STUDENT SYMPOSIUM

CALIFORNIA ASPECTS OF THE RISE AND FALL OF LEGAL LIBERALISM

UC Hastings College of the Law

INTRODUCTION:

Examining Legal Liberalism in California

REUEL SCHILLER*

Modern American liberalism is capacious, embodying a vast panoply of political beliefs and policy prescriptions. At its core, however, are two characteristics: a commitment to mildly redistributive economic policies within a capitalist economic system, and a belief in the value of cultural pluralism. These basic principles have manifested themselves through a variety of laws and legal institutions that developed in the United States since the 1930s. Redistributive principles have been fostered by programs such as Social Security, unemployment insurance, minimum wage laws, and laws supporting the right of workers to form unions. The commitment to cultural pluralism was most famously advanced by the United States Supreme Court in its decisions holding the various manifestations of racial discrimination unconstitutional. These cases were, of course, just the tip of the iceberg. In the years following the Second World War, legislative,

* Professor of Law, University of California, Hastings College of the Law.

judicial, and administrative actions promoted the rights of racial, religious and ethnic minorities, political dissenters, and women.

As the twentieth century progressed, these two strands of liberalism met with different fates. Liberalism's defense of cultural pluralism has grown more robust. The law now seeks to protect the rights of other formerly marginalized groups, including gays, lesbians, and the disabled. While debates over issues such as affirmative action and marriage equality indicate that pluralist beliefs are still contested, even the most cursory comparison between the rights afforded women and racial, religious, and ethnic minorities in 1945 and those afforded them at the end of the twentieth century demonstrates that, to use David Hollinger's evocative phrase, we have expanded "the circle of we."[1]

Liberalism's attempt to promote economic egalitarianism, on the other hand, was considerably less successful. During the last third of the twentieth century, the various mechanisms that sought to further modest redistribution of wealth have been dismantled: taxation has become less progressive, social programs starved of resources or eliminated, the right of workers to join unions eviscerated, the regulatory state weakened by deregulation. The result has been a dramatic increase in income inequality within the United States.

The articles in this symposium examine the legal aspects of the rise and fall of liberalism. Each article explores a component of legal liberalism in California.[2] In some cases the story is one of the ascension and triumph of liberal legal principles. In other cases, the story is mixed, as legal liberalism falters in the face of hostile social and political forces, or struggles against its own internal contradictions. Whatever their differences, however, each article demonstrates that California legal history provides a rich source of material about the contours of twentieth-century American liberalism.

The first article, Jeremy Zeitlin's exploration of the demise of Sunday closing laws in California, shows that some of the earliest rumblings of cultural pluralism in the state were felt in the nineteenth century. Zeitlin begins his piece with a description of the California Supreme Court's

---

[1] David A. Hollinger, "How Wide the Circle of We? American Intellectuals and the Problem of Ethnos Since World War II," 98 *American Historical Review* 317 (1993).

[2] Laura Kalman coined the phrase "legal liberalism." See Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996).

surprising 1858 decision that held the state's Sunday closing law to be unconstitutional. Within three years the Court backed away from its initial hostility toward the law, upholding a newly-passed law by giving it a secular justification. The explicitly Christian rationale for the law evolved into a religiously neutral defense of the workingman's right to a day of rest. By the end of the century, however, Californians rejected this justification, viewing it as an unfair burden on religious minorities within the state, thereby incrementally increasing the rights of those minorities.

If Zeitlin's piece illustrates the pre-history of legal liberalism in California, Catherine Davidson's contribution to this symposium takes us into prime time: the years following World War II. She also introduces us to one of legal liberalism's most famous practitioners: California Supreme Court Justice Roger Traynor. Davidson chronicles the rise of no-fault divorce in California, locating its origins in the 1953 California Supreme Court case, *DeBurgh v. DeBurgh*. Traynor's opinion in *DeBurgh* abolished the doctrine of recrimination in California divorce law, thereby making it easier for women to leave failed marriages. Davidson places the *DeBurgh* opinion in the context of two of postwar liberalism's most salient features: women's entry into the work force and the rise of egalitarian feminist ideology. She also describes how Traynor made these changes in the law, while nevertheless adhering to the modest judicial role dictated by the principle of *stare decisis*. Traynor's genius, Davidson argues, was his ability to bring the law into harmony with the liberal sentiments of the age without asserting an excess of judicial power.

The next two articles in this symposium describe policy areas in which legal liberalism's successes have been more muted than those illustrated by Zeitlin and Davidson. David Willhoite places an ironic spin on one of legal liberalism's triumphs: the passage of California's Agricultural Labor Relations Act (ALRA). Passed in 1975, the ALRA guaranteed the right of California farm workers to form labor unions and required employers to bargain with such unions. The law, which stemmed from the economic and political organizing of Cesar Chavez's National Farm Workers Association, was one of the most pro-union laws in the country. Yet Willhoite demonstrates that channeling disputes between farm workers and agricultural employers into legal forums (as well as Chavez's increasingly erratic behavior) sapped the movement of the grassroots political activism that had sustained it. What

should have been a legislative milestone of legal liberalism had become, by the 1980s, a dead letter — unenforced and ineffective.

Elaine Kuo's examination of California environmental law reveals an outcome that, if not as dismal as the ALRA's, is at least ambiguous. Kuo demonstrates how the state's attempts to preserve its water resources and control its air pollution interacted with the equally powerful commitment to the automobile and to exploiting the state's water resources to promote development. Legal protection of the environment is another significant manifestation of legal liberalism, but, as Kuo demonstrates, countervailing economic and cultural impulses have blunted this facet of postwar liberal ideology. The irony of California's environmental legal history is the simultaneous urge to both preserve the state's resources and to exploit them.

The final piece in this symposium, Jennie Stephens-Romero's article on pregnancy discrimination and family medical leave laws, recounts another of legal liberalism's successes: the passage of state and federal laws that prohibited discrimination against pregnant women and that required employers to grant family medical leave to their employees. Stephens-Romero recounts the complicated interaction of state and federal law and politics that resulted in the passage of these laws. In doing so, she highlights divisions within postwar feminism. Egalitarian feminists believed that any law recognizing differences between men and women would undermine women's equality. Other women's rights advocates thought it was crucial for the law to recognize the specific needs of women, even if it meant giving them benefits, such as pregnancy leave, that men could not have. Stephens-Romero's article thus illustrates divisions within liberalism, focusing on its internal complexity and the effect this complexity had on the development of the law.

Taken together, these five articles demonstrate a range of approaches to studying legal liberalism. First, scholars can identify and describe the legal manifestations of liberalism, and explain how they came into being. Second, they can examine how social forces interacted with legal liberalism, imposing constraints on it and preventing the law from fulfilling liberalism's political desires. Finally, scholars can look at the conflicts within legal liberalism, exploring how different aspects of liberal ideology interacted with one another, shaping and limiting the law and legal institutions

that furthered liberal policy goals. As these articles reveal, the complex legal order of postwar California provides an excellent medium for studying the laws and legal institutions that have shaped contemporary society both in this state and nationally.

* * *

EDITOR'S NOTE

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

Professor Reuel Schiller, whose course offerings at UC Hastings include a seminar on American Legal History, devoted his spring 2012 course to "The Rise and Fall of Legal Liberalism." Professor Schiller — who is also a member of the journal's Editorial Board — graciously agreed to propose to his seminar students that they consider writing on California aspects of legal liberalism with the possibility that the most promising papers might be accepted by the journal. From those provided by Professor Schiller, I have selected the five that appear on the following pages as our first presentation of a Student Symposium in the field of legal history in California.[1]

— SELMA MOIDEL SMITH

[1] The papers provided by Professor Schiller also included the one that appears here by Jeremy Zeitlin, which was written for Professor Joseph Grodin (another member of the journal's Editorial Board).

WHAT'S SUNDAY ALL ABOUT?

The Rise and Fall of California's Sunday Closing Law

JEREMY ZEITLIN*

One Sunday in April 1858, Morris Newman decided to keep his tailor shop, located at 100 J Street in Sacramento, open for business.[1] Soon after, Newman was arrested, tried, and convicted for violating the California law known as "An Act for the better observance of the Sabbath."[2] Newman's actions had been plainly illegal under this statute. By selling his wares on a Sunday, Newman had violated the law's requirement "that no person shall, on the Christian Sabbath, or Sunday, keep open any store, warehouse, mechanic-shop, work-shop, banking-house, manufacturing establishment" or sell "any goods, wares, or merchandise on that day . . . ."[3] As a result of this conviction the trial court imposed a fine of twenty-five

* Jeremy Zeitlin received his J.D. in May 2012 from UC Hastings College of the Law. He expresses his gratitude to Professor Joseph Grodin for both introducing him to the study of California legal history and for his guidance throughout this project. He would also like to thank Vincent Moyer and Professor Reuel Schiller for their generous help. As always the author sends his special love to his family.

[1] *Ex Parte* Newman, 9 Cal. 502, 504 (1858); William M. Kramer, Jewish-Activist Lawyers of Pioneer California 5 (1990).

[2] *Newman*, 9 Cal. at 503.

[3] *Id.* at 519 (Field, J., dissenting).

dollars on Newman. When he failed to pay, the judge ordered Newman imprisoned for thirty-five days.[4]

Newman's desire to break California's Sunday closing law stemmed from his religious affiliation. As an observant Jew, Newman followed his faith's tradition and celebrated the Sabbath on Saturday.[5] Because Newman's religion required him to refrain from work on Saturday, he chose to flaunt the Sunday closing law and keep his shop open on the day of rest demanded by the state.[6]

Newman emphasized this law's burden on his religious exercise when he subsequently challenged the constitutionality of the act before the California Supreme Court. In the case of *Ex Parte Newman*, he contended that the Sunday closing law conflicted with California Constitution article I, section 4's guarantee that individual rights to "the free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever allowed in the state."[7]

Ex Parte Newman was the first volley in the almost quarter-century-long debate over the state's Sunday closing law. This contest played out in both the legal and political realms of nineteenth-century California. Opponents of the law believed that the state was granting an impermissible benefit to a particular religious outlook when it declared all must rest on the traditional Christian Sabbath. Those in favor of the Sunday closing did not focus on the law's effect on religious exercise. These Californians considered the law to be a legitimate extension of the state's police power. In the nineteenth-century understanding of this doctrine, the police power conferred to the states included broad constitutional authority to regulate the people's health, welfare, and morals in order to promote the public good.[8] Because the act's only actual prohibition was on the time period

---

[4] *Id.* at 504.

[5] Kramer, *supra* note 1, at 5.

[6] *Newman*, 9 Cal. at 504.

[7] Cal Const. art. I, § 4 (amended 1879). Newman also argued that a law totally banning business activity on any day of the week, even if devoid of religious effect, violated California Constitution article I, section 1's protection of property rights. *Newman*, 9 Cal. at 503.

[8] *See* Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 572–77 (1868).

Californians could work, supporters of the law characterized it as a simple labor regulation born from the state's traditionally broad police powers.

Ex Parte Newman rejected this police power rationale for the Sunday closing and instead held that the act violated article I, section 4's guarantee of individual religious rights.[9] *Ex Parte Newman's* precedential value was, however, quite minimal.[10] Three years later the California Supreme Court reversed course and found that the Sunday closing did not unconstitutionally interfere with religious rights. The Court now held that the law was "purely a civil regulation, and spends its whole force upon matters of civil economy."[11] Over the next two decades the California Supreme Court pushed questions of religious preference to the sideline as it repeatedly affirmed that the Sunday closing law was rooted in the state's police power.[12] By 1882 the judiciary's comfort with this interpretation was so complete that the California Supreme Court did not feel it necessary to discuss the law's effect on individual religious exercise when it again upheld the statute.[13]

Although California's judges had come to a consensus concerning this law, popular opinion of the ban on Sunday work was decidedly mixed. Indeed, the people of California never wholly adopted the Court's opinion of the Sunday closing law. While civil issues of labor regulation, public morals and temperance did seep into the people's understanding of the law, many Californians continued to view the prohibition on Sunday work as primarily concerning spiritual matters.

In the nineteenth century, the opinion of California's judges and of its people diverged. In decision after decision, the California Supreme Court sustained the Sunday closing law as a reflection of the state's police power to legislate for the general welfare. A conflicting view of the Sunday closing law held sway among the people. Throughout the second half of the

---

9 *Newman*, 9 Cal. at 506.

10 *Ex Parte Newman* appears to be the only instance in which a state supreme court struck down a Sunday closing law. Alan Raucher, *Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview*, 36 Journal of Church and State 13, 16 (1994).

11 *Ex Parte* Andrews, 18 Cal. 678, 685 (1861).

12 *Ex Parte* Burke, 59 Cal. 6, 19 (1881); *Ex Parte* Koser, 60 Cal. 177, 189 (1882).

13 *Koser,* 60 Cal. at 189.

nineteenth century the people of California clung to a belief that their state's Sunday closing law was inextricably tied to religion.

In the United States, laws banning Sunday work date back to the colonial era.[14] In 1610 the Virginia Colony enacted a law commanding attendance at religious services on Sunday.[15] Forty years later, the Plymouth Colony followed suit and passed a law forbidding its citizens to participate in servile work, unnecessary travels, and selling alcoholic beverages on Sunday.[16] By the time of the Revolutionary War essentially all the colonies had a Sunday closing law.[17] This trend continued after independence when the new states both adopted their own constitutions guaranteeing some form of religious freedom, and also passed statutes banning Sunday work.[18]

Throughout the states there were many challenges to the constitutionality of local Sunday closing laws.[19] Each one of these failed.[20] Prior to

---

[14] David N. Laband & Deborah Hendry Heinbuch, Blue laws: the history, economics, and politics of Sunday-closing laws 29 (1987). The Sunday closing laws, like many aspects of Anglo-American culture, has biblical roots. "Remember the Sabbath day, to keep it holy. Six days shalt thou labor, and do all thy work: but the seventh day is the Sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: for in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore, the Lord blessed the Sabbath day, and hallowed it." Exodus 20: 8–11.

[15] *Id.* at 29 (Virginia modeled this law after an English act passed by the twenty-ninth Parliament of Charles II).

[16] McGowan v. State of Md., 366 U.S. 420, 433 (1961).

[17] Laband, *supra* at note 34, 30–37.

[18] Andrew King, *Sunday Law in the Nineteenth Century*, 64 Alb. L. Rev. 675, 685 (2000). During the early republic era, the states repealed statutes providing for mandatory church attendance. Virginia acted first in 1776. Connecticut, however, had a statute requiring Sunday church attendance as late as 1838. Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 Harv. L. Rev. 729, 746 (1960).

[19] At this time, the substantive rights within the United States Constitution's Bill of Rights did not bind the actions of the state governments. Barron v. Baltimore, 32 U.S. 243, 247 (1833). Not until the 1947 case, *Everson v. Bd. of Education*, were the protections of religion within the First Amendment of the United States Constitution incorporated against the states. 330 U.S. 1, 16 (1947).

[20] Early nineteenth-century decisions defended Sunday closing laws as a legitimate means to encourage religious practice. In 1811, for example, New York's highest court stated that bans on Sunday work served to "consecrate the first day of the week, as

ALL THE OTHER DAISYS:

Roger Traynor, Recrimination, and the Demise of At-Fault Divorce

CATHERINE DAVIDSON*

> *Novel legal problems need not take [a judge] by storm if he makes a little advance, uncloistered inquiry into what people most want out of their lives and how they wish to live with one another. It is from the stuff of their relationships with one another and with the state that the common law develops, ostensibly from the cases that formalize their quarrels, but under the surface and over the years, from the values that formalize their aspirations.*[1] — Roger Traynor

I. INTRODUCTION

In 1949, Mrs. Daisy DeBurgh filed suit for a divorce from her husband, Albert, claiming the grounds of cruelty.[2] She alleged that her husband was

* This paper was awarded first place in the California Supreme Court Historical Society's 2012 Student Writing Competition. Catherine Davidson expects to receive her J.D. in May 2013 from UC Hastings College of the Law. She would like to acknowledge UC Hastings Professor Reuel Schiller for his immeasurable support and assistance in every aspect of this paper's evolution. She would also like to thank her mother, Elizabeth Livingston Davidson, for teaching her how to write in the first place.

[1] Roger Traynor, *Better Days in Court For a New Day's Problems,* 17 VAND. L. REV. 109 (1963–1964).

[2] *See generally* DeBurgh v. DeBurgh, 39 Cal. 2d 858 (1952).

a philandering drunk; that he was jealous and cheap; and that he had beaten her on several occasions, once so severely she had attempted suicide by way of sleeping pills.[3] Albert, for his part, countersued, claiming that Daisy had ruined his reputation by sending vicious letters to his business associates alleging that Albert was a homosexual.[4] Clearly their marriage was a failure, and yet the trial court refused to grant them a divorce. At that time, California was one of a vast majority of states refusing to grant a divorce where both parties were at fault for the destruction of the marriage relationship. Known as the doctrine of recrimination, it was a complete bar to recovery in divorce actions. However, the DeBurghs appealed to the California Supreme Court and they won their case. That decision, which took the air out of recrimination doctrine and led the way to California's becoming the first state to have a no-fault divorce system, sent shockwaves through American society. This paper will examine the case and its context, and will attempt to answer the questions: why then, why California?

In 1970, California became the first state in the nation to change from a fault system of divorce to a no-fault system.[5] The California no-fault divorce statute "removed consideration of marital fault from the grounds for divorce, from the award of spousal support, and from the division of property."[6] Before the switch to a no-fault system, the law simply did not recognize consensual divorce involving an agreement between spouses to end their legal marriage relationship.[7] Rather, historically, divorce was only granted as a privilege to an "innocent spouse."[8] In order to obtain a divorce, the plaintiff would have to file a lawsuit against his or her spouse, the defendant, and proceed to allege and then prove "grounds" for the divorce[9] such as adultery, cruelty, or desertion.[10] That is, the plaintiff would

---

3 *Id.* at 871.

4 *Id.* at 871–72.

5 Herma Hill, *An Appraisal of California's No-Fault Divorce Law*, 75 Cal. L. Rev. 291, 291 (1987).

6 *Id.*

7 Lawrence Friedman, *Rights of Passage: Divorce Law in Historical Perspective,* 63 Or. L. Rev. 649, 653 (1984).

8 *Id.*

9 *Id.*

10 Barbara Armstrong, *The California Law of Marriage and Divorce: A Survey,* 19 J. St. B. of Cal. 160, 174 (1944).

need to show the defendant was at fault. Further, under the doctrine of recrimination, if the defendant could show that the plaintiff had also been at fault, the divorce would be automatically denied.[11]

These state divorce systems were generally statutory, and purposefully inefficient, in order to serve as "compromises between two genuine social demands, which were in hopeless conflict. One was a demand that the law lend moral and physical force to the sanctity and stability of marriage. The other was a demand that the law permit people to choose and change their legal relations."[12] Divorce law has historically been awkward and complex because it has so many different meanings and consequences for both the families involved and for society as a whole. Divorce "has economic meaning and economic consequences"[13] in that it "consists of the rearrangement of claims to property and other valued goods. But it also has moral and symbolic meaning. It touches on the basics: sex, romance, family, children, love, and hate."[14]

Divorce, and specifically divorce law, is controversial because it is a deeply personal, frequently devastating and almost always unfortunate event that involves the government in citizens' most private lives. Californians (and Americans in general) had, long before 1970, begun to find ways to circumvent the fault system, encumbered as it was by moral judgments and fraught with procedural hoop-jumping.[15] They had been using every conceivable method to separate themselves from unwanted spouses, even where neither was legally at fault. For example, in California, where one of the more popular grounds was cruelty, the plaintiff would often merely claim the defendant was "'cold and indifferent,'" the defendant would not even bother to show up in court to contest the suit, and the judge would simply rubber stamp the divorce.[16] In the end, no-fault divorce "statutes were a delayed ratification of a system largely in place; a

---

[11] George D. Basye, *Retreat From Recrimination — DeBurgh v. DeBurgh,* 41 Cal. L. Rev. 320, 320 (1953).

[12] Friedman, *supra* note 7, at 653.

[13] *Id.* at 651.

[14] *Id.*

[15] *See* Hill, *supra* note 2, at 297–98.

[16] Elayne Carol Berg, *Irreconcilable Differences: California Courts Respond to No-Fault Dissolutions,* 7 Loy. L.A. L. Rev. 453, 454 (1974).

system that was expensive, dirty, and distasteful, perhaps, but a system that more or less worked."[17]

California Supreme Court Justice Roger Traynor paved the way for California's change to no-fault divorce with his 1952 majority opinion in *DeBurgh v. DeBurgh*.[18] In that case, the Court did away with one of the major bulwarks of the at-fault system: the defense of recrimination.[19] In pruning away what he saw as an outdated and often unjust doctrine, Traynor's decision confronted the reality of a growing divorce rate brought on in large part by changing gender roles following the Second World War. He acted on his own judicial instincts that led him in this case and many others to make what he believed was a thoughtful, well-timed, and necessary modification to the common law in order to meet the challenges of a rapidly changing society. Traynor's hallmark as a judge was his endeavor to make a reasoned and careful decision to initiate a change, and then to craft his opinion in a way that made his thought process clear to lower courts as well as to the legal community at large.[20] While some have accused Traynor of being an activist, he likened himself more to the tortoise than the hare.[21] Far from autocratically transforming the law from the highest bench in the state, Traynor's decision in *DeBurgh* only articulated in the common law that which already existed in practice.

II. *DeBURGH V. DeBURGH*

Plaintiff, Daisy DeBurgh, and Defendant, Albert DeBurgh, moved to California together in 1944.[22] They were living together in Manhattan Beach and were married on October 27, 1946.[23] They separated on February 13, 1949,[24]

---

17 Friedman, *supra* note 7, at 666.

18 39 Cal. 2d 858.

19 *See generally id.*

20 *See, e.g.,* Roger Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. Chi. L. Rev. 223, 230 (1962).

21 Roger Traynor, *The Well-Tempered Judicial Decision,* 21 Ark. L. Rev. 287, 291 (1967).

22 Brief for Appellant at 4, DeBurgh v. DeBurgh, 240 P.2d 625 (1952) (Civ. 18581) [hereinafter *Brief for Appellant*].

23 *Id.*

24 *Id.*

THE STORY OF THE CALIFORNIA AGRICULTURAL LABOR RELATIONS ACT:

How Cesar Chavez Won the Best Labor Law in the Country and Lost the Union

DAVID WILLHOITE*

After many months of political wrangling, and after Governor Jerry Brown had staked his first year in office on bringing peace to the historically violent struggle for workers' rights in California agriculture, the Alatorre–Zenovich–Dunlop–Berman Agricultural Labor Relations Act was signed into law in the first week of June, 1975.[1] One would be hard

* David Willhoite expects to receive his J.D. in May 2013 from UC Hastings College of the Law. He would like to thank Professor Reuel Schiller for his guidance and insight while writing this paper and for his dedication to his students.

[1] For contemporary reports of the event immediately preceding passage, *see*: *California Farm Bill Backed By Panel as Unionists Fight*, United Press International, May 14, 1975; Leo Stammer, *Farm Labor Bill OKd by Assembly Panel*, L.A. Times, May 13, 1975; *Parade Here Backs Efforts by Chavez To Unionize Farms*, N.Y. Times, May 11, 1975; Harry Bernstein, *McCarthy Joins Unions in Seeking Farm Bill Change*, L.A. Times, May 15, 1975; —, Pact on Farm Bill Rejected by Teamsters, L.A. Times, May 17, 1975; *2,800 Rally at Capitol to Back Farm Measure*, L.A. Times, May 19, 1975; Harry Bernstein, *Agreement Reached on Farm Labor Bill*, L.A. Times, May 20, 1975; —, *Farm Labor Accord Sets Stage for Special Session*, L.A. Times, May 20, 1975; *Teamsters Back Farm Labor Accord*, N.Y. Times, May 21, 1975; Jerry Gilliam, *Farm Bill Clears Senate Panel 4–1, Faces One More,* L.A. Times, May 22, 1975; —, *Senate Passes Farm Labor Bill*, L.A. Times, May 27, 1975; —, *Farm Labor Bill Moves Quickly Toward Passage*, L.A. Times, May 28, 1975; —, *Assembly Sends Farm Bill to Brown for Signing*, L.A. Times, May 30, 1975.

pressed to overestimate the significance of this legislation, which remains the only state law in the nation to govern the rights of farm workers to act collectively and engage in union activity.[2] In 1975, few could have predicted that this new legal order would lead to the disintegration of the farm worker movement in California.

Ever since the Delano grape strike a decade earlier, Cesar Chavez had grasped and utilized a national mood of social and legal transformation taking place across the country. This was, of course, a period of great social turmoil, including racial violence, police repression and armed military intervention that culminated in the passage of landmark legislation, massive student and youth activism, a War on Poverty, and what many have argued to be the high-water mark of judicial liberalism in America.

Chavez was a keen student of the civil rights movement and King's and Gandhi's incorporation of religion and nonviolence as a means of organizing. As an alumnus of the Community Service Organization started by Saul Alinsky and trained by the famous organizer Fred Ross, Sr., he had worked across California and Arizona to register hundreds of thousands of Hispanic voters and witnessed citizens of all races coming together to fight injustice. As the urban movements to register voters, oppose unconstitutional laws, and challenge stereotypes and bigotry expanded across the country, it became more difficult to separate issues of race and class. Claims of racial injustice in America became enmeshed with claims of economic justice. The federal government started initiatives addressed to poverty; Catholics and Jews, once excluded from the middle class, turned to help the entre of others; and young people began to focus on these issues in their own communities. By uniting the issues of fair pay and fair treatment in a demand for dignity, Chavez and his farm worker movement focused the nation's attention on some of the most invisible and vulnerable workers in the country.

However, Chavez's effort was not solely directed at consciousness-raising or the repeal of racist laws or even gaining legislative protection; he and the countless others who dedicated themselves to this struggle aimed to empower workers to form a union and bargain collectively with their employers for better wages and working conditions. These two goals, creating a farm

[2] Hawaii's state labor code includes agricultural workers along with the rest of the state's employees, but the code extends no special provisions to this sector of work.

worker union and creating a social movement focused on issues of the working poor, proved difficult to hold aloft simultaneously. Competing social and legal strategies had also led to conflict within the civil rights movement between the efforts of the NAACP and more radical groups like the Student Non-violent Coordinating Committee or Malcolm X's Nation of Islam.[3]

John Lewis, president of the SNCC and a future congressional leader, spoke at the March on Washington for Freedom and Jobs alongside Martin Luther King, Jr. and United Auto Workers president, Walter Reuther, among others.[4] March organizers excised several phrases from his controversial speech including one about the proposed Civil Rights Act introduced by President Kennedy: "The revolution is a serious one. Mr. Kennedy is trying to take the revolution out of the streets and put it into the courts."[5] This conflict between a revolution and a legal order, between gaining public support and gaining legislative victories, between organizing a union and organizing a social movement would prove to be a defining one for Chavez and the UFW.

In this article, I will address the tension between a movement for social justice and a legal regime designed to deliver that justice as manifested in the efforts to organize California farm workers and the passage and subsequent administration of the Agricultural Labor Relations Act (ALRA). I will describe how balancing the needs and priorities of maintaining a broad social movement for the vulnerable and dispossessed and a focused legal fight for good contracts and union rights ultimately led to the collapse of the United Farm Workers' organizing efforts. Ironically, winning the strongest, most protective labor law in the country produced new organizing victories at the same time it exacerbated the internal conflict between these two missions.

—

Although the events leading to the passage of the ALRA started with the "Great Delano Grape Strike" and the signing of the first contract with

[3] *See* Doug McAdam, Political Process and the Development of Black Insurgency, 1940–1970 (1999).

[4] It is interesting in this context to note that the name of the march at which Dr. King gave his most famous speech nodded at this dual goal of economic and racial justice and that the speakers included civil rights and union leaders.

[5] John Lewis, Walking With the Wind (1998).

DiGiorgio, farm worker organizing in California had begun almost a century earlier. From the 1890s to 1960, there were several waves of farm worker organizing, all involving some admixture of ethnic workers' groups, traditional AFL-style unionism, and radical elements such as the International Workers of the World (IWW).[6] Large-scale farming in California is nearly as old as the state itself. Ranchers and farming interests received large parcels of land in as much as 35 million acre "bonanza farms" because of exemption from the Homestead Act. With the new railroad and investments in irrigation, farming soon became more lucrative than ranching. Beginning with the hiring of thousands of Chinese, unemployed after the completion of the transcontinental railroad, the history of field labor in California agriculture can be told through various immigrant groups.[7] In the end, several salient factors led to the failure of farm workers to successfully form a union or win lasting contracts: the transience and vulnerability of an immigrant workforce, the exclusion of agricultural workers from the National Labor Relations Act (NLRA), the introduction of the *Bracero* program, and the general unfamiliarity with and lack of interest in the agricultural sector by traditional AFL-CIO unionism — all set against a backdrop of employer violence and hostility toward organizing efforts backed by law enforcement, judges and politicians.

Field labor in California was initially performed by Asian immigrants, followed by Mexican and Filipino workers, with a brief interlude of white workers during the Depression. Early on, growers learned to recruit a workforce of non-citizen, newly-arrived immigrants who were often barred from other sectors of employment.[8] But in 1882, with the passage of the Chinese Exclusion Act, huge tracts of newly irrigated land lay fallow,

---

[6] Marshall Ganz, Why David Sometimes Wins 23 (2009). For the summary of California farm worker organizing, I have used the following sources: Carey McWilliams, Factories in the Field: The Story of Migratory Farm Labor in California (1939); Stuart Marshall Jamieson, Labor Unionism in American Agriculture, Bulletin 836 (Bureau of Labor Statistics, U.S. Department of Labor; reprint 1975); Juan Gomez-Quiñones, Mexican American Labor, 1790–1990 (1994); Majka & Majka, Farm Workers, Agribusiness and the State (1983). Although there are many others of high quality, these provide a concise account of the activity of the time and are sufficient for this survey.

[7] McWilliams, *supra* note 6, at 66–67.

[8] Ganz, *supra* note 6, at 24.

CALIFORNIA v. CALIFORNIA:

Law, Landscape, & the Foundational Fantasies of the Golden State

ELAINE KUO*

According to the venerable Wikipedia, there are approximately 900 popular songs about California (including at least 76 simply titled "California").[1] There are, perhaps, just as many — and frequently contradicting — cultural perceptions about this Golden State.

For some, there is Jack Kerouac's (and Dean Moriarty's) California: "wild, sweaty, important, the land of lonely and exiled and eccentric lovers come to forgather like birds, and the land where everybody somehow looked like broken-down, handsome, decadent movie actors."[2]

For others, there is Mark Twain's California, full of a "splendid population":

> [F]or all the slow, sleepy, sluggish-brained sloths stayed at home — you never find that sort of people among pioneers — you can-

* Elaine Kuo expects to receive her J.D. in May 2013 from UC Hastings College of the Law. She could not have completed her paper without the unfailing guidance, encouragement, and — in the eleventh hour — flexibility of Professor Reuel Schiller of UC Hastings. Many thanks, also, to professors Kathleen Moran and Richard Walker of UC Berkeley, whose undergraduate lectures inspired and provided the backbone for this paper.

[1] *List of Songs About California*, Wikipedia, http://en.wikipedia.org/wiki/List_of_songs_about_California (last visited May 5, 2012).

[2] Jack Kerouac, On the Road 168 (1976).

> not build pioneers out of that sort of material. It was that population that gave to California a name for getting up astounding enterprises and rushing them through with a magnificent dash and daring and a recklessness of cost or consequences, which she bears unto this day — and when she projects a new surprise the grave world smiles as usual and says, "Well, that is California all over."[3]

Truman Capote, meanwhile, believed that "[i]t's a scientific fact that if you stay in California you lose one point of your IQ every year."[4]

There is the California embodied in the majestic mountains of Yosemite, and the notion of a state that is natural and free and part of the Wild West.[5] There is the California embodied in the box office, and the notion of a state that is all silicone and silicon. All of it is ultimately bound by and built by the same foundational fantasies of a state at the crossroads of backcountry and concrete. This paper explores those fantasies, and discusses the ways in which legal actions over seminal environmental issues of water, travel, and air both mirrored and made the California identity.

California becomes a place not quite as "west of the West" as Alaska, not always as rugged and rural as Washington and Oregon, and yet far

---

[3] Mark Twain, Roughing It 282 (1976).

[4] *Truman Capote quotes*, ThinkExist.com, http://thinkexist.com/quotes/truman_capote/ (last visited May 5, 2012).

[5] John Muir's national park movement and Jack London's words on the will, struggle, and power of nature were seen as fighters against capitalist emasculation and the mechanization of modernity at the turn of the nineteenth century. This fight has persisted in San Francisco's resistance to development, and organizations and (grassroots) movements such as the Greenbelt Alliance and Save the Bay.

At the same time, this resistance is arguably an exercise in capitalism and (concentrated) wealth. As Richard Walker puts it, "rich people want a pretty view." But "wanting green space may have the detrimental effect of not making enough low-income housing to more people." *Forum: The History of Bay Area Environmentalism* (KQED radio broadcast Nov. 16, 2007), available at http://www.kqed.org/a/forum/R711161000.

Consider, too, the relationship between San Francisco and Lake Tahoe: industrial leisure under the guise of "outdoorsmanship" has resulted in lake sedimentation and algae fertilization. Contrast that, however, with the (somewhat unexpected) role of hunters and sportsmen (including Teddy Roosevelt) as early and ardent conservationists. *See generally* John F. Reiger, American Sportsmen and the Origins of Conservation (2000) (arguing that "gentlemen" hunters and anglers came together to lobby for laws regulating the taking of wildlife and wilderness preservation, both out of a desire to protect their hobbies and a nineteenth-century sportsman's code demanding that its followers take responsibility for the total environment).

out enough to be a place where "you can't run any farther without getting wet."[6] Perhaps like much of the West, California is a place and people trying to create community and history from scratch. It is as much fiction as it is fact: a place as carefully constructed in courtrooms as it has been by adjoining tectonic plates. Either way, California has more often than not been built by conquering and controlling nature.

> People were here for the jobs, here for their slice of the dream, and natural beauty gilded connections between the two. The Mediterranean climate churned out mild winters, low humidity and long "Indian" summers promoting outdoor life so convincingly, in fact, that many newcomers seemed to overlook the fact that they'd moved into earthquake country.[7]

In many ways, life here is only possible with the manipulation of water and air. So first came the golden climate; then came the Golden State; and then came the lawsuits.

Indeed, for all its perceived "chill surfer" character, contentious litigation underlies some of the most compelling stories of California: "it is also the place where the American Dream is pursued most fiercely, its spoils contested most brutally."[8]

Law acts as both a conscious reflector and a subconscious creator of culture.[9] And this analysis is not limited to abstract ruminations on an intangible ethos. This paper connects law and film, "two of contemporary society's dominant cultural formations, two prominent vehicles for the

---

[6] Brian Gray, *American West*, class lecture at UC Hastings College of the Law (2012); *Neil Morgan quotes*, ThinkExist.com, http://thinkexist.com/quotation/california_is_where_you_can-t_run_any_farther/217039.html (last visited May 5, 2012).

[7] Chip Jacobs & William J. Kelly, Smogtown: The Lung-Burning History of Pollution in Los Angeles 24 (2008). Consider, too, UC Berkeley's decision to build its Memorial Stadium directly atop the Hayward Fault — against the wishes and warnings of geologists — because that was where the best view would be. It is currently undergoing a massive renovation and seismic retrofit, such that the fault line that runs "from goal post to goal post" will not literally split the stadium in two. *The Hayward Fault at UC Berkeley*, http://web.archive.org/web/20110716064610/http://seismo.berkeley.edu/seismo/hayward/ucb_campus.html (last visited Sep. 7, 2012). (NB: It is nevertheless this writer's opinion that it does make for the best view and is well worth it.)

[8] R.C. Lutz, *On the Road to Nowhere?: California's Car Culture*, 79 Cal. Hist. 50 (2000).

[9] *See generally* Lawrence M. Friedman, American Law in the 20th Century (2002).

chorus through which society narrates and creates itself."[10] Both law and film alike are "dominant players in the construction of concepts such as subject, community, identity, memory, gender roles, justice and truth; they each offer major socio-cultural arenas in which collective hopes, dreams, belief, anxieties and frustrations are publicly portrayed evaluated, and enacted."[11] Whether art has imitated life and the law in the Golden State or vice versa, lawsuits have built California based on a "double mystery" of erasure and positive reinvention: blessed by nature, yet having to battle against it in order to grow and flourish.[12]

Call it "California v. California."

WATER WARS

"Forget it, Jake — it's Chinatown."

First and foremost, the story of California is a story of water.[13] There are the ocean waves along California's 840 miles of coastline, from the seaside cliffs of Mendocino to the surf and sand of San Diego. There is the snow melting off of the Sierra Nevada. There is a flooded valley and an

---

[10] Orit Kamir, *Why 'Law-and-Film' and What Does it Actually Mean?: A Perspective*, 19 CONTINUUM: J. OF MEDIA & CULTURAL STUD. 255, 256 (2005); *see also* JOHN DENVIR, LEGAL REELISM: MOVIES AS LEGAL TEXTS (1996). In fact, the entire fledgling field of "law-and-film" is arguably an exercise in Friedmanism.

In fact, much of American history has been shaped by popular fictions; the nation is built upon stories of "cowboys and Indians" and war. In the couple centuries of its existence, the United States has used these tales of absolute victory of its "Goodness and rosy plumpness" to justify its birth, its expansion, and, indeed, its empire. GORE VIDAL, IMPERIAL AMERICA 6 (2004); STANLEY CORKIN, COWBOYS AS COLD WARRIORS 3 (2004).

[11] Kamir, *supra* note 10, at 264.

[12] *See generally* CAREY MCWILLIAMS, CALIFORNIA: THE GREAT EXCEPTION (1999) ("Is there really a state called California or is all this boastful talk? [. . .] Like all exceptional realities, the image of California has been distorted in the mirror of the commonplace. It is hard to believe in this fair young land, whose knees the wild oats wrap in gold, whose tawny hills bleed their purple wine — because there has always been something about it that has incited hyperbole, that has made for exaggeration."); —, SOUTHERN CALIFORNIA: AN ISLAND ON THE LAND (1946).

[13] The "history of California in the twentieth century is the story of a state inventing itself with water." WILLIAM L. KAHRL, WATER AND POWER 1 (1983). Simply put, California is a "hydraulic society." DONALD WORSTER, UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST 53 (1994).

THE *CAL FED* CONTROVERSY:

Distinguishing California's Pregnancy Leave Law and the Family and Medical Leave Act

JENNIE STEPHENS-ROMERO*

In the modern history of the United States, the feminist movement has been marked by a great divide between those women favoring formal equality and those favoring substantive equality.[1] While supporters of formal equality believe that men and women should be treated the same, including under the law, supporters of substantive equality believe that where men and women are actually situated differently, different rules may be needed in order to achieve equal results.[2] The debate rose to a peak in the 1970s and 1980s in a national debate over pregnancy discrimination and benefits in the workplace.[3] After two devastating U.S. Supreme Court decisions in the 1970s, the divide appeared most prominently between

* Jennie Stephens-Romero received her J.D. in May 2012 from UC Hastings College of the Law. She would like to thank Professor Reuel Schiller, Professor Stephanie Bornstein, and Dean Shauna Marshall for their assistance and insightful comments.

[1] Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harvard C.R.-C.L. L. Rev. 415, 417–20 (2011).

[2] Katherine T. Bartlett & Deborah L. Rhode, Gender And Law: Theory, Doctrine, Commentary 1, 127 (5th Ed. 2010).

[3] Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. Contemp. Legal Issues 279 (1998). Williams also provides a comprehensive analysis of the theoretical debate between feminists in the different ideological camps.

California women's activists and those working on the national level. For the most part, California women's groups came out in support of a substantive approach to equality which provided leave specifically to pregnant women while not specifically mandating leave for other temporarily disabled employees.[4] On the other hand, national women's groups generally favored a formal approach where pregnant women would receive the same leave benefits as any other employee.[5]

In 1987, a Supreme Court case involving California's substantive approach to equality showcased the feminist debate to everyone in the country.[6] *California Federal Savings & Loan Association v. Guerra* truly illuminates the main figures in the leave debate and their beliefs on the issue.[7] But the debate was not over then — national women's groups worked in Washington to promote their formal view. The long-standing feud between supporters of formal and substantive equality can perhaps best be observed in the history of pregnancy and parental leave statutes in the U.S.

"IT NEVER OCCURRED TO ME THAT I MIGHT LOSE MY JOB BECAUSE I'D HAD A CHILD."[8]

In 1982 Lillian Garland, an employee at California Federal Savings & Loan Association (Cal Fed), took maternity leave to have a cesarean section.[9] When she returned to work, she had been replaced, and her job was no longer available.[10] Garland filed a complaint with the California Fair Employment and Housing Commission (FEHA) claiming that Cal Fed had violated California's Pregnancy Disability Leave Law.[11] She was among 300 other women who had filed complaints for violations of that law in

---

4 *See, infra*, text associated with fns. 110–119, for more detail.

5 *Id.*

6 California Federal Sav. & Loan Ass'n v. Guerra (*Cal Fed*), 479 U.S. 272, 278 (1987).

7 *Id.*

8 Tamar Lewin, *Maternity Leave: Is It Leave, Indeed?*, N.Y. Times, Jul. 22, 1984, at F1 (quoting Lillian Garland).

9 Ronald D. Elving, Conflict and Compromise: How Congress Makes the Law 17 (1995).

10 *Id.*

11 *Cal Fed*, 479 U.S. at, 278.

1982.[12] Before the administrative hearing date with FEHA, Cal Fed filed suit in the Federal District Court for the Central District of California seeking a declaration that California's Pregnancy Disability Leave Law had been preempted by the federal Pregnancy Discrimination Act.[13] Cal Fed was joined by the Merchants and Manufacturers Association and the California Chamber of Commerce in what the business community saw as an opportunity to attack the leave law.[14]

In 1984, the District Court characterized the California law as requiring "preferential treatment" for pregnant employees, and agreed with Cal Fed that the Pregnancy Disability Leave Law was preempted by the Pregnancy Discrimination Act.[15] In his opinion, Judge Real not only invalidated a law aimed at helping women achieve equality, but he did so by using another law aimed at the same purpose.[16] The decision caused consternation among many women activists.[17]

"DEBATE OVER PREGNANCY LEAVE"[18]

Cal Fed wound its way through the courts and in October of 1986, the case reached the U.S. Supreme Court.[19] Amicus briefs were filed in support of various points of view — Cal Fed's stance was supported by business and commerce associations, California women's groups supported the Pregnancy Disability Leave Law, and national women's groups supported Lillian Garland's right to leave, but not the Pregnancy Disability Leave Law itself.[20] If the debate between different camps of feminist thought was not

---

12 ELVING, *supra* note 9, at 18.

13 *Cal Fed*, 479 U.S. at 278–79.

14 *Id. See* ELVING, *supra* note 9, at 18.

15 *California Federal Sav. & Loan Ass'n v. Guerra*, 34 FAIR EMPL. PRAC. CAS. (BNA) 562, 1 (1984).

16 *Id.*

17 ANNE L. RADIGAN, CONCEPT & COMPROMISE: THE EVOLUTION OF FAMILY LEAVE LEGISLATION IN THE U.S. CONGRESS 6 (1988).

18 Title of a *New York Times* article describing *Cal Fed*. Tamar Lewin, *Debate Over Pregnancy Leave*, N.Y. TIMES, Feb. 3, 1986, at D1.

19 *Cal Fed*, 479 U.S. at 272.

20 *See, e.g.,* Brief for the Chamber of Commerce of the United States as Amicus Curiae in Support of the Petition, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494); Brief of Equal Rights Advocates, the California Teachers Ass'n, the Northwest Women's Law

clear before, Cal Fed's amici highlighted the internal dispute. While both California and national women's groups called for Lillian Garland's right to leave, they did so with significant differences.

First, California women activists pointed out that the Pregnancy Disability Leave Law was not inconsistent with Title VII and the Pregnancy Discrimination Act; in fact, they shared the same goals of ending discrimination against women in the workplace.[21] While Title VII preempted legislation which relied on stereotypical notions of women's proper roles, California's legislation simply recognized an objective difference between the sexes, namely pregnancy.[22] Accordingly, different policies are necessary to ensure equal opportunities for women.[23] For example, the Equal Rights Advocates Brief suggested comparing men who have engaged in reproductive behavior to pregnant women.[24] That way any difference in treatment between the two groups could be seen as manifestly unjust.[25] Title VII, their brief pointed out, prohibits facially neutral policies that result in adverse impacts on women, and that is what happens when pregnant women are treated the same as everyone else.[26] True to their ideological underpinnings, the California women's groups were not afraid to point out the differences between men and women, and they were not afraid to demand a right to equality while taking that difference into consideration.[27]

Center, the San Francisco Women Lawyers Alliance as Amici Curiae, *Cal Fed*, 479 U.S. 272 (1987) (No. 85-494) [hereinafter *Equal Rights Advocates Brief*]; Brief for the National Organization for Women, Now Legal Defense and Education Fund, National Bar Ass'n Women Lawyers' Division Washington Area Chapter, National Women's Legal Defense Fund as Amici Curiae in Support of Neither Party, *Cal Fed*, 479 U.S. 272 (1987) (No. 85-494) [hereinafter *NOW Brief*].

21 *Equal Rights Advocates Brief, supra* note 20.

22 *Id.*

23 Brief for California Women Lawyers, Child Care Law Center, Jessica McDowell, Lawyers Committee for Urban Affairs, Mexican American Legal Defense and Education Fund, Women Lawyers' Association of Los Angeles, and Women Lawyers of Sacramento as Amici Curiae in Support of Respondents, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494) [hereinafter *California Women Lawyers Brief*].

24 *Equal Rights Advocates Brief, supra* note 20.

25 *Id.*

26 *Id.*

27 *See infra*, text associated with fns 110–119.