



CALIFORNIA SUPREME COURT

Historical Society

NEWSLETTER • SPRING/SUMMER 2017



In 1854, the Supreme Court of California decided the infamous case of People v. Hall, which reversed the murder conviction of George W. Hall, “a free white citizen of this State,” because three prosecution witnesses were Chinese. One legal scholar called the decision “the worst statutory interpretation case in history.” Another described it as “containing some of the most offensive racial rhetoric to be found in the annals of California appellate jurisprudence.”

READ ABOUT PEOPLE V. HALL IN MICHAEL TRAYNOR’S ARTICLE STARTING ON PAGE 2

The Infamous Case of People v. Hall (1854)

AN ODISIOUS SYMBOL OF ITS TIME

BY MICHAEL TRAYNOR*



Chinese Camp in the Mines, [P. 265 Illus., from Three Years in California, by J.D. Borthwick]

COURTESY, CALIFORNIA HISTORICAL SOCIETY, CHS2010.431

IN 1854, THE SUPREME COURT OF CALIFORNIA decided the case of *People v. Hall*, which reversed the murder conviction of George W. Hall, “a free white citizen of this State,” because three prosecution witnesses were Chinese.¹ The court held their testimony inadmissible under an 1850 statute providing that “[n]o black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, a white person.”²

If cases could be removed from the books, *People v. Hall* would be former Chief Justice Ronald George’s candidate.³ Professor Charles McClain described it as “containing some of the most offensive racial rhetoric to be found in the annals of California appellate jurisprudence.”⁴ Judge Leon Yankwich called it “prejudice in

the form of law.”⁵ According to Professor John Nagle, it is “the worst statutory interpretation case in history.”⁶ It preceded in infamy the *Dred Scott* case three years later.⁷

Instead of a legal critique, this note provides brief context from a period of rising hostility to Chinese immigrants in California. It aims to help us comprehend the odious decision while not excusing it.⁸

Here are just a few highlights from eventful 1854, starting nationally and then going to California and our Supreme Court and its decision: Franklin Pierce was president and Roger B. Taney chief justice of the United States. The Republican Party began in Ripon, Wisconsin and two years later nominated John C. Fremont of California for president (he lost to Democrat James Buchanan). The Kansas-Nebraska Act repealed the Missouri Compromise and allowed slavery by self-determination in the new territories. Yung Wing was the first-known Chinese student to graduate from a U.S. university (Yale College). Susan B. Anthony encouraged the attendees at the fifth Women’s Rights Convention to petition state legislatures to protect the equal rights of women. As the year ended, Harriett Tubman conducted her three brothers to freedom in the Christmas Escape.

* © 2017 by Michael Traynor. Michael Traynor is Senior Counsel at Cobalt LLP in Berkeley. The author acknowledges with appreciation the assistance of the California State Archives, the Nevada County Historical Society, and the Nevada Historical Society, which holds the collection of William M. Stewart’s papers. Early papers of Stewart and early records of Nevada County that might have pertained to 1854 and *People v. Hall* were destroyed by fire.

In California, the gold rush continued. Approximately 23,000 Chinese were recent arrivals, many of whom became gold miners.⁹ Sacramento became the new capital. Governor John Bigler, hostile to both American Indian and Chinese immigrants, began his second term. Unprovoked killing of American Indians was common.¹⁰

On March 31, 1854, the Supreme Court moved by horse-drawn wagon from San Francisco to San Jose.¹¹ The court had three members, all quite young: Chief Justice Hugh Campbell Murray, then 28; Justice Solomon Heydenfeldt, then 37; and Justice Alexander Wells, then 34.

Murray, born in St. Louis, Missouri, arrived in California in 1849, entered law practice and politics, served as a trial judge in San Francisco, became an associate justice in 1851 and chief justice in 1852. He was reelected in 1855 as a candidate of the Know Nothing Party and died of tuberculosis in 1857. He never married. He had a mixed reputation as a drinker, gambler, and fighter but also as an author of some important opinions.¹²

Heydenfeldt, born in Charleston, South Carolina, practiced law in Alabama and then came to San Francisco in 1850, entering law practice and politics. He became a justice in 1852 and served until 1857, when he resigned and thereafter practiced law and was a philanthropist. Married three times, he had three groups of children and died in San Francisco in 1890. Among his many opinions was one holding that an intoxicated plaintiff who fell into an uncovered hole in the sidewalk should not necessarily be denied recovery: "A drunken man is as much entitled to a safe street as a sober one, and much more in need of it."¹³

Wells, born in New York City, practiced law and served in the Assembly in New York, earning a reputation as an entertaining speaker and known as the "Great Little Thunder." After arriving in California in 1849, he engaged in law practice and politics and became a justice in 1852. Wells died unexpectedly at his home in San Jose on October 31, 1854, leaving his wife and one daughter.¹⁴

Chief Justice Murray was "anxious to arrive" at the meaning of the statute.¹⁵ His opinion in *Hall* is devoid of facts about the underlying crime and trial. The case file from the trial court and the minutes of the Supreme Court provide the following facts:¹⁶

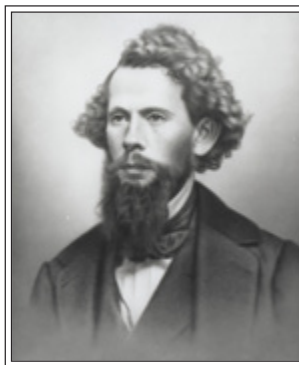
George Hall, John Hall, and Samuel Wiseman were indicted for the murder of Ling Sing, described as "(a Chinaman)," in Nevada County. The indictment charged George Hall with shooting Ling Sing in the back with a shotgun, mortally wounding him with at least fifteen buckshot wounds; it charged John Hall and Wiseman as accessories. William T. Barbour was the trial judge. The district attorney was William M. Stewart. The lead defense counsel was John R. McConnell. Judge Barbour tried the two Halls separately from Wiseman (records indicate no outcome for Wiseman).

At the trial, before a jury of twelve men, the prosecution called twelve witnesses, including three Chinese witnesses who testified with the help of sworn interpreters. The record does not show any defense objection to their testimony on the ground that they were Chinese. The court overruled a defense motion to exclude part of the testimony of one of the Chinese witnesses concerning the handling of the victim's body and what other parties did after the shooting. The defense called 16 witnesses, including Wiseman. The jury found George Hall guilty and John Hall not guilty. Judge Barbour sentenced George Hall to "hang by the neck until he is dead."

Counsel argued the appeal first before Justices Heydenfeldt and Wells. Subsequently, on McConnell's motion, Chief Justice Murray and Justice Heydenfeldt heard reargument.¹⁷ The court thereafter reversed Hall's conviction.¹⁸ Murray wrote the majority opinion in which Heydenfeldt concurred; Wells dissented in one sentence without further explanation.

Supplementary sources provide additional background: Ling Sing was killed in the course of an armed robbery at a Chinese mining camp.¹⁹ It was not unusual then for white miners to attack Chinese mining camps.²⁰ George Hall and John Hall were brothers.²¹ Judge Barbour had won both a contested election and litigation in which Stephen J. Field (later Justice Field) represented the prior incumbent.²² Defense counsel McConnell practiced law in Nevada City after serving as district attorney and later was elected attorney general. District Attorney Stewart served briefly as acting attorney general and later became U.S. senator from Nevada and reminisced about the case.²³ Stewart recalled arguing for the prosecution that the defense had not taken objection to the Chinese testimony and that Chinese were not Indians under the statute. He recalled McConnell arguing that the testimony of Chinese witnesses was inadmissible because they were the same as Indians.²⁴

In his majority opinion, Chief Justice Murray did not address the defendant's failure to object on the ground that the statute made the testimony of the Chinese witnesses inadmissible. He cited no case authority. He referred to the "discoveries of eminent Archeologists" and the "researches of modern Geologists." He concluded that "the name of Indian, from the time of Columbus to the present day, has been used to designate, not alone the North American Indian, but the whole of



*Chief Justice
Hugh Campbell Murray.*

COURTESY ADMINISTRATIVE
OFFICE OF THE COURTS

the Mongolian race”; the word “Black” means “the opposite of ‘White’”; the word “White” “excludes black, yellow, and all other colors”; and the legislature “adopted the most comprehensive terms to embrace every known class or shade of color, as the apparent design was to protect the White person from the influence of all testimony other than that of persons of the same caste. The use of these terms must, by every sound rule of construction, exclude every one who is not of white blood.”²⁵

Murray relied on materials untested by cross-examination or searching counter-argument. He stated that “ethnology” had advanced to “that high point of perfection which it has since attained by the scientific inquiries and discoveries of the master minds of the last half century.” His opinion preceded by a few years Gregor Mendel’s first hybrid peas that bloomed in the abbey garden and Charles Darwin’s *On the Origin of Species by Means of Natural Selection*, by more years the promotion and then renunciation of “eugenics,”²⁶ and by many years the leading cases involving racial intermarriage, school desegregation, and scientific evidence.²⁷

Murray ruled that public policy also impelled the decision: “The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls. This is not a speculation which exists in the excited and overheated imagination of the patriot and statesman, but it is an actual and present danger.”²⁸ He then went on:

The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our government. These facts were before the Legislature that framed this Act, and have been known as matters of public history to every subsequent Legislature. . . . For these reasons, we are of opinion that the testimony was inadmissible.²⁹

On remand, Stewart elected not to retry Hall.³⁰ A local report indicates that Hall was released because one of the principal white witnesses had died and the other could not be found and that in May 1857 he was

“living quietly on Brush Creek near Nevada City.”³¹ The decision aggravated the exposure of Chinese and other minorities to violence by assailants confident that non-white witnesses could not testify.³² A black California correspondent for *Frederick Douglass’ Paper* wrote that “the Chinese have taken the place of the colored people, as victims of oppression.”³³

In January 1855, after another anti-Chinese speech by Governor Bigler, Chinese merchants objected both to it and the court’s ruling that “we Chinese are the same as Indians and Negroes” who are not allowed to bear witness. Sadly, they also made an invidious comparison: “And yet these Indians know nothing about the relations of society; they know no mutual respect; they wear neither clothes nor shoes; they live in wild places and caves.”³⁴

Despite growing protests, which included remonstrations from white leaders, the legislature explicitly disqualified Chinese and Mongolian witnesses in an 1863 amendment to the statute. It finally repealed the offensive law by omission from the Penal Code of 1872 and expressly in 1955.³⁵ Indeed, in 1876, former Justice Heydenfeldt testified in defense of the rights of the Chinese before the Congressional Joint Special Committee Investigation of Chinese Immigration.³⁶

I first learned about *People v. Hall* from Justice Harry Low when I was a young colleague of his in the California Attorney General’s office in San Francisco. It seems fitting to close by referring to his important and heartfelt statement as an appellate justice that the term “Chinese Wall” should be abandoned. Citing *People v. Hall*, he objected to the linguistic discrimination, to the inappropriate reference to “one of the magnificent wonders of the world and a structure of great beauty,” and to the architecturally inaccurate metaphor. The Great Wall of China was built not to prevent two-way communication but “to keep outsiders out — not to keep insiders in.”³⁷ Justice Low called for “jettisoning the outmoded legal jargon of a bygone time.”³⁸ Although we have achieved much progress since *People v. Hall*, more than a vestige remains of the social and cultural effects of the discrimination for which it is infamous.³⁹ ★

ENDNOTES

1. *People v. Hall* (1854) 4 Cal. 399.
2. 1850 Cal. Stat. ch. 99, § 14, pp. 229, 230, amended by 1863 Cal. Stat., ch. 70, § 1, p. 69, repealed by omission from codification, Cal. Penal Code § 1321, officially repealed, 1955 Cal. Stat. ch. 48, § 1, pp. 488, 489; see also Gabriel J. Chin, “‘A Chinaman’s Chance’ in Court: Asian Pacific Americans and Racial Rules of Evidence,” *UC Irvine L. Rev.* 3 (2013): 965–972 (reviewing California statutory and case law history).
3. Richard H. Rahm, “Chief Justices Celebrate Publication of the History of the California Supreme Court,” *CSCHS Newsletter*, Fall/Winter 2016, 5; see also Ronald M. George, *Chief: The Quest for Justice in California*. Berkeley: Berkeley Public Policy Press, Institute of Governmental Studies, 2013, 561–562.

4. Charles J. McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America*. Berkeley: Univ. of California Press, 1994, 21; reviewed by Robert C. Berring, "Review Essay," *Asian L.J.* 2 (1995): 87.
5. Leon R. Yankwich, "Social Attitudes as Reflected in Early California Law," *Hastings L.J.* 10 (1959): 250, 257–261.
6. John Copeland Nagle, "The Worst Statutory Interpretation Case in History," *Nw. U. L. Rev.* 94 (2000): 1445, 1459–1468.
7. *Dred Scott v. Sandford* (1857) 60 U.S. 393.
8. See, e.g., Charles S. Cushing, "The Acquisition of California, Its Influence and Development under American Rule," *Calif. L. Rev.* 8 (1920): 67, 75–76; Mark Kanazawa, "Immigration, Exclusion, and Taxation: Anti-Chinese Legislation in Gold Rush California," *J. Econ. Hist.* 65 (2005): 779, 781–789; Jean Pfaelzer, *Driven Out: The Forgotten War against Chinese Americans*. Berkeley: Univ. of California Press: 2007, passim.
9. See Najia Aarim-Heriot, *Chinese Immigrants, African Americans, and Racial Anxiety in The United States, 1848–82*. Urbana: Univ. of Illinois Press, 2006, 30–42 (3 arrivals in 1848, 325 in 1849, 450 in 1850, 2,716 in 1851, 20,026 in 1852, 4,270 arrivals and 4,421 returns in 1853, net total through 1853 of 23,369).
10. Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe*. New Haven: Yale Univ. Press, 2016, 228.
11. Jake Dear and Levin, "Historic Sites of the California Supreme Court," *CSCHS Yearbook* 4 (1998–99): 63.
12. J. Edward Johnson, *History of the Supreme Court Justices of California 1850–1900*, vol. 1. San Francisco: Bender-Moss Company, 1963, 43. Charles J. McClain, Jr., "Pioneers on the Bench: The California Supreme Court, 1849–1879, chap. 1, in Harry N. Scheiber, ed., *Constitutional Governance and Judicial Power: The History of the California Supreme Court*. Berkeley: Institute of Governmental Studies Press, 2016, 9–20.
13. Johnson, *History of the Supreme Court Justices*, 44–45; *Robinson v. Pioche, Bayerque & Co.* (1855) 5 Cal. 460.
14. Wells' gravestone states that he "died at San Jose, Cal. Oct. 31st 1854 Aged 36 years and 24 days." Two infant daughters predeceased him; see also, Johnson, *History of the Supreme Court Justices*, 48–49 which includes more detail about Wells but states incorrectly that he was born "about 1821" and died leaving "his wife and two little daughters."
15. 4 Cal. at 399.
16. Reviewed by the author on March 21, 2017 at the California State Archives.
17. Minutes of the Supreme Court (1854), 180–181, 332, 349–350, 494, 504–505 (Case no. 255). It was not unusual for two justices to hear argument. The minutes state that at the first argument on January 17, 1854, McConnell argued for the appellant and Churchman for the respondent, *ibid.*, 180–181, and that at the reargument on May 9, 1954, the case was "argued by Atty Genl McConnell," submitted, and taken under advisement. *Ibid.*, 350–351. The minutes do not identify any prosecutor at the reargument. Stewart recalls that he and McConnell argued; perhaps this was at the reargument at which Chief Justice Murray was present. See William M. Stewart, *Reminiscences of Senator William M. Stewart, of Nevada*. New York: Neale Pub. Co., 1908.
18. *Ibid.*, 505.
19. David Alan Rego, "People v. Hall (1854)," in Jonathan H.X. Lee, ed., *Chinese Americans: The History and Culture of a People*. Santa Barbara: ABC-CLIO, 2016, 213–217; Michael Bottoms, *An Aristocracy of Color: Race and Reconstruction in California and the West, 1850–1890*. Norman: Univ. of Oklahoma Press, 2013, 14–38. For a contemporary description of a Chinese mining camp, see J.D. Borthwick, *Three Years in California* [1851–1854]. Edinburgh and London: W. Blackwood and Sons, 1857, 262–267.
20. See Iris Chang, *The Chinese in America: A Narrative History*. London: Penguin Books, 2003, 44–45.
21. Rego, "People v. Hall," 213.
22. See *People ex rel Barbour v. Mott* (1853) 3 Cal. 502 (Field was counsel for the incumbent Judge Mott); Stephen J. Field, *Personal Reminiscences of Early Days In California with Other Sketches*. Washington, DC: n.p., 1893, 29–34 (describing his difficulty and aborted duel with Barbour) (paperback reproduction).
23. Stewart, *Reminiscences of Senator William M. Stewart*, 76–81.
24. *Ibid.*, 79. Stewart says that there had been antagonism between Mr. Churchman, who also was a prosecutor at the trial, and Mr. McConnell and that Churchman "transferred his antagonism" to Stewart when he became district attorney. *Ibid.*, 76–77.
25. 4 Cal. at 401–404.
26. Siddhartha Mukherjee, *The Gene: An Intimate History*. New York: Scribner, 2016, 39–40, 49–50, 64–100, 138, 259.
27. *Perez v. Sharp* (1948) 32 Cal.2d 711; *Brown v. Board of Education* (1954) 347 U.S. 483; *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579.
28. 4 Cal. at 404.
29. *Ibid.*, 404–405.
30. See Stewart, *Reminiscences of Senator William M. Stewart*, 79; Rego, "People v. Hall," 217.
31. Email from Pat Chesnut, Director of the Searls Historical Library in Nevada City, to the author (Mar. 12, 2017) (referring to local historian David Comstock's timeline drawn from early newspapers and contained in Comstock's *Lives of the Pioneers before 1900*).
32. See, e.g., Bottoms, *An Aristocracy of Color*, 29; Aarim-Heriot, *Chinese Immigrants, African Americans, and Racial Anxiety*, 44–45.
33. "Letter from Nubia [pen name for William H. Newby]" *Frederick Douglass' Paper*, April 6, 1855, in Philip S. Foner and Daniel Rosenberg, eds., *Racism, Dissent, and Asian Americans from 1850 to the Present*. Santa Barbara: Greenwood Press, 1993, 211; Eddie L. Wong, *Racial Reconstruction: Black Inclusion, Chinese Exclusion, and the Fictions of Citizenship*. New York: NYU Press, 2015, 100–102.
34. Lai Chun-chuen to Governor Bigler, Jan. 1955, excerpted in McClain, *In Search of Equality*, 22.
35. See n. 2, *supra*.
36. Heydenfeldt's testimony is reproduced in Foner and Rosenberg, *Racism, Dissent, and Asian Americans*, 34–36.
37. *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 293–294 (concurring opinion of Low, P.J.).
38. *Ibid.*
39. See, e.g., Chin, "'A Chinaman's Chance' in Court," 990.



EDITORS' NOTE: We invited Michael Traynor to prepare this imaginary playbill to include colorful tidbits and characters that didn't make it into his necessarily selective, spare, and serious historical account of *People v. Hall*. The endnotes reflect post-performance history and refer to the endnotes in the main article.*

PEOPLE v. HALL, A CALIFORNIA TALE

Premiering Saturday evening, January 31, 1857 8:00 p.m.
at and celebrating Nevada County's new courthouse in Nevada City,
replacing the old courthouse destroyed in the Great Fire of 1856.

ACT ONE: THE TRIAL
ACT TWO: IN THE SUPREME COURT
ACT THREE: AFTERMATH

There will be a short intermission between Acts One and Two,
and, for those of you who wish to stay, a discussion with the cast after the performance.

CAST

Chief Justice of California	Hugh C. Murray
Trial judge	William T. Barbour
District Attorney	William M. Stewart
Additional prosecuting attorney	James Churchman
Defense counsel	John R. McConnell
Defendant	George W. Hall
Jury	Twelve white men
Interpreter	Reverend William Speer
Widow of Justice Alexander Wells	Mrs. Alexander Wells
San Francisco madam	Ah Toy
Chorus	Chinese miners
Governor John Bigler; Associate Justice Solomon Heydenfeldt;	
Associate Justice Alexander Wells; Sheriff William H. Endecott;	
John E. C. Hall; various prosecution and defense witnesses;	
clerk and bailiff of the Supreme Court of California	CSCHS Troupe

CAST NOTES

HUGH C. MURRAY came to California in 1849 via Panama after service as a lieutenant in the war with Mexico. He presently serves as Chief Justice of California and wrote the majority opinion in *People v. Hall*. He previously starred in *In re Perkins* (1852) 2 Cal. 424 (1852) (denying habeas corpus and ordering that three fugitive slaves be delivered by the sheriff to their Mississippi master). Brilliant and fearless, he is also "[w]idely known as a drunk, [who] fit[s] comfortably into the rambunctious world of California courts"; threw a future U.S. Senator (John Conness) against a hotel bar; and "attacked a man on the street and beat him with his cane because the man had publicly described him as 'the meanest man that ever sat on a supreme bench.'"¹

WILLIAM T. BARBOUR served as a trial judge in Nevada County. After a contested election and litigation, he was seated instead of the prior incumbent represented by Stephen J. Field. Judge Barbour presided at the trial in 1853 of George W. Hall and John E. C. Hall in the old courthouse. He is happy to be at the new courthouse for this premiere.²

WILLIAM M. STEWART came to California in 1849. He studied law with John R. McConnell and succeeded McConnell as district attorney of Nevada County from 1853–1854, when he resigned and was succeeded by Niles Searls (later Chief Justice). Stewart persuaded Reverend Speer to serve as interpreter for the Chinese witnesses. "I asked him if they all told the same story, and he said they did, which was a mystery to me. I had not the slightest doubt that Hall killed the Chinaman, because he was seen coming from their camp where the dead body was found." Stewart recalls arguing in the Supreme Court for the prosecution.³

* © 2017 by Michael Traynor. The author appreciates this invitation, noting that no court has ever invited him to submit a supplemental brief containing colorful tidbits not in the main brief.



JAMES CHURCHMAN is an eminent lawyer who previously practiced law at the Illinois bar and is a friend of Abraham Lincoln. After the close of testimony, he opened the prosecution's argument to the jury and he and Stewart closed. Churchman recalls arguing for the prosecution in the Supreme Court as reflected in the court's minutes. He questions Stewart's memory, noting that Stewart recalled that there were six Chinese witnesses rather than three and that there was one defendant, John Hall, rather than two, George Hall and John Hall.⁴

JOHN R. MCCONNELL came to California in 1849 and first became a miner. He is a leading lawyer, expert in mining law. He served as the lead defense counsel at trial and on appeal. He preceded Stewart as district attorney and later was elected attorney general. During Act Two, he will reenact his argument in the Supreme Court and identify his opponent.⁵

GEORGE W. HALL, born in 1823, was convicted of killing Ling Sing at a Chinese mining camp in Nevada County. He did not testify at the trial and is correspondingly quiet in Acts One and Two; in Act Three, we will learn about his life after escaping hanging and retrial.

THE TWELVE WHITE MEN on the jury are played by members of the CSCHS Troupe. On the first day of trial ten jurors were empaneled, exhausting the panel. The court ordered the sheriff to summon twenty-one additional jurors for the next day and two additional jurors were then empaneled.⁶

REVEREND WILLIAM SPEER was the lead interpreter for the three Chinese prosecution witnesses. He is the author of *An Humble Plea Addressed to the Legislature of California, in Behalf of the Immigrants from the Empire of China to this State* (1856). He was a Presbyterian missionary to Canton during the Opium Wars, is fluent in Chinese, and is "a tireless champion of Chinese rights in California."⁷

MRS. ALEXANDER WELLS is the widow of Associate Justice Alexander Wells, who also had come to California in 1849 and died shortly after he issued his one sentence dissent from the majority opinion. She is heartened by having the chance in this play to relate her husband's dismay and will read excerpts from the blistering dissent he was drafting but never finished.⁸

AH TOY, who makes her grand entrance in Act Three, came from Hong Kong to San Francisco in 1848 or 1849 with her husband who died onboard the ship. As the legend goes, she became the mistress of the ship's captain and arrived with plenty of his gold in her pocket. She is a retired madam who ran her famous establishment and peep show in San Francisco. She is glad to help reenact the colorful and tumultuous time when the trial and argument occurred. Until *People v. Hall*, she enlisted the aid of California courts and Chinese witnesses in litigation involving her business, notwithstanding the criminal statute construed in that case and a comparable statute applicable in civil cases. She was impelled by San Francisco's anti-prostitution ordinance of 1854 and the case to go out of business.⁹

THE CHINESE MINERS who constitute the chorus are played by the CSCHS Troupe and resemble those depicted in the accompanying illustration by J.D. Borthwick. We gratefully acknowledge the miners who loaned us their camp clothes for this performance and are attending this premiere as our honored guests.¹⁰

OUR OWN CSCHS TROUPE members wrote the play and enact the various cameo roles as well as the parts of the jury members and the Chinese miners. The core group consists of one justice and two senior staff members who travel with the court to its various locations. The remaining members vary from time to time at our different venues and usually are local judges, lawyers, writers, and aspiring actors and singers. None of us has ever served on a Vigilance Committee.¹¹ ★

ENDNOTES

1. D. Michael Bottoms, *An Aristocracy of Color: Race and Reconstruction in California and the West, 1850–1890*. Norman: Univ. of Oklahoma Press, 2013, 19–20; Edgar Whittlesey Camp, "Hugh C. Murray: California's Youngest Chief Justice," 20 *Calif. Hist. Soc. Q.* (1941): 365–373; Oscar T. Shuck, *Representative and Leading Men of the Pacific*,

Boston: Bacon and Company, 1870, 473–476. Murray died on September 18, 1857 and at his memorial, Chief Justice Terry said, "As a judge, he was just, impartial, and fearless," and Attorney General Wallace said, "He was gifted by nature with an intellect capable of grasping the mightiest subjects." 8 *Cal. iii–v* (1857). Later on tour, Roger B. Taney, his previous understudy, played Murray's role.



2. Justice Field later reminisced that Barbour had engaged in a dispute with him, challenged him to a duel, withdrew, and made amends, and that “My resentment accordingly died out, but I never could feel any great regard for him. He possessed a fair mind and a kindly disposition, but he was vacillating and indolent. Moreover, he loved drink and low company. He served out his second term and afterwards went to Nevada, where his habits became worse, and he sunk so low as to borrow of his acquaintances from day to day small sums — one or two dollars at a time — to get his food and lodging. He died from the effects of his habits of intemperance.” Stephen J. Field, *Personal Reminiscences of Early Days In California with Other Sketches*. Washington, DC: n.p., 1893, 32.
3. Stewart did not mention Churchman’s crucial role at trial or on appeal. See William M. Stewart, *Reminiscences of Senator William M. Stewart, of Nevada*, New York: Neale Pub. Co., 1908. Stewart became acting attorney general and later U.S. senator from Nevada. See Russell R. Elliott, *Servant of Power: A Political Biography of Senator William M. Stewart*, Reno: University of Nevada Press, 1983, 7–8. Shuck, *Representative and Leading Men of the Pacific*, 634–644. After returning from the trip that inspired *The Innocents Abroad* (1869), Mark Twain briefly clerked for Senator Stewart. See Stewart, *Reminiscences*, 219–224. In *Roughing It* (1872) (ch. 54), Mark Twain praised the Chinese while noting that “[a]ny white man can swear a Chinaman’s life away in the courts, but no Chinaman can testify against a white man.”
4. Churchman appears as “Mr. Churchman” in the trial transcript, and with initials [hard to decipher] and last name in the Supreme Court’s handwritten minutes of the first argument, p. 181. He is the only Churchman in a contemporary directory. Brown & Dallison’s, *Nevada, Grass Valley and Rough and Ready Directory*, vol. 1. San Francisco: n.p., 1856. President Lincoln later appointed him as consul to Valparaíso, Chile. See E. G. Waite, “Historical Sketch of Nevada County, California,” in *Bean’s History and Directory of Nevada County California*. Nevada: Daily Gazette Book and Job Office, 1867, 39. His son became a dentist and his daughter a writer in Portland, Oregon, and she traveled with Mark Twain’s party that inspired *The Innocents Abroad*. *Morning Oregonian*, Mar. 17, 1921; Nina Churchman Larowe, “An Account of My Life’s Journey so far, its Prosperity, its Adversity, its Sunshine and its Clouds,” 1917, in Christine Fischer, ed., *Let Them Speak for Themselves: Women in the American West 1849–1900*. Hamden, Conn., The Shoe String Press 1990, 207–228.
5. Shuck, *Representative and Leading Men of the Pacific*, 529–534. “Stewart owes all his dialectic skill, ingenuity, and eloquence to the early training of McConnell.” *Ibid.*, 532. “In political opinion, McConnell may be classed as an old school strict constructionist.” *Ibid.*, 533. In 1861, McConnell ran unsuccessfully for governor, losing to Leland Stanford.
6. Trial Transcript for October 4–5, 1853, California State Archives. A juror then had to be a citizen of the U.S., an elector (voter) of the county, over 21 and under 60, and otherwise competent. Calif. Stat. 1851, ch. 30, § 1. An elector had to be a “white male citizen.” Calif. Const. 1849, art. II, § 1; Calif. Stat. 1850, ch. 38, art. II, § 10.
7. Bottoms, *An Aristocracy of Color*, 35. In 1857, Speer also authored “An Answer to the Common Objections to Chinese Testimony”; and an “Earnest Appeal to the Legislature of California for Their Protection by Our Law,” and “A Remonstrance from the Chinese in California to the Congress of the United States,” in William Speer, *From the Oldest and Newest Empire: China and the United States*. Chicago: Jones, Junkin & Co., 1870.
8. Mrs. Wells came from a prominent New York family. Before she married Justice Wells in 1846, she was known as Annie Van Rensselaer Van Wyck. Born in 1822, she lived until 1919. After Justice Wells’ death, she moved back to New York. Gertrude Wells, their oldest daughter, married Schuyler Hamilton, the grandson of Alexander Hamilton, divorced him seven years later, married Baron Raoul Nicholas de Graffenried, divorced him seven years later, was known as a talented musician, and died at age 94 in 1944. See *Wikipedia* entry for Alexander Wells (California).
9. Ah Toy died in 1928, just shy of her 100th birthday. See Jay Barmann, *San Francisco’s 16 Greatest Infamous Local Legends*, http://sfist.com/2015/04/03/san_franciscos_15_greatest_infamous.php; Ernest Beyl, “A Short History of Bordellos in San Francisco,” Part 2, *Marina Times*, Sept. 2012. After leaving the business, she “married and later sold clams in the South Bay town of Alviso.” *Ibid.*
10. J. D. Borthwick, *Three Years in California* [1851–1854]. Edinburgh and London: W. Blackwood and Sons, 1857, 265. Borthwick also describes his visit to the camp and the people there. *Ibid.*, 262–267.
11. For relevant local history, including political history and names and terms of various officials, see Waite, “Historical Sketch of Nevada County, California,” 9–72. For more about Murray, Heydenfeldt, Wells, Barbour, Bigler, and McConnell, see Oscar T. Shuck, *Bench and Bar in California: History, Anecdotes, Reminiscences*. San Francisco: The Occident Printing House, 1889, 69–71, 79–87, 102, 106, 154–157. For the ill treatment of the Chinese during the period under Governor Bigler, see Theodore H. Hittell, *History of California*, vol. 4. San Francisco: NJ Stone & Co., 1898, 98–115 (noting also, p. 111), that in the 1854 legislative session, Assemblyman B. F. Myres introduced but failed to get approval of a bill to prevent Asiatics “from giving evidence in favor of or against any white person in a criminal case,” and that “what Myres failed to accomplish” was accomplished by Murray in the *Hall* case.

Y.C. Hong Championed Chinese Inclusion:

BEFORE CONGRESS AND FOR MY FAMILY

BY CHERRY GEE*

DECADES BEFORE AMERICANS heard calls for a “Muslim ban,” there was the Chinese Exclusion Act of 1882, the first U.S. law to base immigration on ethnicity.¹ Until that time, the United States had been open to most who wanted to come here. The law and its successors halted entry of Chinese laborers into the U.S. and prohibited those already here from being naturalized. The laws were not repealed until 1943.

Against this backdrop, You Chung (Y.C.) Hong fought for immigration reform and Chinese immigrant rights, becoming one of the foremost authorities on these issues. In his decades-long career, the attorney and activist helped thousands of families, especially those from Guangdong Province in southern China. Mine was one of them.

Then as now, the promise of a better life was the main reason people wanted to emigrate. In the mid-nineteenth century, the California Gold Rush and the building of the Transcontinental Railroad created a great demand for cheap labor. Thousands of Chinese workers voluntarily and legally came to “Gam Saan” (Gold Mountain) to seek their fortune. The 1870 Census reported that more than 99 percent of them settled in the West.² However, as the economy declined over the years, complaints grew that these workers were taking jobs from and lowering the wages of native-born whites, fostering a climate of racial bias, resentment and hysteria against the Chinese.

This eventually led to Congress passing the 1882 law, halting the entry of Chinese laborers for ten years, even though the Chinese represented only .002 percent of the nation’s population.³ There were exceptions for diplomats, merchants, teachers, students and tourists but that required going through an arduous process with no guarantee of success. The law was renewed several times and extended indefinitely in 1902.

The politics of World War II — China was an ally — helped pass the 1943 Magnuson Act repealing the 1882



The author and family in China, 1949.

PHOTO COURTESY GEE FAMILY COLLECTION

ban. Although Chinese were no longer barred, the new law set a quota for them at 105 a year. That figure covered immigrants from anywhere in the world, even those who had never lived in China or been a Chinese national. (European quotas were based on country of citizenship.)⁴ This so-called national-origins standard remained until the Immigration and Nationality Act of 1965 replaced it with a system based on caps per country and a total annual number of visas, and categories for certain skills. In 2012, the House of Representatives issued a formal resolution of “regret” for the Chinese Exclusion Act.⁵

During the years the laws were in force, thousands of Chinese challenged them through different strategies. It was against this back-

drop that Hong fought for repeal and for immigrant rights. At 28, he became president of the Chinese American Citizens Alliance, an Asian civil rights organization. He testified before congressional and presidential commissions for repeal. He made friends with politicians to try to win them over to his cause.

Hong’s activism was likely rooted in his own family’s history in America. He was born in San Francisco in 1898, the son of immigrants from China. His father had come to work on the railroads in the late 1800s but died when the boy was five, leaving Hong’s mother to raise two young children. After graduating high school in the Bay Area in 1915, Hong started an English language school for Chinese immigrants, while he also did book-keeping for restaurants.⁶

Around 1918, Hong moved to Los Angeles and was an interpreter for the U.S. Immigration Service. Two years later, at the suggestion of an acquaintance, he enrolled in USC law school’s night program. He was so poor he had to borrow textbooks from classmates, according to a brief profile in a USC publication. In 1923, he was the first Chinese American to pass the California state bar exam, even before he graduated from law school, and with two degrees.⁷

An injury when Hong was a baby caused a spinal deformity, and he stood only 4 foot 6 as an adult. Overcoming

* Cherry Gee is a longtime journalist in Southern California.

A plaque in Los Angeles' New Chinatown commemorates Y.C. as the first Chinese American lawyer in California, however, Hong Yen Chang was the first Chinese American attorney in the United States. A judge in New York allowed the Columbia law school graduate to be naturalized, and he was admitted to the New York Bar in 1888. But in 1890, the California Supreme Court denied Chang a law license on the basis of non-citizenship. Although the court found Chang qualified to practice law, it ruled that New York erred in allowing his naturalization, because "persons of the Mongolian race" were not allowed to be citizens under the exclusion act. Anti-Chinese feelings in California were especially strong because so many of the workers had settled here and competed for jobs. In 2015, the high court unanimously reversed its 125-year-old ruling and posthumously awarded Chang his license. "More than a century later, the legal and policy underpinnings of our 1890 decision have been discredited," the court wrote in its unsigned decision.⁸

physical disability and poverty early in life may have prepared him well for the challenges of his lifelong fight for Chinese rights and against racial discrimination. When he first set up his law practice, the Los Angeles Bar Association would not admit him because he was a minority, according to his son Nowland, also an attorney.⁹

Hong was also a government lobbyist, civic leader and a founder of Los Angeles' New Chinatown, where his former office has been preserved by the new owner. Hong died in 1977 in Los Angeles at age 79. But a large part of his legacy is the seemingly mundane work he did on more than 7,000 immigration cases in which he helped his clients navigate the U.S. bureaucracy. Most of Hong's clients were working-class immigrants, like my father, who had little money and few English language skills. They were likely as unaware as I was about Hong's broader advocacy for Chinese civil rights and his renown. His was just a name I'd heard adults mention when I was child until I saw the 2016 exhibit about him at the Huntington Library, Art Collections, and Botanical Gardens in San Marino, which acquired his family papers in 2006.¹⁰ When I asked my brother if Hong might have handled my mother's and my immigration cases in the 1950s, he said, "of course," adding that Hong was also the attorney on his own case and those of most immigrants in Chinatown at the time.

One of the main methods Hong employed to help his clients was to use another U.S. law to get around the

exclusionary statutes. In 1898, in the case of *United States v. Wong Kim Ark*, the U.S. Supreme Court established that a child born in the U.S. of Chinese parents who had permanent residency was a citizen.¹¹ But U.S. law also deems children born overseas to American citizens to automatically be citizens, and thus entitled to entry.¹²

It was Hong's job to help his clients prove such familial ties, which was not an easy task. Although some men who applied to bring their wives and children to the U.S. were citizens, others claimed to be citizens and that their records had been destroyed in the San Francisco earthquake of 1906.¹³

To prevent fraud and to weed out so-called "paper sons" (those who purchased false family documents and claimed to be children of citizens), U.S. officials required extensive physical examinations and asked hundreds of questions of applicants. Some of the queries might be as detailed as, how many steps are in your house in the village. Or the would-be immigrant might be asked to draw a map of the village. Many of these people were held at Angel Island in the Bay Area until officials were satisfied. If the answers didn't match, they were deported.

Li Wei Yang, curator of Pacific Rim Collections at the Huntington, in an online 2016 article, cited a case in which one of Hong's clients was rejected "after a 'study' of his bone structure determined that his age was different" from what he had asserted.¹⁴ In some cases, relatives and friends had to provide detailed affidavits confirming family details such as marriage dates, the names of guests at their wedding and their children's birth dates. Yang noted that "Hong never knowingly promoted the use of a false identity" by his clients.

Because of federal privacy laws, Hong's client files are closed to the public until 75 years after inception of the



Y.C. Hong and Governor Ronald Reagan, photograph, late 1960s.

CREDIT: THE HUNTINGTON LIBRARY, ART COLLECTIONS, AND BOTANICAL GARDENS



Y.C. Hong's business card/business flyer, ca. 1928.

CREDIT: THE HUNTINGTON LIBRARY, ART COLLECTIONS,
AND BOTANICAL GARDENS

case or when the client has died. I was able to see mine, my brother's and my late mother's. They were thin but maybe that meant we were luckier than most. Besides a few official documents and some letters, there are only two short, signed documents from a relative and a friend serving as character witnesses for my father. No long questionnaires, no maps.

I was only four years old in 1953 when I left China, and have had many questions about our family history. I have always known, for instance, that I left China for Los Angeles as a U.S. citizen, one of the few details my mother was able, or willing, to tell me. Now I know that I came by that through birthright citizenship. She told me many times that a professional photograph taken of our family when I was one year old, just before my father returned to the U.S., saved my life. It was proof that we were a family. I have the original and had expected to see a copy in the file but it wasn't there.

Another document listed the times my father traveled between the U.S. and China, and when he and my mother got married. There is a letter from Hong to the American consul general in Hong Kong indicating that my mother was applying for a non-quota visa as the wife of a citizen, or in the alternative, for one under the "preference quota." There is a scribbled note, likely written by Hong, on a carbon copy of a letter he wrote to the American consul general in Hong Kong in 1952, saying that "wife is still in village unable to get out," but no reason is given. There also is nothing about why we had to wait months in transit in Hong Kong. I recall relatives saying then that it had something to do with my papers, not my mother's. It took more than a year after her application was approved before we left for the U.S., but I know of families that waited a decade or longer.

I still have questions but through Hong's files, I've been able to fill in some gaps in my early life. Hong's contribution to Chinese immigrant civil rights is incalculable, but his work on cases like mine shows how he also made a big difference in individual lives. His business card from 1928 includes these words: "As a licensed attorney, I special-

ize in immigration cases. These blessings I wish for my compatriots: businesses that flourish; fortunes smoothly sought; once done, a safe and speedy passage home."

As U.S. District Judge Ronald S.W. Lew, whose family's immigration case was handled by Hong, told the Los Angeles Times in 2005: Hong "was very small in stature, yet he was so powerful because of what he did."¹⁵ ★

ENDNOTES

1. The Chinese Exclusion Act of 1882, Pub. L. 47-126, 22 Stat. 58 (1882); "Chinese Exclusion Act," *Avalon Project*, Yale Law School, http://avalon.law.yale.edu/19th_century/chinese_exclusion_act.asp.
2. Diana H. Yoon and Gabriel J. Chin, "Chinese Exclusion Acts," *Encyclopedia.com*, <http://www.encyclopedia.com/history/United-States-and-Canada/us-history/chinese-exclusion-act>.
3. "Shall We Have Chinese. No! No! No!," *History.com*, <http://www.history.com/topics/chinese-exclusion-act>.
4. "Repeal of the Chinese Exclusion Act, 1943," Office of the Historian, U.S. Department of State, <https://history.state.gov/milestones/1937-1945/chinese-exclusion-act-repeal>.
5. Expressing Regret for Passage of Laws Adversely Affecting the Chinese in the United States, H.R.683, 112th Cong. (2012), <https://www.gpo.gov/fdsys/pkg/CREC-2012-06-18/html/CREC-2012-06-18-pt1-PgH3715-2.htm>.
6. "Four Lives," *USC News*, May 1, 1998, <http://news.usc.edu/25798/Four-Lives/>.
7. Ibid.
8. "First to the bar: Chinese immigrant granted posthumous law licence," *Guardian*, Mar. 6, 2015, <https://www.theguardian.com/us-news/2015/mar/17/chinese-immigrant-granted-posthumous-law-licence>; Maura Dolan, "Chinese immigrant, denied law license in 1890, gets one posthumously," *L. A. Times*, Mar. 16, 2015, <http://www.latimes.com/local/lanow/la-me-ln-chinese-lawyer-20150316-story.html>.
9. Nowland C. Hong, "Chinese Americans Face a Challenging Road to Admission," *Metropolitan News*, Sept. 17, 2015, <http://www.metnews.com/articles/2015/legcom091715.htm>.
10. "Chinese-American Advocate, Y.C. Hong," *Verso*, posted Dec. 15, 2015, <http://huntingtonblogs.org/2015/12/chinese-american-advocate-y-c-hong/>.
11. *United States v. Wong Kim Ark* (1898) 169 U.S. 649.
12. 8 U.S. Code § 1401; Andrew Glass, "U.S. enacts first immigration law, March 26, 1790," *Politico.com*, Mar. 26, 2012, <http://www.politico.com/story/2012/03/the-united-states-enacts-first-immigration-law-074438>.
13. Ronald Takaki, *A Different Mirror: A History of Multicultural America*. Boston: Back Bay Books, 2008.
14. Li Wei Yang, "The Lawyer Who Beat Back a Racist Law, One Loophole at a Time," *What it Means to be an American*, April 5, 2016, <http://www.whatitmeanstobeamerican.org/?s=li+wei+yang&search.x=11&search.y=13>.
15. David Pierson, "Chinatown Time Capsule," *L. A. Times*, May 18, 2005, <http://articles.latimes.com/2005/may/18/local/me-chinatown18>.

Justice Kathryn Mickle Werdegarr: A Singular Path to the Supreme Court

EXCERPTS FROM HER FORTHCOMING ORAL HISTORY

BY LAURA MCCREERY*

JUSTICE KATHRYN MICKLE WERDEGAR, a 23-year veteran of the California Supreme Court who will retire in August, graciously made time between the fall of 2014 and the fall of 2015 to sit for a comprehensive series of oral history interviews. Upon completion, the project will reside in the research collection of UC Berkeley's Bancroft Library and will be made available to scholars, students, the bench and bar, and the public. Although the oral history has not yet been released, Justice Werdegarr has allowed publication here of selected excerpts, edited for flow, concerning her education and early career. The passages represent the first miles of a long alternative path she forged as one of few women of her generation in the law and the judiciary.



At age 5.

A note about her early background: Justice Werdegarr is a third-generation San Franciscan. Born in 1936, she lost her mother when she was four and a half years old. Because her father, now a widower, had no way to care for his two children, she and her brother lived for a time with a family in Healdsburg, Sonoma County, where she attended a one-room school with eight grades. She later attended boarding schools in San Francisco and Southern California and ultimately lived with an aunt in Lafayette, California. After graduating from Acalanes High School in Lafayette, she matriculated at the University of California in Berkeley, where she received her B.A. four years later.

PHOTOS COURTESY
KATHRYN MICKLE WERDEGAR COLLECTION

* Laura McCreery is the oral history project director at the Institute for the Study of Societal Issues, UC Berkeley. A specialist in California government and politics, she has conducted oral histories of Governor Gray Davis and of seven justices of the California Supreme Court, including former Chief Justice Ronald M. George.

* * *

ON LOOKING INTO THE IDEA OF GRADUATE STUDY *at the suggestion of her future husband (and on whether she consulted him or others in choosing the law):*

No, I didn't consult anyone. This is the theme of my life. No advice. It was just my choice. But it seemed like a very good idea — and it still does. I think what's different about my background and upbringing is, clearly there was no deep parental involvement. But nobody said I *couldn't* do anything. I was on my own, and so I chose this path. I was sort of naïve, actually. I hadn't thought that being a woman would be an issue. To me the idea of law school was exciting, and I'd come out of it with a solid education, I hoped, and a degree that would take me I didn't know where, but someplace.

ON BEING NAMED THE FIRST WOMAN EDITOR-IN-CHIEF *of the California Law Review at Boalt Hall (a role never fulfilled owing to transfer to George Washington University Law School for the third year due to her husband's military service at Walter Reed Hospital):*

At the end of our third semester I ended up first in my class at Boalt. Just as invitation to law review was strictly by the numbers, so too the choosing of the editor-in-chief traditionally had always been: the number one person in the class is editor-in-chief. Ultimately it was announced that I had been elected editor-in-chief. What I learned only later was that this did not come as a matter of routine. It was only after tremendous resistance — and I'm not exactly clear the extent of the resistance. But I do know from sources inside that there was a fight on the board itself concerning whether they would give it to me.

ON STAYING IN WASHINGTON, DC, FOR A YEAR *after completing law school at George Washington University in 1962:*

I applied to both the Commission on Civil Rights and the Civil Rights Division of the Department of Justice. Both were very new, having been established in 1957 as a result of the Civil Rights Act of 1957. I also applied to serve as a clerk with Chief Justice Earl Warren. In light of my reticence that probably seems a little incongruous, which it was. In any event, no offer was forthcoming and I was happy to join the Justice Department.

A significant part of our work in the Civil Rights Division was writing *amicus curiae* briefs seeking to hold in contempt recalcitrant Southern governors who would not accede to federal orders to desegregate their schools. These efforts would be driven by the attorney general, Robert F. Kennedy, but we would draft the briefs that we were told to draft, and we also became experts in contempt of court for these governors. They were in contempt of court, and I remember researching this wholly new area of law.

We also would write *amicus* briefs to get Martin Luther King, Jr., out of jail when he was arrested. In this context *amicus* — “friend of the court” — really makes sense because we wouldn’t and couldn’t be a party. It would be a state entity that would have arrested him and put him in jail. I think as a political effort to show solidarity with Martin Luther King and the black community, the Kennedy administration decided to submit briefs as friend of the court, urging the court to release him.

Living in Washington and working in the Civil Rights Division of the Justice Department at this time was so exciting. These were the news events of the day. I would go home and turn on the television, and I would see events that peripherally if not directly were what I was working with. A lesser thing that we did, but important to the people involved, was respond to proper *habeas corpus* petitions by federal prisoners. So we drafted legislation, we wrote briefs on behalf of the government in civil right cases. It was quite thrilling.

ON APPLYING FOR WORK in the California Attorney General’s office in 1963–1964:

Armed with letters of reference and recommendations from the Justice Department, I first applied to the state Attorney General’s office, hoping to work in the constitutional rights section. I made some inquiries about clerking for a particular federal district court judge, and I also made some inquiries about clerking for one of the justices of the California Supreme Court.

Having started out in civil rights, that was now my interest. But Boalt called me and said that there was a firm

in San Francisco that was thinking of taking its first woman if they could persuade the senior partner to do this, and would I interview? Which I did. They took me to lunch. It may not have been the best interview. I remember asking them about their *pro bono* opportunities, and maybe that’s not where their

mind was at that time. In any case, nothing came of that. At that time, it’s my understanding, there were no women in any large law firms in San Francisco. Women were perhaps practicing law, but if so they were sole practitioners or maybe practicing with a husband or a father.

There was no law against discrimination in employment at that time. The Civil Rights Act of 1964, which prohibited discrimination in employment, was passed some months later in July of 1964. Many years later I was told that the Attorney General’s office at that time did not hire women, that the only women in the office were those who had been hired in the years of World War II when there were no men.



THIS PAGE, CLOCKWISE FROM TOP:

Autographed photo from Attorney General Robert F. Kennedy.

Souvenir from Justice Department days — she attended the March on her last day in Washington.

With Court of Appeal Justice Panelli as a staff attorney, circa 1989.

Classic pose, classic car, with friend Judy Novell during Washington DC law school days, 1962.





This is hearsay, but I also was told that the attorney general at that time, Stanley Mosk — later my colleague on the California Supreme Court — did not begin to hire women until one of two things happened and maybe both. The first part of the story is, that until Boalt Hall, my alma mater, let it be known to the attorney general they would stop sending applicants there unless he started considering women. The other related story is that he stopped his practice of not employing women when he was considering running for the United States Senate in 1964, and the women in the office — the ones that had been hired during World War II — threatened to go public unless he changed his ways. I can't say, but that was the understanding that was conveyed to me. I'm very happy I had the opportunity to serve with Justice Stanley Mosk. He's a legend in California political history of a certain era, and he certainly brought that to the court.

ON PIECING TOGETHER AN ALTERNATIVE EARLY LAW CAREER *while raising two sons:*

In 1969 Boalt again called to say that the California College of Trial Judges was planning to write the first statewide benchbook for judicial officers. This volume would cover misdemeanor procedure, and would I be interested in assisting them in that under the guidance of a committee of judges? I was delighted to do that. So once again I undertook part-time employment, writing and research, and I produced — under their auspices, but I wrote the entirety of it — the first statewide benchbook.

* * *

After the events described in these excerpts, Justice Werdegar went on to serve as associate dean and associate professor at the University of San Francisco School of Law. She later joined Justice Edward A. Panelli as his senior staff attorney on the California Court of Appeal, First Appellate District, and after his elevation to the Supreme Court, on that court as well. In 1991 Gov. Pete Wilson appointed Justice Werdegar to the First District Court of Appeal, where she was the lone woman among 19 justices. Three years later, in 1994, Wilson appointed her to the California Supreme Court where she assumed the seat vacated by Justice Panelli's retirement and became the third woman to serve on that court. As before, her path was strictly her own. ★

TOP TO BOTTOM:

Being sworn in as a justice on the First District Court of Appeal, Division 3, by Gov. Pete Wilson, August 26, 1991.

With Gov. Wilson and Chief Justice Malcolm M. Lucas after being sworn in as appellate justice.

With family (husband David, sons Maurice and Matt) after swearing in as Court of Appeal justice.

Hiking in Yosemite, circa 1989.

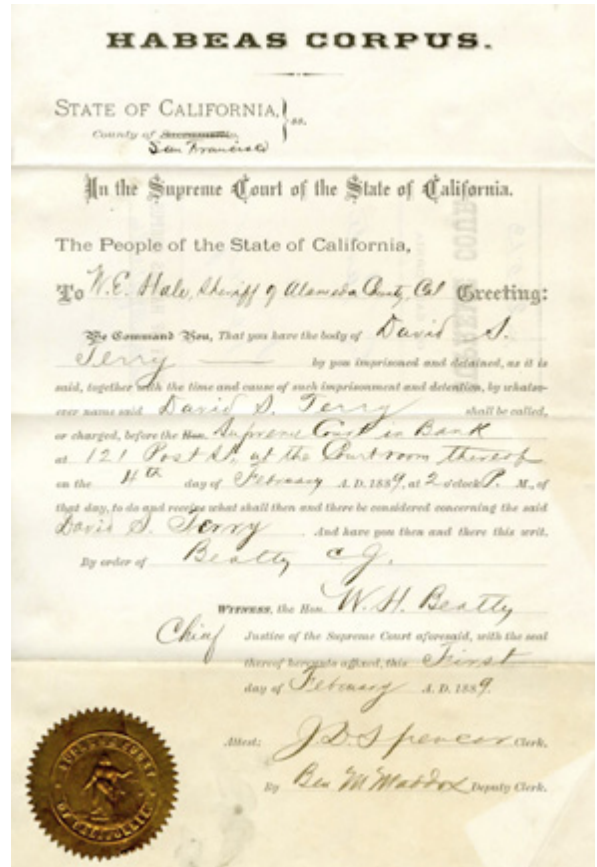
David S. Terry's Writ of Habeas Corpus

BY SEBASTIAN A. NELSON*

DAVID S. TERRY (1823–1889) has been called “California’s most colorful Supreme Court justice.”¹ He may have also been the most volatile justice. The events of Terry’s life, from his famous duel with Senator David C. Broderick in 1859 to his death at the hands of a U. S. marshal in 1889, are familiar to students of California history and to readers of this newsletter.² Perhaps less well known is Terry’s assault on John Franks, another U. S. Marshal, on September 3, 1888, in a San Francisco Federal courtroom as a result of a long-running dispute involving the silver millionaire William Sharon and Terry’s wife, Sara Althea Hill. (Terry knocked out some of Franks’ teeth and tried to stab him with a bowie knife.) Terry was immediately sentenced to six months in jail for contempt of court by the trial judge, U.S. Supreme Court Justice Stephen Field. This sentence triggered creation of arguably the most unusual Supreme Court document in the collections of the California State Archives (a division of the Secretary of State’s Office): a writ of habeas corpus signed by William H. Beatty, the fifteenth Chief Justice of California, regarding Terry, the fourth Chief Justice of California.

Several months after his arrival in the Alameda County Jail, Terry filed a handwritten petition for a writ of habeas corpus with the Supreme Court of California in which he claimed that he was “illegally imprisoned and restrained of his liberty by W. E. Hale, sheriff of Alameda County.” Terry argued that federal law entitled all prisoners, including himself, to deduct five days from their sentences for every calendar month of good behavior. Chief Justice Beatty agreed with Terry that good behavior entitled him to be released about a month early, and on February 1, 1889, Beatty commanded Sheriff Hale to have Terry brought to San Francisco on February 4. According to the case file, which survives at the State Archives, Sheriff Hale answered the writ by writing that he was bound to keep Terry in custody until he had served his entire six-month sentence. Hale continued, stating “that the said writ of habeas corpus has been issued by this Honorable Court under a misapprehension of the facts of this case.”

The U.S. District Court for the Northern District of California quickly weighed in on the matter by ruling that no credits would be allowed to Terry. “Is Mr. Terry, adjudged guilty of contempt of Court, a ‘prisoner convicted of any



Writ of Habeas Corpus, signed by Chief Justice William H. Beatty — part of the case file Ex party David S. Terry (1889), WPA No. 7391, Supreme Court of California Records.

CALIFORNIA STATE ARCHIVES,
OFFICE OF THE SECRETARY OF STATE, SACRAMENTO

offense against the laws of the United States,’ . . . ?” asked Circuit Judge Lorenzo Sawyer in his decision.

In this case the judgment was rendered summarily by the Court upon its own observation of what took place before it. . . .

Some of the acts performed, it is true, constitute specific offenses against the general criminal statutes of the United States for which the prisoner may yet be indicted, tried, convicted and punished. And indictments are, in fact, pending for those statutory offenses. Should the prisoner be convicted and imprisoned for those offenses he would undoubtedly be entitled to any credits that might be allowed to parties in his condition.

* Sebastian A. Nelson is Court Records Archivist, California State Archives.

Continued on page 28

United States Attorney Cecil Poole

A PERSONAL REMEMBRANCE OF AN INSPIRATIONAL CALIFORNIA LAWYER

BY JIM J. BROSNAHAN*

CECIL POOLE WAS already a legend in 1963 when I started to work for him in the San Francisco United States Attorney's office.

What would it be like to work for a legend? I wondered that first morning. He was the first black U.S. attorney, born in Alabama on July 25, 1914. Cecil's mother, Eva, was not allowed to try on clothes in a Birmingham department store, according to his

biographer James Haskins. His father, William, could not hand cash directly to a white person behind the counter in a white-owned store.

Cecil graduated from Michigan Law School, then earned a graduate law degree from Harvard Law School. He joined the Air Force in the Second World War. During officer training at a Southern Air Force base, Cecil and five other black officer trainees were ordered to line up in the commanding officer's office and told to go to a swimming pool separate from that of the white trainees for swim training. Five agreed. Cecil refused.

"Why do you say no when the others are willing to obey my order?" the officer asked Cecil.

"They must do what they think is right," answered Cecil. "I must do what I think is right."

By disobeying a direct order, Cecil risked a dishonorable discharge. Instead, the commanding officer was so impressed with Cecil's courage and the way he expressed himself, he did not require the segregated swim training. He also made his car available to Cecil for a weekend leave in the local town.

Cecil was tough, and usually reasoned and logical. He was not an ideologue, and rarely discussed race. When he did confront a racial situation, he



Cecil Poole being sworn in as United States attorney for the Northern District of California, June 1961, with his wife Charlotte and daughters Patti and Gayle. Poole was the first black U.S. attorney in the continental United States.

sometimes adopted a bemused wonderment, as though he were viewing some strange conduct by aliens from space.

We knew he had to get his hair cut in a black-owned San Francisco barber shop. But he saw the legal world as a place where he belonged, and he was right. When viewing the many demonstrations in the 1960s, he would sometimes have that look of combined curiosity and

puzzlement, with a dash of sternness.

His obvious acumen trying serious criminal cases in the San Francisco district attorney's office, where he worked from 1949 to 1961, helped his decision making. Cecil's life values formed the basis of our respect for him. His strong, principled approach explains why we, his former assistants, "Cecil's guys," still meet for an annual holiday dinner 45 years later, telling and retelling Cecil stories.

He taught us to be managers. Always fight for your people, he advised. Get them the salaries they deserve. No one was allowed to excoriate his staff. *He* might do that if he thought it was necessary. Never be afraid, or don't show it; question authority each day, even when you are the authority; and try to have fun even in the most serious situations. Righteousness is not helpful when making prosecutorial decisions. Total integrity was assumed.

We heard rumors of fistfights between Cecil and a defense lawyer in the 1950s. The district attorney's office then was under the leadership of Edmund "Pat" Brown. When Brown later became California's governor he took Cecil with him to Sacramento where he served as Brown's clemency secretary during one of the state's most controversial executions.

Caryl Chessman was convicted of kidnappings and rapes in the Los Angeles area. He committed no murders. While on death row he wrote four books, including his life story, which became a movie. The question of his pending execution attracted worldwide attention.

* Jim Brosnahan, senior trial counsel at Morrison & Foerster, is author of the forthcoming book *Trial Lawyer*. Copyright Reserved 2017.

After he was executed, his case drove the anti-death penalty movement in California. As Governor Brown's clemency secretary, Cecil was right in the middle of the Chessman legal storm.

In 1960, he was a delegate to the Democratic convention and was influential in moving delegates to John F. Kennedy. Kennedy appointed Cecil U.S. Attorney and promised him a future judgeship. Cecil and the country lost a lot on November 22, 1963, in Dallas.

He seemed to take boundless energy from the excitement of the U.S. Attorney's office during this period of almost daily protests against racism and the Vietnam War. One late afternoon, Cecil popped his head into my office and said, "Come on." We drove to Oakland where University of California students were marching on the Oakland army base.

The scene was chaotic. A line of very large Oakland police officers stood near the base holding batons. About 15 Hell's Angels, holding metal chains, waited for the action to begin. Down the street marched 10,000 demonstrators.

Cecil told the officers that we were federal observers. He then positioned us between the police and the demonstrators, who were still a couple of blocks away.

A police megaphone blared at the students, "Stop and disperse in the name of the people of California!"

Ten thousand demonstrators roared back, "We *are* the people of California!" It was the 1960s.

One of the demonstrators, I learned years later, was then-law student Harold McElhinny, who became a leading intellectual property trial lawyer at Morrison & Foerster. We practiced together for almost 40 years.

Cecil remembered dragging me out of danger that night. I remember dragging Cecil to the curb. We might have been federal observers cloaked with federal gravitas, but we had no helmets.

From the start, I endeavored to learn as much as possible from Cecil but he was not always an easy person to work with. We knew not to approach him in the morning until he had had his coffee and got settled in his corner office.

However, his lawyering had a tough, seasoned integrity. At times a lawyer must be decisive; Cecil was decisive. Prosecutors make tough decisions every day. They want to be sure the boss will back them up; Cecil did that.

When I first got to San Francisco, I was assigned a brothel prosecution. The house, in the East Bay, was fairly out in the open and notorious. A deputy sheriff was in the habit of having Thanksgiving dinner there. As I prepared the case, I noticed checks written by one of the most well-known California state office holders.



Cecil F. Poole, special assistant to Governor Edmund G. "Pat" Brown, about 1960.

PHOTOS COURTESY THE NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

I put a trial subpoena on him. He called Cecil, who called me in to hear the conversation. Here is what Cecil said: "You horse's ass, if you are dumb enough to pay with checks you *should* be subpoenaed!" That was it. The madame pleaded shortly after the call.

When a representative of the San Francisco Fire Department asked that one of his firefighters be charged with a misdemeanor instead of a felony offense, he made a mistake. He told Cecil, "If you give him a misdemeanor,

you will have the whole Department behind you." Cecil did not hesitate. "What I want from the Department is to come when my house is on fire. I think they will do that no matter what I do. It's a felony."

One day, I was sitting in his office while he telephoned an Army general, who was in charge of an East Bay military installation. When antiwar demonstrators sat down in front of the gate, the general threatened to roll tanks over them. At such times Cecil became quieter, more deliberate, and frighteningly clear.

He was in the habit of starting by acknowledging the other person's position. "General, good morning. Nice to talk to you. How's it going over there? I understand, yes, of course. General, I understand you have complete jurisdiction inside your fort. I respect your jurisdiction." Cecil's voice became even firmer, but not any louder. "But if your tanks go one inch outside that gate I'm going to arrest your ass under the Posse Comitatus Act." The tanks did not roll.

Quiet firmness was Cecil's way of dealing with tension. His intensity, which was often displayed, was balanced by his judgment. Cecil understood the uses of governmental power.

"We are not avenging angels," he instructed us. But there were days when we thought we saw his wings flapping. ★

EDITOR'S NOTE: Cecil Poole left the U.S. Attorney's office in 1970 and entered private practice, where he worked mainly in entertainment law, representing the rock musicians Jefferson Airplane, Janis Joplin, and the Doobie Brothers, among others. In 1976, President Gerald Ford nominated Poole to a seat on the Federal District Court where he became the first black federal judge in Northern California, and President Jimmy Carter elevated Poole to the Ninth Circuit Court of Appeals, making him the first black person to serve on that court where he served until 1996 and only the second in the country on any federal circuit bench. Poole died on November 12, 1997 at age 83.



UCLA Law School's Riseborough Mural:

ITS LIFE, DEATH AND REBIRTH AS A COFFEE MUG

BY SCOTT HAMILTON DEWEY*

ON SEPTEMBER 23, 1969, a fifty-foot-long, nine-foot-high mural — then the largest at UCLA — was unveiled on what had been the large, blank western wall of the Main Reading Room on the ground floor of the UCLA Law Library. The artist, Canadian-born, Los Angeles-based muralist Douglas Riseborough, said he liked to “work big” and paint large, dramatic murals. His work included a 125-foot-long portrayal of modern civilization’s impact upon the indigenous peoples of Amazonia for the 1964 World’s Fair in New York City, a four-story mural in Honolulu, and a mural for San Francisco’s Hilton Hotel. As the *Docket*, the law school’s student newspaper, reported, in the mural’s three panels, “Riseborough attempts to depict the tensions, anguish, and contradictory messages both of the established order and of those demanding change.”¹

The mural began as a dinner party joke. Long-time and much-loved UCLA law professor Jesse “Duke” Dukeminier, who in addition to teaching and writing casebooks on real property law, also had a substantial art collection and a longstanding mission of getting more art onto the law school’s walls, first met Riseborough at a party and commented, “We have a wall that is just crying for a Riseborough mural. But, of course, we can’t afford you.” Riseborough replied, “I’ll do it. It will be my gift to UCLA.”²

* Scott Dewey attended UCLA School of Law and later worked as a special researcher for the UCLA Law Library where he was an unofficial historian of the law school. He was recently appointed Faculty Research Librarian at the University of Minnesota Law Library.

The mural’s three panels each offered the artist’s vision of a burning social issue of the day. According to Dukeminier, the leftmost panel, “The Journey,” depicted the Civil Rights movement and “the Black man breaking out of the heritage of slavery to demand equality.” The rightmost panel, “The Ceremony,” concerned “violence in contemporary society and the rebellion of the young” — apparently inspired particularly by student radicalism and the Vietnam War protests on college campuses nationwide that reached a crescendo during 1969. “Regeneration,” the central and most visually dominant panel, “includes symbols of modern technology and departing cultures in addition to three large figures who bring a unifying force to the mural.” Dukeminier explained, “Through them Riseborough reaffirms the need of each generation to reevaluate the past and bring to its times justice through law.”³

Also reflecting some of the heightened environmental awareness of the day, particularly in Los Angeles with its trademark atmospheric problems, Riseborough painted the mural on linen canvas with acrylic paint, “which is believed to be able to resist smog,” so that the mural “is expected to last for centuries.” Riseborough noted that he hoped to “convey something of the condition of our society,” adding that “when you’re a flea on an elephant’s back it is difficult to be objective about the elephant.” So after talking with many law students about their concerns regarding law and life in general, he withdrew to the forests of British Columbia for four months to reflect on the project and try to approach it objectively: “I wanted to be that flea jumping off the back of the elephant. Love and peace to you all.”⁴

From its unveiling onward, the bold, dramatic mural always remained both impactful (not always in a posi-



Photo of the Riseborough Mural.

FROM THE UCLA SCHOOL OF LAW PHOTO ARCHIVES

tive way) and controversial. The *Docket* reported, “The applause greeting the mural’s unveiling on September 23, 1969, seemed to indicate that the students were pleased. One student exulted, ‘It’s big, it’s beautiful, and it’s dealing with contemporary issues that affect our daily lives. More than that, it’s ours.’” Another law student declared, reflecting pride along with perhaps more than a little of the smug self-importance and self-righteousness that sometimes accompanied late-1960s student radicalism, “That’s it — that’s the whole damn story People will get more out of our mural, than say from the murals of the Sistine Chapel, because up there is our heritage, our sweat, our blood, and the struggles that still confound our daily lives.”⁵

Not all observers were so kind. The mural’s unveiling was a significant enough local art-world event to draw the attention of long-time *Los Angeles Times* art critic William Wilson, who commented at length:

Artistically the work is a gravy-brown stew of past styles. The figures, drawn with extreme competence, closely resemble works by Luca Signorelli, Michelangelo, and the Mexican muralists Orozco and Siqueiros. Their symbolic postures are stiff, stagy. Part of the time they look like amateurs playing the nude scene from “Hair,” part of the time like the ponderous, self-consciously noble heroes of Ayn Rand, and just as fictional. Composition is almost psychedelic in complexity. Parts keep popping off the surface. The total picture fails in visual coherence, tempo or conclusion. That, however, doesn’t seem to be the point. If this mural has a style at all it might be labeled Heroic Adolescent Idealism style. It is [a] kind of urban folk manner that can also be seen, varied, in the so-called psychedelic poster, in a large mural on Sunset Blvd’s Aquarius Theatre and youth-exploitive clubs and boutiques. Riseborough’s mural does what adolescents often do. It speculates fuzzily about the future while holding firmly to a safe, conservative past.⁶

Wilson added wryly, “Usually the style stops when the adolescent goes away to college. I hope Riseborough’s picture inspires young lawyers to practical action while we wait for its handsome Apollo to stride into the city and dispel poverty, smog, violence, and bad traffic with a flex of his divine biceps.”⁷

The big, bold Riseborough mural dominated the UCLA Law Library for almost three decades after its installation. As the *Docket* reported in 1985, “Anyone entering the UCLA Law Library for the first time simply can’t ignore it. The 9’ x 50’ mural has inspired, assaulted, enlightened or stupified [sic] observers since its unveiling in 1969.” The article concluded, maybe slightly apologetically, “Perhaps the mural is dated. Still, its reflection of the past does not prevent present and future observers from learning from it and reacting to it, at least as long as the smog-resistant acrylic endures.”⁸

Indeed, it may well have been inevitable that a big, bold mural, created and installed in 1969 at the very height of the student rebellion and counterculture and reflecting the sentiments and passions typical of those times, would come to be seen as dated, even comically or uncomfortably dated, as both the nation and the American legal profession veered sharply away from the radicalism of 1969 and back toward conservatism from the late 1970s through the 1980s, a tectonic political shift symbolized by the election of arch-conservative former California governor Ronald Reagan as president in 1980. At any rate, the chorus of criticism and complaint regarding the mural, which started with art critic Wilson’s gentle mocking of the grandiose, adolescent hippie-dippy-ishness of the mural and its underlying concept, swelled during the 1980s and 1990s while the mural’s defenders seem to have dwindled in number.

The growing drumbeat of hostility toward the Riseborough mural surfaced in 1990 only semi-humorously in a *Docket* editorial column by two law students. The

column appeared as part of a regular feature called “Right Angle,” reflecting conservative students’ views and issues. Entitled, “Dean Prager, Tear Down This Wall!,” the column invoked President Reagan’s famous challenge to Soviet Premier Mikhail Gorbachev regarding the Berlin Wall in the 1980s:

The subject of this column should be patently obvious to anyone who has ever set foot in the law library. We speak of the large, dark, brooding monstrosity which dominates the main reading room, fostering fear and loathing in the breasts of those who are forced to look upon it. Instead of the quiet, studious atmosphere which ought to be associated with the library at an institution of higher learning, our reading room makes an all-out frontal assault on the sensibilities of everyone who dares to enter. Those expecting to see the faces of past deans hardened in oil for the edification of future generations instead are catapulted into the gaping maw of late-60s hippie radicalism at its most gruesome level. The deans are there, indeed, but they hang on a facing wall of the room. The[y] look rather subdued, and perhaps embarrassed by the sight they face day after day.

Of course, we are talking about the mural which covers the wall over the “aviation law library” on the west side of the main reading room. If they had to put a mural in the library, they couldn’t have found a better spot. However, something about this one is disturbing. Obscure artwork from which one has to try to divine some meaning is nothing new, but perhaps personal artistic statements are best left to the community at large rather than a taxpayer-funded university. To say that the subject matter of this work is dated is to state the obvious. Of course, artistic philistines such as the authors are probably missing something that is perfectly clear to the tortured artistes among the law school community, but really, do already harried students have to be subjected to this kind of moody, self-righteous pseudo-political “statement?” People reading this article, for example, can put it away. Short of avoiding the library and committing academic hara-kiri or wearing blinders, there is no way to hide from the presence of that thing in the library.

Of course, criticism which does not propose viable alternatives is only so much hot air. So We could offer the wall to the “power painter” people as an advertisement. They could film a before-and-after commercial in the library, in exchange for a small fee which could be used

to offset the current computer costs extorted by the library. If the school of archaeology has a museum, they might want to cart the thing off and store it somewhere. Our progeny would thus be spared the cost of having to dig it up, and “the message” would be unsullied by all that dirt, and be that much clearer to eager students to come. Lastly — and who says we lack the courage of our convictions — we, Dan Young and Murray Robertson, do hereby offer to the UCLA School of Law our time and effort to paint over the mural, in consideration for not ever having to look at it again. If the school will buy the paint, we’ll give up a Saturday and put the west wall of the main reading room out of its misery.⁹

Although it is difficult to tell precisely what proportion of the law school student body may have agreed with these two witty, sassy young conservatives, there is no doubt that “the thing in the library” gradually came to be seen by much of the law school community as something of an embarrassment, and more serious discussion of its ultimate fate — removal — began to surface. For instance, in 1993, at a Student Bar Association Town Hall meeting mostly concerned with budget problems, student fee hikes, and loan forgiveness, the subject of the planned “new” law library came up, as did the banishment of the specter of the “old” library. The *Docket* reported, “As for the library’s mural, Professor Dukeminier, who was involved in the original selection of the artist, has stated that the law school is free to remove it. It will be offered back to the artist in accordance with California law.”¹⁰

Whether or not the mural ever was indeed offered back to Douglas Riseborough, it remained, and remains, in the possession of the UCLA School of Law. The mural’s brief epitaph appeared in the October 1998 edition of the *Docket*, amidst gleeful celebration of the opening of the “Darling New Library.” Toward the end of a largely humorous student column offering some serious and other non-serious statistics regarding the new library and the improvements it represented over the old, the author noted, “Number of panels of the controversial old mural removed from the Reading Room and placed into basement storage, to be ‘rediscovered by another generation’: Three[.] Approximate percentage of UCLAW students who voted for removal of the mural from the library: 65%.”¹¹

Thus, the Riseborough mural, with its acrylic paint intended to last through centuries of display, met a fate more like that envisioned by the conservative columnists in 1990: a removal to basement storage somewhat analogous to their proposal for removal to an archaeological museum, and a type of cultural whitewashing conceptually similar to the physical painting-over

they recommended. A (counter-)cultural product from 1969, expressing socially critical and even perhaps at least quasi-revolutionary sentiments, found itself increasingly unwelcome in the neoliberal law school. Like the musical *Hair* to which it was (somewhat invidiously) compared, the Riseborough mural fairly quickly became unfashionably dated. Like Yale law professor Charles A. Reich's (in)famous book, *The Greening of America*, which extolled the radicalism of the late 1960s and early 1970s and envisioned a future built on that foundation, and which was thus very much out of step with the new conservatism of the 1980s, Riseborough's mural also came to be seen as a wrong turn to be hidden away. The mural may have fit the décor and color scheme of a late-1960s, early-1970s America, but it was increasingly out of place in a post-Reagan America.¹²

Yet as with so much other rightly or wrongly discarded cultural baggage, it also remains to be rediscovered and, perhaps, reconsidered.¹³

AFTERWORD: COMMODIFICATION AND COMEDY-FICATION OF THE RISEBOROUGH MURAL

In March 2008, the "Law Library's Riseborough Mural Mug" was offered at auction for \$40 as part of the annual fund-raiser for PILF (UCLAW's Public Interest Law Foundation). The item description read,

Perhaps you love it, perhaps you dread it . . . but you'll never forget it. If you remember the library mural that haunted and inspired your studying at UCLAW, you'll regret passing up this treasured item. If you don't remember the mural refresh your memory [here there apparently was a hyperlink to a photo of the mural that no longer works]. This is a limited-edition coffee mug, emblazoned with the Riseborough mural. You can't find this limited-edition piece of law school history anywhere else.¹⁴



How many Riseborough Mural Mugs were made, and what they sold for at auction, remains unknown. ★

ENDNOTES

1. "Mural Reflects World Tension," *Docket*, Sept. 24, 1969, 2. Alec Nedelman, "The Real Truth About the Law Library Mural," *Docket*, Feb. 20, 1979, 9; Chris Cervenak, "Library Mural: Justice in Artform?," *Docket*, Oct. 1985, 4. Old editions of the *Docket*, the student newspaper of UCLA School of Law from 1956 to 2004, are available online at https://escholarship.org/uc/uclalaw_

docket. The *Docket* reporter referred to the World's Fair in New York City in 1963, but *Wikipedia* lists the World's Fair being in New York City from 1964–65, although Riseborough may have painted the mural in 1963 in preparation for the event. See "World's Fair," *Wikipedia.org*, http://en.wikipedia.org/wiki/World%27s_fair; *Wikipedia.org*, "1964 New York World's Fair," http://en.wikipedia.org/wiki/1964_New_York_World's_Fair. As of fairly recently, Riseborough is still living and painting murals between Los Angeles and Sonora, Mexico. See Anders Tomlinson, *Doug Riseborough*, <http://alamos-sonora-mexico.com/tag/doug-riseborough/> (dated 2013; last visited Mar. 9, 2015).

2. Nedelman, 9. Regarding Professor Dukeminier, his relationship with students, and his missionary work directed toward adorning the law school's walls with art, see, e.g., "Docket Dicta: S.F. Relations," *Docket*, Nov. 23, 1965, 2; "Duke's Art Collection May Adorn Law School," *Docket*, Feb. 24, 1969, 1; photo with caption, "In February Professor Jesse J. Dukeminier became the first professor in the law school's history to win a UCLA Distinguished Teaching Award," *Docket*, May 19, 1976, 2; "Not Just Another Boring Law Professor — The Duke," *Docket*, Apr. 10, 1980, 6–8.

3. *Ibid.*, Cervenak, 4.

4. Nedelman, 9; Cervenak, 4.

5. Nedelman, 9; Cervenak, 4.

6. Nedelman, 9 (paragraph structure in original has been collapsed in quotation), quoting from William Wilson, "Riseborough UCLA Mural Accents Youth Appeal," *L.A. Times*, Sept. 28, 1969, D6.

7. Cervenak, 4.

8. Cervenak, 4. Students are shown studying under the imposing mural in "Library Overbooked During Bar Review," *The Cross-Examiner* [a short-lived replacement for the *Docket* during the mid-1970s], Apr. 1974, 1.

9. Murray Robertson and Dan Young, "Right Angle: Dean Prager, Tear Down This Wall!," *Docket*, Sept. 1990, 5.

10. "SBA Holds Town Hall Meeting," *Docket*, Mar. 1993, 1.

11. Cara Horowitz, "Our Darling New Library: A Statistical Breakdown," *Docket*, Oct. 1998, 1.

12. Charles A. Reich, *The Greening of America*. New York: Random House, Inc., 1970. Regarding the critical reception of and conservative backlash against Reich and his book, see, e.g., Rodger D. Citron, "Charles Reich's Journey from the *Yale Law Journal* to the *New York Times* Best-Seller List: The Personal History of *The Greening of America*," 52 *N.Y. L. School L. Rev.* (2007–2008): 387–416; "The 50 Worst Books of the 20th Century," *Intercollegiate Review*, Jul. 12, 2014, <https://home.isi.org/50-worst-books-20th-century> (a conservative, anti-Marxist, anti-radical publication listed Reich's book among its least-favorites).

13. UCLA law librarians note that patrons still sometimes ask whatever became of the mural.

14. See "PILF's 'Bid the Blues Away' Auction — Law Library's Riseborough Mural Mug," <https://apps.law.ucla.edu/pilfauction/default.aspx> (last visited May 9, 2017).

The Wasp Stings the Courts

BY KYLE GRAHAM*

THE WASP was a satirical illustrated periodical of a century ago. Its scalding coverage of the justice system took to heart the adage that good news doesn't sell newspapers.

A West Coast counterpart to the better-known *Puck* and *Judge*, the *Wasp* delivered its sting through pungent commentary and cartoons concerning national, state, and local issues of the day. The San Francisco publication, in business from 1876 through 1941, "began as a staunch partisan of radical change, supporting the Democratic Party. It then passed through a period of political independence. After that it was Republican by default, then Republican at all costs, then Republican when it felt like it, then again Republican at all costs, before settling down into a long period of quiet conservatism."¹ From 1881 to 1886, *The Wasp* also provided a forum for writer Ambrose Bierce, who wrote the "Prattle" column under the pseudonym "B."²

Bound volumes of *The Wasp* have been scanned into a digital format and are now available online through the *Internet Archive* website.³ These collections provide a unique, though occasionally repugnant, perspective regarding California politics, society, and life in the late 1800s and early 1900s. Leafing through one of these editions, a modern reader is likely to be struck by the pervasive and horrifically virulent anti-Chinese-immigrant content of *The Wasp's* editorials and illustrations, particularly during the 1880s and 1890s. This viewpoint was certainly not atypical of the California popular press of that era. But today these articles and cartoons, along with the publication's similarly benighted views regarding other matters of race, religion, sex, and ethnicity, provide an object lesson regarding the tragedies of racism, sexism, anti-Semitism, and nativism.

This article principally concerns another of *The Wasp's* recurring topics of discussion — the law — although as will be seen, the publication's coverage of this subject was tintured by its views on matters of race, gender, and ethnicity. Then, as now, judicial proceedings made for good



The Wasp cover, August 25, 1888.

COURTESY CALIFORNIA STATE LIBRARY

copy, and *The Wasp* offered candid commentary on the cases and courtroom personalities of its day. This content ran the gamut from rapid-fire puns and quips, to profiles of leading judges and attorneys, to critiques of recent decisions by trial and appellate courts, to editorials that pressed for changes to various aspects of the justice system.

A complete discussion of *The Wasp's* coverage of the bench, bar, and litigants would consume several volumes of this publication. Hence, only a sampling is provided here; interested readers can explore online issues on their own.

It did not take long for the publication to adopt an attitude of weary cynicism toward the administration of justice in the local courts. A short article published in *The Wasp's* first year in print, "The Shyster's Paradise," gave a hint at what

would come. It began, "San Francisco is proverbially the 'shyster's' paradise. In this city, as the rule goes in our courts, the 'shyster' is given full and free license to not only insult respectable people when placed upon the witness-stand, but too frequently to act the thief himself."⁴ After registering additional complaints, the article concluded, "If there be anything in the world to bring disgrace upon the dignity of the law, it is an unprincipled sot, calling himself a lawyer. To our idea, all lawyers should first be gentlemen, and lawyers after."⁵

The next year, *The Wasp* expanded its coverage and critiques of the judicial system. Though the topics varied, the prose was invariably purple in hue. The editors caviled against the prevailing system of judicial elections, opining,

The system, then, of electing the Judiciary for a term of years, may be classed among the most pernicious of systems known in a republican country — for by it the majesty of the law is humbled, the greatest criminals in the land, provided they be wealthy or men of political influence, are permitted to escape justice through some technicality, or other judicial error, not unfrequently made with the object in view of thwarting the punishment and in the end defeating the law, and making the very name of justice a mockery.⁶

* Kyle Graham is an attorney on the staff of the Chief Justice of California.

The publication also pressed for higher admission standards for attorneys, recommending,

A law should be passed by the next Legislature making it compulsory upon every man now practicing, and in the future about to practice law, to undergo an examination before the Supreme Court Judges of this State.

With such a law in force, shysterism would be virtually killed, and the name “attorney,” or “lawyer,” would then be restored to the dignified position in which it is held in Europe.⁷

And yet another edition fretted about the future of the bar:

Gradually, but surely, the old California lawyers are dropping off one by one to swell the grand army of luminaries on the other side of Jordan. The question is, who will take their places this side of the river when they depart? All our eminent jurists are getting old and worn out.⁸

The Wasp would harp on similar themes over the years that followed: a supposed surplus of unqualified attorneys, the inconsistent quality of members of the bench, the frustration of justice through legal “technicalities,” and the perceived tendency of attorneys (and other professions; *The Wasp* also was quick to call out “quack” doctors and incompetent architects) to enrich themselves at their clients’ expense. The first of these topics represented an especially rich wellspring for editorial ink. In 1878, for example, an editorial lamented,

There can possibly be no greater calamity befall a country than to have it over-run with half-educated lawyers. And that is one of the great troubles which this nation is suffering from now. Look into every court in the land and you find men struggling — painfully and fruitlessly — with complex propositions which require for their adjustment the application of an intricate and philosophical science to some of the ordinary events of life. . . . You find them indolently lounging, spitting tobacco juice, idly conversing, and generally assuming an air of insolent superiority, in that place which of all others, in a self-governed country, should be sacredly decorous, the Chamber of Justice. And all this simply because these so-called lawyers are ignorant boorish pettifoggers who under a proper system would never have gained admission to the profession.⁹

At times, *The Wasp* seemed to take pity on its prey. In 1893, it would observe of a new crop of would-be attorneys,

The Supreme Court began its session last week, and the first day thereof was devoted, as usual, to the task of examining ambitious youthful applicants for admission to the bar — spacious-browed

and empty-pursed young men, who, deluded by visions of wealth and honor, seek entrance to a profession from which most of them will ere long be glad to escape with a beer check and a forlorn hope of securing admittance to the Alms House.¹⁰

Judges and juries, too, often found themselves at the pointed end of *The Wasp*’s sharp wit. One anecdote from 1893 related,

Some years ago one of the noted Superior Judges of San Francisco had the misfortune, or good fortune, to be reversed by the Supreme Court so many times that the subject became a matter of remark and jest among the members of the bar. One facetious attorney appealed a case that had been decided by this judge to the Supreme Court, and introduced the matter to the attention of that tribunal as follows: ‘If it please the court, this case was decided against my client by Judge; but this is not the only point upon which I base this appeal.’¹¹

A January 1886 entry in an occasional series, “The Devil’s Dictionary,” provided: “Jury, n. A number of persons appointed by a court to assist the attorneys in preventing law from degenerating into justice.”¹² Later that year, in describing a recent trial, *The Wasp* offered a more specific critique of juror expertise. “[W]e have the jury on a San Francisco murder trial judicially sniffing at the vital organs removed from the corpus delicti, and trying to distinguish the odor of garlic from the odor of a diseased liver,” it reported. “The defense for this exhibition is that the smell of the liver is a question of fact for the jury, while the logical inference that the garlic odor is due to phosphorus poisoning is one for expert testimony. But surely an expert pathologist is a better judge of a morbid odor than any twelve laymen.”¹³

The Wasp was not shy in expressing its approval of or disdain for specific judicial decisions, including those of the California Supreme Court. The editors apparently agreed with the result in *Hatch v. Stoneman*,¹⁴ writing of that 1885 decision that “the Supreme Court has decided that no power exists to compel the Governor to call a special election. No one but an infatuated idiot could have expected any other result of the absurd attempt to force a Governor by a writ of mandamus to approve an act of a Legislature.”¹⁵ *The Wasp*’s caustic criticism of the outcome in *People v. Cheong Foon Ark*, meanwhile, incorporated a gratuitous manifestation of the writer’s underlying bias:

The Supreme Court has reversed the judgment of the Superior Court, in which a prisoner was convicted, on the ground that in the indictment the word ‘felonious’ was omitted before the word ‘larceny.’ A larceny, it appears, is not naughty unless it is described as ‘felonious.’ What makes this technical hair-splitting peculiarly provoking is the circumstance that the man turned loose is a Chinaman.¹⁶

Racial bias also insinuated itself into *The Wasp's* commentary when Hong Yen Chang, an immigrant from China, was denied admission to the California bar in 1890.¹⁷ In describing this denial — recognized as a “grievous wrong” by the California Supreme Court in a 2015 decision that posthumously granted admission to Chang¹⁸ — *The Wasp* wrote,

The State Supreme Court has declined to admit Hong Yen Chang to the ranks of the legal profession of California. Mr. Hong was naturalized in New York, and his moral character is said to be good enough to make him lonesome in the company of most San Francisco lawyers, but the Court holds that a Chinaman cannot legally become an American citizen. Of course, this decision is correct, but it is a pity that the law does not permit the enrollment of a few Chinese attorneys to handle the Chinese business in the courts. They would probably be more scrupulous than the white practitioners for one thing, and then they would prevent the gradual Mongolization of the San Francisco bar.¹⁹

Notwithstanding *The Wasp's* generally abhorrent views on matters of race and ethnicity, at times its editors defied popular sentiment to defend a principle. In 1887, the publication condemned a recent lynching of a Chinese American who had been convicted of murder and sentenced to life in prison, but then dragged to his death by a mob in Colusa. “The hanging of Hong Di by a mob was a disgrace to our boasted civilization,” the editors wrote.

Not that he did not deserve death, but the manner in which it was brought about is a total subversion of the cornerstone of government. . . . Hong Di may have been the most deserving of death of all the scoundrels who have tempted the patience of a long-suffering people. But that is not the question now at issue. The point is that he was under the protection of law — that same law which purports to shield the highest as well as the lowest in the land. And there will be an end of all government and a return to anarchy if such un-civilized barbarities shall go unpunished as characterized the saturnalian butchery of Hong Di.²⁰

On the lighter side, *The Wasp* frequently tweaked prevailing sentiments regarding the administration of justice. After discussing some recent litigation in his “Prattle” column in 1882, Bierce bemoaned,

We all bewail the “miscarriage of justice”; we uproll the offended eye and agitate the deprecating tongue; we execute yawps and shouts of protestation. We shrill. The miserable insincerity of it all! The swindler that the Court has acquitted we take by the hand; the known but unindicted thief has his knees under our table and shakes a leg in our parlors with his arm about our wives and daughters. Is he black-

ballad at our clubs? Is his invitation to drink a glass of wine declined? Do you, good reader, know a man who turns his back when an eminently respectable thief offers his hand? Do you do so yourself? No? Then you have not earned the right to rail at our juggling judges and our maudlin jurors. You would better hold your tongue. I shall wag mine, all the same.²¹

It can be difficult to read *The Wasp* today without flinching. The publication's casual juxtaposition of tame jests with stridently xenophobic and racist views now seems repulsive in its minimization of the gravity and harm of the principles its writers, editors, and cartoonists accepted, and sometimes espoused. Yet the existence of these views, however regrettable, is itself a historical fact, and to a critical reader *The Wasp* can provide useful insights into the environment and attitudes that surrounded the judges, juries, and attorneys of the late 1800s and early 1900s. ★

ENDNOTES

1. Richard Samuel West, *The San Francisco Wasp: An Illustrated History*. Northampton, MA: Periodyssey Press 2004, 2.
2. *Ibid.*, 48, 101-102.
3. *Internet Archive*, www.archive.org.
4. “The ‘Shyster’s’ Paradise,” *The Wasp*, Nov. 25, 1876, 150.
5. *Ibid.*
6. “The Judiciary — State and Federal,” *The Wasp*, Jan. 13, 1877, 228.
7. “Shysterism and Quackery,” *The Wasp*, Mar. 17, 1877, 343.
8. “Eminent Blackstonians,” *The Wasp*, May 5, 1877, 425.
9. “Our Greatness in Crookedness: Legal Frauds,” *The Wasp*, Aug. 17, 1878, 34.
10. “Wasp on the Wing,” *The Wasp*, Jan. 21, 1893, 3.
11. “Personalities,” *The Wasp*, May 20, 1893, 4.
12. “The Devil’s Dictionary,” *The Wasp*, Jan. 9, 1886, 3.
13. “Jurors as Experts,” *The Wasp*, Mar. 27, 1886, 6.
14. *Hatch v. Stoneman* (1885) 66 Cal. 632.
15. “Editorial,” *The Wasp*, May 2, 1885, 4.
16. *The Wasp*, Oct. 14, 1882, 652; see *People v. Cheong Foon Ark* (1882) 61 Cal. 527.
17. *In re Hong Yen Chang* (1890) 84 Cal. 163, abrogated by *In re Hong Yen Chang* (2015) 60 Cal.4th 1169. For more on Hong Yen Chang, see Jeffrey L. Bleich, Benjamin J. Horwich & Joshua S. Meltzer, “Righting a Historic Wrong. The Posthumous Admission of Hong Yen Chang to the California Bar,” *CSCHS Newsletter*, Spring/Summer 2015, 2-4, <http://www.cschs.org/wp-content/uploads/2014/05/2015-Newsletter-Spring-Summer.pdf>.
18. *In re Hong Yen Chang*, *supra*, 60 Cal.4th, 1175.
19. “Phonographia,” *The Wasp*, May 31, 1890, 5.
20. *The Wasp*, July 16, 1887, 4. Hong Di was seized from jail and lynched by a mob in Colusa, California, after a jury sentenced him to life in prison for the murder of Julia Billiou. Christopher Waldrep, ed., *Lynching in America: A History in Documents*. New York: NYU Press, 2006, 163-165.
21. “Prattle,” *The Wasp*, July 15, 1882, 437.

Big Thoughts and Vigorous Debate at the Supreme Court Conference

BY DAVID A. CARRILLO*

ON JANUARY 13, 2017, some 300 people gathered at UC Hastings for a day-long conference on the California Supreme Court. The sold-out event was jointly presented by the California Constitution Center at Berkeley Law and the *Hastings Law Journal*.

Six current and former members of the Court attended: Chief Justice Tani Cantil-Sakauye, Justice Goodwin H. Liu, Justice Carol A. Corrigan, Justice Leondra R. Kruger, and Professor Joseph R. Grodin. Justice Kathryn M. Werdegar observed from the audience for most of the day. A number of legal academics spoke, including Professors Jill Bronfman, Lothar Determann, J. Clark Kelso, Rory K. Little, Myron Moskovitz, and Darien Shanske. Some noted attorneys from the California appellate community also served as panelists: Aimee Feinberg, Stephen M. Duvernay, Dennis Peter Maio, Danny Chou, Rex Heinke, and Jeremy Rosen.

* David A. Carrillo is a lecturer in residence and executive director of the California Constitution Center at UC Berkeley School of Law.

The day started with the Chief Justice's thoughts on the state of the state judiciary, followed by an overview of the Court's recent significant decisions. A panel of appellate experts discussed how best to maximize the long odds of a review petition being granted, and after lunch a panel explored possible changes to the State Bar of California. The next panel questioned the utility of California's constitutional privacy right, and contrasted it with privacy protections in Europe. The penultimate segment featured a thoughtful conversation concerning the proper role of a state high court, and the day ended with a free form session at which two justices fielded audience questions.

CLOCKWISE FROM TOP LEFT:

David A. Carrillo, executive director, California Constitution Center at UC Berkeley School of Law and Chief Justice Tani Cantil-Sakauye.

UC Hastings Professor Joseph R. Grodin and Justice Goodwin H. Liu.

FROM LEFT, Carrillo and Justices Leondra R. Kruger and Carol A. Corrigan.

Justices Kruger and Corrigan.

PHOTOS BY JIM BLOCK



What happens when that many luminaries get together? Big thoughts, vigorous debate, and some unscripted surprises. For example, the State Bar panel looked to be relatively sedate, especially since it was scheduled immediately after lunch. But the stage featured significant players in the bar reform arena: California State Assemblymember David Chiu, the State Bar's president James P. Fox and the executive directors of the State Bar and the Bar Association of San Francisco, Elizabeth Rindskopf Parker and Yolanda Jackson. The resulting discussion, with pointed questions from audience members like Jim Brosnahan, was the most spirited of the day's segments. And the conversation between Justice Liu and Professor Grodin featured a lively debate on the serious question of when a state high court can and should disagree with the U.S. Supreme Court. The debate has since inspired three articles: one in the *San Francisco Recorder*, a response from Justice Liu, and another on *scocablog.com*.

The audience was diverse. Fully one-third were law students. Groups from five flagship Bay Area law school journals filled the front rows: *California Law Review*, *Hastings Law Journal*, *University of San Francisco Law Review*, *Santa Clara Law Review*, and *Golden Gate University Law Review*. Judges from the Superior Court and the State Bar Court, justices of the Court of Appeal, staff attorneys from courts and agencies, and practitioners from around the state attended. For the student groups, this was a rare opportunity to be included in a judicial conference, an event usually reserved for practitioners and members of the bench to mingle. For those bench officers and practitioners, it was exactly that: a chance to learn from each other in a (mostly) off-the-record setting. And even with a packed schedule, fast pace, and a consistently high level of discussion, the consensus attendee reaction was that the event was *fun*.

This event is important because California is the largest state by population in the Union, and its high court is the most influential of all the state high courts. Naturally, any serious student of California law would care about the state's highest court, would be curious about its justices, and would seek out expert sources to learn more. This event brings those elements together in a rare mix, and that's why the California Constitution Center organizes it. Encouraging study of California's constitution and high court are the center's twin missions. Growing this field of study and increasing the body of knowledge works better if more minds are involved. These conferences offer a way to gather those minds, bring them together, and let the sparks fly. It seems to be working. This was the third such event; the first conference in 2008 drew over 150 people, the second in 2013 saw closer to 200 attend, and in 2017 the crowd swelled to 300. ★



TOP TO BOTTOM:

FROM LEFT, Jake Dear, chief supervising attorney of the California Supreme Court, Justice Kathryn M. Werdegar, Professor Grodin, Professor Darien Shanske, UC Davis Law School, and David Kaiser, staff attorney, Supreme Court.

Students from several Bay Area law schools were invited to attend the day's events.

Justice Goodwin H. Liu talks with UC Hastings Professor Rory K. Little.

PHOTOS BY JIM BLOCK

Berkeley Law Celebrates New Court History Book and Authors



Professor Emeritus Harry Scheiber and Berkeley Law School Interim Dean Melissa Murray.

PHOTO COURTESY JANE L. SCHEIBER

BERKELEY LAW SCHOOL celebrated publication of *Constitutional Governance and Judicial Power: The History of the California Supreme Court* with an event on the Berkeley campus on January 18. Co-sponsored by Berkeley Law's Center for the Study of Law and Society (CSLS) and the Jurisprudence and Social Policy Program (JSP), the release party also specifically honored the book's editor, Society board member and Berkeley Professor Emeritus Harry N. Scheiber.

Constitutional Governance and Judicial Power, a project of the California Supreme Court Historical Society, is a comprehensive account of the court as an institution and as a key actor in the cultural, socio-economic and political development of California. The book, spanning 1850–2010, is likely the most complete and authoritative account to date of any state high court.

"This is truly a major opus," noted Melissa Murray, Berkeley Law's interim dean. "It couldn't be more timely as we're thinking deeply about the role state courts play in this country."

The event, which drew about 50 Berkeley Law faculty, grad students and visiting scholars, featured a

discussion with Scheiber and two of the book's chapter authors, Professor Lucy Salyer of the University of New Hampshire and Charles McClain, lecturer in residence and vice chair emeritus of the JSP program. That conversation focused on the unique challenges that the California high court has faced over the years, particularly during the tenures of Chief Justices Roger J. Traynor, Donald R. Wright and Rose Bird, the origin of the history book project, and the impact of state-level jurisprudence as a force in shaping regional and national legal culture.

One of Scheiber's objectives for the project was to "produce an authoritative historical study, but one that would be readable and thus accessible to the general reader, as well as being a valuable source for advanced students and professionals in history, political science and law." Since joining the Berkeley Law faculty in 1980, he continued, "I found that, so far as state constitutional law and California legal history were concerned, much less attention was being paid in the curricula and in the student-run journals of most of the state's law schools than the importance of these subjects merited. This situation began to change under the impact of the dramatic issues of race, criminal process, school finance, labor law, and the like that were being decided by the state's high court at that time."

Authors Salyer and McClain also hope the book stimulates more study of state constitutions. "Scholars tend to focus exclusively on the U.S. Supreme Court," Salyer observed, "ignoring the vital role that state supreme courts play in the governance of their states, issuing decisions that often end up shaping national constitutional law."

Salyer said she was drawn by the opportunity to learn more about the California Supreme Court's complex record in the so-called "age of reform," from 1910 to 1940. California was in "the vanguard of 'Progressive' reform states during those years, passing more than 800 bills and 23 constitutional amendments in 1911, alone." California's highest court fielded challenges to many of these new laws and the agencies they created. In so doing, the Court "struggled to demarcate the border between private and public rights and state and federal power as they considered the legitimacy of railroad, utility and water regulations, workers' compensation and protective labor legislation, discrimination against non-citizens, zoning laws, the right to strike and picket."



FROM LEFT, Lecturer in Residence Charles McClain, Professor Emeritus Harry Scheiber, Professor Lucy Salyer.

PHOTO COURTESY JANE L. SCHEIBER

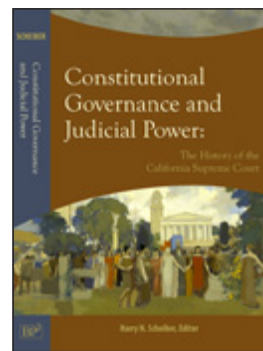
McClain's two chapters included one on the Court's first 30 years — when it issued some disturbing rulings, including *People v. Hall* (1854), which held that Chinese-Americans could not testify against whites in criminal cases. In another repellant decision, *In re Perkins* (1852), a man who had brought three slaves to California from Mississippi was allowed to recover them after the slaves

escaped and to return them to his home state — even though slavery was illegal in California.

McClain's second chapter, on the Court under Chief Justice Phil Gibson from 1940–1964, chronicles how it rose to become the most influential state appellate court in the country. Berkeley Law graduate Roger Traynor ('27) served as an associate justice during those years and became chief in 1964. McClain credits him with propelling what he called “an expansive view of the law's potential to affect significant social change.”

Like Scheiber and Salyer, McClain hopes the book will be a “stimulus to further scholarly research and writing” on California's high court and constitution.

Scheiber's chapter covered the Court's jurisprudence from 1964 to 1987, when it tackled myriad crises. “This was a period of enormous change,” he said. “The Los Angeles riots of 1965, school busing, gay rights, farm strikes, affirmative action in the UC system — all truly divisive issues. There were some amazing intellects on the Court during this time who held a deeply-rooted sense of the need to respect diversity and to protect consumers in the corporate world.” ★



Constitutional Governance and Judicial Power can be ordered here: <https://my.cschs.org/product/court-history-book>.

DAVID S. TERRY'S WRIT OF HABEUS CORPUS

Continued from page 15

Terry's anger toward Justice Field, his former colleague on the California Supreme Court and the man who sent him to the Alameda County Jail, was no secret. One newspaper account recalled a conversation between Terry and a friend:

When he called on him in Oakland jail last December Terry said: “When I get out of here I will horsewhip Judge Field. He will not dare return to California, but the world is not large enough to hide him from me.”

“But,” said his friend, “if you do that Field will resent it. He won't stand any such thing.”

“If he resent it,” said Terry, “I'll kill him.”³

Less than a year after his writ of habeas corpus was issued, Terry would be dead, shot by Field's bodyguard,

U.S. Marshal David Neagle, when he attempted to assault Field. Although Terry failed to win early release, this curious document remains at the State Archives as evidence of the final year of California's most violent Supreme Court justice. ★

ENDNOTES

1. “Telling the Tale of California's Most Colorful Justice,” *CSCHS Newsletter*, Fall/Winter 2014, 20–21, <http://www.cschs.org/wp-content/uploads/2014/05/2014-Newsletter-Fall-Most-Colorful-Justice.pdf>.
2. For a closer look at Terry's life story, see Richard H. Rahm, “Chief Justice David S. Terry and the Language of Federalism,” *California Legal History* 9 (2014): 119; “Chief Justice David S. Terry and Federalism: A Life and a Doctrine in Three Acts,” *CSCHS Newsletter*, Fall/Winter 2012, 2–7 <http://www.cschs.org/wp-content/uploads/2014/07/David-Terry-2012-Newsletter-Article.pdf>; and “Telling the Tale of California's Most Colorful Justice,” 20–21.
3. “Terry's Threats,” *Daily Alta California*, Aug. 15, 1889.

A Conservative's View of Law Professors

BY ERWIN CHEMERINSKY*

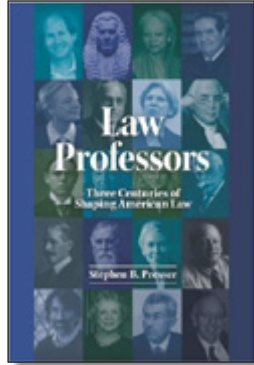
STEPHEN B. PRESSER

LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW

502 pages, \$45.64 (hardcover), \$28.44 (Kindle)
West Academic Publishing, 2016

AS A LAW school dean and a law professor, I obviously welcome a book that focuses on law professors and overall portrays them in a favorable way. Professor Stephen B. Presser's new book, *Law Professors: Three Centuries of Shaping American Law*, is, as he says, the first "single book treating law professors in general, much less a comparative treatment of the biographies of the most important American law professors." The first sentence of the book says that it "is a love letter to the teaching of law." In many ways, the book is exactly that, filled with mostly favorable biographies of luminaries in legal academia. Yet, I found that Professor Presser's staunch conservative views greatly influenced how he presented some of the biographies and wished, especially as to the more contemporary portrayals, that he had been less ideological.

The book is divided into 22 chapters and is organized chronologically. He begins with Sir William Blackstone, who lived in England from 1723–1780, and ends with President Barack Obama. In between, he describes James Wilson and Joseph Story from early American history through Richard Posner and Cass Sunstein from the late twentieth and early twenty-first centuries. Altogether he profiles about 30 law professors, with most chapters devoted to one individual. However, there is a chapter that focuses on five professors who were instrumental to the Critical Legal Studies movement and another that looks at two current Yale law professors (Bruce Ackerman and Akhil Amar).



Some of the choices were obvious and would be included by any author writing such a book. Dean Christopher Columbus Langdell is credited with bringing the case method to legal education and shaping the nature of law schools in a way that lasts to this day. Other selections were more curious. Professor Presser devotes two chapters to fictional law professors, Lewis Elliot at Cambridge University (who I confess that I never had heard of) and Charles Kingsfield of *The Paper Chase* (who is everything I have tried not to be in my 37 years as a law professor). Antonin Scalia and Barack Obama are enormously important figures in recent American history, but not for what they did as law professors.

Obviously, anyone making a list of the most important law professors in American history might make different choices. I wondered why he included Roscoe Pound, but not Jerome Frank in presenting the legal realists of the early twentieth century. Herbert Wechsler unquestionably was a hugely important law professor in the mid-twentieth century. But so was Louis Pollak, who served as dean of University of Pennsylvania and Yale Law Schools, and who wrote a compelling defense of *Brown v. Board of Education* in response to Wechsler's attack on it. Richard Posner undoubtedly warrants inclusion, but why not also Guido Calabresi? Why Antonin Scalia and not Ruth Bader Ginsburg since both were law professors before becoming judges, especially since Ginsburg because of her advocacy for women's rights unquestionably had the more important career before going on the bench?

In my field of constitutional law, titans such as Alexander Bickel, John Hart Ely, and Laurence Tribe are mentioned only in passing or not at all. Bickel's writings, and especially his view that judicial review is a deviant institution in American democracy, has shaped constitutional theory for the last half century. Ely's book, *Democracy and Distrust* published in 1980, is the most influential work on constitutional interpretation during my career. Tribe's treatise on constitutional law was brilliant and enormously influential, to say nothing of his advocacy which continues to this day.

It is notable that of the 30 law professors portrayed, only three are women (Catharine MacKinnon, Mary Ann Glendon, and Patricia Williams) and only two, Williams and Obama are African-American; none

* Erwin Chemerinsky is Dean and Distinguished Professor of Law, Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law. On July 1, he will become dean of the UC Berkeley School of Law.

are Latino. Why not Ruth Bader Ginsburg or Soia Mentschikoff or Herma Hill Kay or Deborah Rhode? Why not Derrick Bell or Harold Koh or Richard Delgado? Choices, of course, had to be made to keep the book, which is 471 pages, to an acceptable length. But still it is disquieting that virtually all of those profiled are white men.

Overall, the book is very readable and the profiles are well done. I especially enjoyed the earlier chapters in the book and learned a great deal from Professor Presser's biographical sketches of Sir William Blackstone, Justice Joseph Story, Dean Roscoe Pound, and John Henry Wigmore. I knew something about each of them, but nonetheless found new information in these chapters.

Not every profile is positive in its assessment. Professor Presser's unfavorable portrayal of Justice Oliver Wendell Holmes borrowed heavily from Albert Alschuler's critical biography and concludes that Holmes: "took credit for others' work, had boundless ambition, failed to come up with a single original idea, wrote utterly incomprehensibly, was possibly perverted, delighted in eugenics, was probably a racist and maybe an anti-Semite."

My problem with the later chapters about more recent figures is that Professor Presser's own conservative views greatly influenced his presentations. In writing about Judge Richard Posner, he says that "Posner appears to believe that the judicial task is ultimately legislative." It is interesting that Professor Presser sees it that way, but I highly doubt that Judge Posner — as an academic or a federal judge — would describe it in those terms.

In portraying Cass Sunstein, Professor Presser says: "Just as the Patient Protection and Affordable Care Act gutted the 10th Amendment, if law professors like Sunstein ran the country, it is not clear what would be left of the notion of limited federal government, or limited government at all." Whether the Affordable Care Act "gutted the 10th Amendment" is obviously subject to debate, and Professor Presser's assertion of it as fact is jarring and unnecessary to his portrayal of Professor Sunstein.

Professor Presser's conservatism is especially evident in his chapter on President Obama. He accuses the former president of having a "radical view of the law" that includes "a penchant for redistribution,"

"his ability to choose what parts of laws he will seek to enforce," and of "wholesale rewriting of American immigration law." He says that President Obama may have learned of the "plasticity of the Constitution" at Harvard and believed that "everything may be malleable." I disagree entirely with Professor Presser's characterization of President Obama, but even more importantly found it out of place in a book that started off as a series of ideologically neutral portrayals of law professors. I question whether President Obama belongs in a book about law professors and had the sense that he was included to provide an occasion for Professor Presser to present his sharply critical views of the Obama presidency.

Indeed, the further into the book one wades, the more Professor Presser's conservative ideology is expressed. In his concluding chapter, he accuses American law professors such as Akhil Amar and Cass Sunstein of having "concocted elaborate systems and elaborate justifications for straying from the strict rule of law." He applauds "other members of the academy" — all conservatives — who "are beginning increasingly to understand the need to return to what some have called 'First Principles.'" He sees the approach of liberal law professors "as a danger to the legal and Constitutional foundations on which our Republic rests."

As a liberal law professor, I obviously disagree with Professor Presser. But what is disconcerting is that he asserts his views as self-evident conclusions that need little elaboration or explanation. My guess is that those who are politically conservative will read these words and nod in agreement. But the rest of us will wonder why they are part of this book that is meant to be a portrayal of law professors and expression of his love for legal academia.

Unfortunately, the last few chapters — the sharp criticisms of Professor Sunstein and President Obama and of liberal law professors generally — left me dissatisfied with the book. But still I learned a great deal from it and having spent almost all of my professional career as a legal educator, I appreciate a whole book dedicated to law professors. ★

EDITOR'S NOTE: *The Bookshelf* is an occasional feature highlighting new releases of particular interest to judges, practitioners and legal academics.

★ ★ ★ LET US HEAR FROM YOU ★ ★ ★

*Send contributions for MEMBER NEWS and suggestions for THE BOOKSHELF to
Molly Selvin at molly.selvin@gmail.com*

New CSCHS Board Member Jorge E. Navarrete

BY KATE GALSTON*

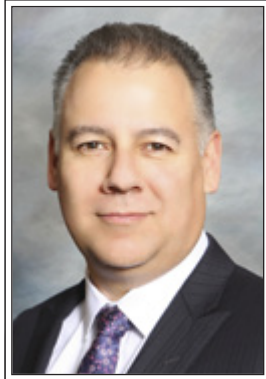
JORGE E. NAVARRETE is the 27th court administrator and clerk of the California Supreme Court and the state's first Latino to serve in this role. He is also the newest member of the California Supreme Court Historical Society Board of Directors.

A native of Guadalajara, Mexico, Jorge immigrated to the United States in 1987 to pursue his dream of becoming a U.S. military pilot. He enlisted in the U.S. Army, served in Operation Desert Storm, and received three promotions during his service before his honorable discharge in 1993.

After leaving the Army, Jorge, who had been interested in the law even before he decided to become a pilot, sought an opportunity to work in the field. He took a position as a security officer and later supervisor at the firm that provided security services to the California Supreme Court and Court of Appeal in San Francisco.

In 1996, Jorge joined the Supreme Court as an office assistant in the Court's file room. From the start, Jorge was interested in court rules and practices and found the work fascinating. He was promoted through five more job classifications before being named as court administrator and clerk on October 1, 2016, succeeding Frank A. McGuire. His new job had been a "dream" from his early days at the Court but it never crossed his mind that he would someday hold this position.

Jorge has seen many changes in the Court's operation during his 20-year tenure. In particular, advances in technology — including email, public Internet access to court information and procedures,



and the electronic case management system — have altered the way that the Court conducts its business. Jorge believes that technology has improved both the Court's internal operations and the public's access to the Court.

However, he notes that there are still rooms filled with folders of record documents — or "doghouses," as they are known in Supreme Court parlance — and that likely will not change any time soon although the Court is in the process of migrating to an electronic filing system.

As court administrator and clerk, Jorge's days are busy and varied. He navigates hundreds of emails each day and handles issues that are as wide-ranging as lights out within the building, important budget decisions, proposed rule changes, personnel problems, and case information. But, "all it takes is one case, one issue, one filing, to change the way a day is going," he said.

He enjoys coming to the Court each day because the work is exciting and makes a real difference to the people of California. He particularly relishes the opportunities to interact with the public, including students, and to provide information about the role of the Court and demystify the Court's process.

Jorge is quite interested in the Society's efforts to preserve and promote the history of the state's highest court and believes that we are now living in a particularly interesting time for the Court. For example, recent appointments have created a female majority, including justices from widely varying personal backgrounds. When passing into the courtroom, Jorge often notes that this is a completely different Court from the one depicted in the old portraits that line the halls.

And, as the first Latino in his job, Jorge is also making history.

In his off-hours, Jorge enjoys spending time with his family and friends, playing tennis, and taking daytrips around Northern California. And every now and then he has a chance to fly a plane again. ★

* Kate Galston is an appellate lawyer in Los Angeles and a board member of the California Supreme Court Historical Society.

Become a member, renew your membership, or make a contribution at

★ ★ ★ WWW.CSCHS.ORG ★ ★ ★

Please report changes in contact information at 800-353-7537 or director@cschs.org.

CHIEF JUSTICE TANI CANTIL-SAKAUYE
Chair

GEORGE W. ABELE
President

MOLLY SELVIN
Vice President & Newsletter Editor

RICHARD H. RAHM
Treasurer

JOHN CARAGOZIAN
Secretary

JENNIFER KING
Immediate Past President

SELMA MOIDEL SMITH
Publications Chair

JAKE DEAR
Newsletter Associate Editor

CHRIS STOCKTON
Director of Administration



CALIFORNIA SUPREME COURT

Historical Society

CALIFORNIA SUPREME COURT
HISTORICAL SOCIETY
P.O. Box 1071
Fresno, CA 93714-1071
Phone (800) 353-7537
director@cschs.org
www.cschs.org

T
A
B
L
E
O
F
C
O
N
T
E
N
T
S

<i>The Infamous Case of People v. Hall</i> MICHAEL TRAYNOR . . . . .	.2	<i>UCLA Law School's Riseborough Mural</i> SCOTT HAMILTON DEWEY . . . . .	.18
<i>Y.C. Hong Championed Chinese Inclusion</i> CHERRY GEE . . . . .	.9	<i>The Wasp Stings the Courts</i> KYLE GRAHAM . . . . .	.22
<i>Justice Kathryn Mickle Werdegarr: A Singular Path</i> LAURA MCCREERY . . . . .	.12	<i>Supreme Court Conference</i> DAVID A. CARRILLO . . . . .	.25
<i>David S. Terry's Writ of Habeas Corpus</i> SEBASTIAN A. NELSON . . . . .	.15	<i>Berkeley Law Celebrates New Court History Book and Authors</i> . . . . .	.27
<i>United States Attorney Cecil Poole</i> JIM J. BROSNAHAN . . . . .	.16	<i>A Conservative's View of Law Professors</i> ERWIN CHERMERINSKY . . . . .	.29
		<i>New CSCHS Board Member</i> <i>Jorge E. Navarrete</i> KATE GALSTON . . . . .	.31