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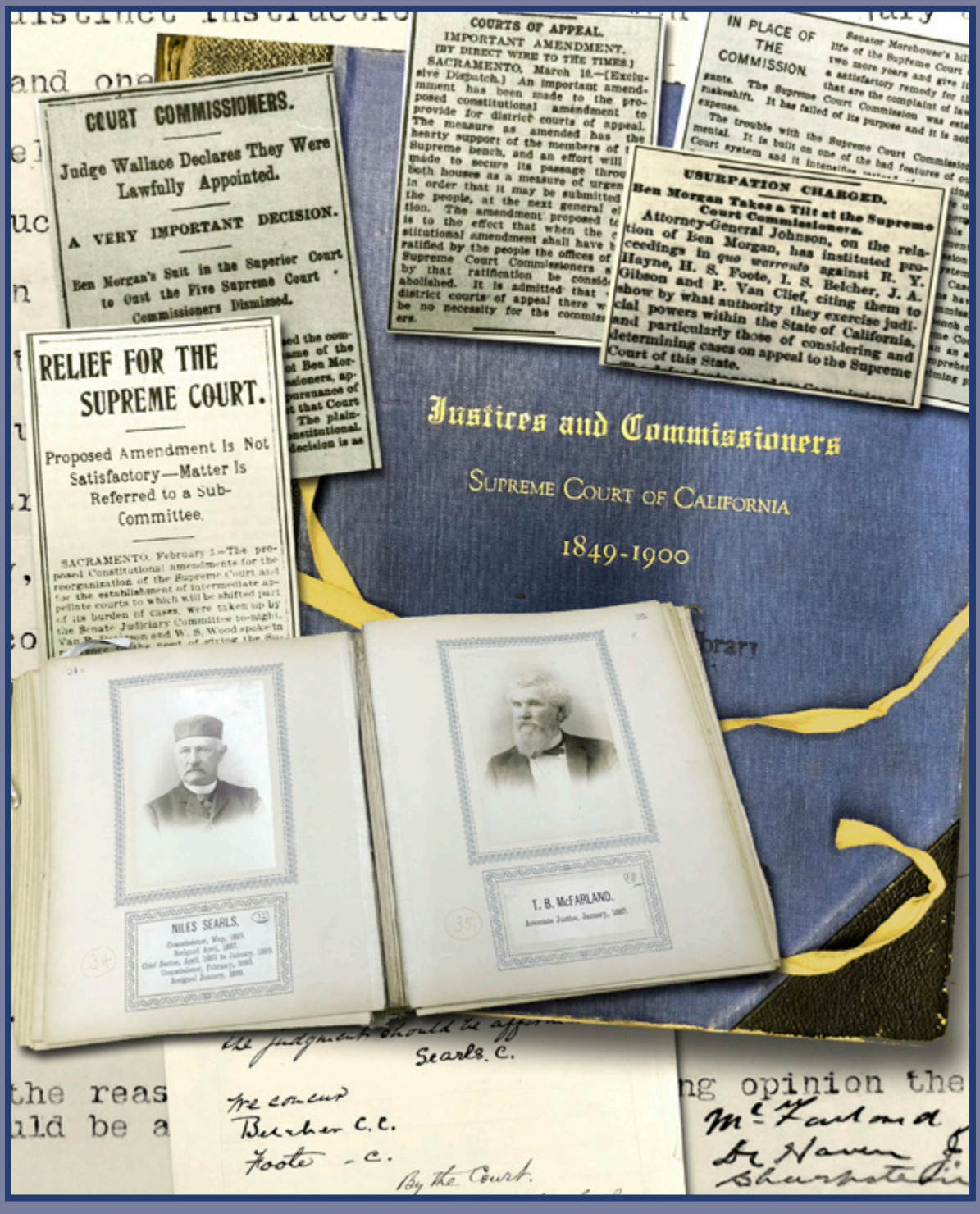


When Supreme Court Staff Signed Opinions

The Surprising Role That Commissioners Played, 1885–1905, in Creating the Courts of Appeal (in two acts)

BY JAKE DEAR

In the late nineteenth and early twentieth centuries, the California Supreme Court employed legal staff — then called "commissioners" — quite differently from how it uses chambers attorneys and law clerks today. Controversy surrounding that former system led to creation of the Court of Appeal. As we'll see, the story unfolds like a Gilbert & Sullivan operetta, in two acts. So let's set the scene.

EXPOSITION:
An Overburdened Court

It's the late 1870s. The Supreme Court bench, having been enlarged from three to five justices in 1862, is nevertheless severely backlogged. To cope with increased litigation in a growing and evolving state, the court resorts to strong measures. Taking advantage of its earlier conclusion that the Legislature can't force it to state the grounds for its decisions in writing, the court frequently decides cases by cursory memorandum decision, instead of by full written opinion — and sometimes it decides cases with no written decision at all. It publishes new rules under which the justices are quick to find that parties have waived their right to appeal, and attempts to shrink its docket by imposing costs when it deems appeals to be frivolous. And the court frequently avoids "the annoyance of petitions for rehearing" by simply making its judgments final immediately.

Yet those and related palliatives don't reduce the backlog. Instead they just upset and frustrate litigants and their attorneys, fueling extant calls for a constitutional convention. And although a former justice proposes that the state create an intermediate appellate court, that won't happen for another quarter century.

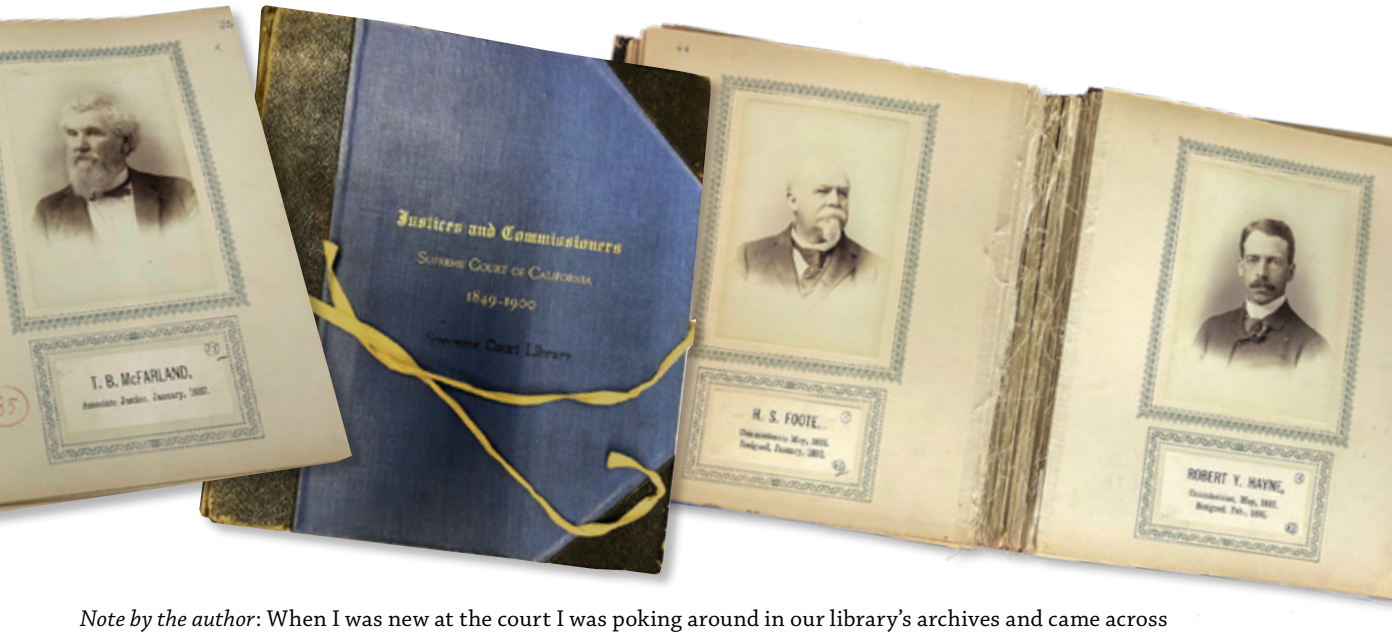
In the meantime, the state's new Constitution, approved by the voters in 1879, attempts to address the court's backlog through other incremental measures: It increases the Supreme Court bench from five to seven members, and adopts a novel procedure that allows the court to designate some of its cases for decision by one of two departments of three-justice panels, with the possibility of rehearing before all seven justices "in bank."

Even with these reforms, and although the court is regularly resolving many hundreds of cases annually (most with written opinions; the *California Reports* for 1882 contain approximately 880), five years later it is still quite backlogged for various reasons. First, because the court's appellate jurisdiction is mandatory — if an appeal of any superior court decision throughout the state is filed, the Supreme Court is obligated to resolve the case — even such high productivity is insufficient in the face of increasing appeals. Second, in an effort to delay judgment against them, many litigants contest minor rulings arising from increasing numbers of trial courts. Third, the Supreme Court's department decisions frequently are reconsidered by the full court in bank, meaning the court decides them twice. And it can't help efficiency that the justices are, as a constitutional convention delegate described, "a Court on wheels" — constantly boarding horse-drawn carriages and steam locomotives, traveling around the state to hear oral arguments not only at its headquarters in San Francisco, but also in Sacramento and Los Angeles.

ACT I, SCENE I:
The Legislature Tells the Court to Hire Help

In 1884 San Joaquin County Judge A. Van R. Peterson revived the earlier suggested solution to the backlog: Create an intermediate court of appeal. But instead, in

An expanded version of this article, with substantial footnotes providing additional and related information and sources, will be published under the title "California's First Judicial Staff Attorneys: The Surprising Role That Commissioners Played, 1885–1905, in Creating the Courts of Appeal" in (2020) 15 *Cal. Legal Hist.*, and will be available on HeinOnline. That expanded draft is presently, and will also remain, available at SSRN.com, at SSRN: *https://ssrn.com/abstract=3568576*.



Note by the author: When I was new at the court I was poking around in our library's archives and came across this lovely and falling apart album, *Justices and Commissioners, Supreme Court of California, 1849–1900*. Commissioners, I thought? Decades and some research later, this article is the result.

March 1885, the Legislature adopted a stop-gap measure, directing the Supreme Court to hire help, telling it to appoint "three persons of legal learning and personal worth" as "commissioners," who will be paid the same as the justices, to "assist the Court in the performance of its duties and in the disposition of the numerous cases now pending." This initial program was funded to last four years.

The court promptly appointed three commissioners, and within a few months the "Supreme Court Commission" was up and running. The court's original plan was to tap three former justices for the positions, but as it turned out, only one of them was available. Each of the three commissioners was nevertheless highly experienced.

Chief Commissioner Isaac Sawyer Belcher, a former gold miner, had been a district attorney and then a district court judge in Yuba County. He served briefly as a justice on the California Supreme Court in 1872–74, and presided as president pro tempore at the then-recent state constitutional convention. Henry S. Foote, son of a United States Senator, had been a federal judge in Oklahoma. Niles Searls, a true '49er, survived an arduous migration to California, and after trying mining took up law practice in Nevada City. He became district attorney, a district judge, and then a state senator. He was also a Mason. Hence, we may assume, the cap.

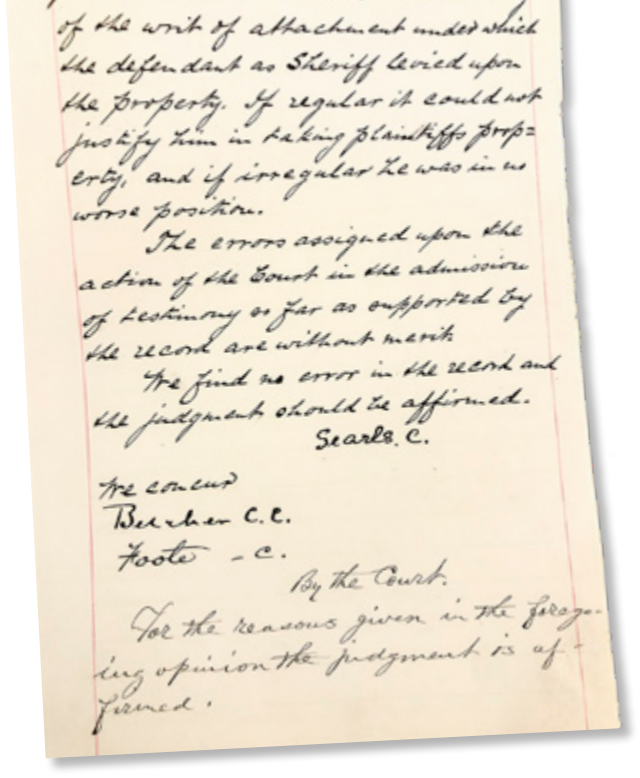
For good and ill, they also reflected their times. Key parts of the 1879 Constitution were astonishingly racist. Those passages mirrored the prejudices of the era, as already reflected in early case law and statutes. Similarly, the justices elected to the court under the new state charter were overwhelmingly members of the xenophobic Workingmen's Party. It's probable that some of the hired staff commissioners held similar views.

ACT I, SCENE 2:
The Commissioners Author and Sign Their Opinions — and the Justices Adopt Them

The staff commissioners performed functions similar to those of today's appellate court and Supreme Court attorney staff. After a case was assigned to three commissioners, they were to review the record and briefs, undertake any necessary legal research, and submit a draft memorandum in the form of a proposed opinion. This is in some respects akin to the model used currently.

There were substantial differences, however. The first related to constitutional organization. As noted, the 1879 Constitution encouraged the court to operate in two departments of three-justice panels. This effectively created a somewhat crude and ultimately dysfunctional internal form of an intermediate court of appeal. Final review was possible in bank before the full seven-member court. Sometimes, full review was *required*: Under the Constitution's judicial article, department decisions had to be unanimous in order to produce a judgment — meaning that any dissent would automatically trigger an in-bank hearing. The same provision afforded no right to oral argument except in cases that were heard in bank. This, in turn, allowed the justices to assign to the commissioners cases that, the court hoped, would be decided on the briefs alone, and with the understanding that they could be resolved without oral argument.

Second, whereas today it is understood that attorney staff serve a behind-the-scenes research and drafting role for the justices, the nineteenth century court commissioners were anything but anonymous. The commissioners' draft opinion — authored by one of them, and usually signed by the other two — would be submitted to a panel of three Supreme Court justices, sitting in one of the departments. And that signed "commissioner


of the writ of attachment under which the defendant as Sheriff levied upon the property. If regular it could not justify him in taking plaintiffs property, and if irregular he was in no worse position.

The errors assigned upon the action of the Court in the admission of testimony so far as supported by the record are without merit.

We find no error in the record and the judgment should be affirmed.

Searls, C.

We concur
Belcher C.C.
Foote - C.

By the Court.

For the reasons given in the foregoing opinion the judgment is affirmed.

opinion" — with each commissioner's name as prominent as any justice's — would be adopted (sometimes after modifications, but often verbatim) by the justices, making it the court's judgment, subject only to rehearing before the full seven-member court in bank. The result of this system was that the commissioners' opinion usually would become *the* opinion of the Supreme Court. And most of these opinions would be published in the *California Reports*, in a format that looked just like any other Supreme Court case set out in those volumes, complete with caption, abstract, headnoted text, and a disposition paragraph.

This process appeared to have vested far more authority in the commissioners compared with the present system, under which a staff attorney submits a draft to a single justice to whom the case has been assigned, and who then reviews, edits, requires rewrites and generally has significant input into the version that finally circulates within the court. It is unknown whether comparable initial (or subsequent) oversight was employed by the justices when they assigned matters to the commissioners.

Fewer than five months after the Legislature told the court to hire help (and just two days after the court decided a case in which Chief Commissioner Belcher himself was counsel of record for one of the parties), three justices of the Supreme Court adopted the first "commissioner opinion": *Smith v. Cunningham,* set out in the *California Reports* at 67 Cal. 262, looking like any other case of the court at that time.

Except for these differences: The opinion shows that it was written by "Searls, C." At the end, after the opinion's reasoning, comes this phrase — a version of which the commissioners and Supreme Court justices would use more than 3,700 more times in the *California Reports* over the next 20 years: "We find no error in the record and the judgment should be affirmed." The signatures of the concurring commissioners, "Belcher, C. C., and Foote, C.," appear next, followed by the statement (as reproduced by the publisher of the *California Reports*): "The Court. — For the reasons given in the foregoing opinion the judgment is affirmed."

ACT I, SCENE 3:
Reports of Unreported Opinions

The justices immediately adopted the same approach with respect to unreported commissioner opinions. Some might, at this point, be thinking: *Unreported* Supreme Court opinions? Yes indeed. Although an early statute mandated that all decisions were to be reported, the 1849 Constitution did not address that issue. And the 1879 Constitution, even as amended today, calls only for the publication of opinions as the court deems warranted. The court declined to report some of its opinions beginning in 1855, and that practice was codified in an 1860 statute, under which the justices were permitted to direct that certain opinions not be reported. The court issued approximately 1,800 unreported opinions over the next 25 years. That practice continued unchanged with the advent of the commissioners, who produced nearly 700 of the unreported opinions, bringing the total number of Supreme Court commissioner opinions to approximately 4,400.

Eventually the court's unreported opinions began to be collected and published regularly, albeit unofficially, in the *Pacific Reporter*, which commenced operation in late 1883. All unreported opinions that could be found from the prior decades were retroactively rescued from archives and published in 1913, in the amusingly named reports, "*California Unreported Cases*."

This page, top: the first "commissioner opinion": *Smith v. Cunningham*; *bottom*: Vols. 1–7 of *California Unreported Cases*.

Facing page, clockwise from top: *San Francisco Chronicle*, Oct. 11, 1889; *Daily Alta California*, Nov. 1, 1889; Ben Morgan, *City Argus*, July 26, 1890.

ACT I, SCENE 4:
Criticism of, and Litigation Challenging, the Commissioners

Even with the help of the three commissioners a substantial backlog of cases remained years later. Renewed calls to create an intermediate appellate court again failed. Instead, in early 1889, the Legislature renewed the commissioners program for another four years and increased their number to five.

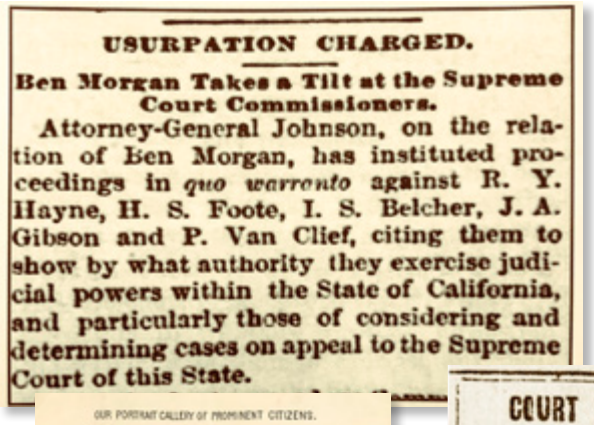
Yet storm clouds were gathering. After the court had issued more than 1,200 commissioner opinions, there was a legal challenge to the system. In mid-August 1889 Ben Morgan, a local attorney and perennially unsuccessful candidate for political office, sued the sitting five commissioners in a quo warranto proceeding in the San Francisco Superior Court, naming Commissioner Robert Y. Hayne the lead defendant. Morgan had, by then, appeared before the Supreme Court in eight cases, losing in his most recent four — thrice, and quite tellingly, in commissioner opinions, two of which were authored by Hayne. Hayne's most recent ruling against Morgan, filed three months earlier, had commenced: "There is absolutely no merit in this appeal." The opinion proceeded to call the underlying judgment, which Morgan sought to undo, "clearly right," and it dismissively concluded: "We cannot see the least shadow of excuse for the appeal." Finally, Hayne's opinion proposed not only affirmance, but also "20 per cent damages" in sanctions. The court, augmenting its customary per curiam adoption language, ordered judgment accordingly.

The *San Francisco Chronicle* noted Morgan's filing under the headline, "Usurpation Charged — Ben Morgan Takes a Tilt at the Supreme Court Commissioners." His suit alleged that the commissioners, by undertaking to give the justices their written opinions, were exercising judicial power that was not theirs. And by inference it suggested that the Supreme Court justices, having routinely adopted opinions submitted to them, were abdicating their own judicial duties.

Justice James D. Thornton and Commissioner Hayne appeared at the trial to testify as fact witnesses. Eyebrows must have shot up when it was reported that the justices review the commissioners' recommendations, but not the briefs submitted by counsel. Three times in his direct examination of Justice Thornton, Morgan pointedly referred to Commissioner Hayne as "Judge Hayne"; and even in his own testimony on cross-examination, Commissioner Hayne referred to his fellow commissioners as "Judge Belcher and Judge Gibson."

The testimony shed light concerning how the commissioners interacted with the justices. Justice Thornton explained, "there is a general order that if a case is not . . . argued orally" it is assigned to the commissioners. Commissioner Hayne elaborated that the commissioners very rarely hear oral argument, and had done so in only two cases in which the parties had specially requested that opportunity. Hayne explained that he and his colleagues prepare opinions concerning cases assigned to them and "send [the opinions] up" to the justices for their review; the justices retain their own copies of the case "record" — presumably including briefs; and he confirmed that, when the justices decide to adopt an opinion by the commissioners, they file a short per curiam statement to that effect. Hayne added that some commissioner opinions and work product, after being sent to the justices, "go[] into the waste basket."

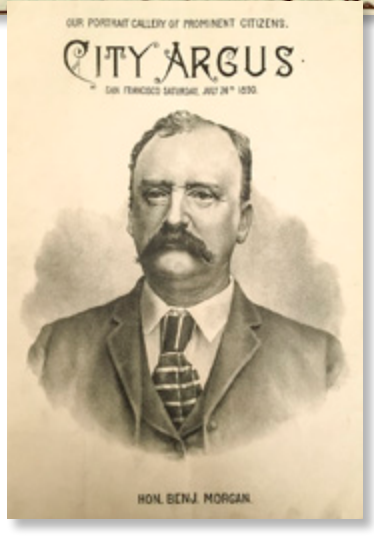
The trial judge ruled for the defendants, rejecting challenges to the statute and the court's implementation of it. The judge's loquacious decision reached back to mid–eighteenth century English jurists Lord Hardwicke, Lord Mansfield, and Lord Chancellor Loughborough to demonstrate that "courts of the greatest authority and . . . the most eminent judicial personages" had long relied on the ability to consult with others in forming their opinions and making decisions.

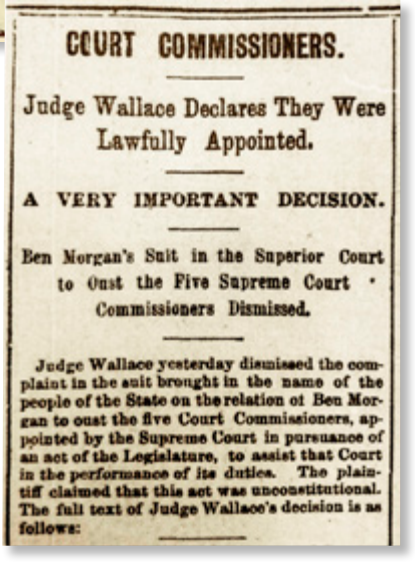


USURPATION CHARGED.

Ben Morgan Takes a Tilt at the Supreme Court Commissioners.

Attorney-General Johnson, on the relation of Ben Morgan, has instituted proceedings in *quo warranto* against R. Y. Hayne, H. S. Foote, I. S. Belcher, J. A. Gibson and P. Van Clief, citing them to show by what authority they exercise judicial powers within the State of California, and particularly those of considering and determining cases on appeal to the Supreme Court of this State.





COURT COMMISSIONERS.

Judge Wallace Declares They Were Lawfully Appointed.

A VERY IMPORTANT DECISION.

Ben Morgan's Suit in the Superior Court to Oust the Five Supreme Court Commissioners Dismissed.

Judge Wallace yesterday dismissed the complaint in the suit brought in the name of the people of the State on the relation of Ben Morgan to oust the five Court Commissioners, appointed by the Supreme Court in pursuance of an act of the Legislature, to assist that Court in the performance of its duties. The plaintiff claimed that this act was unconstitutional. The full text of Judge Wallace's decision is as follows:

The California Supreme Court in 1890. *Left to right*: Associate Justice John R. Sharpstein, Associate Justice Charles N. Fox, Associate Justice John D. Works, Chief Justice William H. Beatty, Associate Justice James D. Thornton, Associate Justice A. Van R. Paterson, Associate Justice Thomas B. McFarland. *Photo: California Supreme Court.*

ACT I, SCENE 5:
The Supreme Court Upholds the Commissioners!

The matter moved quickly from the superior court, housed inside San Francisco's then "New City Hall," to the Supreme Court's temporary quarters in a commercial building a dozen blocks away on Post Street.

Wisely deciding to sit in bank, the Supreme Court agreed to expedite review in light of the "commanding public importance" of the issues raised, which potentially implicated the validity of approximately half of the court's recent judgments. The *Daily Alta California* reported extensively about the oral argument: "During the course of Mr. Morgan's argument Justice Works remarked: 'The act seems to be an attempt to evade the Constitution. The only question is, whether or not the attempt has been successful.' Chief Justice Beatty at once replied with decided emphasis: 'Justice Works speaks for himself and not for the Court. I do not think there has been any evasion of the Constitution. The Commissioners certainly have not violated the Constitution. If there has been any dereliction of duty it has been, not by the Commissioners, but by the Court.' "

In addition to this jousting among the justices, the oral argument also touched on the art and challenge of opinion writing: "Justice Thornton remarked that for him the task of writing out an opinion was *a most tedious one*, as he went over his work two and often three times if he had the time. Chief Justice Beatty said that to write a long and loosely constructed opinion required little effort, but to write a concise opinion is a most difficult task. He said he often reached a conclusion in very much less time than the same could be set forth in writing."[1] The article reported that the "questions asked by the Justices . . . left an impression" that the court would "sustain the constitutionality of the act."

The prediction proved correct. Justice Fox's majority opinion affirming the judgment was issued only 27 days after the trial court's final ruling, and only 12 days after oral argument before the Supreme Court.[2] He spoke for *four* of his colleagues — including Justice Thornton, who as noted had recently testified as a fact witness in the trial court below, but not Justice Works, who, after being reprimanded by the chief justice at oral argument, appears to have taken ill. Chief Justice Beatty penned a concurring opinion. As both documents showed, the justices were quite able to write their own opinions. This assumes, of course, they didn't get help from any of the five defendants.

Justice Fox's decision downplayed the role of the commissioners. First, he said, they are kind of like retained counsel, or amici curiae — but maybe even more friendly and helpful: "It is no more unconstitutional for this court to receive such assistance from Commissioners designated by itself, or from amici curiae, than to accept similar assistance from the statements of fact and arguments of the counsel in the cause." He described the commissioners' work product as simply "*serviceable instrumentalities to aid us in performing our functions.*" He reported that the justices reject "many" commissioner opinions that don't see the light of day, and others are adopted only in part. And, he stressed, the commissioners' opinions don't become judgments unless we, the real judicial officers, say so.

Chief Justice Beatty's concurring opinion was, in some respects, more candid. He said, in essence: Let's get real — our commissioners *write* some of our opinions — yet there's nothing wrong with that. The 1879 Constitution, he pointed out, required that the court give its decisions " 'in writing, [with] the grounds of the decision . . . stated.' " But, he explained, this requires only that the justices *agree* on an opinion, not that they write one.

After briefly sketching how the system worked (and yet avoiding directly addressing whether the justices reviewed counsel's briefs), Chief Justice Beatty responded to a practical question: "If the court, after receiving the report of the commission, re-examines the case for itself, what is the use of the commission?" How does it save labor, or facilitate the disposition of cases? Echoing some of his and Justice Thornton's comments at oral argument, he answered himself: Writing opinions is difficult work. And yet "*[t]here are some persons in whom the literary faculty is highly developed, to whom the writing of opinions may be a*

1. All italics shown here and within subsequent quotes have been added.

2. *People v. Hayne* (Feb. 6, 1890) 83 Cal. 111.

trifling task." And so yes, he explained, this saves us time and energy, "without any abdication or delegation by the court of its constitutional functions."

Meanwhile, the commissioners did not skip a beat. The next opinion filed by the court — just one day after rejecting the challenge in which Commissioner Hayne was the lead defendant — was written by Commissioner Hayne.

INTERMISSION

ACT 2, SCENE 1:
Criticism Continues

The court's affirmation of the commissioner system did little to quell growing public criticism of the program. A January 1891 article in the *Los Angeles Times* called the commissioners "little better than clerks" and the system "a mere makeshift." It reported on pending legislation sponsored by the bar associations of San Francisco and Los Angeles to reorganize the Supreme Court and create intermediate courts of appeal in those cities and in Sacramento.

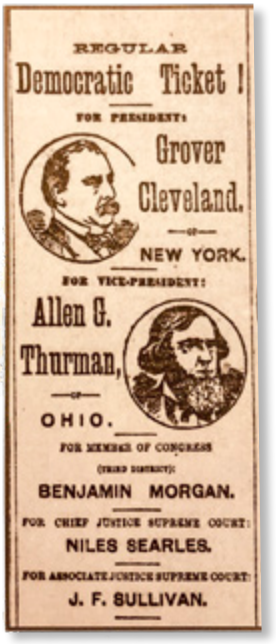
An August 1891 column in *The Wave*, a San Francisco literary weekly, criticized two recent opinions by the court's commissioners, and listed the names of the four commissioners who authored and signed those opinions. Justice Patterson, who had a year earlier concurred in the *Hayne* opinion upholding the commissioner system, responded, apparently on behalf of the court: "There is a general impression that [the commissioners] exercise judicial powers, but that is a popular fallacy. Their functions are purely ministerial. They assist the Court in determining the law and the facts of cases submitted on the briefs, but they decide nothing. Their views are generally, but not always, approved."

And yet, as commentators have observed, although the justices "could review and modify the commissioners' opinions, . . . in practice [the court] simply issued them as its own." It was unsurprising that, despite the court's protestations, many viewed the commissioners as "auxiliary judges." Another observer asserted that the commissioners operated as "an auxiliary court in intent and effect."

ACT 2, SCENE 2:
Musical Chairs

Notwithstanding these ongoing debates, the commissioner system had become useful to the governor, the justices, and the commissioners themselves — facilitating the filling of vacancies, advancement, and job security, all without any diminution in pay. The last two features were especially handy at a time of highly partisan elections, when judges and justices were regularly unseated.

Consider, for example, Niles Searls — one of the first class of three commissioners. He had served two years in that capacity when, in 1887, the chief justice died in office. Being experienced, a Democrat, and in the right place at the right time, he was appointed by the governor to fill in as chief justice. In 1888 he sought to stay in that position, and was promoted on the Democratic ticket along with Grover Cleveland for president, and . . . Ben Morgan, for "Member of Congress, Third District." But Searls lost the statewide partisan election to William H. Beatty. He went back to practice in Nevada City, but not for long: Four years later, and despite having lost to Beatty, he returned to the court to serve a final four years as a commissioner.

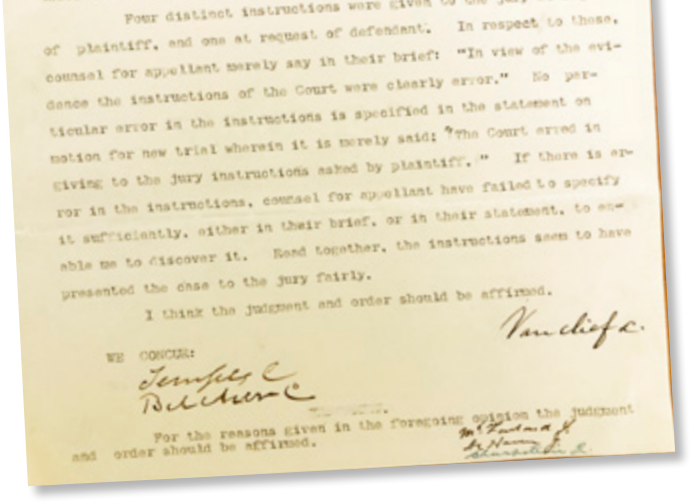


And now back to Isaac Belcher, also in the first class of commissioners. As noted, he was an associate justice before serving as *chief* commissioner for ten years. When that office expired he became a regular commissioner until 1898.

Others similarly traded hats as commissioners and justices. Jackson Temple holds the record, repeatedly bouncing in and out of the court, and between the bench and the commission, over the course of 30 years. He was appointed to fill a vacancy when a sitting justice resigned, and served as a justice from 1870 to 1872. He ran as a Democrat to keep the seat, but lost. He was elected to the Supreme Court in 1886, but resigned three years later in ill health. After recovering, he returned to the court as a commissioner in 1891. Four years later, while still in that position, he ran for yet another term as an associate justice, and was once again elected to that position, serving until his death in office, in 1902.

The justices appointed W. F. Fitzgerald, then a private lawyer in Los Angeles, as a commissioner in 1891. This may not have been the court's best hire. After moving up to San Francisco he served only about a year and a half, producing far fewer opinions than his contemporaries before he quit and briefly reentered private practice in that city. Then in early 1893 he was appointed by the governor to fill the vacancy created by a justice who had died in office. He served a full two years, producing again comparatively few opinions all of which a reviewer described as "distinguished only by their brevity."

Finally, there was one last round of musical chairs: The voters elected Ralph C. Harrison, with no judicial or other public office experience, to a 12-year position as an associate justice in 1891. He was said to have been "meticulous in everything he undertook" and to have "discharged every assignment with finesse." Many of his opinions appeared in casebooks prepared by "the first names in scholarship." He wanted to run for a second term that would start in 1903, but political party



Four distinct instructions were given
of plaintiff, and one at request of defendant. In respect to those,
counsel for appellant merely say in their brief: "In view of the evi-
dence the instructions of the Court were clearly error." No par-
ticular error in the instructions is specified in the statement on
motion for new trial wherein it is merely said: "The Court erred in
giving to the jury instructions asked by plaintiff." If there is er-
ror in the instructions, counsel for appellant have failed to specify
it sufficiently, either in their brief, or in their statement, to en-
able me to discover it. Read together, the instructions seem to have
presented the case to the jury fairly.
I think the judgment and order should be affirmed.
Vanclief C.
WE CONCUR:
Temple C.
Belcher C.
For the reasons given in the foregoing opinion the judgment
and order should be affirmed.
McFarland J.
De Haven J.
Sharpstein J.

Above: The first Commissioner opinion as to which the justices signed their names — scrunching them in at the end! *Right: San Francisco Examiner*, February 4, 1897.

machinations gave the nomination to another, and he resumed private practice. Yet not for long: The court appointed him a commissioner in 1904 — as a biographer said, "*making him for all intents and purposes once more a member of the Court*."

The latter and similar comments didn't help matters. In light of the frequent position-trading, they only underscored one of the continuing criticisms — that unelected staff commissioners and elected justices were, in effect, interchangeable.

ACT 2, SCENE 3:
Muddling Along, and Making Incremental Adjustments

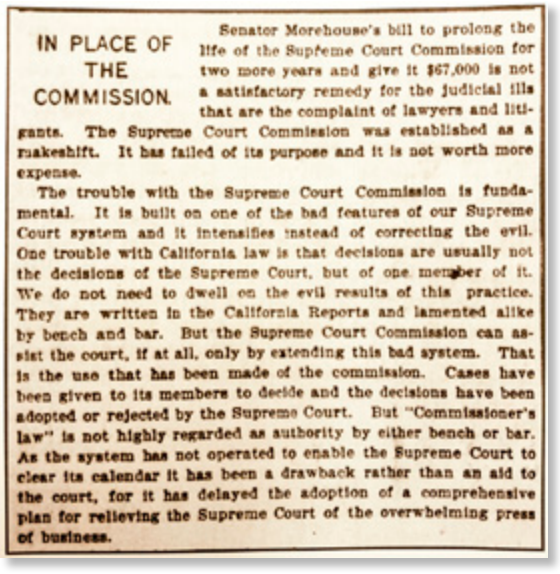
After the constitutional validity of the commissioner system was upheld in 1890, the court's backlog remained, and the Legislature periodically renewed the statute commanding the court to employ commissioners. But criticism of the commission continued.

In apparent response, both the commissioners and justices made some conciliatory adjustments. Instead of routinely ending their opinions by telling the justices that a judgment "should" be affirmed or reversed, the commissioners sometimes used more deferential language, writing what they "think" or "advise" or "recommend" should happen to the judgment. Yet there was no standard language, and the original "should" form continued to appear frequently over 20 years, even after many if not most commissioner opinions eventually adopted more deferential phrasing.

In line with the commissioners' sporadic efforts to show some deference, the justices in turn became a bit more transparent, signing their names when adopting the commissioners' opinions — signaling, apparently, that they had taken judicial ownership of them. A mid-July 1892 commissioner opinion, authored by Vanclief, C., started this new procedure. It concluded: "I *think* the judgment and order should be affirmed." Then the two other commissioners signed, showing they concurred: "Temple, C., and Belcher, C." Next, the justices wrote: (as corrected by the publisher of the *California Reports*) "For the reasons given in the foregoing opinion, the judgment and order are affirmed." And then, squeezing their names onto the bottom of the original typed opinion, *they* signed: "McFarland, J., De Haven, J., Sharpstein, J."[3]

ACT 2, SCENE 4:
Creating the Courts of Appeal (On the Second Try)

But even as some things changed, others remained the same: Still the court remained backlogged; still there was criticism of the justices and their use of commissioners; and there were louder and more frequent calls to create



IN PLACE OF THE COMMISSION.

Senator Morehouse's bill to prolong the life of the Supreme Court Commission for two more years and give it $67,000 is not a satisfactory remedy for the judicial ills that are the complaint of lawyers and litigants. The Supreme Court Commission was established as a makeshift. It has failed of its purpose and it is not worth more expense.

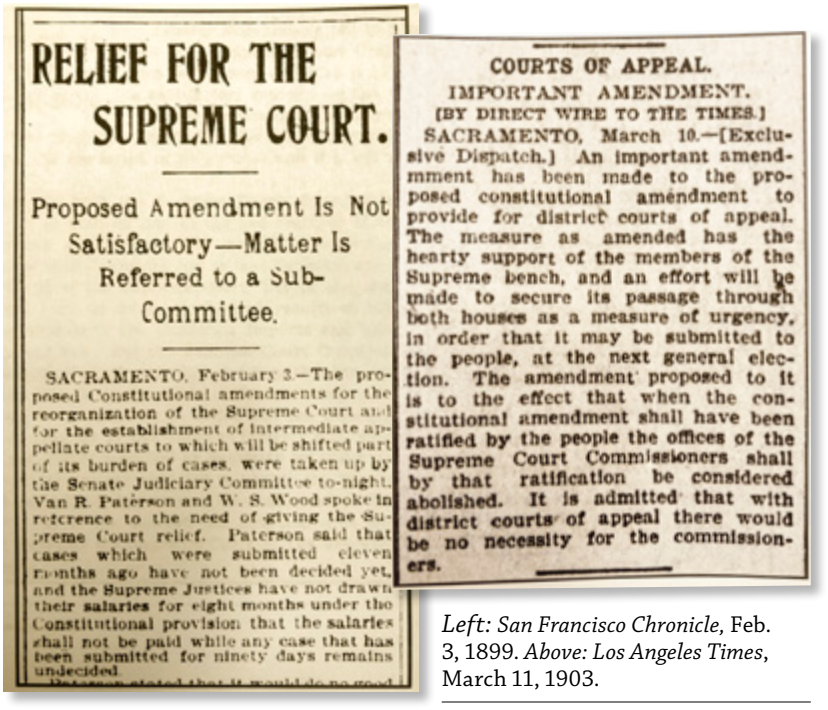
The trouble with the Supreme Court Commission is fundamental. It is built on one of the bad features of our Supreme Court system and it intensifies instead of correcting the evil. One trouble with California law is that decisions are usually not the decisions of the Supreme Court, but of one member of it. We do not need to dwell on the evil results of this practice. They are written in the California Reports and lamented alike by bench and bar. But the Supreme Court Commission can assist the court, if at all, only by extending this bad system. That is the use that has been made of the commission. Cases have been given to its members to decide and the decisions have been adopted or rejected by the Supreme Court. But "Commissioner's law" is not highly regarded as authority by either bench or bar. As the system has not operated to enable the Supreme Court to clear its calendar it has been a drawback rather than an aid to the court, for it has delayed the adoption of a comprehensive plan for relieving the Supreme Court of the overwhelming press of business.

appellate courts. A trenchant 1897 editorial in the *San Francisco Examiner* focused on the unhappy symbiosis of the dysfunctional department system and the commission: "The trouble with the Supreme Court Commission is fundamental. It is built upon one of the bad features of our Supreme Court system and it intensifies instead of correcting the evil." For good measure, the editorial also slammed the decisions authored by the commissioners as "not highly regarded as authority by either the bench or bar."

An article two years later in the *San Francisco Chronicle* reported that the court remained so far behind in its work that the justices had not been paid for eight months, having failed to decide and file its cases within 90 days after submission. The same article critiqued the commissioner system as a "fifth wheel on a coach," and generally supported the idea of a constitutional amendment designed to reorganize the Supreme Court and to create appellate courts.

A few weeks later the Legislature (finally) adopted a proposed constitutional amendment that would revise

3. *Joyce v. White* (1892) 5 Cal. 236, 239, italics added. The original opinion, along with the original opinion in *Smith v. Cunningham*, mentioned earlier, is on file in the California State Archives, Sacramento.



RELIEF FOR THE SUPREME COURT.

Proposed Amendment Is Not Satisfactory—Matter Is Referred to a Sub-Committee.

SACRAMENTO, February 3.—The proposed Constitutional amendments for the reorganization of the Supreme Court and for the establishment of intermediate appellate courts to which will be shifted part of its burden of cases, were taken up by the Senate Judiciary Committee to-night. Van R. Paterson and W. S. Wood spoke in reference to the need of giving the Supreme Court relief. Paterson said that cases which were submitted eleven months ago have not been decided yet, and the Supreme Justices have not drawn their salaries for eight months under the Constitutional provision that the salaries shall not be paid while any case that has been submitted for ninety days remains undecided.

COURTS OF APPEAL.

IMPORTANT AMENDMENT.

[BY DIRECT WIRE TO THE TIMES.]

SACRAMENTO, March 10.—[Exclusive Dispatch.] An important amendment has been made to the proposed constitutional amendment to provide for district courts of appeal. The measure as amended has the hearty support of the members of the Supreme bench, and an effort will be made to secure its passage through both houses as a measure of urgency, in order that it may be submitted to the people, at the next general election. The amendment proposed to it is to the effect that when the constitutional amendment shall have been ratified by the people the offices of the Supreme Court Commissioners shall by that ratification be considered abolished. It is admitted that with district courts of appeal there would be no necessity for the commissioners.

Left: San Francisco Chronicle, Feb. 3, 1899. *Above: Los Angeles Times*, March 11, 1903.

the judicial article to provide for intermediate appellate courts. The would-be amendment also proposed to cut costs by reducing the Supreme Court from seven to five justices and requiring the court to cease hearing oral arguments in Sacramento and Los Angeles, and instead hold all of its sessions at its headquarters in San Francisco. Following litigation about whether the proposed amendment should appear on the ballot, the measure was submitted to the voters at the 1900 General Election. Alas, it failed.

In 1903, after some additional proposals had been floated — including one to increase the court to ten justices working in three departments, and another to double down on commissioners by increasing their number to twelve — the Bar Association of San Francisco regrouped and proposed a new constitutional amendment. A few weeks later, the *Los Angeles Times* breathlessly reported on an "important amendment" to that legislation, a sweetener designed to capitalize on the repeated criticisms of the commissioner system: The measure would be revised to provide that "when ratified by the people the offices of the Supreme Court Commissioners shall . . . be abolished." Three days later the Legislature adopted Senate Constitutional Amendment No. 2.

The question again went to the voters. This time the measure proposed to keep the Supreme Court at seven justices, and allowed them to continue to hear oral arguments in Sacramento and Los Angeles, as well as at their headquarters in San Francisco. The eleventh-hour amendment, designed to seal the deal with a skeptical and cost-conscious public, was tacked on, in a final section 25: "The present Supreme Court Commission shall be abolished at the expiration of the present term of office, and no Supreme Court Commission shall be created or provided for after January 1st, A. D. 1905."

Newspaper articles before the election reminded voters that the court was "embarrassed" by being 1,000 cases behind and "hopelessly in arrears" — despite its filing about 650 opinions annually. The voters overwhelmingly adopted the measure at the November 1904 General Election, the intermediate appellate courts were born, and the Supreme Court Commission was eliminated. The "district courts of appeal" (note the "s" after "courts," but not after "appeal") commenced work, and the last published Supreme Court commissioner case was filed in mid-1905.[4]

With the departure of the last five commissioners (along with their own dedicated support, a secretary and stenographer), the seven justices were left with a spare staff roster: A reporter of decisions, an assistant reporter, two secretaries, two phonographic reporters, two bailiffs, a librarian — and three janitors.

EPILOGUE: Safe Landings for the Commissioners

The Supreme Court reacted to the amendment by articulating principles under which it operates today: It made clear that its oversight of intermediate appellate court work product would be discretionary — and it would not expend time and energy to correct "mere errors" made by those lower appellate courts. Its new role would be to preside over the orderly development of the law, by deciding important issues and resolving conflicts in appellate decisions. Doing otherwise, or more, the court reasoned, would defeat the purpose of the recent amendment. But, the Supreme Court cautioned, when it declines to intervene in an appellate decision, that doesn't mean it endorses that decision or opinion.[5]

And yet, even after the creation of intermediate appellate courts, the Supreme Court continued to struggle with an ever-growing backlog. It used the criticized department system fairly regularly for nearly 50 years, until the late 1920s, when the court began hearing each case in bank — except for two last instances in the early 1940s.[6] The obsolete department provisions were finally removed from the Constitution in 1966, when the judicial article was also amended to conform the appellate jurisdiction of both levels of appellate courts to long-standing practice. A proposal to adopt a new version of the department system was raised and rejected in the 1980s and 90s.

4. *Estate of Dole* (1905) 147 Cal. 188.
5. *People v. Davis* (1905) 147 Cal. 346, 349–50.
6. *Grolemund v. Cafferata* (1941) 17 Cal.2d 679; *Wiseman v. Sierra Highland Mining Co.* (1941) 17 Cal.2d 690.

The Constitution's vaccination against Supreme Court commissioners remained enshrined in the judicial article for 52 years, long after that court and the Courts of Appeal had adopted less controversial methods of utilizing judicial staff. The vestigial provision explicitly prohibiting Supreme Court commissioners was deleted from the charter in the mid-1950s.

But although the Commission had been abolished, never to arise again, the safe landing program continued for the last five commissioners. After considerable press speculation about whom the governor would appoint to the newly created judicial positions, when the music stopped in 1905, each existing commissioner was made a new Court of Appeal justice. Ralph Harrison served as Presiding Justice, First District Court of Appeal, 1905–07. Wheaton A. Gray served as Presiding Justice, Second District Court of Appeal, 1905–06. N. P. Chipman served as Presiding Justice, Third District Court of Appeal, 1905–11. J. A. Cooper served as Associate Justice, First District Court of Appeal, 1905–07, and Presiding Justice, First District Court of Appeal, 1907–11. Finally, George H. Smith, then the senior commissioner, having been in that position for the prior 15 years, served as Associate Justice, Second District Court of Appeal, 1905–06.

These former commissioners and their eleven predecessor colleagues are little remembered today. Yet all of them played a significant role in helping the Supreme Court fulfill its responsibilities for two decades. Moreover, as we have seen, they also facilitated, perhaps unwittingly, creation of the state's intermediate appellate courts. These early court staff attorneys are — and should be honored as — indirect ancestors of the current appellate judicial attorneys who provide analogous assistance to both the Court of Appeal and the Supreme Court, and help those courts fulfill their challenging and demanding responsibilities today. ✯

Jake Dear is Chief Supervising Attorney of the California Supreme Court. He thanks court colleagues Hal Cohen, Neil Gupta, Kyle Graham, Norm Vance, Steve Rosenberg, and Ryan Azad (and former colleague Carin Fujisaki, the latter now a Court of Appeal Justice) for their always helpful comments on prior drafts. And he thanks the court's library reference staff, Jan Gross, Jessica Brasch, and archivist Marie Silva, for their considerable assistance in identifying and locating source materials. Finally, he appreciates the helpful and extensive comments by former Chief Justice Ronald M. George; former court colleague Beth Jay, now of counsel at Horvitz & Levy; David Ettinger, of counsel at Horvitz & Levy and the primary writer for the *At The Lectern* blog; judicial branch historian, Levin; and Mary Ann Koory, of California's Center for Judicial Education and Research (CJER).

Roster of California Supreme Court Commissioners

By month and year of service on the court (listed by first service on the court)

Jackson Temple
Associate Justice, Jan. 1870–Jan.1872
Associate Justice, Jan. 1887–June 1889
Commissioner, March 1891–Jan. 1895
Associate Justice, Jan. 1895–Dec. 1902

Isaac S. Belcher
Associate Justice, March 1872–Jan. 1874
Chief Commissioner, May 1885–July 1891
Commissioner, Aug. 1891–Nov. 1898

Niles Searls
Commissioner, May 1885–April 1887
Chief Justice, April 1887–Jan. 1889
Commissioner, Feb. 1893–Jan. 1899

H. S. Foote
Commissioner, May 1885–Jan. 1893

Robert Y. Hayne
Commissioner, May 1887–Jan. 1891

Peter Vanclief
Commissioner, May 1889–Nov. 1896

James A. Gibson
Commissioner, May 1889–Jan. 1891

George H. Smith
Commissioner, April 1890–May 1905
(Associate Justice, Second District Court of Appeal, 1905–1906)

Ralph C. Harrison
Associate Justice, Jan. 1891–Jan. 1903
Commissioner, Jan. 1904–June 1905
(Presiding Justice, First District Court of Appeal, 1905–1907)

W. F. Fitzgerald
Commissioner, Feb. 1891–May 1892
Associate Justice, Feb. 1893–Jan. 1895

John Haynes
Commissioner, June 1892–Jan. 1904

E. W. Britt
Commissioner, March 1895–April 1900

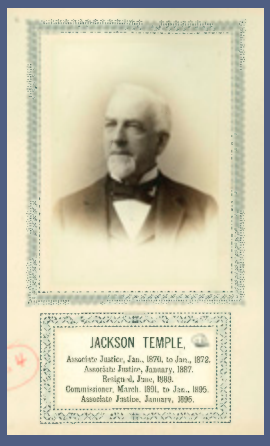
N. P. Chipman
Commissioner, April 1897–May 1905
(Presiding Justice, Third District Court of Appeal, 1905–1921)

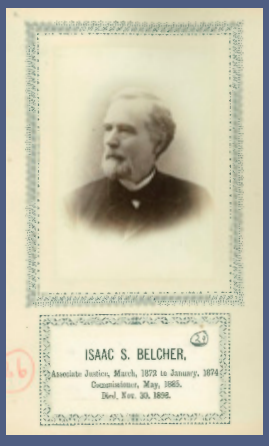
Edward J. Pringle
Commissioner, Feb.–April 1899

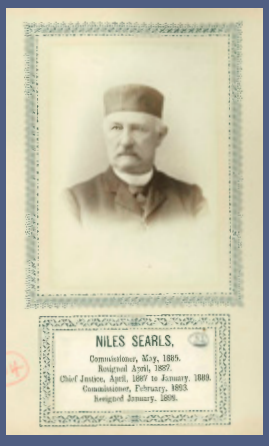
Wheaton A. Gray
Commissioner, Feb. 1899–June 1905
(Presiding Justice, Second District Court of Appeal, 1905–1906)

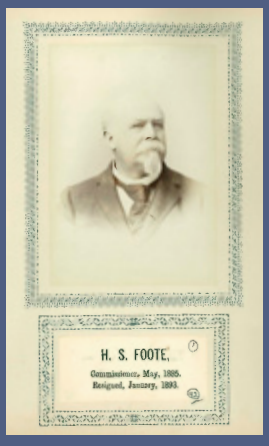
J. A. Cooper
Commissioner, May 1899–June 1905
(Associate Justice, First District Court of Appeal, 1905–1907)
(Presiding Justice, First District Court of Appeal, 1907–1911)

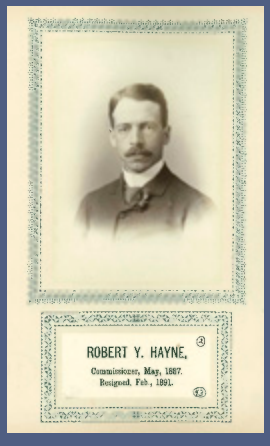
Facing page: Each of the 16 commissioners' portraits in the original album. All handwritten notes are on the originals.

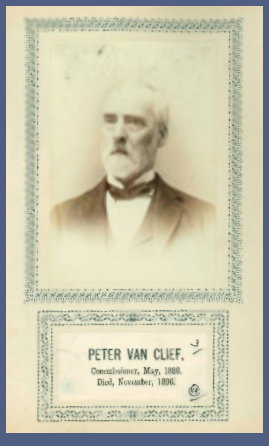

JACKSON TEMPLE,
Associate Justice, Jan., 1870, to Jan., 1872.
Associate Justice, January, 1887.
Resigned, June, 1889.
Commissioner, March, 1891, to Jan., 1895.
Associate Justice, January, 1895.

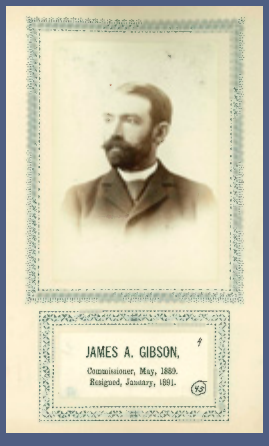

ISAAC S. BELCHER,
Associate Justice, March, 1872 to January, 1874.
Commissioner, May, 1885.
Died, Nov. 30, 1898.

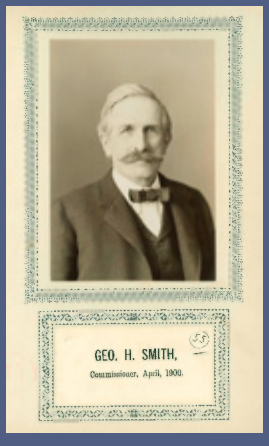

NILES SEARLS,
Commissioner, May, 1885.
Resigned April, 1887.
Chief Justice, April, 1887 to January, 1889.
Commissioner, February, 1893.
Resigned January, 1895.

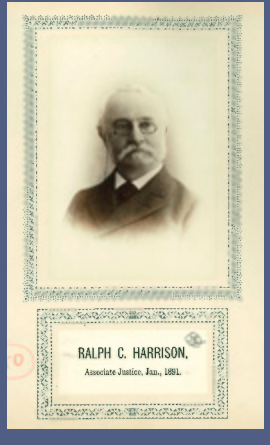

H. S. FOOTE,
Commissioner, May, 1885.
Resigned, January, 1893.

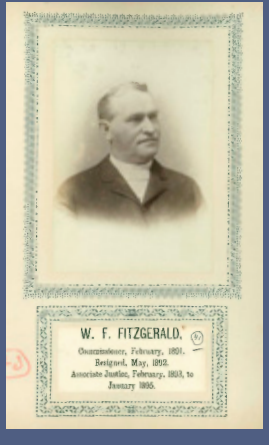

ROBERT Y. HAYNE,
Commissioner, May, 1887.
Resigned, Feb., 1891.

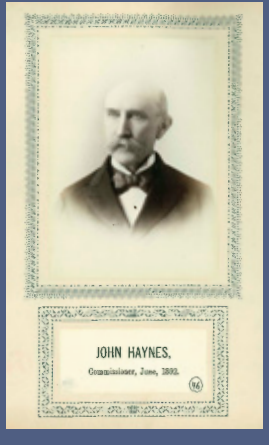

PETER VAN CLIEF,
Commissioner, May, 1889.
Died, November, 1896.

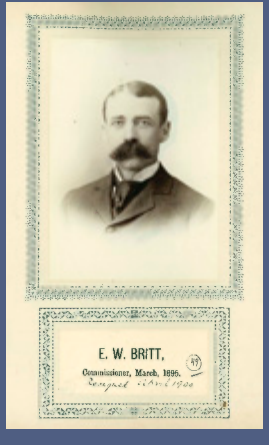

JAMES A. GIBSON,
Commissioner, May, 1889.
Resigned, January, 1891.

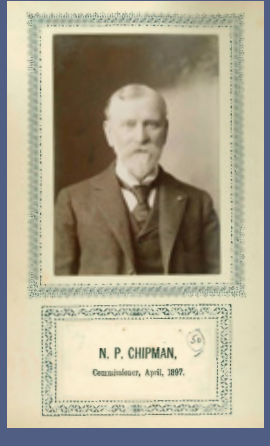

GEO. H. SMITH,
Commissioner, April, 1900.

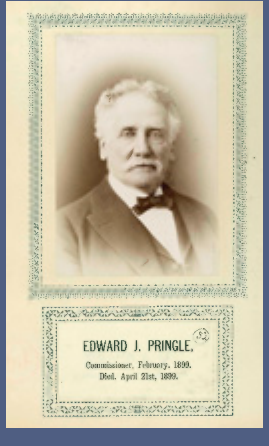

RALPH C. HARRISON,
Associate Justice, Jan., 1891.

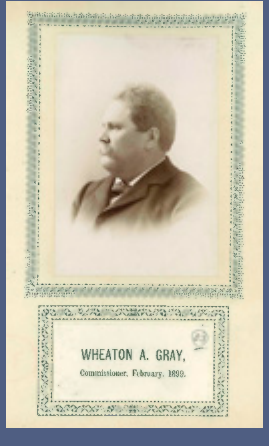

W. F. FITZGERALD,
Commissioner, February, 1891.
Resigned, May, 1892.
Associate Justice, February, 1893, to
January 1895.

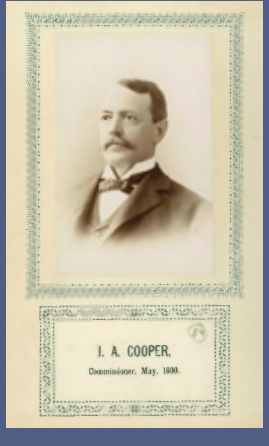

JOHN HAYNES,
Commissioner, June, 1892.


E. W. BRITT,
Commissioner, March, 1895.


N. P. CHIPMAN,
Commissioner, April, 1897.


EDWARD J. PRINGLE,
Commissioner, February, 1899.
Died, April 21st, 1899.


WHEATON A. GRAY,
Commissioner, February, 1899.


I. A. COOPER,
Commissioner, May, 1899.

Comedian Charlie Chaplin, Chief Justice Philip Gibson, of the California Supreme Court, and songwriter Irving Berlin *(from left to right)* arrive at Federal Court in New York on March 31, 1941, to appear as character witnesses in the income tax evasion trial of movie executive Joseph M. Schenck. *Photo: AP Photo.*

When Chief Justice Gibson Joined Hollywood Stars to Testify at a Movie Mogul's Tax Evasion Trial

BY DAVID S. ETTINGER

Charlie chaplin, irving berlin, and the Chief Justice of California walk into a New York City courtroom. No joke.

In 1941, the three luminaries were in town to testify on behalf of Joseph Schenck and a co-defendant, who were being tried for tax evasion in the federal district court.

Schenck was no ordinary defendant. His *New York Times* obituary 20 years later described the Russian-born Schenck as "one of the last surviving giants of the motion picture industry," having been a former president and chairman of the board at United Artists and a founder of Twentieth-Century Fox.[1] On the other hand, this movie pioneer was also quoted in 1928 as predicting, "I don't think people will want talking pictures [for] long."[2]

Another Schenck lapse in judgment was taking fraudulent six-figure deductions on his income tax returns. That's what he was on trial for.[3] And the trial is what prompted Phil Gibson, then California's Chief Justice, to travel across the country to support an old friend as a character witness.

Gibson's testimony was brief, taking up only several pages of a very lengthy reporter's transcript. But it illuminated both his sense of the scope of his office's powers and also confidence in the length of his future tenure.

Establishing his credentials, Gibson — who had been on the court for less than two years — explained that the Supreme Court was California's highest court, that he was an associate justice before becoming Chief, and that he was California's director of finance prior to joining the court. Gibson also testified that, as Chief Justice, he chaired the state Judicial Council, and he agreed with defense counsel's characterization of the job as giving Gibson "jurisdiction and personal supervision of all the other state judges throughout the state of all courts." "That is true," he said.

The Chief Justice was also apparently feeling sanguine about a relatively recent change in California judicial elections. In 1934, the state went from contested elections for Supreme Court and Court of Appeal justices (in which candidates ran against each other for places on the bench and sitting justices were not infrequently defeated) to the current retention election method (in which, instead of having opponents on the ballot, justices appointed or nominated by the governor are given a "yes" or "no" vote by the electorate).[4] After having

1. "Joseph M. Schenck, 82, Is Dead; A Pioneer in the Movie Industry," *N.Y. Times*, Oct. 23, 1961, p. 1.

2. "'Talkies' Just A Fad, Says Joseph Schenck," *N.Y. Times*, Aug. 22, 1928, p. 25.

3. *U.S. v. Schenck* (2d Cir. 1942) 126 F.2d 702, 705.

4. The change was made by initiative, adding section 26 to article VI of the California Constitution. See Gerald Uelmen, "Symposium, California Judicial Retention Elections" (1988)

Gibson confirm that he was elected to the court, the defense attorney asked, "You have some years still to serve, have you?" The Chief responded confidently, "It is virtually a life position." And, in fact, he would go on to serve 23 more years, until his 1964 retirement.[5]

The preliminaries over, discussion turned to Schenck. Gibson testified that he had known Schenck for almost 20 years, having had "business contacts, social contacts and hav[ing] been associated with him in charity work," including the Community Chest and the Infantile Paralysis Campaign.[6]

Schenck's attorney then invited the Chief Justice to expound on Schenck's "reputation in California for honesty and integrity." Before Gibson could answer, the district court judge, seemingly intent on heading off a long and glowing narrative, instructed the Chief Justice to answer, "Good or bad? Is his reputation good or bad." "Good," Gibson responded. He was, however, allowed to answer whether he had "any question about it." "None whatever," the Chief said, ending the direct examination.

The cross-examination was even briefer. The prosecutor asked if Gibson had heard and taken into account that Schenck had made false statements to Justice and Treasury Department officials. Gibson replied he had heard only "the statements that I have read in the papers since I came to New York City" and he had "[c]ertainly not" taken those into account in assessing Schenck's reputation because "[h]is reputation as I knew it included no such thing."

Redirect examination established that Gibson as an attorney had never done legal work for Schenck or his companies, leaving undescribed the prior "business contacts" between the two that Gibson had mentioned on direct. He also explained that he had come to New York voluntarily and not under subpoena: "I came here at the request of Mr. Schenck. He asked me if I would be willing to come here and testify with respect to his reputation and I told him that I would."[7]

Gibson's credentials were no doubt compelling, but he probably couldn't compete with the star power of other character witnesses, Charlie Chaplin, who also testified for Schenck, and Irving Berlin, who testified for Schenck's co-defendant.

When defense counsel asked Chaplin to name some of his most popular pictures, Chaplin replied, "Well, modesty forbids," but — possibly with a wink or a smile — he then immediately listed seven movies. He was also asked whether "there is a picture now being shown of yours," to which he answered, "Yes, sir, called 'The Great Dictator.'" He then proceeded to name-drop Rudolph Valentino, Gloria Swanson, Douglas Fairbanks, Mary Pickford, and Al Jolson, among others. Not to be outdone, Berlin testified to having written "God Bless America," "Easter Parade," and "Alexander's Ragtime Band" ("White Christmas" wouldn't come out until the following year), and he said he had done Astaire–Rogers and Sonja Heine pictures. They vouched for the good characters of Schenck and Schenck's co-defendant, respectively.

Apparently trying to compete, the government called as witnesses two of the Marx Brothers, Harpo and Chico. Yes, Harpo spoke. He testified to having gambled with Schenck. When Harpo said that during one time span he had received much more money from Schenck than he had paid to Schenck, the prosecutor asked, "What is that, luck, or perspicacity?" "Holding plenty of aces," Harpo explained.

Whatever influence the star witnesses might have had, the jury convicted both Schenck and his co-defendant.[8] Both defendants' appeals failed.[9] Schenck was sentenced to three years in prison and a $10,000 fine,[10] but his sentence was reduced for cooperating in the extortion prosecution of two union leaders.[11] He was paroled after serving four months, and President Harry Truman pardoned him a few years later.[12]

It's not every day that a California chief justice is a trial witness anywhere, let alone outside his or her jurisdiction. But after his New York experience, the next time Chief Justice Gibson walked into a courtroom, he was probably on the side of the bench to which he was more accustomed and he was not in danger of being outshone by Hollywood stars. ✯

David S. Ettinger is of counsel at Horvitz & Levy. He serves on the board of the California Supreme Court Historical Society and is the primary writer for Horvitz & Levy's *At The Lectern* blog, which covers the California Supreme Court. Many thanks to Robert Beebe at the National Archives at Kansas City, Missouri, for digging up and providing the pertinent portions of the trial transcripts quoted in this article.

28 *Santa Clara L. Rev.* 333, 339–40; see now art. VI, § 16(d)(1) & (2); Elec. Code, §§ 9083, 13204(a), 13208(a).

5. For more about Phil Gibson, see 5 *Cal. Legal Hist.* (2010) 1–62.

6. Many years later, Gibson identified Schenck as a "pretty able fellow" who was one of Culbert Olson's "leading supporters" when Olson successfully ran for California Governor in 1938. Oral History of Chief Justice Phil S. Gibson, 5 *Cal. Legal Hist.*, p. 16. It was Governor Olson who made Gibson director of finance and who then appointed Gibson a Supreme Court associate justice and elevated him to Chief Justice. *Id.* at pp. 18–19, 24–26.

7. Under current ethics rules, Gibson could not have testified for Schenck voluntarily. See Cal. Code Jud. Ethics, canon 2B(2)(a) ["A judge may testify as a character witness, provided the judge does so only when subpoenaed"]. There was no such prohibition in 1941.

8. *U.S. v. Schenck*, 126 F.2d at p. 704.

9. *Id.* 126 F.2d at p. 702.

10. *Id.* 126 F.2d at p. 704.

11. "Schenck Goes To Prison," *N.Y. Times*, May 3, 1942, p. 48.

12. "Schenk Is Paroled; In U.S. Jail 4 Months," *N.Y. Times*, Sept. 9, 1942, p. 26; "J. M. Schenck Pardoned," *N.Y. Times*, Jan. 4, 1947, p. 9.

Carey McWilliams. *Photo: Gift of Will Connell, Calif. Museum of Photography.*

The Legal Activism of Carey McWilliams

BY PETER RICHARDSON

Carey McWilliams is not a household name, but the Los Angeles author and attorney has amassed many admirers over the years. Historian Kevin Starr called McWilliams the finest nonfiction writer on California and the state's most astute political observer. Fellow historian Patricia Limerick described him as California's preeminent public intellectual and one of "the truly ethical leaders of the American West."[1] Cesar Chavez recommended *Factories in the Field,* McWilliams' 1939 book about California farm labor, as "*the* book for the ordinary guy."[2] Reagan biographer Lou Cannon claimed that McWilliams "defined for Americans everywhere the mythic state of California — that extraordinary place where the moods and movements of today become the national reality of tomorrow."[3] In short, McWilliams may be the most influential California author that most Californians have never heard of.

Much of McWilliams' appeal can be traced to his versatility. Between 1939 and 1950, he wrote nine first-rate books and hundreds of articles, but he also headed California's Division of Immigration and Housing (DIH) and chaired the Sleepy Lagoon Defense Committee, which helped free Latino youths wrongly convicted of murder. Moreover, McWilliams inspired important work, including the Oscar-winning screenplay for *Chinatown* (1974) and Luis Valdez's play *Zoot Suit* (1979). At *The Nation* magazine, which he edited from 1955 to 1975, he asked Hunter S. Thompson to write about the Hell's Angels. That assignment led to Thompson's first bestselling book, and his literary executor later claimed that McWilliams was the only editor whom he unhesitatingly admired.

Even McWilliams' most dedicated admirers, however, have not always appreciated the extent to which McWilliams drew on his legal acumen to advocate for workers and civil liberties and against racial discrimination. On those issues and others, he rarely contented himself with critique; rather, he proposed sensible remedies for the most intractable problems of his day. When his legal activism is added to McWilliams' other accomplishments, we can see why the historian Mike Davis called him "the California left's one-man think tank."[4]

Born in Colorado in 1905, McWilliams moved to Los Angeles as a teenager. At the University of Southern California, he studied law and wrote for the student newspaper and literary magazine. After graduating, he joined a downtown law firm and quickly became a seasoned litigator. "One can learn a lot about a community in the courts, trying cases, examining jurors, and cross-examining witnesses," he wrote later, adding that the experience was "very much a part of my initiation into the history of the region."[5] Even as a busy lawyer, he kept up his writing. His first book, a well-received biography of Ambrose Bierce, appeared when he was 23.

McWilliams took his literary and political cues from his hero, H.L. Mencken, but the Great Depression radicalized him.

McWilliams took his literary and political cues from his hero, H.L. Mencken, but the Great Depression radicalized him. He began to address the major civil liberties issues of the day — sometimes in court and/or on picket lines but also through his writing. He joined the ACLU

1. Patricia Nelson Limerick, "Carey McWilliams: A Tribute," address delivered to the Calif. Studies Assn. meeting, Feb. 5, 1993.
2. Peter Richardson, *American Prophet: The Life and Work of Carey McWilliams*. Ann Arbor: Univ. of Michigan Press, 2005; rpt. Berkeley: Univ. of Calif. Press, 2019, 158.
3. Lou Cannon, "Carey McWilliams: Defined California, Defied Convention," *The Washington Post*, Jan. 28, 1979, *https://www.washingtonpost.com/archive/politics/1979/01/28/carey-mcwilliams-defined-california-defied-convention/34e70b5a-791c-495d-b9f0-41aee2733ad6/*.
4. Mike Davis, "Optimism of the Will," *The Nation*, Sept. 1, 2005, *https://www.thenation.com/article/archive/optimism-will/*.
5. Carey McWilliams, *Southern California: An Island on the Land*. Layton, UT: Gibbs Smith, 1973, xiv.

and represented Mexican-American workers in a 1934 citrus strike. "I hadn't believed stories of such wholesale violation of civil rights until I went down to Orange County to defend a number of farm workers held in jail for 'conspiracy,'" he recalled. "When I announced my purpose, the judge said, 'It's no use; I'll find them guilty anyway.'"[6] Struck by that injustice, McWilliams began writing for progressive magazines about politics and current affairs. He also joined the National Lawyers Guild and served as a trial examiner for the newly formed National Labor Relations Board. His experience informed his first bestselling book, *Factories in the Field*, which is often described as the nonfiction version of *The Grapes of Wrath*.

The year that book appeared, McWilliams joined Governor Culbert Olson's administration as director of DIH. As usual, he maintained his literary output. *Brothers Under the Skin*, a short history of America's racial and ethnic minorities, appeared in 1942. Written in the pamphleteering tradition, it piqued racists and red-baiters in the state Legislature, and the following year McWilliams was called before the Joint Committee on Un-American Activities in California. Its chairman, Jack Tenney, grilled McWilliams on the question of interracial marriage, which was still illegal in California. McWilliams thought the law should be abolished, but because he testified in executive session, the transcript was never published. Instead, Tenney wrote that McWilliams' views on miscegenation were "identical with Communist Party ideology." The California Supreme Court struck down the ban on interracial marriage six years later.[7]

When serving in state government, McWilliams found himself in the middle of what he later described as "certainly the most serious violation of civil liberties in this century."[8] After the Japanese attacked Pearl Harbor, many politicians called for the mass removal of Japanese residents from the Pacific Coast. McWilliams' boss, Governor Olson, supported President Roosevelt's executive order to evacuate and incarcerate 110,000 Japanese and Japanese-Americans. So did state attorney general Earl Warren and Tom Clark, chief spokesman for the Roosevelt Administration. (After serving on the U.S. Supreme Court, both men regretted that endorsement.) Behind the scenes, McWilliams tried to slow the stampede, but he never opposed the internment publicly.

All that changed in 1942. When campaigning for governor that year, Earl Warren pledged that his first official act would be to fire McWilliams. That promise was designed to please the state's growers, who opposed McWilliams' positions on farm labor. After leaving office, McWilliams was free to critique the internment of Japanese residents based solely on their ancestry. In *Prejudice* (1944), he refuted every argument for incarceration and showed that racial prejudice, not military necessity, prompted the order. He also proposed federal action to forbid discrimination based on race, color, creed, or national origin. His arguments resonated with Justice Frank Murphy of the U.S. Supreme Court. A New Deal Democrat who joined the court in 1940, Justice Murphy disagreed with the Court's decision to uphold the constitutionality of the internment. In his dissenting opinion to *Korematsu v. United States*, Justice Murphy cited *Prejudice* on four separate points.[9]

After the war, McWilliams wrote *Southern California Country: An Island on the Land* (1946). Still regarded as the finest interpretive history of the region, it also inspired Robert Towne's original screenplay for *Chinatown*. McWilliams dedicated the book to his friend, Robert Kenny, a former newspaperman, judge, and cofounder of the National Lawyers Guild. When Earl Warren became governor in 1942, Kenny replaced Warren as state attorney general and worked with McWilliams to soothe Los Angeles after the Zoot Suit Riots of 1943. After the war, Kenny observed the Nuremberg trials and reluctantly ran for governor against Warren. When HUAC subpoenaed the Hollywood Ten in 1947, he served as counsel. Rather than asserting their Fifth Amendment rights, the leftist screenwriters, directors, and producers challenged HUAC's right to question them about their political views. They were cited for contempt of Congress and served prison terms. As their appeal went forward, McWilliams drafted a supporting amicus curiae brief, but the U.S. Supreme Court declined to hear their case.

In 1950, McWilliams left Los Angeles for New York City. His charge was to edit *The Nation* magazine's special issue on civil liberties, but he stayed on and became editor in 1955. The McCarthy Era was especially difficult for the magazine and its supporters. McWilliams had sounded the alarm in *Witch Hunt: The Revival of Heresy* (1950), but many Americans were not yet attuned to the threats posed by fervent anti-communism. In 1951, McWilliams became a founding member of the Emergency Civil Liberties Committee (ECLC), which was formed after the ACLU declined to represent those charged under the McCarran Act of 1950. That law, which overrode President Truman's veto, required Communist organizations to register with the U.S. Attorney General. It also created the Subversive Activities Control Board and authorized the President to apprehend and detain those who might engage in acts of espionage or sabotage. The U.S. Supreme Court initially deferred to the law but later struck down many of its provisions on First Amendment grounds. Other parts of the law were repealed, and Congress abolished the Subversive Activities Control Board in 1972.

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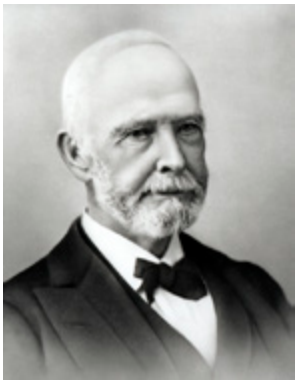
6. Richardson, *American Prophet*, 60.

7. *Perez v. Sharp* (1948) 32 Cal.2d 711.

8. "Honorable in All Things," Oral History Program, UCLA (1982), 187.

9. *Korematsu v. United States* (1944) 323 U.S. 214 (Murphy, J., dissenting).



Peter Hardeman Burnett, first governor of California, circa 1860. *Photo: California Supreme Court.*

Peter Hardeman Burnett's Short but Notorious Judicial Legacy

BY R. GREGORY NOKES

Historians have never quite figured out how to judge Peter Hardeman Burnett, and so mostly have ignored him. Yet in the sweep of western history, he's a hard man to ignore. He held more positions in the early American West than any other leader, including a short term on the California Supreme Court in 1857–1858.

There are two ways of looking at Burnett's career, one, that he was prepared as few men were for high leadership positions, or, two, that he stumbled from one office to another, seldom accomplishing much and leaving behind a legacy of racism-infested decisions.

Burnett is scarcely mentioned in California histories, even though he played a major role in advocating for California self-rule following the Mexican-American War in 1848. He organized rallies, made speeches and wrote long newspaper articles. However, his role was not as great as he boasted to a colleague in 1850: "I believe I have a right to claim the responsibility of making the first public movement toward the formation of a state government."[1]

Notably, and impressively, Burnett was elected in 1849 to a two-year term as the first civilian governor of the new state — not just elected, but elected overwhelmingly by those early Californians who voted.[2] Yet, scarcely 13 months after taking office, he resigned in disgrace on January 9, 1851, widely judged as ineffective and inept. His resignation letter to the Legislature cited "unexpected and unforeseen" circumstances that required him to attend to his "private affairs" without additional explanation.[3]

Typical of Burnett's up-and-down career, he was up again when he was appointed to the California Supreme Court in 1857, and down again after he ruled on behalf of a slave holder in *In re Archy*,[4] a fugitive slave case. Historian Stacey L. Smith called the ruling "the dying gasp of slaveholder rights in California."[5] It also proved the dying gasp of Burnett's long and controversial political and judicial career.

Burnett's racism had both geographical and family origins. He came of age in the slave states of Tennessee and Missouri — he was born in Nashville on November 15, 1807.[6] His father owned slaves, as did his prosperous grandfather, Thomas Hardeman. In Missouri, Burnett would acquire two slaves of his own.[7] When a store-owner in Tennessee, he shot and killed a black slave who allegedly broke into his store — an accident, Burnett claimed.[8]

Burnett was ambitious from an early age, aspiring to both wealth and prestige — "I determined that I would employ my energies in the accumulation of a fortune," he wrote in his autobiography.[9] In Missouri, he taught himself law and served on the defense team for Mormon leader Joseph Smith — Smith had been charged with treason, arson and robbery for his role in the 1838 Mormon War.[10] Burnett also was a three-term district attorney for northwest Missouri. But facing huge debts from failed business adventures, he decided to seek his fortune in the West. He organized and led the first major wagon train from Missouri to Oregon in 1843, known as "The Great Migration." In Oregon, he was elected to the provisional legislature, served as judge

1. Burnett to Samuel Thurston, Aug. 7, 1850, Peter Burnett Papers, 1849–1895, Bancroft Library, Berkeley, California. Thurston was a delegate to Congress from the Oregon Territory.

2. Burnett received 7,783 votes in a sparse turnout, partly blamed on adverse weather. Of the other candidates, Winfield Sherwood received 3,220 votes; John Sutter, 2,201; John W. Geary, the future mayor of San Francisco, 1,358, and William Stewart, 619. "1849 California gubernatorial election," Wikipedia, *https://en.wikipedia.org/wiki/1849_California_gubernatorial_election*. Burnett was elected November 13, 1849, and inaugurated November 20. California became a state September 9, 1850.

3. R, Gregory Nokes, *The Troubled Life of Peter Burnett: Oregon Pioneer and First Governor of California*. Corvallis: Or. State U. Press, 2013, 161.

4. *In re Archy* (1858) 9 Cal. 147.

5. Stacey L. Smith, *freedom's frontier: California and the Struggle Over Unfree Labor, Emancipation and Reconstruction* Chapel Hill: Univ. N. Car. Press, 2003, 77.

6. Burnett's surname at birth was Burnet, with one T. He added a second T when he was 19, believing his name spelled with two Ts was more "emphatic." Nokes, *The Troubled Life*, 6.

7. The 1840 U.S. Slave Census listed Burnett with two slaves in Missouri, a female age 10–23, and a male, under age 10. They may have been a mother and son, or a sister and brother. One of Burnett's slaves may have drowned in the Columbia River during the 1843 emigration. Nokes, *The Troubled Life*, 34.

8. *Id*. at 1–2.

9. Peter Burnett, *Recollections and Opinions of an Old Pioneer*. New York: D. Appleton & Co., 1880, 24.

10. For more on the Mormon War and details of Burnett's role, see Stephen C. LeSueur, *The 1838 Mormon War in Missouri* Columbia: Univ. of Missouri Press, 1978 and John Krakauer, *Under the Banner of Heaven; A Story of Violent Faith*. New York: Doubleday, 2003.

of the provisional supreme court, and, after Oregon gained territorial status in 1848, he was elected to the first territorial legislature. However, he never served a day, departing for California before the legislature met. He also wrote that President James Polk appointed him to the territorial supreme court, after he had already left Oregon.[11]

When serving in Oregon's provisional legislature in 1844, Burnett won passage of an exclusion law aimed at banning African Americans from settling in the region, yet allowing slaveholders to keep slaves for up to three years, reversing an earlier flat prohibition against slavery.[12] Under the statute, after three years, the slave would have to leave Oregon — the onus was on the slave, not the slaveholder — or face a whipping of up to 39 lashes. Known in Oregon history as "Peter Burnett's lash law," it was abolished the following year.[13]

Burnett headed to California along with tens of thousands of other would-be gold miners following the discovery of gold at Sutter's Mill in 1848. He organized his own wagon train of 46 wagons and 150 mostly men, and opened the first wagon road connecting Oregon and California. He briefly mined gold on the Yuba River before setting up a law practice at Sutter's Fort where he teamed with August Sutter, son of John Sutter, and others to establish the new city of Sacramento. As young Sutter's land agent, selling lots for homes and businesses, he finally gained the fortune he'd always wanted, which bankrolled his successful run for governor at a time when California was primed for statehood.[14]

Burnett wasted no time as governor in revealing his prejudices. In his first address to the new California Legislature on December 21, 1849, he urged enactment of an exclusion law against blacks as an issue "of the first importance." Anyone opposing such a law, he told the legislators, was guilty of "weak and sickly sympathy."[15]

Burnett wasn't by any means alone in his racist attitudes during this period. There was considerable pro-slavery sentiment in California. Many of the early settlers and miners came from the slave states of the south, and many brought slaves to help mine gold. One of California's first U.S. senators, William McKendree Gwin, was a former plantation owner with — by one count — nearly 200 slaves in Mississippi.[16]

The proposed exclusion law was only narrowly defeated, but Burnett was back the following year, again urging "the necessity and propriety of excluding free persons of color from the state."[17] This and several tone-deaf policies, such as recommending the death penalty for robbery and theft, and changing the date of the Thanksgiving holiday, subjected him to widespread ridicule, resulting in his resignation as governor on January 9, 1851.

The *Daily Alta California* of San Francisco — California's leading newspaper — which had supported Burnett, did a 180-degree shift and welcomed his resignation in an editorial: "It is not to be denied that the people were most shamefully deceived and egregiously disappointed in their selection for the head of the state government."[18]

Gov. J. Neely Johnson nevertheless resurrected Burnett's career by appointing him to the Supreme Court on January 13, 1857, replacing Solomon Heydenfeldt, who resigned before the end of his term, which would have expired in January 1858. Following the death of Justice Hugh Murray on September 17, 1857, Johnson next appointed Burnett to Murray's term, which expired in October 1858. Voters, perhaps also forgetting Burnett's hapless time as governor, affirmed Johnson's appointment by electing Burnett to the Murray position in January.[19] Stephen J. Field, a future associate justice of the U.S. Supreme Court, was appointed to the Heydenfeldt position vacated by Burnett. The third member of the court was Chief Justice David Terry, who had been elected in 1855 and would be remembered for shooting and killing U.S. Senator David Broderick in a duel.[20]

Throughout Burnett's long career in Missouri, Oregon and California politics, there is no record of his ever having spoken disparagingly of slavery or slave owners. Indeed, in his autobiography, he expressed admiration for slaveholders he knew. He said his own family treated its slaves well,

11. Burnett's governmental offices are compiled in Nokes, *A Troubled Life*. Regarding the Polk appointment, see Burnett, *Recollections*, 194, and *Oregon Blue Book, Almanac and Fact Book 2011–2012*. Salem: Or. Office of the Secretary of State, 2011, 318.

12. The 1843 prohibition against slavery was contained in a so-called organic law adopted by a committee and approved by voters prior to the arrival of the 1843 wagon train. Nokes, *A Troubled Life*, 65–66.

13. Nokes, *A Troubled Life*, 65–66.

14. Burnett details his wagon train to California, his mining experience and role in establishing Sacramento in *Recollections*.

15. The text of Burnett's address was published in the *Daily Alta California*, Dec. 26, 1849.

16. The 1840 Slave Census listed Gwin with 23 slaves. Gwin had multiple plantations and nearly 200 slaves. The other of the first two senators was John C. Fremont, a slavery opponent. Leonard L. Richards, *The California Gold Rush and the Coming of the Civil War*. New York: Vintage Pub., 2008, 39.

17. *Journals of the Legislature of the State of California*, (1851) 19–21.

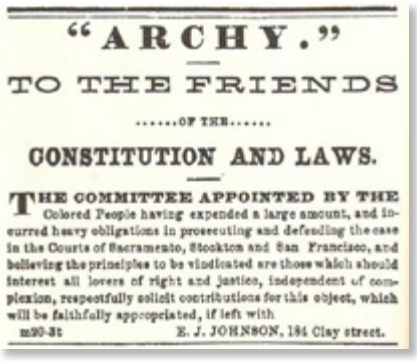
18. *Daily Alta California*, Jan. 11, 1851.

19. Burnett received 54,991 votes, more than twice that of the five other candidates. *Sacramento Union*, Oct. 6, 1857.

20. Terry, who favored slavery, was later involved in a famous duel, shooting dead Senator David Broderick in 1859. After service in the Confederate army during the Civil War, Terry was himself shot dead by a federal marshal bodyguard after assaulting then United States Supreme Court Associate Justice Stephen Field in 1889. Nokes, *The Troubled Life*, 193–94. See also, "Telling the Tale of California's Most Colorful Justice," *CSCHS Newsletter*, Spring/Summer 2014, at 20, *https://www.cschs.org/wp-content/uploads/2014/05/2014-Newsletter-Fall-Most-Colorful-Justice.pdf*.

and that the slaves reciprocated with appreciative obedience.[21]

So it should not be surprising that Burnett took the side of a slave owner in the most important case to come before the Supreme Court while he was a member. The case, *In re Archy*, concerned Archy Lee, a 19-year-old house servant in Mississippi, who was brought to California by his owner, Charles Stovall, in 1857. When Stovall prepared to return to Mississippi several months later, intending to bring Archy Lee with him, Lee escaped. Stovall tracked him down and had him taken into custody as a runaway slave.[22]



"ARCHY."

TO THE FRIENDS

.....OF THE.....

CONSTITUTION AND LAWS.

THE COMMITTEE APPOINTED BY THE Colored People having expended a large amount, and incurred heavy obligations in prosecuting and defending the case in the Courts of Sacramento, Stockton and San Francisco, and believing the principles to be vindicated are those which should interest all lovers of right and justice, independent of complexion, respectfully solicit contributions for this object, which will be faithfully appropriated, if left with

m20-3t E. J. JOHNSON, 184 Clay street.

Archy Lee defense advertisement, 1858. *Image: Public Domain.*

California's active black community came to the aid of Archy Lee and took the case to a district court where Judge Robert Robinson ruled in Lee's favor, declaring him a free man under California law on January 23, 1858. Stovall, however, obtained a new warrant and had Lee rearrested. Stovall next sought relief in the California Supreme Court, where Burnett and Terry heard the case at its January 1858 term.[23] Field, the newest member of the court, evidently did not participate.

Stovall's attorney, James J. Hardy, claimed that Stovall had been only a visitor in California, giving him a "right of transit" and should be allowed to return home with his slave. He also argued that even though the California Constitution prohibited slavery, that provision was unenforceable because the Legislature had failed to enact implementing legislation.[24]

Burnett's majority opinion dismissed Hardy's argument that Stovall had a right of transit, and thus could keep his slave. Burnett noted that Stovall had worked for two months as a schoolteacher in Sacramento and had hired Lee out for work. Said Burnett: "If the party engages in any business himself, or employs his slave in any business, except as a mere personal attendant upon himself, or family, then the character of visitor is lost, and his slave is entitled to freedom."[25] As for Hardy's argument that the Legislature failed to implement the constitutional prohibition against slavery, Burnett said the constitutional provision is self-executing, and requires no legislation to be effective: "It is negative and restrictive in its terms and effects, and by its own force accomplishes the end aimed at . . . that the state of slavery should not exist therein."[26]

Nevertheless, Burnett referred by implication to the state's expired fugitive slave act as justification to return Archy Lee to Stovall's custody. As enacted by the Legislature in 1852, the California Fugitive Slave Act supplemented the 1850 federal Fugitive Slave Act, which gave slaveholders the right to claim a runaway slave who escaped across state lines, but did not apply to slaves who escaped after being voluntarily taken by owners to free states. The California act provided that owners of slaves who escaped *prior* to statehood could claim escapees as their property.[27]

The California Supreme Court had earlier upheld the state act in a ruling that Stacey Smith called "one of the most deeply proslavery decisions[] ever rendered in a free state."[28] In that 1852 opinion, Chief Justice Murray and Associate Justice Alexander Anderson had pronounced the constitutional prohibition against slavery a mere "declaration of a principle, looking to the aid of [a] future legislature to carry it out."[29] And without such legislation, that opinion held, the provision was thus "inoperative."[30] Initially set to expire after a year, the act was extended for an additional two years before finally expiring in 1855, three years before the Supreme Court took up the *Archy Lee* case.[31]

Had Burnett simply ruled that the constitutional prohibition against slavery was valid, self-executing, and enforceable, and then set Archy Lee free, he might well have been praised by anti-slavery interests for upholding the Constitution. However, Burnett bizarrely ruled that Stovall was entitled to an exemption from the prohibition against slavery.

"This is the first case that has occurred under the existing law," Burnett wrote. "The petitioner [Stovall] had some reason to believe that the constitutional provision would have no immediate operation. . . . [U]nder these circumstances we are not disposed to rigidly enforce the rule for the first time. But in reference to all future cases, it is our purpose to enforce the rules laid down strictly, according to their true intent and spirit."[32]

The court's holding directed that "*Archy be forthwith released from the custody of the chief of police and given into the custody of the petitioner, Charles A. Stovall.*"[33] Chief Justice Terry concurred.

21. Burnett, *Recollections*, 4, italics added.
22. Rudolph M. Lapp, *Blacks in Gold Rush California*. New Haven: Yale Univ. Press, 1995, 148.
23. *In re Archy*, 9 Cal. 147.
24. *Id*. at 148 [summary of counsel's arguments].
25. *Id*. at 168.
26. *Id*. at 170.
27. *Compiled Laws of California* (1852) ch. 65, p. 231 ["An act respecting Fugitives from Labor, and Slaves brought to this State Prior to her admission into the Union"].
28. Smith, *freedom's frontier*, *supra* note 4, at 71, commenting on *In re Perkins* (1852) 2 Cal. 424.
29. *In re Perkins*, 2 Cal. at 456.
30. *Ibid*.
31. Smith, *freedom's frontier*, 74.
32. *In re Archy*, *supra*, 9 Cal. at 171.
33. *Ibid*, italics added.

The decision was widely condemned. The *Sacramento Union*, which once supported Burnett, said his ruling "caps the climax of all human absurdity and lowers the dignity of the Supreme Court to a degree wholly unparalleled . . . in the history of any state in the Union."[34] Similarly, the *Daily Alta California* said Burnett and Terry "have prostituted the supreme legal tribunal of California to a point of degradation from which it will not rise, until they cease to pollute the court chambers with their presence as judges."[35]

There were other cases in which Burnett participated, although none of the magnitude of the *Archy Lee* case. One dealt with land sales in Sacramento.[36] Another, which Burnett authored, held a Sunday closing law unconstitutional.[37]

The decision in *In re Archy* effectively ended Burnett's political as well as judicial career. He left the court when his term ended in October 1858, and apparently never looked back. In his autobiography, *Recollections and Opinions of an Old Pioneer*, published in 1880, he mentioned nothing that happened on the court, only the dates he was a justice. Burnett moved on to private life and became a prominent San Francisco banker. He died May 17, 1895 at age 87 and is buried in Santa Clara Mission Cemetery in Santa Clara.

As for Archy Lee, he would not be returned to slavery. Legal moves in other courts set him free,[38] and he eventually moved with other African Americans to Canada. Stovall would return to Mississippi empty-handed. ✯

R. Gregory Nokes is the author of *The Troubled Life of Peter Burnett: Oregon Pioneer and First Governor of California*. More at *http://gregnokes.com*.

34. *Sacramento Union*, Jan. 16, 1858.

35. *Daily Alta California*, Feb. 14, 1858. See also Grodin, "The California Supreme Court and State Constitutional Rights: The Early Years" (2004) 31 *Hastings Const. Law Q.* 141, 147–49 [describing other similar criticisms].

36. *Brannan v. Mesick* (1858) 10 Cal. 95.

37. *Ex Parte Newman* (1858) 9 Cal. 502. See Keiter, "Never on Sunday: Religious and Economic Liberty in Gold-Rush Era California," *CSCHS Newsletter*, Spring/Summer 2019 at 5, *https://www.cschs.org/wp-content/uploads/2019/06/2019-Newsletter-Spring-Never-on-Sunday.pdf*.

38. See Grodin, 31 *Hastings Const. Law Q.* 141, 148, describing the "surprising and gratifying (if somewhat confusing) sequel to the case": After the Supreme Court's decision, Archy again escaped and was recaptured. He was then "put on a boat to San Francisco for transport back to Mississippi, but in San Francisco a friend of Archy by the name of James Riker sought a second writ of habeas corpus, this time for the release of Archy on the ground he was a slave. That case came to be heard before a state judge in San Francisco, but while it was pending Stovall invoked the jurisdiction of a United States Commissioner (George Pen Johnson) on the ground (inconsistent with Stovall's previous declarations) that Archy had escaped from Mississippi, and at the request of Stovall's lawyers, Archy was turned over to the custody of Commissioner Johnson. On April 14, 1858, Johnson decided that Archy was not a fugitive slave after all, and discharged him from custody." *Id*. at 149.

Carey McWilliams

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McWilliams' role on the ECLC did not go unnoticed. The committee became the target for the newly formed American Committee for Cultural Freedom (ACCF) and its affiliate, the Congress for Cultural Freedom (CCF), whose members included Irving Kristol and Arthur Schlesinger, Jr. In a letter to theologian Reinhold Niebuhr, Kristol called the ECLC a Communist front, and after singling out McWilliams for suspicion, he added, "There are, of course, non-Communists who are taking part, but no one can be legitimately described as an anti-Communist."[10] McWilliams described himself as a democratic socialist, but he remained on the FBI's Security Index at least through 1958, and his writings, affiliations, and travel were monitored well after that. As for the CCF, later reporting revealed that its funders included the CIA. Relishing the irony, McWilliams encouraged blacklisted screenwriter Dalton Trumbo to write an article for *The Nation* about the CCF as a CIA front.

McWilliams retired from the *The Nation* in 1975, taught briefly at UCLA, wrote a memoir while suffering from cancer, and died in Manhattan in 1980. At that time, his reputation was well established but not commanding. It improved significantly in the 1990s, mostly on the strength of endorsements by Kevin Starr and Mike Davis. A prolific, popular, and consequential author who was also a radical, McWilliams now embodies an ideal that seems increasingly remote to his admirers — a figure who could litigate a case, serve in state government, write campaign speeches, critique fiction, edit a national journal of news and opinion, and reach general audiences without catering to them. In no small part because of his legal activism, McWilliams is now recognized as one of the most versatile American public intellectuals of the twentieth century. ✯

Peter Richardson teaches at San Francisco State University. *American Prophet: The Life and Work of Carey McWilliams* was reissued last year by the University of California Press.

10. Victor Navasky, *Naming Names*. New York: Viking Press, 1989; rpt. New York: Hill and Wang, 2003, 56.

Justice Ming W. Chin

A Legacy of Public Service, Civility, and Excellence

BY JAMES LEIBSON

In 1990, governor george deukmejian appointed three new justices to the First District Court of Appeal, including Alameda Superior Court Judge Ming Chin. Looking for an alternative to law firm life, I joined the First District's pool of applicants for a staff attorney position with one of the incoming justices. Serendipitously for me, only Justice Chin decided to hire new staff from outside the court. He offered me a position, and I started working for him in December 1990. Almost 30 years later, as Justice Chin prepares to retire from the Supreme Court of California, I still work for him.

My long tenure as a member of Justice Chin's staff is far from unique. Several of his current research attorneys have been with him over 20 years. One joined his staff in 1996, when Justice Chin was elevated to the Supreme Court by Governor Pete Wilson. Another first worked for him as an extern about the same time, and then returned to his staff in 1999 after two years in private practice. One of his former research attorneys just recently retired after 22 years on his staff. And during Justice Chin's 30 years as an appellate judge, he has had only three administrative assistants. The fact is, most who have worked for him stayed as long as they could, and eventually left for reasons like retirement or relocation.

Among the many other notable things about Justice Chin, one in particular stands out: his personal credo of kaizen. A Japanese word, kaizen, literally translated, means constant improvement. Justice Chin talks about it often in his speeches. To him, it means we are all responsible for making our families, our communities, our environment, and ourselves better each day than the day before.

One of the reasons Justice Chin inspires such loyalty is that he treats his staff as family. I've experienced this many times first-hand, including when he stepped under a chuppah to officiate at my wedding. I've also seen it countless other times with other staff members. When one of his research attorneys married and moved to Southern California, Justice Chin arranged for her to continue working for him based out of the Court of Appeal in Los Angeles. When another of his research attorneys wanted to work part time because she had young children, Justice Chin created one of the court's first attorney job-share positions, even after being warned that the arrangement wouldn't work. Over the years, Justice Chin has been quite vocal about how well that decision worked out, and has encouraged colleagues both on and off the court to be open to alternative work schedules that accommodate staff needs.

Justice Ming Chin participates in a California Supreme Court Outreach Session at the University of San Francisco, his alma mater. *Photos: Judicial Council of California.*

The importance of family to Justice Chin is immediately obvious as soon as you walk into his office. Of course, he has received innumerable awards over the years, and has the hardware to prove it. But except for a few mementos that hold particular meaning for him, you won't find his award plaques *in* his office. For the most part, those are displayed elsewhere, in the outer hallways of his chambers. So what actually surrounds his desk? Picture after picture of his family.

This arrangement is a perfect reflection of Justice Chin. Despite his many accolades and professional success, *nothing* is more important to him than his family. To watch the Chins over the years is to bear witness to a true love story. Anyone who has ever been around Justice Chin and his wife Carol can feel the deep affection, enduring love, great tenderness, and tremendous respect between them. Carol is his rock, and he's the first to tell you so. And when he talks about his children Jennifer and Jason — as he often does — he beams. He is incredibly proud of them, both professionally as highly successful and principled lawyers, and personally as great partners to their spouses, devoted and loving parents to their children, and wonderful citizens of the community. Nowadays, as a doting grandfather, he also talks a lot about his five grandchildren. Spending more time with them is very high on his list of post-retirement activities. He also often talks with pride about his seven older brothers and sisters, most now unfortunately departed.

Among the many other notable things about Justice Chin, one in particular stands out: his personal credo of kaizen. A Japanese word, kaizen, literally translated, means constant improvement. Justice Chin talks about it often in his speeches. To him, it means we are all responsible for making our families, our communities,

our environment, and ourselves better each day than the day before.

This credo was instilled in Justice Chin at an early age by his parents, whom he describes as his first teachers. He speaks of them often, always with great love, admiration, and respect. He talks about how they came to America without language or money; how they remained optimistic and never gave up, despite the many obstacles they faced as unwelcome immigrants in a foreign land; and how they ultimately forged an amazing life for their large family.

But perhaps Justice Chin's military service in Vietnam is what really cemented the credo as his guiding principle. Justice Chin doesn't often talk about that service; for him, it's something very personal and private. When he does, though, he doesn't mention the decorations he received: the Bronze Star and the Army Commendation Medal. He talks instead about the 58,000 men and women who never made it home from the war, and about the commitment he made long ago to honor their sacrifice by doing whatever he could to make his community, his state, and his country better. As a tangible reminder of this commitment, and as a symbol of his deep and abiding love of country — something else he got from his parents — hanging in a frame on a wall near his desk is an American flag that once flew in Afghanistan over the home of the Navy Seal Team that carried out the successful raid on Osama Bin Laden's hideout. It was presented to him by a close family friend who had just returned home from a year of service in Afghanistan: U.S. Navy Lt. (and now U.S. Rep.) James Panetta, son of Leon and Sylvia Panetta and godfather to two of Justice Chin's grandchildren.

For Justice Chin, kaizen is more than just talk. He has devoted most of his career to public service, first as a district attorney and then as a judge for over three decades. As a judge, he has displayed his commitment to public service in many different ways. He is well known for being a prolific author of opinions that are thoughtful, clear, and often courageous. What is less well known is that through his service on countless committees, he has been at the forefront of efforts to protect and improve the judicial branch and to provide impartial justice to all. This includes pioneering work in providing continuing education to lawyers and judges, increasing diversity within the legal profession, preserving judicial independence, and addressing bias within the legal system. It also includes visionary work in bringing new technologies to the judicial system to expand access to the courts and streamline the delivery of justice. More often than not, Justice Chin has been the driver of these efforts, not just a passenger.

I want to mention one final aspect of Justice Chin's life work that both reflects his drive for constant improvement and offers insight into the person he is: promoting civility in the judicial system. Justice Chin often tells the story that when he became a trial court judge in 1988, he told his staff, "I expect everyone who comes into my courtroom to be treated with dignity and respect. Regardless of how they're behaving or what they're doing, I want you to treat them with dignity." Over 30 years later, in 2019, when asked what advice he would give to law students and beginning practitioners, his message was much the same. "Civility," he said "should be your foundation. It's the right thing to do, and it will ultimately make you a more effective attorney. It will also make your life better." This has been a consistent theme of his remarks during three decades as a judge.

Here again, Justice Chin practices what he preaches. In the many years I've worked for him, I've never seen him treat anyone with anything other than dignity and respect. Because of this, he has always gotten along well with his colleagues on the court, even when they disagreed about the law. Sometimes, he has even been enlisted to play the role of intermediary between colleagues who weren't getting along quite so well. Asked recently where he gets this quality, he referred, once again, back to his beloved parents. "I think everything I've done comes from a respect for other people. My parents certainly had that. They certainly gave that to me. They were wonderful at it."

Justice Ming Chin in chambers, January 2020.

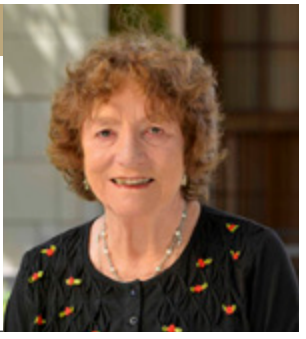
Justice Chin is wonderful at it, too. I know from personal experience. It has been an honor and a privilege to serve at his side for all of these years. And it is my great fortune to be able to call him friend. ✯

James Leibson has been a staff attorney for Associate Justice Ming W. Chin of the Supreme Court of California since 1996, serving as co–chief of staff since January 2019. From 1990 to 1996, he was a staff attorney for Justice Chin while Justice Chin was the Presiding Justice of Division 3 of the First District Court of Appeal and an Associate Justice of that Division.

Legal Scholar Barbara Allen Babcock

Pioneering Attorney Instrumental in the Establishment of Today's D.C. Public Defender Service, First Woman to Serve on the Faculty at Stanford Law School, and Historical Society Board Member

BY SHARON DRISCOLL



Barbara Babcock inspired the hundreds of students she taught. *Photo: Rod Searcey.*

Legal trailblazer Barbara Allen Babcock, the first woman member of the Stanford University Law School faculty and the Judge John Crown Professor of Law, Emerita, died April 18 at her Stanford home.

Babcock, who had waged a long battle with cancer, was 81.

At Stanford Law School, which Babcock joined in 1972, she was an award-winning teacher and legal trailblazer who inspired the hundreds of students she taught.

That was, however, not Babcock's only professional first. In 1966, she joined a pilot project established by the District of Columbia to deliver legal defense services to the poor. In 1968, she was appointed the first director of D.C.'s newly named Public Defender Service. The success of the initiative gained national recognition and led to her recruitment to Stanford.

"Barbara was not simply someone who left an enormously significant public mark, she was someone who was beloved by our students in a way most of us could only dream of," said Jenny Martinez, the Richard E. Lang Professor of Law and dean of Stanford Law School.

"As dean, I get to talk to our alums frequently, and I can't tell you how many mention Barbara as one of the most influential people in their lives," Martinez said. "She was a model of personal warmth and grace, a fantastic storyteller, a true friend and mentor to hundreds of our students."

Public Defender Service

Babcock was a new attorney when she joined the pilot project that became the Public Defender Service. After graduating from Yale Law School, she clerked for Judge Henry Edgerton of the U.S. Court of Appeals for the District of Columbia Circuit and then became an associate at the criminal defense firm Williams & Connolly. But Babcock wanted to do legal aid work, so she joined the Legal Aid Agency in 1966.

Babcock recalled her experiences there in a 2016 interview with *Stanford Lawyer* magazine after publication of her memoir, *Fish Raincoats: A Woman Lawyer's Life*.

"Back then the director's salary was set at $16,000," she said. "You couldn't raise a family on it. So they had a lot of difficulty finding applicants. There were a lot of people who wanted the job, but couldn't afford to take it. In the end, I just decided I would go for it, and I applied to be the director. I thought that I should. That it was a duty. And I became director in 1968. Then it turned into a huge prestigious job that made my career, but at the time it felt somewhat like a sacrifice, but one that I had to do — so I did."

Babcock was credited with creating an agency that strove to give the same level of service to indigent defendants as that provided by private law firms. She established policies, including having every client represented by an individual attorney rather than the office as a whole, allowing attorneys to take cases only if they had adequate time to provide complete representation. Social workers consulted with attorneys on sentencing, especially in juvenile court.

"Because of her leadership, a position at PDS became one of the most sought-after jobs in the country. It was filled with former Supreme Court clerks," said Michael Wald, the Jackson Eli Reynolds Professor of Law, Emeritus, at Stanford. Wald worked with Babcock in 1971 during a sabbatical from Stanford Law, describing the experience as "an amazing education."

Coming to Stanford Law

While running Public Defender Service, Babcock was invited to teach a new class at Georgetown Law called Women and the Law — one of the first legal courses focused on women's issues in the country.

"There was this surge of people, of women, in law school . . . . They were really different from my generation — all we tried to do was not be noticed and to assimilate. But they didn't. They said: 'What is this? You got us here and nobody pays any attention to us and there are no women professors!' " Babcock recalled. She taught the same course at Yale before being considered for the Stanford Law faculty.

Tom Ehrlich, dean of Stanford Law from 1971 to 1976, recalls the turbulent atmosphere on campus and across the country in 1972, with protests against the Vietnam War and movements for equality and justice. The faculty was changing, and Babcock contributed to that change. "It quickly became apparent to everyone that she was a terrific addition to the faculty," he said. "She made

it easier to hire more women on the faculty. And more faculty of color as well. She was a pathbreaker on many levels. She stands very tall in the history of Stanford Law School."

Babcock was honored by the graduating class four times with the John Bingham Hurlbut Award for Excellence in Teaching. Her influence went beyond the classroom, and she became a role model. She was credited by former students for inspiring teaching on civil justice, racial equality, poverty and the importance of lawyers in society.

"Barbara Babcock changed my life for the better," said Judge LaDoris Cordell, a Stanford Law graduate and retired judge of the Santa Clara Superior Court. "A terrific teacher, Barbara loved the law and adored her students, who, like me, adored her."

Babcock also brought practical legal experience and a commitment to clinical education to Stanford. After taking a leave from 1977 to 1979 to serve as assistant attorney general for the Civil Division in the U.S. Department of Justice, Babcock returned to help pilot the school's first clinic. The student-initiated East Palo Alto Community Law Project was the precursor to today's Stanford Community Law Clinic.

Clara Foltz Biography

Babcock was author of the 2011 book *Woman Lawyer: The Trials of Clara Foltz*. Foltz was a late 19th- and early 20th-century California lawyer, public intellectual, leader of the women's movement and legal reformer. Her story was all but lost until Babcock made recovering it her life's work.

The book was widely praised, including by Justice Ruth Bader Ginsburg. Babcock spent years doing readings throughout the country.

"It's hard today for both men and women to imagine what it was like in the days when there were few women lawyers, judges and law professors; and even harder to imagine what it was like to be one of those few women lawyers, judges and law professors. You had to be somebody very special. And if you had to pick one word to describe Barbara Babcock, that's the word: special. A special lawyer, a special teacher, a special scholar," says Lawrence Friedman, the Marion Rice Kirkwood Professor of Law at Stanford. "It was a labor of love for her to spend years writing the life of another special woman, Clara Foltz, and to restore Clara to her proper role in legal history. A century apart, two women pioneers."

Foltz's story was popular with readers, much as Babcock's own would be with her memoir *Fish Raincoats*. One memory out of many that has resonated from the book was Babcock's testimony at the Robert Bork U.S. Supreme Court nomination hearings in 1987. In that testimony, she criticized Bork as "a good 15 years behind the times on women's rights."

"*Fish Raincoats* is filled with episodes from a spellbinding storyteller," said Pamela Karlan, the Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford.

"One of my favorites involves Barbara's representation of a woman named Geraldine, who faced life in prison for a drug-possession offense. Barbara advanced a novel mental-illness defense: 'inadequate personality.' When the jury returned a verdict of 'not guilty by reason of insanity,' Geraldine burst into tears, threw her arms around Barbara, and exclaimed, 'I'm so happy for you.' Barbara used the story frequently to talk about both juries and the special vocation of the public defender. But the reason I always remember the story is because I have never known anyone with a more adequate personality than Barbara's."

Top: Young Barbara Babcock at the lectern, circa 1972. *Right:* Barbara Babcock with a poster-sized photo of lawyer Clara Foltz, a public defender and legal reformer whose story was all but lost until Babcock wrote a book about her. *Photos this page: courtesy Stanford Law School.*

Barbara Babcock was born in Washington, D.C, in 1938, and grew up in Hyattsville, Maryland. Before graduating from Yale Law School, Babcock attended the University of Pennsylvania on a full scholarship, graduating Phi Beta Kappa. She served four years (2000–2004) as a member of the CSCHS Board of Directors. Her husband of 41 years, Thomas Grey, the Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law, Emeritus, was at her side when she died. ✯

Sharon Driscoll is Director of Editorial Strategy at Stanford Law School. A version of this article was originally published by Stanford Law School and is reprinted with permission.

California Leads in Oral Histories of State Supreme Court Justices

BY LAURA MCCREERY

The California Supreme Court in 2006 at the historic Santa Barbara County Courthouse. *Left to right*: Associate Justices Carlos R. Moreno, Kathryn Mickle Werdegar, and Joyce L. Kennard, Chief Justice Ronald M. George, and Associate Justices Marvin R. Baxter, Ming W. Chin, and Carol A. Corrigan. *Photo: courtesy Law Offices of E. Patrick Morris/EPM Photographics, Santa Barbara.*

With a statewide judiciary twice the size of the federal judiciary, and with the largest population of any state, it is perhaps fitting that California also appears to lead other states in preserving its judicial history through oral histories of its supreme court justices. The phrase "appears to lead" is apt, because compiling data has proved elusive. But informal website research suggests that California has produced more oral histories spanning a longer time than any other state. The first of these recordings ocurred in 1955 and 50 years later, in 2005, after intermittent recordings in the 1970s through 2000s, a concerted and ongoing effort began that has produced nine additional oral histories to date.

My search, while not comprehensive, identified many individual states and several regional and national oral history projects (see Appendix) that have used oral history methods to create valuable primary-source material on state high court judging — preserving details not often revealed in the copious written record. Such material can enhance both scholarly research and public discussion concerning issues of the day, such as judicial independence, contested judicial elections, the careers of women and ethnic minorities, and how the "independent and adequate state grounds" doctrine bears upon key constitutional rights such as privacy. Oral histories often explore an array of non-judicial roles that interviewees have played before and after their time on the bench, such as Justice Marvin Baxter's six years as appointments secretary to Governor George Deukmejian.

With generous support from the California Supreme Court Historical Society, the California Supreme Court Oral History Project has, since 2005, conducted comprehensive oral history interviews of nine justices of the California Supreme Court, including individuals appointed by Governor George Deukmejian (5 appointments), Governor Pete Wilson (3), and Governor Gray Davis (1). The completed oral histories, *http://oskicat.berkeley.edu/search~S1?/aCalifornia+Supreme+Court+Oral+History+Project*, reside in manuscript form in The Bancroft Library at UC Berkeley, which serves as the permanent steward of the materials. This phase of work began under the direction of Professor Harry Scheiber at Berkeley Law with the goal of interviewing Governor Deukmejian's retired Supreme Court appointees. All four (Chief Justice Malcolm Lucas, Justice John Arguelles, Justice Armand Arabian, and Justice Edward Panelli) participated, resulting in a valuable archive of material about the judiciary and other aspects of state government.

As alluded to earlier, Supreme Court oral history began in California 50 years before the present-day project. The Bancroft collection includes those earliest interviews from 1955 and 1977, which are part of the overall total of 20 interviewees to date.[1] That total includes Justices Frank Richardson and Ray Sullivan[2] and a single non-judicial oral history with judicial staff attorney Peter Belton, whose entire 40-plus-year career was spent in service to the California Supreme Court.

1. Justice Jesse Washington Carter (interviewed in 1955; see 4 *Cal. Legal Hist.* (2009)); Chief Justice Phil Gibson (interviewed in 1977 as part of the oral history of the Goodwin Knight and Edmund Brown, Sr. gubernatorial era; see 5 *Cal. Legal Hist.* (2010)); Justice Stanley Mosk (interviewed in 1979 and in 1998; oral history from 1998 also in Judicial Center Library); Chief Justice Donald Wright (interviewed 1982; see 9 *Cal. Legal Hist.* (2014)); Justice Frank Newman (interviewed 1989–1994; also in Judicial Center Library; see 1 *Cal. Legal Hist.* (2006)); Justice Allen Broussard (interviewed 1991–1996; see 4 *Cal. Supreme Ct. Hist. Soc'y Yearbook* (1998–1999); Justice Cruz Reynoso (interviewed 2002–2004; see 10 *Cal. Legal Hist.* (2015)); Justice Joseph Grodin (interviewed in 2004; see 3 *Cal. Legal Hist.* (2008)); and Research Attorney Peter Belton (interviewed 1999–2001; see 2 *Cal. Legal Hist.* (2007)).

2. The *Cal. Supreme Ct. Hist. Soc'y Yearbook* also published California Supreme Court oral histories/excerpts not in Bancroft's collection: Justice Frank Richardson (1994: Vol. 1); Justice Ray Sullivan (1995: Vol. 2); and Justice Stanley Mosk (1996–1997: Vol. 3).

Although this search centered on state supreme courts, California has impressive oral history documentation of its courts of appeal as well. The California Appellate Court Legacy Project, *https://www.courts.ca.gov/4199.htm* now includes more than 80 video recordings of judicial interviews available on the California Courts website and in the California Judicial Center Library.

Below is the status of California Supreme Court oral histories conducted since 2005, including year interviewed, name, years on the Supreme Court, appointing governor, and status notes:

2005–2006: Edward Panelli (associate justice 1985–1994, Governor Deukmejian). Oral history is under seal in the Bancroft and will become available in the future. See also *CSCHS Newsletter*, Fall/Winter 2008 and Spring/Summer 2009.

2006: John Arguelles (associate justice 1987–1989, Governor Deukmejian). Oral history manuscript is available in the Bancroft and in the California Judicial Center Library. See also *CSCHS Newsletter*, Fall/Winter 2008 and Spring/Summer 2009.

2007: Armand Arabian (associate justice 1990–1996, Governor Deukmejian). Oral history is newly available in the Bancroft as of March 28, 2020. See also *CSCHS Newsletter*, Fall/Winter 2008 and Spring/Summer 2009.

2007–2008: Malcolm Lucas (associate justice 1984–1987, chief justice 1987–1996, Governor Deukmejian). Oral history is under seal in the Bancroft and will become available on September 28, 2021. See also *CSCHS Newsletter*, Fall/Winter 2008 and Spring/Summer 2009.

2011: Ronald George (associate justice 1991–1996, chief justice 1996–2011, Governor Wilson). The oral history was published in book form in 2013 under the title *Chief: The Quest for Justice in California*, and is widely available in law libraries, including the California Judicial Center Library, and public libraries. Both the book and the draft oral history manuscript are available in the Bancroft. See also *CSCHS Newsletter*, Fall/Winter 2011 and Fall/Winter 2013.

2014–2015: Kathryn Werdegar (associate justice 1994–2017, Governor Wilson). Oral history manuscript is available in the Bancroft and the California Judicial Center Library. The manuscript also appeared, in slightly edited form, in 12 *Cal. Legal Hist.* (2017). See also *CSCHS Newsletter*, Spring/Summer 2017.

2015–2016: Marvin Baxter (associate justice 1991–2015, Governor Deukmejian). Oral history manuscript is available in the Bancroft and the California Judicial Center Library.

2019: Carlos Moreno (associate justice 2001–2011, Governor Davis). Oral history manuscript is available in the Bancroft and the California Judicial Center Library.

2019: Ming Chin (associate justice 1996–2020, Governor Wilson). Interviews took place in the summer of 2019, and the oral history manuscript is near completion. ✯

Appendix: Other State Supreme Court Oral Histories

The states listed below have compiled supreme court oral histories. Each entry includes the number of oral histories located, the project name, if any, and the sponsoring institutions (a mix of universities, historical societies, court systems, and law schools).

Arkansas: (14) Former Justices of the Arkansas Supreme Court, the Arkansas Supreme Court Historical Society and the University of Arkansas, *https://www.arcourts.gov/courts/supreme-court/historical-society/oral-history-interviews*.

Florida: (in progress) Oral Histories of the Supreme Court of Florida, the Florida Supreme Court Historical Society, *https://www.flcourthistory.org/Oral-History-Project*.

Minnesota: (4) Voices of Minnesota: "Supreme Court Justices Oral History Project," the Minnesota Historical Society, *https://collections.mnhs.org/voicesofmn/10002722*.

Nevada: (2) Oral History Collection, the University Libraries, University of Nevada, Reno, *https://library.unr.edu/oral-history*.

New Hampshire: (2) Oral History Project, the New Hampshire Supreme Court Society and the New Hampshire Bar Foundation, *https://www.nhsupremecourtsociety.org/special-projects/oral-histories/*.

New York: (15 oral histories of judges who sat on the Court of Appeals, New York's highest court) "Oral Histories of the New York State Bench and Bar," Historical Society of the New York Courts, *https://history.nycourts.gov/oral-histories/*.

South Carolina: (1) Individual oral history archived at the Library of Congress, *https://www.loc.gov/item/2015669124/*.

South Dakota: (5) "Judicial Voices Project," carried out for the 125th anniversary of the South Dakota Supreme Court and co-sponsored by the court itself, the University of South Dakota School of Law, and the Unified Judicial System, *https://nativeede.wixsite.com/judicialvoices*.

Washington: (2) one in the "Washington State Legacy Project" of the Washington State Historical Society, *https://www.sos.wa.gov/legacy/collection/pdf/dolliver.pdf*; and one in "Activist Oral Histories" of the Seattle Civil Rights and Labor History Project at the University of Washington, *https://depts.washington.edu/civilr/smith.htm*.

National: (4 oral histories of state supreme court justices from Alabama, Oregon, Virginia, and Wisconsin) "Women Trailblazers in the Law Project," the American Bar Association, now housed at Stanford University's law library, *https://abawtp.law.stanford.edu*.

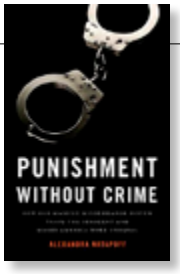
Regional: (2) Oral Histories of the American South at the University of North Carolina (one oral history each of Alabama and North Carolina supreme court justices), *https://docsouth.unc.edu/sohp/index.html*.

Multi-State: (2) Video Oral History Collection of History Makers, based in Chicago, in collaboration with Carnegie Mellon University, *https://www.worldcat.org/search?q=au%3AHistoryMakers+%28Video+oral+history+collection%29&qt=hot_author*.

Laura McCreery, Oral History Project Director at UC Berkeley's Institute for the Study of Societal Issues, has guided the California Supreme Court Oral History Project since 2005 in consultation with Berkeley Law and the California Supreme Court Historical Society.

Lives Ruined, but Was Justice Done?

BY JUSTICE MARIA E. STRATTON



Alexandra Natapoff
Punishment Without Crime:
How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal
New York, Basic Books, 2018.

Had I not agreed to write a book review of *Punishment Without Crime* by UC Irvine law professor and former deputy federal public defender Alexandra Natapoff, I most likely would never have picked it up. After 25 years as a criminal defense attorney and 12 years as a judge of the superior court in California, I thought I knew the minimal toll misdemeanor criminal prosecutions exact on our society. Generally, for a defendant charged with a felony, a plea to a misdemeanor, if available, is an attractive alternative disposition. For a defendant charged with a misdemeanor, hey, be happy it isn't a felony. In the grand scheme of the criminal justice system, a misdemeanor conviction, with its short sentence, probation, fine, and, of course, fees, is the quiet stepchild overshadowed by its flashy felony sibling brimming with drama and consequence. For the judges and lawyers who work in misdemeanor courtrooms, these cases are the training grounds from which they hope to win promotions to the more desirable felony world.

I was wrong. This book is a must read and re-read for anyone who practices in the criminal justice system as it lays bare the ugly practical consequences of misdemeanor arrests and convictions. It is a must read for anyone debating the ramifications of *People v. Duenas*,[1] now exploding across our state. It reminds us how we, as a society, use misdemeanor prosecutions not only to control criminal conduct, but also to control conduct that is neither blameworthy nor suitable for criminal sanction — or, in the words of the book's title, how we impose punishment without crime. And it offers refreshing and surprisingly uncomplicated ways we can mitigate the unfairness of the system without impacting negatively those misdemeanor prosecutions that must be and can be brought justly. City attorneys, public defenders, and judicial officers, take notice.

"The petty offense apparatus has quietly expanded the purposes of punishment to include bureaucratic self-preservation and profit."

Professor Natapoff has written an ambitious survey of misdemeanor and petty offense practice throughout our country, acknowledging the paucity of data compiled in this area (as compared to felony prosecutions) and the absence of uniformity in how the state and federal courts classify non-felony crimes. Despite the lack of easily retrievable statistics, she has written a compelling and well-resourced analysis of the impact on all of us of the 13 million misdemeanor arrests and prosecutions in this country each year, which make up 80 percent of all criminal prosecutions nationwide.

The book is divided into nine chapters succinctly chronicling the misdemeanor apparatus — Impact, Size, Process, Innocence, Money, Race, History, Justice and Change. The author has wisely distinguished those misdemeanor prosecutions that punish truly blameworthy behavior — for example, domestic and other violence, driving under the influence, some drug crimes — from those that punish "order/maintenance" behavior — for example, low level drug offenses, trespassing, traffic offenses, loitering, failure to pay fines — that are not necessarily *malum in se* but can arise out of poverty, mental illness, or result because of arrests prompted by racism. It is the latter category that is the subject of the book. Liberally sprinkled through each chapter are vignettes of actual prosecutions and their catastrophic aftermaths as told by the defendant, defense counsel, prosecutor, or judge. These peripheral consequences include loss of government and educational benefits, employment, and job opportunities; driver's license suspension, vehicle impounds; deportation; debt spirals and warrants due to inability to pay fines and fees on time; social stigma, and the associated stress and anxiety. These blood-boiling accounts turn what might otherwise be just an academic juggernaut into a readable story that easily sparks outrage and supports the author's observation that "Very few people in the general population commit serious crimes, but almost everybody commits minor offenses" which gives police and low-level courts a "ready-made pool of easy to reach suspects." Yet it is invariably working class, low-income, and minority communities, not the wealthy, who bear the brunt of these prosecutions as they have been targeted because of their color or they cannot afford the expense of bailing out of pre-trial detention, the loss of income resulting from that detention, or the fines and fees that are generally part of the sentence imposed, whether it be custody time or probation.

1. *People v. Duenas* (2019) 30 Cal.App.5th 1157. The case concerns whether courts must consider a defendant's ability to pay when imposing or executing fines, fees, or assessments, and if so, whether the defendant or the state bears the burden of showing a defendant's inability to pay.

The result is too many people pleading guilty not because they are guilty, but because they need to get back to making a living. (And it is so true — when you think about it, who among us has not committed a petty offense and yet because of our neighborhood, our status or the color of our skin were never stopped or never arrested?)

Professor Natapoff also identifies the skewed institutional incentives responsible for this unfair system of punishing without crime — police departments that judge their officers by how many arrests are made; private corporations that charge defendants additional fees to monitor and collect fines and fees for municipalities; municipalities themselves that rely on misdemeanor criminal fines and fees to finance their local budgets, including police, prosecutorial and public defender offices, and the courts (note, 85 percent of misdemeanor defendants are sentenced to monetary sanctions); and courts setting bail way out of line with the seriousness of the charge. As Natapoff notes, "The petty offense apparatus has quietly expanded the purposes of punishment to include bureaucratic self-preservation and profit." In her final two chapters, "Justice" and "Change," she identifies a "framework of strong principles to which aspects are legitimate and necessary to a safe and democratic society and which lend themselves too easily to distortion." She supports several easy fixes that would strike at the heart of the injustices she chronicles. (Spoiler alert, for those following the national debate on no-cash bail, own-recognizance release is a primary recommendation.)

In my mind, the two best chapters are "Size" and "History." In "Size" Professor Natapoff explains how the nation's huge volume of misdemeanor prosecutions has turned the process into a self-perpetuating assembly line of potential injustice. In "History" she writes a fascinating summary of "how the petty offense process repeatedly uses its criminal authority to accomplish noncriminal policy ends." She describes the origins of the petty offense system in England (remember, "high crimes and misdemeanors"?); how its purpose morphed when it was adopted by the United States; how it was used post–Civil War to replace slavery and control African Americans and immigrants; how it became the tool to combat "vagrancy" after World War II; and how current "broken window" policing practices turned it into a prosecutorial behemoth. There is also an eye-opening discussion (it surprised me) of how diversion, drug courts, probation, and decriminalization, normally thought of as positive aspects of the criminal justice system, "widen the net" and tend to increase rather than decrease the number of misdemeanor prosecutions.

In her epilogue, Professor Natapoff returns to her roots as a deputy federal public defender, extolling the way misdemeanors are adjudicated in federal court as an example of all-around best practices. At the end of the day, *Punishment Without Crime* successfully aspires to inspire creative changes to the status quo in this overlooked but significant sector of our criminal justice system. ✯

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EDITOR'S NOTE

We hope you like our new design. The *CSCHS Review* now has a cleaner, livelier look throughout, completing a redesign process that we began in the last issue by adding color and changing our name from the *CSCHS Newsletter*. We think the new name and design, fully realized in this issue, better reflect the publication's focus on substantive articles exploring the origins and evolution of California law as well as the lawyers, judges and ordinary Californians who wrote that story.

But rest assured that we are still eager to include news about our members in these pages. Please tell us about your accomplishments, a new job, or a recent award. And as always, we welcome your article ideas, suggestions of books we might review as well as volunteer reviewers. Also, our last issue debuted a new opinion feature in which writers reflect on contemporary legal and political controversies in light of California's past. Send me your ideas at *molly.selvin@gmail.com*.

Huge thanks for the *Review*'s new design to Elaine Holland, our long-time production artist, and to design consultant Suzanne Bean, with special thanks for this issue's cover art and expert Photoshop work. Finally, thanks to our associate editor, Jake Dear, for his invaluable advice and continued enthusiasm over these past years. ✯

— Molly Selvin

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On the cover: Discovering an old album in the library archives with photos of 16 Court Commissioners led Jake Dear to research unveiling the origins of the California Courts of Appeal. *Photos: Jake Dear and newspaper archives. Photo montage by Suzanne Bean.*