THE CALIFORNIA SUPREME COURT

Historical Society

NEWSLETTER · SPRING/SUMMER 2006

A Short, Biased History of Division Six

BY HON. ARTHUR GILBERT

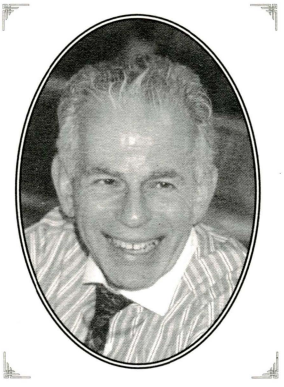
Officially, Division Six of the Second District came into existence in 1982. In fact, the division had been created by the legislature a few years earlier along with other divisions throughout the state. However, a Superior Court judge held that legislation unconstitutional. Luckily, he was reversed, and here we are.

We are the northern outpost of the Court of Appeal's Second District. The six other divisions are located in Los Angeles, including Division Seven which was created at the same time we were. Doesn't it stand to reason that we should have been called Division Seven? We think it best not to complain. What good would it do? Now there is a Division Eight in Los Angeles. Our jurisdiction includes Los Angeles, Ventura, Santa Barbara, and San Luis Obispo Counties.

On December 27, 1982, Steven Stone was confirmed as Division Six's first Presiding Justice, and Richard Abbe and I were confirmed as Associate Justices, by the Commission on Judicial Appointments. The Commission was composed of the Chief Justice, the Attorney General, and the most senior presiding justice in our district. We were unanimously approved. Whew.

Although we were then called the Santa Barbara Division of the Second Appellate District, our chambers came to be located in Ventura. That is where most of the attorneys are and that is where the rent was reasonable. Over ten years, we saved the state in excess of a million dollars in rent. For the first thirteen years of our existence, our chambers were in a prosaic office building with a picturesque view of cars speeding up Victoria Avenue. Our oral arguments, however, were held in Santa Barbara.

Our first oral argument took place in the grand mural courtroom of the Santa Barbara courthouse. It is a magnificent room with impressive high-backed chairs that hearken back to a mythological time. Steve Stone looked like Prince Valiant presiding.



Justice Arthur Gilbert

Unfortunately, however, we had to give up the grandeur of the mural courtroom. We had trouble hearing the argument because the acoustics were bad (possibly a reason to stay!), tourists in Bermuda shorts blinded us with their flashbulbs, and we had no chambers. Sharing the men's room with lawyers and litigants detracted from the mystique. So we moved oral argument to the hearing room of the Santa Barbara Board of Supervisors.

Richard Abbe retired on the last day of November, 1990, and Ken Yegan was appointed the next month. Ken fit in nicely with the Division Six ethos. No coats and ties unless it's oral argument day.

In August, 1994, we moved out of our drab office building and into our own courthouse on Santa Clara Street in Ventura. All three justices had a hand in the project. Construction was completed on time because of Justice Stone's leadership. The building has more character than most government structures because of Justice Yegan's design suggestions. I take credit for the windows that open, allowing real air into the chambers. It helps us think better.

We now have oral argument in our own courtroom. We also hold oral argument once a year in San Luis Obispo and Santa Barbara.

With our ever-expanding caseload, the legislature wisely created a new position for our division. On April 15, 1997, Paul Coffee both paid his taxes and joined us as the first fourth justice of Division Six. He gets an A+ on the test for informality and collegiality. Justice Stone retired in January, 1999, and I became the acting Presiding Justice, or, as I was called, the "titular head." I was appointed the official Presiding Justice in November, 1999, but I'm still known as the titular head, an indication of modest *Continued on page 15*

Athens by the Sea: An Extraordinary Division of the Court of Appeal

BY WILL GORENFELD

"Persons attempting to find a motive in this narrative will be prosecuted; persons attempting to find a moral in it will be banished; persons attempting to find a plot in it will be shot."

Mark Twain, *The Adventures of Huckleberry Finn*

The Little Division that Could

Division Six of the Second District was one of three new courts added to the California Court of Appeal in December, 1982, each set up with three freshly minted appellate justices along with support staff. Unlike the district's other divisions, all housed in Los Angeles, Division Six was planned to serve the growing needs of Ventura, Santa Barbara, and San Luis Obispo Counties. This area, on the scenic central coast of California, was geographically isolated from the urban confines of Southern California. It lacked a major metropolitan area and its towns tended to be small. The local economy was primarily dependent upon tourism, agriculture, oil, and defense. The eastern portion of Ventura County, however, was fast becoming a bedroom community for Los Angeles.

The isolation encouraged development of a collegial relationship between the new appellate court and the county-level Superior Courts located in Ventura, Santa Barbara, Santa Maria, and San Luis Obispo. Rulings and procedures were often informal in these so-called cow county trial courts. And, as Superior Court judges began to serve as pro tem appellate judges, Division Six came to know most of the trial judges who sat in the four courthouses.

From the start, the court's temperament was established by the affability of Justices Richard Abbe, Steve Stone, and Arthur Gilbert to each other and to staff. Originally the court was to have its chambers in Santa Barbara, and in Spring 1983, Clay Robbins, the personable clerk of the Second District, found a suitable location – a beautiful Spanish-style building. As now, however, housing costs were sky-high in Santa Barbara and the justices were concerned about the effect this would have on the court's staff. As a result, in August, 1983, they set up quarters in Ventura.

For the first decade of its existence, Division Six was housed in a nondescript low-rise office building near the Ventura County Government Center. The neighborhood offered such amenities as the constant rush of traffic on Victoria Avenue and announcements blaring over the public address system of the Chevrolet dealer across the boulevard. The building did not contain a courtroom but did house an employment agency,

Division Six's new location in Ventura

the offices of a chiropractor, and an emergency medical clinic. Few individuals passing by could imagine that within these humble walls a court was busily at work reviewing important cases dealing with land use regulations, free speech, discrimination, and murder.

The poor conditions and crowded quarters of the court's chambers arguably humbled the souls of all who worked there. The rapidly deteriorating building featured air conditioners replete with the sound of roaring fans, but failing to produce any cool air; elevators that routinely stalled, trapping the unwary; a leaky roof and basement parking lot turned seasonal subterranean lake (where a court employee placed a sign warning "No Fishing"!); power failures – you name it.

Maybe the court's benevolent atmosphere also stemmed from the proximity of the beach. Dress was casual and each justice's chambers were always open to staff for discussion of cases, procedure, and just about anything else. Where else would a court allow a clerk and an attorney to coach baseball for a couple of seasons? Or participate in relay races and bike rides that included justices and staff?

Lack of Precedent: "Powder River, let 'er buck."

Ramon Adams, *Cowboy Dictionary*

Appellate courts are susceptible to growing pains as judges and staff work to settle into new roles. Often having been elevated from the trial bench, justices sometimes forget that they now sit in review of the trial courts. Indeed, during oral argument of one of Division Six's first cases, the justices were about to have witnesses sworn and testimony taken, when only the frantic gestures of staff attorneys from the back of the courtroom caused them to reconsider this plan!

Division Six's staff, likewise, was sometimes hampered by ignorance of appellate procedure and jargon. Chief Deputy Shug Combs, who had grown up on the harsh dusty plains of west Texas, was a knowledgeable transplant from the clerk's office in Los Angeles. She cracked a wry smile when new deputy clerk Mary

Rosa didn't know what a "doghouse" file was. (For the uninitiated, a doghouse is a box-like container made of stiff cardboard used to hold extensive case records and briefs.)

And new courts, unsure of their footing, may proceed with caution, taking few chances. On the other hand, an absence of a sense of the routine can lead to interesting results. Indeed, appellants may have sensed a breath of fresh air on the Central Coast with the creation of Division Six. As it happened, the geographically isolated justices were not shy about making bold decisions, rightly or wrongly, that served to develop the law. Nor did they feel constrained by hidebound tradition. Consequently, the court's early history is replete with important decisions on issues that otherwise might have been left to the Supreme Court or more established Courts of Appeal.

In one decision filed right out of the chute, the court concluded that, notwithstanding the trial court's finding of no contract, the prevailing defendant in a breach of contract action was entitled to recover attorney's fees. *Jones v. Drain*, 149 Cal.App.3d 487 (1983). In *Raytheon v. Fair Employment & Housing Commission*, 212 Cal.App.3d 1242 (1986), the court held it illegal for an employer to discharge an employee solely because he had been diagnosed with AIDS. In *Boulas v. Superior Court*, 188 Cal.App.3d 422 (1986), the government had convinced the defendant to replace his lawyer with prosecution-approved counsel. Declaring that "criminal defense lawyers are not fungible," the court held this to be an interference with the accused party's attorney-client relationship, requiring a dismissal of charges. *Id.* at 430. And Division Six broke with U.S. Supreme Court precedent (*Wheat v. United States*, 486 U.S. 153(1988)), deciding in *Alcocer v. Superior Court*, 206 Cal.App.3d 951(1988), that, with a proper waiver, a criminal defendant has the right to be represented by a conflict-ridden attorney.

Three Wise Men

Perhaps it was the court's unassuming offices, making for better work and quite possibly some empathy for society's poor and downtrodden, combined with its lack of tradition, that led the justices to rule as they did in *Collier v. Menzel*, 176 Cal.App.3d 24(1988). But things almost turned out differently.

A homeless group in Santa Barbara wanted to register to vote, yet being homeless meant no permanent address. The would-be voters tried to use a landmark Moreton Bay fig tree located across from the railroad station as their home address, but the county clerk refused to recognize this designation. They sued and lost in the trial court, appealing then to Division Six. Prior to oral argument, a draft opinion was prepared by one of Presiding Justice Stone's research attorneys, upholding the trial court's decision.

When the draft landed on Justice Gilbert's cluttered desk, he was horrified to see the suggested result. Justice Gilbert had long thought himself a gifted jazz pianist who only reluctantly attended law school, at UC Berkeley's Boalt Hall. While there, however, he befriended a former seminary student with whom he could discuss issues of social justice. That undergraduate student was Jerry Brown. Mistaken as to the source of the draft, Justice Gilbert charged down the narrow hallway into Justice Abbe's wide-open chambers and accused the bearded Abbe of lacking compassion for the poor.

True, Justice Abbe was a graduate of Stanford University who was born in Paris, France, whose father, James E. Abbe, was a top photographer, and whose mother had been in the Ziegfeld Follies. Justice Abbe had once been a tough prosecutor who had, in turn, hired two former prosecutors as his research attorneys. But he was hardly wanting in the compassion department, opposing both the Vietnam War and capital punishment. Indeed, Abbe possessed firsthand knowledge of what it was like to appear down and out.

In 1969, District Attorney Abbe's automobile broke down in Woodland, California. Legend has it that the prosecutor couldn't find a mechanic that afternoon, so he pumped gas and cleaned windshields for five hours while the owner of the gas station repaired his vehicle.

Years later, having been appointed to the Court of Appeal from the distant Shasta County Superior Court and needing a base from which to house-hunt in Southern California, Justice Abbe took Chief Justice Rose Bird up on the offer of her Los Angeles chambers. He (literally) moved right in. While returning from jogging around the mid-Wilshire district one morning, Abbe became locked in the court's stairwell. This ever-resourceful gentleman knocked on a door which happened to be that of the courtroom. Division Three of the Court of Appeal was, just then, hearing oral argument. Ron Albiston, a deputy clerk for the division, opened the door to a sweaty and bearded man. Albiston was about to slam the door shut on the scruffy-looking intruder when Presiding Justice Joan Klein signaled to allow the mysterious visitor to enter – which he did, tiptoeing past the astonished clerk, counsel, and observers.

Two years later, Justice Abbe, now seated in his Ventura chambers, protested to Justice Gilbert that he was not the lead judge on the homeless voting case and was similarly horrified with the tenor of the proposed opinion. The two energized *Continued on page 12*

A Wistful Farewell

BY DONNA C. SCHUELE

This newsletter issue marks my last as editor, my service as an executive director of the California Supreme Court Historical Society having ended in February. Most all non-profit positions entail financial and other sacrifices, and this one was no exception; my family's forbearance for over five years was very generous. I have so enjoyed serving the members of the Society, however, that I leave the organization quite wistfully.

Producing the CSCHS *Newsletter* has been a labor of love. When I arrived at the Society, the publication was in hiatus. Steady funding from our fee statement donors helped us restart this benefit of membership, and for this opportunity I am very grateful. I hope that you have enjoyed the high-quality scholarship, our now-regular features of book reviews and member news, and the elegant design.

This final column provides an opportunity to acknowledge those who have contributed to the success of the newsletter and other Society projects over the years. Foremost, I would like to thank founding board member Harry Scheiber, whose wholly volunteer efforts in establishing the newsletter back in the 1990s and serving so ably as editor set the bar. Experiencing over and again the efforts required to produce a single issue, I am amazed that there were years in which he produced four.

It was not only Harry's editorial skills that made the newsletter a first-rate publication. Just as important, his stature in the community of California legal historians resulted in submissions from leading scholars. In fact, with the involvement of Harry and other scholars on the board, including Gordon Bakken, Barbara Babcock, Judge John Wiley, Jerry Uelmen, David McFadden, and Susan Westerberg Prager, the CSCHS has stood alone among court-based historical societies throughout the nation for the level of participation by legal historians and academicians.

Kent Richland also deserves particular thanks. As president of the Society, Kent provided the crucial scholarly and creative space to allow the newsletter to take shape and flourish. That Kent has also rolled up his sleeves to serve as our official proofreader further demonstrates his dedication to this project.

Next, I would like to thank our original authors, all of whom provided their services pro bono. They have been both generous with their time and gracious with their acceptance of a exacting editor. Some, such as Kathleen Cairns and Holly Cole, had no previous contact with the Society. Their willingness to produce extensive articles on little more than the assurances of a stranger illustrates the collegiality among scholars that makes it a pleasure to be a part of that world. Others, such as Debra Pollack Levy, probably didn't realize that a contact with the Supreme Court would lead to a writing request. Our members and directors have also served generously as authors, among them David McFadden, Peter Reich, Beth Eagleson, Germaine LaBerge, Barbara Babcock, and Jerry Uelmen.

The Society's alliances with the California Supreme Court, the Court of Appeal, the California Judicial Center Library, and the Administrative Office of the Courts have been invaluable. Most notably, we thank Chief Justice George for generously allowing the Society to publish his historically oriented speeches. His interest in California's past shines through in both the quantity and quality of these addresses. Board member and California Supreme Court Clerk of Court Fritz Ohlrich has been instrumental in providing numerous contacts for newsletter submissions. I'd like to thank Supreme Court Justice Joyce Kennard; Court of Appeal Justices Richard Mosk, Earl Johnson, and Patricia Bamattre-Manoukian; Court of Appeal staff Kevin Lane, Rick Seitz, and Jo Larick; and Judicial Center librarians Fran Jones and Martha Noble for serving as authors.

The newsletter has also benefited from the opportunity to include articles that first appeared elsewhere. It is heartening to see other publications, such as the *Los Angeles Times*, the *Daily Journal*, and *The Recorder*, give attention to California's legal and judicial history. In particular, I would like to thank Cecilia Rasmussen, who, through her *LA Times* column "Then and Now," illuminates some of the bench and bar's more curious history.

One of the features instituted under my editorship has been the "On Your Bookshelf" series. There is always pressure in promising readers a regular column, but my reviewers never disappointed. Their task was double: not only producing an article but first taking the time to consider carefully the subject work. For these efforts, I would like to thank CSCHS members and directors Wendy Lascher, Paul Bryan Gray, Susan Westerberg Prager, and Thomas Reynolds; former CSCHS interns Sabrina Corsa and Shoorat Isaev; Alicia Rivera; and Richard Schauffler.

Another regular feature, Member News, could not have succeeded without the contributions of our accomplished members. Features like this help transform an organization into a community, and I am grateful for the sustained interest you have shown this column.

This issue continues a series that began a year ago in celebration of the one-hundredth anniversary of the California Court of Appeal. It was proposed and facilitated by CSCHS board member Jake Dear, and I would like to thank our authors,

Continued on page 15

Women & the Death Penalty in Victorian San Francisco

BY HOLLY COLE

The Spring/Summer 2005 issue of the CSCHS Newsletter *included "Saved from the Gallows: Nellie Madison, Stanley Mosk, and the Death Penalty in Mid-Twentieth Century California," by Kathleen Cairns, recounting the case of the first woman in California to have her death penalty upheld by the California Supreme Court. A companion to that article, this piece recounts the story of the first Anglo woman in California to be sentenced to death, in the nineteenth century.*

On November 3, 1870, Mrs. Laura Fair, dressed in black and heavily veiled, boarded the El Capitan ferry on San Francisco Bay. After the boat had gone only a short way, she approached Alexander Crittenden, a prominent lawyer who was aboard with his wife and children. Mrs. Fair pulled out a pistol and shot Mr. Crittenden in the chest, whereupon he slumped into his wife's lap. A few days later, he died.

The shooting was the culmination of a long and tempestuous relationship between Laura Fair and Alexander Crittenden, both well-known figures in San Francisco society. When Mrs. Fair, a notorious beauty, was charged with first-degree murder, the trial became one of the most famous of its time (catching the attention of even east coast newspapers), not only because of the melodramatic facts, but also due to the novel gender-based arguments advanced by both the prosecution and the defense.

The prosecution presented Mrs. Fair as an aggressive seductress, a common female stereotype in the Victorian era. Laura Fair's attorneys countered with a temporary insanity defense, blaming Mrs. Fair's incapacity on "female problems." This argument echoed an idea popular at this time, that women were susceptible to madness because of the instability of their reproductive systems. The trial lasted thirty days and ended in a guilty verdict and sentence of death. Followed closely by the press, the case became a rallying point for the burgeoning women's rights movement in California, providing a stark morality play about the sexual double standard.

The Players

At the time of the shooting, Laura D. Fair, by her own accounts, had been married four times. Laura was reputed to be a great beauty, with golden blonde curls and clear slate blue eyes. Born Laura Ann Hunt in Holly Springs, Mississippi, at age sixteen she entered

Laura Fair

into the first in a series of marriages that the prosecution would use to paint her as a "seductress." Laura's first husband, a much older man, died leaving her "without a farthing." As a result, she entered a convent to complete her education in order to support herself.

Her second marriage, to Thomas Grayson, a "terrible drunkard" by Laura's testimony, faltered after only six months. Leaving Grayson, Laura moved to San Francisco with her mother and brother. It was here that she met Colonel William Fair, an attorney. After Fair helped Laura obtain a divorce decree, the two were married.

The couple then moved to Yreka, California, where Laura gave birth to a daughter, Lilllie. A few years later, in 1861, the Fairs moved back to San Francisco. Just a few weeks after the couple reestablished themselves in the city, Colonel Fair died in a friend's office of a gunshot wound to the head. During Laura's trial for Crittenden's murder, some newspapers reported that William had committed suicide out of jealousy over Laura's affairs with a mystery man, but Laura implied that her husband instead was killed over a land dispute.

After Colonel Fair's death, Laura spent some time in Sacramento and San Francisco, appearing on stage in several plays to good reviews. In 1863, during the Silver Rush, she moved to Nevada to open a lodging house. It was here that Laura met Alexander Crittenden.

Alexander P. Crittenden was, by all reports, an extremely well-respected and influential lawyer in San Francisco. In fact, on the day of his funeral, the federal, state, and municipal courts in the city all adjourned. Mr. Crittenden came from a well-known Kentucky family; his uncle was a United States Senator. Quite a bit older than Laura, he married his wife Clara the year that Laura was born. Alexander and Clara Crittenden had six children together.

Crittenden was one of the first boarders at Laura Fair's newly established lodging, the Tahoe House, in 1863. Laura testified that Alexander presented himself as a single man and began to court her soon after they met. Thus began an affair that would last for seven years and culminate in Crittenden's death.

According to Laura, she and Alexander were

engaged within six months of their initial meeting and she did not discover that he was married until 1864. When confronted with his deception, Alexander assured Laura that he would obtain a divorce. This promise may have appeased Laura, but her mother demanded that Crittenden move out of Tahoe House so that Laura could salvage her reputation. Crittenden did indeed move out – to a small house that Laura owned – and Laura and Lillie went to live with him.

By this time, Clara Crittenden had become aware of the illicit relationship. Laura traveled with Alexander to San Francisco in December, 1864, where they stayed in adjoining hotel rooms and Laura was introduced to Clara. In January, 1865, Clara traveled to Nevada and stayed with Alexander at "his" house. When Laura considered revealing the affair to Crittenden's wife, Alexander threatened to kill Laura and himself. Laura testified that Crittenden even pointed a small pistol at his head as he left Laura and Clara alone in a room. Instead of confronting Clara, Laura blamed her agitation on a broken engagement with another man. The affair continued.

Over the next few years, Laura Fair traveled east, breaking up and reuniting with Crittenden. Alexander repeatedly persuaded Laura that he would leave his wife and marry her, even promising to meet her in Indiana where he could obtain a divorce more easily.

While Laura lived in San Francisco, the lovers had frequent fiery exchanges regarding the subject of Alexander's marriage. On one occasion, Laura followed him home after a heated argument, but was intercepted at the front door by Alexander's son, Howard. Crittenden refused to see Laura and a policeman was summoned. According to the testimony of Crittenden's wife and daughter, Laura threatened "bloodshed" as she left their house. A few days after this incident, Alexander went to Laura's home. While he stood in her hallway, Laura fired a gun at him from the staircase, although she claimed later that these were only "warning shots."

Alexander continued to insist on seeing Laura, sending her urgent notes and messages delivered through third parties. He promised he would mostly stay away from her until he was divorced, so long as they could occasionally rendezvous at the hotel where they had once shared adjoining rooms. Alexander did not keep his promise, and soon the lovers were again seeing each other regularly.

In February, 1870, following two previous trips east on Alexander's promises, Laura and Alexander made plans to travel to Indiana so that Crittenden could obtain a divorce. By this time, Clara and the younger children were living in the east, and Alexander assured Laura that the move was permanent. He then canceled the trip to Indiana, pleading financial hardship.

Alexander Crittenden

This turn of events brought Laura to a breaking point. Less than a month later, she married another man, Jessie Snyder. At the trial, Laura testified that she had married Snyder in part to end her mother's constant harping that she was a ruined woman. When Alexander heard about the marriage, he convinced Laura that it was a mistake. He demanded that she stay away from her new husband and arranged a scheme involving another woman and a couple of police detectives to create adultery grounds for a divorce. In September, 1870, Laura and Jessie Snyder signed a mutual separation agreement.

For the next two months, Alexander Crittenden and Laura Fair remained in close contact, seeing each other nearly every day and frequently taking meals together. At some point, Laura learned the awful news that the Crittenden family would be returning to San Francisco. On the day of the shooting, the pair met around 4:30 p.m. and discussed Alexander's plan to meet his wife and children at the train depot in Oakland and accompany them across the Bay. According to Laura, Alexander promised that he would not kiss his wife at this meeting and would kiss no other than Laura.

Later that afternoon, her identity hidden behind a veil, Laura followed the Crittenden family onto the ferry. As Mrs. Crittenden took her husband's arm, Laura approached. According to some reports, she exclaimed to Alexander, "You have ruined me and my child!" as she took the fatal shot.

Laura then briefly disappeared into the crowd. Crittenden's son, Parker, along with a member of the harbor police, found her in the ferry's saloon. When Parker identified her as the shooter, Laura reportedly replied, "Yes I did it, and I meant to kill him. He ruined both myself and my child." Laura Fair was taken into custody as soon as the boat arrived in San Francisco.

The Press

At first, leading San Francisco newspapers seemed to blame Laura Fair and Alexander Crittenden equally for the killing, but as time went on the story became more one of the seduction of an upstanding citizen by a man-

hungry murderess, and the reporting came to fit hand-in-glove with the prosecution's strategy of portraying women, and especially Laura, as a source of hidden passion, a potential evil.

For example, the *Examiner* was initially circumspect, stating that it "d[id] not care to publish any of the many rumors afloat concerning this most distressing event," but later reported that Crittenden was "not the first or second victim of her unbridled passion," painting Laura as a black widow who lured her victims into relationships and then destroyed them. The San Francisco *Chronicle* characterized Laura as a woman "notoriously of bad antecedents and violent disposition."

While the typical story line played on the sexual double standard, newspapers creatively invoked other double standards as well. Endorsing popular Victorian morality and ideals, an editorial in the *Chronicle* acknowledged the unfair effect of the sex-based double standard on women who engaged in these affairs. However, the newspaper also bemoaned the development of a class-based double standard, blasting what it claimed was a common practice of "concubinism" among the wealthy members of San Francisco society.

The *New York Times*, commenting from a distance, wondered whether men and women killers were beginning to receive different treatment, and warned of a "dangerous laxity . . . creeping into our Courts concerning the application of the rules of evidence to female murderers." The newspaper also sarcastically poked fun at Laura's temporary insanity defense, commenting that her "episodes" seemed to come on only when "it is desirable to put somebody out of the way."

The Trial

The trial of Laura Fair became a highly anticipated event. Her arraignment was the subject of so much public interest that the judge, Samuel H. Dwinelle, changed the time of the hearing in order to outwit newspaper reporters. Judge Dwinelle was a seasoned jurist; he had been appointed to the bench of the Fifteenth District Court at its founding in 1864, and served until the constitutional reorganization of California's courts in 1879.

Attorneys on both sides of the case were well known in San Francisco legal circles. Laura Fair was represented by Elisha Cook and Leander Quint. Cook was a leading member of the San Francisco bar, who arrived in San Francisco at the height of the gold rush and then served as counsel for the first Vigilance Committee. The district attorney, Henry H. Byrne, practiced criminal law exclusively. Over time he had built a lucrative private practice and by 1871 was serving his fourth term as a prosecutor. One observer remarked, "He was perhaps the most popular man who ever lived" in San Francisco. Byrne was assisted by Crittenden's law partner, Alexander Campbell, a former municipal judge who practiced primarily criminal law.

The courtroom was filled to the rafters every day of the month-long trial. At first the general public was banned from entering; only attorneys and members of the press were to be allowed. However, this rule went unenforced, and before long there were a number of regular attendees.

The most notorious was a group of suffragists led by Emily Pitts Stevens, a prominent San Francisco activist who owned and edited *The Pioneer*, a weekly whose masthead declared the newspaper "Devoted to the Promotion of Human Rights." Pitts Stevens used her paper not only to lobby on Laura's behalf but also to link Laura's cause to the furtherance of women's rights. The case provided Pitts Stevens with a perfect opportunity to rail against the double standard, and she predicted in an editorial that Laura would not get a fair trial in a legal system run entirely by men.

Indeed, at this time women in California were excluded from the bar and were not permitted to sit on juries. (Admission to the bar would come only a few years later, in 1878, but women were not qualified for jury service until 1917, six years after winning the vote.) Laura Fair's jury, chosen "[a]fter considerable difficulty" over the course of a day, consisted of a group of Euro-American men who were mostly small-time entrepreneurs.

Not only the suffragists, but also both the prosecution and the defense teams, framed the case in terms of Victorian notions of gender and sexuality. Drawing on an accepted belief that women's reproductive systems could wreak havoc with their rational control, the defense team asserted that female maladies caused Laura to suffer from a form of mania at the time of the fatal shooting. Elisha Cook maintained that delayed menstruation, insomnia, and extreme stress had rendered Laura insane, and that, in her fragile condition, the impulse to shoot Crittenden overtook her. To bolster his argument, Cook suggested that Laura must have been crazy to shoot Alexander in public. After all, she had had plenty of private opportunities to hurt him had she wanted to do so.

In order to prove Laura's temporary insanity, the defense called several witnesses, including the nurse who attended to Laura in the wake of the shooting and at length thereafter. Jane Morris testified that, upon arrest, Laura fell unconscious and then became hysterical when she came to, even taking a bite out of a glass from which she was drinking. *Continued on page 17*

A Vision of California?

BY WENDY LASCHER

What if Southern California were not a collection of subdivisions and strip malls laced together by freeways? What if we could live on the land as it was a hundred years ago?

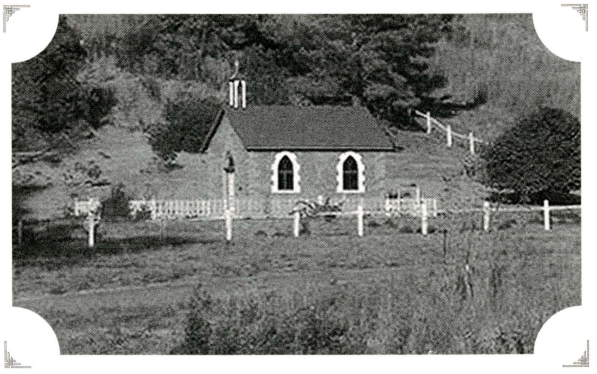
When the "June gloom" fog lifts, Santa Cruz Island offers a tantalizing suggestion. Beyond the oil platforms in the Santa Barbara Channel, the island boasts a 2,470-foot peak; "marine terraces; . . . rolling hills colored with the annual grasses; chalky white diatomaceous outcroppings; jagged canyons; soft, serene valleys; expansive white beaches; majestic Caribbean-like sea coves; meandering creeks; thick closed-cone pine forests; . . . massive cylindrical eucalyptus trees; . . . and along the majority of the coastline, steep volcanic cliffs rising vertically from the water." So writes Santa Barbara attorney John Gherini, whose family owned the eastern end of the island for almost seventy years.

How could such a paradise survive only twenty-two miles offshore? Why wasn't the island developed before the Coastal Commission came into existence? And why, in any event, is such a beautiful, isolated place featured in a newsletter focusing on legal history?

The title of Gherini's recently reprinted book alludes to the answer: *Santa Cruz Island: A History of Conflict and Diversity*. This thoroughly researched chronicle of eight thousand years of island history discusses eight California Supreme Court decisions concerning the island's contested ownership, not to mention six U.S. Supreme Court cases and a host of federal and state trial court and intermediate appellate decisions – all listed in an appendix. According to Gherini, a Santa Barbara estate planning and probate lawyer, "[t]he attraction of the island . . . routinely led people into conflict. . . . The modern history of the island would witness the passion to own it, to protect it, to use it, and to fight over it."

Gherini's report on island-related conflict goes back in history to a Chumash civil war legend and archeological finds that suggest combat among indigenous tribes long before the first Spaniards arrived. Conflict continued between the Chumash and Spaniards until the last of the Chumash left Santa Cruz Island in 1822, shortly after Mexico's independence from Spain.

In 1839, Mexico granted all of Santa Cruz Island to Andrés Castillero, as a reward for having twice brokered peace between the Mexican government and the Californios from Monterey after the latter proclaimed the province of Alta California to be a sovereign state. The Treaty of Guadalupe Hidalgo, ending the



Chapel built in 1891 by Ambrose Gherini

Mexican-American War in 1848, left questions about land ownership in California. Congress required claims of California land under Spanish or Mexican title to be confirmed by the newly created Land Commission. The Commission upheld Castillero's title to Santa Cruz Island in 1855. The federal government appealed the decision to the Supreme Court, unsuccessfully, in *United States v. Castillero*, 64 U.S. 464 (1860). (That was not the last claim made to ownership of the entire island. In 1984, Chumash natives asserted they they held "aboriginal title" superior to the land grant. The Ninth Circuit rejected the claim on the basis that the Chumash had failed to present a claim to the Land Commission in the 1850s. See *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 644 (9th Cir. 1986).)

In 1857, Castillero sold the island, which by then was largely devoted to sheep ranching. A few years later, it ended up in the hands of San Francisco investors who incorporated as the Santa Cruz Island Company. One of them, Justinian Caire, was author Gherini's great-great-grandfather. When the other shareholders encountered business setbacks, Caire acquired their interests in the corporation. Under his management, in addition to wool, the island produced wheat, corn, potatoes, beans, barley, hay, alfalfa, tree fruit, olive oil, and wine. It was Caire's kingdom. "'[N]othing was done, changed, or performed in the least detail without his wish," Gherini relates.

Caire wanted his six children to share equally in the island after his death, but – for reasons Gherini does not fully explain – Caire's widow excluded two married daughters, Amelie Caire Rossi and Aglae Caire Capuccio, from ownership or control. These circumstances set off twenty years of litigation over ownership of the island, handled by Yale Law School graduate Ambrose Gherini, who had married Amelie's daughter, Marie.

Over the course of sixteen years, the California Supreme Court heard five Caire family cases on the merits. The first set dealt with issues involving the cor-

porate ownership of the island. As a result of this litigation, the corporate charter was forfeited, a right to an accounting was established, and the corporation's assets were ordered distributed. A second set of cases involved partition of the land. A motivation all too familiar to today's bench and bar stoked the conflict: According to Ambrose Gherini, opposing counsel blustered that "his clients would rather pay their attorneys" than the Rossi and Capuccio families. No surprise, then, the issue of attorneys' fees also came before the California Supreme Court, twice.

The island was divided into seven parcels, with the two at the eastern end going to the Rossis and Capuccios (and Ambrose Gherini receiving a fractional interest as payment of his contingent fee). Justinian Caire's widow and his other four children received the other five original parcels, which constituted about ninety percent of the island.

Ambrose's wife, Marie Rossi Gherini, eventually acquired the balance of the Rossi and Capuccio interests. The Gherini family ended up owning the eastern end of the island when Ambrose Gherini settled a quiet title action brought by the heirs of his co-counsel and Aglae Caire Capuccio sold her interest to her sister Amelie's children, including Marie Gherini. The Gherinis continued sheep ranching for seventy years, flirted with the idea of residential development until Coastal Commission restrictions made it unfeasible, and finally sold their interests to the National Park Service. In 1937, the other owners sold their interest to Edward L. Stanton of Los Angeles. After even more discord and litigation among the Stanton family, the Nature Conservancy purchased part of the Stantons' nine-tenths of Santa Cruz Island and acquired the remaining portion upon Dr. Carey Stanton's death in 1987.

The possibility of creating a Channel Islands National Park was explored as early as 1933, and the environmental movement of the 1970s rekindled interest. Francis Gherini, one of Ambrose's children and the author's uncle, invoked his personal friendship with former California Supreme Court Justice William P. Clark, Jr., then serving as President Reagan's Secretary of the Interior, to try to speed acquisition of the Gherinis' parcels by the National Park Service. It was not until 1989, however, following the death of Ambrose's other son, Pier Gherini, that the Park Service began purchasing the Gherini parcels. After many years of complicated negotiations (and, of course, more lawsuits), the National Park Service now owns one quarter of Santa Cruz Island and the Nature Conservancy the other seventy-five percent.

John Gherini, who sacked many tons of wool during weekends and summers on the island, used a treasure trove of family memorabilia, private correspondence, contemporaneous newspaper accounts, and scholarly literature to write in exhaustive detail about the history, geneology, ranching and agriculture, geography, weather, transportation and communications, and politics of the island. For more than thirty years, Pier Gherini kept notes of twice-daily radio transmissions to and from the island, filling thirteen notebooks with more than fifteen thousand entries logging the work and the workers on the island. John Gherini's law office shelves are lined with leather-bound Supreme Court reporters back to 1 Cal., bearing Ambrose Gherini's name stamped in gold on the spine. The walls are decorated with island maps, paintings, and photographs.

Author Gherini also made extensive use of probate and litigation files and court transcripts. This book demonstrates how valuable case files can be as original historical documents, an important point at a time when lack of storage resources at courts around California are leading to the destruction of these files. For example, Gherini found the inventory of personal property on the island on November 30, 1911, in the appellate briefs of the accounting case.

Gherini's thorough documentation of every fact gives *Santa Cruz Island* unique credibility, although the book's wealth of detail leaves the reader craving additional context and analysis. Over a pleasant Santa Barbara lunch, Gherini told me that the hardest aspect of writing the book was knowing when to stop researching and how to contain the details. He has many unwritten stories of Santa Cruz Island left to tell. Meanwhile, this history of conflict and diversity is a fascinating study about Southern California that raises yet another question for every answer it provides.

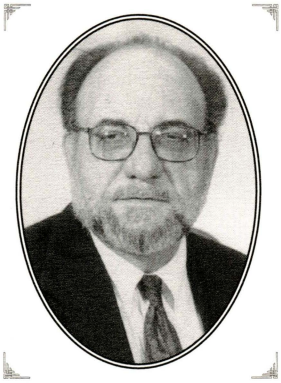
Gherini, John, *Santa Cruz Island: A History of Conflict and Diversity.* Spokane: Arthur H. Clark Company, third printing, 2005, 271 pages.

Wendy Lascher is an appellate lawyer in Ventura. Her only prior knowledge about Santa Cruz Island stems from her involvement in the trial and appeal of People v. Roehler, *167 Cal.App.3d 353 (1985).*

MARSHALL B. GROSSMAN was elected chairman of the State of California Commission on Judicial Performance in March, 2005. He was named an attorney member of the Commission in April 2001 by Governor Gray Davis, was elected vice chairman in 2004, and was appointed to a new term by Governor Arnold Schwarzenegger in early 2005. Grossman, a name partner of Alschuler Grossman Stein & Kahan LLP, has been listed as among the "100 Most Influential Lawyers" in California by the *Daily Journal* for several years running.

MARVIN BURNS writes that, in June, 2005, "I received a 'Recognition' from the California Supreme Court and the State Bar of California 'for fifty years of service as a member of the State Bar of California,' of which I am justifiably proud and appreciative." Congratulations on reaching this milestone, Marvin!

CSCHS Advisory Board member MARGARET LEVY reports that she was elected to the Board of Directors of the Los Angeles County Bar Foundation effective July 1, 2005.

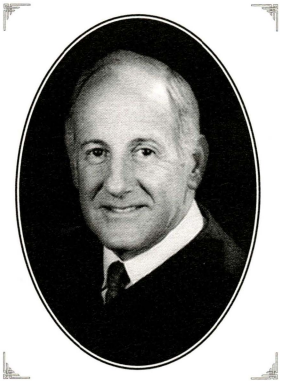


On July 29, 2005, RICHARD IAMELE retired after twenty-five years as Director of the Los Angeles County Law Library. Iamele joined the law library in 1971 and was appointed Librarian (the former title for the position) in 1980. During his time as Director, Iamele saw the library through the adoption of new technologies and worked tirelessly to maintain LACLL's financial stability. His plans for retirement include traveling, especially back to South Bend for Notre Dame football games. The CSCHS salutes Richard for his dedicated service to the bench, bar, and general public of Los Angeles County.

HON. ADORALIDA PADILLA, Administrative Law Judge for the State of California, has been elected to two positions: Vice President of the California Conference of Workers' Compensation Judges, and Treasurer of the State Bar of California's Workers' Compensation Executive Committee. Off the bench, Judge Padilla is an accomplished fiction writer. Her short story, entitled "Guardian Angel," can be found in the collection *Open My Eyes, Open My Soul,* created by Yolanda King (eldest daughter of Martin Luther King, Jr.) and Elodia Tate and published by McGraw Hill. The story is about an adventure Judge Padilla had while on an extended trip to Turkey in 1998.

CSCHS Board of Directors member ERIC JOSS, of the law firm Paul, Hastings, Janofsky and Walker LLP, has been elected as a Fellow of the College of Labor and Employment Lawyers. Selection for this professional honor requires nomination by College members outside one's own firm, references and evaluations from other members of the bar and the judiciary, and screening by a credentials committee in each circuit which makes selection recommendations to a national Board of Governors which votes on new members. Joss was inducted in August, 2005, at a ceremony in Chicago.

CSCHS Board of Directors member TOM MCDERMOTT announces the opening of a new law firm in Indian Wells, in the greater Palm Springs area. McDermott & DeLateur specializes in trial work, appeals, and real estate and land use matters.



The CSCHS extends hearty congratulations to HON. RONALD M. GEORGE, who celebrated his tenth anniversary as California's Chief Justice on May 1, 2006. During his tenure, Chief Justice George has made access to justice for Californians a priority, leading an eight-year effort to rewrite jury instructions, and overseeing both the unification of the municipal and superior courts and the move from county to state responsibility for funding courts and managing court facilities. The Chief Justice has served on the California bench for thirty-four years, as an appointee of four governors, Reagan, Brown, Deukmejian, and Wilson.

CSCHS Treasurer OPHELIA BASGAL was named to the newly established position of Pacific Gas and Electric Company Vice President, Civic Partnership and Community Initiatives in September, 2005. Basgal is a nationally recognized expert on housing and community development issues, having served for twenty-seven years as Executive Director of the Alameda County Housing Authority. In her new position, she is

responsible for managing PG&E's charitable contributions program, external relations, and partnerships with community-based organizations.

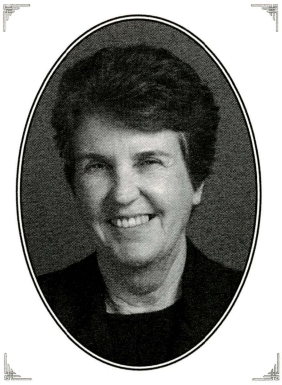
CHARLES LAWRENCE SWEZEY is a recipient of the inaugural 2005 Spirit of CEB Award, bestowed at the Annual Meeting of the State Bar in San Diego in October, for his contributions in the area of workers' compensation law. The Spirit of CEB Awards honor attorneys, motivated by a desire to serve the profession and a love of teaching, who have volunteered their time to author CEB legal publications and/or serve as speakers at CEB's MCLE programs.

On February 28, 2006, former CSCHS president (and present Board of Directors member) KENT RICHLAND argued *Marshall v. Marshall* in the United States Supreme Court on behalf of his client, Anna Nicole Smith. On May 1st, the Court issued a unanimous opinion in Ms. Smith's favor. The case raised the issue of the scope of the "probate exception" to federal jurisdiction – a limitation that Justice Ginsburg described in her majority opinion as "stemming in large measure from misty understandings of English legal history."

Whittier Law School Professor PETER REICH has contracted with Carolina Academic Press to produce *The Law of the U.S.-Mexico Border: Cases and Materials*, which will be the first casebook covering transnational legal issues in the border region. In March, 2006, Reich presented the paper "*Siete Partidas* in My Saddlebags: Spanish Legal Sources in Antebellum Louisiana and Texas" at the Louisiana Historical Association Annual Meeting, held in Lafayette, Louisiana.

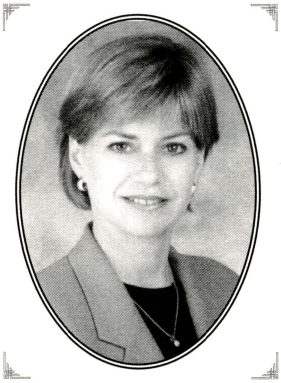
JUDGE WILLIAM BEVERLY writes, "My individual quest for the African American history of Los Angeles developed into Eighth & Wall Incorporated, a nonprofit corporation, in 2003. We have given presentations over the last three years to organizations including the Palos Verdes Library, the Torrance Center for Culture and the Arts, the Southwest Rotary, the Drug Enforcement Agency of the Department of Justice, the University of Southern California, and, most recently on April 15, 2006, the Southern California Library. Currently, we are conceptualizing a sixty-minute video presentation on the history of the African American bar in Los Angeles. More information about Eighth & Wall can be found at our website at *www.eighthandwall.org*."

Reaching quite a milestone, ED HOROWITZ writes, "I have filed a brief on my five-hundredth appellate case as lead counsel (as counted by the Board of Legal Specialization). After almost forty years of practice, I am wondering whether 'enough is enough'." Congratulations on keeping up such a pace, Ed!



The CSCHS congratulates Board of Directors member SUSAN WESTERBERG PRAGER on her appointment as Occidental College's thirteenth president. Taking office on July 1, 2006, Prager is the first woman to hold the post. She was the Arjay and Frances Fearing Miller Professor of Law at UCLA School of Law and served as the dean of the law school for sixteen years. While dean, Prager established the school's first major gifts program, which made possible construction of a dramatic new library.

PASSINGS



The California Supreme Court Historical Society is saddened to inform members of the passing of former Board of Directors member MARCELLE (MARCIE) MIHAILA on July 11, 2005. Mihaila was a partner at DLA Piper Rudnick Gray Cary in the firm's Seattle office, where she specialized in civil writs and appeals. As chairwoman of the litigation department of what was then Gray Cary Ware & Freidenrich, she helped lead a three-way merger of firms in January, 2005. Mihaila was a selfless mentor, especially to women. She was a recipient of a YWCA Tribute to Women in Industry Award and was named among the "Top 20 Lawyers Under 40 to Watch" by *California Law Business.*

The CSCHS is also saddened to report the passing of its former Executive Director, JAMES E. PFEIFFER, on January 14, 2006. Pfeiffer, who served the Society from 1997 to 2000, was founding Executive Director of the Foundation of the State Bar of California for thirteen years until his retirement in 2003. While with the Bar Foundation, he helped to create a variety of programs to educate young people about the legal system, including Peer Courts for first-time youthful offenders, pamphlets entitled "Kids in the Law" and "When You're Over 18," and the Legal Heritage Institute for high school students. At the Society, Pfeiffer oversaw the publication of *California Court Houses*, a pictorial edited by Barbara George.

Athens by the Sea

Continued from page 3

justices bolted into Presiding Justice Stone's chambers to express their displeasure with the draft, vowing to write a new opinion upholding the rights of the homeless to vote.

It was not the first time that Justice Stone had been suddenly confronted while at his desk. The previous year, an emotionally charged woman barged unannounced into his chambers to complain about her dependency case, pending in the Superior Court. Stone patiently listened to her for an hour and she left firm in the belief that she had thoroughly aired her grievances.

Steven Stone clearly knew what it was to be down and out. His family had fled Austria with barely the shirts on their backs shortly after the country was annexed by Nazi Germany. The penniless refugees settled in Stockton. After graduation from Hastings Law School, Stone set up practice in the town of Santa Paula in Ventura County. He was appointed by Governor Jerry Brown first to the Superior Court and then to the Court of Appeal.

Stone was smart, capable, and, most important, compassionate. Early on as an appellate judge, he had shown his concern that the all-powerful state would interfere with the basic human right of family integrity in *In re Cheryl E.*, 161 Cal.App.3d 587, 606 (1984) ("we cannot encourage, under the guise of 'best interests' or 'home stability', the arbitrary determination by a governmental agent that a well-educated 'professional' couple will be better parents than 'red-necked hillbillies'"). Later, he would afford patients who sought psychotherapy the privilege to be free from the prying eyes of the state in *Scull v. Superior Court*, 206 Cal.App.3d 784 (1988). Justice Stone admitted he hadn't yet read the proposed Fig Tree opinion, much less indicated to his attorney how he wanted to rule. He too was horrified with the draft. The proposed opinion was revised and the court ordered the county clerk to allow the homeless citizens the right to vote.

Soon another tough case dealing with fundamental rights of the homeless came to the court, with Justice Abbe now assigned as lead judge. Gloria Fiore, the justice's experienced and talented secretary, winced as she typed draft after draft while the court labored at producing a reasoned opinion. She had previously worked for the highly regarded Justice Otto Kaus – who usually got his cases right with a single draft. When Kaus was elevated to the California Supreme Court in 1981, Fiore decided to remain in Southern California and moved to Ventura with Division Six. A tireless worker, she somehow found spare time to tend to the court's cranky Wang computers and also acted as librarian for a couple of years.

In *Hansen v. Social Services*, 193 Cal.App.3d 283 (1987), the court determined to adopt a broad reading of state welfare law in order to rule that homeless families were entitled to receive public assistance that would keep their children out of foster care. Asserting that "our society can ill-afford to ignore the alarming plight of our homeless population," the court quoted from the Supreme Court case of *Cooper v. Swoap*, 11 Cal.3d 856, 872-873 (1984), in concluding that "'an administration of the welfare program that discards statutory mandate to reduce relief to the indigent young cannot be sustained. A society that sacrifices the health and well-being of its young upon the false altar of economy endangers its own future, and, indeed, its own survival'." *Hansen*, 193 Cal.App.3d at 298

The court's decision came to rely upon data establishing that a significant number of the homeless population included children. However, initially the only study on homeless children that could be found focused on Russia and was published in the Soviet newspaper *Pravda*. This, quite obviously, would not suffice. The court sought assistance from Marty Zacks, its newly hired librarian, to find more relevant data.

The resourceful and daring Zacks, who often doubled as a staff attorney for visiting Superior Court judges sitting pro tem in Division Six, discovered a recent United States Conference of Mayors study revealing that twenty-eight percent of the homeless were families with children. "By far, the most significant change in the cities' homeless population has been in the number of families with children, with four out of five of the survey cities reporting that the number of families seeking emergency shelter has grown. In seventy-two percent of the cities, families comprise the largest group for whom emergency shelter and other needed services are particularly lacking." *The Continued Growth of Hunger, Homelessness, and Poverty in America's Cities*, 2 (1986). This information was promptly added to the opinion, thereby requiring Gloria Fiore to type yet another draft!

Mornings on Bicycles

For the first eleven years of its existence, Division Six lacked a permanent courtroom. The court would sit wherever it could secure a vacant facility, leading staff attorney Kent Kellegrew, later Judge Kellegrew, to refer to the division as "appeals on wheels."

The "wheels" were often those of bicycles. On the first Wednesday of the month, Division Six often held oral argument in the chambers of the Santa Barbara County Board of Supervisors. The next morning, the three justices, having spent the night in Santa Barbara

at Richard Abbe's home, would meet with a few of the court's attorneys and return on bicycles to their chambers in Ventura. These morning bike rides were not intended just to exercise the body, breathe fresh air, dodge cars, and whale watch. Along the way justices and staff vigorously discussed the multifaceted cases that had been argued on the preceding day, and sometimes more.

Even cases that had already been resolved by the court could provide fodder for debate, including, most memorably, *Nollan v. California Coastal Commission*, 177 Cal.App.3d 719 (1986). In *Nollan*, the justices held that the Coastal Commission properly conditioned the issuance of a residential building permit upon the Nollans agreeing to public coastal access. "Here the Nollans' project has not created the need for access to the tidelands fronting their property but it is a small project among many others which together limit public access to the tidelands and beaches of the state and, therefore, collectively create a need for public access." *Id.* at 724.

It was on one overcast fall morning in 1985, a few weeks after the *Nollan* decision had been filed, that the bicyclists stopped near some beach houses situated across the old state highway from the lonely Southern Pacific Railroad siding at Sea Cliff. The group gazed upon the solid line of buildings that for many years had prevented public access to the shoreline. Although the court no longer had jurisdiction over the case, the justices got into a heated discussion all of the way into Ventura about whether it was proper for the authorities to require the Nollans to provide public beach access in exchange for permission to replace their one-bedroom cottage with a two-story, three-bedroom residence.

Not long after, California's high court denied review of the case, but the U. S. Supreme Court, in a 5-4 decision, would reverse Division Six a year later. Justice Stevens, in dissent, pointed out that *Nollan* was a close case and "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of [the United States Supreme Court's] takings jurisprudence." *Nollan v. California Coastal Commission*, 483 U.S. 825, 866 (1987).

Small Towns, Big Cases

In 1985, the court found some extra funds to hire an additional attorney, who would be assigned to work on cases that were particularly time-consuming – usually those arriving with a generous number of doghouses. Jonathan Weg, a refugee from the San Bernardino Office of County Counsel, capably filled the post.

In *Gonzales v. Superior Court*, 180 Cal.App.3d 1116 (1986), Jonathan and Justice Abbe confronted a Santa Paula ordinance that banned temporary noncommercial signs announcing or pertaining to specific events (e.g., an election) but allowed permanent signs and various commercial signs. Ray Gonzales, a local gadfly and the primary target of the ordinance, affixed four placards critical of city government and the mayor to his worn pick-up. He legally parked the truck in front of Quince Letras, a popular local restaurant. When the city confiscated his signs, Gonzales sought a writ of mandamus directing the lower court to enjoin enforcement of the prohibition. Justice Abbe granted the petition, declaring the sign ordinance to be unconstitutional on its face as it was both a prior restraint and overbroad.

Justices and staff returning from oral argument in Santa Barbara

Just around the corner from where Ray Gonzales routinely parked his truck was the dingy Okie Bar. One evening, Marshall Moss, having consumed one too many at this saloon, was stopped by the police and charged with drunk driving, driving without a license, and violation of probation. In April, 1983, he appeared in pro per to plead guilty to the charges and violation of probation. As the judge was taking the waiver of Moss' constitutional rights, a man walked into the courtroom to deliver flowers to the clerk, and proceedings were momentarily halted. The court lost track of giving a proper advisement of rights, resulting in an incomplete waiver. Nonetheless, Moss was found guilty on misdemeanor charges and given the rather harsh sentence of five consecutive one-year terms in jail.

With the procedural irregularity perhaps providing a way around this sentence, Moss sought a writ from Division Six on the basis that the waiver was void. Justice Gilbert agreed and set aside Moss' convictions. Observing that the trial court had become distracted by the delivery of flowers and quoting his namesake Sir William S. Gilbert's *Mikado*, he noted that the disruptive delivery of "flowers [that bloom in the spring]. . . had nothing to do with the case." *In re Moss*, 175 Cal.App.3d 913, 920, fn. 2 (1985).

A Dash of Humor: "They don't blame you – as long as you're funny!"

W.S. Gilbert, *Yeoman of The Guard* (act II)

Over the ensuing years other bits of humor appeared in Division Six opinions. Agreeing with the trial court's dismissal of a lawsuit over the results of a spelling bee, the court, per Justice Gilbert, penned: "As for the judgment of the trial court, we'll spell it out. A-F-I-R-M-E-D". *McDonald v. John P. Scripps Newspaper*, 210 Cal.App.3d 100, 107 (1989). *People v. Holt*, 226 Cal.App.3d 962 (1991), involved the interpretation of Penal Code section 786, a poorly worded statute that Justice Gilbert declared reflected not just "a disregard for careful drafting" but more largely "contempt for the English language." *Id.* at 965.

Justice Gilbert found another opportunity to inject some pointed humor, in *Omaha v. Superior Court*, 209 Cal.App.3d 1266 (1989), a case that came to the court on a petition for a writ of mandate. Petitions for writs are the illegitimate children of appellate courts. Unlike pedigree appeals, writ petitions are not assigned to a judicial chamber, but are footloose and stacked in the office of the court's writ attorney, to await a hearing at the appellate panel's weekly conference. More than ninety percent are summarily denied. By common practice in the California Court of Appeal, the order of denial does not usually state a reason. However, in the early years of Division Six, the justices, being unaware of this orthodox dogma and believing that the parties were entitled to an explanation, ofttimes included a paragraph or two of the court's reasoning in its denials. The court also often used writs as vehicles for many of its significant decisions.

At first, the petition in *Omaha*, which arose out of the trial court's refusal to grant petitioner's motion to sever, was denied. However, the petitioner sought review of the court's decision, and the Supreme Court chanced to remand the petition. Tackling the case anew, Justice Gilbert undertook a comprehensive study of writ relief in California. In a lengthy opinion, he sifted through several California Supreme Court cases on the subject and concluded, after reading the airy persiflage, that it was far "easier to comprehend a 'washing bill in Babylonic cuneiform'" than it was to extract the *raison d'etre* of these sundry writ cases. *Id.* at 1272. Nevertheless, Justice Gilbert dutifully obeyed the Supreme Court's edict and ordered writ relief be granted to petitioner.

Deputy Clerk Ron Albiston, having moved from staid Division Three to Division Six in Fall 1983, sensed the humor and chuckled as he sat back in his catbird seat after filing Gilbert's *bon mot*. The jest was not lost on the late Justice Thomas Crosby of the Fourth District, who, in a dissent in *Patrick v. Superior Court*, 27 Cal.Rptr. 883 (1994), candidly observed of the opinion in *Omaha*, "Justice Gilbert went to the trouble to pen a primer on writ practice, ostensibly for the benefit of the Bar; but it was probably also aimed at the Supreme Court legal staffers and externs. If that was the idea, it was apparently lost on the latter audience." *Id.* at 891. No surprise, the *Patrick* opinion was later ordered depublished by the Supreme Court.

Is There Competent & Willing Counsel in the House?

From its inception, Division Six was sensitive to the need for indigents, having the right to appointment of counsel, to be guaranteed competent services. The matter first came to the court's attention in cases dealing with criminal appellate matters. See, e.g., *Erwin v. Superior Court*, 146 Cal.App.3d 715, 719 (1983) (public defender programs were created in response to the often shoddy quality of legal services donated to indigent criminal defendants).

A few years later, the issue of appointment of counsel in civil cases arose in *Cunningham v. Superior Court*, 177 Cal.App.3d 336 (1986). An attorney had been held in contempt for refusing to serve pro bono as counsel for a defendant in a paternity case. Division Six issued a writ of certiorari compelling the trial court to vacate its orders of appointment and contempt. In doing so it recognized that, while assisting the poor is a legitimate state function, "this goal cannot be accomplished at the expense of one particular group of people (i.e., civil trial attorneys in private practice). It is a denial of equal protection when the government seeks to charge the cost of operation of a state function, conducted for the benefit of the public, to a particular class of persons. ... An attorney who is appointed to represent an indigent without compensation is effectively forced to give away a portion of his property – his livelihood. Other professionals, merchants, artisans, and state licensees are not similarly required to donate services and goods to the poor." *Id.* at 348.

They Went Thataway

Late in 1990, the heady, early days of Division Six began to come to a close. At the end of November, Justice Abbe slipped down the back stairway and mailed his resignation. Almost four years later the court moved to more appropriate chambers, which included a courtroom, and the growing number of appellate filings led to holding calendar twice a month. New justices have since arrived and, of the original cast, only Presiding Justice Gilbert remains.

It was once said by a Division Six wag that the Administrative Office of the Courts (AOC) had a problem for every solution. Indeed, a leitmotif of the

court's early years was to pay little heed to efforts to supplant the court's unique informal manner with decorous process. However, with personnel changes and an increasing caseload, system-wide procedures found their way in, and autonomy gave way to AOC influence over the court's resources. Meanwhile, cameo appearances by Gilbert and Sullivan, Will Rogers, Lewis Carroll, Mark Twain, Satchel Paige, William Shakespeare, and the like in the court's opinions became rare. Although the division continues to conduct business more informally than most, much of the innocence and independence that marked those early years has faded. *Sic transit gloria.*

Will Gorenfeld graduated from Loyola University School of Law in 1969. From 1970 through 1981, he worked in various poverty law programs. Joining the Court of Appeal in 1981, he served Division Six as a writ attorney, retiring in December, 2005. At present, he handles indigent appeals and pens articles on the Mexican-American War.

A Short, Biased History

Continued from page 1

power. Mr. Ventura, Steven Perren, was appointed to the division at the same time, solidifying our informal character. Walk down any street with him and every passerby will offer a greeting, while he in turn inquires about their health, family, and views on the weather.

Our caseload varies year to year, but on average each justice produces about one hundred and fifty opinions annually. For cases where we are not the lead justice, we must also review the briefs and records, and our colleagues' opinions, which is like reading *War and Peace* every day. Unfortunately, the similarity is in the number of pages, not the content.

We welcome you to visit us at Division Six ... the think tank with the tank tops!

An earlier version of this article appeared in the Ventura County Bar Journal *and is reprinted with permission.*

Arthur Gilbert is the Presiding Justice of District Six. Prior to his appointment to the Court of Appeal, Justice Gilbert served on the Los Angeles Municipal and Superior Courts.

A Wistful Farewell

Continued from page 4

Court of Appeal Justices James Marchiano and Arthur Gilbert, and research attorneys Levin and Will Gorenfeld, for providing inside views into the history of the districts and divisions. I encourage the Society to extend this series until all six districts are featured.

Finally, sincere gratitude goes to someone whose name appears nowhere in our issues but whose imprint is pervasive: our talented designer, Christopher Kahl. Christopher has established the elegant, historic look of the newsletter, and has demonstrated an unparalleled dedication to the Society and its mission. In a testament to the Internet Age, over the years Christopher and I have conducted all of our business by computer, fax, and phone. Perhaps now that a newsletter deadline does not loom, we'll have time to meet in person!

I have also enjoyed creating educational programs for the state bar's annual meeting. Our aim has been to choose timely topics where history can inform current debate. To that end, our panels have addressed the use of historians as expert witnesses, California courthouses, WWII reparations cases, civil liberties during wartime, and the First Amendment religion clauses. Our members and directors have given generously of their time in this venue as well: our speakers have included Gordon Bakken, Bill Keller, Peter Reich, and Ray McDevitt. Over the years, the CSCHS's programs developed a reputation for high quality and engaging discussion, drawing large audiences and kudos for being the best of the convention.

Our most recent program, "Religion and the State: Evolution of the First Amendment," was held at the annual state bar meeting in San Diego in October, 2005. The panel was chaired by Alan J. Reinach, an attorney with the Pacific Union Conference of Seventh-day Adventists, who contextualized the subject and moderated an incredibly lively question and answer period. Our panelists were Leigh Johnsen, who holds a doctorate in American history and specializes in colonial and early national Baptist history; Carolyn N. Long, a political scientist at Washington State University who has written extensively on twentieth-century free exercise cases; and Steven D. Smith, the Warren Distinguished Professor of Law at the University of San Diego School of Law, who spoke on the future direction of the Supreme Court with regard to establishment clause cases. The program was well-attended and well-received, with audience members commenting that the panel was "brilliant and well-selected," leading to an "absolutely superb presentation." The Society followed this program with a reception, and we thank the Chief Justice, along with Justice Moreno and former Justice Cruz Reynoso, for joining us.

Thank you again for the opportunity to serve the members of the California Supreme Court Historical Society.

MEMBERSHIP DONORS 2005

Benefactor Level
$2500 and up

Estate of Bernard Witkin
San Diego County Bar Association

Founder Level
$1000 to $2499

Alschuler, Grossman, Stein & Kahan LLP
Joseph W. Cotchett, Esq.
John Donovan, Esq.
Jerome Falk, Esq.

Sponsor Level
$500 to $749

Thomas V. Girardi, Esq.
Kathryn E. Karcher, Esq.
Stanton J. Price, Esq.
Kent L. Richland, Esq.
SBC Foundation
James Shekoyan, Esq.
Charles L. Swezey, Esq.
Hon. Howard B. Wiener, Ret.
Douglas R. Young, Esq.

Grantor Level
$250 to $499

Frederick D. Baker, Esq.
Prof. Gordon Morris Bakken
Theodore J. Boutrous, Esq.
James Brosnahan, Esq.
Michael Case, Esq.
Vicki De Goff, Esq.
Hon. George M. Dell, Ret.
Feris M. Greenberger, Esq.
Hon. Quentin L Kopp, Ret.
Hon. Elwood Lui
Bruce E. Maclin, Esq.
Thomas J. McDermott, Esq.
Ray E. McDevitt, Esq.
Mr. David L. McFadden
Joel F. McIntyre, Esq.
Mrs. Kaygey Kash Mosk
David L. Mulliken, Esq.
Prof. Susan W. Prager
Hon. Charles B. Renfrew
Edward S. Renwick, Esq.
Francis O. Scarpulla, Esq.
Kimberly Stewart, Esq.
Robert F. Tardiff, Esq.
Robert S. Warren, Esq.
Hon. Robert O. Young, Ret.
Diane C. Yu, Esq.

Sustaining Level
$100 to $250

Hon. John A. Arguelles, Ret.
Hon. Orville A. Armstrong
Ms. Ophelia Basgal
Hon. Marvin R. Baxter
Charles A. Bird, Esq.
Ms. Odessa J. Broussard
Hon. Nancy Brown
Richard Carpenter, Esq.
Hon. Ming Chin
Richard R. Clements, Esq.
Joyce Cook, Esq.
Alan J. Crivaro, Esq.
Richard D. DeLuce, Esq.
Paul J. Dubow, Esq.
Elizabeth K. Eagleson, Esq.
Hon. Mark L. Eaton, Ret.
Todd Elliott, Esq.
Hon. Norman L. Epstein
Jack I. Esensten, Esq.
Donald M. Falk, Esq.
Nancy L. Fineman, Esq.
Dennis A. Fischer, Esq.
Hon. Ronald M. George
Hon. Larry J. Goodman
Hon. Ronald L. Grey
Daniel Grunfeld, Esq.
John Hanft, Esq.
Hon. Joseph B. Harvey, Ret.
Kay D. Holley, Esq.
Edward J. Horowitz, Esq.
Robert Hughes, Esq.
Robert K. Johnson, Esq.
Eric H. Joss, Esq.
William H. Keller, Esq.
Donald E. Kelley, Esq.
Hon. Joyce Kennard
John T. Knox, Esq.
Kenneth Kofman, Esq.
Theodore A. Kolb, Esq.
Levin, Esq.
Hon. James Marchiano
Marc Marmaro, Esq.
Hon. William McKinstry
Harold O. McNeil, Esq.
Grover D. Merritt, Esq.
Dale Minami, Esq.
Leslie M. Mitchell, Esq.
Alexander R. Moore, Esq.
Hon. Richard M. Mosk
Hon. Leslie Nichols
Kevin O'Connell, Esq.
Mr. Frederick K. Ohlrich
Thomas M. Peterson, Esq.
Norman H. Pine, Esq.
Forrest Plant, Esq.
John M. Powers, Esq.
Hon. Elwood Rich
Jacob T. Risner, Esq.
James N. Roethe, Esq.
Harvey Saferstein, Esq.
Hon. Ramona G. See
Paul M. Shimoff, Esq.
Selma Moidel Smith, Esq.
Hon. Ronald Stovitz
Gerald L. Tahajian, Esq.
John D. Taylor, Esq.
Sandra F. Wagner, Esq.
Hon. Madge Watai
Howard K. Watkins, Esq.
Roy G. Weatherup, Esq.
Michael J. Weaver, Esq.
Hon. Kathryn Werdegar
Robert H. Zeller, Esq.

Judicial Level
$50 to $99

Hon. Herbert Adden
Hon. Robert P. Aguilar, Ret.
S.R. Ambrose, Esq.
Dennis S. Avery, Esq.
Hon. Paul A. Bacigalupo
Hon. Patricia Bamattre-Manoukian
Hon. Edwin F. Beach
Ms. Marcia R. Bell
Hon. Anthony P. Bellante, Ret.
Peter J. Belton, Esq.
Hon. Gail B. Bereola
Hon. Elihu M. Berle
Hon. and Mrs. William Beverly, Jr.
Hon. Arthur S. Block, Ret.
Richard E. Booker, Esq.
Elayne Breslaw, Esq.
Hon. Carol S. Brosnahan
Keith A. Broussard, Esq.
Hon. Gerard S. Brown
Felicita T. Butler, Esq.
Hon. Zel Canter
Eduardo A. Carvajal, Esq.
Mr. Joaquin Clay
Owen J. Clements, Esq.
Harold Cohen, Esq.
Guy B. Colburn, Esq.
Hon. J. Hilary Cook
Hon. Lee E. Cooper, Jr., Ret.
Hon. Lawrence Crispo, Ret.
Gerald F. Crump, Esq.
Jake Dear, Esq.
Frank Domenichini, Esq.
Keith A. Ducote, Esq.
Robert L. Fletcher, Esq.
Jonathan L. Frank, Esq.
Ms. Nanna Frye
Ms. Tracey E. George
Hon. Jack Goertzen, Ret.
Melvin Goldman, Esq.
Hon. Allan J. Goodman
Edward W. Goodson, Esq.
Arthur W. Gray, Esq.
Hon. William C. Harrison
Alan H. Hedegard, Esq.
Hon. E. Patricia Herron, Ret.
Hon. Francis Hourigan
Hon. Steven J. Howell
Richard Iamele, Esq.
Hon. Joan K. Irion
Hon. Thomas M. Jenkins, Ret.
Hon. Michael Johnson
Fran Jones, Esq.
Hon. Haig Kehiayan
Webster Kinnaird, Esq.
Daniel M. Kolkey, Esq.
Hon. Marlene A. Kristovich
Germaine K. LaBerge, Esq.
Kenneth W. Larson, Esq.
Ms. Clara Lim
Nancy E. Lofdahl, Esq.
Jordan D. Luttrell, Esq.
Hon. Christian E. Markey, Jr., Ret.
Daniel W. Martin, Esq.
James Martin, Esq.
Hon. Richard J. McAdams
Prof. Charles McClain
Paul L. McKaskle, Esq.
Frederick N. Merkin, Esq.
Hon. John J. Merrick, Ret.
Hon. Carlos Moreno
Hon. Wendell Mortimer, Jr.
Mr. Daniel T. Munoz
Anthony Murray, Esq.
Hon. Robert H. O'Brien, Ret.
Hon. Robert F. O'Neill
Hon. Adoralida Padilla
Hon. Edward A. Panelli, Ret.
Pepperdine Law Library
Hon. Daniel J. Pratt
Morgan Prickett, Esq.
Patricia Smith Ramsey, Esq.
Peter Reich, Esq.
Wilford H. Ross, Esq.
Hon. Lawrence D. Rubin
Hon. Joel Rudof, Ret.
Jeremiah R. Scott, Esq.
Hon. Henry W. Shatford, Ret.
Walter T. Shatford, Esq.
Hon. Peter S. Smith, Ret.
John E. Sparks, Esq.
Jonathan B. Steiner, Esq.
Hon. Michael L. Stern
John V. Stevens, Esq.
Gregory P. Stone, Esq.
Hon. Paul Teilh
Hon. Mark Thomas, Jr.
Hon. John H. Tiernan
Hon. Brian R. Van Camp
Hon. John P. Vander Feer
Hon. Judith A. Vander Lans
George R. Walker, Esq.
Ms. Gayle E. Webb
Dr. Bradley Williams
Carrie R. Wilson, Esq.
Mrs. Alba Witkin
Robert S. Wolfe, Esq.
Rosalyn S. Zakheim, Esq.

The CSCHS apologizes to any member who may have been accidentally excluded or classified incorrectly.

The Laura Fair Affair

Continued from page 7

Dr. John Trask, who treated Laura for several months afterwards, reported that he had diagnosed her with "hysteria mania" as a result of irregular menstruation.

The defense then called its key witness, the accused herself. Laura testified that she suffered from periodic states of "semi-consciousness" after each menses, from which she would emerge remembering nothing. She also testified at length about her tortured relationship with Alexander Crittenden, declaring that, on the day of the shooting, she loved him deeply but only because she believed that he loved her too. Laura stated that the last thing she remembered before the shooting was the "disagreeable" sound of Clara Crittenden's voice. She then described having only shadowy memories until she awoke in prison. As for the pistol, Laura explained that she always carried one for self-protection, as directed by Crittenden himself.

To shape its case, the prosecution relied on a different Victorian stereotype of women. Lead prosecutor Henry Byrne set out to represent Laura Fair as an evil, over-sexed seductress who would stop at nothing to get what she wanted. This strategy relied on the widely-held notion that women were essentially sexual creatures whose desires were held in check only through religious and moral pressure. If these moral restraints were absent (as they must be, Byrne argued, in an independent, twice-divorced adulteress like Laura Fair), a woman could become dangerous.

The prosecution was presented with a number of opportunities to make this point. Cross-examining Dr. Trask, Byrne implied that Laura's medical condition, whatever it was, actually resulted from "excessive indulgence in sexual passion." Byrne also got Trask to admit that he had initially believed Laura was faking her symptoms.

Co-prosecutor Alexander Campbell cross-examined Laura, eliciting testimony of numerous incidents of violence in her past, including stabbing a coal man in the hand with a pair of scissors when he tried to enter her house to collect the bill. Campbell also repeatedly questioned Laura about her sources of income, implying at once that she was too interested in money and investments (a man's concern) and that she had been financially dependant on Crittenden.

When Alexander Crittenden's widow was called to the stand, the prosecution undoubtedly thought that Clara would appear as a sympathetic witness. However, her zeal to have Laura convicted made her somewhat less effective. She accused Laura of being a cold and calculating mistress who was so involved with men that she was incapable of having female friends, and she claimed that she would never have acquiesced in a divorce.

The prosecution then presented a string of witnesses, all men, who testified to Laura's reputation as being a loose woman, yet none of these witnesses could point to any specific acts.

In their closing arguments, the prosecutors attacked Laura Fair's character and her insanity defense. Alexander Campbell asserted that Crittenden had been blinded by his infatuation for Laura, and that he didn't see her for the gold-digging, calculating woman she was. He used several of the hundreds of love letters exchanged by Alexander and Laura to show how she was constantly scheming to get him away from his wife. More largely, connecting Fair to the woman suffragists who had come to her support, Campbell branded all of them free lovers whose actions endangered the home.

Byrne took two days to make his closing remarks, during which time Cook caught him repeatedly misstating the evidence. Nevertheless, one supporter concluded, Byrnes' speech was "argumentative, forcible, convincing." He quoted the Bible and Shakespeare, throwing in the chestnut "hell hath no fury like a woman scorned," and noted that Laura's gender had actually bought her special treatment in the courtroom, including a rocking chair, a lounge, and foot baths. Byrne warned the jury that if Laura's insanity defense were to be successful society would virtually crumble and finished by admonishing the men that any verdict other than guilty would be an insult to the intelligence of the age.

Quint's and Cook's closing arguments, sandwiched between those of Campbell and Byrne, also proved colorful. Cook began by asserting that women were more susceptible to insanity because of their relatively weaker minds, and then provided an alternate version of the relationship between Laura and Alexander, characterizing Crittenden as the aggressor who drove Laura to desperate acts through his broken promises and lies. Meanwhile, according to Cook, Laura's delayed menstruation caused blood to rush to her brain, pushing her to madness. Relying on the most fashionable explanation for female insanity, Cook concluded by reciting statistics of women in a nearby asylum, asserting that most had been committed due to mental illnesses brought on by reproductive system problems.

After a thirty-day trial, it took the jury only forty-five minutes to reach a verdict. On April 26, 1871, Laura Fair was found guilty of murder in the first degree. Laura's attorneys immediately made a motion for a new trial based on juror incompetence, which was denied. On June 3, 1871, Laura was sentenced to die by hanging less than two months later.

The Aftermath

Reaction to the verdict and subsequent death sentence was mixed. The *Chronicle* reported "satisfaction" upon the announcement of the verdict. However, noting that the jury had been sequestered during the month-long trial, the *Examiner* editorialized that the guilty verdict was the result of the wretched conditions under which the jury labored. The *New York Times*' prediction – that Fair would escape the gallows because, "in these times of persuasive mania and promiscuous affection," a jury would refuse to overlook any doubt regarding a woman's mental state in order to levy a sentence of death – proved inaccurate.

In July, 1871, just as Laura's attorneys succeeded in gaining a stay of execution, Susan B. Anthony and Elizabeth Cady Stanton arrived in San Francisco on a cross-country suffrage campaign. They joined local supporters in visiting Laura in jail, and both women commented upon the Fair case in speeches delivered over the next two days. Focusing on the all-male jury, Stanton repeated Pitts Stevens' complaint that Laura had been denied a trial by a jury of her peers. But it was Anthony's assertion, that situations like the Crittenden-Fair tragedy could be avoided if "all men" fulfilled their duty to protect "all women," that aroused such a furious reaction from her audience as to leave the noted suffragist quite shaken.

Cook and Quint appealed to the California Supreme Court on Laura Fair's behalf for a new trial, citing three instances of error. First, they argued that Laura should have been granted a new trial on the basis of juror incompetence, when it was discovered that one of the jurors had expressed an opinion as to her guilt prior to the trial and called for her execution. Second, the attorneys argued that prosecution evidence regarding Laura's chastity (or lack thereof) had been improperly admitted. Third, they contended that the defendant had been improperly denied her statutory right to have the final closing argument made by one of her attorneys rather than by the prosecution.

Due to the confluence of calendaring, the November election, and illness, only two out of a possible five justices of the Supreme Court took part in deciding the appeal: Associate Justices William Wallace, who would become Chief Justice upon Royal T. Sprague's death the following month, and Joseph Crockett, who by then was blind and having case materials read to him by family members.

Justice Wallace, writing the opinion, and Justice Crockett, providing a concurrence, were essentially of one mind regarding the outcome of the appeal. Relying on statutory analysis, the Court determined that juror incompetence was not an allowable ground for a new trial (overturning precedent in the process), but agreed with the appellant that the sequence of closing arguments had violated procedural requirements.

The admissibility of evidence to prove Laura's (lack of) chastity was a more complicated question, turning as it did on an intrinsic understanding of Laura's "novel" temporary insanity defense. Both the prosecution and defense agreed that Laura had not, in the traditional way, put her character generally at issue. Instead, the focus was on Laura's testimony that she became insane upon her realization that Alexander would not leave his wife to marry her.

According to the prosecution, the insanity was grounded in Laura's belief that her prospects for marriage (to another man) were now ruined because of her adulterous affair with Alexander. Thus, the prosecution argued, the character evidence had been admitted properly to rebut the implication that she actually believed that she had the possibility of marrying someone else. The defense claimed that the record did not support the prosecution's characterization of its case, and thus the evidence had been improperly admitted for no other purpose than to impugn Laura's reputation.

Justice Wallace's discussion of this issue was relatively restrained, lacking the gendered stereotypes that fueled Laura's trial. He was clear that Laura was on trial for murder, not for a violation against the norms of Victorian womanhood, and that a reputation for chastity was irrelevant to a murder charge. Justice Wallace demonstrated considerable deference to the presumption of good character to which the law entitled every criminal defendant, and noted that the prosecution's position, if accepted, would constitute the sort of exception that would eventually swallow the rule.

Justice Crockett was not in disagreement with his fellow jurist, but perhaps was concerned that Wallace's reasoning on the character evidence might be read too broadly, or that Laura did not deserve to get off so easily in print. Justice Crockett carefully explained that Laura's claim of insanity did not result from "a sense of shame or mortification occasioned by any damage to her good name," and that she did not "pretend" that her insanity resulted from a loss of a "previously good reputation." He wanted to be understood that, had the prosecution's characterization of Laura's defense been accurate, he would have found the evidence of lack of chastity to have been properly admitted.

On the basis of these two errors, the Supreme Court reversed the murder conviction and ordered a new trial.

The publicity surrounding the case made it extremely difficult to empanel a jury for the second trial. Laura's attorneys were unsuccessful in their effort

to gain a change of venue. Over four hundred potential jurors were summoned, and the official reporter noted that those eventually chosen were exceptionally unintelligent. In sharp contrast to the first trial, the second lasted only ten days (eight of which being devoted to jury selection). The jury deliberated for three days before returning a verdict on September 30, 1872, finding the defendant not guilty by reason of insanity. The general opinion in San Francisco was that the second trial had been a farce.

A change of attorneys may also have affected the outcome. Before the Supreme Court overturned the verdict, Elisha Cook died suddenly on December 31, 1871. His opponent, Henry Byrne, had already been succeeded in office by D.J. Murphy, who played a limited role in the appeal. Neither was Byrne available to advise on the retrial. He had suffered from a degenerative brain disease for a number of months, and passed away on March 1, 1872, before the new trial got underway. The two second chairs remained, Quint now leading the defense and Campbell assisting the new district attorney.

It is unclear whether Laura's status as a female defendant hurt her or helped her in the end. On the one hand, her rejection of the role of a proper Victorian woman seemed to override any benefit of the doubt a chivalrous jury might have given her on the insanity defense in the first trial. On the other hand, that the Supreme Court relied partially on a technicality to overturn the verdict suggests that the Court was not prepared to send a woman to the gallows. What was clear, however, was that Laura's case was handled by a legal system made up exclusively of men.

To win her freedom, Laura had amassed significant unpaid legal expenses, which spawned further litigation. With Cook deceased, his widow (left with nine children) brought suit against Laura seeking $10,000 for the services rendered by her husband. Laura, in turn, sued her mother for $16,000, allegedly held for her in trust.

Henry Byrne's estate became tied up in litigation as well. Ironically, it appeared that Mr. Byrne had engaged in his own marital irregularities, walking away from a marriage to an actress nearly twenty years earlier without ever securing a divorce. His wife resurfaced, filing suit demanding a share of Byrne's substantial estate, although the executor was able to end the dispute with a relatively small payoff.

After the trials, Laura Fair continued to reside in the Bay Area, despite a somewhat chilly reception by its citizens. Soon after being acquitted, she attempted to rent a lecture hall in San Francisco to present her side of the story, but, according to a newspaper report, there was "much indignation expressed at this woman's audacity." The proprietors of the hall refused her, so she was forced to give her speech in Sacramento. Entitled "A Wolf in the Fold," it was delivered to a small audience and later published. Her hopes that a lecture tour would allow her to earn enough money to support herself went unrealized. Laura Fair lived to the ripe old age of eighty-two, dying in 1919.

Because of the publicity surrounding the Laura Fair murder trial, the proceedings are particularly well-documented. "Believing that this report of the proceedings on the trial will prove worth the consideration not only of members of the Bar, . . . but also, to the public generally," court reporters Marsh and Osbourne published an official verbatim transcript of the first trial (see Official Report of the Trial of Laura D. Fair, for the Murder of Alex. P. Crittenden *(San Francisco, 1871)), which included a collection of love letters exchanged by Laura and Alexander that had been admitted into evidence. Laura Fair published her speech, "A Wolf in the Fold," in pamphlet form. Extensive reports of the trial can also be found in local and national newspapers of the time, including the San Francisco* Examiner, Chronicle, *and* Bulletin; The Pioneer; *and the* New York Times. *A modern treatment of the trial can be found in Kenneth Lamott,* Who Killed Mr. Crittenden? *(New York, 1963). In "Women Defenders in the West," 1* Univ.Nev.L.J. *1 (2001), Barbara Allen Babcock focuses on the Fair trial in her discussion of the role of women as spectators in the nineteenth-century western courtroom.*

The affair and trial spawned a number of fictional and dramatic treatments as well. Wasting little time, Mark Twain drew upon the trial for his book, The Gilded Age, *published in 1874, in which Fair was portrayed as the character Laura Hawkins. Alexander Crittenden was portrayed in Jerome Hart's* The Golconda Bonanza *(San Francisco, 1923). In modern times, broadcast media have also been attracted to the Fair trial, with a television drama airing in 1953 and a radio theatre production (with singer/actress Toni Tennille starring as Laura) airing in 1980. More recently, Karen Joy Fowler explored an alternate history in which Laura becomes a successful lecturer, in the short story "Game Night at the Fox and Goose" (in* Black Glass *(New York, 1998)).*

Information about the attorneys involved in the Fair case can be found in two works by Oscar T. Shuck: History of the Bench and Bar of California *(Los Angeles, 1901), and* Bench and Bar in California. History, Anecdotes, Reminiscences *(San Francisco, 1887) (focusing on Henry H. Byrnes' career). Information about Justices Wallace and Crockett can be found in J. Edward Johnson,* History of the Supreme Court Justices of California, 1850-1900 (vol. 1) *(San*

Francisco, 1963). The Supreme Court decision is reported at People v. Laura D. Fair, *43 Cal. 137 (1872).*

Much appreciation to David McFadden, CSCHS Secretary, for editorial assistance with this article.

Holly Streeter Cole has a J.D. from Georgetown University Law Center, where she authored an earlier version of this essay for the course Gender and Legal History in America. After graduating from the Law Center, Holly worked for seven years in non-profit organizations assisting battered women. She is temporarily "retired" from the law, raising two young daughters with her husband in Berkeley, California.

CORRECTION

Hon. James J. Marchiano, author of "A History of the Court of Appeal for the First Appellate District," CSCHS *Newsletter* Spring/Summer 2005, offers the following correction: After justices were appointed to fill the first seats on the Court of Appeal, they were required to face the electorate in 1905, but could do so only if nominated by a political party. Justice Harrison sought but did not gain the Republican nomination, as "Boss" Abe Ruef prevailed on that party's convention to nominate his ally, San Francisco Superior Court Judge Carroll Cook, instead. The article incorrectly stated that San Francisco Supervisor James Gallagher received the nomination. Once Harrison did not receive the nomination (which he deserved), Associate Justice James Cooper, Harrison's friend and colleague, agreed to run on the Democratic slate for the Presiding Justice position. He narrowly defeated Judge Cook by 2,500 out of over 100,000 votes cast from the ten counties then comprising the First District Court of Appeal. Ironically, after Ruef was convicted of bribery in 1908 in one of the famous San Francisco corruption trials, the First District unanimously affirmed his conviction with Justice Cooper authoring a carefully written opinion in *People v. Abraham Ruef*, 14 Cal.App. 576 (1910).

TABLE OF CONTENTS

CSCHS
6946 Van Nuys Blvd. Ste. 202
Van Nuys, CA 91405
Phone (818)781-6008
Fax (818)781-6009
director@cschs.org

THE CALIFORNIA SUPREME COURT
Historical Society