

ON BEING HONORED BY THE AMERICAN JEWISH COMMITTEE

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I. THE JUDGE LEARNED HAND HUMAN RELATIONS AWARD¹

Thank you, Jerry,² for your generous comments. And Justice [Joseph] Grodin, thank you for your kind remarks. I am truly honored to receive the Judge Learned Hand Award of the American Jewish Committee. I am also deeply gratified to be placed in the company of the distinguished individuals who have received it in the past.

I thank all of you for attending the ceremony this evening. I'd like particularly to acknowledge my colleagues from the Supreme Court, Justice Marvin Baxter and his wife Jane, Justice Ming Chin and his wife Carol, and also my classmate and friend Judge Thelton Henderson. And my family — David, Maurice and Helen, and Matthew and Monique.

Learned Hand is recognized as one of the country's great judges. He is often described as the greatest judge "*never* to be appointed to the U.S.

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² Jerome Falk, San Francisco attorney.

Supreme Court.” How did it happen that the highest judicial office eluded him? The answer is found in time, place, and politics. According to the story, in the 1920s his appointment was blocked by then Chief Justice William Howard Taft. Gerald Gunther, in his wonderful biography of Hand, writes that Taft strongly urged President Harding not to nominate him, and offered a decisive political argument: “Hand,” he said, “had turned out to be a wild Roosevelt man and a Progressive” — that would be Teddy Roosevelt — and “[i]f promoted to our bench, he would most certainly herd with Brandeis and be a dissenter.”³ Twenty years later, in the 1940s, Justice Felix Frankfurter, a longtime supporter of Hand’s, wrote President Franklin Roosevelt that Hand is “the one choice who will arouse universal acclaim in the press. . . . I never was more sure of anything.”⁴ Frankfurter even drafted a press release for FDR to announce Hand’s nomination. It was not to be. Roosevelt reportedly wanted a younger man and appointed Wiley Rutledge.

Your choosing to honor me this evening prompted me to reflect on my career path, and how I came to be in a position to receive this honor. What I soon realized is that my career in the law, like that of Judge Hand, has been impacted by time and place — and, yes, perhaps politics as well. What I have also come to realize is that my personal journey is reflective of this country’s journey over the past half century, as it endeavored to respond to the newly insistent demands of its African-American citizens and women for equal rights and opportunities. For the next few moments I would like to trace this history and then suggest what relevance it might have for us today.

When I attended UC Berkeley so many years ago, women had few career options; those who aspired to a career most often trained to be a teacher, nurse, or secretary. These were the women’s occupations.

Typical of many, I graduated with a general liberal arts degree, having no defined career goals. I entered the workplace and ultimately accepted employment at the UC San Francisco Medical Center as a ward clerk. There I met three physicians who you might say changed my life.

The first two were women. Seeing them at work was a revelation. Until then I had no idea that a woman could pursue what I had always thought to be a man’s profession. The realization that a woman could do something

³ GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 234 (2d ed. 2011).

⁴ *Id.* at 476-77.

so out of the ordinary inspired me to raise my horizons and consider what I might do. Since medicine was clearly not for me, I pondered other possibilities and soon settled on the law. I had never heard of a woman lawyer; neither had anyone I knew. Nevertheless, I applied to law school and in the fall of 1959 entered UC Berkeley, Boalt Hall, as a member of the class of 1962. In our entering class there were four women; two of us graduated.

Now, I mentioned three physicians; the third, of course, was my husband David. We married at the end of my second year of law school and moved to Washington, D.C., where David was assigned to Walter Reed Army Hospital, and I transferred to George Washington University to complete my studies.

When I embarked on my pathway in the law, this country was on the cusp of radical social change. The civil rights movement was gathering force. Martin Luther King, Jr., had emerged on the national scene as its leader. The feminist movement was soon to follow. Betty Friedan had just published *The Feminine Mystique*. For women of my era, the book was a revelation. It espoused dramatic new views about the role of women and opened up whole new possibilities. I had a sense of the world changing. With a newly minted law degree and living in the nation's capital, I was in a position to be part of that change.

After graduation, I took a position with the civil rights division of the United States Department of Justice. I joined the Appeals and Research Section under Harold Greene. Robert Kennedy was attorney general, Nicholas Katzenbach was deputy attorney general, and Burke Marshall was assistant attorney general for civil rights. I can recall only one other woman in the Justice Department.

It was a momentous period. In the South, segregation was still the rule — bus stations, restaurants, lunch counters, lodgings and schools were separated into “colored” and “white.” Marches and sit-ins were taking place in Selma, and in Birmingham. All of us are familiar with the incredible history of Judge Thelton Henderson, who as a brand-new lawyer, was dispatched to the South by the Justice Department to be an observer for the federal government.

Our task in the Appeals and Research Section of the Civil Rights Division was to enforce, strengthen, and, indeed, develop the civil rights law of the land. (By that I mean we were making it up as we went along.)

When James Meredith integrated the university of Mississippi as its first black student, he was accompanied by Civil Rights Division attorneys. When Martin Luther King, Jr., was in jail, we drafted amicus briefs to secure his release. When the Southern governors of the day — Ross Barnett of Mississippi and George Wallace of Alabama, “stood in the school house door” — as they liked to boast — to bar black students from entering, we researched federal powers of contempt to move them aside. And when the administration wanted to assure equal access to public accommodations and the voting booth, we drafted early legislative proposals that ultimately led to the landmark Public Accommodations Act and Voting Rights Bill of the early 1960s.

My last day in Washington was August 28, 1963. Leaving David to supervise the movers, I joined in the “March on Washington for Jobs and Freedom,” and with thousands of others, I listened to the Reverend Martin Luther King, Jr., as he so eloquently told us, “I have a dream.”

When I returned to California, I was hoping to find work that would allow me to continue to participate in significant issues of the day. I interviewed with the California state attorney general’s office; I applied for a clerkship with the California Supreme Court; I applied for federal clerkships; I applied to legal-service nonprofits. No offers were forthcoming.

Women attorneys were few in those days, almost invisible. I was later told that the only women in the attorney general’s office at the time were the ones left over from being hired during World War II. Boalt called to tell me a prominent San Francisco firm was considering hiring its first woman, if they could persuade the senior partner. Would I be interested?

Although some members of the firm took me to lunch, I was not destined to be that woman. In short, I did not find employment.

Ultimately, and with Boalt’s help, during these early years in San Francisco I found work doing research and writing. One project of particular interest was with Boalt Professor Frank Newman — later Supreme Court Justice Newman. The idea was to investigate what would the Bill of Rights look like if the solicitor general of the United States had *won* all his arguments before the Supreme Court.⁵ Later, the California College of Trial

⁵ See Kathryn Mickle Werdegar, *The Solicitor General and Administrative Due Process: A Quarter-Century of Advocacy*, 36 GEO. WASH. L. REV. 481 (1967–1968).

Judges (now the Center for Judicial Education and Research) recruited me to write a criminal procedure benchbook for trial judges — actually, one of the first benchbooks published in California.⁶ Some time after that, I came to work with California Continuing Education of the Bar.

During this period of my career and the ensuing years, our society was engaged in addressing the issues of equal rights and opportunity for African Americans and women. Significant changes occurred. Discrimination was no longer tolerated. Through political will, and judicial decision, equal treatment and equal opportunity became an increasing reality. Diversity became a byword. The numbers of women entering law schools swelled.

These changes in our society impacted me. What initially had been a barrier, a disadvantage to me — my gender — now had become a benefit. Entities and institutions were looking for qualified women. In 1991, Governor Pete Wilson made me his first judicial appointment when he appointed me to the First District Court of Appeal. I thus took my place as the only woman among the nineteen justices of that court, and only the second woman in its entire history. Three years later the governor elevated me to the California Supreme Court, thereby making history by *doubling* the number of women on the court from one to *two*.

Today, the appointment of a woman to the bench is no longer remarkable. In most law schools, women comprise more than half of the class and now make up 40 percent of the bar. Women fill every conceivable position in the law. And today, as we are so much aware, the Democratic Party has vying for its nomination for the presidency of the United States a woman and an African American. That one of these two individuals will be a major party's candidate to be our next president speaks volumes about how far this country has come these past fifty years and how much we have changed.

What does the history I've described say about today? Are there lessons to be learned? I would say "yes." The paramount lesson is that without the support of our judicial system — without the integrity of an independent judiciary — these strides could not have been made. We rely on our courts to enforce the principles of our Constitution and the laws of our land. The role of the judiciary is to uphold the law for all, safeguarding the rights of

⁶ KATHRYN MICKLE WERDEGAR, CALIFORNIA MISDEMEANOR PROCEDURE BENCHBOOK (1971; rev'd ed., 1975).

individuals and minorities against the will of the majority. In recognizing and enforcing the legal and constitutional rights of African Americans and women, the courts fulfilled that role.

Today, other minorities are making their voices heard. With the California Supreme Court's decision last week [legalizing same-sex marriage],⁷ foremost in our awareness this evening likely are gays and lesbians.

We can't, of course, know how that particular issue will be fully resolved. Nor can we anticipate what issues will confront future generations. But what we can do — what we must do — is commit ourselves to assuring that the courts maintain the independence to fairly address the issues they are called upon to decide, so that through the rule of law, courts are able to assist our society — when necessary — in making whatever changes our Constitution and democratic principles require.

Let me conclude with the observations of two eminent jurists, one of the United States Supreme Court and the other of the California Supreme Court. The first is Oliver Wendall Holmes. Like Judge Hand, Holmes believed in judicial restraint. Nevertheless, he famously said the following, that it was the court's duty "to learn to transcend our own convictions, and to leave room for much that we hold dear to be done away with . . . by the orderly change of law."⁸

The other is Roger Traynor. Sixty years ago, Chief Justice Traynor authored the opinion in *Perez v. Sharp*, the first decision in the country to strike as unconstitutional a ban on interracial marriage. Inscribed on a wall at Boalt Hall are these words of Traynor's: "The law will never be built in a day, and with luck *it will never be finished*."⁹

In its long history, the American Jewish Committee has had a steadfast dedication to law and equality, and has been a stalwart defender of our independent courts. We are all grateful for that.

And I personally am grateful for the honor you have paid me this evening. Thank you.

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⁷ In re Marriage Cases, 43 Cal.4th 757 (2008).

⁸ Address to the Harvard Law Association of New York, February 15, 1913 (emphasis added).

⁹ Roger J. Traynor, *La Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 236 (1962) (emphasis added).

II. THE LEGACY OF JUSTICE AWARD — AND THE ARC OF PROGRESS¹⁰

Thank you, Art,¹¹ for your very kind remarks. And given your international responsibilities, I am grateful you could be here this evening.

I am truly honored to receive the Legacy of Justice Award and to be in the company of my fellow honorees this evening. I want to thank Joe Cotchett for suggesting that I receive this award, and congratulate him for receiving the Judge Learned Hand Award, recognizing his stature as a champion of worthy causes. And my congratulations on receiving the Pursuit of Justice Award to Nancy O'Malley, whom I came to know and admire during our work together on the statewide judicial education program, *How the Courts Failed Germany: Law, Justice, and the Holocaust*.

The Legacy of Justice Award marks the conclusion of my twenty-six years as a judge, twenty-three of them on the California Supreme Court, and it coincides with the fifty-fifth anniversary of my graduation from law school. As I prepare to step down from the bench, my thoughts have turned to the societal changes that have occurred over the course of my career. Today we are in challenging times. But my thesis is hopeful — that over time, progress prevails. Thus, I have chosen to frame my reflections as the *Arc of Progress*.

When I graduated from law school, nationwide only 1 percent of attorneys were women; in California it was 3 percent. In my law school class four of us started and two of us graduated. Law firms could refuse to hire women and did so with impunity. Today, law school classes are more than 50 percent women and Title VII prohibits employment discrimination. Women attorneys hold every conceivable position in the law — including, yes — judges and chief justices.

When I took my first job in the Civil Rights Division of the United States Department of Justice in 1962, in parts of the South facilities and public accommodations were still segregated, black and white — bus stations, drinking fountains, restaurants, restrooms, motels. Governors in Mississippi and Alabama would “stand in the schoolhouse door” as they liked to boast, to block school integration. Federal marshals and Department of Justice attorneys had

¹⁰ Presented by the San Francisco Bay Area Region of the American Jewish Committee, June 1, 2017.

¹¹ Arthur Shartsis, San Francisco attorney.

to accompany James Meredith — the first black student to enroll in the University of Mississippi — to his dorm and his classes for his safety. Federal troops were on standby to forestall a riot. Those days are over.

When, nine years ago, I had the honor of speaking to this group, the right of same-sex couples to marry was in dispute across the land. My court had just declared a California constitutional right, but the voters in Proposition 8 quickly rejected it. Federal litigation ensued. Then, two years ago, in 2015, the issue was resolved. Today the right of same-sex couples to marry is firmly rooted in the United States Constitution.

But none of these achievements could have occurred without the vigilance and contribution of organizations like the American Jewish Committee, steadfastly dedicated to law and equality. Nor could they have occurred without the effort and dedication of lawyers, such as our attorney honorees this evening. And most emphatically, they could not have succeeded without the integrity and courage of judges. In that connection, I will close with reflections on the court I have known these past twenty-three years.

Although we are always *The Court*, changes in our composition and personality do occur. I have had the privilege of serving with three outstanding Chief Justices — Malcolm Lucas, Ron George, and Chief Justice Tani Cantil-Sakauye. Each has met the challenges of his or her time with strength, dedication, and vision. I also have had the pleasure of serving with eleven different associate justices — starting with the venerable Stanley Mosk, to our newest member Leondra Kruger, appointed just two and a half years ago — a kaleidoscope of different backgrounds and experiences, different personalities, philosophies and approaches to the law, but always One Court.

In addition to our chief justice, two of my colleagues are here this evening and I would like to recognize them — Justice Ming Chin, a previous recipient of the Judge Learned Hand Award, and Justice Goodwin Liu.

It has been my privilege over these past twenty-three years to work together with all of my colleagues to uphold and advance justice for all Californians to the best of our ability. I will miss them all and I wish them well. Again, I thank the AJC for awarding me the Legacy of Justice award.

Thank you.