CALIFORNIA SUPREME COURT
Historical Society
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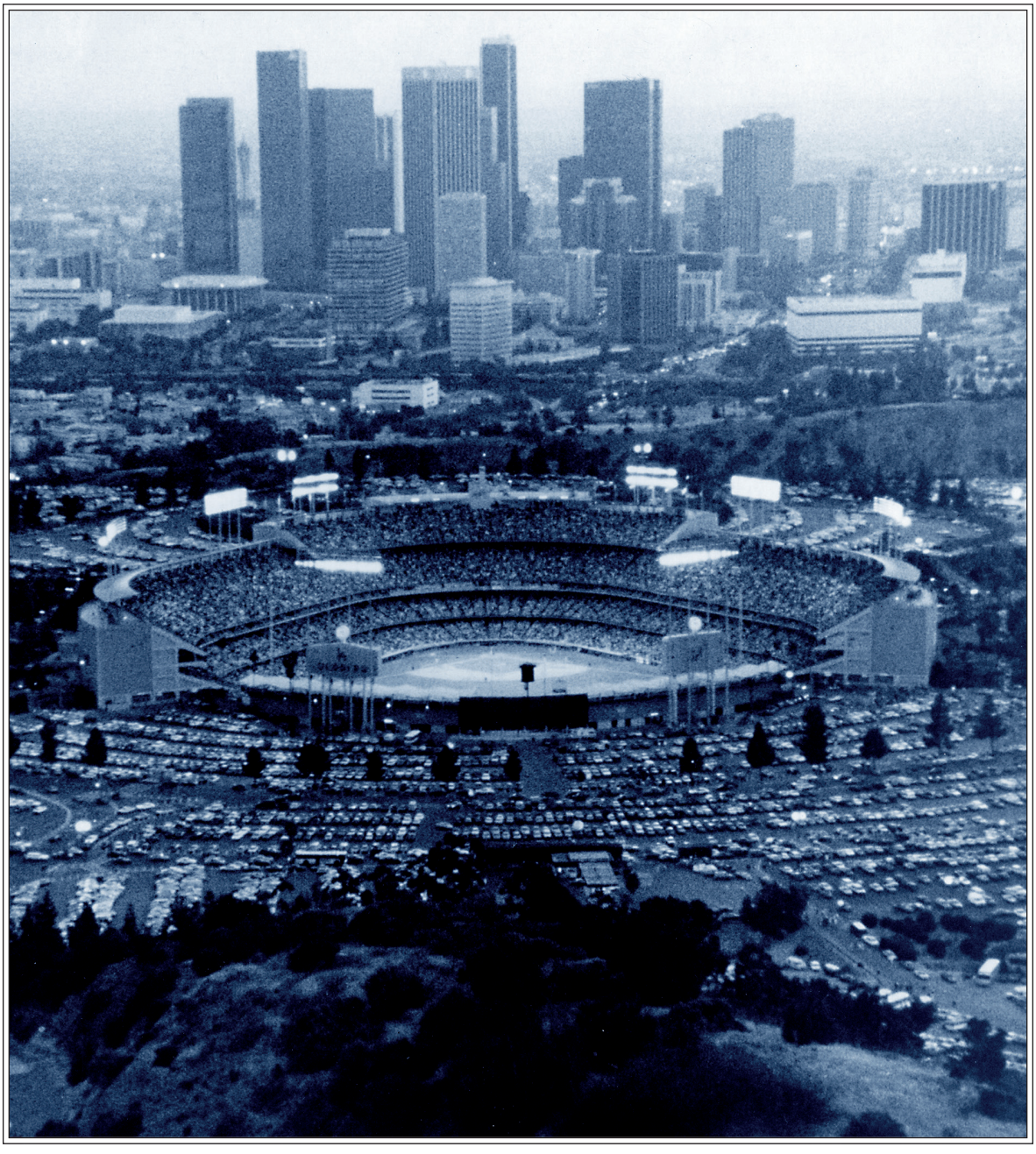


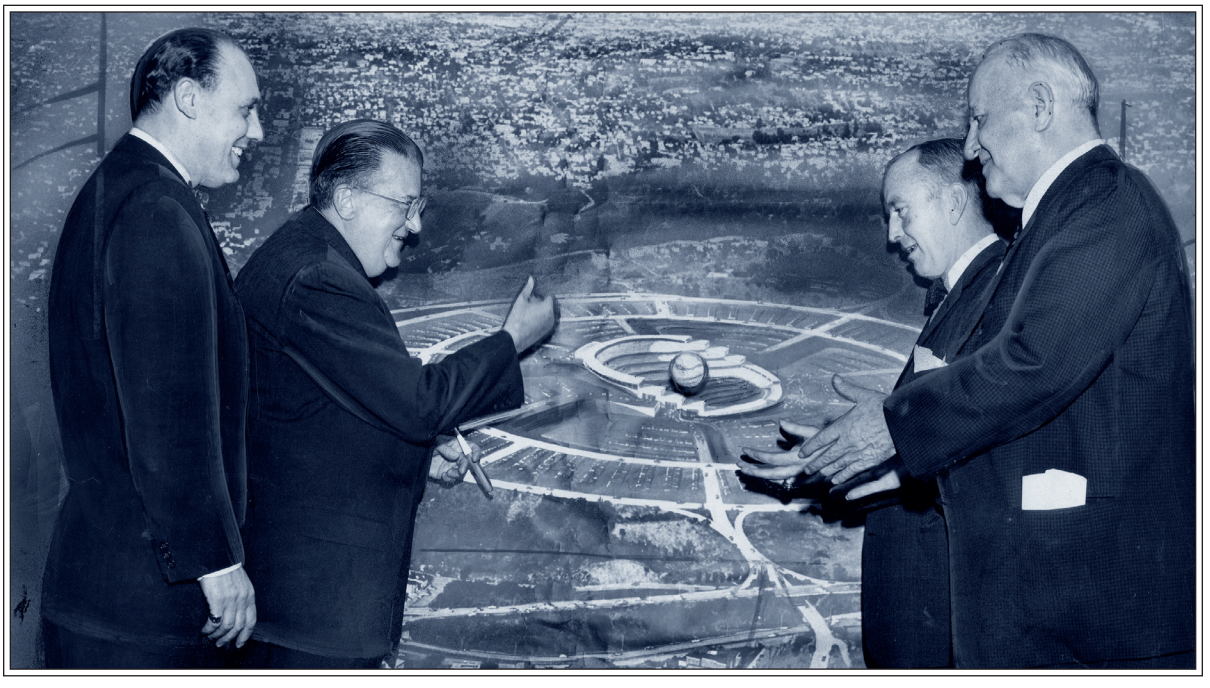
Dodger Blue:

How the California Supreme Court Saved Dodger Stadium

How the California Supreme Court Saved Dodger Stadium

And Helped Create Modern Los Angeles

by jerald podair*



Dodger President Walter O'Malley (second from left) *tosses baseball to attorney Harry Walsh after getting word that the California Supreme Court unanimously allowed construction of the stadium in Chavez Ravine. Looking on in front of a photo-sketch of the proposed stadium were Dodger general manager Buzzie Bavasi* (left) *and attorney Joe Crider, Jr. Photograph dated Jan. 14, 1959.*

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In early october 1957, the Los Angeles City Council adopted Ordinance No. 110,204 — by the margin of a single vote — bringing the Brooklyn Dodgers and Major League Baseball to the West Coast. Under its terms, the City of Los Angeles would contract to convey to the team some 300 acres in the Chavez Ravine neighborhood overlooking downtown, on which the new, privately-funded Dodger Stadium would be constructed. In exchange, the city would receive Wrigley Field — a Dodger-owned minor league ballpark in South Los Angeles — and the team's promise to build a public recreation area on a portion of the Chavez Ravine land.

It was one of the most momentous days in the history of the city, and also one of the most contentious. Indeed, few questions have divided the people of Los Angeles more deeply that those of whether, where, and how to build Dodger Stadium. Between 1957 and 1962, when it finally opened, the battle over the ballpark was an intense and emotional one. It featured an attempt to void the stadium deal through a referendum that failed by a narrow margin in June 1958. It included the controversial eviction by city authorities of a group of Mexican-American Chavez Ravine homeowners who had defied notices to vacate so that land for the stadium could be cleared. The sight of sheriff's deputies forcibly removing residents, broadcast live on television in May 1959, remains a source of contention for the Los Angeles Latino community to this day. It also was the occasion for litigation that eventually reached the highest court in the state and which helped determine the identity and direction of modern

* Jerald Podair is a professor of history and the Robert S. French Professor of American Studies at Lawrence University. His book *City of Dreams: Dodger Stadium and the Birth of Modern Los Angeles* was awarded the 2018 Harold Seymour Medal by the Society for American Baseball Research for the best book on the history of baseball and was a finalist for the 2018 PEN/ESPN Award for Literary Sports Writing.

Los Angeles. Few legal cases have been so fraught with policy implications for the city. If Dodger Stadium was built where team owner Walter O'Malley wished to — on the very lip of the downtown area — it would represent a conscious investment in the future of the central core, a statement of Los Angeles's intention to have a downtown worthy of its status as an emerging super city. But some Angelenos, including many who resided in peripheral areas such as the rapidly growing San Fernando Valley, did not share these aspirations. To them, the idea of a baseball stadium to shore up a downtown they rarely visited was a waste of taxpayer resources that could be more gainfully employed for roads and schools in their own communities.

Shortly after the ordinance was adopted and announcing his team's move from Brooklyn, Walter O'Malley flew west with team officials, landing in Los Angeles on an evening in mid October 1957. Immediately after disembarking, O'Malley was served with process in a lawsuit filed by a city taxpayer to void the Dodger Stadium contract. Fewer than five minutes into his time in Los Angeles O'Malley was already a defendant in a legal action.

The taxpayer suit had been filed by local attorney Julius Ruben in Los Angeles County Superior Court.[1] It argued that a public entity had no right to dispose of public property for anything other than a "public purpose," relying on the language in a 1955 deed of Chavez Ravine land from the Housing Authority of the City of Los Angeles (CHA) to the city of Los Angeles. This land had been the site of a planned public housing project in the early 1950s that had been cancelled, but not before most of its largely Mexican-American residents were removed through eminent domain proceedings. The CHA transferred the land to the city with a deed stipulating that it be employed solely for a "public purpose," without defining what those words meant. Ruben contended that the deed barred use of the land for the benefit of any private business, including a baseball team. The city had promised either to remove the public purpose restriction from the deed or have it held harmless and of no effect, but Ruben maintained this would be illegal.

In April 1958, another taxpayer lawsuit was filed against the Chavez Ravine agreement in Los Angeles County Superior Court,[2] this one on behalf of Louis Kirshbaum, who was represented by Phill Silver, a notorious local gadfly attorney. It objected to the allegedly unequal exchange of Wrigley Field for the allegedly more valuable Chavez Ravine property. The Ruben and Kirshbaum cases were consolidated and set for a bench trial.

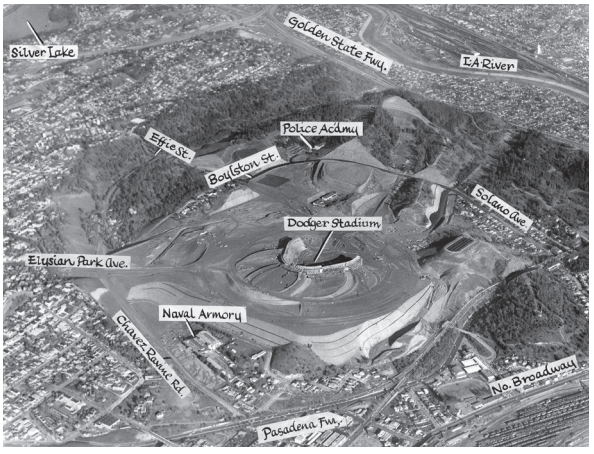
Despite their small-scale legal practices, Julius Ruben, who was representing himself, and Phill Silver, representing Louis Kirshbaum, were formidable adversaries for the Dodgers, who were represented by O'Melveny & Myers and supported by the City Attorney's office. Pierce Works, O'Melveny's lead attorney, was a veteran litigator who was perhaps best known as UCLA's varsity basketball coach in the 1920s and 1930s. Ruben and Silver were known as taxpayer advocates and champions of the little guy. The Dodgers could expect no quarter from them. Ruben and Silver contended that the City Council had exceeded its powers by making what amounted to a gift of public property for the private use of the team. They also posed the litigation's central question: did a privately-owned Dodger Stadium serve a public purpose? A court had never addressed this question. Now one would.

During a pretrial hearing, Ruben and Silver made a concession they would later regret. The relative values of the Chavez Ravine and minor league Wrigley Field properties that were to be exchanged under the terms of the Dodger Stadium deal were the subject of controversy. Contract opponents claimed that the Ravine land was actually worth much more than the city's official valuation of $2,289,204 and Wrigley much less than its assigned $2,250,000.[3] A judicial finding of inadequate valuation could void the agreement. But Ruben and Silver effectively stipulated that property values would not be made an issue in the upcoming trial and the parties would litigate only questions of law, and not of fact.[4] This would preclude the admission of evidence relating to appraisals of the two properties. The attorneys' reasons for limiting the issues are unclear. Perhaps they were confident enough on questions of law that they were willing to concede the complicated property argument in the interests of a clean case. In any event, the question of whether the city had given up a lot for a little in the Dodger deal was, as far as the litigation was concerned, off the table.

The trial began in Los Angeles County Superior Court in mid June 1958 with a touch of farce. Silver called Los Angeles Mayor Norris Poulson as a witness intending to examine him on his attempt to induce the CHA to eliminate the "public purpose" clause from the 1955 Chavez Ravine deed. But the mayor was able to answer only one question in his two hours on the stand, as city lawyers lodged objection after objection to Silver's meandering and argumentative line of inquiry.[5]

The city and the Dodgers opened their case in support of the contract three days later. Judge Arnold Praeger's remarks from the bench did not bode well for the contract's future. He indicated his dissatisfaction with the city's argument that the fact that the Dodgers would derive substantial benefit from the contract was irrelevant to the public purpose question.[6] Ruben zeroed in on the Dodgers as a profit-making entity: "The question is whether the contract is a gift of public property under the law. The whole question hinges on whether the ball club is a private or public purpose."[7] The trial ended on its fifth day.

In mid July Judge Praeger, in a sweeping decision, held the Dodger contract invalid. His opinion was effectively



Aerial view of Dodger Stadium under construction, Jan. 3, 1962. The new home of the Dodgers, which opened April 10, 1962, included 49,000 seats in the grandstands and an additional 7,000 seats in the centerfield pavilion area.

an endorsement of the arguments Ruben and Silver had made at trial. Praeger ruled that a privately owned stadium did not fulfill a public purpose and that the deed conveying the Chavez Ravine property to the city could not be altered to benefit the Dodgers.[8] "There is nothing in the City Charter," wrote Praeger, "that in any wise indicates that [it can] use public funds for the purchase of property for the purpose of selling it to a private person or private corporation for the operation of a private business for private profit."[9] The judge saw no difference between purchasing land for a revenue-generating baseball team and "acquir[ing] property for the purpose of selling it for use for a private bowling alley, a private golf course, a steel mill, a hotel, or any other private purpose."[10] Praeger concluded "this is an illegal delegation of the duty of the City Council, an abdication of its public trust, and a manifest gross abuse of discretion."[11]

Contract opponents were ecstatic. Ruben praised Praeger as "an able and conscientious judge" who had ruled correctly "that public money and public property should be used for the benefit of the public and not for the benefit of a private corporation."[12] But Dodger attorneys were already planning legal strategies aimed at securing a reversal by a higher court. The Dodgers' chances of overturning Praeger were also enhanced by a legal blunder committed by the overeager Silver, who in typically aggressive fashion had sued to prevent official certification of the results of the referendum on the stadium contract's validity that the Dodgers had won narrowly in June 1958, arguing that they had been superseded by Judge Praeger's July decision. Silver's action prompted the Dodgers and the city to employ a legal maneuver, by seeking a writ of prohibition, thus bypassing the intermediate California Court of Appeal and instead proceeding directly to the California Supreme Court — substantially shortening a time-consuming process.

Once the writ of prohibition was filed in the Supreme Court, that Court had the opportunity to rule not only on the procedural question but also on the merits of the underlying action itself. Silver's strategic error, along with his and Ruben's stipulation excluding property value evidence at trial, would bear heavily on the fate of the legal challenges to the construction of Dodger Stadium. They would also illustrate that in law as in life, procedure matters as much as substance, sometimes more so.

Judge Praeger had facilitated the writ-of-prohibition maneuver himself, albeit perhaps unintentionally, when shortly after his ruling he enjoined certification of the referendum results until Silver's suit to invalidate them could be heard.[13] This made an application for a writ of prohibition the next logical step. In mid October the Supreme Court issued an order temporarily halting the referendum decertification and scheduling a hearing on the application for a writ of prohibition.[14] Chief Justice Phil Gibson's order for the Court intimated that the Court favored taking up the entire case along with the writ of prohibition question, in light of the fact that Judge Praeger's decision had not decided questions of fact. The Court asked Silver to submit a brief addressing the factual issues that remained in the case. When Silver was unable to do so to the Court's satisfaction, the stage was set for a full adjudication.[15] The Dodgers now had a second chance in the court system.

The team's lawyers challenged Judge Praeger's decision head-on. The centerpiece of O'Melveny & Myers' argument was one the Dodgers had been making in one form or another for a decade: a privately constructed baseball stadium built on land acquired from a municipality or state agency could fulfill a public purpose.[16] The proper way to analyze the contract, they maintained, was through "the various benefits to be derived by the City from the transaction as a whole," and not solely on the basis of how much money the Dodgers would make.[17]

The Los Angeles City Council had determined that it no longer needed the Chavez Ravine land and that increasing its property tax value with a stadium would aid municipal finances, as would the sales and income tax revenues the new ballpark would generate. The council had also decided that it would benefit the city if the Dodgers built the stadium at their own expense, as opposed to incurring substantial cost and debt on a public structure. A public recreation area at Chavez Ravine, such as the one the Dodgers had agreed to construct, was also in the city's interest as a means of combating juvenile delinquency.[18] The Dodgers-owned minor league ballpark, Wrigley Field, which the city would acquire as part of the bargain with the Dodgers, would provide additional public benefit in this regard.[19] The presence of major league baseball in Los Angeles, which the new stadium would ensure, would increase the number of jobs in the city. Taken in aggregate, the Dodgers' lawyers argued, there were clear, "overall benefits to the City" in the stadium

contract and a manifest "public purpose."[20] The Dodgers' attorneys had thus employed the application for a writ of prohibition as a means of obtaining an expedited and definitive ruling on the substance of Praeger's decision from the state's highest court.

Their approach worked. In January 1959 the California Supreme Court filed *City of Los Angeles v. Superior Court*, granting the writ of prohibition in a unanimous decision and allowing the Dodger Stadium contract referendum result to be officially certified. More important, as the Dodgers had hoped, it ruled on the validity of the contract itself. The Court upheld the City Council ordinance on which the agreement was based, and overturned Judge Praeger's decision blocking its enforcement.[21]

Just as Praeger's ruling had adopted most of Ruben and Silver's contentions, Chief Justice Phil B. Gibson, writing for the Court, embraced the arguments of the Dodgers and the city to support his reasoning. After a decade's worth of legal and policy debate over the question of whether a privately constructed baseball stadium fulfilled a public purpose, Gibson weighed in. "In considering whether the contract made by the city has a proper purpose," he wrote, "we must view the contract as a whole, and the fact that some of the provisions may be of benefit only to the baseball club is immaterial, provided the city receives benefits which serve legitimate public purposes."[22] Gibson found these public purposes in the transfer of the Wrigley Field property to the city and the promise to construct the recreation area at Chavez Ravine.[23] With those established to his satisfaction, Gibson did not find it necessary to reach the issue of indirect public benefits such as tax revenue, job creation, and positive publicity.[24]

CHIEF JUSTICE PHIL B. GIBSON

Through this holding, the Supreme Court ensured that Los Angeles would do what O'Malley's former home city would not. In determining that a privately-owned stadium was not a public purpose, New York officials had concentrated on what the private entity — the Brooklyn Dodgers — would receive, rather than general public advantage. Gibson's decision for the California Supreme Court reversed this perspective. Once he decided the City of Los Angeles would realize benefits from the stadium agreement, his inquiry essentially ended. That Walter O'Malley might also realize benefits may have mattered to New York's political leaders and judiciary, but it did not matter to Gibson and his colleagues. By reconciling substantial private gain with public good, the California Supreme Court both settled a legal question and gave expression to a culture of entrepreneurship and risk that had drawn O'Malley to Los Angeles in the first place. It was true, of course, that the issue of the relative worth of the properties exchanged in the Dodger contract had been stipulated out of the case and Gibson thus did not need to rule on it. But the Court's approach to the public purpose issue was certainly more encouraging to private enterprise than the more limited view taken in New York. It was as if the burden of proof had shifted. Under New York law, O'Malley had been forced to show that his benefits would not substantially outweigh those of the city in any stadium deal. The fact that he would profit significantly was enough by itself to tip the scales against a finding that a public purpose existed.

O'Malley's burden was considerably lighter in Los Angeles. To Chief Justice Gibson and his fellow jurists, it did not matter that O'Malley stood to make a great deal of money on the stadium deal. As long as he could show that the City of Los Angeles would receive something tangible in return for Chavez Ravine, in this instance the local Wrigley Field and the public recreation area, a finding of public purpose was still appropriate. Under this more generous legal standard, entrepreneurs like O'Malley could count on assistance from government and greater freedom of action generally in achieving their goals. Gibson's decision reflected a policy approach in which the state's role was to facilitate enterprise wherever possible and regulate only when necessary, and in which public-private collaborations such as the Chavez Ravine contract were viewed not as giveaways but as economic stimuli beneficial to the entire region. In New York, a privately-owned Dodger Stadium was not considered a public purpose. In Los Angeles, in the opinion of Chief Justice Gibson, it was. O'Malley's vision had carried the day.

In addition, the effort by the city to obtain the removal of the public purpose clause from the 1955 CHA deed of the Ravine property, which had so exercised Phill Silver during the underlying trial before Judge Praeger, was held to be legal and proper, as was the city's plan to indemnify the CHA for any future legal liability resulting from such a removal.[25] The Dodgers had won on these issues as well.

O'Malley's victory was a testament both to good lawyering — O'Melveny & Myers had poured a great deal of time, money and talent into the appeal — and to Silver and Ruben's tactical mistakes. But it also reflected the ways in which California's political and legal culture differed from that of New York. The California Supreme Court had ruled that private profit was not the measure of public gain. The Court had construed the discretionary power of a legislative body broadly, permitting it to interpret "public purpose" in a way that could confer substantial private advantage. It had also given legal sanction to the idea that the state could partner with business in the interests of both, and that entrepreneurial gain sponsored and

abetted by the state meant gain for all and was thus public in intent and effect. Government promoting favored enterprises, picking winners and losers: this is what Ruben and Silver had opposed. These men represented a political impulse with lineage tracing back to the Age of Jackson and even Jeffersonianism. But in this instance, it was the Hamiltonians, the champions of public-private partnerships, who had won. The California Supreme Court had ruled that the state could do more than seek to create an economic climate that benefited business generally. It could also assist specific businesses that in the view of government officials promoted a public purpose. And sports entertainment, the court had held, was such a public purpose.

Walter O'Malley had come to Los Angeles to escape a business environment in New York that had largely equated profit making with profiteering. There were, to be sure, public officials as well as ordinary citizens in the Los Angeles region opposed to government–business partnerships such as the Dodger Stadium project and especially sensitive to what they considered evidence of giveaways. But by January 1959, O'Malley's state-aided entrepreneurial vision had prevailed in contests in both the electoral and legal arenas. He had won two victories that would not have been possible in New York. Both the voters and the courts had justified his decision to move to Los Angeles.

Silver and Ruben made the customary noises about continuing the fight up to the U.S. Supreme Court, but the Gibson decision essentially ended their hopes of stopping the stadium project through the legal system. A few months later the California Supreme Court in related litigation again unanimously sustained its ruling[26] and then denied Ruben and Silver's petition for rehearing, after which Silver asked the U.S. Supreme Court to hear his appeal. It refused to accept the case for review in October 1959, bringing the Dodger Stadium litigation to an end and leaving the California Supreme Court decisions as the definitive word on the validity of the contract. After a legal battle of over two years, O'Malley had gotten what he wanted from the Court: Permission to build his stadium.

When Dodger Stadium opened to great acclaim on April 10, 1962, it marked not just the beginning of a new era for baseball in Los Angeles — the stadium continues to this day as one of the most beloved in the sport — but for the city as a whole. Although downtown Los Angeles remains a work-in-progress, it is a far cry from the drab backwater it resembled when the Dodgers arrived in 1957. Much of the credit in this regard should go to Dodger Stadium, which began the process of building a modern downtown for a modern city, a process that has taken decades to bear fruit. By making the construction of Dodger Stadium possible through an expansive reading of the idea of "public purpose," the California Supreme Court became as much a part of that act of creation as any politician, planner, or bricklayer. ✯

ENDNOTES

1. *Ruben v. City of Los Angeles*, Los Angeles Superior Court, No. 687210 (1958).

2. *Kirshbaum v. Housing Authority*, Los Angeles Superior Court, No. 699077 (1958).

3. Walter O'Malley, "For Immediate Release," May 26, 1958, Walter O'Malley Archive, Los Angeles, CA (hereafter "O'Malley Archive"); *Los Angeles Times*, May 27, 1958; "Chavez Ravine Fact Book," O'Malley Archive.

4. *Los Angeles Times*, June 25, 1958; Neil Sullivan, *The Dodgers Move West* (New York: Oxford Univ. Press, 1987) 166–67.

5. *Los Angeles Mirror News*, June 21, 1958; *Los Angeles Times*, June 21, 1958; *Los Angeles Examiner*, June 21, 1958; Sullivan, *The Dodgers Move West*, 164.

6. *The Dodgers Move West*, 166–67.

7. *Ibid*.; *Los Angeles Times*, June 25, 1958.

8. See *Los Angeles Daily Journal Report Section*, Aug. 25, 1958, pp. 22–27; *New York Times*, July 14, 1958; Sullivan, *The Dodgers Move West*, 168–71.

9. *Los Angeles Daily Journal Report Section*, Aug. 25, 1958, 25.

10. *Id*., at 26.

11. *Id*., at 27.

12. *Washington Post*, July 15, 1958.

13. *The Dodgers Move West*, 171; *Sporting News*, Nov. 19, 1958.

14. *Sporting News*, Nov. 19, 1958; letter, Harry Walsh to Kay O'Malley, Oct. 16, 1958, O'Malley Archive.

15. *Sporting News*, Nov. 19, 1958; Andy McCue, *Mover and Shaker: Walter O'Malley, the Dodgers, and Baseball's Westward Expansion* (Lincoln: Univ. of Nebraska Press, 2014) 228, 230–31.

16. *Ruben v. City of Los Angeles*, Supreme Court of the State of California, L.A. Nos. 25238 and 25239, Opening Brief of Appellant Los Angeles Dodgers, Inc., 18.

17. *Ibid*.

18. *Id*., at 12–18, 22–24.

19. *Id*., at 23.

20. *Id*., at 17.

21. *City of Los Angeles v. Superior Court* (1959) 51 Cal.2d 423.

22. *Id*., at 433–34.

23. *Id*., at 434.

24. *The Dodgers Move West*, 173.

25. *City of Los Angeles v. Superior Court,* 51 Cal.2d at 436; *The Dodgers Move West*, 173.

26. *Ruben v. City of Los Angeles* (1959) 51 Cal.2d 857.

In Conversation with Justice Kathryn Werdegar

CSCHS's Fall Public Program

BY MOLLY SELVIN*

Journalist Jim Newton and retired Justice Kathryn Werdegar.

One mission of the California Supreme Court Historical Society is to present public programs that explore the past in order to enlighten the future. Continuing that tradition, the Society hosted a compelling and timely conversation on November 7 between retired Associate Justice Kathryn Mickle Werdegar and veteran Los Angeles journalist Jim Newton.

Their event drew a hundred or so to the historic Los Angeles Central Library downtown on a balmy evening. The conversation dove deep into a number of issues affecting courts, the state and the nation, including judicial elections and lifetime tenure, science and technology, California's recent governors, and the nomination of federal Judge Brett Kavanaugh to the U.S. Supreme Court.[1]

Justice Werdegar served for 23 years on the Supreme Court before retiring in 2017. She was the third woman appointed to the high court and is admired for her sharp intellect, modest demeanor and grace — qualities much in evidence at the evening event. Some highlights:

On state ballot initiatives

Noting the long list of state measures on the November 2018 ballot, Justice Werdegar said she shares the concerns of many observers that California's initiative and referendum process often produces unworkable, blunt-force laws. She cited the original initiatives from prior decades mandating "three strikes and you're out" for criminal defendants and strict term limits for legislators, and noted that most Californians eventually came to regard those measures as unduly harsh. But, as she noted, amending them also required voter approval, a costly process that took multiple tries.

At the same time, Justice Werdegar views the decision by voters in 2010 to take redistricting away from state politicians as positive. The voter-created Citizens Redistricting Commission now draws California's state legislative and congressional districts in a nonpartisan and more transparent process. She hopes for even greater transparency, specifically concerning the top funders for future ballot measures.

* Molly Selvin is the CSCHS newsletter editor.

BELOW LEFT: *Retired Justice Carlos Moreno with Public Counsel President and CEO Margaret Morrow, who introduced Justice Werdegar and Jim Newton.*

BELOW RIGHT, FROM LEFT: *Journalist Jim Newton; CSCHS President George Abele, Paul Hastings LLP; attorney and CSCHS Past President Jennifer King; and Bob Wolfe, attorney and CSCHS board member who organized the evening.*

On judicial appointments

Justice Werdegar described California's judicial appointment and confirmation process as "the best system" in part because it has remained largely non-partisan. "California has been very fortunate," she said, noting that each of the three chief justices with whom she served (Malcolm Lucas, Ronald George, and Tani Cantil-Sakauye) has been "outstanding." And while she is sympathetic to voters confronted by long lists of judges on the ballot, "I don't think lifetime appointments are a good thing," she said.

She also noted that recent governors took different approachs to judicial nominations. Gov. George Deukmejian, she said, generally tapped former prosecutors with significant bench experience. Gov. Jerry Brown, on the other hand, has appointed academics without judicial experience directly to the Supreme Court, including Justices Mariano-Florentino Cuéllar, Leondra Kruger and most recently, Joshua Groban.

Jim Newton pressed Justice Werdergar for her thoughts on the confirmation hearings for U.S. Supreme Court Justice Brett Kavanaugh. "It was terribly painful to watch," she said. "His response was disturbing, immoderate and intemperate." Kavanaugh "made it very plain" how he would judge a number of issues, she said, raising the question of whether he will recuse himself in those instances.

On writing opinions

How is writing dissents different from writing majority opinions? Justice Werdegar said she sometimes omitted non-essential points from her majority opinions in order to win a reluctant colleague's vote. "In a dissent you're freer," she said. "I'm very fond of my dissents," she added, noting they offer an important window, and should be viewed alongside her majority opinions, in order to understand her thinking.

On science, technology and social change

Justice Werdegar said she and her colleagues struggle to deal with societal and technological change. Yet issues like privacy, water rights, environmental degradation, an individual's right to his or her biological material, and surrogacy increasingly come before courts. "Reasoning by analogy is difficult in these cases," she said. "These issues more properly belong in the Legislature," she suggested, which unlike courts, can undertake outside research to help make policy.

Special kudos to Society Board Member Bob Wolfe for organizing a fascinating program, and thanks also to John F. Szabo, city librarian of the Los Angeles Public Library, and Public Counsel President and CEO Margaret Morrow for their help and participation. ✯

PHOTOS THIS PAGE, TOP TO BOTTOM:

Audience at L.A. Central Library.

FROM LEFT: *Retired Justice Kathryn Werdegar with Justice Lawrence Rubin, 2nd Dist. Court of Appeal (Los Angeles) and Dan Grunfeld, attorney and former CSCHS president.*

FROM LEFT: *Justice Lawrence Rubin, 2nd Dist. Court of Appeal (Los Angeles); Dan Potter, chief executive officer, 6th Dist. Court of Appeal (Santa Jose) and Jonathan Steiner, executive director of the California Appellate Project, Los Angeles.*

ALL PHOTOS: GREG VERVILLE/GV PHOTOGRAPHY

ENDNOTES

1. For more on Justice Werdegar, see "Oral History of Justice Kathryn Mickle Werdegar," *Calif. Leg. Hist.* 12 (2017) 64–481.

BREAKING NEWS: *On Nov. 14, Governor Jerry Brown nominated a senior advisor, attorney Joshua Groban, as associate justice of the California Supreme Court to fill the seat vacated with Justice Werdegar's retirement. The Newsletter will include a profile of Groban in the Spring/Summer 2019 issue.*

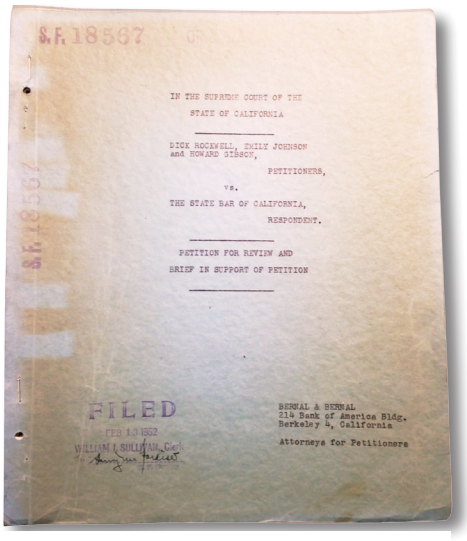
A "Manifestly Unfair" Bar Examination:

The October 1951 Test and Its Aftermath

BY KYLE GRAHAM*

EDITOR'S NOTE: *"A Second Look" is a series of articles that provides new perspectives on noteworthy decisions by the California Supreme Court.*

The California bar examination came under renewed scrutiny last year, with falling passage rates feeding criticisms that the minimum score required to pass had been set too high. This controversy was quelled only by the California Supreme Court's decision to leave the minimum score where it stood, at least for the time being. This was not the first time that the state bar examination has generated controversy. This installment of "A Second Look" ventures back to the early 1950s, when an administration of the test led to special hearings before the Legislature, a push by frustrated applicants to have the Supreme Court regrade their exams, and a messy public spat between the members of the Court.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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DICK ROCKWELL, EMILY JOHNSON and HOWARD GIBSON,
PETITIONERS,
vs.
THE STATE BAR OF CALIFORNIA,
RESPONDENT.

PETITION FOR REVIEW AND BRIEF IN SUPPORT OF PETITION

FILED
FEB 1 3 1952
WILLIAM L. SULLIVAN, Clerk
By Virginia Price Deputy

BERNAL & BERNAL
214 Bank of America Bldg.
Berkeley 4, California
Attorneys for Petitioners

ROCKWELL ET AL. v. STATE BAR OF CALIFORNIA, PETITION FOR REVIEW AND BRIEF IN SUPPORT OF PETITION.
IMAGE: CALIFORNIA STATE ARCHIVES

The October 1951 administration of the bar examination consisted of 25 essay questions, one of which was optional.[1] When the initial round of grading was complete, it was discovered that only 15 percent (160 out of 1041) of test-takers had received passing scores of 70 percent or higher.[2] A "reappraisal" of 326 exams that had come somewhat close to receiving a passing score more than doubled the number of successful applicants.[3] The overall pass rate of 37.5 percent nevertheless remained on the low side. Although four administrations of the fall examination over the prior 18 years had yielded lower pass rates, the average pass rate for fall exam administrations between 1946 and 1950 had been quite a bit higher, at 50.9 percent.[4]

The release of the October 1951 exam results led to an uproar. One contemporary observer wrote, "Almost immediately after the announcement of the October, 1951 results, there arose a great hue and cry. Something must be wrong. The examination must have been unfair. Or it must have been unfairly graded. The bar in general, and the Bar Examiners in particular, must be concentrating on reducing competition for themselves by keeping aspirants out."[5]

A representative of the Committee of Bar Examiners sought to explain the exam results in the January 1952 edition of the *Journal of the State Bar of California*. He wrote that "the examination and its grading were substantially the same" as in recent years, and "the only remaining factor which could account for [the results] is a drop in the quality of the applicants, and that is the conclusion which we Bar Examiners have arrived at."[6] The author added that "this does not necessarily mean a decline in the quality of the applicants below a reasonable norm, but more likely a decline from an abnormal high which obtained in 1948, 1949 and 1950 — not a decline at all, therefore, but rather a return to normal."[7]

Hearings Before the Legislature

Neither the public nor legislators were completely persuaded that test-takers, as opposed to the test itself, were to blame for the poor results on the October 1951 exam. Within two months of when the test results were released, a state Senate Interim Judiciary Committee convened hearings on the bar exam and how it had been graded. The two dozen witnesses included unsuccessful test-takers, law school deans, and State Bar officials.[8] Goscoe Farley, the secretary to the Committee of Bar Examiners, told the interim committee that the test had been fair, and the results not all that surprising. He explained that in administrations of the bar exam prior to World War II, pass rates had usually been between 40 to 45 percent. Results sagged during the war "because the law schools had very few students, and the ones they had didn't seem to be top students." But "[a]t the end of the war veterans returned and the law schools had four, five, and six, sometimes eight applications for every seat

* Kyle Graham is Assistant Chief Supervising Attorney of the California Supreme Court.

they had in the law school, so the school selected the best students," leading to higher pass rates. Now, Farley surmised, "I think the schools are getting back to normal."[9] Other witnesses made similar comments, with multiple law school deans defending the bar examination and — echoing similar comments made in connection with the ongoing legislative review of law school accreditation standards — attributing the poor results to substandard law schools that were being allowed to survive.[10]

The interim committee wasn't convinced. It was noted at the hearings that on five of the questions, fewer than one-quarter of examinees received a passing grade.[11] Another issue raised during the hearings concerned the reappraisal process for exams that had not quite earned a passing score on initial review. Three attorneys were responsible for these reassessments, which consisted of simple pass-or-fail determinations. Their overall grading patterns disclosed that one of the reappraisers was relatively generous in giving a passing grade; the second, more moderate; and the third, rather harsh.[12] This discrepancy informed a perception that whether an examinee passed on reappraisal depended at least as much on the identity of his or her reviewer as on the correctness of his or her answers. Furthermore, there appeared to be a marked difference in pass rates between reappraisals occurring early in the review process and reassessments of similarly situated examinations that happened later, with the later-reviewed exams being assessed more favorably.[13] This shift also suggested that the reappraisers were not applying consistent standards to the tests before them.

After the hearings concluded, the interim committee adopted a resolution that embraced several findings and requests. This resolution, issued on February 2, 1952, observed at its outset that "[t]here is no suggestion of dishonesty, favoritism, intentional severity or carelessness in the conduct of the examination."[14] The poor results upon first grading of the examinations were instead the result of "[u]nusual difficulty in at least three of the questions" and "[s]trictness of grading."[15] The resolution also noted that the resuscitation of a large number of examinations through reappraisal was "a radical departure from the original purpose of reappraisement which was to remedy iniquities in a relatively few borderline cases."[16] Furthermore, although each of the reappraisers "was competent and conscientious," their "lack of uniformity may have worked substantially to the advantage of certain students and the disadvantage of others."[17] The resolution further observed that "[m]any of the persons adversely affected by the decision of the reappraisers are veterans of World War II who sacrificed several years of their normal scholastic life in the service of their country."[18]

The resolution then segued into a request to the California Supreme Court. The Court was asked to "[d]etermine, after investigation and hearing, whether the 47 students whose original marks were between 65 and 67.1 percent and who were failed by the Board of Reappraisers should not be admitted to the bar without further examination,"[19] to "[r]eview the papers of students receiving original marks between 63.75 and 65 percent to determine if the procedures which were followed with regard to this group resulted in substantial injustice to any of the 48 applicants who were failed,"[20] and to "[m]ake such further inquiry concerning the papers between 60 and 63.75 percent as will satisfy the court that no students in that category should have been reappraised and passed."[21] The resolution further requested that the Court and the Committee of Bar Examiners consider several changes in the administration and grading of the bar examination, including "the giving of a reasonable number of alternative questions in each examination," and "[e]stablish[ing] a base, perhaps at a level 5 percent below the average percentage of success in the bar examinations of the preceding five years, above which there must be no failures."[22]

The Supreme Court, Bar Grader?

The Supreme Court did not rush to accept the invitation to review scores of bar examinations. But some frustrated applicants were not prepared to wait. Within days of the resolution's issuance, six petitions were filed with the California Supreme Court by October 1951 test-takers who sought further review of their failing grades. These actions, brought on behalf of eight petitioners in all, invoked section 6066 of the Business and Professions Code. This statute, enacted in 1939, provides, "Any person refused certification to the Supreme Court for admission to practice may have the action of the board, or of any committee authorized by the board to make a determination on its behalf, pursuant to the provisions of this chapter, reviewed by the Supreme Court, in accordance with the procedure prescribed by the Court."

The petitions attacked the October 1951 bar examination as arbitrary and unfair. One of the six petitions, filed on behalf of three unsuccessful applicants, alleged that "the standards used by the Committee of Bar Examiners of the State Bar in determining the qualifications of applicants for certification to this Court are arbitrary and capricious," and that, as applied by the reappraisers, these standards "have resulted in a deprival of the equal protection of the law for these petitioners and others similarly situated."[23] The petitioners asked the Court to "review the refusal of the Committee of Bar Examiners to certify them to this Court for admission to the State Bar of California," with such review to include "the production before it of the particular examination papers of the petitioners and other[s] similarly situated, including therein all

papers within the reappraisal group, together with the records of the graders in the original gradings."[24] The petitioners included as exhibits to their petition not only the scores they received on each of the 24 questions answered, but also their law-school transcripts, with the prominent notations that all were military veterans.[25]

Another petition asked the Court to direct the Committee of Bar Examiners "to submit to the Court all of the 24 examination papers of the petitioner along with the related material, including the questions, and that the Court, itself, or, if it prefers, an appointed referee, make the appropriate findings concerning the alleged disparity between the grades assigned and the grades deserved, the average juristic quality of the petitioner's examination papers, and whether under a reasonable grading system they deserve an average passing grade."[26] This petitioner — an émigré jurist from Austria, who had come to America in 1940 seeking refuge from Nazi oppression — related that he already had published several articles in American legal periodicals, and had been an attorney in the United States Department of the Army for several years prior to taking the bar examination.[27]

The petitioners must have realized that they had a tough case. This was not the first time that frustrated test-takers had asked the California Supreme Court to take a second look at their examinations, and the Court had made it clear that it would not review the substance of a bar examination answer in anything other than truly exceptional circumstances. Less than two decades before, it had resolved, "The attitude of this Court is that if any dissatisfied applicant can show that he was denied passage of the state bar examinations through fraud, imposition, or coercion, or that in any other manner he was prevented from a fair opportunity to take the examinations, this Court will be willing to listen to his complaint. Inability to pass the examinations, which are successfully passed by other applicants, will, of course, not be inquired into by the Court. Also, . . . one's general qualifications are not to be substituted for the requisite knowledge of law which one must possess in order to be admitted into the legal profession."[28] The subsequent enactment of Business and Professions Code section 6066 had not made the Court much more willing to intervene. In 1941, the Court rejected another unsuccessful bar applicant's plea to review his examination, with the majority emphasizing that the petitioner "makes no charge of fraud, imposition or coercion, and does not assert that he was denied a fair opportunity to take the examination."[29]

Unsurprisingly, the Supreme Court declined the petitioners' requests for further review of their test answers. The Court summarily denied all six petitions on May 8, 1952.

Justice Carter Dissents

But the decision was not unanimous. Associate Justice Jesse Carter would have granted the petitions. Carter also took the unusual, if not unprecedented, step of filing a written dissent to the order denying the petitions.

Carter's dissent, which Associate Justice B. Rey Schauer also signed, quoted the interim Senate committee's resolution in its entirety. Carter also emphasized that no applicant had received a grade higher than 80.8 percent on the October 1951 examination, a fact he characterized as proof that "the examination was manifestly unfair."[30] The dissent also called out Farley's concession, made in a speech given just a week before, that "inadvertently three or four questions out of the twenty-four contained problems that had not been adequately covered at most law schools."[31] Carter rejoined, "when the future of more than a thousand applicants who have spent three years of time, money, and labor in the study of law is at stake, . . . there should be no room for such 'inadvertence' on the part of the Committee of Bar Examiners."[32]

ASSOCIATE JUSTICE JESSE W. CARTER

Carter's dissent continued, "I am convinced that petitioners herein have made out a prima facie case for a review by this Court of the October, 1951 bar examination and that the petitions should be granted and a complete record of all proceedings before the State Bar relative to said examination certified to this Court for such determination as may be warranted."[33] Carter acknowledged that "the granting of these petitions may place a heavy burden on this Court because of the effort required for a full review of the proceedings involved in said examination."[34] Nevertheless, he was "convinced that the matter is of such great importance to the public, the applicants and the law schools in this state and elsewhere as to justify the undertaking."[35]

Justice Carter's dissent was filed on May 12, 1952. But that does not quite end the story. Carter wanted his dissent to be published in the official reports. When it did not appear in the advance sheets, he spoke to the press. A resulting article in the June 5, 1952, edition of *The San Francisco Chronicle* featured the headline, "Carter Says Dissent in Bar Exam Suppressed." The article quoted Carter as saying, "I am convinced that

the suppression was at the instigation of the Chief Justice (Phil S. Gibson) without consulting a majority of the court."[36]

Gibson denied ordering the suppression of Carter's dissent.[37] Carter nevertheless continued to repeat the essence of his charge to reporters, in what was now being described as a "bitter internal quarrel" within the Court.[38] Ultimately, Carter's dissent was never published in the bound volumes of the official reports. The members of the Court did agree, however, that in the future, dissenting opinions to minute orders in which no majority opinion was filed would be forwarded to the publishers for possible inclusion in the advance sheets.

Epilogue

The furor over the October 1951 bar examination led to changes in the test, including reinstatement of the prior practice of allowing test-takers to answer only four questions out of every five presented.[39] And as for the eight petitioners who asked the Supreme Court to regrade their exams, this short story has a happy ending. All of them eventually passed the bar examination. Six were admitted to the bar in 1952; the other two in 1953.[40] ✯

ENDNOTES

1. Graham L. Sterling, Jr., "The October 1951 California Bar Examination," *J. of the State Bar of Calif.* 27 (Jan.–Feb. 1952): 37, 41.

2. Senate Interim Judiciary Committee, *Progress Report to the Legislature* (March 1952), 15, 20.

3. *Id*. at 23–24.

4. Sterling, at 40; Senate Interim Judiciary Committee, at 15.

5. Sterling, at 37.

6. *Id*. at 43 (italics in original omitted).

7. *Ibid*.

8. See Don Thomas, "Students Who Flunked Bar Test Tell Stories at Probe," *Oakland Tribune*, Feb. 1, 1952, 5.

9. Senate Interim Judicial Committee, at 15.

10. See Thomas, at 5.

11. Senate Interim Judicial Committee, at 20.

12. *Id*. at 19, 23, 24.

13. *Id*. at 24, 26–27.

14. *Id*. at 24.

15. *Ibid*.

16. *Ibid*.

17. *Ibid*.

18. *Ibid*.

19. *Ibid*.

20. *Id*. at 24–25.

21. *Id*. at 25.

22. *Ibid*.

23. Brief in Support of Petition for Review, *Rockwell et al. v. State Bar of California* (No. SF 18567, Feb. 13, 1952), at 4.

24. Petition for Review and Brief in Support of Petition, *Rockwell et al. v. State Bar of California*, (No. SF 18567, Feb. 13, 1952), at 9.

25. *Id*. at Exhs. A, B, C, A(1), B(1), and C(1).

26. Petition for Review and Brief in Support of Petition, *Koessler v. Committee of Bar Examiners* (No. SF 18562, Feb. 4, 1952), at 7.

27. *Id*. at 3, 4. Koessler's petition explained that he had been a practicing lawyer in Vienna for two decades, only to be "compelled, by the [N]azi 'Anschluss' of Austria, to leave his country of origin." He emigrated to the United States in 1940, and became an American citizen in 1945. *Id*. at 4.

28. *In re Admission to Practice Law* (1934) 1 Cal.2d 61, 64.

29. *Staley v. State Bar of Cal.* (1941) 17 Cal.2d 119, 121.

30. *Koessler v. Committee* (No. SF 18562) et seq., dissent from denial of writ petitions (Carter, J.), 10.

31. *Ibid*. Here, Carter was quoting comments by Farley, as they appeared in "State Student Association Names Goscoe Farley 'Man of the Year,'" *The Recorder*, May 2, 1952, 1.

32. *Ibid*.

33. Dissent by Carter, J., at 13–14.

34. *Id*. at 14.

35. *Ibid*.

36. Phil Gibson, Memorandum in re Publication of Dissents to Orders Denying Petitions for Writs (1952), in *California Supreme Court Justice Jesse W. Carter: An Interview Conducted by Corinne L. Gilb* (1959) 260; see also "Carter Lashes Out At Court Failure To Print Dissent," *Daily Independent Journal* (San Rafael, CA), June 5, 1952, 1.

37. Memorandum by Gibson, at 260.

38. *Id*. at 262–263.

39. "State Student Association Names Goscoe Farley 'Man of the Year,'" *The Recorder*, May 2, 1952, 1, 6.

40. This information was obtained through searches performed on the State Bar of California's website, ***www.calbar.ca.gov.***

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California's Reporter of Decisions

Publishes More Than 1000 Opinions Each Year in the *Official Reports*

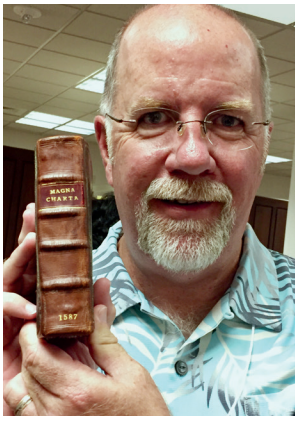
Lawrence Striley looked remarkably serene on a late Monday afternoon, particularly for someone whose already-large responsibilities only continue to expand.

As California's 25th reporter of decisions of the Supreme Court and the Courts of Appeal, Striley is responsible for the preparation and publication of California's appellate opinions in the *Official Reports*. These days, that involves publication of more than 1,000 published Supreme Court and Court of Appeal opinions each year, and another approximately 9,000 unpublished appellate court opinions.

Lawrence W. Striley, Reporter of Decisions

That workload continues to grow and yet for Striley, "this is the best job I've ever had." "I feel very lucky," he said recently in his Supreme Court office in San Francisco's Earl Warren Building.

Most states, but not all, name a reporter of decisions. However, faced with tight budgets and the migration of legal research online, some states have done away with paper publication of appellate opinions. California continues to publish *Official Reports* "advance pamphlets" of approximately 500 pages every 10 days or so, bound volumes comprising about 1,500 pages of Court of Appeal opinions monthly, and 2.5 bound volumes of about 1,500 pages of Supreme Court opinions yearly — all in partnership with a private publisher. In addition, each of these decisions is posted on the judicial branch website.



Lawrence Striley holding a bound copy of the Magna Carta during a visit to the Nevada Supreme Court Library, 2017.

PHOTO: CYNTHIA STRILEY

Striley's staff of lawyer editors reviews each opinion for grammar, spelling errors and the accuracy of the factual information included in both the advance sheets and bound volumes of published opinions. He is also responsible for updating the *California Style Manual*, first compiled in 1942 and now in its fourth edition. A fifth edition is in the works, Striley said.

In May, Striley took on a new task. Over time, many Internet links, including those cited in court decisions, are revised or disappear. In response to this problem of "link rot," the California Supreme Court has joined the U.S. Supreme Court and other courts in efforts to preserve cited web pages. Striley's office has created a web page archive at ***http://www.courts.ca.gov/38324.htm*** of links cited in California appellate decisions, showing cited web pages as they existed at the time the opinion was filed.

Appointed in 2014, following the retirement of Edward W. Jessen who served since 1989, Striley was delighted to return to California. Raised in Orange County, he is a graduate of Cal State Long Beach and earned his law degree from Washington & Lee University School of Law in Virginia.

Following law school, Striley signed on with a general practice firm in a small West Virginia town.

"I wanted experience in court right away," he recalled, and got it.

Before becoming the reporter of decisions, Striley worked at LexisNexis, responsible for the printing and publication of the official versions of opinions from California and several other states. He draws on that broad experience as vice president of the Association of Reporters of Judicial Decisions, which brings together official reporters from the U.S. and Canada. Striley will become the group's president in 2019.

Prior to his law career, Striley spent five years with the Prime Ticket Network, working his way up from a college intern to the associate director coordinating with staff in the production truck to air sporting events. These were the years when Wayne Gretzky and Magic Johnson dominated the L.A. Kings and Lakers.

Striley recalled fondly attending a Lakers NBA championship parade and standing on the steps of Los Angeles City Hall with the team even though, as he noted, "I had nothing to do with them winning the championship." He still follows the Lakers, Rams and the Kings. ✯

— M.S.

Vitrines in the Earl Warren Building display photographs and memorabilia (ABOVE) *from the California Supreme Court's Latino justices. On view until fall 2019, the exhibit is one of several, including one on the Court's women justices* (RIGHT)*, that the California Judicial Center Library has mounted to promote interest in the history of California's courts.*

PHOTOS COURTESY CALIFORNIA JUDICIAL CENTER LIBRARY

Judicial History on Display:

Exhibits on California's Reporter of Decisions, Women and Latino Justices

It's easy to miss the seven glass display cases in the Archive Room on the first floor of the Supreme Court's headquarters in the Earl Warren Building at San Francisco's Civic Center. The area is intentionally lit dimly, and members of the public as well as lawyers with business before the courts can easily miss the vitrines as they hurry past.

But the exhibits on view there and in the nearby Clerk's Office are worth a stop.

The Archive Room currently showcases the four Latino justices who served as or are currently associate justices of the California Supreme Court: Former Justices Cruz Reynoso, John A. Arguelles, Carlos Moreno, and present Justice Mariano-Florentino Cuéllar. Opened in September to coincide with Latino Heritage Month, the exhibit features photos, biographical information, publications and some memorabilia from the four justices. The display will remain on view until fall 2019.

Other recently installed exhibits celebrate, respectively, the women justices of the Supreme Court, and the history of California's reporters of decisions — the latter who have been critical but generally unacknowledged players in the state's legal history.

The changing exhibits are the work of the Special Collections & Archives staff at the California Judicial Center Library, including Law Librarian and Archivist Martha Noble and Donna Williams, director of the center's library.

New acquisitions often inspire these exhibits. Others have been designed to commemorate anniversaries, or scheduled to coincide with other events or observances.

The displays are an opportunity for the Library's Special Collections & Archives staff "to share selections from our holdings with the public, and promote an interest in the history of the courts," Noble said.

The reporter of decisions exhibit, "In Writing With Reasons Stated," nicely illustrated that public education mission.

California's first Constitution, adopted in 1849, directs the Legislature to provide for the "speedy" publication of these decisions and the state's current Constitution requires that the decisions of the Supreme Court and Courts of Appeal that determine causes "shall be in writing with reasons stated."[1]

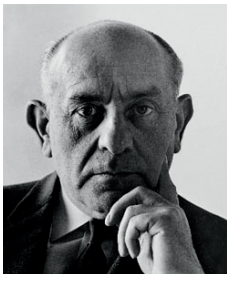
The reporter and his staff now oversee the preparation and publication of all Supreme Court decisions and all published Court of Appeal decisions in the *Official Reports* and post all appellate decisions — including "unpublished" decisions — on the judicial branch's website.

Among the 25 men who have held this position since 1850 (no women have held the position to date), were

rogues, some characters and one of the state's premier scholars of California law.

William Gouverneur Morris (LEFT), for example, served as reporter during 1855, then in the Union Army during the Civil War. In 1869, having returned to California, Morris was named United States Marshal for the District of California.

Gov. John B. Weller appointed Harvey Lee as reporter in 1858 but Lee's work was poor, and an effort was made to repeal the law that authorized gubernatorial appointment of the reporter.[2] Lee expressed his displeasure with the repeal effort to Charles S. Fairfax, the clerk of the Supreme Court. Fairfax reportedly was insulted by Lee's language and a fight ensued. Lee attacked Fairfax twice with his swordcane, inflicting serious harm. Fairfax drew his pistol as Lee attempted a third strike but ultimately held his fire. Lee was soon replaced by John Harmon in 1859.



Bernard Witkin (RIGHT), a legend in California law, was appointed the 21st reporter in 1940, a position he held until 1949. Witkin, of course, is best known for his highly-regarded treatises on California law, volumes that have been cited more than 20,000 times in decisions of the California Supreme Court and Courts of Appeal. He also authored the first edition of the *California Style Manual*, in 1942, and helped draft the Judicial Council Rules on Appeal. Before he was appointed reporter, Witkin was "law secretary" (in other words, staff attorney) for Associate Justice William B. Langdon and Chief Justice Phil B. Gibson.

One of the longest-serving reporters was Edward W. Jessen, who held the position from 1989–2014. He was also a member of the editorial task force appointed by the Judicial Council to rewrite California's Rules of Court pertaining to the appellate process.[3] Lawrence Striley (SEE ARTICLE, PAGE 13) took over as California's current reporter of decisions when Jessen retired.

The display in the Office of the Clerk of the Supreme Court, concerning the seven women who have served on the high court, entitled "Voice and Vision," is on view through March 2019. This exhibit is focused on Chief Justices Rose E. Bird and Tani Cantil-Sakauye, and Associate Justices Joyce L. Kennard, Kathryn M. Werdegar, Janice R. Brown, Carol A. Corrigan, and Leondra R. Kruger. It includes biographical information, photographs, certificates and publications by and about each justice. A previous editor of this newsletter described these justices as "an extraordinary group of highly intelligent, extremely hard-working, fiercely independent lawyers who are blessed with astonishing reserves of stamina."[4] ✯

ENDNOTES

1. California Const., article VI, section 14.
2. Currently the Supreme Court appoints the reporter of decisions.
3. See also, Edward W. Jessen, "Headnotes About the Reporters, 1850–1990," *CSCHS Newsletter*, Spring/Summer 2007, 1, 5–8.
4. Ray McDevitt and Maureen R. Dear, "A Salute to the Women Justices of the California Supreme Court," *CSCHS Newsletter*, Spring/Summer 2013, 2–7.

— M.S.

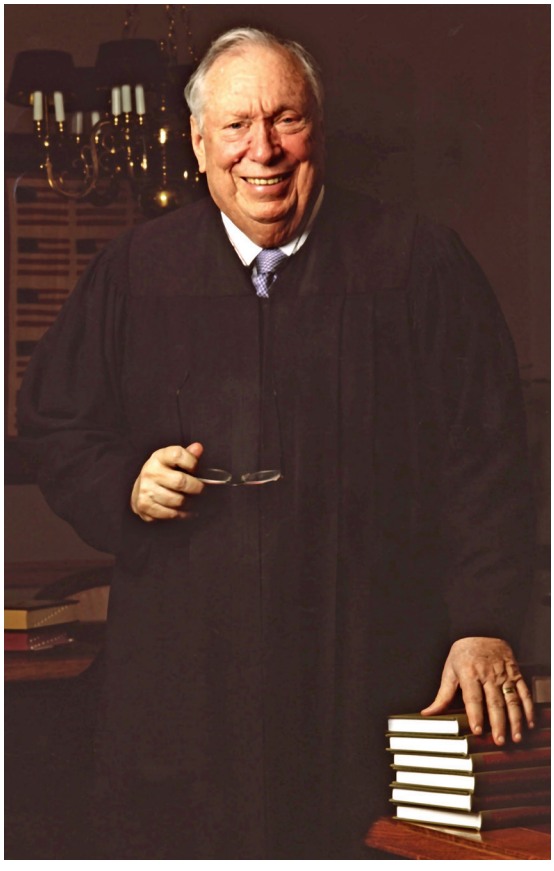
Stephen R. Reinhardt:

A Sense Of Fairness And Compassion

BY HENRY WEINSTEIN*

Stephen Reinhardt's sudden death on March 29 jarred and saddened me. Just six weeks earlier, I sat next to him in a judge's chair in the ceremonial courtroom of the Ninth Circuit Court of Appeals in Pasadena during a conference on the impact of President Jimmy Carter's judges on the nation's largest federal circuit. We chatted at lunch, where he was joined by former law clerks, including one I lobbied him to hire after she had been my student in the inaugural class at U.C. Irvine Law School.

As I spoke to him that day, it was clear that at 87 he was still actively engaged in his cases. He simultaneously manifested the same acute intellect, lively spirit and periodic grumpiness. He lamented the worsening health of his wife, Ramona Ripston, longtime director of the ACLU of Southern California, the fall of his colleague Alex Kozinski stemming from sexual harassment charges and the state of the country under President Donald Trump.



STEPHEN R. REINHARDT
CIRCUIT JUDGE OF THE U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

The day Reinhardt died I called several friends, desperate to engage in conversation about what a loss to the country and the depressing prospect that Trump, a man with no respect for the Constitution or judges, was going to pick Reinhardt's successor. In late April, I attended a memorial service for Reinhardt at a Westwood movie theater, where family members, former law clerks, attorneys, his long-time secretary, law professors, judges and two governors delivered moving, sometimes loving tributes to the man long known as the country's most outspoken, liberal jurist. Those occasions brought memories to the surface.

Over a 20-year period, as a reporter for the *Los Angeles Times*, I wrote dozens of stories about Reinhardt's trenchant opinions and his blistering speeches about the increasingly cramped and uncharitable view the U.S. Supreme Court took of civil rights and civil liberties. Among them was a 1992 law school graduation speech in which Reinhardt declared that the federal courts were becoming "a bastion of white America." He lamented, "only a few years ago it was the federal courts, and particularly the Supreme Court, that offered the greatest hope to our minorities. The message the new Supreme Court has delivered to the minority communities is clear: We no longer care; we have other concerns; look elsewhere for help." Reinhardt manifested no concern that the judges he blasted were in position to reverse his rulings — something that occurred dozens of times during his 38 years on the bench.

During the 20 years I covered the Ninth Circuit, I conversed frequently with Reinhardt. We talked on the phone, at restaurants, walking on the beach near his condo in the Marina del Rey and in his chambers. Among the subjects of our chats: his law clerks, the Lakers, the death penalty, the Raiders, civil liberties, the Dodgers, our wives, our children, Bobby Kennedy, physician-assisted suicide, movies, Broadway plays, his respect for his conservative colleague John Noonan, his admiration for his liberal colleague Betty Fletcher, and how he painstakingly put his opinions through dozens of drafts.

* Henry Weinstein is a professor of the practice of law at the University of California, Irvine School of Law. He was a staff writer for the *Los Angeles Times* for 30 years and covered the Ninth Circuit from 1989 to 2008.

But among the memories one of the most striking was how Reinhardt instigated my decision to write a series of articles in which his name never appeared.

On a hot July evening in 1998, I returned to my hotel room in Atlanta where I was researching stories for the *Times* about the lack of adequate representation for poor people accused of capital crimes in Georgia. I checked my office voicemail and found a message from Reinhardt.

By then, I respected Judge Reinhardt's analytical skill, powerful writing style and most of all his courage to adhere to the Constitution as he saw it and not fear reversal by an increasingly right-wing Supreme Court.

On this evening though, Reinhardt was not calling to express dismay about the latest opinion or speech of Chief Justice William H. Rehnquist or his comrade in arms, Justice Antonin Scalia — subjects he periodically commented on in speeches and in conversations with friends. This time, Reinhardt called to alert me — indeed to lobby me — to write about what he considered an outrageous attempt to censure or even remove from the bench veteran State of California Court of Appeal Justice J. Anthony Kline, whose chambers were in San Francisco and who had become a judge the same year as Reinhardt — 1980.

To provide even a glimmer of my relationship with Judge Reinhardt, I have to provide some context about judges and the craft of journalism. On that hot Atlanta night, I had just marked my twentieth anniversary at the *Times*, after spending nearly a decade with three other newspapers. Like any experienced reporter, I was accustomed to being approached by all kinds of people ranging from ordinary citizens to corporate public relations professionals who tried to persuade me to write stories for purposes ranging from the high minded to the craven.

Although most readers and most of my colleagues thought judges were different from politicians — unapproachable — I thought it was my job to attempt to get to know and understand the perspective of everyone I wrote about — including judges. Although I started writing about law full-time only after being a professional journalist for 20 years, I had spent time in courtrooms around the country writing about the Black Panthers, labor disputes, slumlords and even an anti-trust case pitting quarterback Joe Kapp against the National Football League. I started writing about federal courts full time in 1989 and, by 1998, I knew a lot of judges.

Most judges appreciated that I took them and their jobs seriously, that I read their decisions closely and marked them up before writing. Some liked me and some didn't; some periodically changed their minds about me, depending, not surprisingly, on what I had written recently. Several judges, including Reinhardt, went out of their way to be helpful to me, including some who spoke to me confidentially. Here are a few examples of my experiences. One federal trial judge appointed by a Republican president greeted me warmly in his chambers but all he wanted to talk about was the perennially problematic football fortunes of the University of California Golden Bears, whose games I had announced on the student radio station in the mid-1960s. Another appointee of a Republican president showed me the draft of an opinion he had written in a big case. I will never be certain if he really wanted to know what I thought or simply was trying to flatter me; in either case, I learned a lot. Harry Pregerson, another Carter appointee to the Ninth Judicial Circuit, periodically called me on weekends seeking my help on behalf of homeless veterans. A. Wallace Tashima, who had spent part of his youth in a World War II internment camp, was kind enough to grant me an interview when I knocked on his door on a Sunday morning in 1996. A day earlier, I had gotten a tip that President Bill Clinton planned to nominate Tashima to become the first Japanese American on a federal appeals court. One evening, federal trial judge William Rea interrupted his dinner to confirm that he had issued a significant ruling in a case involving the Rampart scandal concerning officers of the Los Angeles Police Department — a call I had to make because a colleague had inadvertently missed a hearing. Another judge gave me too much credit for the role I played in helping secure the judge's confirmation to the bench with a long article that raised questions about scurrilous attacks that Republicans used in an attempt to keep this smart, conscientious person off the bench. Arthur Alarcón, a conservative jurist invited me to his chambers to give me an advance copy of a law review article he wrote describing in detail why he had concluded that the California death penalty system had become dysfunctional. The attorney for another federal judge attempted, unsuccessfully, to persuade federal prosecutors to investigate me after I wrote about an unpublished decision taking the judge to task for misconduct. I am masking the identities of some of these individuals because they are still serving.

I met Reinhardt before he became a judge; he was the chief attorney for the Los Angeles County of Federation of Labor and I was covering local government. Reinhardt was working with County Fed leader Bill Robertson to bring the Raiders from Oakland to Los Angeles. While feasting on pastrami sandwiches and Dr. Brown's Cream soda from Langer's delicatessen near downtown Los Angeles, my *Times* colleague Bill Boyarsky and I sparred with Reinhardt and Robertson about whether there would be true economic benefits to the city from having a pro football team. Reinhardt was smart and determined. The Raiders came, won a Super Bowl and eventually went back to Oakland. Later in 1980, Reinhardt joined the Ninth Circuit.

When Reinhardt called that July night in 1998, he was angry and had an agenda. He had learned from

Kline, an appointee of Gov. Jerry Brown, that the California Commission on Judicial Performance had accused him of "willful misconduct" because of a dissenting opinion Kline had written the previous year. In the dissent, Kline wrote that "as a matter of conscience" he could not adhere to a 1992 California Supreme Court precedent, *Neary v. Regents of University of California*, that he considered "destructive of judicial institutions." In *Neary*, the state's high court approved a controversial practice known as stipulated reversal. That practice permitted litigants, after a jury verdict, to make an out-of-court settlement that wiped out an earlier judgment. Such reversals are controversial because, in effect, they permit a wealthy litigant to buy his way out of adverse court rulings.

In his dissent, Kline said he understood that as an intermediate level judge he was in almost all circumstances obliged to follow state Supreme Court precedents. But Kline considered this a rare instance warranting a departure from the norm because he said such a reversal "converts the judgment of a court into a commodity that can be bought and sold." Just four years earlier, in 1994, a unanimous U.S. Supreme Court decision, written by conservative Justice Antonin Scalia, barred the practice in the nation's federal courts.

The California Commission had informed Kline of the pending charges at the end of June and planned to make the charges public on Monday, July 6.

Normally, the Commission investigated charges of conflict of interest, corruption and similar matters.

The Commission had never before attempted to discipline an appellate court judge for a written opinion, according to legal experts I consulted within 24 hours of receiving Reinhardt's call.

Reinhardt didn't put it in precisely these words but he made it clear he hoped I would write a story that would raise fundamental questions about whether a commission, whose primary purpose had been to deal with corruption, was attempting to squelch a judge's freedom of speech and harm judicial independence.

Reinhardt gave me Kline's home number. I already knew Kline, whom I met in 1969 when he was a Legal Services lawyer in San Francisco and I was a young reporter for the *Wall Street Journal*, just months out of law school. Kline was one of the key lawyers who had filed a federal lawsuit on behalf of tenants facing displacement because of a major redevelopment project that had the support of Mayor Joseph Alioto, big business, building trades unions and the major San Francisco newspapers. I wrote a long story about the case. Stanley Weigel, a courageous federal judge issued an injunction against the project, paving the way for replacement housing for low-income tenants.

Kline would not comment on the merits of the Commission's pending charges. But he provided me a copy of the charges and a letter he had written to the Commission defending his actions after learning he was under investigation months earlier. I read the material in my hotel room that night and started doing telephone interviews the next morning. Legal ethics experts, other judges and even the lawyer who was on the prevailing side in the case in which Kline dissented all expressed outrage at the Commission's proposed action. NYU Law School ethics professor Stephen Gillers said Kline had simply taken "a public position of conscience." U.C. Berkeley law professor Stephen Barnett said the Commission simply had no evidence that Kline had acted with an improper purpose, the appropriate criterion for assessing judicial misconduct. By day's end, I called my editor to tell him I had a solid story that had to be written and edited promptly so we could get it into the paper by July 6, when the Commission was expected to make the charges public.

My story ran on page 3 of the Monday, July 6 edition of the *Times*. The headline said the case "is expected to generate controversy" and it did. Within days, the American Bar Association urged the Commission to drop the charges. A state legislator introduced a bill that would bar the Commission from taking action against a judge because of one opinion. I wrote stories about those developments, too. The following spring, in a closed session, the Commission dropped the charges. I wrote about that development, too. I am not suggesting that my initial story and the first two follow-ups were the critical factor in the eventual outcome. But those stories put the Commission on the defensive and presented a narrative that was favorable to Kline's position.

I wrote more than 3,000 stories during my 30 years at the *Times* and I had not thought about the Kline controversy for years. Other than my late wife, Laurie Becklund, a great journalist, and one other colleague, I never talked about the genesis of that story. Reinhardt had done nothing improper. He and Kline were friends, but Reinhardt had no personal stake in the outcome, either financially or otherwise. As a federal judge, he did not review Kline's rulings and Kline did not review his decisions. Reinhardt had no vote on the issue. He just had provided me a tip, as many other anonymous sources had during my long, joyous career as a reporter. Keep in mind, after hearing from Reinhardt, I had to report the story, get the facts, call numerous people for comment and have the story subjected to rounds of editing, like all the stories I wrote for the *Times*. I didn't just put stories in the paper on my own accord, nor did Reinhardt.

This situation was different from the one where U.S. District Judge Thomas Penfield Jackson during the government's antitrust trial against Microsoft in 2000 gave two reporters background interviews saying he thought Microsoft's witnesses, including CEO Bill Gates, lacked credibility — actions leading to Jackson's censure by

the D.C. Circuit for violating judicial ethics. And it differed from the situation where Justice Scalia declined to recuse himself from a case involving Vice President Dick Cheney, even though the two had gone hunting during the pendency of that case.

At Reinhardt's memorial service, Kline spoke movingly about their friendship and, in particular, their conversations about the Holocaust. Afterward, I chatted with Kline at a reception. I tepidly brought up the story and asked if he thought it was okay for me to write about it now. He expressed no reservations.

Going to bat for Tony Kline was far from the most important action Steve Reinhardt took during his life, and the stories I wrote about Kline's case were far from the most significant I wrote about either man. But I tell this story because I think it is emblematic of Reinhardt's belief that as a judge he was always supposed to strive for justice.

At a 2003 conference honoring Judge Noonan, Reinhardt said he and Noonan did "not always agree on cases, but, far more important, we have similar views about the values that are central to how we do our job." He cited an article Noonan wrote criticizing lawyers and judges who had become "shackled by bureaucratic rigidity." Reinhardt added, "when lawyers and judges adhere too rigidly to legal rules, they lose sight of the broader purposes for which those rules were created — to do justice . . . . To me, judges without compassion — and there are a fair number of them in our courts today — have simply chosen the wrong profession."

In the aftermath of Reinhardt's death, his long-time colleague Alex Kozinski, an appointee of President Ronald Reagan, also has praised Reinhardt's approach of going beyond the bounds of what a federal judge normally did. The two became known as "the odd couple" of the Ninth Circuit. They became close friends despite their frequent, occasionally vehement disagreements on death penalty cases.

"What Reinhardt brought to the table," Kozinski wrote, "was a passion for the law and, more particularly, for those unfortunates whom the law treated badly. He would use his considerable talents to find a principled way around adverse precedents and pull out a victory. And when the law was insufficient, Reinhardt would try to find lawful extra-judicial means of achieving a just result.

"He did this, for example, in the case of Shirley Ree Smith, the grandmother unjustly convicted of killing her grandchild by 'shaken baby' syndrome, despite compelling evidence that the conviction was based on flawed forensic evidence. After the U.S. Supreme Court summarily vacated the Ninth Circuit's decision setting aside her conviction (over a vigorous dissent by Justice Ruth Bader Ginsburg), Reinhardt called his long-time friend and political ally, Jerry Brown, and urged him to grant Smith clemency, which the governor eventually did. Most judges believe that their job is done once the case is over; Reinhardt believed his job wasn't done until justice prevailed. It's hard not to admire such ardent zeal."

Several speakers at Reinhardt's memorial service, including Yale Law School Dean Heather Gerken and her colleague Judith Resnik, both of whom served as Reinhardt law clerks years ago, emphasized that Reinhardt made a point of reminding his clerks that there were no little cases — that to the litigants every case mattered, particularly powerless litigants.

As I was working on this article, I read and reread Reinhardt's 2003 speech on "The Role of Social Justice in Judging Cases," subsequently printed in the *University of St. Thomas Law Journal*. Reinhardt described the case of Arnulfo Gradilla, a laborer in a Southern California machine shop. Gradilla's employer fired him after he left work for a few days to accompany and care for his wife, who had a serious heart condition, when she traveled to central Mexico for her father's funeral. Two of Reinhardt's colleagues ruled that Gradilla was not entitled to leave under the California Family Rights Act, holding that the law does not require an employer to grant even the briefest leave to an employee who provides medical care for a spouse who travels away from home for reasons unrelated to her own medical treatment.

> **"To me, judges without compassion . . . have simply chosen the wrong profession."**
>
> JUSTICE STEPHEN REINHARDT, 2003

Reinhardt issued a blistering dissent: "This case exemplifies compassionless conservatism. The majority reads the California Family Rights Act, a statute designed to afford a minimal amount of humane and decent treatment to working people with families, as if it were a rigid code intended to limit their rights . . . . That a poor, hardworking, Hispanic man, struggling to support his family by performing manual labor could be fired by his employer under the circumstances of this case is almost unimaginable. That a court could reach the decision the majority does here is even more incomprehensible."

As I read Reinhardt's account of the case, and then the full opinion, l was embarrassed that I missed it and I regret that he did not implore me to write about it. I feel that way even though I doubt whether anything I wrote would have had a significant impact; the case eventually settled. But I have no doubt about two things: there are many Arnulfo Gradillas whose cases are worthy of attention and regrettably there are not many Stephen Reinhardts to stand up for them. ✯

2018 STUDENT WRITING COMPETITION WINNER ANNOUNCED

Winning author Alexandra Havrylyshyn (CENTER) *is congratulated by Chief Justice Tani Cantil-Sakauye* (CENTER LEFT), *Justice Kathryn Mickle Werdegar* (LEFT), *who recently retired from the Court but remains on the Society's Board of Directors, Society President George Abele* (RIGHT), *and Selma Moidel Smith* (CENTER RIGHT), *who initiated and conducts the competition — on September 13, 2018.*

PHOTO PUBLISHED IN THE SAN FRANCISCO AND LOS ANGELES EDITIONS OF THE *DAILY JOURNAL* ON SEPTEMBER 21, 2018

THE CALIFORNIA SUPREME COURT HISTORICAL SOCIETY is pleased to announce the results of its 2018 Selma Moidel Smith Law Student Writing Competition in California Legal History.

The winner is Alexandra Havrylyshyn, who received her J.D. and a Ph.D. in Jurisprudence and Social Policy in 2018 from the UC Berkeley School of Law, where she is now a Robbins Postdoctoral Research Fellow.

Havrylyshyn receives a prize of $2,500 and publication in the 2019 volume of the Society's annual scholarly journal, *California Legal History*. Second and third place winners were not selected this year.

Her winning paper is titled "How a California Settler Unsettled the Proslavery Legislature of Antebellum Louisiana." It is also a chapter of her doctoral dissertation which she is revising into a book, tentatively titled, *Free for a Moment in France: How Enslaved Women and Girls Claimed Liberty in New Orleans (1835–1857)*.

"How a California Settler Unsettled the Proslavery Legislature of Antebellum Louisiana" uncovers the little-known history of Judge John McHenry. During his time on the bench in Louisiana, McHenry interpreted pro-slavery laws so as to favor liberty for certain enslaved individuals. Relying on McHenry's personal and legal papers (preserved at the University of California, Berkeley's Bancroft Library), this article argues that a commitment to the rule of law, rather than a clear commitment to ending slavery, ultimately explains McHenry's unpopular opinions. In a context of heightened sectional tension over the legality of slavery, McHenry departed Louisiana for California, where he was called upon to help frame the state's first constitution. At UC Berkeley, Havrylyshyn is currently teaching a class for undergraduate freshmen students on the topic of "Race, Gender, and Property Law."

The Society's annual competition is open to all law students. Papers must be written during law school enrollment and may address any aspect of legal history dealing significantly with California, ranging from the justices and decisions of the Supreme Court itself to local events of legal and historical importance, at any time from 1846 to the present. The students' papers are judged by a panel of legal historians and law professors. The deadline for the next competition is June 30, 2019. ★

How Supreme Court Nominations Became a Spectacle

BY MARY ZIEGLER*

LAURA KALMAN

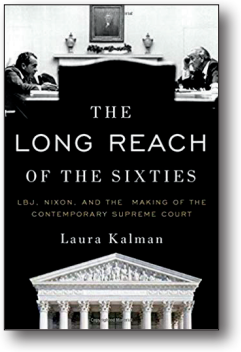
THE LONG REACH OF THE 1960s:
LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT

488 pages
$34.95 (hardcover), $14.39 (Kindle)
New York: Oxford University Press, 2017

EVERY PRESIDENTIAL ELECTION brings reminders of how politicized Supreme Court nominations have become. There is certainly no shortage of unseemly stories about politicians and the nation's highest court. During the 2016 season, pundits speculated that conservatives uneasy about Donald J. Trump's candidacy overcame their doubts because the next president would likely be able to fill several vacancies on the bench. Prior to Trump's ascendancy, Senate Republicans prevented Barack Obama's final nominee, Merrick Garland, from receiving a confirmation vote.

We often assume that these problems began with the now-notorious 1987 nomination of Robert Bork, the failed selection of Ronald Reagan. Bork was one of the most outspoken proponents of originalism, an interpretive theory based on the presumed intentions of the Constitution's framers. In his academic writing, Bork had criticized well-known decisions, including *Roe v. Wade*. As important, when Reagan announced his nomination, Bork seemed likely to hold the deciding vote in a host of divisive cases. Progressive interest groups formed a coalition to block the nomination, and those on either side spent record-breaking amounts of money. Although Bork's nomination failed, the story goes, his nomination forever changed the way the country handles Supreme Court appointments. The choice — and success — of a Supreme Court nominee is one of the most closely-watched and hotly-contested political events in modern American politics, and it seems that we have Robert Bork to thank.

Laura Kalman's richly-researched, thought-provoking book, *The Long Reach of the 1960s: LBJ, Nixon, and the Making of the Contemporary Supreme Court*, tells a very different story. The ugly politicization of federal judicial nominations, she argues, began not with Bork but much earlier. In the 1960s, consensus that senators should not interrogate nominees broke down. Media scrutiny intensified, and senators homed in on nominees' ethics and personal lives. Nominations failed because of the expected impact that a candidate would have on the Court's future jurisprudence. The Warren Court, known for its decisions on school prayer, school desegregation, vote reapportionment, and rights for criminal defendants, became the centerpiece of a political debate about the future of the Court.



Kalman starts *The Long Reach of the 1960s* with the presidency of Lyndon Johnson, a president who unwittingly ushered in a new era in Supreme Court nominations. Throughout the book, Kalman makes savvy use of recently-released tapes from both the Nixon and Johnson Administrations, making the reader part of many of the off-color conversations that unfolded in the White House. Johnson, she showed, assumed office eager to make a mark on the Court. Following the successful nomination of Abe Fortas in 1965 as associate justice, Johnson had a majority that would likely be sympathetic to his Great Society reforms. But John F. Kennedy's nomination of Arthur J. Goldberg in 1962 was the last to fit the model to which Johnson and his predecessors had become accustomed.

Thurgood Marshall, Johnson's next nominee after Fortas, experienced a very different kind of confirmation hearing. Kalman shows that in the summer of 1967, when Johnson got the chance to fill a second Supreme Court vacancy, a few Southern senators vowed to make Marshall's nomination a referendum on the ideology of the current Supreme Court majority. Marshall's record of bringing cases on behalf of the NAACP Legal Defense Fund certainly did nothing to appeal to segregationists in the Senate, but their interrogation of Marshall went beyond any of the nominee's own experiences. Instead, Marshall's confirmation hearings put ideology center stage for the first time, and Southern senators worked to make the Warren Court, as Kalman puts it, "the bogeyman."

Although Marshall joined the Court, other nominees would not be so lucky. *The Long Reach of the 1960s*

* Mary Ziegler is the Stearns Weaver Miller Professor at Florida State University College of Law. Her most recent book is *Beyond Abortion:* Roe v. Wade *and the Battle for Privacy* (Harvard University Press, 2018).

unearths deeper meaning in the disastrous 1968 nomination of Abe Fortas to be chief justice following Earl Warren's retirement. Because of Fortas' role on the Warren Court, his nomination as chief justice faced opposition from the start. Ethical questions that emerged during the hearing only made things worse. Congress took the unprecedented step of asking Fortas to testify before the Senate Judiciary Committee, and senators became frustrated at what they saw as his efforts to evade questions about the cozy relationship that he maintained with the Johnson Administration while on the Court. Fortas's nomination soon became a media spectacle, fueled by revelations that he had accepted speaking fees from private business interests during talks that he gave at American University.

Although Supreme Court hearings had once seemed a formality, it soon became clear that Fortas's nomination was doomed. As Kalman demonstrates, Fortas's failed nomination bore all the hallmarks of a new era of Supreme Court politics. The nominee's ethics and personal life became a media preoccupation, and the politicization of the process seemed almost natural.

When Richard Nixon took office in 1969, Supreme Court nominations became no less political. In 1969, Nixon successfully nominated Warren Burger, a critic of the Warren Court, to replace Earl Warren as chief justice. But any honeymoon for Nixon's nominees was short-lived. When Nixon nominated Judge Clement Furman Haynsworth, Jr. to fill a Supreme Court vacancy, the president's selection seemed relatively uncontroversial. Haynsworth was a Southerner, improving the odds of his confirmation, and he was a moderate, which made him more attractive to liberals. However, civil-rights and union groups mobilized to defeat Farnsworth. Although his record alone did not seal his fate, opponents dug up ethical problems involving Farnsworth's part ownership of a vending machine company and defeated the nomination.

Nixon's next choice, G. Harrold Carswell, fared no better. Carswell came under fire for his previous support for segregation, his spotty record on women's rights, and his mediocrity as a jurist. That Supreme Court seat would remain vacant for more than 390 days before Nixon would successfully nominate Harry Blackmun. Nixon continued to flounder, and it was a stroke of luck that his 1971 nominees, Lewis Powell and William Rehnquist, succeeded.

Kalman steers clear of arguing that the transformations of the Johnson and Nixon years directly caused us to arrive at the present historical moment. But *The Long Reach of the 1960s* compellingly proves that the Supreme Court nomination hearings of the era still cast a long shadow today. The Warren Court remains a touchstone for debate about how the justices should (and should not) interpret the Constitution. But the "Warren Court" we often discuss is far more radical than the reality many experienced decades ago. Kalman documents how the confirmation battles of the 1960s helped to forge the image of the Warren Court that still sets the terms of debate about new Supreme Court nominees.

Nor, Kalman writes, did the Bork nomination chart a new course for Supreme Court nominations. Although Bork's hearing was as contested and politicized as those of the 1960s, many of the nominees who followed him, including those chosen by Republican and Democratic presidents, were confirmed with little controversy or opposition.

Kalman's study is especially timely given the profound controversy sparked by the nomination hearings of Justice Brett Kavanaugh. Dr. Christine Blasey Ford, a former acquaintance, accused Kavanaugh of attempting to sexually assault her while the two were in high school. Additional accusations followed, along with an FBI investigation and an extraordinary hearing at which Kavanaugh accused Democratic senators of orchestrating a political "hit." The Kavanaugh hearings struck some as unprecedented. Kalman's book, however, shows us that the partisan rancor and high-stakes drama that characterized those hearings have roots that reach back decades.

Kalman's book plunges readers into the strategy discussions and inner thoughts of those who lived through the transformation she studies. The characters in her story, both familiar and unfamiliar, jump off the page. While *The Long History of the 1960s* provides a much-needed explanation of the evolution of our own confirmation battles, Kalman never loses sight of the humanity of the politicians, judges, and reporters she studies. Ultimately, Kalman shows that there was nothing preordained about how Supreme Court nominations changed before. And as much as it may seem that nominations will inevitably become more political, the story Kalman tells reminds us that Supreme Court selections have always reflected the political exigencies of a particular moment in time. The nature of the Supreme Court battles we know now could easily change again. ✯

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ON THE COVER: *Aerial view (ca. 1980) showing a packed Dodger Stadium. Downtown Los Angeles is in the background.*
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