colton Hall, the site of the first California Constitutional Convention. There we were treated to his scholarly and engaging exposition of the circumstances surrounding the 1849 signing of our first state constitution and vignettes about its original signators, Californios and Anglos both. Concerned that it not be overlooked, before our departure Justice Grodin guided us to the glass case that holds the original Spanish language copy of our first Constitution.

Bolinas (Marin County, California), and the Declaration of Independence — On July 4th of any given year, family and friends of Joe and Janet Grodin join them in Bolinas to enjoy the unconventional and colorful Bolinas 4th of July Parade, and then gather at their weekend retreat to discuss matters frivolous and profound, but most of all to recognize the document whose creation the day celebrates. “When in the course of human events,” Justice Grodin begins, and then engages each guest in turn to read a segment of our founding document. Lively discussion of the meaning of its various declarations ensues, as phrases are examined and debated. In case food for thought is insufficient nourishment, an old-fashioned July 4th barbeque and refreshing beverages are offered as well.

Silver Lake (Amador County, California), and A Hikers Guide — On vacation in Amador County near Carson Pass, staying at Kit Carson Lodge, David and I venture forth to explore the beautiful Silver Lake and its environs. In our day-packs, as essential to a successful outing as our water supply and hiking poles, we put the area’s only authoritative trail guide. This invaluable guide, my husband’s favorite birthday present that year, was written by a frequent Silver Lake visitor and accomplished hiker. Who was the author? Joe Grodin, in his persona of outdoorsman and inveterate hiker of the Sierras. Justice Grodin, with his daughter, researched the trails over many seasons and wrote a little gem of a guidebook simply for the pleasure of others who might seek the beauty and solitude of that special area of California’s high Sierras.

Justice Joe Grodin's Jurisprudence — As a member of the California Supreme Court for the past twenty-one years, I have had many occasions to research and rely on Justice Grodin's scholarship and jurisprudence. A renowned labor lawyer when he was appointed to the Court of Appeal, he authored the landmark *Pugh v. Sees Candy* case (1981) 116 Cal.App.3d 311, which established that a contract of employment, depending on the facts shown, may contain an implied-in-fact promise that the employee would be terminated only for good cause.

On the California Supreme Court his influential decisions touched on varied, often sensitive subjects, such as a therapist's duty to warn a potential victim and her young child of a patient's threat of harm (*Hedlund v. Superior Court* (1983) 34 Cal.3d 695); the conditions under which a guardian or conservator of a developmentally disabled woman can consent on her behalf to surgical sterilization (*Conservatorship of Valerie N.* (1985) 40 Cal.3d 143); the remedy for an agricultural employer's unfair labor practice of firing resident union-affiliated employees and evicting them from their labor camp housing (*Rivcom Corp. v. Agricultural Labor Relations Board* (1983) 34 Cal.3d 743); and the free speech rights of an environmental group advocating a boycott of advertisers in a newspaper whose editorial policies it criticized (*Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188).

In *Isbister v. Boys' Club of Santa Cruz* (1985) 40 Cal.3d 72, involving the then controversial question of whether a private nonprofit boys club could exclude girls, Justice Grodin, writing for the majority over three separate dissents — one claiming the decision would “strain our social fabric and send shock waves through the realm of children's organizations” (*id.* at p. 93) — concluded that the club could not. Reasoning that the club qualified as a business establishment subject to the nondiscrimination provisions of the Unruh Civil Rights Act, the majority held that the club's male-only membership policy “is an arbitrary form of discrimination prohibited by that statute.” (*Id.* at p. 91.)

In a different vein, dealing not with individual rights but procedure — and critical to orderly judicial review — Justice Grodin, expressing the view of a unanimous Court, wrote the landmark opinion of *Palma v. U. S. Industrial Fasteners* (1984) 36 Cal.3d 171. There the Court set forth rules bringing order and restraint to the previously abused practice of granting peremptory writs of mandate in the “first instance,” that is, without prior

issuance of an alternative writ giving the adverse party the opportunity to oppose. Considering the particular document at issue in the case, the opinion observes that it was neither writ nor order, but “a hybrid, unknown to jurisprudential taxonomy.” (*Id.* at p. 182.)

In the early days of rent control, when communities were experimenting with its parameters, Justice Grodin authored two significant opinions, both upholding the constitutionality of the law in question, *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, involving the requirement of a pre-demolition permit before a landlord may level rental units, and *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, concerning an ordinance that required consideration of tenant financial hardship in determining the validity of a rent increase.

Included in his legacy are numerous significant criminal cases, as well. One with far-reaching implications is *In re Lance W.* (1985) 37 Cal.3d 873, concerning whether the electorate could amend the California Constitution by enactment of Proposition 8, the initiative measure known as “Truth in Evidence.” Proposition 8 mandated that no unlawfully seized evidence could be excluded in a California criminal prosecution that would not be excluded under federal law, thus abrogating the broader vicarious exclusionary rule the California Supreme Court had adopted under the California Constitution. Rejecting the argument that Proposition 8 was an impermissible revision of our state constitution, Justice Grodin concluded the electorate had the authority — and the intent — to change the law so that courts could exclude evidence unlawfully seized under either the California or the United States Constitution only if exclusion is compelled under the federal constitution.

In *People v. Cook* (1985) 41 Cal.3d 373, the Court was presented with a case of first impression involving a police helicopter flying over defendant’s property looking for evidence of marijuana cultivation in his enclosed back yard. Writing for the majority, Justice Grodin rejected “the Orwellian notion that precious liberties derived from the framers simply shrink as the government acquires new means of infringing upon them” (*id.* at p. 382), and concluded that “an individual has a reasonable expectation of privacy from purposeful police surveillance of his back yard from the air” (*id.* at p. 382), and in the absence of a warrant, the search was illegal. In words that resonate today — twenty-five years later — Justice Grodin observed

that the case required the Court “to examine the contours of California citizens’ entitlement to be free from the intrusive gaze of the state, in an era when the instruments of surveillance at the disposal of the police are far more sophisticated than our nation’s founders would have dared contemplate.” (*Id.* at p. 375.)

Beyond his jurisprudence, Justice Grodin has thought deeply about the role of judges in our society. His reflections and philosophy on the subject are valuable contributions to that perennial enquiry. His book *“In Pursuit of Justice: Reflections of a Supreme Court Justice”* (U.C. Press, 1989) is a trove of wisdom that I have often consulted. In the conclusion, he states he has “attempted to convey understanding of the sort of principled creativity that . . . is the essence of the judicial function — the exercise of judgment in a disciplined way within a framework of democratic procedures and values.” (p. 188) His own jurisprudence demonstrates that as a member of the California Supreme Court, Justice Grodin exercised his judgment in a creative but disciplined and principled way, leaving a rich legacy of significant decisions that touch the lives of every Californian and continue to guide courts as they confront the issues of the day.

Justice Grodin’s time on the California Supreme Court was cut short by the retention election of 1986, when the electorate failed to retain three of the four members of the Court who were on the ballot. Legal scholars, other judges, court personnel, and knowledgeable observers of the court — attorneys and lay persons alike — all deeply felt the loss. Nevertheless, in his all-too-brief four years on the California Supreme Court, Justice Joseph Grodin distinguished himself as one of the great judges that make a great court.

★ ★ ★

HONORING JOSEPH R. GRODIN:

A “Founding Father” of the Doctrine of Independent State Constitutional Grounds

RONALD M. GEORGE*

When invited to contribute an article to this issue honoring Joseph R. Grodin, my first reaction was to wonder where one would begin in embarking upon this task. With apologies to Elizabeth Barrett Browning, “Let me count the ways. . . .” After all, Joe Grodin has distinguished himself in numerous ways during his long and prolific career: as a lawyer specializing in labor and employment law; as an academic teaching students at the University of California’s Hastings College of the Law and publishing scholarly articles on a broad range of constitutional and other issues related to the administration of justice; as a jurist whose written opinions both as a justice of the California Supreme Court and of the California Court of Appeal have made lasting contributions to the jurisprudence of our state and our nation; as a highly regarded arbitrator and mediator; and as a steadfast advocate for expanding access to justice.

Faced with this daunting range of subject matter, I have chosen to contribute a few pages highlighting Joe’s contributions to an area that, if

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* Former Chief Justice of California.

not overlooked, has not received the attention it deserves — his groundbreaking efforts in the matter of state constitutions and their corollary, the doctrine of independent state constitutional grounds. At first blush this may appear to be a dry, theoretical subject perhaps worthy of academic debate but not imbued with great practical significance. But how wrong it would be to take such a cramped view of this vital and vibrant doctrine that plays such a critical role in protecting the civil rights and liberties of the residents of California and other states where it is robustly applied by the courts.

Joe Grodin has expressed his views at great length regarding the significance of the doctrine, and my review of portions of an interview he gave as part of his oral history,¹ as well as some of his writings on this subject,² has been of great assistance in preparing this article. Joe credits United States Supreme Court Justice William J. Brennan, Jr. (who served previously as a justice of the New Jersey Supreme Court), Oregon Supreme Court Justice Hans A. Linde, and California Supreme Court Justice Stanley Mosk for being instrumental in developing the doctrinal foundation for this area of constitutional law. I would add Joe's name as the fourth in this pantheon of Founding Fathers.

Joe Grodin's thesis, that state constitutions occupy — and should occupy — a crucial role in our nation's jurisprudence, is premised initially on historical chronology. Each of the original thirteen states adopted a state constitution before the Constitution of the United States and its Bill of Rights were ratified. The first Constitution of California was adopted subsequent to the federal Bill of Rights as the result of our state's 1849 Constitutional Convention, and the second (and current) constitution was adopted following our 1878–1879 Constitutional Convention. Nonetheless, as Joe Grodin has observed, “At that time, the provisions of the

¹ *Oral History: Joseph R. Grodin, Professor of Law and Supreme Court Justice*, conducted by Leah McGarrigle, Regional Oral History Office, The Bancroft Library, University of California, Berkeley (2008) 3 California Legal History 1; specifically, Interview No. 4 (November 23, 2004), pages 97–123.

² Joseph R. Grodin, *The California State Constitution and Its Independent Declaration of Rights* (Fall/Winter 2014) California Supreme Court Historical Society Newsletter, pages 13–14, available at <http://www.cschs.org/wp-content/uploads/2014/05/2014-Newsletter-Fall-CA-State-Constitution.pdf>; Joseph R. Grodin, In Pursuit of Justice: Reflections of a State Supreme Court Justice (1989) pages 123–130.

federal Bill of Rights did not apply to the states, so . . . the California Constitution was the primary, if not the only, protection California[ns] would have against abuse of power by the state and local governments.”³ A 1974 amendment to the California Constitution significantly reinforced the independent nature of the state charter by providing, “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” (art. I, sec. 24.) But both prior to and subsequent to the adoption of this constitutional amendment, the California courts had begun to follow an independent approach in viewing the federal constitution as establishing a floor (or minimum level) of protection of constitutional rights for Californians, while interpreting companion provisions of the state constitution as constituting a ceiling of additional constitutional protection.

In *People v. Cahan* (1955) 44 Cal.2d 434, California’s high court, six years before the nation’s high court came to a similar conclusion based on the federal constitution, held that the state constitutional prohibition against unreasonable searches and seizures barred the admission of improperly obtained evidence in a criminal proceeding. Despite federal constitutional law to the contrary, the California Supreme Court held that the state constitution’s ban on double jeopardy did not permit a defendant in a criminal case to be retried after a mistrial granted on the trial court’s own motion (*Cardenas v. Superior Court* (1961) 56 Cal.2d 273). In a decision later overturned by voter Initiative, the state’s high court invalidated the death penalty as violative of the state charter’s ban on “cruel or unusual punishment.” (*People v. Anderson* (1972) 6 Cal.3d 628.) That Court also took a broader view of a criminal defendant’s “Miranda rights” under the California Constitution than that accorded by the United States Supreme Court under the federal constitution (*People v. Disbrow* (1976) 16 Cal.3d 101). And the Court has interpreted the state’s constitutional protection of free expression as providing a broader level of protection than that accorded by the First Amendment. (See, for example, *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899.) The California electorate’s 1972 addition of a specifically worded constitutional right of “privacy” (art. I, sec. 1), which does not appear in the federal constitution and only has been

³ “The California State Constitution,” *id.* at 13.

held by the courts to be implied in that document, has given rise to a variety of constitutional protections recognized by the courts of this state.

As California Chief Justice Tani Cantil-Sakauye has noted, notwithstanding the Supremacy Clause of the United States Constitution, California courts consider themselves charged with interpreting state constitutional provisions in a manner independent of the interpretation given to comparable provisions of the federal document, even when the state and federal charters are identically or similarly worded. In doing so, our courts give respectful consideration to the rulings of the federal high court, the lower federal courts, and the courts of other states, but are not bound by them.⁴ Lest the decision of a state court not to follow the lead of the federal high court on a given issue be considered a negative manifestation of “judicial activism,” Justice Grodin points out that Chief Justice William Rehnquist’s opinion for the Court in the *Pruneyard* case, “holding that a shopping center is not subject to the First Amendment[,] in no way deprived California of the right to adopt in its own constitution ‘individual liberties more expansive than those conferred by the Federal Constitution.’”⁵

Joe Grodin credits Hans Linde with developing an analytical approach to constitutional interpretation that applies the concept of judicial restraint to the resolution of constitutional issues, and Justice Stanley Mosk for being a leading advocate on the California Supreme Court for that approach. Judicial restraint, of course, traditionally requires courts to resolve issues on statutory or other non-constitutional grounds, if possible, without reaching the constitutional issue. Similarly under Linde’s approach, judicial restraint requires that if the constitutional issue must be reached, courts ordinarily should attempt to resolve it on state constitutional grounds before, if necessary, reaching the federal constitutional issue. Although Grodin confesses to being initially “resistant” to Linde’s approach, he became a self-described “convert” as he observed the ebb and flow in the rulings of the United States Supreme Court over the years and realized the importance of not tethering the decision-making of state high

⁴ Chief Justice Tani Cantil-Sakauye, *The Truly Independent Nature of the California Constitution* (Fall/Winter 2014) California Supreme Court Historical Society Newsletter, pages 15 and 26, available at <http://www.cschs.org/wp-content/uploads/2014/05/2014-Newsletter-Fall-Truly-Independent-Constitution.pdf>.

⁵ *In Pursuit of Justice*, *supra* note 2, at 125.

courts on vital issues of constitutional rights and liberties to every shift in course instituted by a changing composition of the nation's high court.⁶ [6]

Having authored opinions for the California Supreme Court that relied upon independent state constitutional grounds, for example decisions involving the right of reproductive choice and marriage equality for same-sex couples,⁷ I consider myself and my judicial colleagues to be greatly indebted to Justice Grodin, whose writings have afforded recognition to the importance of independent state constitutional grounds as a legitimate basis for judicial decision-making.

Justice Grodin observes that the “reliance of state courts on independent state constitutional grounds as a basis for decision has had a checkered history;” and that “[f]ew courts are consistent in the manner in which they invoke that doctrine, and this inconsistency tends to detract from the doctrine’s integrity.” With his customary modesty, he poses the possibility that he may not have been “blameless” in this regard.⁸ Unfortunately, I must join him in my own *mea culpa*.

But, as noted by Justice Brennan in his Forward to one of Justice Grodin’s books,⁹ given the crucial role played by state courts in resolving the vast majority of the cases filed each year in the United States, as compared to the relatively small number decided in federal courts, it is essential that appropriate attention be given to the vital role of state courts in shaping constitutional and other law. Joe Grodin’s persuasive exhortation to judges and lawyers that they accord consistent and due recognition to independent state constitutional grounds in the development of the law continues to serve as one of his most significant contributions to the American system of justice.

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⁶ *In Pursuit of Justice*, *supra* note 2 at 123.

⁷ *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307; *In re Marriage Cases* (2008) 43 Cal.4th 757.

⁸ *In Pursuit of Justice*, *supra* note 2 at 129, 130.

⁹ *In Pursuit of Justice*, *supra* note 2.

HONORING JOSEPH R. GRODIN:

Tribute to a Colleague

CRUZ REYNOSO*

Justice and Professor Joseph R. Grodin and I share family backgrounds. He's one year older than I am. Both of us had parents who immigrated to the United States, his father from Lithuania and my parents from Mexico. And we both considered Justice Mathew Tobriner a model. I had the privilege of replacing Justice Tobriner on the California Supreme Court.

Our lives diverged. Justice Grodin continued his education. I took two years to serve as a Counter Intelligence Corps agent with the U.S. Army. He graduated from law school in 1954 and I in 1958. After law school, he joined Attorney Tobriner's law firm and I accepted a position in Imperial County in the small law firm of State Senator J. William Beard, as his part-time assistant and part-time associate in the law firm.

It was not until Justice Grodin's appointment to the Agricultural Labor Relations Board that I became acquainted with his work. When the ALRB was formed I was a law professor at the University of New Mexico, in

This article is one of a group published here on the occasion of the UC Hastings College of the Law Tribute Honoring Distinguished Emeritus Professor of Law and former California Supreme Court Associate Justice Joseph R. Grodin, November 12, 2015.

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Albuquerque, and I returned to California in 1976 to assume a position as associate justice on the Third District Court of Appeal. In 1976, he was appointed an associate justice by the same governor, Jerry Brown, to the First District Court of Appeal. In 1979, it was in our capacity as justices of the Courts of Appeal that I got to know Justice Grodin well. We had occasion to sit with the California Supreme Court with Chief Justice Rose Bird on several occasions, and once or twice on the same case.

Governor Brown elevated me to the California Supreme Court in March of 1982 and elevated Justice Grodin at the same time to presiding justice of Division Two of the First District. Later in 1982, Governor Jerry Brown elevated Justice Grodin to the California Supreme Court. Governor Jerry Brown had an extraordinary opportunity to have appointed six of the seven justices of the Supreme Court when he left office.

I appreciated Justice Grodin's role as a fellow justice on the Supreme Court. He and I were generally in the majority in the cases we heard. However, in one case, I was a lone dissenter. I believed that, since the issue was equitable, we had a duty to decide the case. All other justices felt the decision should be left to the Legislature. Justice Grodin wrote a concurring opinion agreeing with the issue I had raised in my dissent, but nonetheless agreeing with the majority that the Legislature should act. I appreciated his gesture which made it appear that it was a five-to-two decision rather than a six-to-one. It made me look better.

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HONORING JOSEPH R. GRODIN:

*Hercules in a Populist Age*¹

HANS A. LINDE²

A preoccupation with judges and judging has marked American views of law at least since Justice Oliver Wendell Holmes of Massachusetts made the prediction of a judicial decision the definition of law itself.³ Unhelpful as Justice Holmes' definition is to appellate judges, the choices in decisions and in styles of explanation that our system leaves open to courts justify this otherwise rather improbable interest in judges.

Prior to their appointments to the Supreme Court, however, both Justices Holmes and Benjamin Cardozo focused American jurisprudence on the judicial function in common law appeals in state courts. They wrote at a time when explicit, contentious, and frequently amended legislation

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Editor's Note: In response to the invitation to contribute to this special section, Justice Linde offered the following review of Joseph R. Grodin's book, *In Pursuit of Justice: Reflections of a State Supreme Court Justice* (Berkeley: University of California Press, 1989), first published at 103 HARV. L. REV. 2067 (1990) and reprinted here by kind permission of Justice Linde. — Selma Moidel Smith.

² Senior Justice, Oregon Supreme Court (retired).

³ See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

for civil and criminal liability was exceptional and constitutional law was marginal to legal theories. More recently the focus both on judicial action and on personal reflection has shifted to the federal bench and its public law agenda. In the states, too, most major social problems long have required not judicial but legislative solutions that often involve fiscal resources; not surprisingly, statutes increasingly occupy the attention of modern appellate courts.

Justice Joseph R. Grodin's slim and eminently readable account of his own career, *In Pursuit of Justice*, is an unusually valuable variation on previous reflections by appellate judges. One reason for its interest is the scene of Grodin's experiences: the California courts, which, like all state courts, span the whole range of common, statutory, and constitutional law. California's courts comprise the nation's largest judicial system. Over 900 California judges on general jurisdiction courts dispose of about 2.3 million nontraffic cases a year,⁴ compared to the approximately 213,000 cases⁵ handled by the 1,218 federal judges and magistrates in article III courts.⁶

The range of issues that California's and other states' courts face makes the agenda of the United States Supreme Court seem narrow and specialized by comparison, as of course the constitutional structure made it. As Justice Brennan stresses in the book's foreword, state courts have the final word on most private law issues, from property and commercial transactions to family relationships and personal injuries (pp. xi-xii). State courts handle issues of state and local public administration, such as education, property taxation, land use, election laws, and "home rule," that have no federal equivalent. Yet state courts also are responsible for the same large issues that have held center stage for a generation — due process, equality, privacy, freedom of expression and religion — either under the state or the federal constitution. The agenda facing courts like California's encompasses both the old jurisprudence and these contemporary concerns.

⁴ See 1987 CONFERENCE OF STATE COURT ADM'RS & NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANN. REP. 88, 116, 222. If traffic and other minor violations in courts of limited jurisdiction are counted, the California statistics are 1669 judges and 15.2 million total dispositions. See *id.*

⁵ See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1989, at 179 (109th ed. 1989).

⁶ See 1988 DIRECTOR OF THE ADMIN., OFFICE OF THE U.S. COURTS ANN. REP. 53, 55 (compiling 1987 statistics for authorized judgeships and total magistrate positions).

The California Supreme Court in the period before and during Grodin's tenure tackled both parts of this wider agenda with energy, style, and a sense of national leadership.

In Pursuit of Justice touches on the California court's creativity in expanding enterprise liability in favor of consumers and employees.

The court used doctrines of strict tort liability, warranty, and implied covenants but also called for balancing policy considerations based on relative ability to avoid, bear, or insure against losses — an approach for which Grodin's enthusiasm exceeds mine.⁷ But the book is not the California version of *The Nature of the Judicial Process*. In two chapters, titled "Common Law" and "Do Judges Make Law?," Grodin introduces readers to the classic themes most familiar to judges and law students, but he is not writing as a theorist or for theorists. Instead he offers something in shorter supply: a thoughtful, articulate, and jurisprudentially sophisticated professional's firsthand account of gaining, performing, and eventually losing judicial responsibility in practice.

A graduate of Yale Law School and the London School of Economics, Grodin joined and soon headed the San Francisco labor law firm of Mathew Tobriner, who preceded him to the California Supreme Court. Grodin briefly served on Governor Jerry Brown's Agricultural Labor Relations Board, and soon thereafter Tobriner persuaded Brown to appoint Grodin to the state court of appeals. In 1982, Brown promoted him to the California Supreme Court. Since his 1986 reelection defeat, Grodin has turned to his original choice of career, teaching law.

Except for this last transition, the bare biographical facts might equally describe a highly qualified appointee to the federal bench, who would thereafter spend a productive and uncontroversial career on the Ninth Circuit, exercising judgment within the verbal bounds set by the United States Supreme Court in federal cases and the opinions of state courts in cases under state laws. What distinguishes Grodin's story from the professional memoirs of a federal judge is the tension between judicial institutions and popular passions that characterizes many elective state courts and that ended Grodin's judicial career.

⁷ For one of our discussions of judicial method, see *THE COURTS: SHARING AND SEPARATING POWERS* 42–47 (L. Baum & D. Frohnmayer eds. 1989).

California in 1934 was the first state to replace competitive election of appellate court judges with gubernatorial appointment followed by periodic retention elections, part of a proposal made by the American Judicature Society (p. 165). It rejected — rightly in Grodin’s view and mine — the Society’s plan to limit a governor’s appointments to a list of consensus choices of a commission, which could be expected to pick traditional over unconventional nominees, and provided instead for confirmation of the governor’s appointees by a commission composed of the chief justice, the attorney general, and the senior presiding justice of the appellate courts. The system has not always been unpolitical; in 1939 a conservative attorney general, Earl Warren, blocked confirmation of an eminent Berkeley professor, Max Radin, for alleged left-wing sympathies, leading to the appointment of his colleague Roger Traynor. But Grodin had no difficulties winning confirmation to the [Court of Appeal] and later to the Supreme Court, supported even by Attorney General George Deukmejian, who later as governor campaigned for the defeat of his predecessor’s appointees.

The final chapter of *In Pursuit of Justice* tells the story leading to the 1986 vote that ended Grodin’s service on the California court along with that of Chief Justice Rose Bird and Justice Cruz Reynoso. Grodin’s account is not detailed, but some of the background of that cataclysm can be found in Preble Stoltz’s *Judging Judges*,⁸ a critical account of the period following Chief Justice Bird’s appointment in 1977 and of an ill-advised, lengthy, and needless commission investigation of political charges against the California Supreme Court while Grodin was still on the lower court. Grodin does mention that friends of Governor Brown and Rose Bird wished that Brown had started her as an associate justice, but the book does not speculate what the consequences might have been if, for instance, Justice Stanley Mosk, a former trial judge and attorney general, had become chief justice. A chief with longer judicial and political experience might have known enough to shrug off press rumors or simply deny their innuendo, and also could have rallied the state’s judges and the legal profession to the defense of an independent judiciary. To thrust Jerry Brown’s rather demonstratively chosen chief justice into that role was no fair test of her judicial potential. The

⁸ See P. STOLTZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* (1981).

California experience makes the case for leaving the choice of a chief justice, at least where the court has a genuinely nonpartisan tradition, to the justices themselves, who best know each others' talents and the demands of the job.

Although acknowledging that personalities matter, Grodin recognizes that the future of his court was decided by larger social developments, specifically by the shift of the public agenda to criminal law enforcement and the death penalty. In other times and other places, the fate of elected judges may have turned on passions aroused by farm foreclosures, by labor strife, by school desegregation and busing, or simply on partisanship or the organized efforts of the personal injury plaintiffs' and defense bars. In California, votes against Supreme Court judges sharply increased in 1966, after the court struck down a popularly initiated constitutional amendment barring fair housing laws as contrary to the federal Fourteenth Amendment, a decision which was later affirmed by the United States Supreme Court.⁹

During recent years the dominant focus of judicial elections, at least in the western states, has been on public expectations that the judge will function as part of the criminal justice system rather than as an umpire between the state and the accused. For state supreme courts, this means a focus on their interpretations of constitutional guarantees, most of which exist to protect individuals against government officers in pursuit of crime. In this setting, majoritarian democracy, the independence of elective courts, and the fragility of state constitutional law intersect. For good reasons, these themes occupy the final chapters of Grodin's book, and they deserve the attention of constitutional theorists, whose view of "countermajoritarian" judicial review (as of all constitutional problems) is singlemindedly fixed on the lifetime federal Supreme Court.

In 1972, the California Supreme Court held the death penalty to be contrary to the state's guarantee against cruel or unusual punishment.¹⁰ Also during the 1970s the court sometimes applied the exclusion of evidence under the state's constitutional restraints on police arrests and searches more strictly than federal decisions under the corresponding

⁹ See *Mulkey v. Reitman*, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), *aff'd*, 387 U.S. 369 (1967).

¹⁰ See *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

Fourth Amendment. Conservative California politicians seized upon “law and order” as a potent political issue, as candidate and President Nixon did nationally. Unlike Nixon, however, they could translate counter-libertarian populism into direct action. California not only has elective judges; it also allows amendment of its constitution by a simple majority of the votes cast on a proposal placed on the ballot by an initiative petition. In this manner Californians amended their constitution in 1972 to reinstate the death penalty and in 1982 to place in the constitution a clutter of specific procedural details under the collective heading “Victims’ Bill of Rights.” Similar initiatives later were adopted in Oregon. Ironically, old-line legislative institutions were more protective of people’s long-term constitutional rights than populist majorities eager to sacrifice their rights to the cause of punishing criminals. Grodin notes the destructive effect that the obligation to review every death penalty case has had on the California and other state supreme courts’ important work in other areas (p. 101). Moreover, as these constitutional initiatives passed, the margin by which California Supreme Court justices won retention elections steadily declined, until Bird, Reynoso, and Grodin lost their judgeships in a 1986 campaign in which the death penalty was the centerpiece.¹¹

In his chapter on judicial elections and elsewhere, Grodin reflects on the conundrum of judicial “accountability” with characteristic objectivity and good sense.¹² One may, of course, observe that any kind of election inevitably politicizes the courts to some degree and that judges whose opinions, like the California courts’, proudly embrace the realists’ preferred style of explicit policy-making should not be surprised to have their policy choices challenged much like any legislator’s. Indeed, as Grodin reports (pp. 175–76), California politicians (including Governor Deukmejian and other lawyers) advised people to vote for or against judges on the basis of

¹¹ Elsewhere Grodin has written that “examination of the 1986 California retention data led to the conclusion that Californians were almost exclusively concerned with the substance of the judge’s decisions, particularly in death penalty cases and criminal cases,” citing an exit poll showing that sixty-six percent of those who voted against Rose Bird did so because she was too “soft on crime” and sixty-four percent because they “did not like her position on the death penalty.” Grodin, *Developing a Consensus of Constraint: A Judge’s Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 nn.29–30 (1988).

¹² See, e.g., *id.* at 1982–83.

agreement or disagreement with the court's decisions, and many voters who paid lip service to an independent judiciary also agreed with that advice. This view of "accountability" implies, among other things, that judges and judicial candidates must be free to state their views on controversial issues short of the point of disqualification from a concrete case. The Oregon Supreme Court some years ago amended the judicial canon accordingly.¹³

But more is wrong with judicial elections than the effect of anticipated or subsequent popular reaction on a court's independent judgment. One thing wrong, as Grodin found to his dismay, is the financing of judicial election campaigns, a process that Grodin calls "one of the worst experiences of my life" (p. 174). The groups that targeted the three justices for defeat spent more than \$7 million on a media campaign, much of it from economic interests for which the emotional issue of the death penalty served as a smokescreen for objections to California's liability case law. The less than \$1 million raised for Grodin's campaign is by California standards a trivial sum for a statewide election. But there is nothing trivial about a judicial candidate's need to solicit such sums for a judicial office from lawyers and interest groups whose identities are known to the candidate and reported in campaign records.

Some see in the funding of election campaigns a more specific threat to judicial independence than in the judges' fear of voters' opinions. But campaign fundraising also reveals the ironies of pursuing reform simultaneously through abstention and disclosure: judges may not personally ask for campaign contributions, but they must accurately report and therefore know these contributions, and it is common courtesy to thank the contributors. I have heard judges agonize whether to disqualify themselves because a litigant's lawyer raised funds for their campaigns; from the perspective of a judge's colleagues, recusal to avoid an "appearance of impropriety" sometimes looks easier than working on the case. Whether fundraising by lawyers for a judge's campaign leaves with the donor or the judge any implied expectation beyond fair and conscientious performance depends on a state's political and professional culture more than on general theories.

¹³ See Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2001, 2005–06 (1988).

Grodin rightly keeps his eye on the larger question of the voters' capacity to assess a judge's, particularly an appellate judge's, performance by criteria other than each voter's agreement or disagreement with the judge's "voting record" in controversial cases (p. 176), and he concludes, as others have, that popular election campaigns are too high a price to pay for periodic review of judicial performance.¹⁴

In Pursuit of Justice is neither an essay on modern jurisprudence for professionals nor an autobiographical apologia. In 188 pages of deceptively simple prose, written from the perspective of a sophisticated participant, the book succeeds in sketching the role, the work, and the political setting of an important, uniquely American institution that academics and the national media often dismiss as a lesser and disorderly adjunct of the nation's real judicial system — that is to say, the federal courts. Addressed to the lay reader (which ought to include first-year law students), *In Pursuit of Justice* particularly should be read and used by teachers of government, social studies, or journalism as an introduction to the world of appellate courts. The book's most important and disturbing question is left implicit: what a system that sacrifices the judicial service of an exceptionally qualified, thoughtful, and dedicated jurist like Joseph Grodin to the ambitions of politicians and the heavily financed emotionalism of a plebiscite tells us about our views of law and of a judge's role.

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¹⁴ Grodin has written:

These are the special risks to the integrity of the courts and the judicial function that are likely to be posed by a judicial election campaign that is conducted in accordance with the premise that judges are nothing but politicians running for office. Is there any way to have elections and avoid that risk? I am dubious. So long as there is money to be made in election campaigns by professional consultants, and so long as the thirty second television spot continues to be the most effective means of communicating campaign arguments, any prospect of debates focused on appropriate criteria seems unlikely. If this looks like an argument for doing away with judicial elections altogether, I plead guilty.

Grodin, *supra* note 11, at 1981. For further discussion of judicial elections, see Feerick & Vance, *Becoming a Judge: Report on the Failings on Judicial Elections in New York State*, 9 PACE L. REV. 199, 202 (1989); and Hill, *Comments on Thompson and Observations Concerning Impartiality*, 61 S. CAL. L. REV. 2065 (1988).

HONORING JOSEPH R. GRODIN:

The Roads Taken and Thoughts about Joe Grodin

ARTHUR GILBERT*

The exceptional Joe Grodin. On the one hand, he is the reflective scholar, the inspiring professor, the discerning adjudicator, the insightful philosopher, the prolific writer. On the other hand, he is the analytical lawyer, the tough negotiator doing battle in the rough-and-tumble world of labor relations. And on the other hand, he is the explorer in nature's wilderness, nourishing his soul in the surroundings of towering mountains, rippling rivers, and soothing forests. Wait a moment . . . that's three hands.

But that proves my point. There is nothing ordinary about Joe Grodin. He is *sui generis*. Does anyone know a philosopher who helped draft a city's plumbing code? The plumbers and pipe fitters of San Francisco can thank Joe Grodin.

Joe has managed to keep in homeostatic balance his many interests despite Governor Jerry Brown's intrusion on two occasions. The governor interrupted Joe's commune with nature in 1975 to appoint him to the newly

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formed Agricultural Labor Relations Board. At the time Joe and his wife, Janet, were backpacking in Garibaldi Provincial Park in British Columbia. It has been reported that The Royal Canadian Mounted Police were sent to find the Grodins. At the campsite Joe was reading from Lord Byron's *Childe Harold's Pilgrimage*,

“There is pleasure in the pathless woods,
There is a rapture on the lonely shore,
There is society where none intrudes,
By the deep Sea, and music in its roar:
I love not Man the less, but Nature more”

Just then, a Royal Canadian officer approached and said, “Mr. Grodin, I presume?”

In 1979, the governor once again intruded during a sojourn with nature. Joe and Janet were preparing for a raft trip down the Colorado River during a trip to the Grand Canyon National Park. The governor was trying to reach Joe. An appointment to the Court of Appeal as an associate justice was in the offing. Great timing, Jerry. A telephone call to the local hotel where they were staying confirmed the governor's wishes. Joe and Janet then rafted down the Colorado for a week smiling all the way.

It occurred to me that, right after Jerry Brown appointed me to the Los Angeles Municipal Court over forty years ago, I also took a rafting trip down the Stanislaus River. Then, we could experience white water, roaring and frothing in some parts of the river, and then spreading out in a calm blanket of serenity in other parts. Perhaps that mutual appreciation for the outdoors created a bond.

A short time later, and in quick succession, Joe was appointed the presiding Justice of Division Two of the First Appellate District and, shortly after that, to the California Supreme Court. Either Joe had less time for hiking, or the governor's timing was better, but, on both occasions, he was readily available for the governor's call. That call could come at any time during the day or night. Perceptive potential nominees knew to keep their phone lines free during the final days of Jerry Brown's first administration.

I first met Joe the morning of December 27, 1982, the date of our mutual confirmation hearings. Joe and I were both nominees, he for the California Supreme Court, and I for the Court of Appeal. There were numerous

hearings scheduled that day for nominees to newly created positions on the Court of Appeal. The attorney general at that time was George Deukmejian, one of three members who sat on the Commission on Judicial Appointments. The other members were the Chief Justice and the most senior presiding justice of the particular district involved. The atmosphere was tense. Deukmejian voted against some of the nominees.

I suspect the nominees who received a “thumbs down” from the attorney general were those who had refused to answer a series of written questions he had sent them in advance of the hearings. Some of us responded to the questionnaire with a respectful explanation why we thought it would be inappropriate, if not ethically improper, to answer a few of the questions.

I do not know if Joe received such a questionnaire, but the vote for his confirmation was unanimous. No wonder. In his previous confirmation hearings, he had received a unanimous vote, and he had proven to be a brilliant justice on the Court of Appeal. His balanced point of view, his respect for precedent, his sound judgment and carefully crafted opinions impressed all the members of the commission.

We congratulated each other on our mutual confirmations and, through a smile and a wink, gave each other a mental high five.

During Joe’s short judicial career, he made a significant contribution to our jurisprudence. A few examples include: *Pugh v. See’s Candies, Inc.* (1981) 116 Cal.App.3d 311, a beautifully crafted opinion which established that so-called “at-will” employment agreements can be wrongfully terminable. My friend Professor Christopher Cameron pointed out in his, “Essay, No Ordinary Joe: Joseph R. Grodin and His Influence on California’s Law of the Workplace,” that Joe drew upon “well established doctrines of contract law in rejecting” what had been the “conclusive presumption of at-will employment.” (52 Hastings Law J. 253 at 266, Jan. 2001)

Joe wrote important opinions in other areas of the law. On the Supreme Court, he authored *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, which established the Court’s obligation to give proper notice before issuing a peremptory writ in the first instance. This decision has been cited over 1,000 times. No doctrinaire liberal as some have mischaracterized him, he wrote *In re Lance W.* (1985) 37 Cal.3d 873, establishing that the voter initiative, Proposition 8, which abrogated California’s “vicarious exclusionary rule,” did not violate equal protection.

His only dissent on our high court was in *People v. Overstreet* (1986) 42 Cal.3d 891. Joe disagreed with the majority who had reversed an enhanced sentence for a defendant who had committed a new crime while he had been released on his own recognizance. Joe's dissent emphasized that the purpose of the Penal Code section at issue was to "impose an increased sentence upon persons who commit additional crimes while released on bail or own recognizance." (P. 903) Conservative voters who voted not to confirm Joe, along with Justice Reynoso and Chief Justice Bird, apparently overlooked this case.

In the famous *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, he established methods for courts to use in determining whether settlements in civil cases involving multiple parties meet the legal standard of good faith.

Joe loved oral argument. My wife, Barbara, and I can attest to that, not as litigants, but as dinner companions. Dinner with Joe is an adventure, filled with enlightenment and good-natured give and take. In comparison, the acclaimed movie, *My Dinner with Andre*, is a tedious bore. Although the atmosphere was always friendly and relaxed, my mind stood at attention.

Many of these dinners occurred at the home of Professor Herb Morris. Herb and his wife, Margie, prepared gourmet meals. It was usually during dessert that we began a lively conversation covering the arts, literature, philosophy, politics, and even the law. Joe's wife, Janet, a talented and well-known artist, is, like her husband, warm, gracious, and unpretentious.

During one of our early dinners, Joe said he was thinking about writing a law review article about the California Supreme Court's practice of depublishing certain Court of Appeal opinions. I was not shy in expressing my distaste for what I thought to be an odious practice. I looked upon it as an illegitimate way our high court controlled its case flow.

Joe wrote his article, "The Depublication Practice of the California Supreme Court," 72 Cal. L. Rev. 514 (1984). In typical Grodin style, he looked at the practice from all sides. He noted its shortcomings and candidly admitted it caused him discomfort. He ended his article with a tepid endorsement. "[I]f the choices are to grant a hearing or to deny and leave published an opinion that could lead to compounded error, the depublication alternative is preferable, though certainly not ideal." (P. 528) I hope that is a sign he will not vote to depublish this piece I am writing about him.

Joe writes so persuasively that his law review article almost convinced me that depublication can have a salutary effect. But I credit Joe's article with launching my 27-year career as a columnist for the *Daily Journal* legal newspaper. My first column entitled "It Never Happened" was a protest against the depublication rule. I guess the Supreme Court did not read it, and I suspect Joe is still not keen on the practice. Currently, depublication is used much less than in the past.

Joe's influence extends to some of the most unexpected places. My colleagues in my division of the Court of Appeal and I visited Cuba in early 1991. I had finished my drink at the La Bodequita bar where Hemingway drank and swore and drank some more. And I swore, a happy swear under my breath and made my way back to the hotel where I climbed the well-worn marble stairs to the veranda and sat in a wicker chair, comfortable, but not too comfortable, and looked up at the trees in front of the veranda where the wind gently touched the branches and let my mind run with the bulls when a hotel employee interrupted and said good naturedly, "Buena suerte viejo, she is here, La Señora is here to see you."

She stood in front of me, shielding me from the glare of the street, white from the sunlight. "Señor Juez," she said. "I have come to interview you for my radio show."

Her first question shook me out of my reverie.

"Do you know my favorite professor, Joseph Grodin?"

"You know Joe?" I asked in astonishment. Her equally astonished response was, "You know Joe?"

I began interviewing her. She had been a student of his at Hastings Law School. She practiced law for a while, and then married a Cuban and moved to Havana. "Professor Grodin taught me to think deeply about the law and how it can effect change in a civilized society," she said. "His class was fun and stimulating. He is the best." She turned off the recorder and told me she had had enough of Cuba and was returning to California. I was offered her job on Cuban radio. I turned it down. "Viejo," indeed.

Like the young interviewer, we are all enriched by the wisdom of Joe Grodin. His books and articles challenge us and compel us to see issues from a variety of viewpoints. No doubt that broad approach to deciding issues was influenced by the work of the philosopher and logician Morris Cohen. For Joe, Cohen's core message is that the true liberal always keeps

an open mind and is open to the possibility that one's own opinions could be wrong and other opinions could be right.

This approach is not advised, however, for those of you who read Joe's *High Sierra Hiking Guide* that he wrote with his daughter, Sharon. Have it handy while you hike the Sierras. You will not lose your way.

Joe has mentioned that certain exceptional jurists have been interested in broad philosophical issues. These include his mentor, Mathew Tobriner, and Benjamin Cardozo, Oliver Wendell Holmes, William Brennan, and Richard Posner. I would add Joe himself to this impressive list. And, yet, despite the depth of his academic credentials, I think Joe would agree with John Lubbock's insight, "Earth and sky, woods and field, lakes and rivers, the mountain and the sea, are excellent schoolmasters, and teach some of us more than we can ever learn from books."

Robert Frost's *The Road Not Taken* is a problematic poem often misinterpreted. The speaker looks into the future and sees himself reflecting back on a more recent past, if not the present. He misinforms us

“. . . with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I —
I took the one less traveled by”

Even the most adept at statutory interpretation will not have an easy time with Frost's mischievous use of language. But however one may interpret this masterful poem, it is a good reference point when we think of Joe Grodin. He can look back, not with a sigh, but a smile. He took both roads and still travels them with joy in his heart.

★ ★ ★

HONORING JOSEPH R. GRODIN:

On My Teacher, Joe Grodin

NELL JESSUP NEWTON*

I started law school in 1973. I had worked at a labor law office (Levy & Van Bourg) as a secretary and knew Joe Grodin by reputation as one of the best and most respected labor lawyers in the Bay Area (he was then at Brundage, Neyhard, Grodin & Beeson). I lived in Berkeley and commuted for the first several weeks until I found an apartment in the city. On the first day of law school, I transferred from the bus at the old Transbay Terminal to a streetcar that was fairly crowded. I was clutching a number of law books and the guy standing next to me commented that it looked as if I were a first year student and asked where I was going to law school. I said UC Hastings and he stuck out his hand and said “Joe Grodin — I teach at Hastings.” I don’t think he was expecting my starstruck answer — “Joe Grodin, *the* Joe Grodin? It’s an honor to meet you.” I planned to be a labor lawyer so we talked about the labor law community all the way to Hastings. I also did not realize that professors in those days were extremely formal and the “Kingsfield” method of teaching predominated. This method

This article is one of a group published here on the occasion of the UC Hastings College of the Law Tribute Honoring Distinguished Emeritus Professor of Law and former California Supreme Court Associate Justice Joseph R. Grodin, November 12, 2015.

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of belittling students to goad them to study harder is, in my opinion, ineffective and inhumane and is no longer followed by the vast majority of law teachers. At that time it would be unthinkable to call a professor by his first name (and all but one of Hastings' professors were men at that time).

I got to know Joe very well during the second year. I was practically living in the *Hastings Law Journal* library and Joe's office was on the same floor of the building. He came by frequently for coffee and loved to sit with us and discuss labor law, constitutional law, and politics. It was the year of Watergate so we had a lot to talk about. Our civil procedure teacher had told us that presidential privilege wasn't really a procedure concept and he didn't know anything about it, but Joe spent hours talking about the legal aspects of Watergate with us. Although he was decidedly liberal in his political views, he was absolutely terrific in making us see and argue the other side. I remember going to his office furious about a decision that I felt trampled on worker's rights and I was almost mad that he didn't agree with me, but instead challenged my easy assumptions and conclusions. By the end of the second year we had asked him to become the law journal's advisor. Joe was the most cerebral of any of my professors. He was happy to discuss doctrine but happiest exploring the philosophical underpinnings of the rules as well as the impact various institutional decisionmakers had on the development of the law.

I have many happy memories of our conversations with Joe about matters high and low, from the moral and political arguments for and against public unions to the finer points of Crazy Eights, a card game the journal staff had been addicted to. He was a great advisor to the journal, keeping out of internal matters, but prepared to give counsel when we brought a difficult issue to him.

Joe was an advocate for students at UC Hastings at a time of great transition for the school — he was one of a handful (I think there were four) faculty hired on a newly created tenure-track as the school began to transition away from the "65 Club" model, which featured teaching by professors who were retired from other great law schools and served on a contract basis. Giants in their fields they were, but perhaps given the length of their service at other schools, they were not particularly focused on student learning or other concerns, at least so it seemed to us. In addition,

during the heyday of the 65 Club there was very little faculty governance, and the deans called most of the shots.

I moved to Washington, D.C. after graduation in 1976 and became a law professor myself. Although I cannot say I ever became the teacher he was, Joe was one of the role models who most influenced my teaching and my interactions with students. (And yes, to this day, when I introduce myself to a student I do so by saying, “My name is Nell Newton”). I returned to Hastings as chancellor and dean in 2009. One of the first emails I received welcoming me back came from Joe, and we had a warm relationship during the three years I served at Hastings. He was always willing to speak to groups of alumni and frequently packed the house. Naturally, he is particularly good at Q & A sessions — the harder the question and the thornier the issue, the more his face lights up as he formulates an answer that will continue the conversation. It was such a great joy to work with Joe again after so many years. I will always treasure his friendship.

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HONORING JOSEPH R. GRODIN:

Joseph Grodin's Contributions to Public Sector Collective Bargaining Law

ALVIN L. GOLDMAN*

INTRODUCTION

The Labor Law Group, established in the early 1950s, is a unique consortium of labor law professors, and usually a practitioner or two, devoted to improving labor and employment law teaching and scholarship. Its primary activities have been publication of course books and sponsorship of conferences on important new developments. All royalty income goes into a trust fund used solely for carrying on the Group's work. By luck more than by merit, I was invited to join the Group around 1969. Because I had practiced labor law for only a few years on the East Coast before entering law teaching in Kentucky and because I have never been a diligent reader of scholarly articles, the name Joseph Grodin was unfamiliar to me when, around 1971 or 1972, the late Professor Benjamin Aaron proposed him for membership in the Labor Law Group.

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Realizing that most of us were from the east, south and mid-west, Ben, as I recall, explained that his nominee had recently entered law teaching full-time at Hastings and, though still a young man, had already distinguished himself as a leading California practitioner.¹ Ben most likely also noted his candidate's adjunct teaching experience, a few of his publications, and probably mentioned his doctorate from the London School of Economics. The potential value of this addition to the Group was immediately recognized,² and we unanimously invited him into membership with a plea to Ben to persuade him to accept our invitation. About a year later the Group met in Denver. It was there I met Joe and Janet Grodin for the first time and discovered the broad range of their interests³ and accomplishments as well as their congenial personalities. In time, my wife got to meet them both and we developed a friendship that Ellie and I cherish.

The scope and intensity of Joseph Grodin's intellectual drive have resulted in his making important contributions to developments in a variety of areas of law. Because our relationship grew out of a shared interest in labor and employment law, this essay focuses on his work in one subcategory of that field — the law of public sector collective bargaining representation.

DEVELOPING THE LAW OF PUBLIC SECTOR COLLECTIVE BARGAINING

Prior to joining academe, Joe had published pieces dealing with private sector labor-management law. At the time he began teaching fulltime, his scholarly efforts initially shifted to public sector labor-management relations, an area of growing importance that was in need of more academic scrutiny and law school course materials. In time, as a scholar, law teacher and jurist, Joe Grodin helped meet both needs.

While on leave of absence from his law firm, Joe taught labor law, constitutional law and administrative law at the University of Oregon. Despite

¹ Joe's time in practice was especially long and impressive in comparison with the experience of all but two or three of the Group's academicians.

² Indeed, I was awed by his credentials.

³ The Grodins' passion for music, the graphic arts, wilderness hiking and Judaic learning, occasionally are encountered in metaphors, analogies and quotations found in Joe's writings.

a newcomer's burdens of preparing for teaching in three demanding areas, he managed to co-author⁴ an article⁵ describing the general contours of the field of collective representation for government sector workers. The article was primarily directed at a newly adopted Oregon statute and provided what amounted to a guidebook for those operating under the state's complex public sector bargaining legislation, regulations, and attorney general's opinions. It also presented suggestions for improving the new law by removing identified statutory ambiguities, gaps, and uncertainties. Additionally, Professor Grodin and his co-author offered a number of broader observations about public sector collective bargaining laws. For example, using Oregon's experience, they noted how political and institutional rivalries often add complexities and uncertainties to these statutes.⁶

A brief footnote in the Oregon article addressed the potential value of strikes in most public sector bargaining. This was an important issue the future jurist would face a little more than a decade later. In a concurring opinion in *El Rancho Unified School Dist. v. National Education Assn.*, Justice Grodin observed that the common law justification for barring public employee strikes was based on the assumption that it interferes with the legislature's activity in establishing the terms of government employment through statutory and administrative fiat. However, he noted that by authorizing a procedure for bilateral determination of local government employee wages and benefits through collective bargaining, the legislature had removed the common law's justification for the work stoppage prohibition.⁷ A few years later, in *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.*,⁸ Justice Grodin joined the California Supreme Court's plurality opinion that took this reasoning a step further and announced that the state common law no longer assumes that a strike by public employees is unlawful "unless or until it is clearly demonstrated

⁴ Typical of Prof. Grodin's sense of decency, he gave full co-author credit to Mark Hardin, a third year law student, rather than follow the common practice of merely dropping a footnote to acknowledge the efforts of a student assistant.

Mr. Hardin had a distinguished career aiding abused and neglected children and served as Director of Child Welfare at the ABA Center on Children and the Law.

⁵ "Public Employee Bargaining in Oregon," 51 OR. L. REV. 5 (1971).

⁶ 51 Or. L. Rev. at p. 9.

⁷ 33 Cal. 3d 946, 963 (1983).

⁸ 38 Cal. 3d 564 (1985).

that such a strike creates a substantial and imminent threat to the health or safety of the public.”⁹ Among other considerations, the opinion examined the economic realities of public sector collective bargaining and found that government entities that had engaged in collective bargaining had demonstrated that they have sufficient negotiating leverage so that work stoppages are a fair counter-balance for generating reasonable settlements.

When he began teaching fulltime at Hastings, Professor Grodin followed up on his Oregon study by preparing a comprehensive survey of California’s primary public sector bargaining law that he published as an article in the *Hastings Law Journal*.¹⁰ Noting that California had entered this field earlier than most other jurisdictions, he expressed disappointment that his home state’s core legislation in this area, the Meyers–Miliás–Brown Act, lacked a comprehensive, intelligible, and forward-looking framework for public sector labor relations. One egregious gap, he observed, was the lack of a structure for resolving questions of a labor organization’s representational status — a problem he had encountered while still in law practice.¹¹ Another major problem was the lack of a precise list of prohibited actions that violate representational rights. These problems persisted until, gradually, over the next four decades, the California Legislature partially mitigated them by adopting amendments, consistent with some of Professor Grodin’s recommendations, that a) established an administrative agency with specialized expertise to adjudicate and remedy prohibited employment practices and conduct elections,¹² b) delineated in greater detail the protections afforded the right to representation,¹³ and c) provided mechanisms to facilitate bargaining impasse resolution.¹⁴

The California courts, on the other hand, were much quicker to embrace Professor Grodin’s careful analysis of the Meyers–Miliás–Brown Act’s intent which gave the courts a basis for coping with critical gaps in the statutory language. They similarly were guided by his suggested approaches to

⁹ 38 Cal. 3d at 586.

¹⁰ J. Grodin, “Public Employee Bargaining in California: The Meyers–Miliás–Brown Act in the Courts”, 23 *HASTINGS L.J.* 719, 720–22 (1972).

¹¹ *Id.* at 743–46 and text accompanying footnotes 114–119.

¹² *Id.* at 728–29, 745; Cal. Gov. Code § 3541.

¹³ *Public Employee Bargaining*, *supra* note 10 at 727–28, 746–48; Cal. Gov. Code § 3506.5, 3508.5.

¹⁴ *Public Employee Bargaining* at 755–60; Cal. Gov. Code § 3505.4–5.

interpreting particular provisions in which the language of the Act was burdened by vagueness. Accordingly, the Hastings article was cited and followed frequently by the California courts.¹⁵

In noting the Meyers–Miliias–Brown Act’s absence of statutory impasse resolution procedures, Prof. Grodin’s Hastings article observed that many public employee bargaining laws provided for fact-finding with recommendations and impasse arbitration.¹⁶ Prof. Grodin soon explored the potential value of those approaches in a study he made of a new amendment to the Nevada public employment bargaining law.¹⁷

The Grodin study of the Nevada statute explained that while fact-finding had been part of the state’s public employment collective bargaining law for several years, a significant number of Nevada public employers had been ignoring fact-finding recommendations.¹⁸ This led the state legislature to adopt an amendment allowing the governor, on the request of either party, to make the fact-finder’s recommendations binding on all sides regarding any or all deadlocked issues in local government collective bargaining. Thus, if requested prior to the commencement of fact-finding, the

¹⁵ Decisions citing and approving the Grodin article’s analysis include *L.A. County Civil Com v. Superior Court*, 23 Cal. 3d 55 (1978) and *Public Employees of Riverside County v. County of Riverside*, 75 Cal. App. 3d 882 (1977) (holding that rules adopted by local entities must be consistent with the purposes of the Meyers–Miliias–Brown Act); *Vernon Fire Fighters v. City of Vernon*, 107 Cal. App. 3d 802 (1980) (unilateral changes in terms of employment are a *per se* violation of the duty to meet and confer in good faith); *Solano County Employees’ Assn. v. County of Solano*, 136 Cal. App. 3d 256 (1982) and *International Assn. of Fire Fighters Union v. Pleasanton*, 56 Cal. App. 3d 959 (1976) (injunctive relief should be granted where a local government made changes in the terms of employment without conferring with the employees’ representative).

The *Public Employee Bargaining* article on the Meyers–Miliias–Brown Act has been declared “the single most frequently cited authority on how the statute works.” C. Cameron, “No Ordinary Joe: Joseph R. Grodin and His Influence on California’s Law of the Workplace,” 52 HASTINGS L.J. 253, 267 (2001).

¹⁶ *Public Employee Bargaining*, *supra* note 10, at 759.

As noted below, impasse arbitration is more commonly called “interest arbitration” to distinguish it from grievance arbitration. The award in interest arbitration is an imposed settlement of the unresolved terms of the negotiating parties’ contract. The award in grievance arbitration is a judgment establishing whether one of the disputing parties was wronged, and if so, what remedy should be provided.

¹⁷ J. Grodin, “Arbitration of Public Sector Labor Disputes: The Nevada Experiment,” 28 INDUS. & LAB. REL. REV. 89 (1974).

¹⁸ *Id.* at 91.

governor could transform fact-finding into binding impasse arbitration.¹⁹ Prof. Grodin's study observed that while other states had procedures for ascertaining whether to require the parties to submit to final, binding arbitration of a public sector bargaining impasse, Nevada's law was unique in placing this authority in the hands of an elected official.

At the time of the study there was too little data for a statistical analysis of the amendment's impact on Nevada's public sector collective bargaining system. Therefore, Prof. Grodin approached his task by examining the circumstances in which public sector bargaining impasses posed an opportunity to apply the new law, the outcomes, and the parties' own impressions of any changes in the dynamics of collective experiences under the amended statute. He also conducted interviews with neutrals involved in Nevada's arbitrated cases inasmuch as their conduct was bound to influence the parties' subsequent negotiating conduct.²⁰

The Grodin study sought to ascertain whether the prospect of binding arbitration had a chilling affect on the efforts of local governments and employee organizations to resolve their differences through bargaining rather than rely on a settlement imposed by an arbitrator. He found that the evidence leaned in the opposite direction and attributed this in part to the Act's efforts to guide both the decision as to whether to require binding arbitration and the guidelines imposed on arbitrators.

The Nevada Act set out criteria to be considered by the governor when electing whether to impose arbitration in seemingly deadlocked negotiations. Although Prof. Grodin contended that those statutory guidelines were too vague to be meaningful, he found that in the first couple of years operating under the amended statute, two considerations were important in the governor's decisions to impose or not impose binding arbitration. One was the governor's impression of whether in the past the parties had given due consideration to fact-finding recommendations. The other was whether their bargaining to date was consistent with what he judged to be a good faith, reasonable effort to resolve differences at the bargaining table.²¹ Prof. Grodin observed that these elusive elements in the governor's

¹⁹ *Id.* at 89–90.

²⁰ *Id.* at 99–101.

²¹ A history of ignoring fact-finding recommendations was likely to result in imposing binding arbitration whereas bargaining efforts considered by the governor to

decision left the parties with considerable uncertainty that itself may have propelled them to greater efforts to reach a negotiated settlement.

Additionally, because the Act required the arbitrator to assess the local government's financial ability as well as its obligation to provide facilities and services protecting the community's health, welfare, and safety, Prof. Grodin found that, once a decision was made to require binding arbitration, the parties had further motivation to reach their own settlement. That motivation partly was to avoid the extra costs involved in presenting their case to an arbitrator whose expenses they would have to share equally. In part, too, the motivation was to avoid the costs of preparing for the arbitrator a budget-oriented presentation necessitated by the statute's emphasis on ability to pay.²² Additionally, Grodin found that this guidance helped press the parties to do a better job of preparing for bargaining and, thereby, facilitated more productive settlement discussions.²³

Prof. Grodin's conclusions found that the success of the amended approach was facilitated by the fact that the then-governor had a labor relations background. Therefore, the study suggested that to ensure that the system continued to function well it would be best to place the responsibility of deciding whether and when to impose binding arbitration in the hands of a person or tribunal with labor relations expertise. The Nevada law has since been amended to give this authority to a panel consisting of an accountant and a lawyer selected by the parties through the procedure of mutually striking names separately provided by the Nevada State Board of Accountancy and the State Bar of Nevada.²⁴ The wisdom of Prof. Grodin's suggested change, therefore, is dependent upon whether the appropriate expertise in the labor field is possessed by the persons proposed by the Accountancy Board and the Bar.

The growth of public employee collective bargaining was accompanied by an increase in work stoppages and work stoppage threats. This resulted in increased scholarly and political attention to the merits or problems of work stoppage substitutes, especially resolution of bargaining impasses by

reveal a good faith reasonable effort to negotiate a settlement were likely to result in declining to impose binding arbitration. 28 *INDUS. & LAB. REL. REV.* at 95–96.

²² *Id.* at 97–98.

²³ *Id.* at 98–99.

²⁴ Nev. Rev. Stat. Ann. §§ 288.200 to .202.

impartial third parties, a procedure most commonly known as interest arbitration. Although he had previously discussed interest arbitration in his writings, in 1976 Professor Grodin published a paper that comprehensively examined the theoretical issue of whether such arbitration violates the democratic principle that “governmental policy is to be determined by persons responsible, directly or indirectly, to the electorate.”²⁵ He explained that the issue is particularly compelling because issues involved in public sector collective bargaining “can involve significant elements of social planning.”²⁶

Prof. Grodin observed that, due to the complexity of modern government and the need to insulate some decisions from political intrusions, courts have been reluctant to place rigid constitutional constraints on legislative discretion to delegate legislative-type decisions. Accordingly, he focused not on what restrictions might be required by constitutional doctrine but rather on what, as a matter of sound policy, legislatures ought to do in delegating authority to interest arbitrators.²⁷

At the outset of his analysis Prof. Grodin confronted what may be the politically most delicate issue respecting legislative delegation of authority for arbitrators to decide collective bargaining impasses in the public sector: How can the legislature justify authorizing non-elected persons to resolve public employment pay disputes? His succinct but compelling answer stated that the arbitration system should “presuppose a policy determination that employees should be paid whatever they are ‘worth,’ in the same way that public agencies purchase goods at whatever price the market dictates.”²⁸ To help discipline the decisional process, he suggested a variety of guideposts such as the increase in the cost of living or private sector collectively bargained wages for employees doing similar work. Grodin labeled this approach “the proper wage model” and argued that in applying it an arbitrator should not weigh the public’s ability to afford the result; rather, fiscal shortfalls should require the public employer to respond by reducing the affected work force and services, shifting funds from other parts of its budget, raising taxes or borrowing.

²⁵ J. Grodin, “Political Aspects of Public Sector Interest Arbitration,” 64 CAL. L. REV. 678, 680 (1976).

²⁶ *Id.* at 682.

²⁷ *Id.* at 683.

²⁸ *Id.* at 684.

Being a realist, Prof. Grodin acknowledged a degree of artificiality in the proper wage model formula inasmuch as private sector wages for similar work often vary; the determination of whether work is “similar” often is subjective; some work is unique to the public sector; and the public sector often is the dominant source of some types of work and, therefore, the dominant influence of wage rates for its private sector counterpart. Additionally, he noted that even the more concrete cost-of-living guidepost poses a problem inasmuch as when those costs go up for employees, they also go up for government operations and, thereby, may impose a fiscal squeeze that limits the government’s ability to meet all of its obligations, including providing cost of living increases for its workers.²⁹

Political pressures, Prof. Grodin noted, give rise to demands that arbitrators not ignore the government’s ability to pay. Thus, that requirement was common in legislation mandating interest arbitration as a work stoppage substitute. However, his survey of existing public sector bargaining laws that used interest arbitration revealed that references to weighing ability to pay were vague as to how that factor is to be taken into account.³⁰ Professor Grodin expressed concern that this vague requirement regarding ability to pay inevitably shifts to the unelected arbitrator the burden of making broad public policy choices.

Of at least equal concern in Prof. Grodin’s analysis of public sector interest arbitration is the observation that many non-wage collective bargaining issues pose even more difficult problems of allowing social policy choices being delegated to the discretion of a non-elected decider. Examples such as school room class size or social worker case loads implicate broad educational or other policy choices while retirement and other employee welfare benefit programs can have long-range fiscal impacts that alter revenue-raising needs. This, argued Prof. Grodin, poses the need to structure the bargaining impasse system so as to preserve as much as possible the responsibility of elected officials to guide such choices, and he posed a number of suggestions toward this end. One is that statutes providing for interest arbitration should more specifically describe the weight

²⁹ *Id.* at 685. Depending on the government entity’s tax structure, a cost of living increase can, of course, be accompanied by increased government revenue from sources such as sales taxes.

³⁰ *Id.* at 687.

to be given to the public entity's ability to pay and identify the various income and expenditure elements that can be considered in weighing ability to pay.³¹ He also advocated consolidating interest arbitration for all employee groups with the same public employer inasmuch as they feed from a common pie.³²

The interest arbitration article additionally emphasizes the importance of judicial review to set aside public sector interest awards that violate the statutory constraints placed on the process. However, it also urges that initial review of challenged interest awards should be assigned to a state labor relations board in order to provide a more expeditious procedure enhanced by the benefit of specialized expertise and greater uniformity of results.³³ Further, the article warns that, because issues can change during the course of the arbitral proceeding, courts should avoid intervening prematurely. Accordingly, as a general rule they should not entertain efforts to enjoin the process on the grounds of non-arbitrability.³⁴

A decision by the Michigan Supreme Court, a few years later, demonstrated the care with which Prof. Grodin had weighed the competing considerations for evaluating public sector interest arbitration arrangements. That decision, which upheld the constitutionality of the state's interest arbitration system for police and firefighter bargaining impasses, cited the Grodin article as authority for stated arguments in both the majority and dissenting opinions.³⁵

DEVELOPING TEACHING MATERIALS ON PUBLIC SECTOR BARGAINING

Normally, in our country a lawyer's and jurist's foundation for understanding law and the legal process begins in law school and for many, perhaps most, that understanding is also primarily shaped by law school studies. Because most law school classes are centered on materials presented in the assigned course book, well-designed, thoughtful course books can

³¹ *Id.* at 695.

³² *Id.*

³³ *Id.* 699–700.

³⁴ *Id.* at 699.

³⁵ *Detroit v. Detroit Police Officers Asso.*, 408 Mich. 410 (1980).

be expected to significantly influence what is taught and how it is taught. Therefore, preparing course books can significantly influence developments in the particular area of law.

Within a few years after he joined the Labor Law Group, Joseph Grodin teamed with Donald Wollett to co-author the Group's revised course book on public sector collective bargaining, then a new area of law school study. The team of Wollett and Grodin provided a particularly valuable perspective inasmuch as these two scholars were also seasoned practitioners from both sides of the bargaining table. Don Wollett had been a partner in a major management firm in New York City;³⁶ Joe Grodin in a major union firm in San Francisco. Joe, Don, and other Group members produced further revisions of the Public Sector Bargaining book into the 1990s and, after Don retired from the task, Joe and others continued its revision and updating into the current century. Joe eventually retired from the project but its successor course book, now expanded to cover non-collective bargaining aspects of public sector employment, continues to be the source for teaching public employment collective bargaining law.

CONCLUDING OBSERVATIONS

Joseph Grodin's studies, discourses, decisions, and teaching in the area of public sector labor law are bound together by several threads that demonstrate his adherence to values and work habits he discussed in his book *In Pursuit of Justice*.³⁷

Both as Prof. Grodin and as Justice Grodin, he has been faithful to the principle that legal rules ultimately are the prerogative of democratically elected representatives. His regard for legislative authority is evident in the care with which he examined the competing interests that gave rise to the compromises reached in adopting the public sector bargaining laws he studied, thereby gaining more accurate understanding of the intent of

³⁶ Kaye Scholer Fierman Hays & Handler. Donald Wollett had experienced both perspectives inasmuch as he represented the National Education Association for about a decade. During the course of their team effort, Wollett's understanding of public employment collective bargaining was further enhanced by his serving for several years as the New York State Director of Employee Relations.

³⁷ University of California Press, 1989. See, especially, chapters 9 and 10.

those laws. It is also evident in his proposals for improving them through suggested legislative changes rather than creative judicial interpretations.

Additional evidence of Joe Grodin's efforts to preserve the central role of elective government is his examination of public sector interest arbitration. There his focus emphasized how to maximize labor peace and equitable results without unduly delegating to non-elected persons the authority to shape social policies.

Finally, both as a professor and a jurist, Joseph Grodin has also directed his efforts at discovering not only what is theoretically reasonable, but also what is practical. Thus, in determining what improvements have been attempted and what reforms would be beneficial, Prof. Grodin has tried to discover practitioner insights into the effect law has on the parties' conduct. His research and discourses have not been confined to the typical academic analysis of archived decisions and documents or weighing the logic of competing arguments. Rather, his studies have reflected his respect for those who put flesh on the legal skeleton by including interviews to learn about the experiences of the officials, lawyers, and other decision-makers who work within the statutory system.

Accordingly, the integrity with which Joseph Grodin serves California, our nation, and the study of law deserves our admiration and gratitude.

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HONORING JOSEPH R. GRODIN:

Open-Minded Justice

BETH JAY*

It is a privilege and a pleasure to be asked to write about Associate Justice, Professor Emeritus, and friend, Joseph Grodin. When he was appointed to the Supreme Court in 1982, I was a relatively new member of the Court staff. I already knew him, however, because I had worked with Associate Justice Frank Richardson, on whose staff I then served, on a dissent to a majority opinion that Justice Grodin authored while sitting as a Justice Pro Tem on the Supreme Court. At the time, he served on the Court of Appeal. During the development of the opinions in the case, he and I had occasion to discuss the issues, and entered into a friendly wager about the result when the United States Supreme Court granted certiorari. I won the bet, and collected my princely winnings: an ice cream cone in the flavor of my choosing.

What I remember most about that first encounter was not the ice cream, but the opportunity to discuss with him the subject matter of the

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case. We touched on not only the specific facts and issues before the court, but also on broader questions reflecting the potential for abuse of an expansive interpretation of the application of the Federal Arbitration Act. More than thirty years later, I appreciate his farsighted concern about the overuse and misuse of consumer arbitration. Those were the first of many opportunities for me to see his thoughtful, informed and always curious intellect at work.

For a while I commuted from North to South Berkeley to carpool to the Court with Justice Grodin, Justice Otto Kaus, and Alice Shore, a member of Justice Kaus' staff. There was always a risk involved, because neither jurist excelled in driving as they did in jurisprudence, but the chance to sit in the back seat with Alice and listen to the two of them argue, inquire, and simply explore the law was better than any law school class. The two of them truly "loved the law," for its challenges, intricacies, structures, and the ultimate questions of justice and the demands of judging.

The United States Supreme Court this term appears poised to reconsider its 1977 decision in *Abood v. Detroit Board of Education*, holding that employees who decide not to join a union nevertheless may be compelled to pay union fees, except for those costs related to purely political activities. In a locally grown case, *Friedrichs v. California Teachers Association* (No. 14-915), the high court will be entertaining a challenge asserting that collective bargaining in all its aspects is political in nature, and thus the plaintiffs should not be compelled to pay any dues. The breadth of the Court's decision in interpreting political speech may have far-reaching consequences for unions, and the increasing reliance on the First Amendment as a rationale for permitting actions once not thought generally governed by the dictates of that provision. My interest in the case is a result of a long-ago insightful description of *Abood* by Justice Grodin during one afternoon commute, a discourse that Alice and I listened to closely, but then noticed that the other front seat passenger seemed to be thinking very deeply with his eyes closed. It had been a long day for the jurists in the car, but I think it is telling about how engaging Justice Grodin's approach to an issue can be that some thirty years later, I remember the case, parts of his description, and the excitement that he transmitted while discussing it.

Since returning to Hastings, Professor Grodin has presided over a casual lunch before teaching. Three of us, two of his former staff members,

Hal Cohen and Jake Dear (both still working on Chief Justice Cantil-Sakauye's staff) and I, have been consistent attendees. The lunches, held at restaurants in the Civic Center area, and often including others, typically prove to be spirited discussions over plates of Thai or Vietnamese food. The subjects range from the topic assigned for the seminar he is about to teach to a critique of the latest United States Supreme Court opinions, with an occasional movie or book review thrown in. They are freewheeling explorations, with ideas put forth and shot down or supported, and the unspoken freedom to voice any idea, whether fully thought through or only a trial balloon.

I have had the good fortune to work personally and directly with excellent jurists throughout my career at the California Supreme Court. I never served on Justice Grodin's staff, but he remains one of my favorite jurists and lawyers after some thirty-five years working at the Court. For him, the pursuit of the law is a pursuit of true intellectual passion. And as a jurist, he also understood and took seriously the distinct duties and obligations of serving as a judge.

These qualities, and their significance to the continued preeminence of the rule of law in our system, recently have been sharply put into relief, as I find my assumptions about a basic common civic understanding of the role of jurists all too frequently fractured. For years, I have watched as commentators inveigh loudly against judges who act against the so-called popular will as reflected in legislation, the latest polls, or those whose views agree with the disappointed commentator's. The appearance of this strain in ever more vociferous protestations by individuals seeking the presidency, after the seminal opinion in *Marbury v. Madison*, can in no way be taken for granted.

How dare four or five unelected judges overturn the will of the people? Isn't the majority supposed to rule? Lately, similar assertions have been posed stridently by individuals who aspire to the highest offices in our nation. The fundamental value of an impartial judicial system, governed by applicable law and precedent, at times seems as antiquated as the practice of ladies wearing white gloves when they went downtown. And it is not simply politicians and commentators who have raised my concern.

The first time I read Justice Antonin Scalia's majority opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), declaring Minnesota's

judicial ethics clause barring a judge's announcement of his or her views during an election unconstitutional as an infringement on First Amendment speech, I immediately thought about all that I had observed about judges in my many years working with the courts. Justice Scalia's opinion describes the exercise of impartiality by a jurist, and in doing so portrayed what seemed to me to be a cavalier acceptance that judges almost universally had essentially committed to reaching particular legal conclusions before and even after ascending the bench. Thus, impartiality in the judicial context generally refers only to bias against a party, but not as to conclusions about issues coming before a judge.

Even assuming impartiality could cover legal views, he concludes, guaranteeing such a state of mind would not amount to a compelling state interest; it contradicts common sense and experience that inform us that virtually every judge has some preconceptions about legal questions upon assuming the bench after a career in the law. Finally, as to impartiality connoting open-mindedness, he considers that to be not a common meaning of the term, and in any event concludes that, while such an approach at least suggests that each litigant might have a chance to prevail, it need not be discussed in the case at hand. He nevertheless dismisses out of hand the notion that a judge's statements announcing his views during a campaign might any way place on the successful jurist an unreasonable burden of remaining consistent with those stated views — as opposed to views stated either before the candidacy was announced or after assumption of office, whether in an opinion or in another forum.

I disagree with his approach to impartiality, for many reasons including those contained in the articulate dissents. The effect of his views have been further highlighted by retired Supreme Court Justice Sandra Day O'Connor's statements after leaving the court that she does not ordinarily second-guess her decisions, but the *White* case was one in which she had come to believe that the Court was probably incorrect. Moreover, it seems contrary to the approach taken by the justices whose working style I have most admired, including Justice Grodin. For them, the judicial role asks that they look first at the issue, next at the briefing, precedents, and applicable constitutional and statutory law, and only then decide on the outcome. Justice Scalia seems to anticipate a far less complex process: look at the issue, call up one's existing view on the matter, and then fashion an

analysis to reach that conclusion. This difference in approach was recently delineated in remarks made outside the Court following the decision in *Glossip v. Gross* (576 U.S. ___, No. 14-7955, decided 6/29/15). In his dissent to the majority's affirmation of the death penalty, Justice Stephen Breyer raised several questions about the death penalty as presently conducted. Thereafter, as reported in an opinion piece in *The Los Angeles Times* ("Justice Antonin Scalia 'wouldn't be surprised' if Supreme Court ends the death penalty," 9/25/15), Justice Scalia informed an audience of Tennessee students, "If the death penalty did not violate the 8th Amendment when the 8th Amendment was adopted, it doesn't violate it today."

Justice Breyer, in contrast, in an interview conducted by Marcia Coyle on September 25, 2015, as part of the City Arts and Lectures series in San Francisco (and available online on KQED, a local PBS affiliate), responded quickly to her suggestion that he had expressed the view that the death penalty was unconstitutional in his dissent in *Glossip*. To the contrary, he stressed, the dissent had raised numerous questions and expressed an interest in the opportunity to consider such issues, but only after full briefing, argument, and consideration — and he drew a contrast to "others" who had already reached their conclusions on the constitutionality of the death penalty without the benefit of such information.

I cannot remember the specific case or question, but I can remember clearly a conversation with then-Justice Grodin about an issue before the Court in which he explained how he had wrestled with the result, because as a matter of policy he might have selected a different approach. As a matter of law, however, he felt constrained to follow the precedents and authorities that applied in the area and ultimately to reach a decision that he otherwise would not prefer. In other words, he looked at the case with an open mind. He upheld the rule of law and engaged in a process similar to that described by Justice Breyer: consider all the information before him, and reach the appropriate result in the full and proper exercise of the judicial role. This is not to say that doing such analysis will ineluctably lead to the same result for any open-minded judge — but it is to say that the process of judging with an open mind is indeed an essential part of the judicial enterprise. And Justice Grodin, as jurist and as teacher, and in his daily life, has provided an example of the way it should be done.

For the past few years, I have been fortunate to join the Grodins, along with others including Jake and Hal, on July 4th. As the sausages grill, and beer is sipped, and topics are tossed around the group, the judge brings us to a pause and we begin the reading of the Declaration of Independence. Each time it is a revelation. Each time it is a reminder of the brilliance of our founding fathers. Each time it is a reminder of how fortunate we all are that men of good will and extraordinary intellect, such as Joe Grodin, have devoted themselves to the pursuit of justice and the rule of law. And how fortunate I have been to know him.

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HONORING JOSEPH R. GRODIN:

Walking with Grodin

JAKE DEAR*

My friend and colleague Beth Jay has written beautifully about the regular lunch conversations that we (with Hal Cohen) have had with Justice Grodin. She has focused eloquently on his integrity, vision, intellect, and compassion. Other contributors to this symposium, including former Chief Justice Ronald M. George, have highlighted some of Grodin's cases, theories, articles, and books — including, most recently, *The California State Constitution: A Reference Guide* (Oxford Univ. Press 2d ed., 2015) (with Michael B. Salerno & Darien Shanske), and one of my favorite books about law and process, *In Pursuit of Justice: Reflections of a State Supreme Court Justice* (University of California Press, 1989). But another book, which Justice Grodin coauthored with his daughter Sharon in the early 1980s — *Silver Lake* (High Sierra Hiking Guide No. 17, Wilderness Press, 1983), about the hiking trails of that area of the Sierra — reminds me of other dimensions, and this leads me to address him from a

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different perspective: Walking with, and learning from the man over the past three decades.

The very first walk I recall was at a staff picnic on Angel Island, in the middle of San Francisco Bay, 1985. I wish I could summon forth some poignant vignette from our long hike that day, but my lasting image was simply of us — him, his wife Janet, and his entire chambers staff — picnicking in the sun-dappled shade, and having lively conversations as the afternoon lazed by and the bay wind picked up.

Another walk, a few months later, remains with me much more clearly. The Chief had assigned him a case concerning a facial constitutional challenge to San Jose's rent control law, and after much discussion I'd prepared a draft calendar memo for his review. The judge (inside the Court we sometimes use that simpler and slightly less formal term instead of "Justice" and I'll do that here), suggested that we take a quick walk to discuss it. Foregoing a constitutional around the fairly scenic and architecturally interesting Civic Center Plaza, he guided us out the back of the 350 McAllister state building where we passed through the depressing institutional green annex facing Golden Gate Avenue and into the adjacent and rather gritty Tenderloin area. Briskly up Golden Gate, with lefts on Hyde and Turk; cross Larkin; then another left, past the monolithic wind-tunnel-inducing federal building. All the while we were discussing — he more deeply than I — intricacies of the analysis in the San Jose case. Back at the corner of Larkin and Golden Gate, with the old state building annex now back in sight, he was in full absent-minded-professor mode, and neglected to notice that the pedestrian crossing light was red. He stepped off the curb, and started to walk across as a car whizzed by, far too close for comfort. I had put my arm across his chest to slow him down, and as we can all see, it worked. To this day, I'm not sure he noticed; he barely skipped a beat on his side of the discussion. It was, after all, a quite absorbing and challenging case — eventually decided by the slimmest of margins in his resulting opinion, *Pennell v. City of San Jose*, 42 Cal.3d 365 (1986).

In November 1986 the voters terminated the judge's lease, depriving themselves of one of the most principled, brilliant, and thoughtful justices they could ever hope to grace the California Supreme Court. As a result, however, our walks in and around the Tenderloin increased, because the judge eventually resumed teaching at nearby UC Hastings. Hal, Beth, and

I have, since then, walked with him (and sometimes a guest lecturer) to and from various pre-class lunches up and down Larkin, Golden Gate, and McAllister, where over pho and various rice-dish plates of the day, we have discussed the matters of the day, as well as the topic for that afternoon's class.

After these lunches, we amble back down the street to a point where we must part in order to return to our respective buildings: He to Hastings, we to the old state building. At this point, many times over these many years I've become rather melancholy, thinking: he should be walking with us. Only recently I have started to think of it differently and more positively:

He *is* walking back with us; he's in the building, and in the Court, by virtue of the dignified example that he has lived, the wisdom that he has displayed, the books and articles he has produced, the students he has taught and mentored — and yes, by virtue of the law that he was able to leave in the Official Reports during his too-short tenure.

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HONORING JOSEPH R. GRODIN:

A Trailblazer

JIM BROSNAHAN*

That night in the 1960s, almost fifty years ago, when the call came in around 5 p.m., it directed the recipient lawyers to gather at Joe Grodin's office. Three hundred and seventy-five people had been arrested on Telegraph Avenue in Berkeley. Some of them had been demonstrating, and some had been there to buy cigarettes, when they were unceremoniously rounded up. They would need lawyers. In those wild Berkeley days lawyers were not retained, they were mobilized.

From memory, that may have been the first time I met Joe Grodin. The large group of citizens had been taken to Santa Rita, a then failing institution, with some sheriffs who had returned from the Vietnam War with the idea that prisoners were to be beaten. The lawyers in Joe's office worked through the night and presented an injunction motion to Federal Judge Robert Peckham, who commanded the sheriffs to stop beating the prisoners. Judge Peckham then signed the injunction, and Santa Rita became a public issue with cries for reform.

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It was no accident we were summoned to Joe Grodin's office. At that time Joe was among the top labor lawyers, if not the leading one, on the side of the workers. Born in Oakland in 1930, Joe graduated with honors from UC Berkeley in 1951 and *cum laude* from Yale Law School in 1954. He immediately began practice as a labor lawyer, but also took the time to teach at Hastings College of the Law and the University of Oregon School of Law. Exploring his academic side, Joe got his Ph.D. in labor law and labor relations from the London School of Economics.

Surely there should be a full biography of Justice Grodin forthcoming before too long. The first chapters of Volume 1 will have to cover the scholarly student, the brilliant young labor lawyer, and his friendship with his mentor Justice Mathew Tobriner, who had worked as a labor lawyer until 1959, when Brown appointed him to the California Court of Appeal. Grodin's teaching and legal writing could be Volume 2. Two more volumes could be devoted to his time on the California Court of Appeal, his appointment to the California Supreme Court, and his judicial election, representing a tumultuous intrusion of politics, tearing off the cover of California judicial independence, which ended his judicial career. There could be a chapter on Justice Grodin's development of state constitutional jurisprudence. Joe followed another mentor, the prolific Justice Hans Linde of the Oregon Supreme Court, in his state constitutional interest. As the years went by, no one in California led more in the area of the California Constitution than did Justice Grodin. As long as I am hoping the reader will be inspired to read the full Grodin biography, I will go further and hope that contained in its pages will be a full exploration of Justice Grodin's broader legal thoughts, for they reflect many of California's developments during Joe Grodin's long career. When he discusses the Fourteenth Amendment, whether the listeners are students at Hastings, former colleagues on the bench, or lawyers having dinner, he is respected for the depth of his knowledge.

I wanted to give the reader some snippets about Justice Grodin as a legal scholar, and made the mistake of asking our firm's librarian to pull Joe's writings. It was as though I had entered the bottom of Niagara Falls for a shower. Justice Grodin has written on almost every subject in the broad book of California jurisprudence.

As I look upon his prolific writings, I am struck by how the young, determined workers' rights labor lawyer always turned to reason as his basis for expression. Additionally, his intellectual interests would not allow him to be limited to any one subject: Challenges to religious liberty. Should courts depublish opinions? Do arbitrators set social policy? How does the common law respond to social challenges? Enterprises affected with a public interest. Labor-management relations. The Taft-Hartley Act. The relationship between tort and contract. The history of our state constitution. Liberty and equality under the California state constitution. Freedom of expression. Agricultural labor in California. Same-sex relationships and state constitutional jurisprudence 2007. The constitutional right to pursuit of happiness. Appellate review procedures. The history of legal aid. Wrongful termination. How do American law and British law compare? Judicial selection, state and federal. Provocative thoughts on legal education. Privacy and the right of publicity. Pieces over time on Justice Otto Kaus, Justice Frank Sullivan, Justice Mathew Tobriner, Chief Justice Phil Gibson, Justice Jesse Carter, and Justice Frank Newman.

Justice Grodin even took his own judicial defeat and ran it through his thoughtful scholarly thinking, producing an important piece on judicial retention elections.

You can never be sure how much a graduate's legal education is going to affect his or her later achievements but, in Justice Grodin's case, I think it not accidental that when he attended Yale Law School the faculty was drenched in legal realism stressing increased understanding of the outside world. There was great early interest at Yale in the direction of emphasizing the relationship between law and social problems. John Dewey, the American philosopher of note, and Justice Benjamin Cardozo had written during the 1920s about the need to connect law and social problems. Both men were all about progress and the future. The law school that first acted on those pragmatic writings was Yale Law School. The dominant educational theme was that law should be seen as a method for progress, a kind of perfectionist institutionalism. In Joe Grodin's life, his mentor and law partner Justice Tobriner no doubt reinforced that approach. The law is not just about concepts. It is there to be of the greatest service to as many people as possible.

Matching legal rules with the people to whom they apply has always been given an empathetic quality in anything that Justice Grodin has done. But it may be the development of state constitutional law in particular that will be his lasting contribution, as it was for his teacher in this regard, Professor Hans Linde of Oregon.

Proponents of greater use of the California Constitution may believe it seems almost rude to ignore the existence, history and contribution of the early founders of California, who put the words into our Constitution for a reason. In the journal of the *California Supreme Court Historical Society*, Volume 3, 2008, Justice Grodin gives some history of what he calls, “the movement.” Stanley Mosk was a strong supporter of the use of state constitutions. Justice Grodin’s idea is that California courts should consider the state constitution before the judges consider the federal constitution. He shows frustration that this is not done more frequently. He believes the state constitution should come first. If California citizens and others have rights under the state constitution, they should not be dissolved by blind adherence to federal constitutional decisions. He points out the advantages of “the adequate and independent state grounds doctrine.” He believes the California Supreme Court has at times ignored state constitutional principles, usually without explanation. He bemoans the advocates who appear and don’t argue for state constitutional rights. He cites examples in which the federal courts send the case back to the California Supreme Court to consider state constitutional grounds. He cites *Serrano v. Priest*, involving funding of education; search and seizure cases involving search of garbage cans; and a variety of other cases involving our state’s constitution. With appropriate modesty, Joe Grodin refers to his thoughts on state constitutional jurisprudence and his writing about it as “kvetching.” In repeated articles he lays out various aspects of his state constitutional jurisprudential theories.

This piece does not do justice to Joe Grodin, California scholar, judge, and teacher, but it is an invitation for others to explore his enormous contribution to our state.

Is there no defect in this trailblazer? To retain my credibility, I will end with a short personal story. Joe Grodin wrote a book on the Sierras. It was a good book about the trails, lakes, views and wildlife. Many years ago I joined Joe and his daughter on a hike, west of Tahoe in the Desolation Wilderness.

We climbed up to Lake Genevieve and Crag Lake. As we went to cut back, east to rejoin our families, Joe suggested we leave the trail and take a shortcut that he knew. How could I not rely on such a naturalist, a person of deep mountain understanding? So off we went, taking a sharp left and leaving the trail behind. Within minutes we were climbing over a slide of boulders in sun-reflected heat that made me understand how a chicken feels in the oven. The rocks were so hot we didn't want to put our hands on them, though we had to because of the slant of the rock slide. It goes to show, nobody's perfect. So, I must admit, all of these years later, Joe Grodin has taught me all about the Fourteenth Amendment and one other important thing. Never, ever leave the trail, while hiking in the Sierras.

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HONORING JOSEPH R. GRODIN:

About Joe Grodin

EPHRAIM MARGOLIN*

I asked some friends about Joe Grodin: Gerry Uelman describes Joe as “a renaissance man, an intellectual, engaged in politics, culture, art and law, unpretentious, modest, curious and brilliant.” “Joe Grodin was a splendid Supreme Court justice and remains a terrific human being,” writes Professor Larry Tribe; “my mentor and one-time boss Mat Tobriner was Joe’s good friend, and any good friend of Mat’s became a friend of mine. May he live forever. Okay, so maybe not *forever*, but to the closest comfortable approximation.” “A more decent, fair-minded and compassionate human being is hard to imagine. California suffered a body blow when he was unfairly removed from the state supreme court,” writes Judge Alex Kozinski. Len Sperry believes him “brilliant, kind, caring, generous, and well married.” (Joe married Janet when she was twenty years old and they are inseparable ever since. I asked her for a one-sentence description

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of Joe. She said, “He is fascinating.”) I agree with them, and still think up inadequate appellations: “elegant,” “thought-full,” “enthusiastic,” “kind,” “personally warm,” and, simply, that Joe is my best friend.

As we grow older, our lifespaces narrow, but imagination expands. Herb Morris, Joe’s first-year law school friend, tempered his interest in legal positivism with speculation about a “snake-less” biblical Gan Eden (paradise). I turned increasingly from trial to appellate and state bar practice and then also moved to speculation about a snake-less paradise and modern-day repopulating the Ark. Joe and I frequently used to parse biblical stories together. Studying the Book of Ecclesiastes, Joe had been literal in his dissents. Studying the Book of Exodus, Joe raised his eyebrows, one at a time, and we argued. In the universe of everyday politics, we talked about the Iran deal and America post-Iran. I felt like arguing my “case” before the court. Sometimes, Joe would suddenly move into other areas of discussion: what is my “opinion about a certain Dworkin book?” In turn, I would ask him about his take on Yuval Harari’s *Sapiens* or about Assaf Gavron of Israel. A conversation with Joe resembles a modern version of a Socratic dialogue. Curious, unpretentious, brilliant. And warm. And both of us are older than Socrates but still his disciples.

As I write, Joe is reaching 85. “You are *so* young,” I blurt out from my 88 advantage. “I know,” he responds. By this September, Joe’s second volume on the California Constitution will be published. He continues teaching at UC Hastings College of the Law, arbitrating, writing, and defying the calendar. There is nothing better than moderation, including moderation. In between, we sip our café lattes. We praise Obama’s signing of the Amazing Grace, and wonder about opinions of the new judges on the California Supreme Court. Joe confesses to unease: “We are too comfortable,” he says, “in an un-comfortable world.” We turn to issues of *access* to justice, of *access* to politics. We worry about *fairness* in the legal delivery system (not just about *equality*). We turn to medical issues. Joe probes effective counter-arguments. He searches for substance. If our conversation turns too depressing, we shift to aesthetics: What is new in the opera, or in the latest classical music performances; what theater productions and art exhibitions should one see? Joe’s interests were never monochromatic.

Fifty-five years ago, Mat Tobriner introduced me to Joe. I did not know him in law school, since he enrolled when I graduated, in 1952. I did not know

him in his London years. In the late 1950s, I was doing some minor research for Mat Tobriner. It was before Mat's law office became Brundage, Neyhart, Grodin and Beeson. Tobriner introduced me to Joe, and Joe met me with a huge smile and a thorough cross-examination. He wanted to know about my experience clerking for the Supreme and District Courts in Israel and about my work as a private secretary for Menachem Begin, head of the Irgun Underground in Israel, as Begin was emerging into his public life. I could not stop talking. He asked sensitive questions. Later, I arrogantly tried to recruit him into the local ACLU, where I briefly chaired its legal committee. He did not need my help. Never giving up, I recruited him instead into the American Jewish Congress Commission on Law and Social Action. We were several dozen Bay Area lawyers dabbling in social justice issues: devising legal attacks on racial discrimination, arguing about due process, equal protection, separation of church and state, segregation, and anti-Semitism. (He tried unsuccessfully to get me interested in labor law.) He introduced me to Janet, his wife. Each of them summered separately at the Brandeis Camp. My friendship with Joe and Janet, now fifty-five years in the making, endured, grew, and deepened.

Two thousand years ago, in *Ethics of the Fathers*, Joshua ben P'rahyah left a set of three instructions, for which he is still remembered: "provide yourself with a teacher, acquire a friend; and judge every man charitably." (Mishnah 6; my translation.) Judging every man charitably defines for me an ideal of what judgeship means. This is what Joe did when he became a judge. He turned into a great judge. But he was more than a "judge." Like Tobriner, he was also a splendid teacher. He is a good human being. A good husband. A good father. And he is a good friend.

It is normal to strive to "provide yourself with a teacher." He was what a good teacher should be. Yet, even great teachers, as rare as they are, relate to students with unilateral authority. Finding a good friend is more difficult. True friendship is less unilateral than a teacher-student relationship. Friendship implies concern for the other, consideration, devotion, perseverance, and care. It is more than Hillel's teaching of "What is hateful to you, do not do unto others"; it is doing for the other more than you would do for yourself. In this sense, having a real friend is the rarest of luck. Keeping friendship alive for fifty-five years is an amazing accomplishment. A minor miracle.

When he studied at the University of California, Joe would drive to school and give rides to other, non-driving students. Friendships bloomed.

Janet remembers that driving his car, he still seemed looking at her sitting in the rear of his car. She must have looked back. She remembers telling Joe where he parked his car for he did not remember it. When they were married and Joe became a lawyer, Janet took up dry point, monotype, wood blocks, printmaking, painting in different techniques, and ended up juried into the Library of Congress. Her art decorates their home. Joe “tried to paint,” but it “was not very exciting.” Painting seems the only thing he ever tried in which he did not excel. In time, they had a daughter, Sharon, “curious and verbal at nine months,” a lawyer, grown into communal leadership. And, then a second daughter, Lisa, a great violinist. Lisa’s recording would play in the car as we drove to Inverness; she entertained at the Lawyers’ Club Retreat, and grew in stature. Sharon would join us occasionally when we studied some issue or book. In time, the Grodins multiplied and grandchildren became the apple of their eye. The Grodins seemed always together. The family celebrates holidays and travels the world together. Joe likes to travel: Aspen, Yosemite, Europe, East Coast, the Mediterranean. When Joe’s junior grandchild arrived in Scotland this year, he wrote his parents in wonder that “they drive on the wrong side of the street!”

Dinners and lunches with Joe were always fun. Generally, we meet in my office or, when Janet joins us, in San Francisco around major museum exhibits or concerts. At dinner Joe acts like a chief justice, making the food secondary. He takes care of Janet, fusses about her menu, in restaurants orders carefully a balanced meal, and always initiates a sparkling platonic dialogue. As I mentioned, he is into philosophy, literature, politics, theater, art, the Hebrew Bible — What books were read? What events crowd the mind? What do I think about the latest news, what about Putin? Why does Netanyahu seem “strident”? What of Obama’s style? How does daily news square with decency, logic, and general wellbeing? We visit the landscape of hearsay. And we share news about children, grandchildren, travel, the courts . . . Sometimes we meet at the Brosnahans’ jurisprudence café, with law as our subject, or with the Sperrys, where art and Len’s jokes become the main course, or we meet at my home, where both of us keep searching for better tomorrows. Since Joe likes to travel, I joined the Grodins in Ireland, where he was teaching, and I delivered a lecture on some utterly forgettable subject.

As a Court of Appeal judge, Joe would sometimes discuss with me a carefully camouflaged legal issue — whatever bothered him at the time,

after altering the underlying facts, for he would never talk about his real cases deeming them privileged. This could lead to strange outcomes. On one occasion, he discussed a criminal case involving Munchausen by Proxy. I opined that Munchausen by Proxy made psychiatric sense. Several weeks later, I was horrified to read Joe's opinion. Our conversation was about the reliability of psychiatric evidence, not about its applicability to the facts of the case. When the court opinion was published, I became aware that I failed to deal with the Fry test, an important issue for the criminal defense bar. I should have thought of the *Fry* case anyway, but we talked only about the psychiatric validity of the Munchausen by Proxy doctrine, and Joe never mentioned legal issues of admissibility.

At a 1986 meeting in the Zuni restaurant, with only Joe, Jerry Marcus and myself, Joe told us that he was approached by a rightwing political advisor who offered to help Joe escape the label of the liberal "gang of four" (Chief Justice Rose Bird, Mosk, Reynoso, and Grodin), if Joe disowned Chief Justice Bird, publicly endorsed capital punishment, and joined the opposition to her reelection. Joe was not beholden to Rose Bird. He did not blindly track her positions. On one occasion, if memory serves, he upheld capital punishment on the facts of the case. He never did anything blindly. He would not lockstep. He voted his own conscience. Moreover, her doctrinaire tone was not simpatico. But, asked for my opinion, I told him that one should never abandon colleagues in their need. Self-interest should not beat loyalty. Marcus opined that loyalty to Bird might cost Joe his judgeship. With Joe it was a matter of principle.

I worried about my advice when Joe was defeated. I came to the Fairmont Hotel, where Joe and Janet awaited the result of the vote and witnessed a great judge removed from office. I saw Janet devastated by the vote. Outwardly, Joe held his feelings private. He returned to teach law at Hastings and counsel clients in labor law. There was pain. Joe never discussed that vote again. At least with me. And life went on.

As Larry Tribe put it: "May he live forever." In spite of aggravations, political and physical. May he continue to seek logic in a grimly illogical world. And may he enrich BART by frequent trips to San Francisco.

IN SEARCH OF CALIFORNIA'S LEGAL HISTORY:

A Bibliography of Sources

BY SCOTT HAMILTON DEWEY*

INTRODUCTION

In the summer of 1988, Christian G. Fritz and Gordon M. Bakken published an article, entitled, “California Legal History: A Bibliographic Essay” (hereinafter referred to as “Fritz & Bakken”).¹ This article discussed various key topics in the legal history of the State of California and pointed readers toward some of the essential resources then available regarding those topics. Fritz & Bakken’s article also marked an early recognition of California legal history as a rich research area worthy of further exploration.

Fritz & Bakken’s original essay was just over nineteen pages long. As Professor Fritz has observed recently, it was intended only as a brief introduction to its topic, and as an encouragement to additional research and researchers, at a time when American legal history generally remained relatively new as a field of study, and California legal history even newer.²

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¹ Christian G. Fritz & Gordon M. Bakken, “California Legal History: A Bibliographic Essay,” *Southern California Quarterly*, Vol. 70, No. 2 (Summer 1988), pp. 203–222.

² E-mail message from Christian G. Fritz to Selma Moidel Smith, October 16, 2015.

More than twenty-seven years later, like many other fields of history in the post-1970 era, California legal history has expanded hugely, even explosively, over its still-fledgling state as of 1988. The field of legal history also has tended at times to merge with other fields of history, such that now, in addition to more traditional, “pure” legal history of matters such as courts, cases, judges, lawyers, and legal doctrine, one also routinely finds “hybrid” studies, combining legal history with, for example, social history, gender history, demographic history, labor history, agricultural history, economic history, or environmental history — among many other possibilities. Thus California legal history has grown progressively richer and more complex over the past quarter century, in ways that might have been difficult even to dream of when Fritz & Bakken offered their original introduction.

Given the growth, evolution, and maturation of the field of California legal history over the past decades, Selma Moidel Smith, editor of the journal *California Legal History*, has for some time been eager to have Fritz & Bakken’s essay updated and expanded. In 2010, she wrote:

One of the rewards of studying California legal history is that the field may be entered from nearly any perspective and pursued in nearly any area of interest. This is so because California legal history is not merely a microcosm of American legal history. It is a special case. California’s eventful legal history and its position as a legal innovator have allowed it to be among the few states whose legal history is recognized as a field of study. Unlike the study of American legal history in general, it is exceptional because it has not as yet crystallized into a self-contained academic field.

This circumstance gives rise to both its weaknesses and its strengths. Among the obvious weaknesses are that few university courses are devoted specifically to California legal history, and it is not recognized as a field of publishing apart from *California Legal History*. It would be difficult to name a scholar whose career has been devoted entirely to its study. And yet this circumstance also leads to one of the field’s less-obvious strengths, its unique diversity of perspectives and subject matter.³

³ Selma Moidel Smith, “At the Intersection of Law and Scholarship: Recent Approaches to California Legal History,” *California Supreme Court Historical Society Newsletter* (Spring/Summer 2010), p. 7 (written without a byline in the author’s capacity as Publica-

Accordingly, Selma informed me that her goal in asking me to undertake this project was to create a resource that would encourage scholars to pursue new research and also enable teachers to prepare course curricula in the field. The bibliography that follows represents an effort to do just that, as well as a slightly belated twenty-fifth-anniversary commemoration of the original article.

As readers will quickly discover — perhaps gleefully, perhaps glumly — this updated bibliography is a whole lot longer than the original, and seeks to be more comprehensive than the original was ever intended to be. The new bibliography also draws upon powerful new digital bibliographic research tools and techniques that remained mostly or entirely unavailable back in 1988.⁴ Indeed, the whole era of microcomputing and related digital technologies that have revolutionized libraries, research, and information science in general has happened mostly since that time. Partly as a result of that transition and the expanded access to information that it has made possible, this bibliography includes a much wider range of particular topics and subtopics than the original article, along with expanded coverage of the topics Fritz & Bakken addressed.

As the length of this work approached 120,000 words (requiring about 300 pages in *California Legal History*), Selma proposed the more practical — and altogether more desirable — concept of expanding the bibliography from the pages of the journal to an independent online format. Thus, the main body of this text appears in the 2015 edition of the journal (volume 10) for general reading, but the complete results of my work — including the full body text and over 400 notes with thousands of bibliographic entries — appear online at <http://www.cschs.org/history/resources/bibliography>.

The benefit is self-evident: Rather than being out-of-date the moment it is published, the bibliography will become a living resource. Readers are hereby invited to submit suggestions for citations (and corrections, please) directly to me at dewey@law.ucla.edu. I have agreed to continue in the capacity of Bibliography editor and gatekeeper for an indefinite period.

Perhaps ironically, though, notwithstanding the present bibliography's greatly expanded size and ambitious — or hubristic — goal of being complete and comprehensive, it is actually only *more* comprehensive than Fritz &

tions Chair and Editor of the *Newsletter*); available at <http://www.cschs.org/wp-content/uploads/2014/08/2010-Newsletter-Spring-Intersection-of-Law-and-Scholarship.pdf>.

⁴ See my “Research Notes and Concluding Comments” on this topic and several others at the end.

Bakken, and thus in a sense remains, like the original, only an introduction. That is, despite the copious lists of sources concerning myriad topics that may be found here, this bibliography, too, remains inherently and inevitably incomplete — there is, and likely will always be, even more information out there regarding California legal history than can ever be captured in a bibliography.

That is partly because, like any other field of history, California legal history is a moving target: new books, articles, and theses are being written or are already in the publication pipeline even as this introduction is being written, while existing primary and secondary materials are being found — or recognized as relevant — and added to library or archival collections, catalogs, indexes, and finding aids. Such items are not yet listed in indexes or databases to be found. So, just as one cannot put one's foot in the same river twice, this snapshot of the state of California legal history, begun in the summer of 2015, would be doomed to incompleteness at the outset and in ever-greater need of updating later, like its predecessor, if not for the new era of digital, online publishing.

This bibliography is nevertheless predestined to be incomplete for the added reason that it remains practically impossible to construct and conduct theoretically perfect searches that produce all actual relevant results (and, preferably, no irrelevant ones) on any topic, and certainly on a topic as broad and diffuse as California legal history. It is frankly daunting, even humbling, to approach a subject as broad and multi-faceted as “California legal history,” to confront even a fraction of the myriad potential sub-topics, directions, and paths one may wander down in pursuit of that broad, amorphous general topic, and to recognize that law and legal history potentially touch almost all aspects of human existence and vice versa. John Muir's famous quote is singularly appropriate here: “When we try to pick out anything by itself, we find it hitched to everything else in the Universe.”⁵ Where, exactly, does legal history stop, and “ordinary” history, or life, begin? In terms of digital research, the proliferation of sub-topics entails a similar proliferation of potential search terms. And there is no one master database, and no one set of “correct” search terms, that will produce everything that could be appropriately characterized as California legal history — which categorization necessarily requires a

⁵ See http://vault.sierraclub.org/john_muir_exhibit/writings/misquotes.aspx.

human judgment call, anyway. Rather, the results must be chased down using various different search terms in several different databases, and, perhaps contrary to the idealized theories of information science, in reality, if you switch databases, or even if you switch search terms or strategies using the same database, you will continue to find new relevant results that did not appear in earlier searches. Although this bibliography was compiled from many different searches in many different databases producing thousands of potentially (but not always actually) relevant results that had to be sifted one by one, along with other search techniques and many helpful suggested items for inclusion from members of the editorial board of *California Legal History*, it did not (and could not) draw upon literally every conceivable search in every available database. For this reason, too, it is inevitably incomplete.

With the caveat that this bibliography (even with ongoing improvement) can by no means be the final word on the subject, and remains only an introduction, a gateway into the field of California legal history the way Fritz & Bakken's original essay was, it is nevertheless hoped that it may serve as a helpful, useful, maybe even stimulating exposure to the vast, diverse, complex richness that California legal history has become. Indeed, hopefully some readers and researchers may come away with some of the same sort of feeling of discovery, and awe, that the author/compiler experienced — rather like Howard Carter reportedly murmured in 1923 following his first glimpses of the treasures in Tutankhamun's tomb, in response to Lord Carnarvon's question, "Can you see anything?"

"Yes, wonderful things."⁶

SPECIAL HONORS & COMMEMORATIONS

Although it is not the purpose of this bibliography to play favorites, certain scholars have made particularly notable and extensive contributions to scholarship in various areas of California history, and this bibliography seeks to appropriately recognize their efforts. For the most part, such special contributions are commemorated at or near the beginning of relevant topic headings — with the following two exceptions concerning two scholars who have made particularly major and broad-ranging contributions to California legal history in general.

⁶ See https://www.goodreads.com/author/quotes/202032.Howard_Carter.

IN MEMORIAM: GORDON M. BAKKEN

Professor Bakken, coauthor of the original 1988 bibliographic essay, passed away in December 2014 at the age of 71. An obituary in the Legal History Blog described him as “probably the leading legal historian of the American West of his generation.”⁷ Along with his wider work on the West as a region and other states or localities within it, Bakken’s contributions to California legal history were extensive. In addition to his numerous publications, he chaired or otherwise served on a vast number of committees for master’s theses on legal history topics that have come out of California State University, Fullerton over the past several decades, many of which appear in this bibliography.

In memory of Prof. Bakken, and in recognition of his contributions to the field, here, taken from his online curriculum vitae, are lists of his many books,* book chapters and encyclopedia entries,* articles,* and oral history interviews* specifically regarding California and its legal history. (Many of his works that concern the West more generally also touch upon California, of course.) These works also appear elsewhere in the bibliography under specific topics and headings.

LAWRENCE M. FRIEDMAN

Fritz & Bakken in 1988 noted the “path-breaking work of Lawrence M. Friedman and Robert V. Percival” in their seminal book examining in detail an example of the local history of California courts and criminal law, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870–1910*.^{*} After many other similarly in-depth explorations of a variety of topics in criminal or civil law in several different California counties, after advising or assisting many student dissertations, theses, and research papers, and also after the passing of Prof. Bakken, probably few would deny Prof. Friedman the honorary title of the current “Dean of California legal history” — particularly with regard to the general history of courts and of civil and criminal law. In honor of his record of lifetime achievement in service of that field, here is a list of his publications specifically concerning California legal history (only a fraction of his total publication list).^{*}

★ ★ ★

⁷ Dan Ernst, “Gordon Bakken (1943–2014),” Legal History Blog, December 11, 2014, available at <http://legalhistoryblog.blogspot.com/2014/12/gordon-bakken-1943-2014.html>.

* All notes available at <http://www.cschs.org/history/resources/bibliography>.

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THE LOEB FIRM

And the Origins of Entertainment Law Practice in Los Angeles, 1908–1940

MOLLY SELVIN*

I. INTRODUCTION

The story of how Edwin Loeb got his start as an entertainment lawyer, like many tales told of the studio moguls who became his clients and poker partners, has multiple versions.

One account pins Edwin's first entertainment client as "Colonel" William N. Selig, an ex-sideshow operator who turned to slapstick comedies, minstrel-themed shows and westerns. In 1890, Selig moved his operation from Chicago to what became the Echo Park neighborhood of Los Angeles and began making movies, often featuring his growing collection of exotic animals. According to a former Loeb & Loeb partner, Selig retained Edwin in 1914 or 1915 to resolve some of his legal problems after meeting him at

* Research Fellow, Stanford Law School. Ph.D., Legal History, UC San Diego. I am tremendously grateful to former Loeb & Loeb partners Howard Friedman and Robert Holtzman for sharing their memories and documents and for commenting on an earlier draft of this paper. Cameron Norris (J.D. 2011, Southwestern) offered excellent research assistance at the start of this project, and my former Southwestern colleague Professor Kelly Strader also kindly provided helpful comments on the draft. Finally, I particularly thank Bryant Garth, former dean of Southwestern Law School, for encouraging me in this project and for the summer funding that enabled me to start.

a social function. Upon his return to the office, Edwin reportedly told his brother, Joseph Loeb, that he had a new client for their fledgling practice. When Joseph asked what fee he'd negotiated, Edwin reportedly replied, "I put him on retainer for \$100," assuming that payment would be made annually. Much to the Loeb's surprise, however, Selig paid the brothers \$100 weekly for some period — quickly demonstrating the potential profitability of entertainment work to the bottom-line conscious Joseph.¹

Another version of Edwin's start holds that movie producer David Horsely asked for Edwin Loeb's help in the 1910s after his Los Angeles lawyers had allowed default judgments to be taken against his studio, located at Washington Boulevard and Main Street. Horsely had found Loeb after writing to a New York lawyer he knew for the name of more competent local counsel. The New York lawyer in turn queried Jesse Steinhart, a San Francisco lawyer friend who was also a friend of Edwin and Joseph. Steinhart recommended the Loeb's.² One of Horsely's first matters with the Loeb's was a dispute with the producers of what were called "L-Ko Comedies."³ Edwin's assistance in settling the dispute so favored Horsely that one of the opposing producers reportedly told Edwin, "The way you treated us is terrible, and if we ever need a lawyer, we are coming to you." They subsequently did.

Whether either story is fact or fable is probably beside the point. Both illustrate some of the qualities that made Edwin Loeb the city's preeminent entertainment lawyer during the early twentieth century and the Loeb & Loeb firm a major power broker in the emerging movie business and the broader Los Angeles business community.

Entertainment emerged as a specialty practice initially to service the novice movie producers and the film empires they eventually built. The Loeb firm represented the major studios, including Universal, Warner Brothers, Republic Pictures, RKO, Metro Goldwyn Mayer, Samuel

¹ Interview with former Loeb partner Howard Friedman, Oct. 19, 2010 (on file with the author) [hereinafter Friedman Interview].

² This section along with much of the early history of Loeb & Loeb draws heavily on Bill Colitre, "A History of Loeb & Loeb LLP from its Inception to the Present Day," typewritten manuscript (2002) (on file with the author) [hereinafter Loeb History].

³ L-Ko comedies were one- or two-reel silent caper comedies produced between 1914 and 1919.

Goldwyn Studios, United Artists, and Twentieth Century Fox. The firm — particularly Edwin — put together their early movie deals, real estate acquisitions, and distribution arrangements and often mediated their labor negotiations. As the movie business grew and diversified, new legal issues prompted further specialization within the entertainment bar: Some firms and individual practitioners focused on the “talent” — representing the actors, producers, writers and directors who contracted with the studios. Still others developed expertise in copyright, intellectual property, labor relations, and, more recently, in new media. (And some counselors have found a profitable niche in sorting out the indiscretions and misdeeds of their celebrity clients.⁴)

Loeb & Loeb was not involved in every deal or major event nor did it represent every studio, mogul, agency, or distribution company. But the firm’s lawyers had a hand in most of the major disputes and developments of the pre–World War II era. Moreover, as was true of other Jewish and ethnic law firms, several Loeb lawyers, including Martin Gang, George Cohen, Alan Sussman, Lawrence Weinberg, and Robert Rosenfeld, spawned their own firms, many of which became entertainment powerhouses. Loeb & Loeb’s entertainment client base still includes talent as well as movie and television producers, film funds, record companies, music publishers, private equity funds, and advertising agencies. As such, the firm’s development mirrors the broader evolution and expansion of the entertainment practice.

This article charts the origins of entertainment law sub-practice by focusing on the Loeb brothers and the major legal developments in the industry from 1908 through 1940. The brothers’ careers and the story of the firm they built nest within a large body of research about how lawyers, including those from ethnic minorities, pursue their careers. Their story underscores the work of some scholars and expands that of others.

⁴ Two examples are Jerry Giesler (as told to Pete Martin), *The Jerry Giesler Story* (New York: Simon and Schuster, 1960) and Milton M. Golden, *Hollywood Lawyer* (New York: Signet, 1960). Golden’s practice largely involved divorcing celebrities and producers, drunken clients whom he bailed out of jail, adulterous clients who wanted Golden’s help to squelch publicity over their dalliances along with assorted accident and other personal injury matters. Golden used pseudonyms for his clients but insisted readers of the time would know their names.

For example, as their practice and reputations grew, the Loeb brothers came to exemplify the central role that Robert Gordon⁵ and other scholars have identified for lawyers — as writing new “rules of the road” and then employing those rules to their clients’ benefit. While many accounts of the early moguls portray them as having almost singlehandedly built their studios, the Loeb brothers and other leading practitioners were essential to the growth and success of their clients’ entertainment and corporate enterprises. By lobbying for favorable laws and regulation, navigating those legal rules on behalf of their clients and guiding them through transactions and litigation, the Loeb brothers were critical to the survival and growth of those companies. Their assistance also legitimized their business endeavors. The role of these counselors proved especially important to studio heads who sought not just wealth but respect as the new movie business tried to shake off its burlesque and sideshow roots.

Loeb & Loeb was long characterized as a “Jewish” firm, even though Joseph and Edwin were largely unobservant and they partnered with non-Jewish lawyers from their first days in practice. Nonetheless, as anti-Semitism constrained opportunities for Jewish lawyers beginning in the 1890s, the firm was the major Los Angeles firm that hired Jewish lawyers through the mid-twentieth century. Other scholars have documented the exclusion of Jewish lawyers from de facto Protestant firms in New York and other eastern and Midwestern cities; the rapid growth of Jewish (and other minority) firms “by discriminatory default”; and the eventual erosion of the religious identity of both WASP and Jewish firms beginning in the 1950s.⁶ That pattern prevailed in Los Angeles to varying degrees at different times. Well into the 1950s, Jewish lawyers, including top graduates from prestigious law schools, were largely passed over by Gibson Dunn, O’Melveny, and the city’s other white-shoe firms.⁷ As a result, Jewish lawyers eager to

⁵ See Robert W. Gordon, “Legal Thought and Legal Practice in the Age of American Enterprise,” in *Professions and Professional Ideologies in America*, ed. Gerald L. Geison (Chapel Hill: Univ. of North Carolina Press, 1983), 70–110; and Parts IV and V below.

⁶ See, for example, Eli Wald, “The Rise and Fall of WASP and Jewish Law Firms,” *Stanford Law Review* 60 (2008): 1803.

⁷ For example, Howard Friedman, a Yale Law School graduate who was admitted to the California bar in 1955, joined Loeb & Loeb after other major Los Angeles firms turned him down. Friedman Interview.

expand their own practices found some of the region's major business clients and social institutions out of reach.

Yet the Loeb's story also reveals differences that help explain their financial success and influence within Hollywood, the local bar, and the broader Los Angeles community. When the brothers opened their doors, in 1909, Los Angeles was a pioneer town compared with San Francisco and a cultural and economic backwater, overshadowed in sophistication, population and wealth by its northern neighbor. The Los Angeles legal community was smaller and more fluid in those years. But the region's soaring economic and geographic growth would soon generate enormous opportunities for local lawyers whose ethnicity, for a time anyway, may have been less important than their skills and eagerness.

These differences worked to the advantage of the hometown Loeb boys, eager to grow their business in tandem with the city. It certainly helped that Joseph and Edwin were native Angelenos, unusual for white residents at the turn of the twentieth century, and part of an extended family with deep roots and important connections in the city. Their local pedigree enabled them to attract an A-list of banks and other business clients who might have been unwilling to trust their affairs to immigrants, Jews, or recent transplants to the area. By the 1930s and 1940s, the firm's book of business included many of the region's major corporate and nonprofit institutions.

At the same time, like Jewish lawyers in other cities, the Loeb's pursued clients that WASP firms might have passed up; in other words, they hustled. The tawdry reputation of the movie industry in its early days may have repelled some attorneys in mainstream firms. But the Loeb's — young and ambitious — had more reasons to take chances.⁸

That they were Jewish may have mattered for many of the studio heads and actors they represented. Carl Laemmle, the Warner brothers, Samuel

⁸ Malcolm Gladwell makes a similar point in *Outliers* when describing several New York Jewish lawyers, many the children of immigrants, who came of age during the Depression. Excluded from WASP firms in the 1950s by anti-Semitic snobbery, they turned to unglamorous legal specialties like proxy fights. By the 1970s and '80s, when that work had become highly remunerative, the established firms that had previously turned up their noses at the business became interested. As Gladwell notes, for these New York lawyers, like the Loeb brothers and their Jewish colleagues in Los Angeles, accidents of birth and standing gave them "the greatest of opportunities." Malcolm Gladwell, *Outliers: The Story of Success* (New York: Little, Brown and Co., 2008).

Goldwyn, Irving Thalberg and Louis B. Mayer were themselves Jewish immigrants or, like the Loebes, children of Jewish immigrants. As a result, they may have instinctively felt more comfortable trusting their business affairs to *landsmen*. Indeed, because some (but not all) of the other law firms that took on entertainment clients during the early twentieth century were considered “Jewish” firms, the specialty became tagged early on as a “Jewish” sub-practice,⁹ a characterization that to a large extent remains true.

The Loeb brothers’ extensive service to the local bar as well as their philanthropic activities on behalf of secular and Jewish causes also contributed to the firm’s stature — and certainly to its bottom line. These activities helped propel both brothers and their firm onto the top rungs of Los Angeles commerce and society, and surely served to expand the firm’s business portfolio.

So while the story of the Loeb brothers — like the origins of entertainment practice — is one of skilled and ambitious Jewish lawyers, the firm’s success transcends that simple ethnic narrative. The fortunate convergence of geography, family wealth and connections, timing, and just plain moxie also explain Loeb & Loeb’s financial success and the firm’s stability, even during the worst years of the Great Depression, as well as the brothers’ lasting influence in the broader Los Angeles community. As such, this account of the firm’s early dominance in entertainment law should add texture to previous scholarship on law firm organization, the role and career arc of ethnic lawyers and the firms they created, and the economic and social development of Los Angeles.

★ ★ ★

This article proceeds as follows: Part II charts the brothers’ early years; Part III focuses on their start as practitioners. Part IV charts the central role lawyers played by writing the “rules of the road” for the nascent entertainment industry between 1900 and 1940 and then employing those rules to their clients’ benefit. I focus here on some of the early patent intellectual property disputes, censorship and the first efforts at labor organizing. The Loebes, particularly Edwin, were involved in much of the litigation and

⁹ Two others are Mitchell, Silverberg & Knupp and Kaplan, Livingston, Goodwin, Berkowitz & Selvin (no relation of the author).

negotiation in these areas. Part V includes observations about the role of Jewish identity in the Loeb's careers and in the Los Angeles legal community more broadly; and Part VI draws some conclusions from the Loeb's story about the role of lawyers in the movie business.

A final introductory note before we begin: Two narratives intertwine albeit imperfectly throughout this essay. The first, as noted above, locates the Loeb brothers and the firm they built at the nexus of a pioneer town poised for dramatic growth and a small, prosperous German-French Jewish community. The firm's financial success and the brothers' philanthropic activities moved them into the Los Angeles elite, reinforcing their ability to attract topflight commercial and entertainment clientele. The second narrative charts some of the new legal structures that emerged as the studios matured, including film distribution and exhibition networks, craft and talent unions, and New Deal regulatory initiatives directed at this still-young industry.

Available documents and interviews with former Loeb partners who knew the brothers and other entertainment lawyers kind enough to share their recollections permit us to explore the firm's role as entertainment law came into its own. Although few case files or case-related correspondence remain, extant first-person accounts and primary-source documents,¹⁰ combined with secondary accounts of the rise of the studios and guilds as well as biographies of the major industry players, point toward inferences about the influence and involvement of Loeb lawyers in particular and entertainment practitioners more generally. Where I can document the firm's role I have done so; in other instances, I have drawn what I hope are judicious conclusions. Regardless, a fuller account remains to be written.

II. EARLY LIFE AND EDUCATION

Leon Loeb, a native of Alsace, France, arrived in Los Angeles in 1853 and within a few years opened a dry goods store downtown. In those years, Los

¹⁰ Most helpful were six boxes containing daily logs, correspondence, litigation files, ledgers, and ephemera housed at the firm, referred to internally as the "History of Loeb & Loeb Vault Material." The Huntington Library also houses several boxes containing Joseph Loeb's personal correspondence, early firm ledger books, and ephemera.

Angeles included fewer than 5,000 residents¹¹ with whites and native Angelenos in roughly equal numbers. During the late nineteenth century, the city was a dynamic mix of Mexicans, Chinese, Japanese, African Americans, and European immigrants like Loeb;¹² boundaries between those ethnic groups were sometimes peaceful and porous, at other times fear and racism turned murderous.¹³

As a European Jew in what was then a small town, Loeb inevitably met Harris Newmark, a prominent Jewish merchant, real estate investor, philanthropist, and patriarch of one of the city's founding families. In 1879, Leon Loeb joined Newmark's family by marrying his daughter Estelle. The first of their three children, Rose, was born two years later, followed by sons Joseph in 1883, and Edwin in 1886.

That the Loeb children were born and raised in Los Angeles, near downtown and close to their influential Newmark relatives, goes a way toward understanding the brothers' later financial success. Joseph remembered playing "Indians" in the weeds with his uncle Marco (Harris Newmark's son — and Estelle's brother — who was only five years older than Joseph), and recalled how Edwin, walking their dog in the "wild" area west of Westlake (now MacArthur Park), would sink knee-deep into the pools of black crude that dotted the area.¹⁴ The Newmark and Loeb families

¹¹ *Los Angeles Almanac*, <http://www.laalmanac.com/population/po25.htm>. The City of Los Angeles was incorporated in 1850, the same year California entered the Union.

¹² The 1870 census counted 330 Jews or 5.76 percent of the city's population. Reva Clar, "The Jews of Los Angeles: Urban Pioneers — A Chronology," http://home.earthlink.net/~nholdeneditor/jews_of_los_angeles.htm. That number rose to 2,500 by 1900, or 2.5 percent of Los Angeles' 102,000 residents. Jewish Virtual Library, "Los Angeles," https://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0013_0_12766.html.

¹³ See e.g., Jean Pfaelzer, *Driven Out: The Forgotten War Against Chinese Americans* (New York: Random House, 2007); Douglas Flamming, *Bound for Freedom: Black Los Angeles in Jim Crow America* (Berkeley: Univ. of California Press, 2006); Edward J. Escobar, *Race, Police, and the Making of a Political Identity: Mexican Americans and the Los Angeles Police Department, 1900–1945* (Berkeley: Univ. of California Press, 1991); William Deverell, *Adobe: The Rise of Los Angeles and the Remaking of Its Mexican Past* (Berkeley: Univ. of California Press, 2004).

¹⁴ "Joseph Loeb, Los Angeles Attorney," Interview transcript, Oral History Program, Claremont Graduate School, 1965, 1. Around this time, Leon, as a native of France, was appointed *Agent Consulaire* or French consul for Los Angeles, although he served only a few years, resigning in 1898 in protest over the Dreyfus Affair. (Loeb had become a U.S. citizen in 1870 in response to Germany's capture of Alsace during

regularly gathered for dinner, often with assorted Franco-German friends and relatives. Rose Loeb Levi's great niece, Linda Levi, recalled those evenings as lively with marathon stag card games often conducted out of sight of disapproving female relatives.¹⁵

Apart from the poker and gin rummy tutorials, the Newmarks were a major influence on both boys and their father. Joseph credits Marco, a Berkeley undergraduate when Joe was in high school, with persuading him to study law. "I was going to be an electrical engineer," he recalled in 1965. "This amuses me," Loeb added, noting how easily he changed his mind "because it shows how clearly I was really cut out to be a lawyer."¹⁶ (The two men had planned to go into law practice together but Harris Newmark successfully pressured his son Marco to enter the wholesale grocery business.)

After graduating from Los Angeles High School, Joseph earned his bachelor's degree in 1905 at UC Berkeley where he was elected to Phi Beta Kappa. He took what he called "preliminary law courses" as an undergraduate "and then decided I shouldn't impose on my father by going to Harvard Law School as I intended, but go home for a year and work and then go to law school."¹⁷ That



JOSEPH LOEB

Courtesy The Huntington Library.

Loeb felt he had the choice to attend law school (let alone Harvard) underscores his family's relative affluence and, notwithstanding the financial

the Franco-Prussian War. Loeb History, 1–2.) Loeb had succeeded Marc Eugene Meyer as consul when Meyer, grandfather of *Washington Post* publisher Katherine Graham, moved to San Francisco.

¹⁵ [Linda Levi], "Loeb and Loeb, Pioneer Los Angeles Law Firm, 1909–Present," 2, <http://homepage.mac.com/lindalevi/PersonalAW/LOEB&LOEBSHISTORY.htm>.

¹⁶ "Joseph Loeb, Los Angeles Attorney," 4.

¹⁷ *Ibid.*, 5.

turmoil that followed the devastating Panic of 1893, the economic stability of the extended Loeb–Newmark clan.

Courtesy of Newmark family connections, Joseph Loeb became an office boy at the O’Melveny firm immediately after his college graduation. According to his oral history reminiscences, Joseph never did go to law school, instead studying for the bar while apprenticing to O’Melveny. In those years, he recalled, some offices charged would-be lawyers to apprentice but he was taken on without paying and shortly after starting work there, Henry O’Melveny began paying him ten dollars a month in return for running errands and doing clerical work. Loeb passed the bar in 1906 but stayed at the O’Melveny firm until 1907.¹⁸

Edwin took a different path to the law. He quit college in 1906 to work his way around the world on a trading ship. Leaving Los Angeles with a box of cigars and \$340 from his parents, he visited Australia, Japan, England, and France, among other countries. Letters home during this odyssey recount his travels along with his growing skill at cards.¹⁹ Before he returned to Los Angeles, in the summer of 1907, Edwin had planned to join the family grocery business but once back he decided that law would be more remunerative and allow him the opportunity to work with his brother. He enrolled at USC’s law school but quit soon after and like Joseph, signed on with O’Melveny, working mostly as a switchboard operator and receptionist while he began his bar studies.²⁰

Edwin also apparently convinced his brother that they would do better on their own, so in January 1908, Joseph Loeb and another ex-O’Melveny associate, Edward G. Kuster (a Gentile), opened their own office on Main

¹⁸ *Ibid.*, 6. O’Melveny listed him among the office’s “associates” following his admission to the Bar; Loeb is the only recognizably Jewish name among his contemporaries. William W. Clary, *History of the Law Firm of O’Melveny & Myers 1885–1965* (privately printed, 1966), 826–27.

¹⁹ Letters of Edwin Loeb, notebook, Box 2, History of Loeb & Loeb Vault Material. At the time, an applicant had to demonstrate that two members of the bar had personally examined his legal qualifications. Loeb’s certificate of admission states that H.W. O’Melveny, along with another firm attorney, attested to his ability. Clary, *History of the Law Firm of O’Melveny & Myers*, 157–58.

²⁰ Dr. Norton Stern, “Report of an Interview with Edwin J Loeb,” Jan. 25, 1967, 2, History of Loeb & Loeb Vault Material.

Street.²¹ Edwin worked as a clerk and office boy for both lawyers as he studied for the bar. When he passed, in January 1909, the firm was renamed Kuster, Loeb and Loeb. Two years after the three lawyers joined forces, Kuster retired from the firm and moved to Carmel, and the firm then became known as Loeb and Loeb. At the time, a grand total of five Jewish attorneys practiced in Los Angeles.²²

III. BEGINNING IN PRACTICE

As was true in other U.S. cities, the Loeb's lineage as the educated, native sons of successful German-French families allowed them to appear more secular, distinguishing them from more recent immigrants from Eastern Europe who, along with large numbers of Midwestern Protestants, arrived in Los Angeles after World War I. The city's Jewish population also jumped, from 2,500 in 1900 to 20,000 by 1920,²³ due to a large influx of Eastern European Jews. As happened in other cities, the established Jewish immigrants were often embarrassed by and disdainful of the new immigrants' lack of English, odd customs, and obvious poverty.²⁴

Moreover, the brothers' very different personalities worked to their collective advantage from the start. Edwin was the funny one, always up for a good time, according to friends and former colleagues who described him as "magnetic," "exuberant," "a great storyteller," "loved life," and "mischievous." His gregariousness undoubtedly helped the firm attract clients in the movie business where personal relationships and a flair for the dramatic, in addition to a shared ethnic identity, perhaps counted even more than in other areas.

By contrast, Joseph was formal, steady and serious, fastidious and careful — the "consummate business lawyer," according to Howard Friedman.²⁵ In the early years, Joseph tended to the firm's finances in addition to his clients.

²¹ Clary believed that Loeb could have remained at that largely Gentile firm. See Clary, *History of the Law Firm of O'Melveny & Myers*, 157–58.

²² Neal Gabler, *An Empire of Their Own. How The Jews Invented Hollywood* (New York: Anchor Books, 1988), 272.

²³ Phil Blazer and Shelley Portnoy, *Wrestling with the Angels. A History of Jewish Los Angeles* (Encino, Cal.: Blazer Communications, 2007), 136.

²⁴ Frances Dinkelspiel, *Towers of Gold. How One Jewish Immigrant Named Isaias Hellman Created California* (New York: St. Martin's Press, 2008), 5, 160–61.

²⁵ Friedman also described Joseph Loeb as "dour" and even "fatalistic."

His cash ledgers and daily logs, written in a neat slanted script, detailed mundane expenses — the cost of his *Los Angeles Times* subscription, for instance, and the walking-around cash he gave his daughters — along with client fees received and the firm's bank balances. His logs also record each day's activities — cases worked on, client conversations, successes, losses, everyday details, and memorable events. His notes on a call to City Hall about uncollected garbage cans include the phone number he dialed, for future reference, and the 26-year old's impressions of the first "aeroplane in flight" he saw.²⁶

Where Edwin loved to party, Joseph wrote poetry and collected Horatio Alger books. Studio heads and movie stars often began their letters to Edwin with a gushing "My dear Eddie"; correspondence to and from Joseph was more formal. Edwin had a longstanding Sunday golf date with Samuel Goldwyn at the Hillcrest Country Club while Joseph represented the firm on philanthropic boards. Joseph married once; his brother three times.²⁷ Joseph's discretion, caution, and legal skills built the firm's stable of corporate clients that as much as the movie studios were mainstays of the firm's practice for decades, beginning with the brothers' partnership with Kuster.

In their first years, Kuster, Loeb and Loeb did what many beginning lawyers do: everything and anything. Joseph Loeb's daily logs from 1908 through 1912 record work on divorces, wills for relatives, real estate purchases, contract disputes, and accident cases. But the young firm had strategic advantages: a Loeb cousin married into the family of Kaspere Cohn, a local wool merchant whose immigrant savings bank eventually became Union Bank & Trust Company of California, later Union Bank of California, and one of the firm's earliest, largest and most loyal clients. Joseph eventually served on the bank's board. Edward Kuster was the nephew of

²⁶ "Went up on the roof with Edwin and Phil Crowds watching from the streets, window and roofs." Joseph Loeb, Jan. 4 and Jan. 13, 1909 entries, 1909 daily log, handwritten, Box 6, History of Loeb & Loeb Vault Material.

²⁷ In January 1909, a week after passing the bar, Joseph married Amy Cordelia Kahn of San Francisco. The couple had two daughters, Kathleen and Margaret. On their fiftieth wedding anniversary, he presented Amy with fifty roses. Edwin married his first wife, Bessie Brenner, the following year and also had two daughters, Marjorie and Virginia. He married a second time in 1938, to Ellen Van Every. In 1957, at age 70, he "eloped" to Las Vegas with Cally Alsap with whom he'd lived for the previous ten years at the Roosevelt Hotel on Hollywood Boulevard. He died in 1970 at the age of 84.

William G. Kerckhoff, a founder of Pacific Light and Power Company, and the utility also signed on with the young Loebes. The O'Melveny firm provided steady client referrals; Harris Newmark made introductions around town and advised the brothers on many matters.²⁸ Leon Loeb's philanthropic activities yielded other business for his sons (he was on the board of the French Hospital in what is now Chinatown, one of the first hospitals to serve the city's French community).

Early courtroom victories surely also helped to build the Loebes' business and reputation. Beginning in 1909, Joseph Loeb and Kuster represented a group of local wholesalers in their effort to eliminate a hefty surcharge the railroad companies imposed on railcars bringing goods in from San Francisco. Again, family connections helped. A Newmark uncle was president of the Associated Jobbers of Los Angeles; when another attorney declined to take the case, Loeb and Kuster got the chance. The firm won before the Interstate Commerce Commission the next year, knocking out the \$2.50 per car charge and earning a whopping \$25,000 fee.²⁹

In another early railroad case, the young firm persuaded the State Railroad Commission, now the Public Utilities Commission, to eliminate discriminatory freight rates that penalized Los Angeles. The brothers' grandfather, Harris Newmark, considered the firm's lawyering "unusually brilliant" and the case "probably the most notable of all of the cases of its kind in the commercial history of Los Angeles."³⁰ Hyperbole aside, the discriminatory freight charge was a drag on local commerce and its elimination a major impetus to the region's growth.

²⁸ Joseph Loeb's entries in his 1908 and 1909 daily logs include several references to advice and referrals from "Grandpa." Box 6, History of Loeb & Loeb Vault Material.

²⁹ Joseph Loeb Interview, 18–19. The case eventually landed at the U.S. Supreme Court which affirmed the I.C.C.'s judgment abolishing the so-called "switching charge," and facilitating business between Los Angeles and San Francisco. The case consumed a major portion of Joseph Loeb's and Edward Kuster's time beginning in the summer of 1908 and continuing through May 1910. Typical were these entries from February 10 and 12, 1909: "Switching case all day," and "Switching case at house all evening." Joseph Loeb, 1909 daily log, handwritten, Box 6, History of Loeb & Loeb Vault Material. Loeb's May 6, 1910 entry recording the young firm's victory, after the years of long hours, was characteristically understated: "Switching case decided our favor." Loeb, 1910 daily log, Box 6, History of Loeb & Loeb Vault Material.

³⁰ Harris Newmark, *My Sixty Years in Southern California, 1853–1913* (Boston: Houghton Mifflin Co., 1930), 637.

The firm's work for Union Bank as the region dramatically expanded in population and land mass laid the foundation for much of Loeb's lending, real estate and corporate work. In 1900, Los Angeles was the nation's thirty-sixth largest city, with a population of 102,479, as compared with San Francisco which ranked 9th with 342,782 residents. Just ten years later — a year after the firm began — Los Angeles residents numbered 319,198 to San Francisco's 416,192. By 1920, the population of Los Angeles had shot up to 576,673, edging out San Francisco, with 506,673.³¹

Annexation vastly increased the city's land mass. By 1910, Los Angeles had acquired the "Shoestring," a narrow strip of land leading from downtown south to the Port of Los Angeles, along with the harbor cities of San Pedro and Wilmington, and Hollywood. The opening of the Los Angeles Aqueduct in 1913 and the arrival of new railroad lines prompted more annexations, including large portions of the San Fernando Valley and the Westside, such that by the early 1920s, the city had more than tripled in size.

This white-hot expansion yielded steady real estate and incorporation work on behalf of clients with such fanciful names as the Wild Rose Mining Co. and the Rawhide California Mining Co.³² This early boom and the relative absence of established corporations (compared with eastern and Midwestern cities), combined with the Loeb's deep local roots, brought the young lawyers clients who would later become major power brokers — bankers, real estate developers, and oil men as well as the studio chiefs — along with individuals who provided the brothers access to existing Los Angeles elites. This pattern differed somewhat from one that scholars have described in more established legal markets where Jewish lawyers often depended on small and mid-size Jewish clients and "Jewish" corporations to sustain their practices, as well as practice areas that WASP firms considered distasteful, including litigation and bankruptcy.³³

Entertainment was a significant part of the Loeb's business from the start although, as noted above, the exact origin of the firm's initial involvement

³¹ See U.S. Bureau of the Census, *Population of the 100 Largest Cities and Other Urban Places in the United States, 1790-1900*, Tables 13-15, June 1998, <http://www.census.gov/population/www/documentation/twps0027/twps0027.html>.

³² Others included Tampico Petroleum, Midway Field Oil Co., and the San Gabriel Valley Fertilizer Co.

³³ See e.g., Wald, "The Rise and Fall of WASP and Jewish Law Firms," 1851-53.

is unclear. Edwin's early litigation against two brothers on behalf of David Horsely over the so-called "L-Ko Comedies" did indeed prompt the producer brothers to retain Edwin in subsequent matters as they had jokingly promised to do.³⁴ And momentarily for the Loebes, the L-Ko producers introduced Edwin to their brother-in-law — Carl Laemmle, founder and president of Universal Studios.³⁵

By the early 1920s and through a chain of personal connections, the firm was representing Metro-Goldwyn-Mayer, United Artists, Universal, Loews, and other studios.³⁶ Edwin had become a close friend of Louis B. Mayer and by 1924, had helped him to organize the MGM behemoth. Irving Thalberg, another of Edwin's friends, was also instrumental in the consolidation of that studio.³⁷ Thalberg had been Laemmle's private secretary in Laemmle's New York office and in 1920, Laemmle asked the 19-year old Thalberg to accompany him on a visit to his Universal Studios in California — and to help him catch up on his correspondence while onboard the cross-country train trip. Once in California, Laemmle was apparently so impressed by his underling's acuity and maturity that he asked Thalberg to stay in Hollywood to watch over the studio.

Thalberg's ascendancy at Universal, then the largest movie studio in the world, was swift. But by 1922, after a failed romance with Laemmle's daughter, Thalberg was restless. He was already close friends with Edwin, his attorney, who introduced him to Mayer at Loeb's home. Neal Gabler writes that "all parties knew this was an audition," one which Thalberg apparently passed, joining Mayer the next year as vice president and production assistant.³⁸ At the same time, friction developed between Marcus Loew, the wealthy theater chain owner, and Adolph Zukor, head of Paramount Pictures. When Zukor took over the Famous-Players Lasky Corp. he made it difficult for the Loew Theaters to acquire pictures. In response, Loew acquired the Metro Film Co. in 1920 and the Goldwyn Pictures Co.

³⁴ See account in text at note 3 above.

³⁵ Friedman Interview.

³⁶ Joseph Loeb Interview, 20. See also Gabler, *Empire*, 220–23.

³⁷ According to Scott Eyman, Edwin Loeb was at one time also the personal attorney for both Mayer and Thalberg. See Eyman, *Lion of Hollywood. The Life and Legend of Louis B. Mayer* (New York: Simon and Schuster, 2012), 250.

³⁸ Gabler, *Empire*, 221.

in 1924. Later that year, he bought the Louis B. Mayer Picture Corp., naming Mayer as studio head and Thalberg as production supervisor. Edwin helped put the deal together.

Meanwhile, the Loeb firm had undergone its own changes. When Joseph's friend Irving Walker joined in 1914, the firm became Loeb, Walker & Loeb. In the same year, Walker married Evangeline E. Duque, from one of the oldest Los Angeles WASP families who reportedly "disapproved strongly" of his association with "a Jewish law firm."³⁹ When Walker eventually departed, in 1938, the firm became Loeb and Loeb again, later adopting its current branding as Loeb & Loeb LLP.⁴⁰

During these early years, Edwin and Joseph first became involved in civic activities that reflected their individual personalities and professional interests. Their motivations were sincerely philanthropic, as evidenced by their long involvement. Yet as Parikh and Garth noted in their analysis of the career of Chicago lawyer Philip Corboy, these activities also deepened the brothers' links to local elites, further strengthening the firm's reputation and bottom line.⁴¹ In 1927, Edwin and others founded the Academy of Motion Picture Arts and Sciences to honor excellence in the field and, as discussed below, to counter growing pressure for unionization from the industry's talent and craft workers. Loeb did the legal work to acquire the academy's state charter as a nonprofit organization and he is often credited with the idea of holding the Oscar awards. The first awards ceremony took place in May 1929 at the Hollywood Roosevelt Hotel where Edwin later took up residence.⁴²

Joseph directed his energies toward the Los Angeles County Bar Association as well as a number of local charities. Originally organized in 1878 as the Los Angeles Bar Association with the goal of founding a law library, the group drifted until the early 1900s. Loeb joined in 1906 or 1907 as a brand-new lawyer and quickly became an active member. He helped

³⁹ Loeb History, 7.

⁴⁰ Email from former Loeb partner Robert Holtzman, June 23, 2011 (on file with the author).

⁴¹ Sara Parikh and Bryant Garth, "Philip Corboy and the Construction of the Plaintiffs' Personal Injury Bar," *Law & Social Inquiry* 30 (2005).

⁴² See "History of the Academy," *The Academy of Motion Picture Arts and Sciences*, <http://www.oscars.org/academy/history-organization/history.html>; [Levi], "Loeb and Loeb, Pioneer Los Angeles Law Firm," 3; Loeb History, 11.

to revise the bylaws, eventually chaired the attorney discipline committee, and participated in a special committee that made recommendations on statewide court practices regarding attorney fees.⁴³ Loeb served as a trustee of the bar association from 1915 to 1921, and the Loeb firm produced two association presidents, Irving Walker in 1931 and Herman Selvin in 1951.⁴⁴

IV. EARLY ENTERTAINMENT PRACTICE (1908–1940)

As noted above, Loeb & Loeb's earliest entertainment work involved helping to incorporate and structure a number of the major studios along with contractual matters involving those clients and others. This work drew the firm into three of the major legal issues of those early years: the long-running challenge to the Motion Picture Patents Company (MPPC), otherwise known as the Edison Trust; the Hays codes; and early efforts at industry unionization.

Legal historian Robert Gordon has identified lawyers as a driving force in the direction of large enterprises, or as what Kai Bird termed “lawyer-servant[s] to the most powerful private interests.”⁴⁵ That description certainly captures Edwin Loeb's role in the emerging entertainment industry and Joseph's in the Los Angeles corporate community. Gordon focuses on the innovations or “products” that nineteenth century corporate lawyers created — “the legal forms they devised rather than their presence in the boardroom.”⁴⁶ He stresses the legal-technological innovations lawyers made, focusing on such corporate “products” as new forms of security (e.g., preferred

⁴³ W. W. Robinson, *Lawyers of Los Angeles: A History of the Los Angeles Bar Association and the Bar of Los Angeles County* (Los Angeles: Los Angeles Bar Assn., 1959), 155.

⁴⁴ The Beverly Hills Bar Association, founded in 1931, attracted a large number of entertainment practitioners, many of whom were Jewish. According to Friedman and Holtzman, Loeb & Loeb did not join the association until the firm opened its Beverly Hills office, in 1961, after acquiring the entertainment practice of Louis Blau. Blau represented Stanley Kubrick and Walter Matthau, among others. Email message to the author from Robert Holtzman, Nov. 2, 2011 (on file with the author); phone interview with Howard Friedman, Nov. 3, 2010.

⁴⁵ Gordon, “Legal Thought and Legal Practice”; Kai Bird, *The Chairman. John J. McCloy. The Making of An American Establishment* (New York: Simon and Schuster, 1992), 662.

⁴⁶ Gordon, “Legal Thought and Legal Practice,” 78–80.

stock and convertible debentures) and organization (e.g., the trust and holding company). These new “products” and institutions offered opportunities as well as risks for corporate clients that, with their lawyers’ adept guidance, could help legitimize their business enterprises, control competition, generate new revenues, and even change the course of world affairs. Development of the “poison pill” by the Wachtell Lipton firm in the 1980s is a classic example. That innovation or “product” both allowed corporations to fend off hostile tender offers and made Wachtell the go-to legal firm for takeover defenses.⁴⁷ Others, including Kai Bird, view power as emanating equally from high-level advice and brokering. John J. McCloy — Wall Street partner, Chase Manhattan Bank chairman, and advisor to successive presidents — is Bird’s exceptional example.⁴⁸ In both roles, lawyers like McCloy and the Loeb set in motion a virtuous circle of sorts, amplifying their own power and influence as they did the same for their clients.

Edwin Loeb, working on behalf of his clients, helped create much of the infrastructure of the modern entertainment industry, including agreements regarding talent representation and labor organization, film production, exhibition, arbitration, revenue and royalty distribution, and copyright. Legal innovation continued throughout the twentieth century as new media emerged (for example, television and home video systems) and, if anything, it has intensified in recent decades with Internet-based communication and entertainment.

⁴⁷ See Michael J. Powell, “Professional Innovation: Corporate Lawyers and Private Lawmaking,” *Law & Social Inquiry* 18 (1993): 423 (providing a detailed history of the “poison pill”).

⁴⁸ The Harvard-educated McCloy had an extraordinary career and outsize influence. He was the Assistant Secretary of War from 1941 to 1945 and a crucial voice in setting — and implementing — U.S. military priorities. McCloy helped construct the legal arguments to justify the internment of Japanese Americans as well as advised on military strategy in North Africa. In 1949, McCloy became the U.S. High Commissioner for Germany, overseeing the creation of the Federal Republic of Germany and, at his direction, the campaign to pardon and commute the sentences of Nazi criminals. Originally a partner at Cravath and later Milbank, Tweed, Hadley & McCloy, he went on to become chairman of Chase Manhattan Bank, the Ford Foundation, and the Council on Foreign Relations. As an advisor to Presidents Kennedy, Johnson, Nixon, Carter and Reagan, McCloy served on the Warren Commission and was the primary negotiator on the Presidential Disarmament Committee. Bird, *The Chairman*.

A. MPPC CHALLENGES

By the 1890s, Thomas Edison, through his Edison Manufacturing Company had acquired the rights to a new motion picture projection device, the Phantascope, which he renamed the Vitascope and marketed as an Edison invention. By 1908, when other companies had developed their own film projection systems and began to compete with Edison, he moved to copyright his productions and, in concert with nine other companies including Biograph, formed the Motion Picture Patents Company (MPPC). In an effort to control the industry and shut out smaller producers, the MPPC required competitors to buy licenses to use his cameras and filed patent infringement lawsuits against film producers, distributors and exhibitors who failed to do so. This strategy essentially reduced American production to two companies, Edison and Biograph, which used a different camera design.

Edison set a January 1909 deadline for all companies to comply with his licensing requirement, a move that drew in a number of smaller studios including Loeb client, the Selig Studios. However, several other companies, led by another Loeb client, Carl Laemmle, refused to go along. These so-called “independents” viewed the MPPC as a trust in violation of the Sherman Anti-Trust Act, and continued using unlicensed equipment and imported film stock, creating their own underground market.

Their defiance coincided with a major surge in the audience for popular entertainment and a corresponding increase in the number of nickelodeons and other theaters. The MPPC tried to bully non-licensed independents into line with patent claims. An MPPC’s subsidiary, the General Film Company, underscored that intention with violence, confiscating unlicensed equipment, trying to block distribution of unlicensed films, which eventually grew to include those produced by the Disney studio, and threatening renegade theater owners with bodily harm.⁴⁹

⁴⁹ Marc Elliot characterized the independent studios as “mostly immigrant Jewish filmmakers” led by Laemmle, and argued that the “goon squads” Edison hired, the suspicious nickelodeon fires, and the smashed arcades helped prod New York producers like Laemmle to migrate west and set up shop in California, out of range of Edison’s process servers. Marc Elliot, *Walt Disney: Hollywood’s Dark Prince* (New York: Birch Lane Press, 1993), 48–49. On Disney, see also, Neal Gabler, *Walt Disney. The Triumph of American Imagination* (New York: Knopf, 2006).

In court, Edison initially prevailed with judges who held that antitrust claims were not a defense to patent infringement by violating companies. Yet many independents continued to use MPPC's patented film technology, figuring that the chances of getting caught were minimal and that the profits to be reaped outweighed whatever fines or adverse judgments they might have to pay.⁵⁰ Some independents, including Laemmle's Independent Motion Picture Co. (the predecessor to Universal) and Adolph Zukor's Famous Players, launched their own productions and gradually shifted their focus from exhibition to production as the nickelodeon boom crested, around 1911.⁵¹ By that time, there were as many independent producers as signatories to the MPPC agreement.⁵²

As a result, when the Justice Department finally began antitrust proceedings against Edison's MPPC in August 1912, the company may have already lost much of its clout. Federal judges hammered the final nail in MPPC's coffin; following a 1915 decision finding that the company had violated Section 1 of the Sherman Act and the Supreme Court's 1918 decision to dismiss the group's appeal,⁵³ the MPPC dissolved.

The demise of the MPPC opened the way for the studio system that quickly came to dominate Hollywood production. As Alexandra Gil noted, "men like William Fox, Carl Laemmle, Adolph Zukor, Jesse Lasky, and Louis B Mayer were just small independent businessmen during the reign of the MPPC, but they began to see the opportunities available to them. Many, like Mayer and Fox, began as theater owners and exhibitors, but soon realized they liked production better."⁵⁴

Although I was unable to find specific evidence of the Loeb's involvement in these patent and antitrust disputes on behalf of MPPC signatories

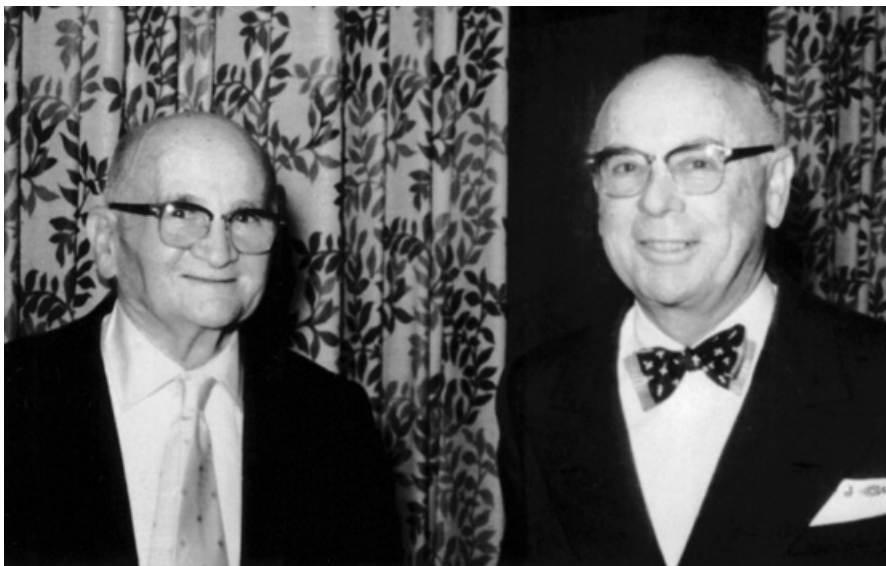
⁵⁰ Alexandra Gil, "Breaking the Studios: Antitrust and the Motion Picture Industry," *NYU J. Law and Liberty* 3 (2008): 93, http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__journals__journal_of_law_and_liberty/documents/documents/ecm_pro_060965.pdf. On the origins of the MPPC, see also J.A. Aberdeen, "The Edison Movie Monopoly," *Hollywood Renegades Archive*, http://www.cobbles.com/simpp_archive/edison_trust.htm.

⁵¹ Aberdeen, "The Edison Movie Monopoly."

⁵² Gil, "Breaking the Studios," 94.

⁵³ *United States v. Motion Picture Patents Co.*, 225 F. 800, 808 (E.D. Pa., 1915); Gil, "Breaking the Studios," 95.

⁵⁴ Gil, "Breaking the Studios," 95–96.



LOEB & LOEB — EDWIN (LEFT) AND JOSEPH
ON THE OCCASION OF EDWIN'S 75TH BIRTHDAY, 1961.

Courtesy Loeb & Loeb LLP

or independents, the outcome clearly freed fledgling studios and Loeb clients like Universal and Warner Brothers to ramp up production on shorts as well as the new, feature length films that began to draw audiences in the 1920s. The studios' rapid expansion and vertical integration depended on the creativity of their attorneys who devised an array of new legal instruments and protocols to facilitate this growth. Those instruments — including contracts governing talent, studio and theater acquisition, production, screening, and revenue distribution — underscore assertions by Gordon and Parikh and Garth, among others, with respect to the key role lawyers have played in other economic domains by controlling competition and generating new revenues. The Loeb firm's work in this regard enhanced the stature and wealth of their clients and, in the process, burnished the firm's reputation as a power broker operating at the highest echelons of the blossoming entertainment industry. That success, in turn, reinforced their status within the broader Los Angeles economy and legal community.

The MPPC antitrust litigation also proved to be the first battle in what became a long-running war for control of film production and theatrical distribution that would continue into the 1960s (and indeed continues today

over new forms of content delivery). While these contests may seem relatively straightforward if almost quaint compared with today's complex claims over rights, profit points, intellectual property and piracy, they involved the major law firms of the day in often vicious, bet-the-company litigation.⁵⁵

Loeb & Loeb was a repeat player, with clients on both sides of the ongoing litigation. Starting in the late 1920s, the studios' effort to vertically integrate production, distribution and exhibition triggered new claims of monopoly and restraint of trade. The government accused seven major studios of controlling almost all U.S. movie theaters, either through ownership of their own chains or "block booking," forcing independent theaters to sign contracts with the studios that required them to show a given number of films.⁵⁶ By 1940, government and studio representatives had worked out a compromise in which the studios would retain their theaters but limit block booking. Yet dissatisfaction with this deal prompted the leading independent studios to form the Society of Independent Motion Picture Producers (SIMPP) which pushed the matter back into court. Among those independents were Loeb clients Samuel Goldwyn, Mary Pickford, and Charlie Chaplin. A New York trial court gave the independents a partial victory in 1945 but both sides appealed and in 1948, in *U.S. v. Paramount Pictures, Inc.*, the U.S. Supreme Court affirmed the earlier verdicts, finding the studios guilty of violating antitrust law. Under terms of the consent decree, the studios had to divest themselves of their theater chains and end block booking by agreeing to sell all films individually.⁵⁷ The case was returned to the U.S. District Court for the Southern District of New York where the parties negotiated a stipulated judgment known as the "Paramount Decree" or the "Consent Decree." Yet the litigation continued for years afterward with Loeb & Loeb a major player. Former partner Robert Holtzman, who joined the firm in the 1950s, recalled that these cases quickly came to dominate his work for the firm and that of many of his colleagues and remained a major matter.⁵⁸

⁵⁵ Clary, *History of the Law Firm of O'Melveny & Myers*, 505–06, 582–85. (For example, O'Melveny represented Paramount Studios during the 1920s and '30s on labor-relations and other matters).

⁵⁶ The majors included Paramount, Universal, MGM, Twentieth-Century Fox, Warner Bros., Columbia, and RKO.

⁵⁷ Gil, "Breaking the Studios," 98–118; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

⁵⁸ Interview with Robert Holtzman, Jan. 19, 2011 (on file with the author).

B NEW THREAT: CENSORSHIP

The demise of the MPPC freed producers from the threat of patent infringement claims yet also prompted the studio heads to join forces. Their goals were twofold: first, to create a regulatory body that would monitor quality and impose censorship standards and second, to foil efforts by talent and craft employees to organize.

Since the U.S. Supreme Court had refused, in 1915, to extend First Amendment protections to motion pictures,⁵⁹ state and local governments, already under pressure from religious and temperance groups, moved to bolster their earlier efforts to regulate movie content through censorship boards. Fears that movies glorified and encouraged amoral, even illegal, behavior dogged the young industry from its earliest days but took on new urgency for producers with the 1921 arrest and trial of silent-film comedian Roscoe “Fatty” Arbuckle for rape and murder. Although Arbuckle was acquitted of those charges after two mistrials, the incident is considered a major impetus for the decision by industry leaders in 1922 to preempt state and local censorship by hiring lawyer and former Postmaster General Will Harrison Hays to lead the new Motion Picture Producers and Distributors of America (MPPDA).⁶⁰

Hays was tasked with “cleaning up” pictures, a role for which his conservative credentials as a Presbyterian deacon and past Republican Party chairman well suited him. His main role was to persuade individual state censor boards not to ban specific films outright and to reduce the financial impact of the boards’ cuts and edits. States imposed varying standards so studios might have to produce different versions of the same film to pass muster with multiple state censorship boards. Hays initially operated by trying to intuit what different boards might accept but by 1927 had developed a set of guidelines he called, “The Don’ts and Be Carefuls,” a list of eleven subjects to

⁵⁹ *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U.S. 230 (1915).

⁶⁰ Arbuckle’s arrest and other scandals involving movie actors, producers, and directors prompted a spate of resolutions in 1921 and 1922 condemning sinfulness in films from the Southern Baptist Conference, the Central Conference of American Rabbis, the General Federation of Women’s Clubs, and Catholic, Episcopalian, and Methodist organizations. In 1921 alone, nearly one hundred censorship bills were introduced in the legislatures of thirty-seven states. Ben Yagoda, “Hollywood Cleans Up its Act,” *American Heritage* 31 (1980), http://beta2.americanheritage.com/articles/magazine/ah/1980/2/1980_2_12.shtml.

be avoided in films, and twenty-six to be treated with special care. Among the “Don’ts” were “miscegenation,” “ridicule of the clergy,” and “scenes of actual childbirth;” the “Be Carefuls” included “excessive or lustful kissing, particularly when one character or another is a ‘heavy.’”⁶¹

Compliance was difficult to enforce. By 1930, Hays’ initial guidelines were superseded by the Motion Picture Production Code, drafted by a priest and lay Catholics. Under increasing pressure, producers eventually agreed to submit all scripts and completed films to the Hays office. But the staff’s decisions could be overridden by an appeals board composed of studio executives and lawyers — “who, following a philosophy of mutual back-scratching in hard times, were hardly strict constructionists.”⁶²

The code persisted in various forms through the 1930s, successfully blocking efforts at federal censorship as well as several threatened state initiatives. But the successive codes and guidelines locked producers and their lawyers in continuous skirmishes with religious conservatives and Hays over storylines, words, and violent or provocative visuals. The advent of sound raised new challenges or opportunities, depending on one’s perspective, bringing “the clink of highball glasses, the squeal of bedsprings, [and] the crackle of fast conversation to a thousand Main Streets.”⁶³

Censorship may have been the public rationale for the Hays office but monopoly control of the industry by the producers was its main goal, according to J. Douglas Gomery. Trade associations multiplied and flourished during the 1920s, according to Gomery, as the federal government “openly promoted” their establishment and endorsed (tacitly if not overtly) their anti-competitive goals.⁶⁴

But disputes within the industry did surface, of course, particularly between distributors and exhibitors, and the Hays office assumed a major role here as well as industry spokesman and power broker. According to one estimate, there were some 500,000 to 700,000 contracts for film

⁶¹ “List of ‘Don’ts and Be Carefuls’ adopted by California Association for Guidance of Producers, June 8, 1927,” Appendix D in Raymond Moley, *The Hays Office* (Indianapolis: Bobbs-Merrill Co., 1945), 240–41.

⁶² Yagoda, “Hollywood Cleans Up its Act.”

⁶³ *Ibid.*

⁶⁴ J. Douglas Gomery, “Hollywood, the National Recovery Administration, and the Question of Monopoly Power,” *Journal of the University Film Assn.* XXXI:2 (1979): 47, 48.

exhibition entered into annually by 1922, with litigation over the terms of these deals growing rapidly. In response, the Hays office created arbitration boards composed of exhibitors and distributors in several major cities that heard complaints regarding violation of contract terms. During its first six years, the boards heard over 75,000 cases and the number of lawsuits filed in court dropped precipitously.⁶⁵

For Edwin Loeb, a trusted counselor to several studio heads, the Hays office appeared to be a potential source of income along with an avenue for continued influence within the industry. In December 1931, he began to work directly for Hays; his appointment “came at the insistence of the leading producers in Hollywood and the ruling executives in the New York offices of the studios.”⁶⁶ Loeb temporarily suspended his law practice to take on the assignment, presumably orchestrating some of the “mutual backscratching” among producers, between distributors and exhibitors, and with the Hays office as well as with state censors and Justice Department regulators. It must have seemed like a good idea at the time since the Depression had cut into the firm’s revenue while Edwin apparently continued to spend freely on European travel and other personal indulgences.

But the Hays office, located in New York, was experiencing hard times as well, prompting Loeb to submit his resignation not long after he signed on, citing Hays’s plan to cut expenses and reduce compensation. In a series of letters to Hays, other lawyers, and studio heads, he sought to collect what he believed he was owed. In April 1932, Loeb wrote Hays that he had “rendered special services to the producers [on behalf of the Hays office] for a period of eight or nine months prior to December [1931] with the understanding that a substantial fee was to be paid to me for the same.” Loeb noted that he waived that fee, based on his understanding with Hays about his compensation once he formally joined the code office.⁶⁷

“I am badly up against it as a result of not having the money,” he wrote to a New York attorney friend the following year, claiming that Hays owed

⁶⁵ [anon.] “Motion Picture Arbitration System,” typewritten paper, Mar. 27, 1947, Box 6, History of Loeb & Loeb Vault Material.

⁶⁶ Loeb History, 12; Holtzman interview.

⁶⁷ Letter, Edwin Loeb to Will H. Hays, Apr. 21, 1932, Box 5, History of Loeb & Loeb Vault Material.

him \$13,946.21.⁶⁸ The office derived its revenue from studio payments for reviewing scripts and footage; Warner Brothers, for example, paid Hays \$1,000 weekly in 1933 for this service. With Hays holding onto cash to meet his own expenses, Loeb's friends openly lobbied on his behalf and worked behind the scenes with the firm's studio clients to secure his back pay.

Loeb took his leave at a good time. By 1933, the Depression left some studios near bankruptcy or in receivership. In the face of stepped-up pressure from the Catholic Church and the National Legion of Decency, producers agreed to disband their liberal appeals board and levy a \$25,000 fine for producing, distributing or exhibiting any picture without approval from the Hays office. That agreement would last into the 1960s.⁶⁹

C. UNION EFFORTS AND THE FOUNDING OF THE ACADEMY

1. *Craft workers*

The second impetus for collaboration among the studios after the MPPC's demise was to counter the first serious stirrings among industry guilds and labor unions. Here again Edwin Loeb was a key player, this time as one of the founders of the Academy of Motion Picture Arts and Sciences, which represented producers in early labor negotiations. The Loeb's initial years in practice coincided with the first major wave of union organization in

⁶⁸ Letter, Edwin Loeb to Bertram S. Nayfack, Esq., May 29, 1933, Box 5, History of Loeb & Loeb Vault Material.

⁶⁹ The code system broke down completely with the 1966 release of "Who's Afraid of Virginia Woolf," which included the phrase "hump the hostess" and the word "screw." But deep cracks were visible by the early 1950s; as television, with its family-friendly fare, became ubiquitous, film producers fought for audiences in part by offering more sex and violence. Meanwhile, Supreme Court decisions chipped away at the code's power and rationale. As noted above, in its 1948 *Paramount* decision, the Court ruled that studios could no longer own giant theater chains, and, in 1952, it held, contrary to the 1915 *Mutual* decision, that movies were in fact included within constitutional freedom of speech guarantees. As a result, censorship was no longer a threat and independent producers could distribute films relatively easily without code approval. So when Otto Preminger's "The Moon Is Blue" was refused a seal in 1953, in part because the script included the word "pregnant," its distributor, United Artists, resigned from the MPPDA and released the film anyway. Yagoda, "Hollywood Cleans Up its Act;" Amy K. Spees, "Founder-Keeper," *Los Angeles Daily Journal Extra*, Feb. 23, 2004, 15.

Los Angeles broadly and in the new entertainment industry in particular. For example, beginning in the summer of 1909, through negotiation and short boycotts, stage employees, musicians, electricians and projectionists won higher wages and other concessions from several local theater owners.⁷⁰ The building trades won some victories as well; by October 1911, the Los Angeles Central Labor Council counted ninety-one affiliated organizations representing approximately 15,000 carpenters, sheet metal workers, plumbers, lathers, painters, and structural ironworkers. What Grace Stimson termed “the organizing fever” among local building trades was critical to this brief notable period of union success.⁷¹

These early successes were tempered by the bombing of the *Los Angeles Times* building in October 1910 and the guilty pleas by brothers John and James McNamara in December 1911. These events, plus the *Times*’ ceaseless campaign against the closed shop, ushered in a “trying period of readjustment, of declining membership, of waning vitality.” Within a few years, the open shop had become a distinctive feature of the city’s economy and remained so for decades to come — a stone in the shoes of the men and women who labored in the movie business.

As lifelong Republican voters,⁷² the Loebes were likely untroubled by this anti-union push, especially since their major entertainment clients were more often the studios and theater owners, many of whom were outspoken Republicans, than the talent or craft workers. (Indeed, decades later, during the McCarthy era, the firm would loyally — and vigorously — represent their producer clients who had blacklisted writers, directors and actors suspected of Communist ties.)

⁷⁰ The “moving picture machine operators” first organized in 1907. Grace Heilman Stimson, *The Rise of the Labor Movement in Los Angeles* (Berkeley: Institute of Industrial Relations, 1955), 360, 333.

⁷¹ *Ibid.*, 435.

⁷² Donald Critchlow recounts a dinner party Edwin Loeb attended in 1932 that devolved into an angry debate between supporters of Herbert Hoover and the then-presumed Democratic nominee, Al Smith. Loeb and his client Louis B. Mayer bet Irving Thalberg that Al Smith would not be the next president and put \$300 down on another bet that Hoover would win reelection. Critchlow writes that those bets “reveal just how far out of touch many studio heads [and perhaps their attorneys] were with the actual political climate of the country.” Critchlow, *When Hollywood was Right. How Movie Stars, Studio Moguls, and Big Business Remade American Politics* (New York: Cambridge Univ. Press, 2013), 15.

Despite the repercussions that followed the *Times* bombing, organizing efforts continued. Workers behind the camera won the earliest significant victories, followed by creation of talent guilds representing writers and actors. When studio production took off in the 1920s, the two strongest industry unions were the International Alliance of Theatrical Stage Employees (IATSE), which included cameramen, carpenters, grips and other backstage workers as well as theater projectionists, and the American Federation of Musicians (AFM), representing the musicians who played during silent movies. Both unions were affiliated with the AFL.⁷³

Their first significant accomplishment was the Studio Basic Agreement, signed in November 1926 between the crafts guilds and the Association of Motion Picture Producers. The hard-won pact followed years of strikes and boycotts triggered, in part, by the studios' decision in 1921 to cut the wages of studio craftsmen and lock out between 800 and 1,200 IATSE craftsmen in an effort to break the union. This move came despite rising studio profits from movies. The basic agreement did not establish a closed shop but it granted recognition to IATSE and other craft unions, including musicians; established an eight-hour day with higher wages for Sundays and overtime; and created a mechanism for settling future disputes with producers.⁷⁴ Moreover, the advent of "talkies" so expanded the market for instrumentalists in Hollywood that by 1930, the musicians' local had become the third largest in its trade in the nation.⁷⁵

2. *Talent guilds*

Creation of the Actors Equity Association in 1913 was the first significant attempt to organize talent employees, in this case, stage actors. Equity subsequently affiliated with the Associated Actors and Artistes of America that had jurisdiction over the Motion Picture Players Union representing Hollywood bit players. By the early 1920s, Equity tried to represent major film actors. The bigger film stars then belonged to the Screen Actors of America, more a social club than labor union, and with their higher compensation and visibility, they had little interest in fighting to improve the lot of their less well-paid brethren.

⁷³ Louis B. Perry and Richard S. Perry, *A History of the Los Angeles Labor Movement, 1911-1941* (Berkeley: Institute of Industrial Relations, 1963), 320.

⁷⁴ *Ibid.*, 323-25.

⁷⁵ *Ibid.*, 326.



TWENTY FOUNDERS OF THE ACADEMY OF MOTION PICTURE ARTS AND SCIENCES IN 1927, THE YEAR OF THE ACADEMY'S FOUNDING. STANDING, LEFT TO RIGHT, ARE CEDRIC GIBBONS, J. A. BALL, CAREY WILSON, GEORGE COHEN, EDWIN LOEB, FRED BEETSON, FRANK LLOYD, ROY POMEROY, JOHN STAHL, HARRY RAPP; SEATED, LOUIS B. MAYER, CONRAD NAGEL, MARY PICKFORD, DOUGLAS FAIRBANKS, FRANK WOODS, M. C. LEVEE, JOSEPH M. SCHENCK, FRED NIBLO.

Courtesy AMPAS.

Moreover, with the demise of the Edison Trust, producers essentially had no bargaining unit, leaving Equity without a negotiating partner.

In 1922, producers asked Will Hays to draft a standard contract to, in effect, represent them in talent negotiations.⁷⁶ Although Hays declined, the request is another indication of the cozy relationship between Hays and leaders of the industry he was tasked with monitoring. However, Hays did eventually gather a committee of lawyers representing the major studios to advise him on labor matters, including Edwin Loeb and O'Melveny's Walter Tuller, representing Paramount.⁷⁷

The group's immediate goal was to foil Equity's continued efforts to organize film actors, and by May 1927, producers responded by founding the Academy of Motion Picture Arts and Sciences aimed in large part at doing

⁷⁶ *Ibid.*, 338.

⁷⁷ Clary, *History of the Law Firm of O'Melveny & Myers*, 505–06.

that. As noted above, Loeb was one of the thirty-six original Academy founders and presumably did the legal work to secure the group's nonprofit state charter. In a photo of the founding members, he stands just behind actress Mary Pickford and the Academy's first president, Douglas Fairbanks, surrounded by other friends and clients including, Louis B Mayer, George Cohen, Fred Eastman and others.⁷⁸ Edwin's position, nearly at the center of the photo, powerfully illustrates Gordon's and Bird's characterization of lawyers as indispensable go-betweens who create infrastructures that, in turn, solidify their clients' legitimacy and stature.

Barely a month after the Academy coalesced, in June 1927, producers announced their intention to slash the salaries of all non-contract players and to "ask" contract players to swallow a pay cut. Predictably, the move was a boon to Equity's organizing efforts, so much so that Fairbanks quickly stepped in and helped persuade producers to postpone the salary cuts. Under Fairbanks's leadership, the Academy began negotiations that, by December 1927, produced a basic agreement covering independent actors, writers and directors.⁷⁹

Yet that contract failed to address abusive working conditions, including workdays of up to twenty hours and workweeks as long as eighty hours, lack of pay for rehearsals, and lump sum payments with no stipulated production termination date. These defects, along with the absence of compulsory arbitration of disputes, emboldened the nascent talent guilds. As sound films continued to draw New York stage actors to California — many of whom were militant unionists — dissatisfaction festered on both sides. By June 1929, Equity had called a strike and ordered all members — as well as non-member film actors — to stop working for producers who did not agree to a closed shop.

The strike lasted through the summer but ultimately failed because the more influential Hollywood actors didn't recognize Equity's claim to represent them. Once again, the Academy stepped in and by February 1930, had negotiated a new standard contract with a committee of twenty-one actors and all the major producers that remedied several of the defects in the 1927 agreement. Players won an eight-hour day with provisions for

⁷⁸ [Linda Levi], "Loeb and Loeb, Pioneer Los Angeles Law Firm," 3; Loeb History, 11.

⁷⁹ Perry and Perry, *A History of the Los Angeles Labor Movement*, 338–39.

overtime and compulsory arbitration and, in exchange, actors agreed not to strike for the period of the contract. In February 1931, all sides voted to renew the agreement for four years.⁸⁰ I have not found specific evidence of Edwin's role in these negotiations but given his considerable involvement in the Academy, it's hard to imagine he was absent from the process or unhappy with the outcome.

In these early years, the Academy was both a promoter of film achievement and technical innovation as well as the producers' de facto bargaining arm. These dual roles initially worked to the producers' advantage. And while neither Edwin nor his brother were likely strong unionists, the Academy's desire for harmonious labor relations — as opposed to an all-out war to preserve the open shop — likely dovetailed with Edwin Loeb's personality and go-along-to-get-along approach to practicing law. However, as the Depression cut severely into studio profits and triggered layoffs, actors and writers chafed at what they saw as the Academy's role as, essentially, a company union. In 1933, under the aegis of the short-lived National Recovery Act (NRA),⁸¹ they revived the languishing Screen Writers Guild and the Screen Actors Guild to push back against a new round of threatened salary cuts.

Edwin Loeb may have played a key role here as well. Under the NRA, an industry appointee drafted and administered the governing codes for each industry and among other responsibilities, set wages, hours and working conditions. Some former Loeb partners have speculated that Edwin's role as Will Hays' west coast chief meant he also served as the NRA's film "czar" but I found no evidence for that claim. Raymond Moley's account of the Hays office does not mention Loeb but does refer to New York lawyer Sol A. Rosenblatt, tapped by Washington as "Division Administrator" to "co-ordinate the efforts of the three branches of the industry to devise the film code."⁸² Other

⁸⁰ Ibid., 342.

⁸¹ The U.S. Supreme Court declared the mandatory code provisions of the NRA to be unconstitutional in *Schechter Poultry Corp v. United States*, 295 U.S. 495 (1935).

⁸² Moley, *The Hays Office*, 203–04. Hays' own memoirs do not mention Loeb either. Will H. Hays, *The Memoirs of Will H. Hays* (New York: Doubleday & Co., 1955). Moley himself was an interesting fellow. Recruited to Roosevelt's "Brain Trust" while a Columbia Law School professor, he advised the New York governor in his 1932 presidential run and then became a powerful figure in FDR's first administration as a speechwriter, penning such phrases as "the Forgotten Man." Moley initially lauded Roosevelt's New

accounts are consistent.⁸³ Yet even if he wasn't formally appointed as film "czar," Loeb was on the Hays payroll during this period and his role as an intermediary if not a regulator is another indication of his status as a trusted industry broker.

By 1935, the National Labor Relations Act replaced the NRA, explicitly granting employees the right to form and join unions, and obligating employers to bargain collectively with unions selected by a majority of the employees. Notwithstanding the law, labor relations remained bitterly confrontational. The Screen Actors and Screen Writers Guilds won NLRB certification by the late 1930s but anger over compensation and working conditions continued to simmer and sparked grinding organizing campaigns among new employee groups, for example, animators. Studio heads — including Loeb client Irving Thalberg⁸⁴ — believed they could hold the line on contract concessions.⁸⁵ Louis Nizer represented Fleischer Studios during the 1930s as it battled animators; Gunther Lessing, Walt Disney's longtime general counsel, carried out the company's ruthless response to animators who struck that studio in 1941.⁸⁶ And although many ultimately

Deal for having "saved capitalism in eight days" but beginning in 1933 became one of the sharpest conservative critics of Democratic economic policy. In 1970, President Richard Nixon awarded Moley the Presidential Medal of Freedom.

⁸³ Gomery wrote that in July 1933 NRA head Hugh Johnson appointed Rosenblatt as deputy administrator in charge of drawing up the motion picture industry code; Gomery, "Hollywood, the National Recovery Administration, and the Question of Monopoly Power," 50. Rosenblatt is elsewhere referred to as "NRA Division Administrator" and a "loyal New Dealer." See "Cinema: Stars and Salaries," *Time*, July 30, 1934, <http://www.time.com/time/magazine/article/0,9171,754385,00.html>; Thomas Doherty, "A Code is Born," *Reason.com*, Jan. 2008, <http://reason.com/archives/2007/12/04/a-code-is-born>.

⁸⁴ Thalberg swore he would die before accepting the Screen Actors Guild. In 1936, Thalberg died and in 1937, the studios accepted defeat and signed the first meaningful agreement with actors according to "SAG Timeline," Screen Actors Guild, <http://www.sag.org/sag-timeline>.

⁸⁵ By the 1930s, the studio heads explicitly linked their fight against union representation to the broader campaign against communism and fascism, justifying efforts to achieve an open shop and, of course, the witch-hunts of the Blacklist years, per Critchlow, *When Hollywood was Right*, 42–65.

⁸⁶ See Tom Sito, *Drawing the Line: The Untold Story of the Animation Unions from Bosko to Bart Simpson* (Lexington: Univ. of Kentucky Press, 2006); Elliot, *Walt Disney*; Gabler, *Walt Disney*, 356–74. More than Edwin Loeb, Nizer represented celebrities as well as the studios in contract, copyright, libel, divorce, plagiarism, and antitrust

recognized the Hollywood craft unions and talent guilds, the anti-Communist witch hunts of the late 1940s and 1950s were their opportunity to retaliate, blacklisting and/or firing activist employees in an effort to weaken the unions. In some instances, studio lawyers orchestrated these anti-union campaigns.

V. THE ROLE OF JEWISH IDENTITY

This brief review of the origins of entertainment law situates Edwin Loeb as a major player, and Joseph Loeb as a comparable authority in the Los Angeles bar and the broader business community. As such, their experience was both typical and different from Jewish lawyers in Los Angeles and elsewhere.

In his study of Wall Street law firms in the late 1950s, Erwin Smigel explored how the broader social currents of the time — especially, heightened anti-Semitism — determined the career paths of “minority” lawyers in those firms — particularly, Jewish lawyers. Those few Jewish lawyers invited to join mainline Wall Street firms typically had Ivy League pedigrees and faced a higher bar to hiring and promotion than did their Gentile counterparts. While the large Wall Street firms represented the largest corporate clients, Smigel found that smaller corporate firms founded by Jewish or other minority lawyers generally represented smaller businesses, often headed by members of the same ethnic group.⁸⁷ Heinz and Laumann found a parallel stratification among Chicago lawyers: Those with elite social and educational pedigrees were more likely to practice in the white-shoe firms that

matters. His role in the Fleischer strike may have been a somewhat uncomfortable one for Nizer whose personal politics trended center-left. For instance, his efforts on behalf of John Henry Faulk, the CBS radio and television personality linked by an ultra-conservative publication to a communist conspiracy, was widely credited with breaking the back of blacklisting in broadcasting. In 1962, Nizer won a \$3.5 million libel judgment for Faulk — later reduced to \$550,000 on appeal. He also served as general counsel for the Motion Picture Association of America and helped develop the group’s movie ratings system. Eric Pace, “Louis Nizer, Lawyer to the Famous, Dies at 92,” *New York Times*, Nov. 11, 1994, <http://www.nytimes.com/1994/11/11/obituaries/louis-nizer-lawyer-to-the-famous-dies-at-92.html?src=pm>.

⁸⁷ Erwin O. Smigel, *The Wall Street Lawyer. Professional Organization Man?* (New York: Free Press, 1964), 65, 173–75. At the time of his research, Smigel found that African-American lawyers faced overt racism and near total exclusion from the top firms.

ministered to larger corporate and organizational clients while small-firm lawyers, often ethnic minorities or those from families with lower socio-economic status, made up another “hemisphere” and were typically left with individual clients and/or small organizations.⁸⁸ The Loeb brothers founded their own firm rather than try to remain with O’Melveny or the city’s other top firms, yet from their earliest days in practice could claim a roster of blue chip, corporate clients. While their representation of the first film moguls may have initially resulted in part from ethnic affinity — consistent with the pattern Smigel and Heinz and Laumann identified — the Loeb’s legal skill and creativity clearly helped propel the studios into powerful corporate conglomerates whose business the established firms soon courted.

Parikh and Garth’s study of Chicago lawyer Philip Corboy illustrates important parallels with the Loeb’s careers, namely how lawyers can change the nature of practice, often advancing their clients’ as well as their own interests. The son of poor Irish immigrants, Corboy lost out on a job with a top defense firm to a far less qualified but better-connected candidate — despite having just graduated as valedictorian of his law school class. He eventually became a personal injury lawyer, growing his practice by consciously elevating the reputation of personal injury lawyers from that of bottom-feeding ambulance chasers and creating avenues to new clients.⁸⁹ Through leadership roles in Illinois bar associations and the Chicago Democratic machine, by lobbying the Illinois Legislature, and through key appellate victories and steady referrals, Corboy and his partners generated an extraordinarily lucrative practice. They also helped to change ethical rules that favored business development by corporate lawyers but penalized P.I. practitioners, for example, rules allowing lawyers to pass out their business cards at country clubs but barring the practice in emergency rooms. Legislative lobbying and courtroom victories liberalized Illinois tort law by expanding the field of possible defendants in product liability, medical malpractice and construction injury cases as well as by raising the ceiling on possible recoveries.⁹⁰ Like Corboy’s philanthropic and legislative activities, Edwin Loeb’s professional and personal involvements, most

⁸⁸ John P. Heinz and Edward O. Laumann, *Chicago Lawyers. The Social Structure of the Bar* (rev. ed.) (Evanston: Northwestern Univ. Press, 1982, 1994).

⁸⁹ Parikh and Garth, “Philip Corboy.”

⁹⁰ *Ibid.*

notably his work on behalf of the Academy of Motion Picture Arts and Sciences, allowed movie producers to shed their early sleazy reputation and established their attorneys as key industry players.

Yet when laid against the Loeb's history, previous scholarship on lawyers' careers does not fully account for the influence of time, place, and birth. True, the brothers' successes and those of their firm flowed from the two men's considerable legal and personal skills, and, like Corboy, from their record of philanthropy and civic involvement. In this, the Loeb's were no different than successful attorneys everywhere who consciously cultivate their "book of business" by leveraging their business and social contacts and through good works. But the brothers were also remarkably fortunate in their family connections, their ability to straddle the shifting ethnic lines in Los Angeles, and to have entered law practice at a moment when religious identity may have been less salient in Los Angeles than in other cities.

The brothers' sincere philanthropic interests were an important element in Loeb & Loeb's success. Joseph Loeb was an active board member of the Los Angeles Bar Association from his first years in practice and remained involved throughout much of his career.⁹¹ The local bar was only one of dozens of civic, educational, and corporate groups to which he devoted significant time, energy and money over his career.⁹² Edwin Loeb concentrated his charitable and philanthropic involvement more narrowly on the entertainment industry where he may have been motivated as much by *bonhomie* as a sense of professional obligation.⁹³ Joseph and to a

⁹¹ Joseph Loeb retired from active practice in 1970 and died in 1974.

⁹² That long list includes Town Hall (Board of Governors), Los Angeles Tuberculosis and Health Association (Board of Directors), Welfare Federation of Los Angeles (Board of Directors), University of California Alumni Association, Friends of Claremont Colleges, Friends of the Huntington Library, Indian Defense Association (Los Angeles Board of Directors), California State Board of Education (gubernatorial appointee), American National Red Cross, Los Angeles Athletic Club, California Republican League, Union Bank (Director), Los Angeles Civic Light Opera Association (Board of Governors), Arthritis Foundation (Founder and first president, Southern California Chapter), and the Community Chest.

⁹³ His activities included the Motion Picture Relief Fund of America, Inc. (Life Member) and the Academy of Motion Picture Arts and Sciences (Life Member). He was also active in the Los Angeles Athletic Club, the Los Angeles Stock Exchange, and the California Yacht Club.

lesser extent Edwin were also active in Jewish philanthropies including the United Jewish Welfare Fund, the Federation of Jewish Welfare Funds, the American Jewish Association, the Jewish Orphan's Home of Southern California (now Vista Del Mar Child Care Services), B'nai B'rith of Los Angeles, the American Jewish Committee, National Conference of Christians and Jews, and Cedars of Lebanon Hospital. For both men, civic and philanthropic involvement provided entrée to and eventually significant influence in Los Angeles' increasingly Gentile legal and business institutions.

Notwithstanding their Jewish charitable activities, the brothers' religious identity was complicated. As noted above, neither brother considered himself a practicing Jew. Edwin often described himself as an atheist.⁹⁴ Former Loeb partners characterized Edwin and Joseph as having consciously cultivated a "non-Jewish image." With only a handful of Jewish lawyers in Los Angeles when Joseph Loeb first hung his shingle, non-Jewish lawyers including partner Edward Kuster were part of the firm from the earliest days. Others included Irving Walker, Carl Levy, a Catholic (despite his name), Dwight Stephens, John Cole, and Leon Levi, the firm's long-term managing partner who was a Seventh Day Adventist. Beyond a commitment to recruiting the best lawyers regardless of religion, those hires may have also reflected a desire, perhaps unconscious, to dilute their "Jewishness," in order to attract the broadest array of corporate clients. Neal Gabler and others have noted that the studio heads also deliberately downplayed their Judaism as a defense against anti-Semitism and allegations of dual loyalty as well as to draw the broadest audience for their movies. Yet when

⁹⁴ At Edwin Loeb's 70th birthday, Rabbi Edgar Magnin of the Wilshire Blvd Temple exhorted him, in front of the assembled guests, "All right, it's time to return to the fold." Holtzman recalled that Loeb was annoyed. Holtzman interview. The Loeb's grandniece Linda Levi grew up with a similar distance from institutional Judaism.

As far as organized religion goes it was almost non-existent in our family. I knew that I was Jewish, but we never went to temple, never celebrated Jewish holidays, and seldom ate Jewish food. In fact we celebrated Christmas with a big tree. I always went to school on Jewish holidays. All my young life, on Christmas Eve, and Christmas day, our friends and relatives had parties, open houses and many had big trees. Most of them were Jewish and if they had a religious affiliation they were likely to be Reform Jews.

Linda Levi, "Growing up as a 'Newmark' in Los Angeles, 1935-1950. A Memoir," *Western States Jewish History*, XXXIX:3 (Spring 2007): 75-76, http://lindalevi.org/history/Growing_up_a_Newmark_in_Los_Angeles_1935-1950_by_Linda_Levi.pdf (23-24).

Adolf Hitler rose to power, some, like Carl Laemmle, helped to rescue many European Jews — at some risk to his reputation and fortune.⁹⁵

As white Protestants became an overwhelming majority by the early twentieth century, groups that had once mingled freely began to go their separate ways. Discrimination and ostracism was not as severe in Los Angeles as elsewhere but social exclusion, which had been merely “noticeable” in previous years, now became more apparent.⁹⁶ Harris Newmark was a charter member of the California Club but resigned when the club began to exclude Jews.⁹⁷ The immigrant Jewish studio heads, so anxious to prove themselves as Americans, felt that sting particularly keenly. Like the Loebes, many tried to avoid outward displays of religion, but when they were still excluded from the mainstream social and civic organizations, they created their own, including the Hillcrest Country Club and the Concordia Club, along with a number of benevolent societies.

Far more serious than being rejected for club membership was employment discrimination. While exclusion and “quotas” were not as strict as in other cities, jobs in WASP banking, retail, and insurance establishments were generally off limits to Los Angeles Jews. Elective office was also generally beyond reach.⁹⁸ Notwithstanding very real discrimination, the Los Angeles bar may have been more open to Jewish attorneys than in New York

⁹⁵ Neal Gabler, “Laemmle’s List: A Mogul’s Heroism,” *New York Times*, Apr. 11, 2014, <http://www.nytimes.com/2014/04/13/movies/unlike-his-peers-a-studio-chief-saved-jews-from-the-nazis.html>.

⁹⁶ Dinkelspiel, *Towers of Gold*, 160–61. In elementary school, Linda Levi “became aware of anti-Semitism in my neighborhood and my school. Most of the kids on the 800 block of Rimpau [in Hancock Park], the ones I played with, were Catholic. I understood that our friendship began and ended with playing sports. I was never invited into their homes, and I felt their parents were remote. If I wanted to play with one, I either joined a game or went in front of their houses and yelled out ‘Billy’ can you play? Of course the situation was wise [sic] versa. They were never asked into my house.” Levi, “Growing up,” 84 (32).

⁹⁷ The *Los Angeles Blue Book*, also known as the *Society Register of Southern California*, listed 44 Jewish members in 1890, 22 in 1921 and none for many years thereafter. Jewish Virtual Library, “Los Angeles.”

⁹⁸ That was less true during the 1870s when city voters elected Isaiah M. Hellman as treasurer (1877) and Emil Harris as police chief (1878). “The Jews of Los Angeles.” Appointive office, however, may have been different. For instance, in 1943 Governor Earl Warren appointed Joseph to the California State Board of Education where he served until 1956.

City, Chicago or even San Francisco. In addition, the Loeb's early successes, deep personal and familial connections, their longstanding ties to Gentile firms such as O'Melveny as well as their own roster of non-Jewish partners gave the firm establishment respectability. So when anti-Semitism intensified in Los Angeles, the Loeb's continued to flourish. As such, Loeb & Loeb doesn't fit easily into one practice "hemisphere," but instead, from its first decades, combined big clients and smaller ones, mainline corporations as well as "ethnic" enterprises.

VI. THE LOEB FIRM AND THE ORIGINS OF ENTERTAINMENT LAW PRACTICE IN LOS ANGELES

The entertainment industry, like the Loeb firm, emerged in Los Angeles from a serendipitous mix of timing, sun and personal connections. Climate and wide-open opportunity lured the immigrants who would build the major studios at the same moment that a desire to escape Edison's infringement suits propelled them from New York and other eastern cities. The Loeb brothers were waiting for them in their office at the corner of Fourth and Main Streets, eager and affable, and already making a go of their small practice.

In many respects, the story of the Loeb firm as entertainment law pioneers and traditional corporate counselors conforms to the empirical findings of scholars who have examined the rise of law firms. Yet, the brothers' family heritage along with the role of geography and the historical moment in which they lived suggest a narrative that is more complex and less easily pigeonholed.

That they were Jewish may have initially helped draw many of the Loeb's entertainment clients, but as the mist-shrouded stories of Edwin's first clients indicate, not all of those early clients were Jewish nor, apparently, was it determinative that Edwin and Joseph were. Apart from religious or cultural ties, then, the brothers' family network and their effectiveness in front of and behind the scenes cemented their success. While Edwin's politics were generally more consonant with those of his clients than opponents on the picket lines or in court, his skill as a conciliator and dealmaker, even during early bitter labor battles, burnished his personal reputation and that of his firm. Loeb clients were key players in the early major industry disputes including the wrangling over industry integration, distribution agreements,

and unionization. Edwin acted as both the glue and grease in these matters. By bringing parties together, forging agreements, softening the impact of the Hays codes, defusing labor hostilities, he and his counterparts helped the industry to expand. In this regard, he played a role no different from that of successful corporate attorneys everywhere who facilitate, moderate and counsel their clients.

As movies became a major cultural force in the early twentieth century, Loeb and other early entertainment practitioners could claim credit for helping legitimize a business long considered disreputable. Their success also enhanced their practices and personal influence, allowing them to attract new clients in that industry and beyond. But the reverse was also true: that the Loeb brothers could early on claim mainstream corporate clients including local banks, real estate, mining, oil and railway companies, further enhanced their reputation and power with their studio clients.

The story of Hollywood's rise is often told as a form of singular accomplishment: The studio chiefs traveled west, built their dream factories, and their acumen and labors — theirs and theirs alone — made them rich and powerful beyond measure. Even in Neal Gabler's thorough account of the Jewish studio heads,⁹⁹ the critical role that Edwin Loeb and his contemporaries played in their clients' success by building the infrastructure of one of the most legalized industries is largely absent.

I hope this modest effort is a first step toward a fuller narrative.

★ ★ ★

⁹⁹ Gabler, *Empire*.

LAURA'S LAW:

Concerns, Effectiveness, and Implementation

JORGIO CASTRO*

As a litany of stories attest, there is an ongoing mental health crisis in America, and the current mental health care “systems” are not adequately addressing it. The latest surveys indicate that nearly 40 percent of adults with severe mental illnesses¹ such as schizophrenia and bipolar disorder receive no treatment, and that 60 percent of all adults with a mental

This paper was awarded first place in the California Supreme Court Historical Society’s 2015 CSCHS Selma Moidel Smith Law Student Writing Competition in California Legal History.

* Member of the California Bar; J.D. 2015, UC Hastings College of the Law. I would like to thank Professors Lisa Faigman, Robert Schwartz, Jaime King, and Lois Weithorn, who have provided tremendous support, assistance, and feedback in the creation of this paper. Thanks to my parents, extended family, and friends for the support they have provided me. This paper is dedicated to those suffering from severe mental illness, the family and friends who love them and are struggling to help today, and a humane, compassionate, and real future for all.

¹ “Serious” or “severe” mental illnesses are principally those designated by the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS as psychotic disorders, with schizophrenia and bipolar disorder the most common. See KENDRA’S LAW: FINAL REPORT ON THE STATUS OF ASSISTED OUTPATIENT TREATMENT, New York State Office of Mental Health, March 2005 [hereinafter “Final Report”] (84% of Kendra’s Law AOT individuals had a diagnosis of either schizophrenia or bipolar disorder).

illness receive no treatment.² Current state mental health laws and policies are roundly criticized as not being anywhere near sufficient in addressing the challenges posed by severe mental illness.³ The challenges of dealing with severe mental illness continue to loom over communities.⁴ One type of program that has been proposed to help meet this challenge is assisted outpatient treatment (AOT),⁵ known in California as Laura's Law.⁶

HOW LAURA'S LAW HELPS

Specifically, Laura's Law targets a subset of the population of people with mental illness who are falling through the cracks. There is a portion of that population who do not accept treatment voluntarily because of "anosognosia," the medical term for a lack of awareness of their illness.⁷ As a result, they do not avail themselves of treatment services.⁸ This makes intuitive

² Liz Szabo, *Cost of not caring: Nowhere to go*, USA TODAY, <http://www.usatoday.com/longform/news/nation/2014/05/12/mental-health-system-crisis/7746535/>.

³ There are various ways of expanding access to treatment, including involuntary treatment. For example, several states have civil commitment standards that are broader than California's. See, e.g., Wis. Stat. § 51.20(1)(a)(2) (Wisconsin state civil commitment statute with a broad definition of "dangerous" and "grave disability" that recognizes potential for deterioration). Many of these proposals have merit. However, they are outside the scope of this paper.

⁴ Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police are Mentally Ill*, KQED NEWS, Sept. 30, 2014, available at <http://ww2.kqed.org/news/2014/09/30/half-of-those-killed-by-san-francisco-police-are-mentally-ill>.

⁵ Here as in other controversial areas, proponents and opponents use different terms to describe the legal procedure in question. Opponents often will describe it as "involuntary outpatient commitment." Proponents often use the terms "assisted" or "assertive outpatient treatment," as does the California Welfare and Institutions Code. Other terms include preventive assistive community treatment, community outpatient treatment, and preventive outpatient treatment, among others. See Rachel A. Scherer, Note, *Toward A Twenty-First Century Civil Commitment Statute: A Legal, Medical, and Policy Analysis of Preventive Outpatient Treatment*, 4 IND. HEALTH L. REV. 361, 369-70 (2007). This paper will generally use assisted outpatient treatment or "AOT."

⁶ Cal. Welf. Inst. Code § 5345.

⁷ This is an issue contested by opponents of Laura's Law. See *infra* Part "Opponents' Arguments." This paper adopts the view of the proponents, supported by medical studies, that anosognosia is a real neurological medical condition. See *infra* Part "Proponents' Arguments."

⁸ Sometimes individuals do not seek or continue treatment because of the undesirable side effects of medications. Reducing or eliminating undesirable side effects often

sense: if someone subjectively doesn't think they are ill, they will not seek out "unnecessary" treatment. That "lack of necessity" leaves this population unengaged with treatment options until they are brought in through the involuntary system of care. In California, as in other states, the current standards for involuntary hospitalization require the person to be a danger to self or others, or be gravely disabled.⁹ Section 5150 of California's Welfare and Institutions code allows someone to be held up to 72 hours. However, if someone no longer meets the criteria — as may often happen when someone comes in as a danger to herself or others and has the opportunity to "calm down," or start to receive some of the effects of medication for her illness — she has to be released.¹⁰ This process of admission, stabilization, discharge,

requires finding the right type of medication or the right dosage, as individuals respond to medications differently. This can only be done with continued engagement and supervision with a competent prescribing physician and competent treatment team, which is Laura's Law's goal. Sometimes individuals do not seek or continue treatment if they find the treatment is limited and does not meet their needs. Laura's Law provides for a "whatever it takes" model, providing appropriate services to meet the client's needs.

⁹ Cal. Welf. Inst. Code § 5150; see also Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 PSYCHIATRY (Edgmont) 10, 30–40 (2010), at *Shift to Dangerousness Criteria as the Standard for Civil Commitment*. On October 7, 2015 California enacted AB 1194, which clarifies that "the individual making that determination [for involuntary hospitalization] shall consider available relevant information about the historical course of the person's mental disorder if the individual concludes that the information has a reasonable bearing on the determination, and that the individual shall not be limited to consideration of the danger of imminent harm." AB 1194, 2015-2016 (Cal. 2015), available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1194. Many counties had been construing § 5150 to require imminent danger, which resulted in uneven and decreased application of § 5150 in many appropriate cases. Opponents argued that the bill is "unnecessary" and "suggests that consideration of historical course alone can lead to a finding of present danger." Letter from Margaret Johnson, Advocacy Dir., Disability Rights California, to Assemblyman Rob Bonta (Apr. 6, 2015), available at <http://www.disabilityrightsca.org/legislature/Legislation/2015/Letters/AB1194EggmanOpposeApril62015.pdf>.

¹⁰ See e.g., Demian Bulwa, *Killing Reveals Mental Health Care Fight*, SF CHRONICLE, Oct. 16, 2014, available at <http://www.sfgate.com/crime/article/Killing-reveals-mental-health-care-fight-3781958.php> ("What they really want to know is: Did he hit you? Did he damage something? They'll keep him as long as he's exhibiting that behavior in the hospital. If he's not, the revolving door continues." Candy Dewitt describing her son Daniel Dewitt's nine § 5150 holds.); Meredith Karasch, Note, *Where Involuntary Commitment, Civil Liberties, and the Right to Mental Health Care Collide: An Overview of California's Mental Illness System*, 54 HASTINGS L.J. 493, 493 (2003) [hereinafter

INVERSE CONDEMNATION: *California's Widening Loophole*

DAVID LIGTENBERG*

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This paper was awarded second place in the California Supreme Court Historical Society's 2015 CSCHS Selma Moidel Smith Law Student Writing Competition in California Legal History.

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INTRODUCTION

In 1789, directly influenced by Thomas Jefferson, France’s Declaration of the Rights of Man stated:

Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights.¹

Known as the “harm principle” and formalized in 1859 by John Stuart Mill in his seminal work, *On Liberty*, this principle contends that “[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”² Much of civil law, springing from English courts of equity, adheres to this principle: when someone causes another harm, the law should provide a remedy.³

It was under color of this principle, in 1879, that California constitutional delegates included a progressive damages clause as a supplement to the takings clause of California’s constitution.⁴ In the event that a government did not proactively and intentionally “take” private land, but indirectly caused it to be damaged or unusable, the California constitutional delegates felt that

¹ DECLARATION OF THE RIGHTS OF MAN art. 4 (Fr. 1789); see also GREGORY FREMONT-BARNES, *ENCYCLOPEDIA OF THE AGE OF POLITICAL REVOLUTIONS AND NEW IDEOLOGIES, 1760–1815*, at 190 (2007).

² JOHN STUART MILL, *ON LIBERTY* I.9 (1859), available at <http://www.econlib.org/library/Mill/mlLbty1.html>; see also Richard Warner, *Liberalism and the Criminal Law*, 1 S. CAL. INTERDISC. L.J. 39, 39 (1992).

³ See John J. Farley, III, *Robin Hood Jurisprudence: The Triumph of Equity in American Tort Law*, 65 ST. JOHN’S L. REV. 997, 1000–01 (1991).

⁴ See CAL. CONST. art. I, § 19 (2014).

the interests of private owners warranted a remedy.⁵ Perhaps today, this looks like a strange remedy for a situation that appears to fall squarely under the umbrella of tort law. In 1879, however, the doctrine of sovereign immunity shielded the State of California from tort liability — a privilege not waived until 1963 with the enactment of The California Tort Claims Act.⁶

Since its inception, the damages clause has taken on a life of its own through inverse condemnation claims, creating something of a quasi-tort.⁷ While possibly appropriate at the time of ratification, such a broad interpretation is inconsistent with California's modern statutory scheme.⁸ Furthermore, the modern application of the damages clause has eviscerated what remained of the traditional concept of sovereign immunity doctrine without a clear legislative directive.⁹

If the doctrine of sovereign immunity is to act as a bar for claims against the state, it cannot have the quasi-tort of inverse condemnation drilling a hole directly through its center. When California waived sovereign immunity in 1963 with the passage of the Tort Claims Act, the Legislature struck the proper balance of public accountability and sovereign immunity.¹⁰

⁵ See 3 E.B. WILLIS & P.K. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1190 (1881).

⁶ California Tort Claims Act, CAL. GOV'T CODE §§ 810 *et seq.* (Lexis 2014); see Austen L. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision*, 15 STAN. L. & POL'Y REV. 267, 281 (2004).

⁷ See, e.g., *City of Pasadena v. Superior Court*, 228 Cal. App. 4th 1228 (2014) (using language from *Albers, Holz, Customer Co.*, and *Regency* to determine an inverse condemnation claim); *Regency Outdoor Adver., Inc. v. City of Los Angeles*, 39 Cal. 4th 507 (2006) (holding that damage as part of the construction of a public improvement satisfies an inverse condemnation claim); *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 376–80 (1995) (clarifying that just compensation “encompasses special and direct damage to adjacent property resulting from the construction of public improvements”); *Holz v. Superior Court*, 3 Cal. 3d 296 (1970) (adequately stating a claim for inverse condemnation for damages from construction of a rapid transit system); *Albers v. Cnty. of Los Angeles*, 62 Cal. 2d 250, 263 (1965) (defining public use as “improvement as deliberately designed and constructed”).

⁸ See generally California Tort Claims Act (allowing tort claims against the government based on legislature-defined parameters).

⁹ See, e.g., *Pasadena*, 228 Cal. App. 4th (allowing the possibility of strict liability against the city for damage from a falling tree); *Albers*, 62 Cal. 2d (finding a county liable for property damage resulting from a landslide caused by the construction of a road).

¹⁰ See Parrish, *supra* note 6, at 283–87.

Inverse condemnation, on the other hand, provides a remedy that amounts to strict liability against the government without any benefit of legislative gravity or deliberation.¹¹ Because of the presumption against the waiver of sovereign immunity, courts must be cautious in extending strict liability without a clear directive from the Legislature.¹²

In *City of Pasadena v. Superior Court*,¹³ the extremes of inverse condemnation appear writ large, i.e., full-fledged strict liability against the government.¹⁴ That means liability without any need to prove carelessness or fault, a standard usually reserved for “hazardous” activities.¹⁵ Such an extreme standard is an indication that it is time to end the damages clause experiment¹⁶ and to reformulate an appropriate eminent domain standard.

Part I of this article explores the history of eminent domain and how and why California introduced a damages clause to its constitution.¹⁷ Part II tracks and analyzes the modern case law, showing that the current doctrine of inverse condemnation is exactly what the enactors of the damages clause feared that it would become — broad to the point of excess.¹⁸ Part III contrasts the damages clause with the California Tort Claims Act, which is sufficient to render inverse condemnation no longer necessary.¹⁹ Part IV explores the possible legislative and judicial solutions to remedy the loophole in California’s sovereign immunity — abolition of the damages clause, judicial overruling of the overbroad case law, or specifying *intentional* damage in application of the damages clause.²⁰

¹¹ See *Pasadena*, 228 Cal. App 4th at 1234; *Albers*, 62 Cal. 2d at 262.

¹² Cf. Peter M. Gerhart, *The Death of Strict Liability*, 56 BUFF. L. REV. 245, 246 (2008) (arguing that strict liability is a “superfluous doctrinal container for addressing non-intentional harms,” and “a doctrinal shadow” that should be done away with).

¹³ See generally *Pasadena*, 228 Cal. App. 4th (considering whether a street tree, maintained by the city, that fell on a private house during a windstorm may create an action in inverse condemnation).

¹⁴ See *id.*

¹⁵ See *Strict Liability Definition*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/strict-liability.html> (last visited Jan. 27, 2015).

¹⁶ See *infra* Part II.B.

¹⁷ See discussion *infra* Part I.

¹⁸ See discussion *infra* Part II.

¹⁹ See discussion *infra* Part III.

²⁰ See discussion *infra* Part IV.

ORAL HISTORY
CRUZ REYNOSO

ASSOCIATE JUSTICE
OF THE CALIFORNIA SUPREME COURT
(1982-87)

JUSTICE CRUZ REYNOSO:

The People's Justice

KEVIN R. JOHNSON*

One of the leading Chicano civil rights leaders of his generation, Cruz Reynoso has been said to be the Latino equivalent of the late U.S. Supreme Court Justice Thurgood Marshall, the first African American appointed to the U.S. Supreme Court. Needless to say, Reynoso is nothing less than an icon in the national legal community.¹

From humble beginnings, Reynoso rose to greatness. Raised in a working-class neighborhood in Southern California, he attended segregated schools as a youth. With optimism and a zest for life, he persevered and pursued a higher education, first at a community college and later at Pomona College and the University of California, Berkeley School of Law. Young Reynoso served his country in the Counterintelligence Corps of the United States Army for two years.

Cruz Reynoso began his legal career in private law practice serving the Mexican-American community in El Centro, California, a remote, rural agricultural town near the U.S./Mexico border. Why El Centro, one might ask? Reynoso went there because he sensed that the Mexican-American

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¹ The documentary film, "Cruz Reynoso: Sowing the Seeds of Justice" (Ginzburg Video Productions, 2010) provides some of the highlights of Reynoso's illustrious career.

working-class community needed the help of a lawyer. He became that lawyer, not just for El Centro but for a generation of Latinos.

In the 1960s and the early 1970s, Cruz Reynoso led the fight for the rights of the rural poor, including but not limited to farm workers, as director of California Rural Legal Assistance (CRLA).² An innovative legal services organization, CRLA was at the vanguard of the national war on poverty. In making CRLA a national force, Reynoso earned a national, if not international, reputation. His fight for the rights of the poor did not go unchallenged and in fact faced determined opposition from the highest levels of the state government, including popular conservative Governor (later President) Ronald Reagan.

As is well known, Reynoso ultimately served as a distinguished jurist, first as an associate justice of the California Court of Appeal, Third Appellate District (1976–82) and later as an associate justice of the California Supreme Court (1982–87). A person of many “firsts,” Reynoso was the first Latino justice on the California Supreme Court, which alone would have sealed his place in history.³ A contentious, highly controversial, and some might say “dirty,” campaign in the 1986 confirmation election led to the removal of Justice Reynoso, along with Associate Justice Joseph Grodin and Chief Justice Rose Bird, from that court.⁴ Thinking it inconsistent with the ethical duties and obligations of a judge, Reynoso did not mount an election campaign.

In all of his professional activities, Cruz Reynoso has striven to promote the public good. Besides his work as an attorney and jurist, he has taken on important high-profile, public service assignments to ensure that the rights of minorities were protected. President Jimmy Carter appointed Reynoso to serve on the Select Commission on Immigration and Refugee Policy, which, after careful study, recommended reforms to the U.S. immigration laws.⁵ The recommendations contributed to major immigration reform legislation passed by Congress in 1986.⁶

² See Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1 (1972).

³ See Cruz Reynoso, *Brief Remembrances: My Appointment and Service on the California Court of Appeal and Supreme Court, 1976–1987*, 13 BERKELEY LA RAZA L.J. 15 (2002).

⁴ See Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988).

⁵ See, e.g., STAFF REPORT OF THE SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY (1981).

⁶ See Immigration Reform and Control Act, Pub. L. 99-603, 100 Stat. 3445 (1986).

From 1993 to 2005, Reynoso served as a member of the U.S. Commission on Civil Rights, which investigates the most serious civil rights matters arising throughout the United States. During his tenure, the commission investigated alleged voting improprieties in Florida in the contested, and razor close, 2000 presidential election. The outcome of the presidential election — the election of President George W. Bush — turned on the vote in Florida. The commission's investigation and report raised awareness of the glaring voting rights issues raised by that state's election scheme.

Although never one to pursue personal ambition, much less awards and accolades, Reynoso has received too many awards and accolades to mention here. He has attained the highest available public recognition for his distinguished career. In 2000, President Bill Clinton awarded Reynoso the Presidential Medal of Freedom, the nation's highest civilian honor given to leaders who "have helped America to achieve freedom." In awarding the medal, President Clinton stated:

Cruz Reynoso is the son of Mexican immigrants who spent summers working with his family in the fields of the San Joaquin valley. As a child, he loved reading so much, his elementary school classmates called him *El Profe*, the Professor.

Later, some told him to put aside his dreams of college, saying bluntly, they will never let you in. But with faith in himself and the values of our country, Cruz Reynoso went on to college and to law school but never forgot his roots. He worked for the Equal Employment Opportunity Commission and led the pioneering California Rural Legal Assistance Program. In 1976 he was appointed Associate Justice of the California Court of Appeals and rose to become the first Latino to serve on the State's highest court.

Today, he continues to labor in the fields of justice, serving as Vice Chair of the U.S. Civil Rights Commission, opening new doors for Latino lawyers and teaching a new generation of students the world of law. Not long ago, the person his classmates once called *El Profe* was voted by his own students Professor of the Year.⁷

⁷ William J. Clinton, Remarks on Presidential Medal of Freedom (Aug. 9, 2000), available at <http://www.presidency.ucsb.edu/ws/?pid=1482>.

In addition to his civil rights and judicial work, Reynoso served as a distinguished law professor for many years. He initially served as a faculty member at the University of New Mexico Law School. After his time on the California Supreme Court, Reynoso returned to law teaching. He first went to UCLA School of Law. A few years later, Reynoso became the inaugural holder of the UC Davis School of Law's Boochever and Bird Chair for the Study and Teaching of Freedom and Equality.⁸ I helped convince Reynoso to come to UC Davis and to be closer to his ranch south of Sacramento, where his wife Janeene continued to live while Cruz taught at UCLA.

It seems entirely appropriate that Cruz Reynoso ended his professional career at UC Davis School of Law (although he remains very busy in retirement, including serving as an investigator on a variety of civil rights matters). As a court of appeal justice, Justice Reynoso dissented from a majority opinion finding that the Law School's race-conscious affirmative action admissions plan was unconstitutional:

King Hall, the University of California at Davis School of Law, from whence this lawsuit emanates, was named in honor of Martin Luther King, Jr., a black minister. Through the moral force of his character and faith he inspired America to seek after justice, and he shared with America his dream of a true and abiding equality among all racial, ethnic and linguistic groups who call this land their own. We have paid homage to his ideals by naming a law school in his honor. But we honor his dream with greater warmth when we march that added step or two, as did he, toward the mountain top of equality. King Hall took that step.⁹

The California Supreme Court ultimately agreed with Justice Reynoso.

Besides the many professional achievements, Cruz Reynoso is one of the humblest and most decent people one could ever want to meet. Devoted to his family, community, and faith, he is all that we could aspire to want in a revered historical figure. He continues to attend meetings of the UC Davis

⁸ See Cruz Reynoso, <https://law.ucdavis.edu/faculty/reynoso>.

⁹ *DeRonde v. Regents of the Univ. of California*, 102 Cal. App. 3d 221 (1980) (Reynoso, J., dissenting), *rev'd*, 28 Cal. 3d 875 (1981). Reynoso later wrote about the concept and importance of diversity in American law. See Cruz Reynoso, *Ethnic Diversity: Its Historical and Constitutional Roots*, 37 VILL. L. REV. 821 (1992).

La Raza Law Students Association and serves as a mentor and inspiration to law students. And, even in retirement, Cruz Reynoso serves as the social conscience of the UC Davis law faculty as well as the state and the nation. Unlike some who have fought tough battles for years in the trenches, he is not bitter but remains quick to laugh, talks philosophically about the challenging times in which we live, and maintains optimism about what the future holds for social justice in America.

★ ★ ★

ORAL HISTORY AND THE CALIFORNIA STATE ARCHIVES

BY NANCY LENOIL*

We appreciate this opportunity to showcase the work of the State Government Oral History Program with the publication of the oral history interview of former Associate Justice Cruz Reynoso. It is also a pleasure to work once again with the California Supreme Court Historical Society. We have had a long relationship with the Society through its grant to digitize the working papers of the 1879 Constitutional Convention,¹ and through articles prepared by Archives staff, particularly Court Records Archivist Sebastian Nelson.² Readers of *California Legal History* will also be familiar with the article on our holdings in this field that I was proud to co-author with Society Board Member John Burns, my predecessor as

* California State Archivist and Chief, Archives Division, Office of the Secretary of State.

¹ Laren Metzger, "State Archives Digitizes Constitutional Convention Papers," *California Supreme Court Historical Society Newsletter* (Fall/Winter 2008): 22–23; available at <http://www.cschs.org/wp-content/uploads/2014/08/2008-Newsletter-Fall-State-Archives-Digitizes-Papers.pdf>.

² Sebastian A. Nelson (Court Records Archivist), "Nineteenth-Century Supreme Court Resources in the California State Archives," *California Supreme Court Historical Society Newsletter* (Spring/Summer 2013): 17–19; available at <http://www.cschs.org/wp-content/uploads/2014/05/2013-Newsletter-Spring-State-Archives-Resources.pdf>.

State Archivist.³ It is, therefore, especially appropriate for us to authorize the publication of Justice Reynoso's oral history in this journal.

The State Government Oral History Program (SGOHP) was established at the California State Archives in 1985 to enhance the historical understanding of legislative and executive processes and policymaking in California. Government Code section 12233 requires the California Secretary of State to conduct a regular governmental history documentation program to provide through the use of oral history a continuing documentation of state policy development as reflected in California's legislative and executive history.

This systematic and disciplined effort to record history, and preserve and make it available for future research supplements the official record. It serves to document California's institutional memory and provides much needed content in a digital age when paper files increasingly give way to either non-recorded conversations or electronic documents that can be easily erased.

Since 1986, the SGOHP has completed over 200 interviews. Interview subjects are people who have had a significant role in California state government: former members of the legislature, constitutional officers, agency and department heads, and others who have shaped public policy and/or are identified as being influential in political and public developments at the statewide level. They were selected on a non-partisan basis, with the goal of illuminating key aspects of California government history. Interviewees include Supreme Court Justices Stanley Mosk, Frank C. Newman, and Cruz Reynoso.

Earlier this year, the Center for California Studies at California State University, Sacramento provided the funding for completion of an oral history interview with the late William (Bill) Hauck who held a number of positions in state government including Deputy Chief of Staff to the Governor, Chief of Staff to two Assembly Speakers, and Chair of the Constitution Revision Commission and Co-chair of the California Performance Review Commission. The interview was donated to the State Archives for inclusion in the Archives' State Government Oral History Program. The

³ John F. Burns & Nancy Lenoil, "The First California Statute: Legal History and the California State Archives," *California Legal History* 4 (2009): 443-76.

Center for California Studies has recently completed another interview with former Legislative Analyst Elizabeth Hill which will also be donated to the State Government Oral History Program.

The oral history interviews supplement the historical records in the Archives and provide researchers with a broader and more complete picture of California government than can be gleaned from documents alone.

Further information about the State Government Oral History Program and a catalog of available transcripts is available at <http://www.sos.ca.gov/archives/admin-programs/oral-history/>.

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Oral History of

JUSTICE CRUZ REYNOSO

EDITOR'S NOTE

The oral history of former Associate Justice Cruz Reynoso was conducted from 2002 to 2004 by Germaine LaBerge of the Oral History Center of the Bancroft Library, University of California, Berkeley, in partnership with and under the auspices of the California State Archives, State Government Oral History Program.

The oral history is reprinted by courtesy of the copyright holder, the California State Archives, and may not be reproduced without written permission of the California State Archives, 1020 O Street, Sacramento, California, 95814.

It is presented here in condensed form, intended to focus on matters directly related to Justice Reynoso's life and judicial career. It has received minor copyediting for publication.



CRUZ REYNOSO

— SELMA MOIDEL SMITH

LABERGE: I am sitting in King Hall at UC Davis with Justice Cruz Reynoso. I know, just from reading a couple of things, that you were born 1931, May 2. Why don't you tell me the circumstances that you know of. Where? What number you are in the family.

REYNOSO: I was born on that date, in the outskirts of a then little town by the name of Brea in Orange County. I was the third child born to my parents. The two older were boys also. Then, after that, there were several other children, so I ended up with five brothers and five sisters. I was born at home. Most of my mom's children, that I can remember, were born at home. And my father, at that time, was — and continued to be for many years — a farm worker. He and my mother had come from Mexico, from the state of Jalisco. They came to this country in the late 1920s. I was born in '31.

LABERGE: What were your parents' names?

REYNOSO: My dad's name is Juan, and my mother's Francisca. I never met my grandparents. Apparently they died when I was still pretty young, in grammar school.

LABERGE: What was your first language?

REYNOSO: Spanish. Yes, we spoke only Spanish at home. When my parents came, I am not quite sure how they made their way to the U.S., but they were obviously getting here through the shortest possible way, because they crossed the border in Arizona. My dad started working for the Union Pacific, I believe, Railroad. He and my mother, made their way to California with his working on the railroad. He worked as a laborer, laying down the ties — railroad ties — that needed to be corrected. In those days, the workers lived in boxcars, literally. So, he and my mother lived in a boxcar. When they got to California, then he quit the railroad, and started working in the orange groves of Orange County.

LABERGE: And your mother. Did your mother also work in the orange groves, or was she at home with the kids?

REYNOSO: No, she was always at home. Well, I say always, except during the Second World War we traveled to the Central Valley to pick fruit, and at that time, she would work with us picking fruit. When I was growing up, she was always at home.

My first recollection is of living in a house in the outskirts of Brea. We lived there for several years. My father appeared to have been — I know he was

— a very hard worker, and a very dependable worker. He became what is referred to in Spanish as “trabajador de planta,” which means “a steady worker.” It meant, that even though I was born in 1931, just as the Depression was getting into its worst years, my father always worked. He was never unemployed.

Brea had very few — in fact, I remember only one other Mexican family. They lived near where we did. So we grew up, we children grew up speaking only Spanish at home, but everything that we did outside the house was in English. We played with our neighbors in English, and we thought in English, and we talked in English. I remember that some of our neighbors would give us the Sunday comics, which we were able to read. Of course, we didn’t have, in those days, any bilingual education so the concept of immersion that some people are very much in favor of, it appears to me probably does work under the right circumstances. The right circumstance was that everybody around us, except the other family and we, spoke English. So, we grew up speaking English as well as Spanish.

When we went to school, I don’t remember having any problems with the teachers. Even in kindergarten, I don’t remember their ever having to repeat things, or feeling that we didn’t — or a sense that we didn’t understand what the teacher was saying. We just simply learned it as youngsters, so by the time that we went to school, apparently we knew it perfectly well.

LABERGE: And at home, did your parents know any English when they came to the United States?

REYNOSO: No. They knew no English, and my dad only learned what he needed to know, particularly for work purposes. Later on in his life, when he tried to learn some English in a more formal way, he would say in Spanish, “El español me olvidé. El inglés nunca aprendí. Quede mudo,” he would say. “I have forgotten my Spanish, I never learned English, I am now speechless.” [laughter] But no, neither of my parents ever learned English sufficiently well to be comfortable with it. My mom learned even less.

In growing up, my parents continued with what they knew of their religion, in terms of being very religious. My mom seemed to have some doubts about religion, at least the way it was practiced in Catholicism. My dad never did. We routinely went to Mass every Sunday. We would go to two churches. Mostly, my recollection is we would go to a barrio in La Habra. The barrio was populated completely by Spanish-speaking persons — immigrants and Chicanos.

Everything there was done in Spanish and Latin. We would go sometimes to Fullerton, where everything was in English, but mostly, I believe, we went to La Habra. There were two or three barrios in — outside the city limits of La Habra, literally on the other side of the tracks. And there was a church there.

I do recall that during the Depression, there were a lot of hobos, nowadays called homeless people. Many of them would come to our house. I remember reading an article which said that the hobos in those days had signs and insignias and messages they would leave for one another, indicating which houses would be responsive to them. If that's true, we must have been on that list, because an awful lot of hobos would come to our house. I remember, because my mother would always put out a great feast for them. Carnes, meats, and tortillas, frijoles, beans, and everything. We would complain to our mother that she fed the hobos better than she fed us, and she would deny it. She would say that we were lucky to have a father who was working during the Depression so that we had a roof over our heads, clothing on our shoulders, and food on the table. We had a duty to share with others. I still remember our protest and her response.

LABERGE: But, also, that that was inculcated in you at an early age.

REYNOSO: Oh, very much so. From Dad, you know, I remember the import that he placed on working hard and being honest with the people you work for, but expecting also to be paid an honest day's wage for an honest day's work. That was very much a part of the culture that my parents came from.

LABERGE: Were you ever in charge of the younger children?

REYNOSO: Not in terms of giving them instruction, and so on. If the parents would leave, they would expect that whoever was older would be sure to take care of the younger children. But I don't think that our family was as hierarchical as some other families were. We had neighbors where the younger children were simply expected to obey whatever the older child did. I don't think our family was ever quite that strict. But whenever the parents left, or something of that sort, whoever was the oldest child was expected to be in charge.

There's an element of sadness in that regard that perhaps we will go more into detail later. But a time came when things went very awry with the family. My parents separated, and neither was at home. At that time, I was in college and my oldest brother was married, my immediate older brother was in the military, and my parents had left, leaving the children, then, by themselves.

AGRARIAN LIFEWAYS AND JUDICIAL TRANSITIONS FOR HISPANIC FAMILIES IN ANGLO CALIFORNIA:

*Sources for Legal History in the Autry
National Center of the American West*

MICHAEL M. BRESCIA*

An immediate and unmistakable sense of urgency permeates the brief letter that José Sepúlveda sent his *compadre*, Juan Sepúlveda, on August 23, 1850. “Come at once because the lawyers are here and are just waiting for you so they can start business. I hope you hurry and, with tomorrow’s train, Tuesday, leaving at 9:00, I assured them that you would be here . . . today the lawyers started [to address] the matter.”¹ Unfortunately for us, José failed to identify “the matter” at hand, nor did he establish the broader context and delineate local circumstances for the contemporary reader. It is clear from his imperative tone, however, that the territorial cession of 1848 — and subsequent statehood for California in 1850 — promoted angst and uncertainty among many Hispanic families. José’s letter

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¹ The original Spanish reads, “Benga U. inmediatamente por que aqui estan los abogados y solo se espera a U para comenzar el negocio. Espero pues no pierda momento y con el tren de mañana martes a las nueve, este U aqui asi les asegure yo a ellos . . . [H]oy comensaron los Abogados el asunto.” José L. Sepúlveda to Don Juan C. Sepúlveda, August 23, 1850, Autry National Center of the American West Archive and Manuscript Collections, Los Angeles, California, Miehle and Sepúlveda Family Papers [hereinafter ANCAMC, MSFP], MSA.31, document 8.

conjures images of American lawyers descending upon Juan Sepúlveda's home in Los Angeles, armed with judicial decisions and legal documents that perhaps challenged his rights to the land and water he and his family had enjoyed for years under the laws of the prior sovereign, Mexico.

Land dispossession was quite common throughout the North American West in the years following the Treaty of Guadalupe Hidalgo despite its explicit guarantees to protect the property rights of those Mexicans who were prejudiced by the territorial cession.² In California, the rapid move to statehood in light of events at Sutter's Mill and the Gold Rush that followed led to federal passage of the Land Act of 1851, which subjected Hispanic property rights to adjudication in U.S. courts. A potent combination of chicanery, intimidation, and indebtedness resulted in the transfer of nearly 40 percent of Hispanic land in California to American ownership.³ Territorial cession, therefore, set up a clash of legal cultures as the more established Hispanic civil law, which had defined the nature and scope of property rights and agrarian lifeways in Spanish North America since the sixteenth century — and in Alta

² For California, see the classic accounts by W.W. Robinson, *Land in California* (Berkeley & Los Angeles: University of California Press, 1948), and Leonard Pitt, *The Decline of the Californios: A Social History of the Spanish-Speaking Californians, 1846–1890* (Berkeley & Los Angeles: University of California Press, 1966). The literature on New Mexico is vast. Malcolm Ebright summarizes quite nicely the changing political, social, and legal landscapes there in his *Land Grants and Lawsuits in Northern New Mexico* (Albuquerque: University of New Mexico Press, 1994). For Arizona, see the interdisciplinary study by Thomas E. Sheridan, *Landscapes of Fraud: Mission Tumacácori, the Baca Float, and the Betrayal of the O'odham* (Tucson: University of Arizona Press, 2006). David Montejano evaluates how land dispossession unfolded in Texas in his well-researched study, *Anglos and Mexicans in the Making of Texas, 1836–1986* (Austin: University of Texas Press, 1987). Article VIII of the Treaty of Guadalupe Hidalgo protected “property of every kind.” The best survey of the treaty remains Richard Griswold del Castillo, *The Treaty of Guadalupe Hidalgo: A Legacy of Conflict* (Norman: University of Oklahoma Press, 1992). Arizona south of the Gila River to present-day Nogales, as well as southwestern New Mexico, were not part of the 1848 territorial cession and remained in Mexico's hands until the Gadsden Purchase of 1854, which in Mexico is known as *La Venta de La Mesilla*. See William S. Kiser, *Turmoil on the Rio Grande: History of the Mesilla Valley, 1846–1865* (College Station: Texas A&M University Press, 2011).

³ Shirley Ann Wilson Moore, “We Feel the Want of Protection: The Politics of Law and Race in California, 1848–1878,” in John F. Burns and Richard J. Orsi, eds., *Taming the Elephant: Politics, Government, and Law in Pioneer California* (Berkeley & Los Angeles: University of California Press, 2003), 102.

California since 1769 with the establishment of San Diego, followed in earnest by the *rancho* movement in 1784 — was forced to make way for American common law understandings of property rights *and* the onslaught of attorneys representing Anglo land speculators and mining interests.

The property rights tradition that evolved in Spain, and later Mexico, classified natural resources as property in ways that were quite distinct from Anglo common law, thus ensuring confusion after 1848 when adjudication took place in the newly acquired territories. Since water was considered property under the laws of Spain and Mexico prior to the territorial cession, U.S. courts were being called upon by both international law and American case law to act as surrogates for the Hispanic civil law of property.⁴

Spanish (and later Mexican) jurisprudence recognized three kinds of property rights that are fundamental to understanding the intersection of law and rural economic activities in places like California, Arizona, New Mexico, southern Colorado, and Texas, which were once part of the Spanish dominion in North America. Surface water was *propiedad imperfecta*, or a property right that was subject to qualification and measured against the rights of others.⁵ For example, unlike Anglo common law, the Spanish civil law did not recognize riparian rights to running rivers or streams. If a piece of property fronted on a creek or river the owner could only use the water for domestic purposes and *not* for irrigation. The Spanish crown (and later an independent Mexico) conveyed rights to surface water for agricultural and industrial purposes via several mechanisms: *merced de agua* (a specific grant of water); *repartimiento de aguas* (a judicial procedure that divided surface water according to certain criteria such as need, intent, and legal right); *composición* (the judicial process of authenticating

⁴ For a summary of these international and national contexts, see Michael C. Meyer and Michael M. Brescia, "The Treaty of Guadalupe Hidalgo as a Living Document: Water and Land Use Issues in Northern New Mexico," *New Mexico Historical Review* 73 (1998): 321–345. For the California context, see Peter L. Reich, "Dismantling the Pueblo: Hispanic Municipal Land Rights in California since 1850," *The American Journal of Legal History* 45 (2001): 353–370, and Peter L. Reich, "Mission Revival Jurisprudence: California Courts and Hispanic Water Law since 1850," *California Supreme Court Historical Society Yearbook* 2 (1995): 3–47.

⁵ For an explanation of the distinctions between *propiedad imperfecta* and *propiedad perfecta*, see Mariano Galván Rivera, *Ordenanzas de tierras y aguas, o sea formulario geométrico-judicial* (Mexico City: no publisher, 1849), 3–4.

asserted water rights); or if the land grant itself contained language that conveyed water rights for irrigation (for example, if a parcel of land was identified in the granting instrument as *tierras de pan llevar* or *tierras de labor*, both of which meant irrigable land).

Groundwater was classified as *propiedad perfecta* in the Spanish civil law of property. Ownership of spring water, rainwater, snowmelt, or water percolating under the ground was nearly absolute, and landowners could not be easily deprived of these waters once conveyance was extended by competent authority, even if use of such water caused damage to neighbors. The paucity of disputes over groundwater during the Spanish colonial period suggests that the nascent science of hydrology had not yet informed jurisprudence in the Spanish world. Most disputes in the documentary record reflect concerns over access to surface water rather than groundwater.

Propiedad usufructuaria, or usufructuary property, rounds out the third property right in the Hispanic civil law.⁶ Usufruct is the right to use and enjoy the property of another, and to draw profit from it provided that such acts neither alter nor eliminate the purpose or substance of the property being used. In the case of Spanish New Mexico, usufructuary property was manifest in the common lands attached to Spanish municipalities, Indian pueblos, and, in northern New Mexico, informal agrarian hamlets known as *acequias* or *plazas*. Individual Spanish citizens (*vecinos*) residing in a town (or Native peoples in their pueblos) enjoyed a property interest in the common lands, which were used for recreation, hunting, fishing, for pasture, the gathering of wild fruits and nuts, for the watering of livestock, and for cutting wood. Citizens of the community, rich and poor alike, enjoyed equal access to the commons. In fact, most settlers would have found it difficult to make a living and support their families without regular access to the commons. The activities cited above, therefore, were usufructuary property rights, and, although our understanding of these rights is not nearly as nuanced as our knowledge of water rights, it is clear from the statutory and case law that Spanish jurisprudence recognized them as such.

Fortunately for historians and legal scholars, the Autry National Center of the American West in Los Angeles is home to two impressive research libraries that contain plenty of primary source materials for the study of

⁶ Meyer and Brescia, "The Treaty of Guadalupe Hidalgo," 323.

law, legal custom, and agrarian lifeways during the critical transition period between Spanish colonialism and American rule. The Autry Library, located at Griffith Park, and the Braun Research Library, which until very recently was located at the Southwest Museum of the American Indian on the Mount Washington campus but is moving to its new state-of-the-art facility in Burbank, include papers from several prominent Hispanic families that reveal both glimpses and panoramic views of change and continuity in their social circles, material well-being, and rural practices. Moreover, these resources also show how quickly the Americans became part of the California landscape even before the transfer in sovereignty, as some married into Mexican families and experienced firsthand the traditions and practices of Hispanic ranching culture, while others employed to their economic advantage the new political and legal infrastructure established under U.S. sovereignty. Finally, the Autry National Center has a user-friendly online catalogue that allows researchers to search its multiple archival and manuscript collections. The historical vignettes that follow identify and evaluate select items found within certain family papers, emphasizing what the sources tell us about the legal and cultural values that fashioned agrarian life for Hispanic families in California.



THE AUTRY NATIONAL CENTER OF THE AMERICAN WEST,
GRIFFITH PARK CAMPUS

Introduction: Student Symposium on

THREE INTERSECTIONS OF FEDERAL AND CALIFORNIA LAW

JOHN B. OAKLEY*

In January of 2015, as I commenced my class in Constitutional Law II at King Hall, the law school of the University of California, Davis, I was asked to invite students to write papers on aspects of California's legal history for possible inclusion in a student symposium to be published in the journal, *California Legal History*. The subject of my course was individual rights and liberties under the Bill of Rights and the Fourteenth Amendment of the federal constitution. This offered the prospect for students to undertake original research comparing rights and liberties protected by federal law with those protected independently by California law. A number of students responded to my invitation. Their only reward was the substitution of their papers for a final examination. They received no extra credit for the very substantial additional work that is manifest in the three papers reprinted below. These papers were deemed by anonymous reviewers to be of exceptional merit, worthy of publication in the symposium that follows. I take great pride in presenting them to you.

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I.

Absent voluntary compliance by the judgment-loser, every judgment of a court of law becomes effective only through the coercive enforcement of that judgment. At common law, this entailed the issuance by the court of a “writ of execution,” authorizing the sheriff or some other law-enforcement officer to exercise such force as was necessary to achieve compliance with the writ, and hence to “execute” the judgment. The most draconian judgment to be executed by a legal system is the imposition of capital punishment: the execution of a judgment that the defendant shall be put to death. And so the whole process of capital punishment has become uniquely identified with the legal term of art for enforcing that as well as any other legal judgment: condemned prisoners are said to be “executed,” and legally unsanctioned murders that are accomplished by particularly purposeful and conclusive methods are accordingly called “execution-style” killings.

This most awesome and irrevocable use of the coercive power of government as licensed by law is rarely used in modern democracies dedicated to the socially inclusive values of liberty, equality, and autonomy. Even in warfare, the killing of disarmed prisoners is not tolerated. The total eradication of life — as opposed to the systematic curtailment of autonomy through life-long incarceration, always subject to prospective correction should judicial error be belatedly discovered — is a stark reminder of the totalitarian régimes which stained the middle decades of the twentieth century. Nonetheless, capital punishment remains politically popular in the United States, although by a declining majority as evidence of the actual execution of innocent defendants mounts. Given the prominence of judicial protection of individual rights against majoritarian action within our constitutional scheme of governance, it is not surprising that capital punishment has been a recurrent topic of litigation under both state and federal constitutions.

Kelsey Hollander’s paper on *The Death Penalty Debate* gives an excellent overview of federal and state constitutional law as applied to this subject in California. The applicable federal constitutional norm is the Eighth Amendment’s prohibition of “cruel and unusual punishments.” This nominally limits only the power of the federal government, but it has been incorporated into the meaning of the “due process of law” that limits the power of state governments under the Fourteenth Amendment. As Ms. Hollander makes clear, the Eighth Amendment has never been interpreted

by a majority of the Court as imposing a *substantive* ban on capital punishment. In keeping with the exclusively adjectival wording of the ban not on punishment, but only such punishments as are “cruel and unusual,” the Eighth Amendment has been given only *procedural* effect in limiting *how*, not *whether*, capital punishment may be imposed. Less obviously, but no less importantly, this emphasis on procedural review of the execution of judgments of death has never resulted in the invalidation of a particular method of execution prescribed by state or federal law.

Execution methods have, of course, drastically changed since the founding of the United States. While the beheadings of Tudor England and revolutionary France never gained a foothold in American law, hanging and firing squads were common into the twentieth century. The move to electrocution and gas chambers was driven by a strange coincidence of technological pizzazz and putative humanitarianism at play in legislatures unmediated by courts. Execution technique has most recently converged on lethal injection, with the apparent supposition that life can thus be extinguished in both an antiseptic and anesthetic way: pulling the plug without pain, if not without the painful anxiety of a conscious person aware that death is just a needle away.

Lethal injection is rare among American execution methods in that it kills the prisoner endogenously rather than exogenously — by poison rather than by some lethal application of external force. The only similar method is the gas chamber, where the poison is inhaled rather than injected. The fact that lethal gas — from the trenches of World War I to Auschwitz to San Quentin Prison — operates mainly by suffocating its victims, was a major factor in its displacement by the seemingly more humane method of lethal injection, which is supposed to sedate the victim into unconsciousness before stopping the victim’s heart and/or respiration.

Recently both the medical profession and the pharmaceutical industry have refused to facilitate executions of the condemned, or to supply products for use in execution by lethal injection. This has led to jury-rigged drug protocols that have apparently suffocated prisoners without prior sedation. Ms. Hollander considers, and accurately predicts, whether the Supreme Court of the United States will allow this procedural uncertainty about the manner in which death occurs to inhibit the substantive power of government to impose capital punishment. In its final opinion of the 2014 Term

— decided on June 30, 2015, the very day her paper was submitted — the Court held 5–4, in the alignment Ms. Hollander wrote was most likely, that petitioners facing execution by lethal injection using an untested protocol of drugs had failed to carry their burden of proving that the protocol entailed a constitutionally-unacceptable risk of pain. “Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, ‘[i]t necessarily follows that there must be a [constitutional] means of carrying it out.’ . . . Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether.” *Glossip v. Gross*, 576 U.S. ___, 135 S.Ct. 2726, 2732–33 (2015).

Ms. Hollander also provides an overview of the California Supreme Court’s formerly independent review of the constitutionality of the death penalty. In 1972, that court struck down California’s death-penalty statutes because its arbitrary and inconsistent application violated California’s disjunctive prohibition of *either* “cruel” *or* “unusual” punishments. The high court found that the substitution of the ban on “cruel or unusual punishments” instead of “cruel and unusual punishments” in the 1849 California Constitution, carried over to the still-effective 1879 Constitution, had not been inadvertent. This disjunctive rather than conjunctive phrasing was parallel to the majority of state constitutions in effect at the time of California’s founding. In *People v. Anderson*, 6 Cal.3d 628 (1972), the California Supreme Court ruled that the actual carrying-out of executions in California had become so capriciously rare as to be “unusual” within a strictly domestic context, and no less unusual when compared to the worldwide practices of civilized legal systems. The court also held that the infliction of capital punishment had become “cruel” as a matter of state constitutional law, whether or not it was deemed unconstitutionally “cruel” by the United States Supreme Court in that Court’s interpretation of the Eighth Amendment.

This independent construction of the state constitution was announced in an opinion written by the Chief Justice of California, Donald R. Wright, and joined by all but one of the court’s seven justices. This decision surprised Governor Ronald Reagan. Chief Justice Wright was a municipal bond lawyer in Pasadena before becoming a state trial judge. He was a judge’s judge, who had served as presiding judge of one of the nation’s largest courts, the Los Angeles County Superior Court. When Governor Rea-

gan appointed him chief justice, he was thought to be both colorless and conservative. Governor Reagan, who remained in office until 1975, swiftly repudiated both his appointee and the *Anderson* opinion that Chief Justice Wright had authored.

The California Constitution is rather easily amended: an initiative amending the constitution requires only the signatures of registered voters equal to one-eighth of the votes cast for governor at the last gubernatorial election in order for an initiative to be placed on the ballot, and then only a simple majority of votes cast for the enactment of that initiative. *People v. Anderson* was decided on February 18, 1972. With the full support of the popular governor, Proposition 17 was adopted by a 2–1 margin at the general election of November 7, 1972. This initiative amended the California Constitution to declare that the death-penalty statutes in effect on February 17, 1972, were restored to full force and effect free of any state constitutional impediments. Thus the constitutionality of the death penalty in California remains subject only to the lenient federal standards of *Glossip v. Gross*.

It is difficult to resist the conclusion that Eighth-Amendment death-penalty standards — to which California law is tied — have taken an ironic turn. As Justice Thomas has made clear, in an opinion highlighted by Ms. Hollander, the framers of the Eighth Amendment surely meant at least to bar such exquisitely cruel means of ending life as the stake and the gibbet. Both involve the infliction of extreme pain not just as the means of death, but as its precursor. One might conclude from these exemplars that the most immediate and conclusive means of death would be the most constitutionally acceptable. And this would seem to recommend the means of execution favored in the People's Republic of China: the instantaneous and hence painless bullet to the back of the head.

This method of execution is not only painless, but self-evidently quick and simple, even painless. Why is it beyond the constitutional pale? I suspect the reason lies in its exogenous brutality. We want the condemned to die, not to be killed. Better to be burned from within than to be bruised or bloodied from without. The Chinese method would transform a metaphor into a fact: execution-style killing employed for executions. The Eighth Amendment, it seems, now protects the process, not the product. It has encapsulated death, indifferent to its potential agony. And Californians, having foregone their constitutional independence, have nothing more to say.

II.

Justice Louis Brandeis, dissenting in 1932 from a decision of the United States Supreme Court that condemned as unconstitutional an Oklahoma state scheme requiring a license for the manufacture, sale, or distribution of ice, famously praised the potential of states to serve as “laboratories of democracy” within our federal system. Allowing states leeway to experiment with innovative grants of rights or policy initiatives, when not in fundamental conflict with federal law, allows legislators nationwide to determine the value of such innovations based on actual practice. When California enacted Proposition 17 in 1972, it closed down its laboratory on administration of the death penalty by specifying that state law was to be identical to federal law, however that should develop. But Megha Bhatt’s paper, *Gender Equity in the Workplace*, demonstrates that California continues to be a well of legal inspiration when it comes to the integration of pregnancy into the law of reasonable accommodation of disabled workers.

The United States Supreme Court’s nine justices now include three women. That is hardly over-representation. As Justice Ruth Ginsberg has whimsically noted, there will be “enough” women on the Court when all nine of the justices are women. Statistically, the representative figure should be between four and five. Until the appointment of a transgender justice, utopia will have to wait. But we do have a good sense of the consequences of dystopia. Until President Reagan’s appointment of Sandra Day O’Connor in 1981, no woman sat on the Supreme Court. Only this circumstance can explain what Ms. Bhatt describes: a pair of decisions, in 1974 and 1976, in which the Court ruled that the denial of disability-benefits to pregnant women was not gender-based discrimination under either the Equal Protection Clause of the Fourteenth Amendment, or Title VII of the 1964 Civil Rights Act. The relevant classification, the all-male Court held, was between pregnant and non-pregnant people, and since women were included along with men in the non-pregnant class, the classification was not gender-based. Although women did not then hold the highest judicial office, they had since 1919 possessed the constitutional right to vote. Congress swiftly passed the Pregnancy Discrimination Act (PDA), which in 1978 amended Title VII to forbid discrimination in employment based on pregnancy.

The persistent problem addressed in Ms. Bhatt’s paper arose after the passage in 1990 of the Americans with Disability Act (ADA). The ADA requires

employers to provide reasonable accommodation of the disabilities of employees. The PDA does not include a reasonable-accommodation provision, and federal courts have read the two Acts as providing parallel but not congruent remedies. Thus women temporarily disabled by pregnancy — a disability which varies markedly from woman to woman, and pregnancy to pregnancy — have no federal protection against loss of employment when disabled by pregnancy from performing their normal workplace duties. In California, pregnant workers have been given statutory protection beyond that provided by the federal ADA and PDA. Ms. Bhatt traces the reverberations this California experiment has had on the body of federal law which it supplements.

III.

The final paper in this symposium, Elaine Won's *Protecting Our Children*, deals with the constitutional constraint on federalism's "laboratories of democracy." State-law innovations, however valuable as experiments in effective governance, cannot transgress federal constitutional limitations on state power. Requirements that school children be vaccinated for such common diseases as measles have been left entirely to state law. There are three common exemptions: the medical exemption of students who have some sort of immuno-deficiency; the exemption of students whose parents have a religious objection to vaccination; and the more-amorphous exemption of students whose parents object to vaccination on "personal-belief" grounds.

Recent outbreaks of vaccination-controllable diseases, most prominently a measles outbreak among visitors to Disneyland, have focused attention on "herd immunity." In any given population, vaccination of approximately 90 percent is sufficient to prevent epidemic disease by vaccination-preventable pathogens. This "herd immunity" allows immuno-deficient individuals to benefit from that shared immunity without the potentially fatal consequences of personal vaccination. But when additional individuals decline vaccination on religious or ideological grounds, depressing the overall vaccination rate below the 90-percent herd-immunity threshold, a serious threat to public health may be created.

Ms. Won's paper discusses the constitutionality of proposed legislation in California that would abrogate the religious and person-belief exemptions to California's mandatory school-vaccination law. The bill she discussed,

Senate Bill 277, was in fact signed into law by Governor Jerry Brown on the same day that Ms. Won's paper was submitted for review: June 30, 2015.

The requirement of vaccination as a condition of enrollment in public schools has a long history of judicial review. Ms. Won begins her account of the relevant state and federal cases in the nineteenth century. It seems that parents blindly opposed to vaccination inhabit the same forget-the-facts anti-intellectual space as climate-change deniers. Recently, a retracted report of a wholly unproven correlation between the principal childhood vaccines and autism has led to a four-fold spike in parental claims for a "religious" or "personal-belief" exemption of their children from vaccination. This threatens the herd immunity of school children, which is the only defense against epidemic disease for children who, because they have degraded immune systems (often incident to organ transplants or cancer treatment) would likely be killed by otherwise routine vaccinations.

The enactment of SB 277 has already spawned lawsuits and proposed ballot measures. Ms. Won's careful and sustained analysis in support of SB 277's constitutionality suggests that, in court at least, the opponents of comprehensive vaccination of public school students are unlikely to shut down this particular experiment in the laboratories of democratic federalism.

★ ★ ★

EDITOR'S NOTE:

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

Professor John Oakley, who offers a course each year in Constitutional Law at the University of California, Davis School of Law, graciously agreed to propose to his Spring 2015 students that they consider writing on California aspects of the topic, with the possibility that the most promising papers might be accepted by the journal. From those provided by Professor Oakley, three appear on the following pages as a student symposium on intersections of federal and California law.

— SELMA MOIDEL SMITH

THE DEATH PENALTY DEBATE:

Comparing the United States Supreme Court's Interpretation of the Eighth Amendment to that of the California Supreme Court and a Prediction of the Supreme Court's Ruling in Glossip v. Gross

KELSEY HOLLANDER*

INTRODUCTION

The United States has long grappled with the constitutionality of capital punishment. The flip-flopping history of the country's stance on the death penalty indicates that this issue not only has several underlying components, but also that it has never been and never will be a non-controversial societal problem.

As society progressed and technology advanced, the death penalty did not become obsolete but instead became even more complex. Methods of execution that the early Americans relied on, such as hanging and the firing squad, were displaced by drugs and other technological advancements. And with these new methods came increasing judicial and public scrutiny.

This paper traces the history of the United States Supreme Court's application of the Eighth Amendment to the death penalty and compares

This paper was awarded third place in the California Supreme Court Historical Society's 2015 CSCHS Selma Moidel Smith Law Student Writing Competition in California Legal History.

* Member of the California Bar; J.D. 2015, UC Davis School of Law. The author would like to thank Professor John Oakley for his time and feedback!

this to the California Supreme Court's application of the California Constitution to capital punishment. This paper will also discuss how the current shortage of lethal-injection drugs has prompted states to turn to other methods of execution, such as using a controversial drug in their lethal-injection protocol. One such case currently before the United States Supreme Court, *Glossip v. Gross*, addresses this issue. This paper will predict how the United States Supreme Court will apply the federal constitution's "cruel and unusual punishment" prohibition to this pending case.

I. THE UNITED STATES SUPREME COURT'S INTERPRETATION OF THE EIGHTH AMENDMENT

A. A BRIEF HISTORY: DOCUMENTING THE COURT'S VARIOUS OPINIONS REGARDING CAPITAL PUNISHMENT

American society instituted the death penalty as early as 1608, and American views regarding lethal punishment have greatly fluctuated ever since.¹ The mid-twentieth century saw a substantial fluctuation in the public's perception of the death penalty. While the death penalty gained traction and support from 1920 to 1940, this movement was quickly quelled by a counteracting decrease in public support for capital punishment in the 1950s.²

The 1960s featured new challenges to the death penalty's seemingly unbridled discretion. Until this time, the Fifth, Eighth, and Fourteenth Amendments had been interpreted as allowing the death penalty.³ This wave of new analysis began by addressing the absolute discretion given to sentencing juries,⁴ a trend that continued until *Furman v. Georgia* in

¹ *History of the Death Penalty*, DEATH PENALTY INFORMATION CENTER, available at <http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const> (last accessed Feb. 27, 2015).

² *Id.*

³ *Id.*

⁴ See *United States v. Jackson*, 390 U.S. 570 (1968) (holding that the death penalty provision of the Federal Kidnapping Act, which states that the defendant shall be punished by death if the kidnapped person has not been liberated unharmed and if the verdict of the jury should so recommend, is unconstitutional because it tends to discourage of the defendant's assertion of his Fifth Amendment right to plead not

1972. However, amid the increasing scrutiny of the death penalty and the meager number of executions that actually took place in the mid-twentieth century, the federal government expanded the list of death-eligible federal offenses. A series of airplane bombings and hijackings in the late 1950s led Congress to establish such crimes as capital offenses, and killings by explosives became capital crimes in 1970.⁵ Therefore, although the list of capital crimes was increasing, the era of the Civil Rights Movement spurred litigation that somewhat restricted jurors' discretion in death penalty cases.

Then in 1972, the United States Supreme Court released an unprecedented yet divided five-person majority judgment in *Furman v. Georgia*⁶ that invalidated every existing capital statute and verdict.⁷ The fact that each justice wrote a separate opinion, and that no justice signed more than one opinion,⁸ highlighted American society's reluctance and ability to reach a resolution, a trend that is unlikely to change any time soon. In *Furman*, the justices agreed that the current death-penalty administration was unconstitutional but that this may not be the case for death sentences imposed under different procedures.⁹

Many states responded by ratifying new capital statutes, beginning just five months after the *Furman* decision was published.¹⁰ When rewriting their statutes, states focused on reining in discretion from the jury and even the judge. The Supreme Court reviewed the constitutionality of

guilty and to deter exercise of the Sixth Amendment right to a jury trial); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (a juror cannot be prevented from serving on a jury for a death penalty case simply because he has indicated he had reservations about the death penalty).

⁵ Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 *FORDHAM URB. L.J.* 347, 371 (1999).

⁶ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁷ James S. Liebman, *Slow Dancing With Death: The Supreme Court and Capital Punishment, 1963–2000*, 107 *COLUM. L. REV.* 1, 7–8 (2007).

⁸ *Id.*

⁹ *Id.* at 8 (however, while the justices did agree that the current system was unconstitutional, they could not agree on the basis for which it was unconstitutional. Justice Douglas believed the process was discriminatory while Justice White thought the death decisions were "arbitrarily infrequent.").

¹⁰ *Introduction to the Death Penalty*, DEATH PENALTY INFORMATION CENTER (last accessed February 27, 2015), available at <http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const> (Florida rewrote its death penalty statute just five months after *Furman*).

GENDER EQUITY IN THE WORKPLACE:

A Comparative Look at Pregnancy Disability Leave Laws in California and the United States Supreme Court

BY MEGHA BHATT*

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* Megha Bhatt, J.D. 2015, UC Davis School of Law. Thank you to Professor John Oakley for his mentorship and effective guidance as I developed this paper.

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INTRODUCTION TO PREGNANCY DISCRIMINATION IN THE UNITED STATES

Pregnant women have historically faced barriers in being recognized as a special class of people in the workplace in need of greater protections. Until the last half-century, legislatures in the United States “protected” women by 1) systematically encouraging their total exclusion in the workplace except as teachers, secretaries, nurses and nannies and 2) regulating the

number of hours that pregnant women could work.¹ But this “protection” was often a pretext for preserving better jobs for men and keeping women out of certain roles.² The challenge we face today is how to protect women’s access to the modern labor market without ignoring the difficulties and disabilities that affect women only. Many legislatures and employers do not recognize pregnancy as a valid “disability” condition that sometimes requires reasonable accommodations, temporary leave from work or other workplace protections. State and circuit courts are split regarding the idea of whether facially neutral laws violate the Pregnancy Discrimination Act (PDA) when they fail to recognize a disparate impact on pregnant women. I will discuss laws such as the PDA of Title VII of the Civil Rights Act of 1964 that was enacted to protect pregnant women, as well as California and federal case law that give women increasing protections in the workplace.

This paper will comparatively present the evolution of cases from the federal courts as well as California courts on the subject of job-protected pregnancy leave and reasonable-accommodation laws. I will also discuss how the history of cases affects women and families in their daily lives and what this means for the future of sex jurisprudence. The way that the United States Supreme Court has interpreted how the status of pregnancy fits into sex discrimination has evolved over the past forty to fifty years. Due to the Americans with Disabilities Act — which provides for reasonable accommodations in the disability rights context — groups have advocated for similar protections for women. However, the Supreme Court has been reluctant to accept this comparative approach. There are many explanations of how the law should protect pregnant women in the workplace. In this paper, I argue that when courts fail to recognize a lack of pregnancy

¹ Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL’Y 67, 71–72 (2013); 208 U.S. 412, 422 (1908).

² See, e.g., Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1237–38, 1239 (1986) (observing that “[f]etal vulnerability policies excluding all fertile women have been adopted only in male-dominated industries,” while “women are generally allowed to work in women’s jobs without restrictions based on fetal safety”); David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality*, 34 WM. & MARY L. REV. 101, 115 (1992) (“Expressions of corporate concern for the plight of fetuses . . . have been highly selective. Businesses that depend heavily on women workers have been much less scrupulous about the dangers they impose on the unborn . . .”).

leave or reasonable accommodations in the workplace as having a disparate impact on women, it furthers sex discrimination. It may seem obvious that lack of reasonable accommodation leads to a disparate impact for women, but surprisingly, California courts and the United States Supreme Court have been slow to make this recognition explicit. In order to establish statutorily reasonable accommodations, the courts must first recognize the disparate impact.

Lack of proper leave laws and reasonable accommodations put women at risk of losing their livelihood, medical benefits, career trajectory and sense of security. It is important that when deciding cases that interpret the PDA, our federal judiciary should act in a way that will allow pregnant women to get reasonable accommodations that are necessary in the workplace. In California, there are more protective laws than those in the federal system. However, the California judiciary also has great potential for improvement in pregnancy discrimination jurisprudence.

II. HOW TO RECONCILE TITLE VII WITH MORE ADVANCED STATE LAWS: PDA AND PREGNANCY DISCRIMINATION LAWS

A. FEDERAL STATUTORY AND CASE LAW

Pregnancy-discrimination jurisprudence in the United States made some significant strides over the past fifty years. Early cases about pregnancy decided that pregnancy discrimination was not considered sex discrimination and pregnancy was not considered a disability.³ A brief overview of the progress that our legislature and judiciary have made will be presented.

Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits employment discrimination on the basis of sex and several other protected classifications. While it seems obvious now that treating an employee differently because she is pregnant would fall within the protections of Title VII, this was not always the case. In *Geduldig v. Aiello*, in 1974, the U.S. Supreme Court held that there was no equal protection violation for denying

³ *Martinez v. NBC Inc.*, 49 F. Supp. 2d 305, 308 (S.D.N.Y. 1999) (“Every court to consider the question to date has ruled that pregnancy and related medical conditions do not, absent unusual conditions, constitute a [disability] under the ADA.”).

normal pregnancy disability benefits from the California state disability insurance program.⁴ The four plaintiffs in *Geduldig* argued that being denied disability insurance for pregnancy although they were otherwise qualified for the program was a violation of the Equal Protection Clause because the policy adversely affected women. Regarding the Equal Protection Clause arguments, the Court reasoned that “the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.”⁵ The Court was quick to dismiss the gender discrimination issue in a footnote — reasoning that the potential recipients of disability funds are either pregnant women or non-pregnant persons.⁶ While the first group is all-female, the second group consists of males and females and therefore members of one sex only were not discriminated against.⁷ At this time, the Supreme Court was not ready to accept pregnancy discrimination as sex discrimination but did not say so explicitly.

Two years later, in *General Electric v. Gilbert*, the Supreme Court addressed the issue of whether a disability policy that excluded pregnant women was a violation of Title VII.⁸ In *Gilbert*, the Court stated that the *Geduldig* equal protection rationale was directly on point to the Title VII discrimination claims in the present case. The Court held that discrimination based on pregnancy was not sex discrimination, as prohibited by Title VII.⁹ *Gilbert* was the first instance in which the Court held explicitly that Title VII of the Civil Rights Act did not protect women from pregnancy-based discrimination.¹⁰

In *Nashville Gas Co. v. Satty*, decided only one year after *Gilbert*, the Supreme Court invalidated an employer policy forcing pregnant women to take leave from work and then denying them their previously accumulated seniority when bidding for new positions thereafter.¹¹ As the Court reconciled this position with *Gilbert*, employers were not required to provide

⁴ *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974).

⁵ *Id.* at 485.

⁶ *Id.* at 496 n.20.

⁷ *Id.*

⁸ *General Electric Co. v. Gilbert*, 429 U.S. 135–36 (1976).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977).

PROTECTING OUR CHILDREN:

The California Public School Vaccination Mandate Debate

ELAINE WON*

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* J.D. Candidate, Class of 2016, UC Davis School of Law. I would like to thank Professor John Oakley for his guidance and encouragement on this paper.

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INTRODUCTION

In late December of 2014, a measles outbreak sickened 147 people in the United States.¹ Of those cases, 131 were in California.² Six of these measles cases were among infants who were too young to be vaccinated.³ Health officials suspected that this outbreak originated from an overseas visitor who spread the disease at Disneyland in Anaheim, California.⁴ While measles outbreaks are rare in the United States, outbreaks have occurred in U.S. communities with low vaccination rates.⁵ The Disneyland measles outbreak highlighted a small, but growing population of parents who refuse to vaccinate their children for religious or other personal reasons.⁶

While the United States does not have federal vaccination laws, each of the fifty states have laws mandating vaccination of children against diphtheria, tetanus, pertussis, polio, measles, and rubella as a condition of enrolling in public schools.⁷ However, there are exemptions to this rule.⁸ All states allow a medical exemption where vaccinations would complicate the health of the child; most states have a religious exemption; and nineteen states have a personal-belief exemption.⁹ California is one of nineteen states that allow all three of these exemptions [prior to enactment of SB 277 in June 2015].¹⁰

As children, and particularly those who are unvaccinated, are at higher risk of contracting and spreading diseases, public schools have become

¹ Alicia Chang, *Disney Measles Outbreak That Sparked Vaccination Debate Ends*, ASSOCIATED PRESS (Apr. 17, 2015, 4:44 PM), http://hosted2.ap.org/APDEFAULT/bbd825583c8542898e6fa7d440b9feb9c/Article_2015-04-17-US--Measles%20Outbreak-Things%20to%20Know/id-23d959cc52384abb72c1b7c9d320a1b.

² *Id.*

³ Christopher Ingraham, *California's Epidemic of Vaccine Denial, Mapped*, THE WASH. POST (Jan. 27, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/27/californias-epidemic-of-vaccine-denial-mapped/>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *State Vaccination Exemptions for Children Entering Public Schools*, PROCON.ORG, <http://vaccines.procon.org/view.resource.php?resourceID=003597> (last visited Mar. 8, 2015).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

the hotbed for the vaccination debate. Pro-vaccinators argue that children must be vaccinated in the absence of a medical issue in order to maintain herd immunity.¹¹ Herd immunity occurs when approximately 90 percent of a community is vaccinated and protected from disease.¹² The higher this percentage of immunization is, the less potential there is for an outbreak.¹³ This could be a matter of life or death in cases of children who cannot be vaccinated due to weak immune systems caused by chemotherapy or other health issues.¹⁴ On the other hand, anti-vaccinators who claim a personal-belief exemption cite the purported link between vaccinations and autism.¹⁵

Recently, the California Senate introduced SB 277, a bill that would eliminate California's religious and personal-belief exemptions from the mandate requiring vaccinations for students seeking to attend public school.¹⁶ The bill was recently passed by the California Senate and referred to the California Assembly Committee on Health for additional amendments.¹⁷ Anti-vaccinators, however, continue to oppose the bill, arguing that the bill forces their children to be homeschooled.¹⁸ They further contend that homeschooling is infeasible for single-parent and low-income families and would strip their children of their right to obtain a

¹¹ *Community Immunity* ("Herd Immunity"), VACCINES.GOV, <http://www.vaccines.gov/basics/protection/> (last visited Apr. 18, 2015).

¹² Emily Willingham & Laura Helft, *What is Herd Immunity*, KVIE, <http://www.pbs.org/wgbh/nova/body/herd-immunity.html> (last visited Mar. 8, 2015).

¹³ *Id.*

¹⁴ Lisa Aliferis, *To Protect His Son, A Father Asks School to Bar Unvaccinated Children*, NPR (Jan. 27, 2015, 5:05 PM), <http://www.npr.org/blogs/health/2015/01/27/381888697/to-protect-his-son-a-father-asks-school-to-bar-unvaccinated-children>.

¹⁵ Steven Salzberg, *Anti-Vaccine Movement Causes the Worst Whooping Cough Epidemic in 70 Years*, FORBES (July 23, 2012, 6:00 AM), <http://www.forbes.com/sites/stevensalzberg/2012/07/23/anti-vaccine-movement-causes-the-worst-whooping-cough-epidemic-in-70-years/>.

¹⁶ A Senate Bill Removing Religious and Personal Belief Exemptions from Vaccination Mandates, S.B. 277, 2015 Sess. (C.A. 2015), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB277 [hereinafter SB 277 Bill Text].

¹⁷ *Id.*

¹⁸ Tracy Seipel, *Vaccine Exemption: California SB 277 Opponents Vow to Pull Kids from School if Bill Passes*, SAN JOSE MERCURY NEWS (Apr. 13, 2015, 6:24 PM), http://www.mercurynews.com/health/ci_27907241/vaccine-exemption-california-sb-277-opponents-vow-pull.

public school education.¹⁹ The fundamental issue underlying this debate is whether one student's right to an education trumps another student's right to stay healthy.²⁰

This paper argues that SB 277 is constitutional. Part I provides background to the debate on balancing health and education in California public schools. Part II discusses foundational case law and statutes on vaccination. Part III analyzes the constitutional complexities that SB 277 brings to the debate. Part IV addresses concerns of inability to access vaccinations and adjustments to the terms of SB 277 with future biomedical advances. Part V is a summary and conclusion.

I. BACKGROUND: THE ANTI-VACCINATION DEBATE

This section provides a general background to the vaccination debate. It first discusses the idea of “herd immunity” and why low vaccination rates in public schools are of concern. It then tracks the increasing level of unvaccinated children in California and what contributed to the recent trend of unvaccinated children. Finally, this section discusses the demographics of anti-vaccinators in California.

A. HERD IMMUNITY

Pro-vaccinators emphasize the importance of immunization because of the idea of community immunity, or “herd immunity.”²¹ Herd immunity is critical to a community's health because it prevents the potential for outbreak and infection of individuals who are particularly vulnerable to disease.²² These persons include infants, pregnant women, or immunocompromised individuals.²³ While the threshold vaccination percentage for herd immunity is dependent on the disease, most diseases meet

¹⁹ Dave Marquis, *Bill Requiring Student Vaccinations Headed to Committee, Again*, News 10 ABC (Apr. 22, 2015, 10:48 AM), <http://www.news10.net/story/news/local/california/2015/04/22/vaccine-bill-immunize-home-school-amendments-vaccinate/26167515/>.

²⁰ *Id.*

²¹ *Community Immunity*, *supra* note 11.

²² *Id.*

²³ *Id.*

BOOK REVIEWS

*GOLDEN RULES:
The Origins of California Water Law in the Gold Rush*

BY MARK KANAZAWA

REVIEWED BY PETER L. REICH*

Chicago: University of Chicago Press, 2015. xvii+351pp.

Mark Kanazawa has written a thoroughly researched, highly focused study of the beginnings of the prior appropriation doctrine in California water law. He situates his examination within the considerable economic history literature on the Gold Rush, and expands our knowledge of the era with a detailed examination of miners' codes, trial and appellate court rulings, and water company records. Kanazawa's approach to the issue addressed makes his book more of an application of law and economics theory to aspects of the period than a history of how California water law developed.

Kanazawa introduces his subject by noting that the 1850s gold mining industry dramatically increased water demand, which in turn gave rise to

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“strong pressures to create legal rules to define and enforce property rights in water” (p. 4). He characterizes the water rights emerging from this period as appropriative, including rules that in order to be exclusive, claims had to have temporal priority over all others, be beneficial, have a quantified use, and be actually worked. The author surveys existing historical and economic literature on water in the Gold Rush, although he curiously omits the most comprehensive work on California water, Norris Hundley, Jr.’s *The Great Thirst* (1992/ 2001). Kanazawa finds that as a body, this literature fails to provide “a theoretical framework that permits sensible interpretation of the evidence in a coherent and consistent manner” (p. 8). He clearly identifies with the law and economics school of interpretation, asserting that common-law water doctrine incentivizes economic activity, reduces uncertainty, and was promulgated by judges “largely insulated from political pressures to rule in certain ways” (pp. 10–11).

Kanazawa’s substantive chapters elaborate on his theoretical perspective, the effects of technology, ditch company development, informal mining camp law, the common law of water rights, the origins of appropriation, and liability for water degradation and bursting dams. In Chapter 2, on economic theory, he studies various types of disputes that emerged between water users, and states that “the central interpretive question concerns how, and the extent to which, the law promotes economic efficiency” (p. 44). Chapter 3 documents how technological improvements over simple placer mining, including sluice boxes to catch gold flakes on riffles and, later, high-pressure hydraulic hoses, dramatically increased water demand and hence legal disputes. In Chapter 4 Kanazawa discusses the growth of the ditch industry into massive integrated companies with reservoirs and miles of flumes, or wooden aqueducts, whose investments were constantly under legal attack due to their diversions, venting tail waters, leaky ditches, and collapsed dams. The author’s minute examination of mining codes in the fifth chapter creates perhaps the most thorough description to date of mining camp self-governance, including provisions for unlimited claim purchases, permission for collaborative arrangements between miners, and requirements that claims actually be worked. The codes kept order and encouraged investment not only by miners but by companies as well.

When Kanazawa delves into the origins of common-law water rights, and specifically of prior appropriation, certain limitations of his paradigm

become apparent. In Chapter 6 he considers how the continuation of the Mexican system of local magistrates, or *alcaldes*, managed the doctrinal transition from the previous regime to American rule by allowing “fundamental changes in the application of the law” (p. 159) — that is, of the common law of water as informed by mining camp rules. The *alcaldes*, according to Kanazawa, “had little or no knowledge of Spanish law nor the ability to read what texts were available,” so they “naturally fell back on common-law principles” (pp. 159–60). Yet this assertion is at odds with surviving *alcalde* memoirs, such as those of Edwin Bryant, who consulted the *Recopilación de leyes de las Indias*, and of Walter Colton, who possessed the standard nineteenth-century Mexican code compilations of Alvarez and Febrero. Miners in fact relied on Hispanic law in arguing for public access to minerals, in the California Supreme Court cases of *Stoakes v. Barrett* (1855) and *Biddle Boggs v. Merced Mining* (1859). Post-Gold Rush, substantial litigation over communal water sharing as practiced in the Mexican period continued through the end of the century. Kanazawa tends to conceptualize Gold Rush-era legal doctrine as if it emerged *ab initio* rather than being repeatedly invoked by miners and farmers attempting to preserve aspects of the prior system. Certainly, Mexican mining and water law was eventually replaced, but not for lack of argument.

In his seventh chapter, Kanazawa traces the origins of California water law in a particular manner. After showing previously that the mining industry’s growth sparked numerous conflicts over usage, he now asserts that “the result was the creation of the basic doctrine of prior appropriation, which became the fundamental basis for water law not only in California but in much of the rest of the western United States” (p. 183). But as water historians Norris Hundley and Donald Pisani have shown, priority in right was only part of the story. Riparian (riverbank) land ownership, if acquired before appropriation by others, confers a water right, according to the California Supreme Court rulings in *Crandall v. Woods* (1857) and *Lux v. Haggin* (1886), both of which Kanazawa cites, thus making the state a mixed riparian and prior appropriation jurisdiction along with Oregon and Texas. Notwithstanding Kanazawa’s contention that these cases were really conditioned on “temporal priority” (p. 199), Hundley has demonstrated that by the time of *Lux* all farmable riverbank land in California had passed into private hands without having been subject to any significant appropriations, giving ripar-

ian owners a distinct legal advantage and solidifying the incontrovertibly hybrid nature of the state's water law.

Chapters 8 and 9 of *Golden Rules* are well-crafted, dealing with water quality and dam failures, respectively. The courts imposed strict liability (proof of fault unnecessary) on upstream users who degraded the condition of water, particularly when the parties had been informed about the cause and damages were larger. When dams burst, causing harm to those downstream, the courts applied a negligence rule (liability only if fault), reflecting the ability of water companies to prevent damages in advance. Both of these scenarios support Kanazawa's economic efficiency thesis, given the belief held during this period that water pollution was more destructive than dam collapse.

Kanazawa concludes *Golden Rules* by summarizing his argument that the prior appropriation doctrine became law in California because it was economically efficient: "secure water rights were necessary to support investments in water infrastructure" (p. 266). Further, he defends the doctrine against long-standing criticism of its rigidity and environmental unsustainability by saying that "there is nothing in appropriation law that necessarily imposes restrictions on the transfer, and therefore the reallocation to higher value uses, of water" (p. 270). These assertions that California's system is monolithic and neutral exemplify a conceptual problem in the book. By assuming that law develops and operates as though in a vacuum, Kanazawa ignores the weight of the prior legal tradition of public mineral access and water sharing. More crucially, to support his "coherent and consistent" theoretical framework, he mischaracterizes California water law as solely appropriative, and then defends his construction as the best possible contemporary regime. As Norris Hundley noted, riparianism remained doctrine because it was supported by established ownership patterns, and in practice prior appropriation depleted many watersheds, such as Mono Lake. These failures to explore historical context fully confine the usefulness of *Golden Rules* to the analysis of specific case rationales, such as those in the water quality and dam failure decisions. But the book is less valuable as an explanation of the multifaceted, on-the-ground development of California water law.

*FORGING RIVALS:
Race, Class, Law, and the Collapse of Postwar Liberalism*

BY REUEL SCHILLER

REVIEWED BY WILLIAM ISSEL*

New York: Cambridge University Press, 2015. xv+343pp.

Forging Rivals is a fascinating, and original, analysis of twentieth century United States political history. Reuel Schiller makes a compelling case for the role of legal history, specifically the history of the clash of two competing legal doctrines, in the rise and fall of Democratic Party liberalism from the early 1940s to the early 1970s. Liberalism's demise, often ascribed to the shortcomings, misjudgments, and failures of the Truman, Kennedy, Johnson, and Carter administrations' policies, and public rejection of federal government activism, was actually a far more complex phenomenon. The limited success of liberalism was also the product of a bitter divorce that ended what many imagined would be a happy marriage between the labor movement and the civil rights movement. The breakup was messy, and perhaps inevitable, with the two parties more often talking past one another than communicating effectively because they differed on how to use the law to achieve "the blessings of liberty." Their irreconcilable differences were rooted in what Schiller defines as "legal and institutional contradictions," which were in turn traceable to the conflicting "legal regimes" of labor law on the one hand and the law of employment discrimination on the other.

Schiller begins with a capsule history of how New Deal liberalism was "forged" in a way that would bedevil labor union and civil rights cooperation from the beginning. New Deal labor law reforms did not undo the right of white employees and employers to maintain, if they chose to do so, racial segregation and racial differentials in hiring, promotions, pay rates, and workplace conditions. Nonwhite workers challenged this feature of the New Deal Order as an egregious case of old racist wine in new administrative law bottles and demanded the addition of fair employment practices law to the liberal agenda. Predictably, white labor tended to regard the new fair employment rules to be as unwelcome an intrusion into their affairs as

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did business. From the early 1940s through the 1960s, the result was continuous conflict between white labor leaders and civil rights leaders and their respective memberships. A relationship that was rancorous from the start only got worse as the parties clashed in one after another episode of bickering, with the crackup following closely on the heels of the black nationalist turn in the civil rights movement in the mid-1960s.

Schiller ably develops his argument that postwar liberalism's legal infrastructure did more to forge rivals than to facilitate cooperation between the labor movement and the civil rights movement. His method is to provide "thick description" of the ways the two parties constructed incompatible legal regimes in cooperation with the executive, legislative, and judicial branches of federal, state, and local governments. His five vividly written vignettes from the San Francisco Bay Area nicely illustrate the complexities in the legal wrangling that developed in California and all across the nation. He shows how public officials, civil rights leaders, labor union bureaucrats, and ordinary employees with workplace grievances involved themselves in bitter disputes from the early years of World War II to the end of the Vietnam War. More often than not, the unanticipated consequences of their actions influenced the degree to which they could obtain justice under the law as much as, or even more than, their original intentions. By 1966, in one especially fraught San Francisco case, labor union officials forthrightly condemned a local civil rights ordinance as "intrusion into collective bargaining" that they were duty bound to "resist." The city's CORE president, unmoved, declared simply that "I don't give a damn about the labor unions." (p. 174)

Schiller uses a wide range of primary sources, including twenty-one archival collections and interviews, and synthesizes a fully up-to-date selection of local and national secondary sources that document the intersections of race, class, and law in the history of postwar liberalism. In its focus on legal history as integral to the origins, development, and demise of postwar liberalism, this book breaks new ground and makes a significant contribution to the fields of both legal history and political history. *Forging Rivals* will be of great value in undergraduate and graduate courses. Schiller's story of the complexities and contingencies of the liberal project beautifully weaves both "agency" and "structure," and most importantly law and institutional history, into the narrative of twentieth-century American politics and policy.



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