

Through Bernie's Binoculars

BY BERNARD E. WITKIN

EDITOR'S NOTE : BERNARD E. WITKIN, LEGAL "GURU" AND FORMER REPORTER OF DECISIONS, WAS TRULY WITHOUT PEER BOTH IN HIS LEGAL EDUCATION BOOKS AND OBSERVATIONS OF CALIFORNIA'S LEGAL SYSTEM. "BERNIE," AS HE WAS AFFECTIONATELY KNOWN BY ALL THOSE WHO LOVED AND RESPECTED HIM, GAVE THESE TONGUE-IN-CHEEK REMARKS ON APRIL 11, 1968 AT THE LAWYERS' CLUB OF SAN FRANCISCO'S ANNUAL LUNCHEON HONORING THE SEVEN JUSTICES OF THE CALIFORNIA SUPREME COURT AT THE ST. FRANCIS HOTEL. THESE REMARKS REVEAL AS MUCH ABOUT BERNIE AS THE JUSTICES THAT HE DESCRIBED AND INTRODUCED.

Ten years ago, I stood on this same platform, charged with this same task. Of the court of that day, only two active members remain and naturally I'm a little older, but neither wiser nor reformed. As on that day, I say again: Who wants biography?

There are occasions when the air is blue with vital statistics: When a new appointee mounts the bench to have the halo affixed to his robe and when, full of years and honor, he graciously accepts the bounty of Government Code Section 75025 and becomes a retired justice sitting pro tem.

Today's jollification calls for neither inaugural nor valedictory and a collective capsule life history should suffice. So I quote from my unchallenged testimony given on April 18, 1958.

"These great men were born in log cabins, flats, furnished apartments, motel rooms—what does it matter? Of course, they were all poor boys and each, in his own way, stumbled into the law. With a little bit of luck, they passed the bar, met the governors, and became judges—this is the American way." As of now.

It remains only to cap this capsule biography with capsule characterizations of the entire court. The man from ATLA [American Trial Lawyers Association] offered us one just recently—"Showcase of the Nation." But I don't dig that. The key word connotes exhibitionism—a characteristic wholly lacking in our "Self-Effacing Seven." Perhaps "Round Table" would better describe this loose coalition of crusading knights-errant and mildly disapproving squires. Here, in this contemporaneous Camelot, under the wisdom and restraint of a latter-day King Arthur, a measure of unity is miraculously achieved.

It would be invidious to present them in order of seniority. Each, on his ascension, became ipso facto a judicial statesman possessed of all the learning and



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art and inspiration of his predecessors. Else why the express constitutional directive—one judge, one vote?

So, taking them at random, I come first to the man who wears no chain mail, but rides the whitest horse, carries the longest lance and hacks more evil giants to bits than any other knight of the Table. Hallucinating Indians, fortuitous bastards, sleepy welfare receivers, loose-mouthed interrogates, naïve insurers—to all of these rescuees and many more, he is a champion of champions.

To those in the law, he exhibits so many characteristics of other great jurists that one can scarcely enumerate them. Bold as Black, crafty as Cardozo, dogged as Douglas, flowery as Frankfurter, humble as Hughes, wild as Warren.

Indeed, to shift gears a bit, pontifical as Paladin.

Here is a knight without armor in salvageable land, roaming the jurisprudential jungle with bold heart and questing mind, carrying that card with the strange device: "Have opinion, need case."...

JUSTICE MATHEW O. TOBRINER.

If the Chief is the Court's King Arthur and Justice Tobriner its Paladin, surely the next man is its compact Paul Bunyan. His weapon is no broad sword or six-gun, but the monstrous axe of the fabled woodsman, which cleaves through legislative dogma and judicial precedent like a super-Schick through a hippie beard. The acknowledged master of appellate positivism, he is at his best when demonstrating, beyond any possible doubt, that the Court's majority is wholly, indisputably and knowingly wrong.

But this is not the Whole Man. Like all liberal reformers, he has his own streak of conservatism and his most celebrated exhibition of it has furnished judicial historians with the reason why Court of Appeal justices yearn for promotion to the Supreme Court. It is not the miniscule increase in emolument, not the easier workload, not even the exciting prospect of coping with three law secretaries instead of one.

It is because, as this justice held, Courts of Appeal have no jurisdiction to disregard controlling decisions of the Supreme Court, only the Supreme Court can freely disregard its own precedents. Breathes there an appellate justice who does not long for the day when he, too, can topple precedents?...

JUSTICE RAYMOND O. PETERS.

One look at the next man — that benign scholarly visage, instantly indicative of the Jesuit-trained philosopher, and you cry, “At last, a conservative!” But alas, you’re wrong.

Not so far out as Mathew, not so hard-lined as his namesake Raymond I, not so wide-ranging as the Chief, he is nevertheless the bloc’s solid fourth vote.

But conformity ends with that vote: His judicial product is individual and his opinions combine scholarship with judicial craftsmanship of the highest quality. And with it all, a gentle courtesy, constantly manifested when, with his facile pen, irreconcilable decisions are delicately reconciled and egregious judicial errors are urbanely transformed into mere differences of view on distinguishable facts.

He is the latest to join the Magnificent Seven and it gives me great pleasure to present the Court’s acknowledged expert on mathematical probability....

JUSTICE RAYMOND L. SULLIVAN.

Of our next judge, Sir William Schwenck Gilbert might have said,

*“He is the very embodiment
Of everything that’s precedent
He stands unmoved by any flaw
Till he decides to change the law.”*

But nobody’s perfect. And on behalf of all conventional high court opinion writers and digest paragraphers and free-lance speculators in the judicial world, I ask:

“Where, sir, in your judicial product are those titillating recitals of fact, embracing the activities of each party and his privies at all discoverable periods? Where are the broad expositions of common law on tangential aspects of the case? Where are the lengthy extracts from the record, the quotations from learned writers quoting opinions quoting learned writers?

“Where are the footnotes that undermine the headnotes? And why only one abrupt answer to each vital question when reiteration would make it so much more authoritative?

“Judge, the pathway from your premise to your conclusion is as straight as Highway 101, but please, sir, just a silly kilometer longer?”

As you have guessed, I have all but introduced the Court’s only genuine lawman....

JUSTICE MARSHALL McCOMB.

What makes an ultraliberal Court look good? What highlights its fixed determination to fashion a legal world in the shape of its creators’ vision? What, without which, its innovations, its overrulings and its replacement of principles with policies, would go unnoticed



The California Supreme Court in April 1964 with all of the members that Bernie Witkin talks about in his address.

From left to right, front row: Marshall F. McComb, Roger Traynor and Raymond Peters.

From left to right, back row: Louis H. Burke, Mathew O. Tobriner, Stanley Mosk and Raymond E. Sullivan.

except by Harvard Law Review and the reasonable facsimiles thereof?

Why, the conservative minority anchored to the proven past and working present. That minority, in its effort to preserve the jurisprudential pattern, actually furthers the revolution by emboldening those whose assaults on the status quo are exposed but not contained. In California's Court, that minority is composed of two well-known figures. The first you have already met.

The second is a judicial progressive whose name has been prominently connected with the national movement for reform of court administration. His current obsession is a Deplorable Dichotomy: California's trial courts are a marvel of business efficiency with judicial manpower fully utilized and congestion a mere distasteful memory. But the reviewing courts? Why not maximize their effort and minimize their opinion content?

And so, as he pursues his Grail mounted on a slow horse, we greet the Knight of the Impossible Dream....

JUSTICE LOUIS H. BURKE.

The next man is an enigma. Is he for or against the status quo and which? Is he a new or an old New Dealer? Why does he one day cuddle with the Chief and another day huddle with Burke? Is he a cautious liberal or a daring mugwump?

The superior craftsmanship and persuasive style of this intransigent causes acute anguish in the bloc. And residents in the vicinity of 3494 Jackson have heard, in the still of the night, spectral tenor of Mathew, crooning in his Blooming boy:

*"Can't you hear me yellin'
Your vote should be jellin'"*

*Not just hanging on the vine;
Stanley, Baby, won't you make up your mind
to be mine?"*

Yes, that's our uncommitted Knight....

JUSTICE STANLEY MOSK.

The last man is the head of our knightly order. His decisions cover the vast panorama of the law—substantive, procedural, civil and criminal. He gave us strict product liability, additur, tenant power, legislative precedents, sophisticated appellate review, collateral estoppel by a stranger and, as you know, he raised *Cahan*. A collection of his opinions would almost serve as a working encyclopedia of modern law.

Yet this is not the Whole Man. An appellate opinion, inexorably confined to the justiciable issues raised by the parties to an adversary proceeding, is a restricted vehicle for the reshaping of broad areas of the law. And our Chief Justice, realizing this more acutely than any other high court judge, has supplemented his daytime product with truly magnificent moonlighting.

His many addresses—delivered at strategic places throughout the land and reproduced in legal publications—have made a permanent record of the Traynor philosophy and the Traynor concept of the appellate process.

These immense deposits of legal treasure are not for this day alone. Succeeding generations will find in them the inspiration and the form and content of innumerable reforms in the law. The justice of Traynor will far outlive Traynor, the Justice.

It is with great pride that I present to you the Once and Future Judge...

CHIEF JUSTICE ROGER J. TRAYNOR.

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T O D A Y



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