Civil and Uncivil Rights in California: The Early Legal History

A PANEL PRESENTATION IN TWO PARTS

PART I — JANUARY 22, 2009
California Judicial Center, San Francisco

PART II — JUNE 1, 2009
Los Angeles Times Building, Los Angeles

Panel Presentations

(the speakers' presentations have been edited for length.)

THE SOCIETY THANKS THE FOLLOWING BOARD MEMBERS WHO ARRANGED THIS EDUCATIONAL PROGRAM:

Jake Dear, Ophelia Basgal, Hon. James Marchiano (Jan. 22, San Francisco)
Robert Wolfe and Molly Selvin, (June 1, Los Angeles)

PHOTOS: WILLIAM A. PORTER (SAN FRANCISCO), GREG VERVILLE (LOS ANGELES)

Welcome

David McFadden, president, california supreme court historical society

I'd like to welcome you all to our program on the early years of civil and uncivil rights in California. In the past we had programs at the State Bar Annual Meeting each year. We're now changing the venue. We're having programs at different times and different places throughout the state. This is the first of those, and it is being presented in two parts. The first, in San Francisco, is cosponsored by the Bar Association of San Francisco, which is providing the MCLE credit. The second, in Los Angeles, is cosponsored by the *Los Angeles Times*, Southwestern Law School (which is providing the MCLE credit), Public Counsel, the Los Angeles County Bar Association Appellate Courts Committee, and the Ninth Judicial Circuit Historical Society.

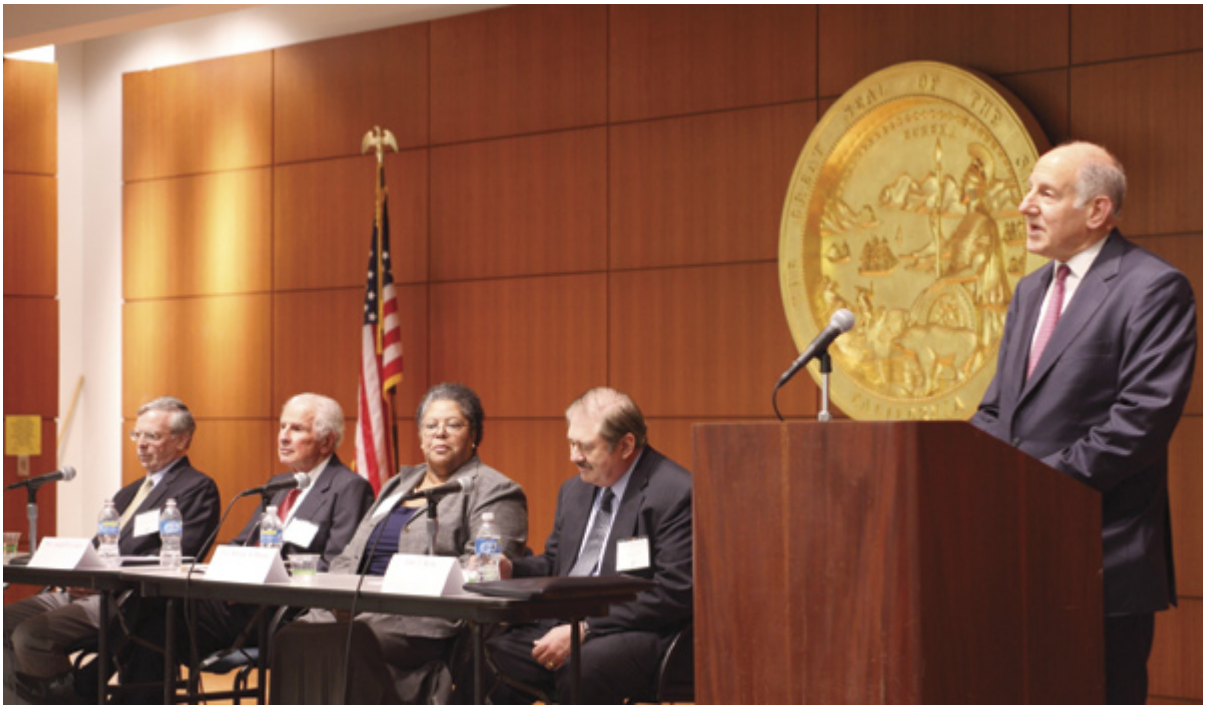
In addition to putting on programs, the Historical Society has been funding oral histories of California Supreme Court justices. We've just finished a group of them that we funded. We funded the digitization project of a legislative history of the 1878-79 Constitutional Convention. The State Archives digitized these legislative history materials. We also sponsor an annual writing competition for law students and graduate students to write on the California Supreme Court. The oral histories themselves end up, some of them at least, in edited form in *California Legal History,* which is our annual publication, our journal. In addition, we also have in the journal substantive articles on California legal history. An additional publication the association has is our Newsletter, which in addition to having all these news items, also has substantive legal historical articles.

And now let us begin today's program. ✯

January 22 program, Milton Marks Auditorium, California Judicial Center, San Francisco

Greetings and Introduction

Ronald M. George, chief justice of california



Chief Justice Ronald M. George introduces the January 22 program in San Francisco.
speakers, seated left to right: *Charles J. McClain, Professor, UC Berkeley*
Joseph R. Grodin, Professor, UC Hastings College of the Law, Associate Justice, California Supreme Court (Ret.)
Shirley Ann Moore, Professor, Sacramento State University
John F. Burns (moderator), Historian and former State Archivist

Greetings — January 22, 2009 Program

I'm very happy to be here, and I want to thank, in addition to David McFadden — president of the California Supreme Court Historical Society — the members I'm glad to see from the Board of Directors of the Society. I want to welcome them as well as the rest of those in attendance today, including justices and judges of both our state and federal systems and also of the Administrative Office of the Courts of California, many members of the San Francisco legal and academic community, and those interested generally in history. Today's program is sponsored jointly by the Society and the Bar Association of San Francisco.

Greetings — June 1, 2009 Program

Thank you all for your warm welcome. I also thank the *Los Angeles Times* for its generosity in making this wonderful facility available for today's meeting of the California Supreme Court Historical Society. In addition to David McFadden, whom you've met, the president of the Society, I see in the audience many fellow members of the Board of Directors and I want to echo Jim's and David's welcome to them and to the rest of you in attendance, including justices and staff of the courts, and I would note that I have the pleasure of seeing two of my colleagues from the California Supreme Court here present, Justice Kathryn Werdegar, who is a Board member — Justice Werdegar [applause] — and Justice Carlos Moreno [applause]. And of course someone else who will receive a more complete introduction with the panel, the very distinguished former justice of the California Supreme Court, Joseph Grodin [applause]. With them all are many members of the Los Angeles legal community and those interested in history generally. Today's program is sponsored jointly by the Society and the *Los Angeles Times* and our four cosponsors who were mentioned by David.

Introduction to the Programs

Preliminarily, I would like to offer some brief comments about this gathering. During the past nine years, the California Supreme Court, in an effort to make the Court's work more accessible and known to the general public, has held one oral argument session each year at a location other than our usual venues, our courtrooms in San Francisco, Los Angeles, and Sacramento. We have "brought the Court to the people." We've engaged in extensive outreach efforts directed not only to the community at large, but in particular toward high school students, trying to remedy some of the inadequacies of our current civics education, in terms of the rights and responsibilities that young people should be aware of. We've held those special sessions in San Diego, Riverside, Santa Ana, Santa Barbara, Fresno, San Jose, Sonoma and Redding. And recently the Court cooperated with UC Berkeley's Boalt Hall at a conference addressing the work of the California Supreme Court.

I view today's program as a similar form of expanded outreach. The Society has sponsored programs such as the present one previously at the Annual State Bar Meeting. But by holding today's program apart from the Annual State Bar Meeting, the Society has an opportunity to reach a much broader audience. This is consistent with the Court's efforts to reach different segments of the legal community and the public in order to provide information about the court system and the rich history of California's legal and judicial systems. Thus, I'm especially pleased to participate today in the inauguration of the Society's new approach to presenting educational programs, which is being presented in two parts, in San Francisco and Los Angeles. I look forward to more such events in the future.

The topic today is this Court's early civil rights cases. There is much that can be learned from looking back at those old decisions. As I'm sure we will hear today from our panelists, some of the cases have stood the test of time, or at least they can be seen as strong and workman-like products of their own era. Other cases are artifacts of their social and legal times, but they help us put into perspective the legal and social changes in the intervening century and a half. Some cases are quite objectionable to modern sensibilities.

One particularly notorious decision is *People v. Hall,* in the fourth volume of the official Cal. Reports, 4 Cal. 399, an 1854 opinion authored by the fourth Chief Justice of the California Supreme Court, Hugh C. Murray. One or more of the panelists will speak on *Hall* today, but I shall offer a few observations of my own. The statutes at issue in *Hall* were, from our perspective today, ugly and racist. They provided, "No black or mulatto person or Indian shall be allowed to testify in court in any action in which a white person is a party." Apparently California was not alone. It appears other states had similar statutes. The defendant Hall, a white man who was a gold miner, had been brought to trial for murdering a Chinese immigrant. Hall was convicted and sentenced to hang. But his conviction rested in part on the testimony of three Chinese witnesses, and he raised some objection to that evidence for the first time on appeal.

In an analysis that purported to explore and draw upon subjects as diverse as archeology, geography, and anthropology, Chief Justice Murray held for the Court in a two-to-one split decision that these exclusion statutes applying to blacks, mulattos, and Indians not only were fine as far as they went, but that they also served to bar witnesses of Chinese ancestry from testifying against white individuals. He gave an expansionist approach to these statutes. Chief Justice Murray went on to explain that even if his statutory interpretation analysis were subject to doubt, "we would be impelled to this decision on grounds of public policy."

He explained that if non-whites were allowed to testify against whites, "this would lead to numerous incredible and unthinkable results" if the Court ruled otherwise, and these "inferior persons would have all the equal rights of citizenship and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls." He added, "This is not a speculation which exists in the excited and overheated imagination of the patriot and statesman but is an actual and present danger." The Court then proceeded to reverse the murder conviction of the white defendant on that stated ground. It may be of interest to note that Chief Justice Murray, a member of the aptly named Know-Nothing Party, died of consumption only three years later at the age of 32. Editorials at the time made note of his heavy drinking as a concurrent cause and of his reputation as a younger man who had engaged in "wild and questionable habits."

I cannot help but imagine the reaction of the Court of 1854 and the members of the public that accepted this infamous decision, if they could know that so recently the people of California and of the United States, with hope and pride, inaugurated as the 44th President of the United States, Barack Obama, a person who 150 years ago would have been found incompetent even to testify in our courts, let alone vote or hold any office. We certainly have come a long way since the decision in *Hall,* both as a Court and as a society. I greatly look forward to the presentations of our excellent panelists and to hearing their views and their observations on these early civil rights cases that, for better or for worse, helped shape the state that we have today. ✭

Overview of Early California's Civil Rights Legacy

John F. Burns, Moderator
historian and former california state archivist

The general subject matter that we're going to treat is the legacy of early California's civil rights cases that provide the base on which much of what occurred in the 20th, and now the 21st century, takes place in terms of jurisprudence. At the national level and the state level, from 1850 to the present, the word "rights" and their expansion are absolutely essential to understanding our history of that time. Constitutional rights, civil rights, human rights — nothing is so fundamental to our democracy as these rights — the ostensible violation of which prompted the American Revolution, and 70 years after the Revolution, our right, as we felt it, to continental expansion, embodied in the phrase "Manifest Destiny."

The feeling on the part of Americans that we had the right to expand across the continent resulted in the American acquisition of California. And that happened virtually coincident with the discovery of gold, the two events together turning a backwater Mexican province into a magical world destination. As word spread in 1849, California became a global magnet. Twenty-five percent of the gold seekers were from other lands, all over the world from Australia, to Chile, to Europe. But about 75 percent were actually from the eastern part of the United States. This was a young, principally male, energetic group of sojourners who believed they had the right, and the responsibility, to import the common law legal system with which they were familiar, and which placed significant emphasis on individual rights. It replaced the Roman law-based system that the Mexican government had maintained from the Spanish period, and one that, frankly, the Americans didn't much understand or even appreciate.

They all sought wealth, success, and the opportunity that is still characteristic of California for personal reinvention and personal expression, while they established, paradoxically, a government based on their roots. They were bold, adventurous, and impatient men, but when the necessity came to form a structure for governing, they turned to their constitutional practices from Iowa and New York, to the county system, and to what they had known back east. Now, the early California attitude was certainly that we can be what we make of ourselves — we can do this irrespective of what we were before. But there's a conservative streak there, which has always been part and parcel of California: the innovation, the adventure, and at the same time, a certain conservatism about how we approach government. Nonetheless, being the adventurous and inpatient fellows that they were, they wrote a constitution in 1849, and began making laws in 1850, several months before they had any authority to do this. Statehood was not to come until September of 1850, but Californians thought they had the right to a constitution and they had the right to pass laws, so they just went out and did it anyway.

I also should note, I talk about men because men at that time were the only ones permitted into the governing system, but women had substantial influence in their own way and, even though much fewer in number, there were quite a lot of women who came during the gold rush period, too. Their journals reveal an equal headiness about the freedoms they encountered, compared to the gender-based restrictions of the east. One woman, for instance, wrote, "We are free from all fashions and conventionalities of society. I like this!" And another asserted, "The very air I breathe, seems so very free that I have not the least desire to return to Maine."

So, as they began to frame a society and a government to provide order to that society, they carried with them, yes, the idea of a government structure based on what they knew before. But at the same time they also carried with them the values and social practices and social ideas of their origins. Whether they wanted to go back there or not, they felt that as they established a new state here, some of the parameters were not to change much.

The expansion of rights, the freedom they sought, was not automatically available to all people. African-

Americans, native Californians, whether of tribal or Spanish descent, those from non-white countries generally, were motivated to come to California for the same reasons that everybody else did, and found that securing the same rights met with substantial obstacles. To the prevailing white majority in charge of governing, all was not equal, as the Chief Justice's comments well introduced. And yet here we are 160 years later experiencing the outcome of a remarkable human evolution, the wide expansion of rights over time to an extent unimaginable by the '49ers, and the development of law and precedent to underpin it. To fully understand the magnitude and majesty of this executive human accomplishment, it is vital to know whence we came and how we got here today, and what the struggles were that brought us to this place. Because, ladies and gentlemen, it's not over, is it?

The quest for rights and the contest over them continues to be something that is at a pronounced level in our state and in our nation, and we know that what happens in California also has, quite often, a substantial effect on the rest of the country. Consideration of the struggle for rights in the early days of statehood lends perspective and insight into where we are today, but also begins to provide some equal perspective and insight as to where we might go as a society, in legal terms, in the future. ✯

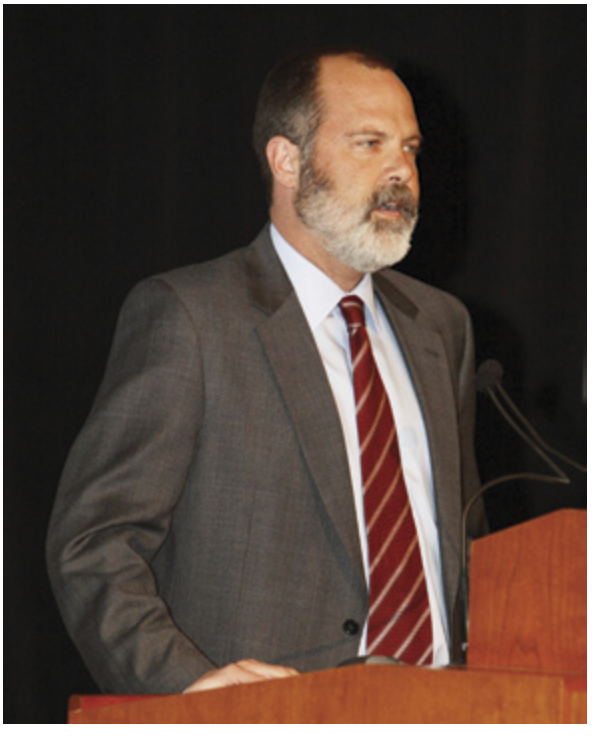
Early California Prejudice and the Young Earl Warren

Jim Newton, Moderator
editor, *Los Angeles Times*
editorial pages

When I was researching Earl Warren's early life in Bakersfield, I spent a couple weeks rummaging through newspapers and records from that period [for the book, *Justice for All: Earl Warren and the Nation He Made*], and it is quite striking to discover the indifference and even the contempt that is expressed in those documents toward California's minority populations, particularly the Chinese and other Asians. The Bakersfield phone book where Warren grew up did not list Chinese residents by name, but merely by race and phone number. The city's Chinatown was vividly described in one account as being separated from the rest of the city by an irrigation ditch, described by one writer as a moat. And then there was a murder trial in 1899 of a Chinese resident named Jee Sheok. The *Bakersfield Californian* described the group of Sheok's friends and family who attended the trial as "an outpouring of heathendom."

Warren was just a little boy when that case was tried, and his reactions to it aren't recorded, but it is hard for me to escape the conclusion that growing up in that environment really inured him to the notion that California's Asian population was not worthy of his full consideration. That's an indifference that was only reinforced as he came into politics by his strong association with the California Progressives. The Progressives were good at many things. They were supportive of woman suffrage and child labor laws, the recall and the initiative — a good thing or a bad thing, depending on where you sit — but racial equality was clearly not their strong suit. The Progressives, in fact, really joined forces with the state's labor movement in the early part of the century in scorning immigrant Chinese and Japanese populations.

I am convinced that the confluence of those biases in which Warren grew up allowed him to regard the Asian population here not as full members of society, and made it possible for him to be such an enthusiastic champion of the Japanese Internment in 1942. In that

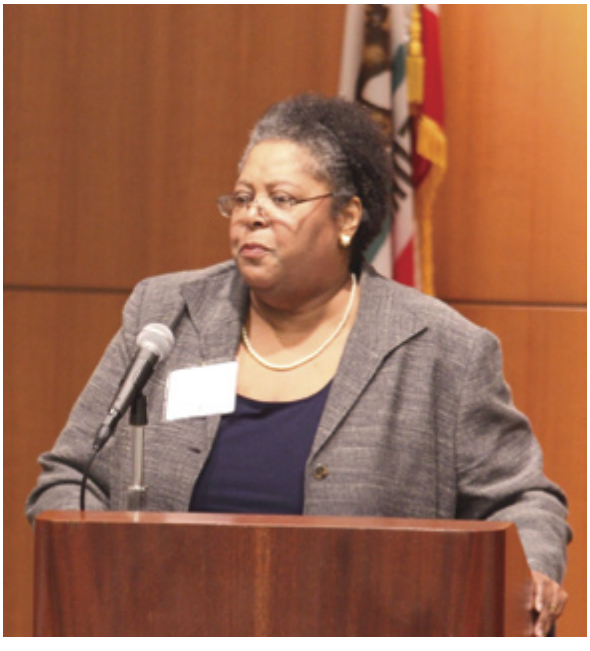


regard, in 1942, Warren testified before the Tolan Committee in San Francisco and offered the opinion, when asked what would justify treating Japanese in the state any differently than Germans and Italians, "When we deal with the Japanese, we are in an entirely different field and we cannot form any opinion that we believe to be sound." It is staggering to realize that just 11 years later, the same Earl Warren concluded that separate-but-equal had no place in American life. ✯

African-Americans Fight Racism in Early California

Shirley Ann Moore
professor, sacramento state university

My remarks will address the historical context in which black men and women lived and worked in California, and I will touch on other people of color as well. They lived and worked in 19th-century California, a so-called "free state," in which law, custom, and history were actually arrayed against them. In the past 20, maybe even 30 years, if I stretch it, historians have begun to reassess California's history, and they have begun to challenge earlier historical interpretations and notions of the inevitability of white domination and Manifest Destiny. Recent scholarship reveals a context that was far more dynamic and complex in which African-Americans and other people of color were *actors*. They were agents. They were not just acted upon. And so California's history has to encompass that as well.



From the beginning, racial and ethnic conflict have been embedded in the matrix of California's development. For example, Spanish and Mexican settlers pursued a policy of exploitation, conversion, and subordination of Indian populations that eventually led to the decimation of indigenous peoples and the suppression of their traditional ways of life. By the time of the discovery of gold, Indians had paid a high price for their interaction with white newcomers and for their interaction with missionization. They saw their number decline nearly by 80 percent. The population figures are absolutely staggering. When the Mexican War erupted in 1846, both Mexicans, or "Californios" as they were called, and Indians would be overpowered by Yankee and European foreigners. Jose Maria Amador, the owner of a vast land grant in what is now Santa Clara and Alameda Counties feared that "the bear flag and the presumptuous revolt it symbolized showed the Californios that independence would likely translate into Yankee domination in one form or another," and his fears portended badly for the indigenous populations and other people of color in California.

Property and Suffrage

In 1848, the treaty of Guadalupe Hidalgo brought an end to the Mexican War and transferred one third of Mexico's territory, including California, to the United States. However, there was a provision in the treaty that guaranteed all Mexican citizens, all Mexicans or Californios, citizenship and property rights in California, but those provisions were ignored. This threw Mexican land titles into chaos and paved the way for the federal Land Act of 1851, which opened Californio lands to litigation in American courts. As a result of fraud and manipulation, and indebtedness, nearly 40 percent of lands held by Mexicans before 1846 was transferred to American ownership. Indians also suffered under the transfer of California into American territory. They were proclaimed wards of the federal government, and they were denied property rights that they had held under Mexico, going back to Spanish rule.

Months after the treaty, the U.S. Congress was locked into a bitter debate over the fate of slavery in the new territory. In June of 1849, the civil governor of California, General Bennet Riley, called for a state constitutional convention to settle the matter. Delegates convened in Monterey to forge a constitution as a prerequisite to statehood. Whiteness now became the new criterion upon which citizenship in California rested. The primary task for the delegates at that convention was to determine, as one of them said, "just who is white," and it wasn't as easy as you might think. The delegates arrived at a compromise, adopting an amendment that bestowed whiteness on Mexican Californians, giving the franchise to "every white male citizen of the United States and every white male citizen of Mexico." A proviso to this amendment left it to the discretion of the state legislature to extend the vote to Indians or their descendents, but this possibility would be very unlikely.

At the first meeting of the new California Legislature, the body quickly moved to restrict suffrage to white citizens exclusively. The delegates also barred slavery

from California. The declaration of rights which outlawed slavery in California passed not on humanitarian grounds but because the delegates feared that slavery would degrade white labor. They were opposed to enslaved blacks entering the territory, and free blacks as well. After all, they reasoned, how can free white working people compete economically with slave labor? That was the essence of the reasoning, and they feared that if African-Americans were allowed to enter, especially slaves, this gave slave owners an unfair advantage in the gold fields and other areas of economic competition. The convention proposed a provision that would exclude all African-Americans, regardless of status, whether they were enslaved or whether they were free. That provision said, we don't want them. They weren't the first. Oregon had done so. A number of western territories had attempted to do so, but they abandoned this provision fearing that the United States Congress would reject California's bid for statehood, because such a ban on blacks would violate the federal Constitution. So they decided to make California a free state in order to expedite admission to the Union.

Freedom and Discrimination

Now I want to talk a little about the nature and scope of freedom. I think we're getting the picture here of what freedom was, but let's look at the nature and scope of freedom. With the discovery of gold, California, as we've heard, really captured the attention of the world. And this discovery occurred nine days before the ratification of the Treaty of Guadalupe Hidalgo and before California entered the Union. However, events in the gold fields reveal the quality and meaning of freedom for blacks and other peoples of color. In 1849, there were an estimated 85,000 miners, 23,000 of whom were foreign born. They lived and worked in the gold regions. The census of 1850 shows 962 people of color residing in California, including African-Americans, and at that time African-Americans comprised roughly one percent of the state's total population. Black miners, free and enslaved, worked alongside their white and Indian and Mexican and Chinese counterparts in the gold mining regions.

Discrimination there was codified into law when the California Legislature of 1850 enacted a $20 Foreign Miners' License Tax in response to natural born white miners' fears about competition. I think we're going to hear more about this in some of the other presentations. This monthly tax was levied against all miners who were not U.S. citizens. Ostensibly, it was aimed at all foreigners, but the law especially targeted Chinese miners. Many Chinese and Indians were forced to quit independent mining altogether. Some hired themselves out to white miners and others just left, but they didn't leave without a struggle, without complaining. Mexican miners for example in Sonora, California, who refused to pay the tax, were attacked by hundreds of armed whites. In 1850 the state Supreme Court upheld the law, ruling in *People v. Naglee,* that the tax did not conflict with California's Constitution, the Bill of Rights, or the Treaty of Guadalupe Hidalgo. However, under pressure from local merchants who saw their revenues decrease when there was such an exodus of foreign miners, they said, "Wait a minute. We don't like this. We need to do something about it." So the legislature repealed the tax in 1851, but it was reinstated as a $3 monthly fee.

Slaves in Search of Freedom

African-American miners in the gold fields who were free or enslaved really were at the mercy of their white counterparts. There was a saying among white miners that it was good luck to establish your claim next to a black miner's claim because that brought good luck. What it actually meant was that they were immune from any kind of prosecution, legally, if they were to steal or jump that black miner's claim. So in a way, I guess it was kind of good luck for them if that were the case. Now, not all discriminatory laws emanated from competition in the gold fields, however. Within the first decade of statehood, California had established what one historian has called an "appallingly extensive body of discriminatory laws that deprived people of color of any kind of legal recourse." Black people and other people of color were denied citizenship. They could not legally homestead public land. They could not vote. They could not hold public office, give court testimony against whites. They could not serve on juries. They could not send their children to public schools. They could not use public transportation — in this "free state." So we're getting to understand the quality and nature of freedom.

Slavery remained the most critical civil rights issue confronting African-Americans, whether they were enslaved or whether they were free. Some slaves were brought to California, accompanying their white masters as part of a household. Others were brought by gold-seeking slave owners to toil in the goldfields for their master's benefit with promises of manumission if they performed faithfully. Others were brought against their will because their loved ones were held hostage in slave states. Some were employed as personal servants and assistants to whites. California's Fugitive Slave Act of 1852 dealt the most crushing blow to African-Americans' aspirations for freedom in this free state, and that law galvanized the black community, inspiring a vigorous anti-slavery movement in the state.

The Fugitive Slave Act mandated the return of runaway slaves to their masters despite their free-state residence. This act was allowed to lapse in 1855, but it reversed some earlier trends toward giving slaves freedom if they claimed

it. For example, in 1852, the Perkins Case became the first test of the Fugitive Slave Law in California. The case involved three Mississippi slaves, Carter Perkins, Robert Perkins, and Sandy Jones, who were brought by their master, C.S. Perkins, to California in 1849, and they were left there as free men when their owner returned to Mississippi later that year. When the Fugitive Slave Act was passed three years later, however, C.S. Perkins issued an order for the arrest of his former slaves seeing an opportunity to reclaim his human property under the new fugitive slave law. The black men took their case to court, where the California Supreme Court dismissed their appeal and ordered that they be remanded to their owner in Mississippi. The Court ruled that residency of the former slaves in a free territory had no legal bearing on their condition of servitude under California's Fugitive Slave Act.

In 1856, Bridget "Biddy" Mason came, and her case became the largest of a number of African-Americans to successfully challenge the Fugitive Slave Law. "Biddy" Mason, as she was known, was a Georgia-born slave of a Mississippian by the name of Robert Smith. She was part of a contingent of Mormon immigrants known as the Mississippi Saints who were bound for Utah in 1848. The Smith entourage eventually moved to San Bernardino in 1851. (That's my hometown where I was born and raised, and I can say that growing up there in high school, I never heard one word of this case. It wasn't taught in school. I didn't know anything about it, so I was amazed to learn that this groundbreaking case emanated from somewhere that I thought I knew very well.) They moved to San Bernardino in 1851 and later Los Angeles, where Mason and 13 of her family members would be rescued by abolitionists. In 1856, Mason was aided by members of the free black community and anti-slavery whites as well. In Los Angeles she successfully sued for her freedom and that of her family. Los Angeles District Court Judge Benjamin Hayes, himself an abolitionist, sympathized with a rule that "all of the said persons of color are entitled to their freedom and are free forever."

In 1857, however, the U.S. Supreme Court's Dred Scott decision upheld the rights of slave owners to retrieve their property anywhere in the country. In California, the Archy Lee incident was California's last fugitive slave case. It is also called "California's Dred Scott Case" because it crystallized the nature of freedom in that state for African-Americans. It's a very convoluted story. Some of it verges on the realm of myth but the bare-bones facts are laid out in Rudolph Lapp's book, *Archy Lee,* which was spoken of and is available. I wrote the foreword to it. This is the best little version of the facts, although I think some of it is going to remain hidden in the shadows. The case was this: Archy Lee, an 18-year old slave from Mississippi, had been brought to Sacramento in 1857 by Charles Stovall, the son of Lee's master. Stovall settled in Sacramento to teach school and hired Lee out for a number of years. Archy Lee claimed freedom. He said, "I'm in California. I'm a free man," and he ran away from his owner, but was arrested. The anti-slavery community there, including Sacramento Attorney Edwin Bryant Crocker, rallied around him, sheltering him and providing him with his legal defense. After a series of very intricate legal maneuvers in which County Judge Robert Robinson, followed by U.S. Commissioner George Pen Johnson and, later, State Supreme Court Justice David Terry heard the case, the California Supreme Court held that the state's Fugitive Slave Law protected Stovall's interest. The Court ruled in his favor, saying that he was there for years and years so he was beyond sojourner, noting that the white man's youth, poor health, and inexperience with the legal process should not be grounds for the forfeiture of his human property. As Stovall prepared to sail back to Mississippi from San Francisco with Lee, abolitionists blockaded the ship and rescued Lee. Archy Lee won a reprieve while his supporters fought the extradition order in court. After weeks and weeks of legal wrangling, Lee was declared free.

Now, the Archy Lee case highlights the perilous nature of freedom for African-Americans who lived in the shadow of the Fugitive Slave Act. In March of 1858, the California Legislature nearly passed an immigration bill that would have required current black residents to carry registration papers and would have deported blacks who had already entered the state. That spring, when gold was discovered on the Fraser River in Canada in British Columbia, and after the governor of British Columbia had made very welcoming overtures to the black community in California, between 400 and 600 African-Americans, almost ten percent of the state's black population, began an exodus from California to Vancouver, British Columbia. Archy Lee was among them.

Demanding the Right to Testify

California's testimony laws, which were put in place by the state Constitution in 1849, also show the limitations placed on black access to the courts. The law stated, as you heard previously, "No black or mulatto person or Indian shall be permitted to give evidence in any action to which a white person is a party in any Court of this state." The earliest known test of this law came in 1850 in *People v. W.H. Potter,* which occurred in Sacramento County and was heard by Justice of the Peace Charles C. Sackett. It involved Sarah J. Carroll, identified in the census as a free woman of color and listed as a mulatto and a prostitute. She charged William H. Potter, of whom nothing is known, with grand larceny for theft of $700 in "gold coin and other articles of value." When the court determined that defendant Potter was not a

Negro as had originally been assumed, the case was dismissed the same day it was filed. The court clerk made a notation on the back of the complaint that said very tersely, but says it all, "Defendant discharged, he proving himself a white man, and none but colored testimony against him."

Similarly, in 1852, the murder of African-American Barbara Gordon Chase by a white thief in San Francisco demonstrates that vulnerability. Critical testimony of an eyewitness to Chase's murder was disallowed because an examination of the witnesses here revealed him to be, "one-sixteenth African." In 1854, the California Supreme Court, in *People v. Hall,* overturned the conviction of another white murderer because a Chinese witness had been allowed to testify. In 1857, Manuel Dominguez, a man of Mexican descent, a member of the Los Angeles Board of Supervisors and former delegate to the original Constitutional Convention took the stand to testify for a defendant in a San Francisco case and was dismissed when the plaintiff's attorney objected that Dominguez's "Indian blood disqualified him." In 1869, San Francisco businessman, Fung Tang, and other Chinese representatives met with a U.S. Congressional delegation in San Francisco to demand to testify before this delegation and to demand protection under the law. He spoke for all people of color in the state when he told the delegation, "We are willing to pay taxes cheerfully when taxed equally with others. Most of all we feel the want of protection to life and property when the courts of justice refuse our testimony and that leaves us defenseless and unable to obtain justice for ourselves."

Now, African-Americans were actors. They fought back. They were in the vanguard of those who would risk their lives and fortunes challenging these outrageous injustices. They would contest the legitimacy of these laws in California's courts and, just as importantly, in the court of public opinion. In 1852, black San Franciscans formed the Franchise League to demand repeal of anti-testimony. And they also formed the Colored Convention Movement which took over this important petition to have a repeal of the anti-testimony law. Also, they were engaged in fighting against humiliating laws that restricted them from public conveyances. In 1863, there were civil suits filed against the streetcar lines in San Francisco.

Mary Ellen Pleasant, who was a free woman of color, a black woman, known as the "Mother of Civil Rights in California," filed a lawsuit in the 12th District Court after she was ejected from the streetcars. She won $500 but this was reversed on appeal. Her attorney argued before the Supreme Court in 1867 that if this was allowed to continue, "My grandchildren will be back before the children of you judges and make the same arguments one hundred years from now." And nearly a century later, in 1958, the *Stanford Law Review* cited the Pleasant Case to demonstrate the difficulty in getting damages for this kind of racial discrimination. In 1981 the Pleasant Case was again invoked by Attorney David B. Oppenheimer in *Commodore Home Systems v. John Brown*, in which it was used to win the case for two black men who were terminated wrongfully from their employment. In 1893, the California Legislature enacted the Equal Public Accommodation Law that ended segregation in all public conveyances. In 1855, the courts had segregated schools in California. African-Americans were in the forefront of the fight to let black children go to desegregated schools. The most famous case was *Ward v. Flood,* a landmark case that argued against segregated schools in California.

I'm going to end by saying that African-Americans and other people of color in 19th-century California conducted their lives in an environment where civil rights were predicated on race even in this free state. They would be compelled to carry their fight into the 20th century, where succeeding generations would devise new strategies to overcome both old and new obstacles, about which I'm sure we'll hear more from the other panelists. ✯

FRONT ROW CENTER (RIGHT TO LEFT): *Jake Dear, Society board member, with his wife Maureen ("Mo") Dear, Esq., and Janet (Mrs. Joseph) Grodin.* SIXTH ROW CENTER: *Society board members Justice Kathryn Werdegar and Ray McDevitt, Esq.*

California Supreme Court Cases on Civil Rights in the Early Years

Joseph R. Grodin,
professor, uc hastings college of the law, associate justice, california supreme court (ret.)

Thank you, Professor Moore, that was very interesting. What I have to say is somewhat more confined than that. I'm going to talk about a more confined period and about Supreme Court decisions, but before I do that let me make a couple of general observations. I set on the task of exploring the early decisions of the California Supreme Court under article I of the state Constitution in the pre-Civil War period, with the thought that, a) it would be interesting, and b) possibly

enlightening, to see what the Court did with those provisions at a time when they were the only game in town — that is to say, it was understood at that time that the federal Bill of Rights had no application to the states. The Declaration of Rights which was adopted by the delegates to the 1849 Convention, and re-adopted with minor changes in 1879, constituted the basis on which a California citizen could raise a complaint about what was happening to him at the hands of the state. So it is interesting — but enlightening is a different question.

What I found was a legal culture that was so different from our own in a variety of ways that the opinions of the courts at the time provide little by way of guidance to any reasons or exploration of constitutional issues. There was a quality that what was happening in the courts seemed to match the rough and tumble of what was happening in the minefields, and we look back on a quality of near lawlessness in what was supposedly the rule of law. We find precedents ignored. We have consistency disregarded, rational discourse giving way to challenges for a duel, and while some cynics might say that some of that is still around, at least now we have a veneer of respectability about what we do that did not exist at the time.

Archy Lee and the Fugitive Slave Act

At the time before the Civil War, even though the California Constitution in article I, section 18, contained a ban on slavery, slavery continued to be very much an issue. People came to California with the hope and expectation that there would be slaves. One of them, a fellow by the name of Hastings, who I am pleased to say was not associated with my law school, a different Hastings, left California in dismay when he discovered that we were not going to have slaves here, and he went to Brazil where he could satisfy his desires. And the battle continued to rage in California, really up to the time of the Civil War. A high percentage of California legislators, congressmen, members of the Court, were from the South and were pro-slavery. That was true in 1858, when the Court decided the case of Archy Lee. The Court at the time consisted of three justices. In those days justices were nominated by a political party and identified on the ballot as a candidate of that party.

David Terry, who was one of the justices, had the distinction along with Chief Justice Murray, as Chief Justice George observed, of being the candidate of the Know-Nothing Party whose platform consisted in large measure of supporting slavery and opposing Catholics. One might say it was the equivalent of the political arm of the Ku Klux Klan. Terry, who had been elected in 1853, soon became chief justice and served until he was forced to resign as a result of a duel in which he killed one of the United States senators from California, David Broder. Years later he came to be killed himself by the bodyguard to Stephen Field, by then a justice of the United States Supreme Court, but those are all different stories.

The other two justices were a bit less flamboyant. One was Peter Burnett who had been California's first governor and, like Terry, a Southerner and pro-slavery in his views, and the third was Stephen Field who was a brother of David Dudley Field, the author of the famous Field Code in New York, the most learned in the law, a Northerner, and at least mildly anti-slavery — anti-slavery enough to be appointed by President Lincoln to the United States Supreme Court.

How Archy Lee's case came to the California Supreme Court is a bit mysterious in terms of legal procedure, but

there it came, and on behalf of Archy it was argued that article I, section 18, of the California Constitution, the No Slavery Provision, should be interpreted along with the Fugitive Slave Law in such a way as to allow Archy to have his freedom because, as Professor Moore told us, he was brought here by his master Charles Stovall who then put him out to work while Stovall opened a private school in Sacramento. So the argument was that whatever protection Stovall had under the Fugitive Slave Law had been waived. The Court had decided a previous case, the case of Perkins in 1852, and Perkins had made a similar argument which the Court at that time dismissed on the ground that article I, section 18, was not self-effectuating, but required legislation for its implementation, and therefore could be disregarded in the resolution of the issue.

When the case came to the Supreme Court in 1858, the Court entirely disregarded the Perkins case and wrote an opinion as if the Perkins case did not exist, except for when it came to the remedy. The opinion was by Burnett, with the concurring opinion by Justice Terry. Stephen Field did not participate in that case. Why he did not participate is not clear. One source says that he was out of the state, another that he was ill, and possibly both were true. A desire to avoid having to participate in what was clearly a highly political case may also have played a role. In any event, he expressed no opinion until after the case was decided, at which time he announced to the reporters that he entirely disagreed with the Court's decision. What the Court did in that case was to lay down a rule and then say it didn't apply to Archy. The rule which the Court laid down was that if you come into the state temporarily with the person who happens to be your slave, but who also serves as a personal attendant, then his status as a slave and as your property is retained. But on the other hand, if you come to the state for an extended period of time and if you put yourself out to work, parenthetically, in competition with white workers, then you lose the protection of the Fugitive Slave Law and your slave is free.

But, said the Court, that rule which we now announce we will not apply to Archy Lee or to his poor owner Mr. Stovall because, as Professor Moore said, Mr. Stovall was not very bright and, in any event, may have been misled by our prior decision in *In re Perkins*. That was the only mention of *In re Perkins*. The Court's opinion was not received well by anti-slavery forces in California, and San Francisco's *Daily Alta California,* which was owned at the time by David Broderick who later became a U.S. senator and was shot by David Terry, criticized Justice Burnett's opinion "for setting forth a rule and then not follow it" and characterized it as "a crowning absurdity and the greatest mass of legal contradictions that has ever come under our notice." Both justices, the newspaper proclaimed, "have not only disgraced themselves but have brought odium on the state by this decision and rendered the Supreme Bench of California a laughingstock in the eyes of the world." Now, I'm familiar with criticism of judicial opinions, but this went pretty far and Joseph Baldwin, who became Justice Baldwin and succeeded Burnett on the Bench, summarized the case as holding "that the Constitution does not apply to young men traveling for their health, that it does not apply for the first time, and that the decisions of the Supreme Court are not to be taken as precedents." So, as Professor Moore observed, that was the last fugitive slave case in California. Soon, the Civil War broke out and, after the Civil War, slavery was no longer an issue.

Sunday Closing Law

Three years after Archy's case, the Court considered the case of Mr. Newman — the opinion does not provide us with his first name. A merchant had been arrested for keeping his clothing store open on Sundays in violation of the state's Sunday Closing Law which made it a crime to do so, and he was represented before the California Supreme Court by Solomon Heydenfeldt, who had been the first Jewish member of the Court, and who had resigned from the Court a year before. The motivations behind the Sunday Closing Law were no doubt various, and it would be erroneous to view them as being entirely motivated by racial prejudice. The communities of Jews were flourishing in California at the time, especially in San Francisco, and were playing an important role in the community, but during legislative consideration of a prior version of the statute, a Mr. William Snow, an assemblyman from Santa Cruz, announced on the Assembly floor that he had no sympathy with the Jews, "who ought to respect the laws and opinions of the majority." They were a class of people "who only came here to make money and leave as soon as they had effected this object" He saw the Sunday Closing Law as a way of expediting their exodus.

The title of the bill was, "An act to Provide for the better observance of the Sabbath." Mr. Newman and Justice Heydenfeldt argued to the Supreme Court that the statute was invalid on two grounds. The first was article I, section 1, of the state Constitution which at the time provided, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." The provision has since been amended, as you know, to add privacy to the list of protected rights. Now, article I, section 1, has some contemporary significance in the case pending before the California Supreme Court involving the validity of Proposition 8. The Attorney General in his brief has relied upon article I, section 1, as grounds for declaring Proposition 8 to be invalid. Newman also argued that

the statute violated article I, section 4, of the state Constitution which provided at the time, "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be forever allowed in this state."

Both arguments found a friendly reception in two of the three justices. Terry, now chief justice, wrote the controlling opinion in which Justice Burnett joined. Terry, by nature, was probably not that upset about a provision that was aimed in part at Jews, but as an active member of the Know-Nothing Party probably liked Catholics even less, and he saw this Sunday Closing Law as the doings of the Catholic Church. The State argued that the Sunday Closing Law had nothing to do with religion, that it was all about a day of rest, and Sunday just seemed to be a convenient day to select for

Ray McDevitt, immediate past president of the Society, poses a question in San Francisco

that purpose. In fact, Sunday Closing Laws were common throughout the country, and this was precisely the argument that other state courts had used to uphold their validity. It was also the argument the U.S. Supreme Court would ultimately use when the issue was raised under the federal Constitution.

But Terry would have none of it. To him, it was obvious that the law had a religious purpose and therefore violated the principle of religious neutrality embodied in article I, section 4. He then went on to say that, even if the law were viewed as a civil regulation, that is, having nothing to do with religion, but rather as simply a kind of labor law, it would violate article I, section 1, because, without necessity, it infringes upon the liberty of the citizen by restraining his right to acquire property. Now, this was a strange argument coming from Terry because in a case decided only months earlier, a case called *Billings v. Hall,* Terry had insisted that article I, section 1, gave rise to no legally enforceable right. It was simply a truism which has never been construed as a limitation on the power of the government. And the State, in its argument before the Court in the Sunday Closing Law case, quoted extensively from Terry's prior dissent — but that was then, Terry said. And since then, the interpretation which the Court had given to article I, section 1, as giving rise to enforceable rights, had become the law. The principle of *stare decisis* forced him to accept the majority's view that article I, section 1, did indeed give rise to legal rights.

Justice Field dissented, insisting, first of all, that the Court had no right to inquire into the purpose of the legislation, a common argument we see made today, and essentially adopted the position that Terry had expressed in his dissent in *Billings v. Hall*, namely, that article I, section 1, was simply an expression of the Enlightenment natural-law view that there are certain inalienable rights which deserve to be recognized, but are not really part of the positive law. The constraint which Justice Fields displayed in his *Newman* dissent is somewhat at odds with the position he later took on the U.S. Supreme Court, especially in his dissent in the *Slaughter-House Cases,* if you're familiar with that, but then, "Consistency is the hobgoblin," etc.

Three years later, the Legislature adopted an almost identical Sunday Closing Law. Why did they do that in view of the Supreme Court's opinion that it was unconstitutional? Because, ladies and gentlemen, the composition of the Supreme Court had changed. By this time, Field was chief justice, Burnett and Terry had left to be replaced by Justices Baldwin and Cope, and there was reason to believe that the new Supreme Court might view matters differently, and indeed it did. The new law came before the Court in 1861, and it was upheld by a unanimous Court, with Justice Field writing the opinion on the basis of the argument that had been made and rejected in the earlier case — no attempt to distinguish or even to confront the Court's opinion in *Newman.* So much for *stare decisis*.

Clara Foltz and Women's Rights

I come now finally to what I call the Clara Foltz Amendment to the California Constitution, which occurred as part of the Constitutional Convention of 1879. Clara Foltz was one of two women practicing law in California. She did so without benefit of a law degree, without benefit of admission to the Bar. She had, however, a flourishing practice. For some reason, she thought it would be desirable to go to law school, and she applied to Hastings College of the Law. She was promptly rejected by the authorities at Hastings on the ground that the practice of law was not appropriate to women. Whereupon she sued. Her friend, the other woman who was practicing, applied and was rejected at the same time

and also sued, but she sued in federal court under the federal Constitution. Clara sued in the state courts, and she won in the trial court. But the Hastings board had the bad grace to appeal that decision to the California Supreme Court, and while that appeal was pending, the 1878-79 Constitutional Convention was in progress.

A powerful force within the '78-79 convention was the Workingmen's Party of California. Now, the Workingmen's Party of California was devoted to the interests of working people, but we should not assume from that that it was a liberal, progressive force. It was vehemently opposed to Chinese labor, a subject that will next be discussed. But women were a different story, and some of the delegates from the California Workingmen's Party actually proposed woman's suffrage — a relatively novel idea back then, that did not fly. But they had heard of Clara Foltz and were sympathetic with her situation, and so they included in the proposal for the '78-79 Constitution a provision which was unique at the time among all state constitutions. Article I, section 8, provided that any person may not be disqualified from entering into or pursuing a business, profession, vocation, or employment because of sex. That was a kind of early Equal Rights Amendment that had far-reaching implications. Later, nearly a century later, it was amended to include race and religion, but at the time it only protected against sex discrimination.

In the early cases which came before the California Supreme Court, the Court interpreted literally and, no doubt, according to its intent. It held that a law which prohibited women from being bartenders was invalid, whatever reasons might be advanced in support of the law. Later, the Supreme Court aimed to change its position and held such a law to be valid if there were substantial reasons in support of it, and indeed there were, according to the Court, because the bars were places where women had no business being bartenders. And that continued to be the state of the law in California until 1971 when the California Supreme Court decided *Saylor v. Kirby,* and held that the Supreme Court had got it right the first time and overruled the intervening decisions.

So we have decisions that have reached the Court in the early years involving race, involving religion, involving sex, in which the results were not particularly enlightening or instructive. They were the product of their times. And I guess we have to be realistic about that if we're looking for guidance and enlightenment and perhaps some stimulation to our own forward thinking. We have to look long and hard to find it in those early decisions of the Court. But we've come a long way, and the history of the California Supreme Court, if it was written today on these subjects, which I think Chuck [McClain] is in the process of doing, would be a much different history. ✯

Race, Gender, and the Loyalty Oath in Early California

Charles J. McClain
professor, university of california, berkeley

Professor Grodin was talking about Justice Joseph Baldwin's scathing critique of the *Archy* decision. I believe it ended by saying that the Court had given the law to the North and the Negro to the South, which is a wonderful way of summarizing that opinion. As is often the case with the last speaker on a panel like this, one finds that much of the ground has already been covered. I have just finished writing a general history of the California Supreme Court in the first 30 years of its existence, and I have written about the Chinese and their struggles in both the state and federal courts in the 19th century. So I thought what I would do would be to say a bit generally about the Court during this period, roughly 1850 to 1880, and then say a little more about

some of the civil liberties cases decided during this time period with some special emphasis on the Chinese.

[Professor McClain then provided an overview of the early justices, indicating that they were "largely self-educated men," most with little formal legal training, who were "some of the most colorful and controversial judges to ever sit on an appellate bench."]

Chinese Exclusion and Resistance

Let me turn now to some of the cases involving race and the law, focusing in particular on the Chinese. I became

interested in this subject indirectly. I was interested in the early history of the Equal Protection Clause of the 14th Amendment, the way the U.S. Supreme Court treated that provision of the amendment — such an important one nowadays, but not so important then, between roughly 1880 and 1920. Naturally, when one looks into this, one comes upon the case of *Yick Wo v. Hopkins,* a very famous opinion of the U.S. Supreme Court, decided in 1886, involving Chinese laundrymen denied licenses to carry on the laundry business, who brought their complaint alleging discriminatory treatment to the U.S. Supreme Court, and who were vindicated in one of the really landmark cases in the history of the Equal Protection Clause.

The more I have thought about the case the more it seemed to me to be fascinating as much from a social as from a doctrinal standpoint. It was a case which was brought by the Chinese Laundrymen Guild and it ran counter to the traditional image of the Chinese one often encounters, namely, of sojourners who came to this country only to make money, who had no interest in their larger political surroundings, and who, in the words of one historian, "bore with helpless stoicism the many indignities thrust upon them." Rummaging around a bit more yielded the obvious fact that this was clearly not the case. The Chinese were quite aware of their political surroundings and did a great deal to try to shield themselves against anti-Chinese measures. For example, they testified before committees of the California Legislature in the 1850s. I discovered this at the Presbyterian seminary in San Anselmo, looking at the correspondence of one of the Presbyterian missionaries who had helped the Chinese find a lobbyist to represent them in Sacramento. In 1860, he had asked them if he could find a lobbyist to help them because they were concerned about anti-Chinese legislation.

And then of course there were the numerous Chinese names that dot the federal and state case reports. So it was clear that the Chinese had played a significant part in the legal history of California and of the United States. *People v. Hall* has been explored already. I don't have much more to say about it. It was an appeal of a criminal conviction. A white man had been convicted based on Chinese testimony and alleged that it should not have been accepted because of this statute which barred the admission of the testimony against whites from blacks, mulattos, and Indians. Justice Hugh Murray agreed. He wrote the opinion, arguing that ethnographers had once viewed Asians and Indians as belonging to the same racial stock, and he said even if they were not Indians under the law, the word "black" could be construed as including all races other than whites. But, as the Chief Justice mentioned, quite apart from this ethnographic analysis there were considerations of public policy. The Chinese, Murray wrote, were a race "whose mendacity was proverbial, a race of people whom nature has marked as inferior and who are incapable of progress or intellectual developments beyond a certain point." It was inconceivable, he said, that the Legislature would have wanted the lives and liberties of whites be put at risk by their testimony.

Murray's opinion had an impact beyond criminal law. Five years later the opinion in *Hall* would serve as a basis for court decisions extending the ban on Chinese testimony to civil cases as well as criminal cases. The Court had occasion several times during these years to revisit the question of Chinese testimonial disabilities. In the 1865 case, *People v. Awa,* the question was whether a Chinese criminal defendant could call Chinese witnesses in his own behalf. Judge Lorenzo Sawyer ruled that he could. The State, Sawyer said, was not a white person within the meaning of the statute, and therefore the ban on Chinese testimony against whites did not apply to criminal prosecutions. A very interesting case in 1869 was *People v. Washington*, arising out of the indictment of an African-American for the robbery of a Chinese. The indictment was based entirely on Chinese testimony, and on motion of the defendant the indictment was set aside. The State appealed. The Supreme Court, in an opinion by Justice Augustus Rhodes, affirmed, holding that this result was compelled by the Civil Rights Act of 1866 which it said had put African-Americans on exactly the same level as whites, and if whites were permitted to exclude Chinese testimony, so were blacks. It said the law was a law for the protection of personal security and that citizens of African ancestry were as much entitled to invoke it as were whites. The ban on Chinese testimony was not formerly abrogated by the California Legislature until 1872. It was probably illegal as a result of the Civil Rights Act of 1870, but the Legislature didn't officially abrogate it until 1872.

Discriminatory Taxes

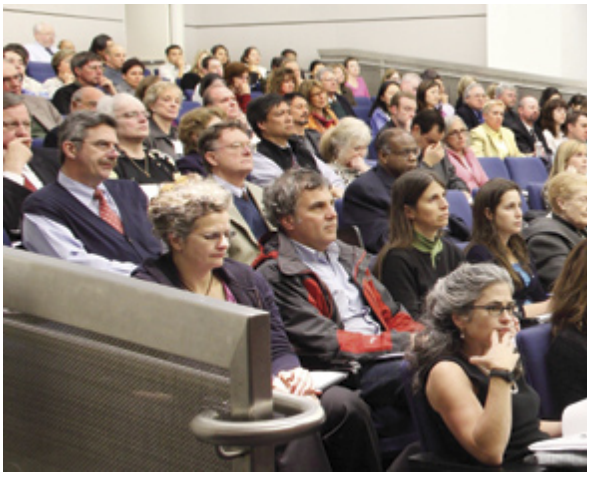
Let me turn to the tax measures. One of the chief ways in which California sought to discourage Chinese presence was through discriminatory taxation. Professor Moore has talked about the Foreign Miners' License Tax which, initially, as I understand, was aimed primarily at Chilean and Mexican miners but encompassed the Chinese as well. It imposed a special very high tax on foreign miners for the privilege of working in the mines. The tax was absolutely impossible to enforce. It was set at much too high a level so it was reduced substantially. Between 1850 and 1855 the Chinese were treated pretty much the same way that other foreign miners were. They were all subject to the same level of taxation, but then the Legislature in 1855 passed a law establishing a much higher tax for "foreigners ineligible to citizenship." That was a code phrase for the

Chinese. The Chinese were not eligible for naturalization at the time. It established a prohibitively expensive tax, one that would impose an additional $2 a month, every month in perpetuity, on Chinese miners. That too proved impossible to enforce and was repealed. But this didn't end the Legislature's efforts to use tax measures to discourage Chinese immigration.

This leads us to the case of *Ex Parte Ah Pong* decided in 1861, a case brought by a Chinese laundryman in El Dorado County. An 1861 law, the revision of the Foreign Miners' License Law, said that all foreigners residing in the mining districts, no matter what they were doing, no matter what their occupation was, would be considered miners for purposes of taxation. The county tax collector sought to collect this tax from Ah Pong, but he refused to pay it and was put to work on the county roads and eventually sentenced to imprisonment. He sued out a writ of habeas corpus to challenge his imprisonment. He applied to the state Supreme Court, and the Court issued the writ and agreed with him. In a very brief opinion, the Court said that the argument had been that this was an arbitrary measure, and it was unconstitutional because it was totally arbitrary. The Court didn't say that in so many words, but it reached essentially the same result. The mere fact that a Chinese person was living in the mining district could not subject him, a laundryman, to something designated the Foreign Miners' License Tax. If the act is to be so construed, "It cannot be supported any more than a law which imposed upon every man residing in a given section of the state a license as a merchant, whatever his occupation." So that was the end of that particular piece of anti-Chinese legislation.

Another tack tried by the State as a way of trying to discourage the Chinese from immigrating and to encourage those who were here to leave was the enactment of much more draconian and more direct measures. In 1855, a law was passed entitled, "An act to discourage the immigration to the state of persons who cannot become citizens," and it imposed a tax of $50 per head on every immigrant who was brought into the state. The tax was to be paid by the master of the vessel or the owner of the vessel who brought the people in. This aroused a great deal of controversy, not only among the Chinese but among shipping companies, merchants, etc., and one of the shipping companies challenged the law. In the California Supreme Court decision of *People v. Downer,* the law was struck down. It was a very brief opinion, with the Court simply saying that it was an attempt by a state to regulate foreign commerce, and that was purely the bailiwick of the national government. However, the very next year, the California Legislature passed a law which flatly prohibited the immigration of any Chinese into the state. This too was challenged and, interestingly, in an unpublished opinion, the California Supreme Court struck it down, again on Commerce Clause grounds.

This takes us to what is the most important Chinese tax case, and that is *Lin Sing v. Washburn,* an opinion of the California Supreme Court, decided in 1862. It arose out of a measure captioned, "An act to protect free white labor against competition with Chinese coolie labor and to discourage the immigration of the Chinese into the State of California." What you find in reading about the anti-Chinese legislation of the State of California and of municipalities throughout the 19th century is that these bodies were very crude. They just telegraphed exactly what it was that they wanted to do in this legislation. One sure way to raise a red flag is to caption an act, "An act to discourage the immigration of the Chinese into



California." So it levied a tax of $2.50 a month, called the "Chinese Police Tax," on most Chinese living in the state. Furthermore, it made employers liable for payment of the tax. I happened to come across an article in a Sacramento newspaper which said that the Chinese community was preparing a test case to challenge this particular act, and a test case was indeed brought.

The California Supreme Court, in line with its previous decisions, said the State has no authority to do that. The decision was not issued so much out of broad-minded progressive racial views, but was based on the thought that the State simply had no right to do what only the federal government could do. That is purely the preserve of the national government. It characterized this law as a measure of "special and extreme hostility" to the Chinese, in an opinion by Justice Warner Cope. Field dissented in the case. He cited the Foreign Miners' License Tax, which imposed a tax on all foreign miners, that had been upheld by the California Supreme Court, and Field said that under the authority of that decision he didn't see what the difference was. He thought the results should be the same here. But the majority said — and there certainly is some tension

between the two decisions — that the tax was upheld in the *Naglee* case because it was a tax on the privilege of mining, not on the privilege of residence, and that was a crucial distinction.

African-Americans and Segregation

There are some very interesting cases that Professor Moore was talking about, brought by African-Americans. Professor Moore was talking about the *Ward v. Flood* case, to which I'll add a couple of additional comments. The lawyer who represented the plaintiffs in that case was John Dwinelle, who had represented the Chinese in *Lin Sing v. Washburn*. In reading the argument of counsel and the opinion of the Court in *Ward v. Flood,* I'm really struck by how much was owed to the very famous case of *Roberts v. The City of Boston,* an 1849 interpretation of the Massachusetts Constitution also challenging segregation in the schools. Both the argument that Dwinelle made, that segregation posed what he called the "odious distinction of caste" on people, and the decision of the Court upholding the right to segregate just seemed so resonant with what Charles Sumner, the lawyer for the plaintiffs in *Roberts*, had argued and with Justice Shaw's opinion. Indeed, large segments of the Shaw opinion are quoted in the *Ward v. Flood* case.

Woman Suffrage

Professor Grodin talked about the Clara Foltz case. Let me mention one other case involving women in the law decided during this time period, the case of *Van Valkenberg v. Brown,* decided in 1862. Ellen Van Valkenberg filed a mandamus action in the county clerk's office in Santa Cruz County asking the clerk to inscribe her on the roll of registered voters. Her claim was that her right to vote was guaranteed by the Privileges and Immunities Clause of the 14th Amendment, added to the Constitution in 1868, which said that no state should infringe the privileges or immunities of citizens. The right to vote, she argued was a privilege or immunity of citizenship. This was the first instance in which anyone made such a claim under the 14th Amendment. The Court, however, in an opinion by William Wallace, disagreed. It said that it had no doubt she was a citizen. She had been one even before the 14th Amendment was adopted, and citizens' privileges or immunities were protected certainly. But it said the right to vote was not one of the privileges or immunities of citizenship. Actually, that was perfectly in line with predominant thinking at the time. It should be noted, for example, that many states limited the right to vote to citizens who held certain amounts of property. That was never thought to be unconstitutional. There was considerable precedent, he pointed out, for the proposition that citizenship and the right to vote were not inextricably intertwined.

Interestingly, when the U.S. Supreme Court three years later addressed the very same question in *Miner v. Happersett,* it reached the exact same conclusion, following the same sort of reasoning, arguing that citizenship and the right to vote were very different matters. This was pretty much of a dead end, and that was why eventually it was realized that in order to get the franchise, constitutional change was necessary.

An Early Loyalty Oath

Let me end with one final case, a civil liberties case involving loyalty oaths. There was a large number of former Southerners, as has been pointed out, in California at the time. I don't think there was ever any serious question that California would remain in the Union, but there was a lot of pro-Southern sentiment in California. The fact that the state's government was firmly in the hands of pro-Union forces was made clear in 1863 by the enactment of a measure entitled, "An act to exclude traders and alien enemies from the Court of Justice." It was a very intrusive and unusual kind of law. It allowed the defendant in a civil action to object to the continued prosecution of the action on the grounds that the plaintiff was disloyal. And the defendant could then require the plaintiff to take this loyalty oath, a loyalty oath which pledged support to the United States and state Constitutions and affirm that he had never in any way, shape, or form supported the Confederacy.

Plaintiffs could make the same sort of challenge to defendants who had counterclaims, and all attorneys in the state had to take this oath. A number of prominent attorneys refused to take the oath. Among them were Solomon Heydenfeldt, the state's first Jewish justice, and also a very famous mining law attorney by the name of Gregory Yale. In any event, there was a substantial amount of opposition. The law went up for a challenge to the Supreme Court, and Justice E.B. Crocker, in his opinion in *Cohen v. Wright* sustained the oath. He said it was valid. He had some hesitation about the fact it was so broad in its coverage, but he sustained. He claimed that one of the objections was that there was a provision in the Constitution that said officers of state government should only take one oath. There was to be only one oath. The objection was that this was a different oath. Therefore, it was said that attorneys shouldn't be required to take it. But Crocker said attorneys were not officers of the state within the provision of the law. Justice Field, interestingly, three years later when he was on the Supreme Court of the United States would reach an opposite result in the case of *Ex Parte Garland.* He found a Congressionally prescribed oath remarkably similar to this California oath to be unconstitutional. With that I'll end. ✯

Los Angeles Times Building, Los Angeles, June 1, 2009

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"THE PURSUIT OF CIVIL LIBERTIES AND CIVIL JUSTICE HAS BEEN ONE OF THE CORE PILLARS OF EVERYTHING THAT WE DO HERE AT THE *LOS ANGELES TIMES,* AND ONE THAT ALL OF US, REGARDLESS OF OUR POSITION HERE AT THE *TIMES,* HOLDS NEAR AND DEAR TO OUR HEARTS."

—EDDY W. HARTENSTEIN, PUBLISHER OF THE *LOS ANGELES TIMES*

ABOVE: *Associate Justices Kathryn Mickle Werdegar and Carlos Moreno of the California Supreme Court*

BELOW: *Assistant Presiding Judge Lee Edmon and Presiding Judge Robert McCoy of the Los Angeles Superior Court*

The Chinese Rewrite the Letter of the Law

Jean Pfaelzer
professor, university of delaware

My disclaimer is that I am not now, nor have I ever been a lawyer. In the 1970s, I moved with my daughter, who was six years old, up to the woods in Humboldt County, right in the northern corner of the state, to take one of those extremely contingent adjunct sabbatical replacement jobs. Well, I finished my dissertation. During that time, President Nixon resigned, the Vietnam War was coming to an end, and we were hopeful.

Humboldt State then, as now, had a very unusual mix of students: white kids who were very committed to the environment — it has a terrific wildlife management program — and tribal students. Six tribes send their kids to Humboldt State. And so it was a time of people getting together. But at peace rallies, at meetings where the Hupa students were demanding that Native American myths and history be part of the curriculum and that there be more Native American faculty, and in my classes, I looked around. I was born in L.A. and

went to Hamilton High. Humboldt State didn't look like California. I looked around my classes and there were no Asian kids. And I started asking where are the Asian students? Most people didn't have an answer, and in fact, most had not noticed. But one local poet said, "Chinese Americans will not send their kids to Humboldt State because 100 years ago, the Chinese were rounded up and driven out of Eureka." That was all I knew.

For years, I lived with this story of a roundup, of a purge, and it took me until about eight or nine years ago to feel that I had the standing, the skills, the right, to look into this story. I thought, in fact, that it was just the story of one roundup, and then it turned into the story of Pi Wa, or the "Driven Out." Here is a pictogram painted for my book, *Driven Out: The Forgotten War Against Chinese Americans* [see photo page 23]. On the left side is the image of Pi which means to drive, to push, to expel, and on the other side is the image that depicts the Chinese, and within that image is the image of a sword.

For hundreds of years, before the lumber companies arrived, the Yuroks called the land of Humboldt County and the lagoons, "Oketo" — there, where it is calm. And when I was teaching there, I fell in love with the land and, as we did in the '70s, went in with a bunch of other people I barely knew and bought a cabin, and have returned to Humboldt every year to hike, to fish, to write, and to bring my kids there. But as with other places of great beauty, there was a history of violence embedded in this haunting landscape. For seven years, I had been searching for my missing students, and I followed the footsteps of thousands of Chinese people who were violently herded onto railroad cars, logging rafts, steamships, marched out of town, or killed. Driven from the towns of the Pacific Northwest to the Rocky Mountains, from Seattle down to Portland, Crescent City, Eureka, Arcata, Ferndale, Stockton, Fresno, Bakersfield, Los Angeles, San Diego, Riverside. And I felt compelled to tell the story of these roundups, which at first I thought only happened in Eureka, because of my love of the land as well as my own civil rights history. What I found is that between 1850, when the first Chinese Americans came to pan for gold, and 1906, there were over 340 purges of Chinese Americans. Here is a map of the roundups just in California alone. This is a placard from Crescent City that reads, "A mass meeting of the citizens of this place will be held at Darby's Hall to devise some lawful means of ridding Crescent City of the Chinese." That was 1886.

Today, I want to talk about some of the legal cases of the first Chinese Americans, who couldn't testify, couldn't serve on juries, couldn't be naturalized, couldn't vote, but who turned to the U.S. legal system to demand their civil rights and to resist ethnic cleansing. As most of you know, the first Chinese came to the United States to mine for gold, and there are two stories that I'll tell. One is the story of the Chinese men and the other is the story of the Chinese women. They're very different stories.

Mass Lynching in Los Angeles

Here is a photo of Los Angeles's Chinatown in the early 1870s. This street, where I believe Union Station is now, was called at the time, El Pueblo Calle de los Negros, Chinatown, or more commonly, Nigger Alley. This is

where, on October 24, 1871, the famous lynching of the Chinese took place.

Two days earlier, a runaway prostitute, a woman named Ya Hit, married a Chinese man in an "American wedding." There are lots of questions. Who owned Ya Hit? Did she marry to deliver herself from slavery? Did the groom marry her to avoid having to pay for her? Was she avoiding a very common charge against Chinese runaways, enslaved prostitutes, the theft of herself? The wedding started a fight between two Chinese companies and one man from each Company was charged. A representative from one Company went to the jail and said, "Let my guy out. I have $6,000 in gold nuggets as surety." Word quickly got out in Los Angeles that there was gold in Chinatown, and the raid on Chinatown started. By that night, there were mobs, torches, and violence. The mob cut holes in the adobe tiles of the roofs of houses and shot into the Chinese houses. They dropped firebrands into the Chinese houses, starting fires in Chinatown. One Chinese woman climbed onto the roof of her house and started shooting at the mob with a rifle. The Chinese ran into the orange groves and across the river, and the riot lasted for three hours.

The LAPD showed up, all six of them, as well as the mayor and the sheriff, and the chief of police. The chief of police deputized a few white men and instructed them to shoot any Chinese men who tried to leave their houses, and then the group went off to drink. The lynching began. The first Chinese man to be lynched was named Wong Tuck. He was hung by a rope from a corral gate at St. Agnes's Episcopal Church, the only Protestant church in L.A. Others, 16 Chinese men and one Chinese woman, were lynched that October night. Many of them were murdered and then hung. Many were hung nude. One man had his finger cut off, perhaps a symbolic castration. After 11:00 that night, the bodies were cut down and they were taken to the jail, where they were kept for two days as families came to identify their bodies and find their families.

Why did this happen? Was this because minority men had deliberately challenged the image of white domesticity and sexuality in a town with very few white women? Did the wedding contradict the idea that the Chinese were temporary? Did the wedding mean that the Chinese were permanently part of the California landscape, that they were family? That there would be an enduring Chinese presence? That there would be an interracial future for California?

The Chinese merchants in L.A. pressed charges against the mob, but we remember that in *People v. Brady*, the California Supreme Court prevented a Chinese person from testifying against a white defendant. So the jury in these cases would never hear the Chinese describe what happened on the streets of L.A. Even without Chinese testimony, a coroner's jury was called and it indicted (the numbers are unclear because I could only get them from newspapers) between 30 and 150 members of the mob. But the list of those indicted in the coroner's jury disappeared. In the end, 11 men were brought to trial. Eight were convicted of manslaughter and sent to San Quentin for terms ranging from two to six years. But within months, the California Supreme Court called the indictment "fatally defective," defective because it failed to allege that the victims of the lynching — very dead — had been murdered. The convicted prisoners were released.

Yet the Chinese remained in L.A. The Chinese went back to court. Within a week of the massacre, Sam Yuen

sued the City of L.A. for restoration of his property. But the jury said that by Yuen's very presence in the riot, he had participated in the riot. And besides, Yuen failed to notify the sheriff or the mayor, who were out drinking, that a riot was taking place, and he lost the case.

The L.A. lynching was the largest single mass lynching in California, a ritualized terror and intimidation. In California, 302 people were lynched between 1849 and 1902, of whom 200 were Asian.

Driven Out of Eureka's Chinatown

This is the story I had first heard about. In 1885, the lunar new year was going to come on February 15, and the Chinese people of Eureka went to the cops and said, "Gamblers are going to come up for Chinese New Year's and cause trouble, and it is your duty to protect us as you would protect anyone else." The police ignored them, and indeed, on the night of Friday, February 5, 1885, two Chinese gamblers shot at each other. They happened to kill a man named David Kendall in the crossfire. Bad luck, because David Kendall was on the city council. Within minutes, a mob gathered. One of the leaders of the mob rang a bell, and 600 men followed this ringing bell into a building named Centennial Hall.

They lit the gaslights on this cold, dark, wet North Coast February night, and the meeting was chaired by the mayor, which is legally significant. He entertained motions. The first was to massacre all of the Chinese. Voted down. The second was to burn Chinatown, which occupied a crowded city block. Voted down because the Chinese didn't own Chinatown. They weren't allowed to own property, and Chinatown was owned by the man who owned the Palace Stables down the street, so he was really opposed to the idea of burning Chinatown. The motion that passed was that the Chinese would have 24 hours to leave town. And so in the cold and dark, the Chinese had one night to pack up all of their belongings. At dawn, a sheriff's posse marched 300 Chinese down to the wharf while teams of vigilantes went out into the redwoods and brought back Chinese who worked in the cookhouses for the lumber companies, Chinese who worked as ranch hands, and Chinese who were building the local short haul railroads to bring timber back down into Eureka. In all, 300 Chinese people were rounded up. They were kept in a warehouse on Humboldt Bay, under guard, with whatever they had been able to pack during the night. The merchants' wives marched painfully on small bound feet as their belongings were carried down to the docks. Two steamships were in Humboldt Bay, and it took a day to load the ships with the Chinese and their belongings, and they finally sailed on Sunday morning.

That weekend, the wind was from the north, and they arrived in San Francisco early Monday morning. While the customhouse was still closed, the Chinese jumped off the ship and rushed into the safety of Chinatown. At 3:00 that afternoon, after this cold and frightening and brutal weekend, when they had been divided from their families on the two ships, the Chinese called a meeting. They invited the white press, and they made a historic announcement. They said through the words of the Chinese consul, "Somebody will have to pay for the injury. We intend to seek redress in the courts." China had just paid the U.S. $700,000 after anti-American riots destroyed some American Christian missions in Canton.

On January 21, 1886, 50 Chinese men and two Chinese women sued the City of Eureka. The case was called, *Wing Hing v. The City of Eureka*. They demanded $132,000 for lost property and the destruction of their businesses and for the city's failure to protect its Chinese citizens from riot and mob action.

Framed as a negligence action, it is this demand for redress for being the objects of the riot and mob action that in my view raises *Wing Hing* from an ordinary tort action to a demand for reparations. And this may be the first lawsuit to demand reparations in the United States. The *Eurekan* newspaper declared, "The facts of the case are simply that the Chinese left for their own protection, that they were assisted to take away their worldly goods, and not a dollar is due them from the citizens of Eureka." The term "reparations" was popularized by General Sherman's field order at the end of the Civil War and Thad Stevens' bill to give African-Americans who had been enslaved 40 acres and a mule. In *Wing Hing*, I see a precursor to reparation demands that would follow, from Hawaiians, Japanese-Americans, Jews, and most recently, African-Americans. The concept of reparations — justice that repairs — relies on evidence of continuing stigma and economic harm to a group. It asks the law to restore personhood, not just stuff.

Viewing *Wing Hing* in tort terms, the proximate cause of the injuries was the purge of the innocent Chinese residents of Eureka. The town boasted of its actions. Indeed, it proudly declared its culpability. The consequences of the roundup were foreseeable. The City easily could have imagined and predicted the harm it caused and intended to cause. But the doctrine of reparations goes further. As a remedy for the violation of human rights, it implies that some form of redistribution of wealth must be involved in the realization of liberty. Whether for Australian Aborigines, New Zealand Maoris, or the first Chinese-Americans, reparations speak to the economic implications of racism. Supreme Court Justice Scalia once said that there is no debtor or creditor race. In *Wing Hing,* the Chinese from Eureka argued that indeed there is a debtor and a creditor race.

Moderator Jim Newton and panelists (LEFT TO RIGHT) *Hon. Joseph R. Grodin, Professor Jean Pfaelzer, and Professor Robert Chao Romero*

The Chinese faced a lot of complicated legal and political decisions: how to bring together these people who couldn't come back to Eureka to gather evidence. How to come up with a total of $500 in demands so they could sue in federal court, because they didn't stand a chance in local court. How could refugees, frightened about their immigration status under the Chinese Exclusion Act — the first immigration law to ban a people by race — take such public action? And how to protect and represent the women — the enslaved prostitutes who had managed to run away from slavery in San Francisco to these tiny remote towns — who had now been transported back to San Francisco, where their slave owners were?

Ultimately, the Chinese lost this lawsuit, and they lost it because they were not allowed to own property. Eureka said, "If we owe them anything, we owe them $22 for the taxes for their property taxes." It was a totally illogical and meaningless conclusion. They attacked the core part of the case. They said a riot never happened, and if it did happen, the Chinese left voluntarily. But what matters to us here is that in *Wing Hing,* the first Chinese-Americans assumed fair access to neutral law, and they brought along their consciousness as immigrants and as members of a racial minority. They knew how the law worked, and they sought to extend its reach. *Wing Hing* tried to hold Eureka accountable for the economic effects of racism. It exploded the stereotype that Chinese work, homes, and segregated Chinatowns were worthless. The Chinese resisted the dangerous and popular myth that they were coolies, enslaved persons or transient workers.

A Chinese Woman Seeks her Rights

I said there were two different stories. This is a women's story. In 1875, Congress passed the Page Act, which said that no Chinese women could enter the United States. The language of the Act is really weird. It says that merchants' wives can enter the country because their feet are bound and they can't leave the house and cause trouble. Here is a photo of a Chinese slave town in McConley Hill in Sonora, and this is where Chinese girls were bought and sold. It was not a brothel. It was a place where human beings were sold. Now, here is a Chinese girl on Jackson Street in San Francisco. She was kept in a cage. There was a row of cages along Jackson Street that borders the southern part of Chinatown, so it could serve both the Chinese and the white business community in Chinatown. I became very interested in these girls because those who managed to escape ended up in these little towns across rural California, and when they were driven out, this is what they would be returned to. The average life of a Chinese prostitute, once she entered prostitution, was seven years.

This is one of my favorite legal actions. A woman named Yoke Leen marched up the steps of the courthouse in Sonora and demanded that her deposition be taken. She created her own legal genre, or affidavit. She said her husband was in jail, that men might kidnap her to sell her as a prostitute. She described her face, her scars, she attached her picture, and she said, "I'm 36 years old. I am born in California. I am not allowed to become naturalized because I'm Chinese, and I declare to you that I am a free woman and no man may ever own me again." This is one of a series of legal actions that the Chinese created and brought against the people who were trying to achieve ethnic cleansing in California.

What I want to share is that the Chinese turned to the law. They extended the reach of the law. They had financial support, unlike Native Americans and African-Americans. They had the financial support of a Chinese merchant class and of China. As long as they had that support, they were able to turn to the American legal system for their civil rights. ✯

Mexican and Chinese Rights in Early California

Robert Chao Romero
professor, ucla

It is now my privilege to present remarks in response to the excellent papers of Professor Pfaelzer and Justice Grodin. I found both of their papers quite compelling. In light of the fact that I am a native Californian of both Chinese and Mexican ancestry, I can't help but wonder, how would I have been treated if I had lived in California in the mid-19th or early 20th century? The papers of Justice Grodin and Professor Pfaelzer provide a window into the processes of legal integration and exclusion experienced by various minority groups in California history. Professor Pfaelzer's paper paints a vivid and compelling picture of the discrimination encountered by Chinese immigrants in California during the late 19th and early 20th centuries.

Justice Grodin's paper speaks to the processes of legal integration and exclusion experienced by other marginalized social groups, such as women, African-Americans, Jews, and Asians during these same years. In a manner which is unique to the existing historiography on the topic, Justice Grodin also examines the internal wrestling and struggles of the California Supreme Court as it sought to create a legal structure that would accommodate the profound social changes which occurred in California during the mid-to-late 19th century. As Justice Grodin's law review article points out, the 1849 California Constitution stated, "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people." [See CSCHS *Newsletter,* Spring/Summer 2008; and 31 *Hastings Constitutional Law Quarterly* 141 (2004).]

Much of California's early legal history revolves around a single question, and that is, who are the people of California? Related to that question, what ethnic and religious groups would be granted full political, economic, and legal inclusion as part of the people of California? Which groups would be excluded? And finally, what would the responses be of such marginalized groups as the Chinese?

Mexican-American Citizens in Anglo California

As a professor of Chicano-Latino studies and Asian-American studies, I am most interested in and well acquainted with the history of legal exclusion experienced by Mexicans and Chinese in early California history. Most of my comments will relate to the experience of Mexican-Americans, and I think that would probably be most beneficial to our time. I'd like to begin by first speaking about the Mexican-American War. It's been said that the Mexican-American War is one of the most defining historical events for Mexican-Americans because, as a result of this war, and the subsequent treaty, Mexicans living in the southwest became Mexican-Americans. As a consequence of the Mexican-American War, Mexico ceded to the U.S. almost half of its territory in exchange for $15 million. Included in this transaction were the present day states of California, New Mexico, Nevada, parts of Colorado, Arizona, Utah, and even Oklahoma. In all, the U.S. took over about half-a-million square miles from Mexico.

It's interesting to note that Abraham Lincoln opposed the Mexican-American War as unjust. As a junior congressman, he voted in favor of a resolution that declared the war with Mexico "was unnecessarily and unconstitutionally commenced by the President." Nicholas Trist was sent by the U.S. to Mexico to act as peace commissioner and to negotiate the Treaty of Guadalupe Hidalgo, which ended the war and ceded the aforementioned territory to the United States. Upon returning home from Mexico, Trist wrote, "If those Mexicans had been able to look into my heart at that moment, they would have found that the sincere shame I felt as a North American was stronger than theirs as Mexicans, although I was unable to say it at the time. It was something that any North American should be ashamed of."

In spite of its importance in legal history, the Treaty of Guadalupe Hidalgo remains largely unknown and ignored. One historian has written, "The Treaty of

Guadalupe Hidalgo is the key document of Mexican-American history, for through it, Mexicans living in the southwest became Americans and were guaranteed 'all the rights of citizens of the United States.'" Despite its great importance, the Treaty remains relatively unknown in the United States. In Mexico, however, the Treaty is still remembered with bitterness. Articles 8 and 9 of the Treaty set forth the terms by which the former Mexican citizens and their property would be incorporated politically into the United States. These articles affected some 100,000 Mexicans in the newly acquired territories, including a large number of Hispanicized, as well as nomadic, Native Americans in New Mexico and California.

I'd like to talk in turn now about citizenship and property rights. As provided by Article 8 of the Treaty, a person had one year to elect his or her preference for Mexican citizenship. In other words, within one year of the signing of the Treaty, a person could decide whether to become a U.S. citizen or to retain Mexican citizenship. The catch was Article 9. According to Article 9, Mexicans who chose to become U.S. citizens would be granted citizenship "at the proper time determined by Congress." And so Mexican-Americans, although offered the possibility of U.S. citizenship, were not given citizenship immediately, and there was ambiguity in the language as to when Congress would judge that Mexicans should be incorporated into the U.S. as citizens. In terms of property, Articles 8 and 9 granted that absentee Mexican landlords would have their property "inviolably respected," and that others would be "maintained and protected in the free enjoyment of their liberty and property." So in general terms, the Treaty granted, at least in theory, pretty solid citizenship or relatively solid citizenship and property rights to Mexican-Americans.

The next question to be asked is, how did these Treaty rights play out in the following years? As you might imagine, unfortunately, many of these legal rights were denied. One of the big questions which was asked in the ensuing years was, what was the necessary act of Congress that would trigger U.S. citizenship for Mexicans? An example of this question comes from a case that was heard before the California Supreme Court, and this case was known as *People v. de la Guerra*. In this case, the status of the former Mexican citizens was finally resolved. Pablo de la Guerra came from the upper landholding class known as *Californios*. He signed the California Constitution, and he eventually ran for district judge in 1869. In response to de la Guerra, his political opponents in the election challenged that he had no right to run for judge because he had not yet become a citizen of the United States. In other words, his opponent said, "Well, de la Guerra is not a citizen because Congress has not conducted any act which would trigger U.S. citizenship." And so the California Supreme Court heard the case and ruled in de la Guerra's favor. They said that California's admission into the Union was that proper act that triggered U.S. citizenship for Mexican-Americans.

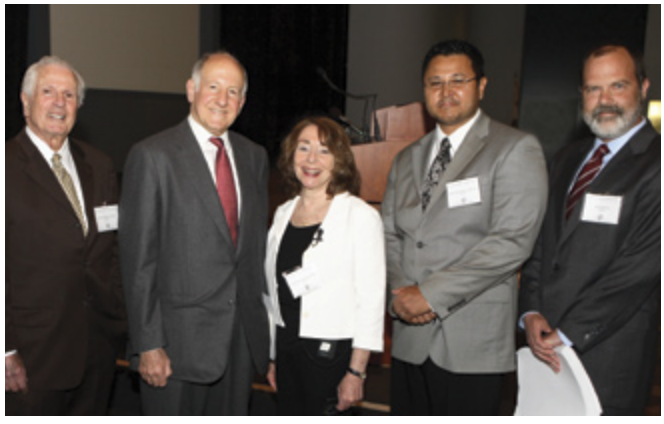
Mexican-American Property in Anglo California

I'd like to turn now to the issue of landownership. As Professor Pfaelzer discussed, in California, thousands of gold rush migrants came to California seeking their fortune and many of them encroached on the land grants of Californios, and they demanded that something be done to "liberate" the land. The result was the passage in Congress of the Land Act of 1851. This law set up a board of land commissioners whose job it would be to adjudicate the validity of Mexican land grants in California. Every grantee was required to present evidence supporting title within two years or their property would pass into the public domain. The land commissioners were instructed by law to govern their decisions according to the Treaty of Guadalupe Hidalgo, the law of nations, Spanish and Mexican laws, and previous decisions of the U.S. Supreme Court. The land commission in California examined 813 claims, and eventually confirmed 604 of them, and these claims involved approximately nine million acres. This, however, did not mean that the majority of Mexican land holders were ultimately protected by the courts.

On the contrary, most California land holders lost their lands because of the tremendous expense of litigation and legal fees. To pay for the legal defense of their lands, the Californios were forced to mortgage their ranches, or ranchos. Falling cattle prices and high rates of interest conspired to wipe them out as a landholding class. Pablo de la Guerra, whom we just mentioned, summarized the experience of Californios for the California Legislature. He said, "Sir, if he gained his suit, if his title was confirmed, the expenses of the suit would confiscate his property and millions have already been spent in carrying up cases that have been confirmed by the land commissioner, and landowners in California had been obligated to dispose of their property at half its value in order to pay for the expenses of the suit." Even if some landholders were able to fulfill the terms of the 1851 land law, they still had to deal with squatters, Anglo-American squatters. Also, many people who held perfect title to their land ended up losing their title because they did not fulfill the obligations of the 1851 land law. In summary, although in theory Mexican-Americans were granted full legal inclusion into the socioeconomic and political life of early California under the Treaty of Guadalupe Hidalgo, in practice, they experienced legal exclusion on many levels.

As evidenced by the ambiguous language of the Treaty which promised them citizenship "at the proper

time," they were reluctantly granted political citizenship; even then, as demonstrated by the case of Pablo de la Guerra, the validity of their citizenship was sometimes called into question. Moreover, although promised that their property rights would be inviolably protected and respected under U.S. law, many Mexican landholders lost their lands, either as a consequence of denied petitions before the U.S. land commission, or as a result of exorbitant legal fees which they were forced to pay in order to successfully prove title to their lands.



PANELISTS (LEFT TO RIGHT)
Hon. Joseph R. Grodin, Chief Justice Ronald M. George, Professor Jean Pfaelzer, Professor Robert Chao Romero, and moderator Jim Newton

Chinese Immigrant Smuggling

I'd like to conclude with a brief discussion of the Chinese. This is a large portion of my research and I want to spend a few minutes on the topic of Chinese undocumented immigration. Unbeknownst to most people, the Chinese were the first undocumented immigrants from Mexico. As Professor Pfaelzer mentioned, the Chinese were the first racial group to be singled out and excluded by U.S. immigration policy. In response to the Chinese exclusion after 1892, the Chinese literally invented smuggling into California. In the late 19th and early 20th centuries, there were virtually no restrictions on Mexican-Americans' immigrating to the U.S. The only restrictions that were in place had to do with the Chinese. And so in response, the Chinese invented immigrant smuggling. They created a transnational network of smuggling involving China, Mexico, Cuba, Canada, and many land and seaports in the United States. The smuggling ring was allegedly organized by the San Francisco Chinese Six Companies, which was a Chinese fraternal organization headquartered in San Francisco. I don't have time to go into the details. I have an article on this topic in your readings, but I wanted to close with a smuggling vignette which I think you might find interesting.

On the first of July, 1911, six Chinese immigrants, Hom Hing, Ah Fong, Lee Lock, Sam Seu, Leu Lin, and Joaquin Mon, drove by wagon from Ensenada to Carise in Lower California. They were received in the vicinity of the U.S.-Mexico border by two Mexicans, Francisco Rios and Antonio Solis, who were contracted to take them safely across into the U.S., and so these were the first "coyotes," as they are called today. On the third of July, the Chinese immigrants, together with Rios and Solis, entered the U.S. through San Ysidro, Lower California. Following their illegal crossing at San Ysidro, the group proceeded to the city of El Cajon near San Diego, where they were hidden by their Mexican guides in a strawstack on a hill located close to Riverview Station. Five days later, while en route to Anaheim, California, six immigrants, together with the coyotes, were spotted by the Immigration Service Inspector in Charge Harry H. Weddle near San Marcos, California. Following an escape attempt, the group was arrested and subsequently interrogated by Weddle and his partner, Chinese Inspector Ralph Conklin. Upon their inspection and interrogation of Rios and Solis, Weddle and Conklin learned that the "contraband" immigrants were consigned to Chinese individuals residing in Anaheim, California.

Following the successful apprehension of these smuggled immigrants, Inspectors Weddle and Conklin proceeded north to Anaheim in pursuit of the Chinese agents to whom the smuggled immigrants had been consigned. As part of their plan, Weddle and Conklin stopped first in Santa Ana, where they recruited sheriff employee George Placencia to pose as Francisco Rios, the coyote. On July 15, 1911, Weddle, Conklin and Rios traveled to Anaheim seeking to locate the intended recipient of the smuggling letter. Posing as Rios, Placencia learned from a elderly man, Ngan Fook, that the correspondence was addressed to the "big boss man," Chin Tung Yin, who resided in Los Angeles. Fook further explained to Placencia that Chin would meet with him the next evening in Anaheim to discuss the arrangement. On the evening of July 16, Placencia met with Fook and the "big boss man" in the Anaheim Chinatown, and they worked out a plan for the delivery of the contraband Chinese described in the secret letter. Following their discussion, Placencia led Chin and Fook outside to a blackberry hedge, where they were arrested by Inspectors Conklin and Weddle. The United States Attorney subsequently dismissed charges against Ngan Fook for conspiracy to violate immigration laws related to Chinese exclusion. Francisco Rios and the "big boss man," Chin Tung Yin, were also acquitted. Thank you. ✯