CALIFORNIA SUPREME COURT

Historical Society

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Joshua Groban

Newest Associate Justice of the Supreme Court of California

On Page 2: Insights from a Former Colleague
by justice gabriel sanchez

THE SUPREME COURT OF CALIFORNIA: *Associate Justices Leondra Kruger, Ming Chin, and Goodwin Liu, Chief Justice of California Tani Cantil-Sakauye, Associate Justices Mariano-Florentino Cuéllar, Carol Corrigan and Joshua Groban.*

PHOTOS: JUDICIAL COUNCIL OF CALIFORNIA

Introducing Justice Joshua Groban

BY JUSTICE GABRIEL SANCHEZ*

When Joshua Paul Groban took the oath of office as an associate justice of the California Supreme Court on January 3, 2019, he was in one sense a familiar face to attorneys and judges throughout the state. As a senior advisor to Governor Edmund G. Brown Jr., Justice Groban screened and interviewed more than a thousand candidates for judicial office. Over an eight-year span, the governor, with Groban's assistance and advice, appointed 644 judges, including four of the seven current justices on the California Supreme Court and 52 justices on the California Courts of Appeal. These appointments have transformed California's judiciary.

It is, therefore, not only fitting that he has devoted countless hours to thinking about what makes a good judge but necessary since he must now apply those lessons as the Court's 117th justice. California's legal community is eager to learn how he will decide important questions of law. I have known Justice Groban for many years, first as colleagues and friends at the law firm Munger, Tolles & Olson and more recently over Governor Brown's last two terms in office. I was asked by the California Supreme Court Historical Society to profile Justice Groban, and although I will refrain from offering any predictions about the kind of jurist he will be, I am honored to share some personal insights from having worked together on many challenging issues.

A native of San Diego, Groban received his Bachelor of Arts degree from Stanford University, majoring in modern thought and literature and graduating with honors and distinction. He earned his J.D. from Harvard Law School where he graduated cum laude and then clerked for the Honorable William C. Conner in the Southern District of New York. He was an accomplished litigator at Paul, Weiss, Rifkind, Wharton & Garrison from 1999 to 2005 and Munger, Tolles & Olson in Los Angeles from 2005 to 2010, where he handled a wide range of complex commercial litigation matters.

He took the unusual step of leaving private practice to become the legal advisor to the Jerry Brown for Governor 2010 campaign, though as he explained to me, it was less a leap of faith than a series of incremental decisions that intertwined his future with that of Brown's. A Munger Tolles partner, Alan Friedman, connected him to the campaign through Kathleen Brown. What began as a small pro bono project soon morphed into major campaign duties, requiring Groban to take a leave of absence from the firm. He had every intention of returning to private practice when the election ended, but was asked to stay on and help with the transition, and ultimately, to serve as one of Brown's senior advisors from 2011 to 2018. While he remained in Los Angeles and traveled as needed to Sacramento, he taught appellate practice and advocacy at UCLA Law School and frequently lectured on judicial appointments.

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At the Governor's Office

Brown and Groban have a close and unique relationship, forged from years of policy discussion, intellectual debates, and time spent on the campaign trail and beyond. Brown leaned on Groban for counsel on a wide range of legal and policy matters, from constitutional law to criminal justice reform, teacher tenure rules to sanctuary city laws, regulatory reform to consumer protection. It was not unusual for the governor to seek out the advice of different advisors on many policy or legislative topics, myself included, but he invariably turned to Groban as a sounding board. At the swearing-in ceremony, Governor Brown remarked, "Probably next to my wife I've talked to no other person as much as Josh Groban" — to which First Lady Anne Gust Brown quipped, "I think you've talked to him more."

To illustrate their relationship, Brown and Groban attended numerous meetings at the Lawrence Livermore National Laboratory and the Hoover Institution at Stanford University, and traveled to Washington D.C. to better understand the threats posed by nuclear proliferation. Why, one might ask, is a state governor concerning himself with a matter of national security? Governor Brown understood that any misstep with nuclear weapons in another region of the world poses an existential danger to all of us, and California occupies a prominent position on the global stage as an economic engine and center of innovation for ideas and technology. And thus, along with his many other roles, Groban became steeped in the details of nuclear security risk.

His primary work, however, involved judicial appointments. During the last eight years in office, Brown named approximately one of every three California state judges. These judicial appointments have been lauded as the most diverse in the state's history: 44 percent of Brown's appointees were women, 40 percent identified as African-American, Latino, or Asian, approximately 6 percent identified as LGBT, and 3 percent were veterans. Among many "firsts," they included the first openly gay and lesbian appellate justices, the first Muslim judge and later appellate justice, and the first Korean-American appellate justice. I was honored to be the first male Latino justice appointed to the First District Court of Appeal. Statistics reveal only part of the story. Counties that had never witnessed a woman on the bench, such as Del Norte, Sierra, and Glenn, or a judge of Hispanic descent, such as Placer and Butte, or an African-American woman, such as Napa and San Mateo, now include jurists who reflect the rich diversity of the communities in which they serve.

Beyond demographic characteristics, Brown and Groban consciously strove to broaden the professional backgrounds and experiences of judges, adding more civil litigators, public defenders, and government attorneys alongside prosecutors and magistrates. They understood that bringing diverse experiences and perspectives allows judges to make more informed decisions and increases public confidence in the courts. Groban has received numerous awards from bar groups and other legal organizations in recognition of his work on judicial appointments and his commitment to improving the judicial system.

Appointment as Associate Justice

As the newest associate justice, Justice Groban fills the vacancy following the retirement of Justice Kathryn M. Werdegar. In my view, Governor Brown's selection was guided by his appreciation for Groban's intellectual curiosity, vast knowledge of the law, steadying presence and tendency to emphasize continuity and clarity in the law. Justice Groban reflected this outlook when he remarked at his swearing-in ceremony, "I am joining an institution

Joshua Groban's hearing and confirmation at the Supreme Court courtroom in San Francisco, Ronald M. George State Office Complex, Earl Warren Building, on December 21, 2018

Left: *The Commission on Judicial Appointments members who considered the appointment are* (left to right) *California Attorney General Xavier Becerra, Chief Justice of California Tani Cantil-Sakauye* (chair)*, and senior Presiding Justice of the state Court of Appeal J. Anthony Kline.*

Right: *Justice Carlos Moreno (Ret.) of the Supreme Court of California speaks on behalf of Joshua Groban's confirmation.*

whose fundamental purpose is to provide stability and consistency; I look forward to doing that with a sense of reflection, respect, fidelity to the law and compassion."

Justice Groban possesses several qualities that will serve him well on the Supreme Court. He is very personable and approachable. He has the quiet confidence to admit when he does not fully understand an issue and needs more information, and to move on when his initial impression proves incorrect. He has mentioned to me that the best justices he has known, no matter their experience, are amenable to input, open to new ideas, and do not make up their minds until all of the necessary information is received and considered. Groban is a nimble and pragmatic thinker, open to competing points of view and deliberate in forming conclusions. His natural inclination is to find consensus and build rapport.

Finally, he has developed a way of thinking and analyzing problems that is familiar to those of us who have worked closely with Jerry Brown — what Brown calls "living in the inquiry." It is to ceaselessly question the assumptions one holds, to weigh the implications of a decision or legal rule with caution and particularly its unanticipated consequences, and to be mindful that however thorough a brief or appellate record may seem, it likely reflects an incomplete picture of a complex legal or social problem. In short, "living in the inquiry" requires approaching the task of interpreting and developing the law with a dose of humility and understanding that very few things can be known with certainty. Justice Groban remarked that he will be well served if he can internalize this process and apply it to his jurisprudence.

On the Supreme Court

Justice Groban was kind enough to share with me some initial impressions as he acclimates to his work on the Supreme Court. He was quick to mention how incredibly supportive everyone in the Court has been, from the justices and their chambers, to the talented and experienced central staffs who have filled in to assist him with the Court's heavy workload as he interviews candidates for longer-term positions in his chambers. On his approach to hiring, he explained, "It's a process as you balance myriad options, whether to take on permanent staff versus annual clerks, for me whether to hire staff in Los Angeles or San Francisco, whether you look for attorneys steeped in civil or criminal law versus generalists, balancing all those needs."

CLOCKWISE FROM UPPER LEFT:
JOSHUA GROBAN TOOK THE OATH OF OFFICE IN SACRAMENTO, IN THE STANLEY MOSK LIBRARY AND COURTS BUILDING, ON JANUARY 3, 2019.

Justice Groban receives congratulations on his earlier confirmation from Chief Justice Cantil-Sakauye and Gov. Jerry Brown.

Justice Groban takes the oath of office from Gov. Brown.

Justice Groban's family lends hands to help him into his new robe.

A productive working relationship with one's chambers staff is essential, but it takes time for staff to become familiar with how a justice views cases and drafts opinions. I asked Justice Groban how he is developing those relationships. He said, "particularly early on, I have tried to give input about a case so they don't have to guess or attack the case blindly. Over time, they will have a better ability to predict how I might want to approach a case, but that takes some time. Rather than passively wait for them to work up a case, I have shared my initial thoughts, and in doing so have helped them understand how I approach things."

Continued on page 14

Never on a Sunday:

Religious and Economic Liberty in Gold Rush–Era California

by mitchell keiter*

Sunday closing laws were common through most of American history. When the U.S. Supreme Court upheld their constitutionality in 1961 in *McGowan v. Maryland* it noted that every appellate court in American history had done so — except one.[1] That court was the California Supreme Court. Its short-lived decision in *Ex parte Newman*[2] was remarkable, not just for its result but also for its reasoning — and the eventual fates of the justices involved.

In April 1858, the California Legislature passed a law forbidding businesses from operating on Sundays. Morris Newman, a Sacramento tailor who observed the Sabbath on Saturdays according to Jewish tradition, kept his shop open on a Sunday and was convicted and fined.[3] When he refused to pay the fine, he was imprisoned.[4] Newman retained Solomon Heydenfeldt to represent him on his appeal to the Supreme Court. Heydenfeldt had served on the Court earlier in the decade, and, with colleague Henry Lyons, had formed a Jewish majority of justices in 1852.[5]

The case generated three opinions: Chief Justice David Terry's lead opinion for the Court, invalidating the law; Justice (and former Governor) Peter Burnett's concurrence with that result; and Justice Stephen Field's dissent, which would have upheld the law. The two justices who constituted the majority described the issues presented as (1) whether the law discriminated in favor of one religious profession or was a "mere civil rule of conduct"; and (2) whether the Legislature could validly compel a citizen to abstain from his "ordinary lawful and peaceable avocations" one day a week. In addition to these issues of religious and economic liberty, the Court addressed a preliminary question: the degree of scrutiny with which courts should review legislation.

Judicial Scrutiny or Deference?

Although courts no longer face Sunday closing laws today, the question of how much authority legislatures may wield over people's lives, and how vigorously courts should scrutinize legislative enactments, remains highly controversial. Chief Justice Terry endorsed the view popularized in 1857, the year before the *Newman* decision, by John Stuart Mill in *On Liberty*: "[M]en have a natural right to do anything which their inclinations may suggest, if it not be evil in itself, and in no ways impairs the rights of others."[6] Terry opposed governmental "usurpations which invade the reserved rights of the citizen."[7] If Congress "perform[ed] an act which involves the decision of a religious controversy . . . it will have passed its legitimate bounds."[8]

Justice Field, by contrast, feared (at least at this stage of his career) judicial usurpation of legislative power. Citing the Legislature's "undoubted right to pass laws for the preservation of health and the promotion of good morals," he opposed judicial interference with the decisions of the Legislature, contending "there is no power, outside of its constituents, which can sit in judgment of its actions."[9] "It is not for the judiciary to . . . exercise a supervision over [legislative] discretion . . . . [W]hen it does so, it usurps a power never conferred by the Constitution."[10]

Terry refused to defer to legislative wisdom, asserting that if the Legislature could bar work on *one* day a week, it could bar work on *six* days a week.[11] Justice Field supposed "members of the Legislature will exercise some wisdom in its acts," but if not, "the remedy is with the people. . . . Frequent elections by the people furnish the only protection . . . against the abuse of acknowledged legislative power."[12]

Article I, Section 4: The Free Exercise of Religious Profession, Without Preference

Notwithstanding this debate, the *Newman* opinions focused mostly on the substantive issues. The first concerned religious liberty, which enjoys protection under article I, section 4, of the California Constitution: "[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall for ever be allowed in this State." Terry did not contend, as asserted in a later case, that Sunday closing laws effect a structural discrimination against Jews on the basis that religious Jews could work only five days a week and yet religious Christians could work six days a week.[13] Instead, he characterized the law barring work on Sunday as the enforced observance of a Christian religious practice, as Sunday rest was "one of the modes in which

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[Christianity's] observance is manifested and required."[14] Justice Burnett, finding the law transformed a voluntary Christian practice into a compulsory one, concluded the law thereby "violates as much the religious freedom of the Christian as of the Jew."[15]

Justice Field's dissent disputed these claims by characterizing the law as imposing a "cessation from labor," not "religious worship."[16] "What have the sale of merchandise, the construction of machines, the discount of notes . . . to do with religious profession or worship? . . . It is absurd to say that the sale of clothing, or other goods, on Sunday, is an act of religion or worship . . . ."[17]

Field's minority view further refused to base the constitutionality of the law on its classification as exclusively "civil"; he asserted that religious roots did not necessarily invalidate a socially valuable practice. Instead, he argued, just as society may proscribe homicide and perjury, even though these prohibitions appear in the Ten Commandments, so too could a state prescribe a day of rest for its social benefits.[18]

These contrasting opinions echo internal religious debates. One could contend the Sabbath rule is simply a prohibition against working on a seventh day, but its language, "Six days a week you shall work"[19] could also be not merely permissive but directory. If so, forbidding the fulfillment of this religious command would indeed interfere with the exercise of religious freedom, not so much by compelling a Christian practice (Sunday rest) but by forbidding a Jewish one (Sunday work).

Similarly, the Biblical text can support either the interpretation that the Sabbath is a "religious" rule regulating humans' relationship with God, or a "civil rule of conduct," regulating humans' relationship with one another. In Exodus (20:12), the Sabbath derives from the fact God rested on a seventh day, so humans should emulate God. But the cited rationale in Deuteronomy (5:15) is that Pharaoh enslaved the Israelites, and denied them a day of rest, which created an ethical imperative for the now-freed Israelites to treat their own employees with greater humanity.

JUSTICE PETER BURNETT

ATTORNEY AND FORMER JUSTICE SOLOMON HEYDENFELDT

Article I, Section 1: "Free and Independent" Californians' Right to Acquire Property

The law's religious source was not the only ground for the Court's ruling. The majority concluded that even if the rule were not a "preference favorable to one religious profession" but simply, as Justice Field asserted, "a mere civil rule of conduct," it still violated the state Constitution. Article I, section 1, declared everyone "by nature free and independent," and recognized Californians' "inalienable rights," including "acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness." The majority, shaped by the Gold Rush *zeitgeist*, found the law failed as a secular, economic regulation because it restricted one's right to work and acquire property.

Ironically, as it upheld Newman's right to celebrate a day of rest (according to his own calendar), Chief Justice Terry's lead opinion for the Court questioned the very concept of a Sabbath, wondering how a pursuit that was not only lawful but commendable and praiseworthy six days a week could be "arbitrarily converted into a penal offence" on the seventh.[20] Terry doubted there was a societal problem in "the habit of working too much": "We have heard . . . reproaches against the vice of indolence," but no complaint of an "unhealthy or morbid industry."[21] Terry trusted free and independent Californians to judge for themselves when they needed a break from toil, relying on the same interest in self-preservation that led people to seek sleep, food, or pain relief when needed.[22] Because the rest needed by some citizens may be "widely disproportionate to that required by" others, he reasoned, it should be a matter that "each individual must . . . judge for himself, according to his own instincts and necessities."[23]

Justice Burnett's concurring opinion echoed this reasoning. Whereas children or slaves might need state intervention to guarantee their needs, Burnett trusted "free agents to regulate their own labor."[24] If such adults could not be trusted to set their own schedules, they also could not be trusted to make their own contracts.[25] If the state needed to prescribe and enforce their *days* of rest, it could also enforce the *hours* — for working, resting and eating. Just as free adults did not need the state to enforce bedtimes or mealtimes to ensure they enjoyed enough sleep or food, they did not need a paternalistic state to set their work schedule.[26]

Justice Field disputed the article I, section 1 argument on both practical and ideological grounds. As a practical matter, he denied the law restricted individuals from acquiring property, as a weekly respite could improve their productivity during the rest of the week. "With

more truth it may be said, that rest upon one day in seven better enables men to acquire on the other six."[27]

Field's ideological argument provided the foundation for future generations to prescribe the hours for working (and now for eating, too). He denied Justice Burnett's premise that laborers were free and independent agents who could choose the hours they worked, rested, and ate. "The relations of superior and subordinate, master and servant, principal and clerk, always have and always will exist. Labor is in a great degree dependent upon capital, and unless the exercise of power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise. . . . It is idle to talk of a man's freedom to rest when his wife and children are looking to his daily labor for their daily support."[28]

Justice Field abandoned his opposition to both economic autonomy and judicial review when he joined the United States Supreme Court, where he served from May 1863 until December 1897, a tenure second in Supreme Court history only to Justice William O. Douglas' 35 years, 7 months. When the high court in *Munn v. Illinois*[29] permitted a state to impose a cap on what a business could charge, Field found it "subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference."[30]

The *Newman* holding was short-lived: the Court disapproved it three years later in *Ex parte Andrews*.[31] Why? The Court's composition had changed, and the two justices who replaced Terry and Burnett, Joseph Baldwin and Warner W. Cope, analyzed the issues differently. And why did Terry leave the Court? Because U.S. Senator David Broderick had offended Terry, who then challenged Broderick to a duel. Terry resigned from the Court in order to face off against the senator. When the dust had settled, Terry had lost his position, Broderick had lost his life, and Morris Newman had lost his precedent.

It would not be Terry's last act of violence involving a United States senator, nor would *Newman* be the last act in the Terry–Field rivalry.

Aftermath — 1880s

The Supreme Court, having expanded to its current size of seven justices, reviewed the issue again in March 1882.[32] The 4–3 decision cited *Andrews* in upholding a newer Sunday closing law. But its *constitutionality* did not guarantee its *popularity*. As prosecutions clogged the San Francisco courts, the issue became a major focus of the 1882 elections.[33] The Republican platform favored the restrictions, whereas Sunday laws were opposed by the Democratic Party, whose platform deemed "anti-democratic" "all laws intended to restrain or direct a free and full exercise by any citizen of his own religious and political opinion."[34] The platform committee's chair was David Terry, and the Democrats swept to victory in November.[35]

Justice Field had a countermove. San Francisco enacted a measure regulating laundries to ensure general standards of sanitation and cleanliness.[36] One provision barred work at night or on Sunday. Police arrested one Soon Hing for working at night, not Sunday, but Field used the opportunity to include dicta in the U.S. Supreme Court's unanimous opinion: "Laws setting aside Sunday as a day of rest are upheld . . . from [the government's] right to protect all persons from the physical and moral debasement which comes from uninterrupted labor."[37] The high court would cite this language in *McGowan*, right after noting the outlier *Newman* holding and its disapproval in *Andrews*.

The two justices — Terry and Field — also collided in a more personal context. Sarah Hill had been the putative wife of mining magnate and U.S. Senator William Sharon. The validity of the marriage was disputed after his death, and by 1888 Hill had married her lawyer in that litigation — Terry. Although the California Supreme Court had found the marriage valid (with Hill due to collect a tidy sum) a federal panel rejected this analysis, and found Hill and Sharon had never been married. When a judge from the panel announced the decision, it generated an altercation in the courtroom; David Terry was arrested for assault and Sarah Terry for contempt of court, with the citation issued by the judge — Stephen Field.

Terry's subsequent threats led to Field's protection by U.S. Marshal David Neagle. In 1889, Field and Neagle were riding on a Los Angeles–San Francisco train that the Terrys boarded in Fresno. When the train stopped in Lathrop for breakfast, Terry confronted Field, and Neagle shot Terry to death. The shooting also generated a United States Supreme Court case, with a 6–2 majority (Field recused himself) finding Neagle acted within his federal duties and therefore could not be prosecuted in state court.[38]

Aftermath — 2017

Eroding public support for requiring *businesses* to close once a week did not extinguish public interest in protecting *employees* from working without rest, as urged by Justice Field's *Newman* dissent. Labor Code section 552 implemented this imperative by providing "No employer shall cause his employees to work more than six days in seven." Now, in the twenty-first century, many companies operate 7 days a week (even 24 hours a day) but may not require employees to work this entire schedule.

Just two years ago, the California Supreme Court in *Mendoza v. Nordstrom, Inc.*[39] construed section 552. First, the Court needed to define the "seven" day period. Did it apply to each calendar week, or on a "rolling" basis to the preceding seven days? In other words, if an employee was off on Monday in one week, Tuesday the next week, and Wednesday on the third, did that violate

the statute? The Court concluded the law required a day off in each calendar week, not after every sixth day, and so such a schedule would be lawful.

More significantly, the Court's interpretation of the verb "cause" synthesized the opinions of Justice Burnett and Justice Field in *Newman*. Burnett insisted "Free agents must be left free" to make their own arrangements, and work as much as they chose, whereas Field doubted that employees, subject to employers' command, could really exercise free choice. The Nordstrom employees, echoing Field's view, contended employers "caused" employees to work simply by *permitting* that labor, as if free choice by employees to work was impossible.[40] Nordstrom countered with Burnett's position that free people exercised free choice, so seven-day labor was freely chosen (and lawful) unless the employer "requires" or "forces" it.

In her last months on the California Supreme Court before retiring, Justice Kathryn Mickle Werdegar authored a unanimous opinion that endorsed neither extreme. She denied that *permitting* work qualified as *causing* it. After all, the Legislature could have barred employers from permitting an employee to work six days a week, as it had done in prohibiting employers from permitting such seven-day-a-week labor by minors, but it had not imposed so rigid a requirement for adults.[41] On the other hand, the Court's opinion recognized an "employer can, short of requiring or forcing employees to go without rest, still implicitly make clear that doing so will redound to their benefit, or spare them sanction, and thereby motivate or induce employees to work every day."[42] Rather than condone such "implied pressure," the Court held employers needed to inform employees about their right to rest, and then maintain "absolute neutrality" as to their decision.[43] Employees thus could work seven days each week if they chose, but employers could do nothing to induce ("cause") that choice.

Nearly sixteen decades after Morris Newman opened his shop on a Sunday, the California Supreme Court had finally produced an opinion that implemented all the priorities expressed in *Newman*. It protected employees from working beyond their desired workweek, as Justice Field wished to do, but also allowed them to set their own schedule, as the *Newman* two-justice majority had urged. But rather than simply *assume* employees exercised free choice, Justice Werdegar's opinion for the Court *ensured* they would. And no one got shot in the process. ✯

Endnotes

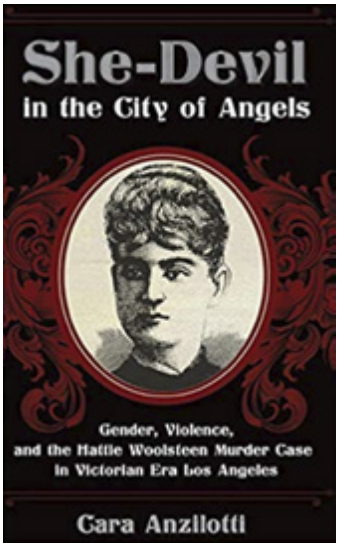
1. *McGowan v. Maryland* (1961) 366 U.S. 420, 435.
2. *Ex Parte Newman* (1858) 9 Cal. 502 (hereafter *Newman*).
3. Jeremy Zeitlin, "What's Sunday All About? The Rise and Fall of California's Sunday Closing Law" (2012) 7 *Cal. Legal Hist.* 355–356, citing William M. Kramer, *Jewish-Activist Lawyers of Pioneer California*. Los Angeles: Univ. of Judaism, 1990, 5.
4. *Newman*, 9 Cal. at p. 504.
5. Heydenfeldt penned one of the most memorable lines in California Supreme Court history in permitting recovery by a plaintiff who fell into an uncovered hole in the sidewalk while intoxicated: "A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it." (*Robinson v. Pioche, Bayerque & Co.* (1855) 5 Cal. 460, 461.)
6. *Newman*, 9 Cal. at p. 507.
7. *Newman*, 9 Cal. at p. 508 (lead opn. of Terry, C.J.).
8. *Id.*, at p. 507.
9. *Id.*, at p. 520.
10. *Id.*, at p. 520.
11. *Id.*, at p. 509.
12. *Id.*, at p. 527.
13. *Ex parte Koser* (1882) 60 Cal. 177, 208 (dis. opn. of Sharpstein, J.).
14. *Newman*, 9 Cal. at p. 506 (lead opn. of Terry, C.J.).
15. *Newman*, 9 Cal. at p. 513 (conc. opn. of Burnett, J.).
16. *Newman*, 9 Cal. at p. 523 (dis. opn. of Field, J.).
17. *Id.*, at p. 519.
18. *Id.*, at p. 522.
19. Exodus 20:8; Deuteronomy 5:12.
20. *Newman*, 9 Cal. at p. 507 (lead opn. of Terry, C.J.).
21. *Id.*, at p. 508.
22. *Ibid.*
23. *Ibid.*
24. *Newman*, 9 Cal. at p. 518 (conc. opn. of Burnett, J.).
25. *Ibid.*
26. California law now prescribes meal breaks for employees. See e.g., *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1018.
27. *Newman*, 9 Cal. at p. 528 (dis. opn. of Field, J.).
28. *Id.*, at p. 520.
29. *Munn v. Illinois* (1876) 94 U.S. 113, 135.
30. *Id.*, at p. 136 (dis. opn. of Field, J.).
31. *Ex parte Andrews* (1861) 18 Cal. 678.
32. *Ex parte Koser* (1882) 60 Cal. 177.
33. Zeitlin, *supra*, 7 *Cal. Legal Hist.* at pp. 369–371.
34. *Id.*, at p. 374.
35. *Id.*, at p. 372.
36. *Soon Hing v. Crowley* (1885) 113 U.S. 703, 708.
37. *Id.*, at p. 710.
38. *In re Neagle* (1890) 135 U.S. 1.
39. *Mendoza v. Nordstrom Inc.* (2017) 2 Cal.5th 1074.
40. *Id.*, at p. 1090.
41. *Id.*, at p. 1092, fn. 8.
42. *Id.*, at p. 1091.
43. *Ibid.*

The Death of Doc Harlan:

Sex, Lies, Violence and Gender in Victorian Era Los Angeles

by cara anzilotti*

In october, 1887, Los Angeles dentist Charles Harlan went missing. His body was found in a burned-out barn in the nearby community of Compton. He had been bludgeoned, stabbed, shot in the head and set on fire. The prime suspect was a 21-year-old woman named Hattie Woolsteen, with whom it was rumored the married Harlan had been having an affair. Hattie soon found herself facing a murder charge as well as public scorn and outrage. She was dubbed "Wicked Woolsteen," the "fiendish murderess" and a "she-devil." The crime and Hattie's subsequent trial captivated the public as few incidents had before. The fact that Charles Harlan ended up dead was not particularly noteworthy. It was the identity of his assailant that caused consternation, and that had everything to do with Victorian notions of class, gender, and sexuality.



During the nineteenth century it was considered a settled fact that gender roles were fixed, immutable, and that nature had endowed men and women with completely distinct yet complementary character traits. One's gender, it was held, determined one's character. Men were independent, assertive, aggressive, and self-interested — traits that served them well in the competitive world of business and politics. Women, in contrast, were gentle, passive, sympathetic, nurturing, selfless — and completely dependent. They were also supposedly endowed with natural purity and piety, and were therefore not only morally superior to men, but uniquely qualified to serve as society's moral guardians. From the household, the sanctuary of the domestic sphere that shielded them from the corrupting influences of the public realm, they could employ their innate moral superiority to influence and temper the baser instincts of their husbands and sons.[1]

It was this longed-for "truth" about woman's nature that led the public to anxiously seek facts about the death of Doc Harlan that would exonerate Hattie Woolsteen. The desire for a sympathetic narrative meant that within weeks of her arrest, Hattie's image underwent a profound transformation. No longer a she-devil, she was reimagined as a symbol of female victimization and the sexual double standard. Though the evidence against her was compelling, once she stood trial for Harlan's murder, the jury took just over 10 minutes to acquit her of the charge.

The circumstances surrounding Harlan's death, particularly the possibility of a female assailant, created a sensation. The desire for details was intense. In the nineteenth century, most people believed that murder was a crime committed almost exclusively by men. Women were far more often the victims than the perpetrators. And yet when questioned by the chief of police, Hattie Woolsteen freely admitted that she had killed Doc Harlan. Her initial explanation was that it was an accident. But that was only the first of many versions of the story. And as it turned out, nothing was perfectly clear and no one was who she or he seemed to be.

It was widely suspected that Hattie and Harlan were lovers, and she was seen with him on the day of the murder, so Patrick Darcy, chief of the Los Angeles Police Department, brought her in for questioning. He did not believe her to be the guilty party, but he thought she might have important information to divulge. In fact, Hattie provided a variety of possible scenarios for Harlan's death. When pressed for details, she told a tale of her despondent lover's suicide. She claimed that while taking a buggy ride around the city, Harlan begged her to run away to Denver with him. When she refused his plea he pulled a pistol out of his pocket and shot himself. Fearing the sound of the gunshot would draw attention and that she would be held responsible for Harlan's death, she determined to dispose of the body. Hattie described wrapping her right arm around his neck to hold the body upright to prevent too much blood from pooling on the buggy floor. With her left hand she took the reins and drove to Compton, a distance of about 10 miles, to the abandoned ranch of an acquaintance.

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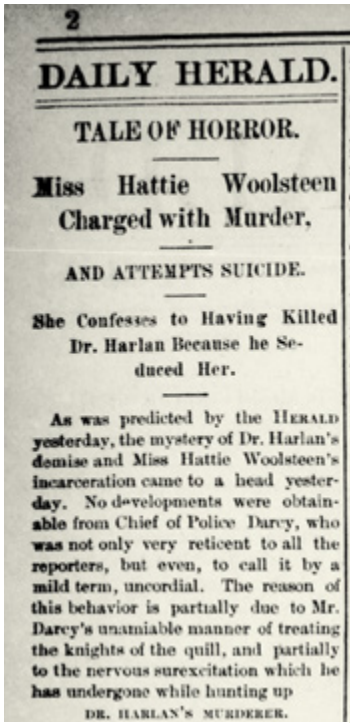
There she pushed the dead man out of the vehicle onto the floor of the barn and covered him with straw, which she set ablaze. In this first full telling, Hattie was simply the hapless witness to Harlan's self-destruction.

But Chief Darcy was unconvinced. How, he asked, had the right-handed dentist managed to shoot himself above his left ear? Without a plausible explanation, Hattie changed her story. As she was questioned by Darcy and several of his officers, she provided variations of her narrative. The details changed with each retelling. In one version, when she refused Harlan's request to go with him to Denver, he drew the pistol to murder her. She begged for her life and as they struggled over the gun it discharged accidentally, the bullet striking Harlan in the head. She provided graphic details regarding his death. By his watch, which she stole, it took ten minutes for him to expire. She related that he "kicked a few minutes and was dead." Hattie also described the corpse striking the buggy step as she dumped it out into the barn, which she claimed explained the bludgeon marks noted in the coroner's report.



2

DAILY HERALD.

TALE OF HORROR.

Miss Hattie Woolsteen Charged with Murder,

AND ATTEMPTS SUICIDE.

She Confesses to Having Killed Dr. Harlan Because he Seduced Her.

As was predicted by the HERALD yesterday, the mystery of Dr. Harlan's demise and Miss Hattie Woolsteen's incarceration came to a head yesterday. No developments were obtainable from Chief of Police Darcy, who was not only very reticent to all the reporters, but even, to call it by a mild term, uncordial. The reason of this behavior is partially due to Mr. Darcy's unamiable manner of treating the knights of the quill, and partially to the nervous surexcitation which he has undergone while hunting up

DR. HARLAN'S MURDERER.

Los Angeles Herald, *Sunday Morning, October 16, 1887.*

In another of Hattie's versions of events, she admitted she killed Harlan "in the heat of passion" when she learned he was a married man. She claimed she did not mean to kill him, but aimed a pistol at him to demand that he divorce his wife and make good his promise of marriage. The story changed as it was told and retold. At one point, recounting two different versions of events, she asked one of Darcy's officers his opinion as to which narrative to offer up at trial, inquiring of him, "Now Jeffries, which one is the most likely to tell effectively in court?"[2]

At her arraignment Hattie provided yet another iteration of the incident. She claimed that as she and Harlan sat in the buggy in a eucalyptus grove on the outskirts of the city, she was so devastated upon learning that he was a married man that she drew a pistol to kill herself. She said that as he grabbed for it the gun discharged accidentally. This version introduced two accomplices who aided her in disposing of the body, Hattie's sister Minnie and Minnie's lover, Willie Witts. Witts procured a wagon in which to transport Harlan's remains, then followed the sisters in the buggy to the abandoned Compton property. There they dragged the body into the barn, doused it with kerosene and set it ablaze. So Harlan's death was a tragic accident, she insisted, not murder.

By the time Hattie stood trial in Los Angeles Superior Court in April, 1888, her lawyers had concocted an even more sympathetic version of the circumstances surrounding Harlan's death. G. Wiley Wells and C. C. Stephens sought to articulate a narrative credible enough to exonerate Hattie in the courtroom and redeem her in the court of public opinion. As they told it, on the night he died, Harlan and Hattie took a buggy ride to the deserted Compton ranch. There, the new account revealed, the dentist attempted to rape her. Defense counsel claimed that "in her despair over her disgrace she drew a pistol to shoot herself." When Harlan grabbed for it, it discharged, inflicting the fatal wound. Hattie then accidentally set fire to the barn when she lit a match to see Harlan's body in the darkness and dropped it in the straw.

This storyline was directly at odds with the confession Hattie had made to Chief Darcy and his officers. But Hattie's lawyers concocted details with which to discount that damning information. They insisted that Hattie's incriminating testimony was coerced, and that Darcy threatened to rape her if she did not admit guilt. It was a charge designed specifically to throw the police investigation into complete disarray. Hattie's tale of sexual assault became a key narrative device, rendering her the innocent victim of male aggression, guaranteed to elicit the public's pity. And so, as the case went to trial, Hattie's image had been fully rehabilitated in the minds of many, Harlan was dismissed as a scoundrel who deserved his fate, and Chief Darcy emerged as the real villain in the drama.

Still, there were conflicting images of Hattie Woolsteen to be grappled with. To some who knew her, Hattie was bold, fearless, a woman who "wouldn't whimper if the whole world was against her." To others, she was the frail victim of male aggression, in need of sympathy and protection. Harlan apparently believed her to be quite wealthy, "the daughter of a cattle king." He claimed he was transacting real estate purchases on her behalf; that she had plenty of money and he "could get all he wanted of it."[3] When she arrived in Los Angeles, Hattie crafted a personal narrative that suggested a genteel upbringing and social respectability, claiming to be supported by regular infusions of cash from wealthy relatives. She also indicated that she planned on becoming a teacher, reinforcing that image of middle-class respectability.

In fact, Hattie was the oldest child of a bricklayer from Peoria, Illinois. She and her sister, Minnie, departed their hometown for parts west after they stole a watch. Their father paid for the watch and hustled them out of town. Their travels brought them eventually to Los Angeles in the summer of 1887 where they briefly worked as maids before moving to a downtown boarding house and the company of a large number of gentlemen callers, one of whom was Doc Harlan. So many men visited the sisters' room at the house on Fort Street (now Broadway) that their landlady, irritated, raised their rent.[4]

The Hattie Woolsteen who first came to the public's notice through the press following her arrest was bold and assertive. But as she stood accused of murder, she retreated into gendered conformity, altering her persona to reflect the image that society expected. At her trial she dressed modestly and stylishly in dark colors, her face obscured behind a heavy veil. More tellingly, she wore her hair in a long braid draped over her shoulder that hung to her waist, a deliberate and artful piece of imagery, meant to evoke the innocence of youth. During the nineteenth century, only girls wore their hair in braids. Women wore their hair pulled up high on their heads, off their shoulders and away from their faces. A girl put her hair up for the first time in her mid-teens as a rite of passage from childhood to adulthood. With her hair down, Hattie presented herself as a child, in need of support and sympathy.

If Hattie was to be rehabilitated in the public's mind she had to be reimagined as a victim. And someone had to play the part of villain. That fell to the chief of police. It was Patrick Darcy's dogged pursuit of the case against her that damned him in the eyes of the public. Resentment against him allowed for his complete vilification. The public demanded Hattie's innocence, and his refusal to let the matter go (he knew, after all, what she had confessed to him and his officers) led to his downfall. If gender convention was to remain unchallenged, then Hattie must be innocent. A guilty verdict would demand a reappraisal of society's firmly held beliefs about gender, that nature had made the sexes completely distinct. Hattie branded a murderer meant that she must possess a masculine character. And if she had manly traits, other women might also, and therefore perhaps men and women were not completely distinct after all. To Victorian society, that notion was profoundly unsettling. The public demanded to be shielded from such a forced reappraisal. The stakes were high, and Darcy and justice lost.

Darcy was decried as either hyper-masculine or emasculated, both images at odds with his reputation before the death. He had been regarded as "a firm, courageous man and an experienced officer." But his refusal to allow a more palatable narrative to be told about Doc Harlan's death made him a transgressor against public opinion and therefore an easy target. Someone had to take the fall. If Hattie's confession was to be dismissed, those who heard it must be discredited. During Darcy's testimony at her trial, Hattie's lawyers casually demeaned him by asking "did you ever follow an honest occupation before you were Chief of Police?" A letter from a reader to the *Los Angeles Times* illustrated the public's condemnation: "The outrageous brutality of the ex-Chief of Police . . . as reported in THE TIMES, is a disgrace . . . and should be severely punished."[5] The campaign to demonize those who investigated the case began with the chief, then moved to his officers who, one by one, were branded as criminals, incompetents, and fools.

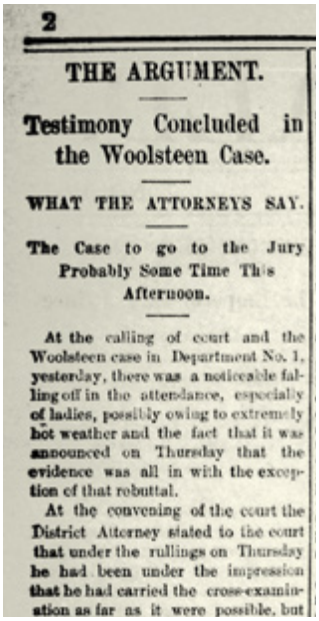
The press led the charge. The reporter's role in the nineteenth century was as much to entertain as to present the facts. Los Angeles boasted four daily newspapers in the 1880s, the *Times,* the *Herald,* the *Tribune* and the *Evening Express,* and all of them covered the story of the body in the barn extensively. It had all the ingredients newspapermen could desire: mystery, violent crime, and illicit sex. The case allowed reporters ample opportunity to embellish, speculate, and instruct readers how they should think about the crime, the trial and its outcome: namely, that a woman could not possibly be capable of wanton violence. The press launched an aggressive assault on Darcy's character; for Hattie to be the victim, he had to be portrayed as the villain.

The legal system abetted public opinion. During the nineteenth century the law was a malleable thing, often bowing to community sentiment. The criminal justice system pitted the letter of the law against the public's expectations, ultimately allowing for the outcome the community desired.[6] Hattie's lawyers certainly understood that. As they questioned prospective jurors, her defense team asked whether homicide was justifiable in the defense of a woman's honor. Each answered in the affirmative, expressing the view that, as one stated, such defense was "the first law of nature."[7]

Hattie's counsel crafted a narrative that would resonate with the public; one that would gratify social sensibilities in spite of the facts. They knew that the case against her was also a case against Victorian beliefs about gender and character. Middle class values and ideals themselves were at stake. Following Hattie's arrest a member of the local Woman's Suffrage Club wrote a letter to the *Times* in support of the defendant. She was pleased, she said "to see a goodly number of refined, philanthropic women present at the examination, who evidently felt it right that [Hattie] should be sustained by the presence of representatives of her own sex in the terrible ordeal . . . . She is entitled to the benefit of every reasonable doubt."[8] Victorian discernment relied on "truths" and an impregnable gender divide was one of those. The public was determined to

cling to the cultural conviction that a woman, by virtue of her gender, could not possibly possess the agency to commit murder. Hattie's lawyers consciously groomed her to play the part of sympathetic defendant. Her confession was ultimately deemed inadmissible because it was made to law enforcement officers without a lawyer present. For reasons not made clear, the prosecution did not present potentially damning testimony at trial, including other injuries to Harlan's body or the fire that destroyed the barn.

The story told in court during the 11-day trial fit neatly within the bounds of gender convention, that Hattie shot Harlan accidentally when she brandished a pistol as he attempted to rape her. His fate was therefore well deserved. During the nineteenth century, male sexual predation was regarded as particularly dangerous to an orderly society, and it was feared to be on the rise. As a result of that anxiety, the so-called unwritten law was often deployed to exonerate a man accused of murder committed to avenge a woman's honor. In fact, the press briefly reported a fictitious account that insisted the true killer was Hattie's cousin who traveled to Los Angeles to avenge her.[9] Manly virtue required an aggressive response to any assault on womanly virtue. Juries routinely acquitted men of killing the seducers of their wives, daughters or sisters, believing that their actions were justified. Manliness called for the protection of female purity by any means.[10]



2

THE ARGUMENT.

Testimony Concluded in the Woolsteen Case.

WHAT THE ATTORNEYS SAY.

The Case to go to the Jury Probably Some Time This Afternoon.

At the calling of court and the Woolsteen case in Department No. 1, yesterday, there was a noticeable falling off in the attendance, especially of ladies, possibly owing to extremely hot weather and the fact that it was announced on Thursday that the evidence was all in with the exception of that rebuttal.

At the convening of the court the District Attorney stated to the court that under the rullings on Thursday he had been under the impression that he had carried the cross-examination as far as it were possible, but

Los Angeles Herald, *Saturday Morning, April 14, 1888.*

But what was regarded as an act of chivalry when undertaken by a man was deemed criminality of the most unsettling sort when the assailant was a woman. The public balked at the notion of a woman acting on her own behalf to redress her grievances and restore her honor through violence. In light of that anxiety, therefore, Hattie's narrative did not imagine her actively avenging herself. Rather, she was simply the victim of circumstances she could not control.

The all-male jury (women were barred from serving on juries until the twentieth century) deliberating Hattie Woolsteen's fate understood that in certain respects truth is irrelevant. The jurors considered the competing versions of the facts presented at Hattie's trial, that she was either the aggressor or the victim of sexual assault and killed Harlan in self-defense, and arrived at a verdict in line with cultural convention. The jurors looked beyond the law and weighed the evidence against societal expectations and values. The jurors applied community norms to their judgment, and those norms insisted that a woman could not be guilty of premeditated murder. The men tasked with deciding Hattie's fate employed jury nullification, setting aside the evidence to render the verdict that they desired and that the public expected.

The jurors returned to the packed courtroom just over 10 minutes after they left, and declared Hattie Woolsteen not guilty. The room erupted in enthusiastic applause. Spectators lined up to shake Hattie's hand. A large crowd gathered in the street outside cheered.

Ultimately it did not matter who killed Doc Harlan or who the real Hattie Woolsteen was, or for that matter who was the real Charles Harlan, or Patrick Darcy. Hattie became a stock character in a Victorian melodrama, telling us more about the audience and its values than providing clarity about the circumstances surrounding Charles Harlan's death. Hattie Woolsteen's trial for his murder threatened to upend Victorian gender roles that her acquittal and social redemption at least temporarily restored. ✯

Endnotes

1. See Barbara Welter, "The Cult of True Womanhood, 1820–1860," 18 *Amer. Qtly* (1966): 151–74.
2. *Los Angeles Times*, Nov. 11, 1887.
3. *Id.*, Nov. 4, 1887; Apr. 7, 1888.
4. *Id.*, Apr. 10, 1888.
5. *Los Angeles Times,* Sept. 6, 1887; Apr. 8, 1888; Apr. 13, 1888 [capitalization in original].
6. See Lawrence Friedman and Robert Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870–1910.* Chapel Hill: Univ. of North Carolina Press, 1981.
7. *Los Angeles Herald,* Apr. 14, 1888.
8. *Los Angeles Times,* Nov. 16, 1887.
9. *Los Angeles Herald,* Oct. 16, 1887; *Los Angeles Times,* Oct. 18, 1887.
10. See also Robert M. Ireland, "The Libertine Must Die: Sexual Dishonor and the Unwritten Law in the Nineteenth Century United States," 23 *J. of Soc. Hist.* (Fall 1989).

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The 1937 Murder Case That Influenced Governor Newsom's Death Penalty Moratorium

BY DAN MORAIN*

Peter Pianezzi (RIGHT) *and his lawyer Nathan Freedman.*

UCLA LIBRARY SPECIAL COLLECTIONS, LOS ANGELES DAILY NEWS NEGATIVES

GOVERNOR GAVIN NEWSOM recently took a step back to an era of mob hits, a killer nicknamed Jimmy the Weasel, and a guy named Pete Pianezzi, dubbed the Bum Rap Kid.

"I was a young man learning that life story and . . . got to know Pete," Newsom said in March 2019, as he announced the reprieves of 737 condemned inmates. "I also had the opportunity in that spirit to start thinking and reflect upon the death penalty."

By the time young Newsom met Pianezzi, the "Kid" was an elderly denizen of North Beach in San Francisco, one with quite a backstory.

He had straightened himself out and worked his way up to become the *San Francisco Examiner's* circulation manager. But in the 1930s, Pianezzi was part of a crew that robbed banks in Los Angeles.

In October 1937, two gunmen walked into Roost Cafe in Los Angeles.[1] One shot and killed Les Bruneman, a former bootlegger who had run gambling operations in Redondo Beach. The triggerman killed a restaurant worker who had run outside apparently to get the hitmen's license plate.

Police arrested Pianezzi in December 1939, and he was tried and convicted of double homicide. He might have landed on death row except a single juror held out on the death penalty. An L.A. newspaper came to believe that he was wrongly convicted and dubbed him the Bum Rap Kid. But he was sentenced to an indeterminate life term for the killings and for an unrelated bank robbery.[2]

He ended up serving a 13-year prison term, was paroled from Folsom Prison in 1953, and settled in San Francisco where he met Newsom's father, California Court of Appeal Justice William Newsom — who died in December 2018, shortly before his son was sworn in as governor.

"I always heard that he was framed," Justice Newsom recalled in an oral history. "And so I worked on the case outside the court system, and I determined on my own that he had, in fact, been framed."[3]

Justice Newsom's father (the governor's grandfather) similarly became convinced of Pianezzi's innocence of murder and had worked to get him paroled.

"'I was no angel, Bill, but I never killed anybody in my life,'" Justice Newsom recalled his friend saying. Meanwhile, two *San Diego Union* reporters, the late John Sandefer and his partner Carl Cannon, broke the story that Jimmy "The Weasel" Frantianno, a Mafia hitman who had flipped in 1977, told the FBI the real story of Bruneman's murder.

At the direction of L.A. mob boss Jack Dragna, a San Diego mobster named Frank "The Bomp" Bompensiero watched the door, while Leo "The Lips" Moceri shot Bruneman eight times.

Realizing it was necessary to present the question to the Supreme Court, Newsom said he "persuaded the majority of the Supreme Court to . . . give[] permission to grant a pardon to Pianezzi." And so, in 1981,

Justice William Newsom fought to exonerate Pete Pianezzi.

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Newsom turned to a friend, Quentin Kopp, then on the San Francisco Board of Supervisors and later a California state senator and Superior Court judge, to present Pianezzi's request for a pardon to then Gov. Jerry Brown.

"I don't remember him ever showing bitterness," Kopp said of Pianezzi. "He was just another one of the boys in North Beach."

Brown granted the pardon[4] in 1981, presenting Justice Newsom and Pianezzi with the certificate at North Beach Restaurant. Pianezzi was grateful, though he lamented that his wife didn't live long enough to see the day when he was fully cleared of murder.

"The guy got evidence that he is innocent," Jerry Brown told me recently. "Why wouldn't you pardon him? If you don't pardon him, you're doing an injustice."

San Francisco Chronicle columnist Herb Caen recorded Pianezzi's death in 1992 at age 90 with an item about the memorial at the Washington Square Bar & Grill, where Justice Newsom would be presiding over "bibulous ceremonies."

On March 13, Gov. Newsom gathered legislators and reporters on the second floor of the Capitol, and spoke in personal terms about his father and grandfather's quest to exonerate Pianezzi, and how people can be wrongly convicted.

"This is about who I am as a human being. This is about what I can or cannot do — to me this was the right thing to do," he said. ✯

Endnotes

1. Cecilia Rasmussen, "Rampart Site was a Noir Landmark," *Los Angeles Times*, Sept. 26, 1999, *https://www.latimes.com/archives/la-xpm-1999-sep-26-me-14440-story.html*.

2. *People v. Pianezzi* (1940) 42 Cal.2d 265.

3. Justice William Newsom, Video Interview Transcript, California Appellate Court Legacy Project, *https://www.courts.ca.gov/documents/Newsom_Jr_William_A_6048.pdf*.

4. "Gov. Edmund G. Brown, Jr., Tuesday pardoned Peter Pianezzi," UPI, Oct. 27, 1981, *https://www.upi.com/Archives/1981/10/27/Gov-Edmund-G-Brown-Jr-Tuesday-pardoned-Peter-Pianezzi/9019373006800/*.

Introducing Justice Joshua Groban

Continued from page 4

With the exception of capital punishment cases, review by the Supreme Court is a matter of discretion, and that discretion is exercised on rare occasions. Of the nearly 7,000 petitions for review and requests for writ relief filed each year, the Court grants full review (and eventually issues an opinion) in roughly 60–70 cases. The Court's review-granting function is central to its role in deciding important legal questions of statewide concern and ensuring that the law is applied uniformly throughout the state. I wanted to explore this process a bit further with Justice Groban.

The criminal and civil central staffs prepare a detailed "conference memorandum" for every petition, which summarizes the pertinent facts and procedural posture of the case, evaluates the merits of the underlying issues, and assigns the case to the Court's internal "A" or "B" list.[1] Cases on the A list are those that staff have deemed worthy of warranting formal discussion at the weekly conference. The remaining B-list cases are not discussed at the conference unless a justice has so requested.

Every week, the five attorneys on Justice Groban's staff divvy up the conference memoranda and offer input and analysis. Groban reviews every conference memorandum, any supporting materials, and his staff's analysis, and occasionally will ask for further research on a particular issue. The undertaking is substantial, he noted, adding "I could spend the entire week working on the petition cases alone."

The weekly petition conference obeys longstanding formality, with the justices taking turns to discuss each case by order of seniority (with the exception of the Chief Justice, who gets the last word). Justice Groban finds this process edifying. "Generally, it is an opportunity for the justices to share how they view threshold questions, the role of our Court, standard of review, deference, these kinds of overriding issues that are implicated every week. Because petitions by their nature are designed to look at issues of statewide importance or issues where there has been a conflict between the courts of appeal, the conference is a helpful tool for identifying impactful cases and the state of the law."

Justice Groban shared one other helpful observation about the Supreme Court's processes. Much of the communication between the justices occurs through detailed memoranda and other written exchanges, particularly in the "preliminary response" to an authoring justice's pre-argument calendar memo (akin to a draft opinion). In Justice Groban's view, "having to memorialize your thoughts in writing requires a more detailed and methodical approach to cases. It allows us, in a systematic way, to see each other's thought processes, as one justice builds upon the response of the previous justice."

I look forward to reading Justice Groban's opinions and observing how he will shape the law in the years to come. ✯

Endnote

1. For a more complete description of these and related procedures, see the Court's "Internal Operating Practices and Procedures" at *https://www.courts.ca.gov/documents/The_Supreme_Court_of_California_Booklet.pdf*, pages 25–51.

Postcard showing the front of Los Angeles County Courthouse from the corner of Grand and First Streets. Caption reads: "The new county courthouse is located at the Civic Center and is one of the finest administrative buildings found anywhere. It has been planned for the enormous expansion and increase in population for Los Angeles County."

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Making the Stanley Mosk Courthouse

BY MICHAEL L. STERN*

More than 60 years have passed since the dedication of Los Angeles' main courthouse by United States Supreme Court Justice Earl Warren on October 31, 1958. The construction of this monumental structure with its 100 courtrooms took 25 years of diligent political action and planning by civic and judicial leaders. Although no public ceremony marked this anniversary, the occasion prompts us to revisit the rich history of this landmark building and its predecessors.

When the doors of Los Angeles' fifth principal courthouse opened six decades ago, it was heralded as the "Dream Courthouse" and the "Courthouse to Last 250 Years." In 2002, the County Courthouse was renamed as the Stanley Mosk Courthouse in honor of former Superior Court and California Supreme Court Associate Justice Mosk, the longest-serving justice in the Court's history (1964–2001). It has fulfilled its destiny as a worthy successor to the Los Angeles courthouses that preceded it.

The first Los Angeles courthouse was the humble adobe home of County Judge Agustin Olvera, a former Mexican official who was elected in 1850 by 377 of his new fellow citizens soon after California attained statehood. It was located on the plaza adjacent to the mission church La Iglesia de Nuestra Senora la Reina de Los Angeles, founded in 1776. With virtually no legal training and limited English, Judge Olvera used an interpreter when he presided over cases under the bilingual first California Constitution.

From 1852 to 1861, court was convened in various downtown buildings, including rented space in the judiciary's second main home in the elegant Bella Union Hotel. Standing at 314 North Main Street, it was the best hostelry in town. But even in those rough and tumble times, it was recognized that dignified legal proceedings ought not to be conducted within shouting distance of its boisterous barroom.

By the time Lincoln was elected president in 1860, county officials were searching for a more suitable courthouse location. They finally settled on the second floor of the Market House, a two-story building near the site of the current City Hall with a market and outdoor stalls on the first floor. Up to that time, the

* Judge Michael L. Stern has presided in a civil trial court in the Mosk Courthouse since 2014. A version of this essay first appeared in the *Los Angeles Daily Journal* on Oct. 31, 2018.

The Clocktower Courthouse

The Red Sandstone Courthouse, c. 1892

second floor had been a multi-purpose theater offering bear baitings, cock fights and an occasional circus. Courtrooms and judges' chambers were constructed for what became the third main courthouse, which served as home of Los Angeles' judiciary for the next 30 years (1861–1891). One must wonder if any lingering echoes of past amusements could be heard when Los Angeles judicial legends such as Judges Ignacio Sepulveda and H. K. S. O'Melveny raised their gavels in this converted arena.

By 1880, this building began to be called the "Clocktower Courthouse" when a gigantic four-faced clock with 11-foot hands and large Roman numerals was installed in the prominent central tower of the Market House. The huge clock became a principal landmark of that era and would play a part in Los Angeles courthouse architecture to the present day.

But the courtrooms of the Clocktower Courthouse were small and cramped, prompting many waiting for their cases to be heard to congregate at the downstairs market stalls. When someone was needed in court, the bailiffs poked their heads out the courtroom windows and shouted three times for those whom they wanted, always appending "esquire" to the attorneys' names. This call system was basic, but it served its purpose until 1891. By then, the Clocktower Courthouse had outlived its usefulness.

Los Angeles' booming economy and exploding population in the late nineteenth century stimulated constant discussion about constructing a grand courthouse that met expanding judicial needs, and both satisfied and reflected civic pride. In courthouse planning that began in the mid-1880s, it was decided that the best location was Pancake Hill, a slope then occupied by Los Angeles High School at Temple and Broadway where the Foltz Criminal Courts Building now stands. By 1886, the school buildings had been moved to nearby Fort Moore Hill, a former cemetery where the school headquarters and later a high school have been located ever since. In April 1888, the cornerstone for a fourth main courthouse was laid.

The magnificent new multi-story courthouse opened in August 1891 with great celebration. Locals proudly boasted that it was the largest and most beautiful courthouse west of the Mississippi. An outstanding example of Romanesque Revival architecture whose exterior was clothed in distinctive red stone, it was nicknamed as the "Red Sandstone" courthouse. Notice the cathedral-like massive arches, Victorian gables, quaint spires and ornamental stonework of this grandiose edifice.

Lending continuity, the huge clock face of the Clocktower Courthouse was removed and reinstalled on the imposing central tower of the Red Sandstone courthouse. Efforts to replace the weight-driven pendulum clockworks with an electric mechanism failed, however, so the decade-old weight-driven system was reconnected to the original clock face with its impressive numerals and 11-foot hands.

The state-of-the-art Red Sandstone was equipped with new fangled inside and outside bird cage elevators (the type still operating in the 1893 Bradbury Building at Third and South Broadway). The windowed elevator tower became a tourist attraction, nicknamed the "honeymoon tower" because couples ascended it to the third-floor marriage license office. The lift was said to be slow enough to allow for last-minute reconsideration.

The Red Sandstone was the scene of many important legal proceedings in its heyday, beginning in the Gay Nineties. But even this majestic temple of justice began to suffer from wear and tear as the Roaring Twenties came to a close. In March 1930, the tired elevators ceased working after four decades of service. Even the judges had to trudge up long flights of stairs to mete out justice.

In 1931, an early morning earthquake caused large chunks of the unreinforced brick tower to come crashing down into a judge's chambers. The tower was declared unsafe and ordered removed. The final coup de grace to the proud old Red Sandstone Courthouse came at 5:54 p.m. on March 10, 1933, when the tremendous Long Beach quake struck. The beloved castle-like courthouse was irreparably damaged and the courts were forced to abandon it. Angelenos mourned when this majestic palace of justice was razed in 1936.

For the next 25 years, the Los Angeles courts were scattered around the civic center area in temporary courtrooms at the Hall of Justice, City Hall and wherever space could be found. An unattractive complex of low-lying wooden bungalows, dubiously called the Plaza de la Justicia, was constructed on the Red Sandstone site opposite City Hall. But these makeshift courtrooms were an unsatisfactory solution for a judicial housing crisis. For instance, the build-out at the old Brunswig Building (1883), now the L.A. Plaza on Main across from Olvera Street, was so inadequate that Superior Court Judge Arthur Alarcon once overheard an attorney instructing his client how to perjure himself through the other end of a heating duct that led to his chambers.

The Los Angeles Board of Supervisors and local leaders were well aware that decisive action was required to construct a new courthouse befitting Los Angeles and meeting the constantly growing judicial demands. By 1936, the first of a series of suggested designs to house the Superior and Municipal Courts was presented.

However, in the heart of the Great Depression, it was one thing to propose new public works and another to get them off the ground. The county coffers were empty and funds for a new courthouse could not compete with more dire needs. Multiple attempts to borrow federal funds failed. Then came World War II and it was inconceivable to initiate courthouse construction with building materials in short supply. Ballot measures to fund courthouse construction bonds were rejected by cost-conscious voters in 1936 and 1946.

Nonetheless, the Board of Supervisors remained determined to provide a courthouse that was adequate to serve the public's legal needs. Unable to convince the electorate to authorize court bonds, the Board ingeniously set aside at least $2 million a year to build a courthouse on a "pay-as-you-go" basis. As this fund gradually grew, Board members engaged in a tug-of-war about whether to build at First and Hill or two blocks up at Temple, where the cathedral now stands. The former site finally won out, especially as it was favored by a legal community that wanted the courthouse closer to the Spring Street corridor where many law offices were then located.

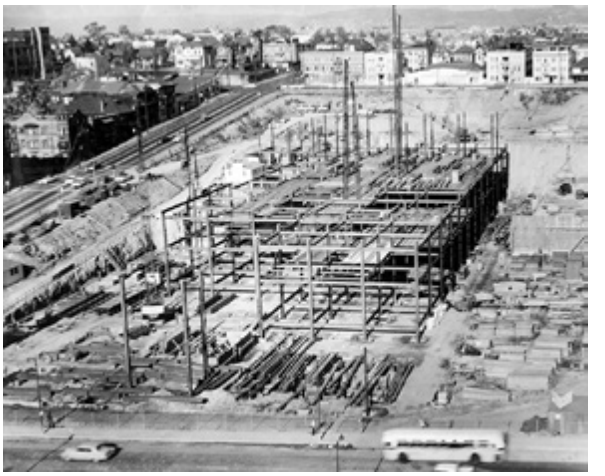
With a courthouse location decided and funding in place, the Board turned to selecting an appropriate design and architects. Proposed designs ranged from skyscraper configurations to a series of "split-level" structures on terraces cascading downhill from Grand to Hill astride First Street.

The site itself was a major challenge for the architects. It was an irregular steep hill that, until 1943, had been a summit to which a railway car — like Angel's Flight at Third and Hill — mounted from Broadway near City Hall. A roadway tunnel ran through a part of the hill, northerly on Hill to Temple starting at about the present location of Grand Park. Nevertheless, an advantage of this site was that there were few buildings on this inhospitable rock and dirt mound.

After intense wrangling about construction costs, the supervisors approved the preliminary design of the Mosk Courthouse as it exists today in 1954 based upon a submission from an architectural team headed by the award-winning African-American architect Paul Williams. During his long career, Williams worked on the designs of many public and private buildings in Los Angeles, including the Shrine Auditorium, the LAX theme building, First A.M.E. Church and homes for Hollywood stars like Lon Chaney and Lucille Ball.

On March 26, 1954, United States Chief Justice Earl Warren lowered a shovel at First and Olive to break ground for an ambitious $24 million project. Fewer than two months later, on May 17, 1954, he would author the Supreme Court's unanimous decision in *Brown v. Board of Education* that changed America forever.

Once the dignitaries congratulated themselves on getting the project off the ground after two decades of effort, the actual construction presented significant challenges. These included hollowing out and leveling the largely vacant site by excavating 460,000 cubic yards of earth (enough to fill 12 football fields to the top of the goal posts); carting in 25 railroad cars of Vermont marble; delivering 50 railroad cars of Texas granite for



Courthouse construction site, 1956.

PHOTOS PP. 16–17: WATER AND POWER ASSOCIATES

the building facing (nearly the weight of three Navy destroyers); and crafting enough white oak to panel 100 Superior Court and Municipal Court rooms in two side-by-side buildings, separated by a small, almost imperceptible gap.

By early fall 1958, Los Angeles's fifth county courthouse was nearing occupancy by judges and staff who had been scattered throughout downtown in improvised courtrooms. The modern edifice included the latest in engineering and technological innovations including automatic elevators. Although automation made the "starter" person (to ensure that elevator doors properly opened and closed) superfluous, that employee was allowed to stay a few years more to complete his service for retirement. Escalators, another first, would also whisk passengers between floors.

The up-to-date courthouse offered a bit of old mixed with the new to lend continuity. The historic 11-foot hands and numerals from the Clocktower and Red Sandstone clock were retrieved from storage and installed on the new courthouse tower. A bronze cornerstone inscribed "Los Angeles County Courthouse 1958," surrounded by a carved frieze made of red stone from the Red Sandstone courthouse, was placed at the Hill Street entrance. Inside, is a copper box filled with historic documents, including newspapers of the day and a Los Angeles telephone directory.

Still, there were some detractors. A few complained that the tiled corridors, running the length of two blocks, were too long to be easily walked. A court reporter made fun of the slick hallways by roller skating up and down from one end to the other. The judges were ridiculed for insisting on the "extravagant" expenditure of $1,200 for each courtroom's drinking fountain. The county supervisors continued bickering over the landscaping budget, which resulted in the ground coverings for opening day being green-painted wood chips and sawdust rather than grass.

Some also commented that the stark, ultramodern interior of the courthouse lacked character due to a paucity of decoration or artwork. In fact, the donation of a magnificent sculpture of Abraham Lincoln from Beverly Hills neurosurgeon and sculptor Dr. Emil Seletz was blocked on the ground that the generous doctor's gift presented a conflict of interest because he frequently appeared as an expert witness. Fortunately, this controversy was later resolved and the solemn bust of the young Lincoln is displayed in the Hill Street lobby today.

On the eve of the formal dedication ceremony, a member of the Board of Supervisors objected to hanging a portrait of Chief Justice Warren in the new courthouse, reportedly because of his opinion in *Brown*. This too was ironed out when the supervisor said that he "didn't mean" anything derogatory.[1] The portrait was hung, but it was later transferred to the California Supreme Court, where it hangs today in the public entry of San Francisco's Earl Warren Building, which is part of the Ronald M. George State Office Complex.

Los Angeles County Courthouse dedication ceremony.

LOS ANGELES PUBLIC LIBRARY, HERALD-EXAMINER COLLECTION

At last, the dedication day, October 31, 1958, arrived. In a ceremony marked by pomp and circumstance, festive music performed by the county band and attended by some 3,000 gathered on Hill Street in front of the courthouse,[2] Chief Justice Earl Warren proclaimed a commitment to justice to be administered in the largest courthouse of the land:

> This beautiful building, spacious today and most modern in its appointments, will soon be outmoded and as much a relic as was the little old sandstone courthouse at Broadway and Temple Street when it was abandoned in 1933. . . . We are, of course, proud of it as a building, but our most fervent hopes for the future . . . must rest largely on the standards of justice maintained in it. . . . The spirit and meaning of our courts do not lie in the material settings we provide, but in the living principles which they enshrine.[3]

Chief Justice Warren's eloquent remarks are as vital on this diamond jubilee anniversary as when delivered on the steps of the Mosk Courthouse more than 60 years ago. ✯

Endnotes

1. "Courthouse Stirs Up Dedication Squabble," *Los Angeles Mirror News*, Oct. 30, 1958.

2. "Bench, Bar, Community Leaders Dedicate $23,000,000 Court," *Metropolitan News,* Nov. 3, 1958, p. 1.

3. *Ibid.*

Editor's note: For more on the Mosk Courthouse and architect Paul Williams, see "A House for Equal Justice" in CSCHS Newsletter, *Spring/Summer 2014, https://www.cschs.org/wp-content/uploads/2014/05/2014-Spring-Paul-Williams.pdf.*

Celebrating Selma

Pillar of the California Supreme Court Historical Society

by kathryn mickle werdegar*

To all who know her, Selma Moidel Smith is just Selma. Or perhaps "our Selma" or "the famous Selma." And multitudes know her. Why? Because Selma is one of the most ubiquitous, treasured, talented, tireless and accomplished attorneys any of us could ever know. Admitted to the Bar January 5, 1943, she has been that way for a very long time — I'll venture longer than most any other attorney in the state, possibly the country.

selma moidel smith

We have infinite reasons to celebrate Selma. I do so now on the occasion of her 100th birthday, which occurred on April 3. Yes, 100 years — one splendid century.

Where might you find Selma these days? Certainly not reclining on the divan in her pleasant home. Maybe attending the Plácido Domingo concert at the Hollywood Bowl, accompanied on that occasion by her son, a Los Angeles architect. Perhaps attending the meeting of the National Association of Women Lawyers (NAWL) in La Jolla in February where she introduced Chief Justice Tani Cantil-Sakauye, Justice Carol Corrigan and myself for a panel on the women of the California Supreme Court. Perhaps at Stanford University for the luncheon recognizing the women in the ABA Women Trailblazers in the Law Oral History Project. Or maybe accepting an award that was created just for her, from the Fellows of the American Bar Foundation. The Fellows had to specially create the award for Selma because none of their existing awards did her justice.

But if you seriously want to find Selma, you would do well to look for her at a board meeting of the California Supreme Court Historical Society. Since being invited to join the board some 18 years ago, Selma has helped transform our low-key organization devoted to the legal history of California into a premier powerhouse of state legal history, recognized nationally for its superb Journal, *California Legal History*, and lively informative Newsletter, both publications elevated and for many years edited by — yes, Selma. She now devotes herself exclusively to the annual Journal, a substantive publication exploring and preserving the legal history of California, including procuring the oral histories of the justices of our Supreme Court. Most recently, the Journal has published oral histories of Justice Joe Grodin and myself. In the near future we hope to see those of others, including that of former Chief Justice Malcolm M. Lucas. In between Journal duties, Selma initiated and continues to oversee the Historical Society's annual writing competition for law students to explore subjects relating to the history of California law. It is of course the Selma Moidel Smith Writing Competition, renamed for Selma at her 95th birthday celebration (*https://www.cschs.org/programs/student-writings*). But the Society doesn't have an exclusive on that. The National Association of Women Lawyers has created its own Selma Moidel Smith Law Student Writing Competition, devoted specifically to women and the law.

This year, in recognition of her extraordinary contributions to the Historical Society, the Research Travel Grant in California Legal History was established in Selma's honor. The grant funds will be used to defray the travel and other expenses of graduate students researching California legal history for purposes of preparing an article or other paper and who need to travel to access relevant archival materials. For more information on how to apply, see p. 20.

Law, it must be noted, is not Selma's only talent and devotion. A gifted composer and musician and an erstwhile flamenco dancer fluent in Spanish, she is a woman of multiple talents. Indeed, her music will soon be performed at Walt Disney Concert Hall in Los Angeles, and not for the first time. When Selma was introduced at the NAWL meeting in February, we heard a brief recording of Selma playing some of her piano music, waltzes and Latin tangos, preludes and nocturnes. As the attendees applauded, to the delight and, might I say, surprise of all present, Selma rose from her chair on the dais and proceeded to dance gracefully across the stage in rhythm to her music.

* Kathryn Mickle Werdegar is associate justice of the California Supreme Court (Ret.). A version of this article appeared in the *Daily Journal*, March 12, 2019.

Selma's music will be performed by the Los Angeles Lawyers Philharmonic at Disney Hall on Saturday evening, June 29.

Feliz cumpleaños, Selma, and congratulations on this splendid birthday. Heartfelt thanks from all of us who have had the privilege to know you, to work with you and to experience your energy and vision, your enthusiasm and leadership, all to the immeasurable benefit of our Historical Society and every organization you have ever been a part of. We celebrate you. ✯

California Supreme Court Historical Society

Research Travel Grant in California Legal History

The California Supreme Court Historical Society has established a Research Travel Grant, funded by the generosity of California Supreme Court Justice Kathryn Mickle Werdegar (Ret.) and David M. Werdegar, M.D., in honor of Selma Moidel Smith, editor-in-chief of *California Legal History*.

Pursuant to this grant, the Society will defray the expenses of graduate students and law students at accredited U.S. universities and law schools who are researching California legal history for purposes of preparing an article or other paper on that subject and need to travel to access archival materials related thereto. It is expected that most travel will be to or within California, but exceptions will be made in the case of relevant archival materials in other locations. The Society will award individual grants to be used to defray the cost of travel and/or accommodation in amounts typically no more than $700 per project, with a maximum of $1,000 in special cases.

Grants will be awarded on a rolling basis until such time as the fund for the grant is exhausted. Grant applications must include the following information:

- A brief description of the project that necessitates the travel, identifying the specific archival collection or collections that the grantee wishes to access;
- An itemized estimate of the expenses associated with the research trip, which reflect economical choices of travel and accommodation;
- A statement whether the applicant intends to enter the resulting paper in the Society's Selma Moidel Smith Student Writing Competition in California Legal History;
- A copy of the applicant's curriculum vitae; and
- A brief letter of recommendation from a person familiar with the applicant's scholarly work.

Applicants should send materials by e-mail or conventional mail to: Professor Reuel Schiller, University of California, Hastings College of the Law, 200 McAllister Street, San Francisco, CA 94706; *schiller@uchastings.edu*.

Grant applications will be expeditiously reviewed by a three-person review committee of faculty from differing institutions and must be approved by a unanimous vote. For complete grant information, see *https://www.cschs.org/wp-content/uploads/2019/02/CSCHS-California-Legal-History-Research-Travel-Grant-121018.pdf*.

Applicants are encouraged to enter the Society's Selma Moidel Smith Student Writing Competition in California Legal History (*https://www.cschs.org/programs/student-writings*), and are also advised that publishable works resulting from this grant will be considered for inclusion in the Society's annual journal, *California Legal History*. ✯

WOULD YOU LIKE TO WRITE FOR US?

The Newsletter warmly welcomes articles on California legal history, particularly involving the California Supreme Court and the state's lower courts, the bar and the profession. We publish articles about the people, cases, and broader legal developments as they have affected our state, then and now.

Because we are a newsletter for a relatively broad audience, not an academic journal, please go easy on the legal jargon and citations. Most of our articles are in the 1,000- to 2,500-word range (although we're flexible on length), and illustrated with photographs and/or archival material (we'll handle that part). Submissions must be in Word.

Note to State Bar members: You can receive up to 12.5 hours of MCLE credit for "self-study," including time spent to research and write, as provided in the California State Bar Rules, Rule 2.83.

So please send me your ideas. And if you don't have an article in mind at the moment but would like to see your name in print, I'll happily give you an assignment.

Please query Newsletter Editor at *molly.selvin@gmail.com*. I look forward to hearing from you.

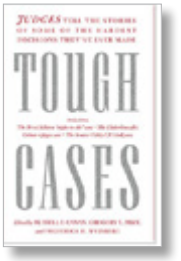
Finding Certainty and Often Solace Elusive

BY PRESIDING JUSTICE ARTHUR GILBERT*

RUSSELL CANAN, GREGORY MIZE, AND FREDERICK WEISBERG (EDITORS)

TOUGH CASES:

JUDGES TELL THE STORIES OF SOME OF THE HARDEST DECISIONS THEY'VE EVER MADE



320 pages
$16.82 (hardcover), $15.39 (Kindle)
New York: The New Press, 2018

They profoundly influence our lives. They can be found all over the world. When not fulfilling their mission, they blend in with the general populace so as to be undetectable. They are young, old, of different ethnicities, political points of view, personalities and dispositions. They are fat, lean, gregarious, cranky, loquacious or taciturn, sometimes both. Their cover is so complete that even among themselves they can rarely detect that a stranger is one of them.

But when they meet and reveal themselves, there is an immediate unspoken mutual sympathy, an instantaneous bond. They know the emotions, the trials and tribulations (pardon the cliché, yet there is no better way to say it) each has endured from time to time. Their nods of understanding, their occasional smiles, reflect the unexpressed satisfaction that comes from carrying out their special mission.

Is there a name for this cult of individuals who mingle among us and deeply affect our lives? Yes, I know them well, because I was once one of them. They are called . . . trial judges.

Certain members of this unique society now reveal their innermost feelings and secrets in *Tough Cases: Judges Tell the Stories of Some of the Hardest Decisions They've Ever Made*. Their riveting accounts of trials over which they have presided compel me to reveal what I have long suspected and suppressed for years: trial judges have the hardest and most demanding job in the judiciary. Would appreciate it if you keep this under your hat.

The existential philosophers wrote that all human beings are "condemned" to make choices. Judges have chosen a profession that demands of its members that they make reasoned choices in deciding which side prevails in litigation. The compelling chapters in *Tough Cases* reveal what many in the legal profession know but seldom articulate — judges are students who must make decisions. They rely on the law written in statutes and cases and the arguments of counsel urging the interpretation and application of the law to the facts in the case at hand. And let's add intuition and commonsense to the mix.

In *Tough Cases,* judges share their innermost feelings, their fears and doubts about how to rule. They reveal their emotions about the effect their decisions will have on litigants and the public. One thing they have learned: certainty and often solace can be elusive.

Judge George Greer in Florida explains how he arrived at his agonizing decision to terminate life support in the famous Terri Schiavo case. He weighs the omnipresent emotional conflicts, the opposing pleas of Terri's parents, and her husband, the evidence of her medical condition, application of the law, and what Terri would have wanted. How can any one human being make this judgment in light of so many competing points of view? And in the background, there are pleas of religious and political leaders from all over the world and the cacophony of the press. Solomon would understand. Judge Greer received threats and was called a terrorist and murderer by a few members of Congress. We all know how he ruled, but in so doing he raised a significant point: "As much as you read, and as well as you listen, and as hard as you think about a case, for a good judge there is always doubt."

Judge Greer tells us he is a "Southern Baptist at heart," even though the pastor of his church told him to leave the church after his decision. Whatever his personal religious and philosophical beliefs, Judge Greer was committed to one certainty — the issue in the Schiavo case "was not a religious question; it was a legal question." Judge Greer is the epitome of Socrates' ideal judge. He did his job.

Recently appointed Los Angeles Superior Court Judge Michelle M. Ahnn tells the compelling story of her transition from public defender to the bench. During her first year, seemingly routine matters were as difficult as deciding guilt or innocence, like, whom to release on bail? Many of us grappled with that in the trial court. Judge Ahnn asks herself whether a female defendant accused of domestic abuse is less of a flight risk than a similarly charged male defendant. She worries about unconscious biases. Good for her. She struck a responsive chord with me when she reveals that making decisions each day compelled her to

* Justice Arthur Gilbert is Presiding Justice of Division 6 of the California Court of Appeal, Second District and writes the "Under Submission" column for the *Daily Journal*.

avoid restaurants with large menus requiring yet more decisions. Now that her first year has passed, Judge Ahnn makes decisions more easily. But I know how she feels. I have been a judge for 45 years and still have trouble deciding which socks to wear each morning.

Judge Gregory E. Mize served as a judge of the Superior Court of the District of Columbia. He presided over a dependency case involving a mother who he concluded suffered from Munchausen Syndrome by Proxy. Because the mother's illness placed her minor daughter in danger, Judge Mize awarded custody to the father, and allowed monitored visits with the mother and daughter. The daughter fared well with therapy, but the mother did not: her illness progressed and a few years later her body was found washed ashore in the Chesapeake Bay.

Years later Judge Mize and the now-grown daughter met. She became a dental hygienist, has many friends, and lives a happy and productive life. Many judges have decided similarly wrenching dependency cases, and moved on to the next case. Judge Mize points out he has made thousands of decisions in tens of thousands of cases, yet this case still haunts him. It prompts him to think about questions that trouble many of us, "questions about our human condition and the limits of the judicial office."

Remember "Scooter" Libby? He was an assistant to President George W. Bush and at the same time chief of staff and assistant for national security affairs for Vice President Cheney. There were rumors and allegations concerning whether Iraq sought to purchase uranium from Niger. If true, they would support President Bush's desire to pursue a war against Saddam Hussein. A former ambassador, Joseph Wilson, was sent to Niger to investigate the truth of the allegations concerning the alleged transaction in Niger. He reported that the allegations were false. Shortly thereafter, Wilson's wife, Valerie Plame Wilson, was revealed to be a CIA employee with a covert position. Was this leak revenge for embarrassing the president for his contention that Saddam Hussein had weapons of mass destruction? Following another investigation, Libby was charged with obstruction of justice for lying to the FBI and a grand jury about his knowledge of Valerie Wilson's CIA employment.

Judge Reggie B. Walton was a U.S. District judge for the District of Columbia when he was randomly assigned the case. Judge Walton's account of the trial grabs the reader by the throat and doesn't let go. He points out that a seemingly routine case can be challenging. This happens when the facts have political implications, the public is "polarized" and the accused has generated notoriety. Add to that, controversial expert testimony, a defendant who does not testify, and motions implicating the federal Classified Information Procedures Act that protects unnecessary disclosure of classified information. After the jury convicted Libby of some of the charges, how does Judge Walton arrive at the appropriate sentence? Should letters from Henry Kissinger, Donald Rumsfeld, and John Bolton, to name a few well-known figures, matter? Despite the political pressures, Judge Walton did what was required of him when he took the oath of office. He assured that Libby received a fair trial and sentenced him accordingly. President Bush commuted the prison sentence. Last year the current president pardoned Libby. But that is all beside the point.

In a chapter titled "A Quiet Grief," Judge Lizbeth Gonzales recalls a case when she sat in the New York City Housing Court. A father lived with his autistic son in an apartment. They both appeared in court for the hearing in which the father complained about outstanding repairs not made to his apartment. The son's odd behavior in the courtroom prompted Judge Gonzales to call in other agencies to determine if the boy was living in a safe environment. Those agencies determined the boy was safe. Years later when Judge Gonzales was sitting in the City Civil Court, she read in the newspaper that the father had slashed the son's throat and left him to die in the bathtub. Over the years there had been hearings in family court concerning whether the father should have custody of the son.

Judge Gonzales shares with us her sorrow and regret over what later happened to the son. She points out that when the case first came to her, her jurisdiction was limited to rent and housing repairs. She recognizes that investigators and social workers are bound by protocols and legal constraints. She agonizes that she could not have done more. She points out what we all know: judges decide motions, make rulings, adjudicate trials, and do their best to ensure that justice is done. But they do not have limitless power. She still wonders if she could have done more to save the son. And she reveals that "like litigants, and lawyers, we too suffer when things go wrong." Judge Gonzales still grieves for the son. That is why people like her belong on the bench.

It is difficult to imagine the convoluted intricacies of the world-famous Elian Gonzalez case. Elian and his mother fled Cuba in a boat that capsized off the shore of Florida. The mother drowned but Elian was saved. At the time, Judge Jennifer D. Bailey was a family law judge in Miami. The case, which began as a custody matter before another judge, wound up in Judge Bailey's court when the original judge and others had to be recused. In what on the surface would be a simple case became complicated by federal law, immigration agencies, and massive public, media and political pressure. Pressure from thousands of protestors and from prominent political leaders demanding a particular outcome raised the stakes even though most had not the slightest idea of what the case was about. Judge Bailey did what was required of her. She decided the case according to the law. Federal orders to return Elian to his father controlled. She lost and gained some friends over her

decision. But she concludes by modestly refusing to take praise for resisting political pressure because that "is what judges are supposed to do."

Remember at the beginning of this review I wrote that trial judges have the most difficult job in the judiciary? I also facetiously suggested you keep it under your hat. Just in case anyone took me seriously, let us publicly praise trial judges and acknowledge their significant contribution. The engrossing narratives in *Tough Cases* remind all of us: "always seek and speak the truth." ✯

MEMBER NEWS

CSCHS Board Member Laura Kalman

BY MOLLY SELVIN*

More than a year before the bruising hearings over Brett Kavanaugh, Society Board Member and legal historian Laura Kalman published her account of how U.S. Supreme Court nominations have escalated into frenzied political battles.

Kalman's book is typical of the best historical scholarship in that the UC Santa Barbara professor persuasively applies insights from the past to the present. *The Long Reach of the Sixties: LBJ, Nixon and the Making of the Contemporary Supreme Court*, traces the politicization of judicial nominations not to Ronald Reagan's nomination of Robert Bork in 1987, as commonly believed, but much earlier — to debate over the legacy of the Warren Court that began before Chief Justice Earl Warren retired in 1969 and continues today.

Following Kavanaugh's confirmation, Kalman worries that future nominations will succeed "only when the president and the Senate are of the same party," she said in a recent telephone interview. The modern confirmation process "makes it easier to attack nominations not by attacking ideology which is difficult, but using the smokescreen of ethics or sexual misconduct," a development she called "really, really dispiriting."

Kalman earned her J.D. at UCLA and a Ph.D. in U.S. history at Yale before she joined the UC Santa Barbara faculty in 1982. When a law student, she served as a summer extern for Justice Stanley Mosk and remembers the state's longest serving Supreme Court justice as especially gracious toward her.

She and her husband Randall Garr, a professor of religious studies at UCSB, inherited her beloved childhood home in Los Angeles which they have slowly upgraded over the years. When not poring over archival material, Kalman likes to cook and garden. She considers herself a dedicated mystery reader.

The Long Reach of the Sixties, reviewed in this newsletter's Fall/Winter 2018 issue at *https://www.cschs.org/wp-content/uploads/2018/12/2018-Newsletter-Fall-Book-Review-Nominations.pdf*, is Kalman's sixth book. In earlier monographs she charted the emergence of contemporary political debates during the Ford and Carter administrations, the rise of legal realism, and the evolution of American liberalism through her biography of Abe Fortas.

Kalman's current research focuses on President Franklin Delano Roosevelt's threat, in 1937, to "pack" the U.S. Supreme Court with six additional justices, in reaction to early high court decisions invalidating New Deal programs. The project is an outgrowth of her book on the 1960s and responds to what she calls "talk in the blogosphere" about whether the Democrats should propose legislation similarly allowing the president to add justices to the Supreme Court and lower federal courts if they win the White House in 2020. "Roosevelt's idea is so widely regarded as a disaster, a solution never to be tried again," she said, "but if you look at the debate of the time, it almost worked"; at many points, if FDR had been willing to settle for two justices instead of six, he could have gotten them, she believes. Whether such a proposal is a good idea "is another matter," she added, "but I'm always interested in the uses of history."

Kalman, 64, joined the Society's board of directors in 2017. At UCSB she now holds the title of "Distinguished Professor" where she is a popular teacher known for her lively lectures and political candor.

To wit: The accusations of illegality by President Trump and some of those surrounding him substantiated in the report from special counsel Robert S. Mueller III have caused her to "really fear for our institutions."

"Nixon did hand over the tapes, he did resign" but despite those allegations, Kalman thinks it is possible Trump might refuse to leave the White House if he loses his re-election bid in 2020 and that his base would support him. "This is a terrifying, terrifying time," she added. ✯

* Molly Selvin is the CSCHS newsletter editor.

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CALIFORNIA SUPREME COURT
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TABLE OF CONTENTS

Introducing Justice Joshua Groban
GABRIEL SANCHEZ 2

Never on a Sunday
MITCHELL KEITER 5

The Death of Doc Harlan
CARA ANZILOTTI 9

The Murder Case That Influenced the Death Penalty Moratorium
DAN MORAIN 13

The Stanley Mosk Courthouse
MICHAEL L. STERN 15

Celebrating Selma
KATHRYN MICKLE WERDEGAR 19

Research Travel Grant in California Legal History 20

THE BOOKSHELF: TOUGH CASES
Finding Certainty and Often Solace Elusive
ARTHUR GILBERT 21

MEMBER NEWS
Board Member Laura Kalman
MOLLY SELVIN 23

ON THE COVER: *Chief Justice of California Tani Cantil-Sakauye and Associate Justice Joshua P. Groban at his swearing-in ceremony, Jan. 3, 2019.*

PHOTO: JUDICIAL COUNCIL OF CALIFORNIA