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California Legal History

Journal of the
California Supreme Court
Historical Society

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California Legal History is published annually by the California Supreme Court Historical Society, a non-profit corporation dedicated to recovering, preserving, and promoting California's legal and judicial history, with particular emphasis on the California Supreme Court.

SUBSCRIPTION INFORMATION:

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Libraries may subscribe at the same rate through William S. Hein & Co. Please visit http://www.wshein.com or telephone (800) 828-7571.

Back issues are available to individuals and libraries through William S. Hein & Co. at http://www.wshein.com or (800) 828-7571. Please note that issues prior to 2006 were published as *California Supreme Court Historical Society Yearbook*. (4 vols., 1994 to 1998–1999).

SUBMISSION INFORMATION:

Submissions of articles and book reviews are welcome on any aspect of California legal history, broadly construed. Unsolicited manuscripts are welcome as are prior inquiries. Submissions are reviewed by independent scholarly referees.

In recognition of the hybrid nature of legal history, manuscripts will be accepted in both standard legal style (Bluebook) or standard academic style (Chicago Manual). Citations of cases and law review articles should generally be in Bluebook style. Manuscripts should be sent by email as MS Word or WordPerfect files.

Submissions and other editorial correspondence should be addressed to:

Selma Moidel Smith, Esq.
Editor-in-Chief, *California Legal History*
Telephone: (818) 345-9922
Email: smsth@aol.com

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Cover Photo: Participants in the first virtual meeting to congratulate the winners of the Society's annual writing competition — Top, left to right: California Chief Justice Tani Cantil-Sakauye, Associate Justice Kathryn Mickle Werdegar (Ret.), Competition Chair Selma Moidel Smith, Society President Richard H. Rahm. Bottom, left to right: Winning authors Taylor Cozzens, Gus Tupper, Brittney M. Welch. See articles on pages 163 to 290.

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ORAL HISTORY

FIFTEEN YEARS OF CALIFORNIA LEGAL HISTORY:

The Role of a Journal in an Emerging Field

SELMA MOIDEL SMITH*

This is the fifteenth volume of *California Legal History*, the annual journal of the California Supreme Court Historical Society, and the twelfth that I have had the privilege to edit. These anniversaries offer the occasion for a brief review.

The founding editor, Professor Harry N. Scheiber, had the foresight to join the name of the journal with its subject. Four volumes of the Society's previous journal, the *Yearbook*, had appeared under his editorship from 1994 to 1999, and he concluded his tenure in 2006 with his launching of the present publication. In his preface, he declared it was the journal's purpose to "provide sound building blocks for the construction of California legal history in its many dimensions."[1]

California legal history does not have a long record as a field of study. Courses in *American* legal history are offered widely at law schools in California and the rest of the country, but the legal history of California is rarely mentioned at any of the leading law schools, even in California. Similarly, the

* Selma Moidel Smith, Esq., is Editor-in-Chief of *California Legal History* and Publications Chair of the California Supreme Court Historical Society, which first elected her to its Board of Directors in 2001.

[1] Harry N. Scheiber, "Editor's Preface," *California Legal History* 1 (2006): 1.

Professor Harry N. Scheiber and Selma Moidel Smith at the November 15, 2016 celebration to mark the publication of the history of the California Supreme Court edited by Scheiber.

Photo: Jane Scheiber

literature on American legal history is vast, but there are no treatises or textbooks devoted primarily to California.

As a result, neither professors nor students regularly produce papers that could be published in the journal.

The response has been to create a comprehensive program to promote the study of California legal history. Mindful that any academic field consists of scholarship, education, and research materials, the goal has been to support each of these through the medium of the journal. Therefore, the content was planned to serve as both a stimulus and a resource for the study of California legal history. This has been pursued in the following ways:

1. SCHOLARSHIP

The principal goal of the journal is to publish new scholarship and to encourage the writing of publishable new work.

Editorial Board: A first step was to appoint an Editorial Board of distinguished legal historians for the dual purpose of increasing awareness of the journal in academic circles and promoting their participation in the journal. Over the years, each Editorial Board member has made one or more substantive contributions of new scholarship to the journal. These range in type from book reviews and articles to the previews of forthcoming book chapters published by former Justice Joseph R. Grodin in the 2011 and 2012 volumes.

Articles: Nearly all of the articles published in the journal have been ones solicited directly from scholars whom I observed were engaged in relevant work. Because no legal historian specializes in the legal history of California, it has been necessary to acquaint potential authors with the journal and assure them of its standing as a peer-reviewed journal and its distribution both in print and online. Ultimately, the response has been uniformly positive.

Symposia: To increase awareness of the journal and also engender articles for publication, I invited Professor Reuel Schiller of UC Hastings to organize a panel of legal historians to present papers on California topics at the American Society for Legal History 2012 Annual Conference in St Louis. It appeared in the conference program as "The Golden Laboratory: Legal Innovation in Twentieth-Century California (Co-Sponsored by *California Legal History*, the journal of the California Supreme Court Historical Society)." The three presenters' papers were published in the 2012 volume. Further initiatives of this type remain a continuing goal, but subsequent ASLH conferences — before the coronavirus pandemic — have generally been far from California at a time when many institutions have cut back on travel funding.

Writing Competition Papers: When I initiated our Society's student writing competition in 2007, the prize immediately included publication of winning papers in the journal, both as a reward for the student and to provide up-to-the-minute content for the journal. This has continued each year, providing one, two, or three papers for the journal, and ensuring coverage of the most topical subjects being taught and studied in current coursework. Fortunately, the coronavirus did not discourage but seemingly enlarged the pool of entrants, including the students from three states whose winning papers appear in this volume.

Society Board Members: It also seemed likely that worthwhile scholarship for the journal might come from those who had already indicated their interest in the field by their membership on the Society's Board of Directors, so I have tried to make the journal a platform for work by these authors. So far, thirteen Board members have been published by the journal on twenty-four occasions: Jake Dear (2009, 2015, 2017, 2020), Douglas R. Littlefield (2009, 2010), Mitchell Keiter (2009, 2014, 2018), John F. Burns (2009), Ellis Horvitz (2010, 2020), Harry N. Scheiber (2013, 2018, 2019), Gordon Morris Bakken (2010, 2013), Roman Hoyos (2013), Richard H. Rahm (2014, 2020), Molly Selvin (2015), Kathryn Mickle Werdegar (2015), George W. Abele (2016), and John S. Caragozian (2020).

2. EDUCATION

Another principal goal has been to use the journal to promote the teaching of California legal history. This has been accomplished in several ways:

Student Symposia: I have invited professors of courses in American legal or constitutional history to encourage their students to choose California topics for their course papers. This has resulted in a number of excellent articles for the journal and also several writing competition winners. Recent budget cuts have reduced the number of such elective courses offered by law schools, but so far there have been three student symposia published in the journal, introduced by their professors:

"California Aspects of the Rise and Fall of Legal Liberalism," Professor Reuel Schiller, UC Hastings, 2012;

"The California Supreme Court and Judicial Lawmaking," Professor Edmund Ursin, University of San Diego, 2014;

"Three Intersections of Federal and California Law," Professor John B. Oakley, UC Davis, 2015.

Writing Competition Judges: As another means of increasing awareness of the journal and the field of California legal history, I have invited a deliberately wide range of professors to serve as judges in the Society's annual student writing competition. So far, twenty scholars have served as judges: Stephen Aron (UCLA), Stuart Banner (UCLA), Mark Bartholomew (SUNY Buffalo), Michal Belknap (UCSD), Mirit Eyal-Cohen[2] (Alabama), Christian Fritz (New Mexico), Sarah Barringer Gordon (Pennsylvania), Ariella Gross (USC), Laura Kalman (UCSB), S. Deborah Kang (CSU San Marcos), Gregory C. Keating (USC), Sara Mayeux[3] (Vanderbilt), Charles McClain (UC Berkeley), Peter L. Reich (Whittier and UCLA), Reuel E. Schiller (UC Hastings), JoAnne Sweeny (Louisville), Edmund Ursin (University of San Diego), Chris Waldrep (SFSU), Robert F. Williams (Rutgers-Camden), and Victoria S. Woeste (American Bar Foundation).

mentorship: I have asked individual professors to inform promising students about the opportunity for publication offered by our writing competition, which has resulted in more than one winning paper (as well as faculty awareness). In one instance, when a student submitted a paper that lacked the organizational skill to be selected for an award by the judges, but which had unusual merit in subject and thought, it was possible to find a faculty member

[2] First-place winner, 2007 CSCHS Student Writing Competition.

[3] First-place winner, 2010 CSCHS Student Writing Competition.

at the student's law school who agreed to serve as a mentor in writing legal history and which resulted in an article published in the journal.

Society Programs: Over the years, the Society has been active in presenting educational programs on topics in California legal history. The journal has proved the ideal vehicle for preserving these oral presentations in an accessible written form, with the addition of a scholarly apparatus. Commencing with last year's volume and continuing with the present volume, five such programs — ranging in date from 2006 to 2017 — have now been published.

3. RESEARCH MATERIALS

The third principal goal for the journal is to make materials available for scholarly research. This has been accomplished by highlighting archival collections, publishing unpublished materials, and by making known previously published and unpublished scholarship.

Archival Collections: Commencing with the 2009 volume, I have invited an ongoing series of articles by different scholars on the holdings of various archival collections, wherever materials might be found that would be useful for research in California legal history. So far, these have included the California State Archives (2009), Huntington Library (2010), Bancroft Library (2011), Stanford Law Library (2012), UC Hastings Library (2013), Autry National Center (2015), UCLA Special Collections (2016), and Los Angeles County Law Library (2019).

Unpublished Primary Sources: It has been possible to locate a number of items that would otherwise remain little known, but which are important for the field, and to publish them in the journal. Some examples are: "Fifteen Unpublished Papers of Justice Stanley Mosk (2009), "Nine Speeches by Justice Roger Traynor" (2013), speeches by Chief Justice Donald Wright, Justice Raymond Sullivan and Bernard Witkin (2014), and address and speeches by Justice Kathryn Werdegar (2012, 2017), and "Ten Unpublished Speeches by Justice Carlos Moreno" (2019).

Oral Histories: Most volumes of the journal include a section that publishes oral history as a primary source for research on legal history in California. The collecting of oral histories of California Supreme Court justices has been funded by the Society as an ongoing project. Oral

histories published by the journal have included those of justices and other significant legal figures in California. So far, the journal has published complete or significant sections of oral histories by Justices Frank C. Newman (2006), Joseph R. Grodin (2008), Jesse W. Carter (2009), Chief Justice Phil S. Gibson (2010), Chief Justice Donald R. Wright (2014), Cruz Reynoso (2015), Kathryn Mickle Werdegar (2017), and Armand Arabian (2020).

Unpublished Dissertations: For the three most recent volumes, it has been possible to locate doctoral dissertations that were written several decades earlier and which, usually for personal reasons in the lives of their authors, were not published at the time but still merit publication for the benefit of present-day scholars. Unlike an academic press that would publish only current research, the journal is uniquely suited to publish such works in their original form, making them available both for their scholarly content and as primary sources on the state of research and thought at a given time.

Bibliography on California Legal History: A special project solicited for the journal is the monumental annotated bibliography prepared in 2015 by Scott Dewey (then of the UCLA Law Library). With thousands of entries in 469 categories, it is the answer to the long-felt need for a comprehensive guide to published and unpublished writing on the legal history of California, available at: https://www.cschs.org/wp-content/uploads/2016/01/CLH15-Dewey-Web-012016.htm.

These projects have drawn an increasing circle of scholars and students (many now lawyers and law professors themselves) into the study of California legal history. In pursuing these goals, I am grateful for the confidence of the Society's Board of Directors over these many years.

If I have referred here only to the past, it is because — having reached the age of 101 in April of this year — I would not presume to discuss plans for the future. Nevertheless, I hope for the continued success of the Society and the journal. Let me say simply, as I have said elsewhere, that I am grateful for the gift of time — for the privilege of years.

October 2020

* * *

CALIFORNIA SUPREME COURT HISTORICAL SOCIETY

PROGRAMS

JUSTICE DAVID S. TERRY AND FEDERALISM

A Life and a Doctrine in Three Acts

RICHARD H. RAHM*

EDITOR'S NOTE:

Richard H. Rahm, current president of the California Supreme Court Historical Society and also a scholar of legal history, prepared the script for a CLE program on Justice David S. Terry that was presented four times by the Society from 2012 to 2014. The "starring" roles were played by present-day justices and judges from the state and federal courts in California. The script appears on the following pages, together with some of the many illustrations seen by the audience.

California Chief Justice Tani Cantil-Sakauye (right) and Associate Justice Marvin R. Baxter

San Diego, Sept. 12, 2014. Photo by S. Todd Rogers.

The "performers" who played historical roles (in period costume) in one or more of the programs were California Chief Justice Tani Cantil-Sakauye; California Supreme Court

* Richard H. Rahm received his J.D. and Ph.D. from UC Berkeley, his M.Litt. from Oxford University, and his B.A. from UCLA. He is a Shareholder at Littler Mendelson, P.C., residing in its San Francisco office.

(ABOVE, L.–R.) **U.S. DISTRICT COURT JUDGE WILLIAM ALSUP AND CALIFORNIA SUPREME COURT ASSOCIATE JUSTICES MARVIN R. BAXTER AND KATHRYN MICKLE WERDEGAR**

SAN FRANCISCO, OCTOBER 15, 2012. PHOTO BY WILLIAM PORTER.

Associate Justices Marvin R. Baxter, Ming W. Chin, Carol A. Corrigan, Goodwin Liu, and Kathryn Mickle Werdegar; California Court of Appeal Justices Brad R. Hill, Charles S. Poochigian, and Laurie D. Zelon, Senior U.S. District Judge Thelton Henderson, U.S. District Court Judges William Alsup, Larry A. Burns, Andrew J. Guilford, Terry J. Hatter, Jr., Anthony W. Ishii, Ronald S. W. Lew, Lawrence J. O'Neill, and Yvonne Gonzalez Rogers; and Superior Court Judge Barry P. Goode.

Serving as narrators were U.S. District Judge James Ware, CSCHS President Dan Grunfeld, CSCHS Vice President John Caragozian, California State Bar CEO Joseph L. Dunn, and Richard H. Rahm.

The four events were:

■ October 15, 2012 — Milton Marks Auditorium, Ronald M. George State Office Complex, San Francisco — cosponsored by the U.S. District Court for the Northern District of California Historical Society.[1]

■ June 25, 2013 — Ronald Reagan State Building Auditorium, Los Angeles — cosponsored by the Ninth Judicial Circuit Historical Society, the U.S. District Court for the Northern District of California Historical Society, and the California Historical Society.

[1] For feature story and photos, see *CSCHS Newsletter* (Fall/Winter 2012): 1–7, available at: https://www.cschs.org/wp-content/uploads/2014/07/David-Terry-2012-Newsletter-Article.pdf.

(ABOVE, L.–R.) **U.S. DISTRICT COURT JUDGE JAMES WARE, SUPERIOR COURT JUDGE BARRY P. GOODE, U.S. DISTRICT COURT JUDGE YVONNE GONZALEZ ROGERS, AND SENIOR U.S. DISTRICT JUDGE THELTON HENDERSON**

SAN FRANCISCO, OCTOBER 15, 2012. PHOTO BY WILLIAM PORTER.

■ January 30, 2014 — Robert E. Coyle Federal Courthouse, Fresno — cosponsored by the Fresno County Bar Association, Federal Bar Association — San Joaquin Valley Chapter, the Association of Business Trial Lawyers — San Joaquin Valley Chapter, and the U.S. District Court for the Northern District of California Historical Society,

■ September 12, 2014 — California State Bar Annual Meeting, San Diego.[2]

(L.–R.) **CALIFORNIA SUPREME COURT ASSOCIATE JUSTICES MING W. CHIN, CAROL A. CORRIGAN, AND GOODWIN LIU.**

SAN DIEGO, SEPT. 12, 2014. PHOTOS BY S. TODD ROGERS.

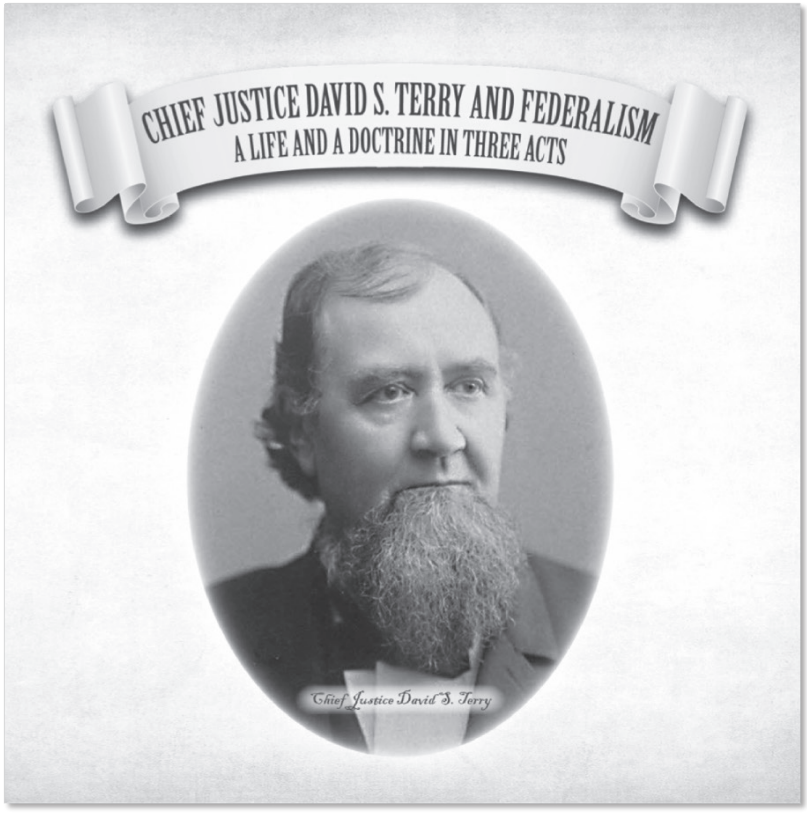
Historical documents used in the script for the characters' speeches were condensed or modernized in various places. Actual citations should be quoted from the original sources.

This program is published in the 2020 volume of *California Legal History* as the first of a group of four Society programs given their first publication in this volume. The two-fold purpose of publication is to preserve these informative programs in tangible form and to make them available to a wider audience.

—SELMA MOIDEL SMITH

[2] For photos, see "Disorder in the Court," *California State Bar Journal* (October 2014), available at: https://www.calbarjournal.com/October2014/TopHeadlines/TH4.aspx.

A Joint Presentation of
The United States District Court for the
Northern District of California Historical Society and
The California Supreme Court Historical Society



Monday, October 15th, 2012 ★ 5:30pm to 7:00pm
Milton Marks Auditorium
455 Golden Gate Avenue, San Francisco

2

Announcement of the Society's Program on Justice Terry

INTRODUCTION

NARRATOR 1: The relationship between the national government and the individual states has been a matter of dispute since the birth of the Republic. Dissatisfaction with the balance which the Articles of Confederation struck between the powers of the states and the central government led to enactment of our present Constitution. Issues left unsettled in that Constitution led to the Civil War, which confirmed federal supremacy — at the cost of over 750,000 lives. One need look no further than the recent, sharply divided U.S. Supreme Court decisions on health care and immigration to see that federalism is not an abstract concept. The tensions inherent in a federal system remain tenacious, and how they are resolved has real-life consequences for individuals.

Tonight, we will look at three periods in the life of one of California's most colorful, and controversial, Supreme Court justices: David S. Terry. Terry served on the California Supreme Court from 1855 to 1859, two of those years as chief justice. Although Terry never had occasion to address the concept of federalism while on the court, it was a theme running through his life. More broadly, both the Navy and Army refused to intervene against the Vigilance Committee's armed takeover of San Francisco.

NARRATOR 2: In our first Act, in the mid-1850s, we will see how a narrow view of federal power restrained the U.S. Navy from rescuing Terry from imprisonment and possible execution by the San Francisco "Committee of Vigilance" — the Vigilantes.

Act II takes place some thirty years later, in the 1880s. Terry, again a practicing lawyer, represents Sarah Althea Hill in two of the most notorious trials in San Francisco. In both trials, one in San Francisco Superior Court and the other in federal court, Sarah claimed that she was secretly married to U.S. Senator William Sharon, one of the wealthiest individuals in the United States. The state and federal courts came to opposite conclusions, leaving matters unsettled for seven years, until the issue of jurisdictional priority was finally decided in favor of the federal courts.

Finally, Act III involves (as many a good drama does) a killing. We present the legal aftermath of Terry's being shot dead in 1889 by a U.S. deputy marshal after he assaulted a U.S. Supreme Court justice. The issue

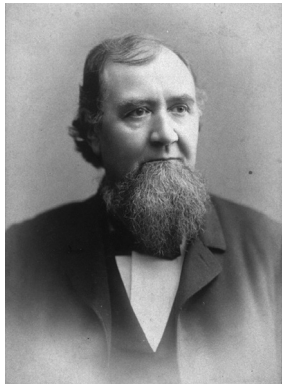
in dispute: whether the U.S. marshal could be tried for murder in California courts if he was acting in the course and scope of his federal duties?

Our presentation this evening aims to make these events come alive. So we will be mixing explanation, original source materials, and historic images to give you a flavor of these events and the people caught up in them. David Terry was a formidable man — and the ripples he sent out into the world have had a lasting legal effect.

And now to our drama.

ACT I: TERRY'S "ARREST" BY THE VIGILANCE COMMITTEE (1856)

TERRY'S BACKGROUND



David S. Terry, Chief Justice of California

NARRATOR 2: Who was David Terry? Let him tell us.

JUSTICE DAVID S. TERRY: I was born in Kentucky in 1823. My father left us when I was eleven and my mother took my brothers and me to live on our grandmother's plantation in Texas. At thirteen, I fought in the Texas War of Independence from Mexico, which is where I learned to use a Bowie knife. Thereafter, it was my custom to keep this knife in my breast pocket, and for very good reason as you will see. In 1846 I served as a lieutenant in the Texas Rangers during the war between the U.S. and Mexico. I trained as a lawyer in my uncle's law office, and I later ran for district attorney of Galveston, but lost the election. In 1849, during the Gold Rush, I moved to California.

REPORTER: What did you do in California?

TERRY: I tried my hand at mining but after a few months I opened a law office in Stockton, with another lawyer from Texas. I believe I earned quite a reputation for being a good lawyer there.

REPORTER: But wasn't it in Stockton where you also earned a reputation for violence. For example, didn't you stab a man with your Bowie knife in a Stockton courthouse?

TERRY: If you lived in California as early as 1851 you would know that Stockton was not the most quiet or orderly place; and that a Justice's Court, in those days, was not a place of any great sanctity. On this occasion I was armed because I thought that arms were necessary for my defense, in a community almost all of whom were armed; and because I had frequently in the course of my practice been compelled to speak plainly of desperate characters and I was liable to be called to account by them at any moment. And I always thought that the best way of preventing an attack was to be prepared to repel it. The assault was committed in the justice's office because the provocation was given there. If the character of the place did not shield me from insult, I saw no reason why it should shield the aggressor from punishment.

REPORTER: You speak of "insults." Did your sensitivity to insults, real or perceived, account for your involvement with duels?

TERRY: I will promptly resent a personal affront. One of the first lessons I learned was to avoid giving insults and to allow none to be given to me. I believe no man has the right to outrage the feelings of another, or attempt to blast his good name, without being held responsible for his actions.

REPORTER: What do you mean, "responsible for his actions"?

TERRY: If a gentleman should wound the feelings of anyone, he should at once make suitable reparation, either by an ample apology or, if he feels that circumstances prevent this (that is, if he made charges which he still thinks true), he should afford the person who is the subject of his remarks the satisfaction that person desires.

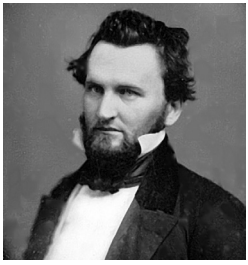
REPORTER: And, of course, by "satisfaction" you mean by participating in a duel?

TERRY: Yes. I know that a great many men differ with me, and look with a degree of horror on any one entertaining such sentiments. My own experience has taught me that, when the doctrine of personal responsibility obtains, men are seldom insulted without good cause and private character

is safer from attack; and that much quarreling and bad blood and revengeful feeling can be avoided.

NARRATOR 1: In the early 1850s, there was really only one party in California, the Democratic Party, which was deeply divided over the issue of slavery. The pro-slavery "Chivalry Democrats" came primarily from the Southern states and were led by U.S. Senator William Gwin. The anti-slavery Democrats came primarily from the Northern states and were led by David Broderick, who became a U.S. senator in 1857. Terry's natural affinity was with the pro-slavery Chivalry faction.

But the 1850s also saw the rise of the Know-Nothing party in American politics, which was nativist, anti-Catholic and anti-Irish. The Know Nothing moniker came from the fact that it was originally a secret society; in answer to any question about the organization, the response would be "I know nothing." In 1855 the Know Nothing party dropped its secrecy, held a national convention, and presented slates of candidates throughout the country. In California, many of the Chivalry Democrats, including David Terry, defected to the Know Nothing Party and, in the 1855 election, the Know Nothing slate of candidates won several statewide offices in California. Neely Johnson was elected governor and David Terry won his bid to become an associate justice of the three-member California Supreme Court.



NEELY JOHNSON, GOVERNOR OF CALIFORNIA

THE SAN FRANCISCO COMMITTEE OF VIGILANCE

NARRATOR 1: Shortly after taking his seat on the court, Terry became embroiled with the San Francisco Committee of Vigilance of 1856. A Committee of Vigilance first arose in San Francisco in 1851, in reaction to mostly Australian criminal gangs setting fire to buildings in order to loot them. The 1851 Committee, comprising primarily businessmen, hanged four men and banished thirty others. After about a month, believing their job was done, the Committee adjourned, but did not disband.

Four years later, tensions once again ran high in San Francisco. It was a dangerous place, with over 200 murders committed each year. There was

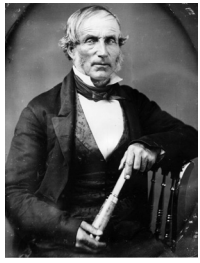
a sense among the general public that city government (now largely in the hands of Senator Broderick's Tammany Hall–style political machine) was corrupt, that the police and courts were incompetent at best, and that many criminals went unpunished. Two murder cases were seen by many as glaring examples of the problem.

The first case involved Charles Cora, a gambler who lived openly with the beautiful proprietress of one of the city's most luxurious brothels. In late 1855, Cora shot and killed William Richardson, a federal marshal who, although a hero of the Mexican-American War, was also a violent drunk. Cora went on trial for murder but the jury deadlocked. While awaiting a new trial, Cora remained in jail for several months, visited daily by his mistress with a basket of culinary comforts. Local newspapers called for formation of a new Vigilance Committee to redress Marshal Richardson's murder.

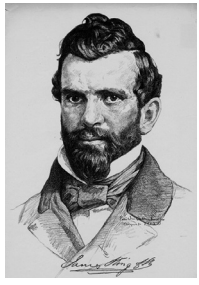
The second murder was of reformist newspaper editor James King of William. As corruption and violent crime continued, King wrote an editorial on May 14, 1856 that attacked San Francisco County Supervisor James Casey. Later that same day, Supervisor Casey shot King as he was leaving his newspaper office. Casey was jailed and was awaiting trial, but the veterans of the 1851 Vigilance Committee reorganized, grew quickly, and marched on the jail. It demanded and received Cora and Casey. The Committee then immediately tried the two men.

William Tecumseh Sherman, who would later obtain fame as a general in the Civil War, in 1856 was a banker in San Francisco, having remained in California after serving as a military officer in the Mexican-American War. Even though his "day job" was as a banker, Governor Johnson appointed Sherman to the position

Charles Cora



U.S. Marshal William Richardson



James King of William

Supervisor James Casey

of major general of the State Militia during the period of the Vigilance Committee events.

MAJOR GENERAL WILLIAM TECUMSEH SHERMAN: People here assert, with some show of truth, that any man with money can, through the sheriff, so pack a jury that they cannot agree. All these elements were rife when James King of William was shot by James Casey, a member of the Board of Supervisors, and an ally of Senator Broderick.

MAJOR GENERAL WILLIAM TECUMSEH SHERMAN

James King was the editor of the *San Francisco Bulletin*, a paper critical of corrupt city officials, Broderick's growing political power, and an ineffective judiciary. He published an article attacking Casey, revealing that, before coming to San Francisco, he had served time in Sing Sing prison in New York. Although the story was true, Casey demanded a retraction, which King refused. Casey then shot King from across the street at the corner of Washington and Montgomery streets. King died a few days later.

The legal government of San Francisco was paralyzed, and the mayor in his helplessness telegraphed the governor, who came but was as powerless as anybody else. The Committee of Vigilance was quickly reorganized, declaring their intention to purge the city of rowdies and criminals, and its numbers quickly grew to over 5,000, headed by William T. Coleman, a successful local businessman.

REPORTER: What was Fort Vigilance?

SHERMAN: It was the headquarters of the Vigilance Committee, more commonly known as Fort Gunnybags because of the wall of sand-filled gunnysacks that was built up to protect it. They had a perfect citadel, with cannon above and below, a perfect arsenal of muskets within, and detention cells with steel bars. On the roof they installed a firehouse bell so they could summon their members.

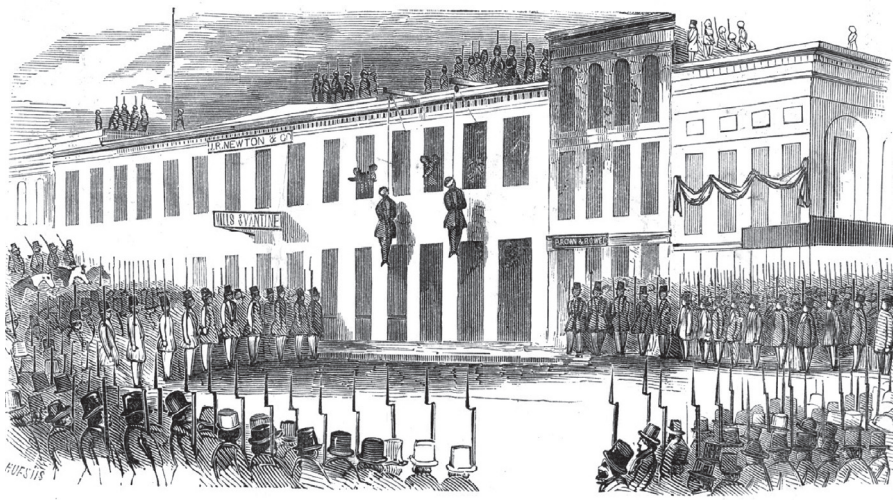
NARRATOR 1: Fort Gunnybags was located on Sacramento Street more or less across the street from what is now Embarcadero Two.

REPORTER: What did the Vigilance Committee do first?

SHERMAN: On Sunday May 18, 1855, I went to see the governor, who had just arrived in San Francisco and was staying at the International Hotel on Jackson Street between Montgomery and Kearny. When I got there, Governor Johnson was on the roof of the hotel, along with many others, pointing toward the jail, located at Broadway near Columbus; all the houses commanding a view were covered with people. Telegraph Hill was black with them, and the streets were a complete jam — there must have been at least ten thousand people within a rifle-shot of the jail.

A man then rode by on a white horse, followed by a carriage which stopped at the jail door; soon a shout announced success, and the procession began to move from the jail, down Kearny to Pacific, Pacific to Montgomery, Montgomery toward Sacramento, to Fort Gunnybags. It was headed by two platoons of about sixty or eighty men, with bright muskets, followed by the carriage with Casey and Cora with two files of armed men on each side, followed by a promiscuous crowd.

Cora and Casey were each given a quick trial, found guilty, and hanged as Mr. King's funeral cortege passed by in front of Fort Gunnybags. Over



EXECUTION OF

JAMES P. CASEY & CHARLES CORA,

.... BY THE ....

Vigilance Committee of San Francisco, on Thursday, May 22nd, 1856, from the windows of their Rooms, in SACRAMENTO STREET, BETWEEN FRONT AND DAVIS.

the next few weeks the Vigilance Committee sentenced several dozen men to deportation from California and hanged two more murderers.

REPORTER: What was Judge Terry's reaction to all this?

SHERMAN: Judge Terry of the Supreme Court was a most violent opposer of the Vigilance Committee, and he honestly opposed the progress of the Committee by all the influence he possessed. Both he and I were outraged about the events, and he was one of the leaders of the so-called "Law and Order Party." This was a loosely organized group that included the new governor, other state officials, as well as some prominent judges and lawyers in the City.

REPORTER: What steps did you take to stop the Vigilance Committee?

SHERMAN: The Committee was the largest and best-armed organized military force in California, and the State Militia had almost no arms. So the governor turned to the federal government for help. He asked the commanding officer of the federal military garrison at Benicia, General John Wool, to release 3,000 rifles, other arms and ammunition from the federal armory to me. Wool refused, saying that he needed permission from the president.

NARRATOR 1: General Wool did agree to provide the governor with a much smaller number of rifles, which Terry had convinced him the State Militia was legally entitled to as its annual quota. Three members of the militia set sail from Benicia in the schooner *Julia* to bring the rifles to the state armory in San Francisco. But the Vigilance Committee had been tipped off and dispatched its own boat to intercept the *Julia*. The vigilantes boarded the *Julia* in the early morning as it lay at anchor at Point San Pablo in San Pablo Bay. The 100 rifles were confiscated and taken to Fort Gunnybags, as were the three militiamen, who were questioned and then released.

REPORTER: General Sherman, what happened next?

SHERMAN: One of the militia members on the *Julia* that the Committee released, Reuben Maloney, began making threats of violence against Committee members, and the Committee ordered its sergeant at arms, Sterling Hopkins, to locate Maloney and re-arrest him. Hopkins located Maloney at the office of Richard Ashe near Portsmouth Square, whose office was also serving as a temporary headquarters of the Law and Order Party.

Judge Terry was there, along with several Law and Order Party adherents, and they refused to turn over Maloney to Hopkins. Hopkins returned to Fort Vigilance where he was given reinforcements.

Meanwhile, Ashe, Terry, Maloney and their supporters, armed with pistols and shotguns, left the building and headed toward one of the armories used by one of the State Volunteer Companies, on Jackson Street, between Kearny and Grant. They were followed by Hopkins and others, who endeavored to seize Maloney, but Ashe and Terry interposed. They had nearly reached the armory, when Hopkins seized the gun from Terry's hands, a scuffle ensured, a pistol went off, and Terry, a strong fine-looking man, excited, announced himself a judge of the Supreme Court, commanded the peace, and endeavored to escape from Hopkins, who held his gun with his left hand, and with his right grasped Terry by the hair or neckcloth. Then Terry drew his knife, showed it to Hopkins, and stabbed him in the left side of his neck. One witness recalled Terry shouting, "Damn you, if it's a kill — take that!" Hopkins by this time had Terry's gun, with which he ran down the street, crying he was stabbed. Maloney, Terry, Ashe, and the rest of their party reached the armory, which is in the third story of a fire-engine house. Then arose such a tumult as I never witnessed. The

STABBING OF OFFICER HOPKINS BY JUDGE TERRY.

General Affray on Jackson Street, on Saturday, June 21st, 1856.

Vigilance bell pealed forth its wildest clamor, and men ran, calling, "Hang him! Hang him!" (referring to Judge Terry). Crowds of people with muskets, and swords, and pistols poured by up Jackson Street, and a dense mass of men filled the street from Montgomery to Stockton. Soon approximately 1,500 men, with two cannons, surrounded the armory, demanding its immediate surrender. Ashe offered to surrender if the Committee would promise to protect them from the mob that had assembled outside. The Committee agreed; the men came out and were taken in coaches to Fort Gunnybags.

NARRATOR 2: While Hopkins underwent emergency surgery to repair the severed artery in his neck, the Vigilance Committee put Terry on trial the following week. Terry addressed the Committee in his opening statement:

TERRY: You doubtless feel that you are engaged in a praiseworthy undertaking. This question I will not attempt to discuss; for, whilst I cannot reconcile your acts with my ideas of right and wrong, candor forces me to confess that the evils you arose to repress were glaring and palpable, and the end you seek is a noble one. The question on which we differ is, as to whether the end justifies the means by which you have sought its accomplishment; and, as this is a question on which men equally pure, upright and honest might differ, a discussion would result in nothing profitable.

The difference between my position and yours is that, being a judicial officer, it is my sworn duty to uphold the law in all its parts. You, on the contrary, not occupying the same position or charged with the performance of the same duty, feel that you are authorized, in order to accomplish a praiseworthy end, to violate and set at naught certain provisions of law. Although you may feel assured that you are right, you must see that I could not, with any regard to principle or my oath of office, side with you.

NARRATOR 2: As the Vigilance Committee's trial of Terry began, Governor Johnson wrote to Commander C. B. Boutwell, the captain of a Navy "Sloop of War," the *U.S.S. John Adams*, which lay just off Pier 1, with a plea for him to rescue Terry. This was followed the next day by a letter from Justice Terry himself, making the same request:

TERRY: Sir: I desire to inform you that I am a native-born citizen of the United States, and one of the justices of the Supreme Court of the State of

California, and that, on the 21st day of June I was seized with force and violence by an armed body of men styling themselves the Vigilance Committee, and was conveyed by them to a fort which they have erected and formidably entrenched with cannon in the heart of the city of San Francisco, and that since that time I have been held a prisoner in close custody and guarded day and night by large bodies of armed men. I desire further to inform you that the said committee is a powerful organization of men, acting in open and armed rebellion against the lawful authorities of this State.

In this emergency I invoke the protection of the flag of my country. I call on your prompt interference, with all the powers at your disposal, to protect my life from impending peril. From your high character I flatter myself that this appeal will receive your early and favorable consideration.

NARRATOR 2: Commander Boutwell dispatched a letter the next day to the Vigilance Committee, which requested the Committee to consider Judge Terry a prisoner of war and place him on board the *U.S.S John Adams* or, "from a desire to avoid the shedding of American blood, by American citizens, on American soil," surrender him to the lawful state authorities. The letter closed with the following plea:

COMMANDER C. B. BOUTWELL: Gentlemen of the Committee, pause and reflect before you condemn to death, in secret, an American citizen who is entitled to a public and impartial trial by a judge and jury recognized by the laws of his country.

NARRATOR 2: The possibility that Boutwell would use force was not out of the question. The *U.S.S. John Adams* was a steam-powered sloop with twenty-six cannon and could have destroyed the Vigilance Committee's headquarters at Fort Gunnybags. Accordingly, the Vigilance Committee decided to go over Boutwell's head, forwarding his letter to his superior officer, Commander David Farragut, the commanding officer at Mare Island. The Committee explained that, "Owing to the extraordinary logic and menacing tone" of Boutwell's letter, they thought it advisable to "submit it to his superior's notice, for whom we entertain the highest regard and esteem."

Commander Farragut's reply to the Committee reveals his considerable tact and an astonishing degree of familiarity with constitutional law. It reads in part:

COMMANDER DAVID G. FARRAGUT: I have perused with great attention the correspondence between the Committee and Commander Boutwell, and although I concur with the Commander in many important facts of the case, still I conceive it to be my duty to avert, as far as possible, the evils now hanging over this highly excited community. And although I believe Commander Boutwell to be actuated by the same motive, he has perhaps taken a different mode of attaining this end. I perfectly agree with him that the release or trial of Judge Terry, in accordance with the Constitution of the United States, would be the readiest mode of attaining the great object we all have in view.

Commander David G. Farragut, United States Navy

NARRATOR 1: Farragut then discusses the Fifth and Sixth Amendments regarding due process and public trials and refers to Section 4 of Article IV which requires the federal government to, in specific circumstances, protect each state against domestic violence. Nevertheless, Farragut assured the committee that he would always be ready "to pour oil on the troubled waters, rather than to do aught to fan the flame of human passions, or add to the chances of the horrors of civil war."

The same day Farragut addressed a stiff letter to Commander Boutwell:

FARRAGUT: Yesterday I received a communication from the Vigilance Committee, inclosing a correspondence between yourself and the Committee, in relation to the release of Judge D. S. Terry, and requesting my interposition. In regard to the constitutional points, I cannot agree that you have any right to interfere in the matter.

In all cases within my knowledge, the Government of the United States has been very careful not to interfere with the domestic troubles of the States, when they were strictly domestic, and no collision was made with the laws of the United States, and has always been studious of avoiding as much as possible, collision with State rights principles.

So long as you are within the waters of my command, it becomes my duty to restrain you from doing anything to augment the very great

excitement in this distracted community, until we receive instructions from the Government.

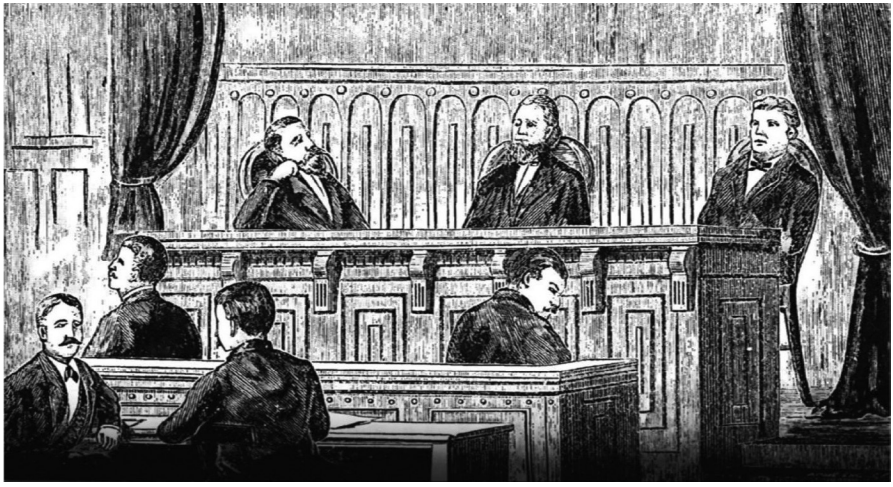
NARRATOR 1: Days later, Governor Johnson wrote directly to President Franklin Pierce to request assistance. (In 1856 — before the Pony Express or transcontinental telegraph — it took three weeks for a letter to go from California to the East Coast, and another three weeks for a return letter to arrive in California.) Even though the U.S. Senate adopted a resolution requesting President Pierce to inform the Senate if he received any application from the governor of California for military aid against the Vigilance Committee, being close to the presidential election of 1856, President Pierce nevertheless decided to move cautiously and referred the matter to his attorney general, Caleb Cushing.

Attorney General Cushing concluded that the president could not provide the requested assistance for two reasons. First, Article IV, section 4 of the Constitution provides that the federal government may interfere within a state "against domestic violence" if called upon by the legislature of the state or, if the legislature was not available, by the governor. Yet, Governor Johnson had offered no explanation why the request was not made by the California Legislature. Second, the 1795 statute implementing the constitutional protection against "insurrection" authorizes the president to summon the militias from other states to assist in quelling the violence, but not to provide weapons and ammunition, as the governor also requested. Although Cushing admitted that an emergency could arise when the president *might* furnish arms alone, the circumstances in California "did not afford sufficient legal justification for acceding to the actual requests of the governor of the State of California."

On July 19, 1856, with Cushing's legal analysis in hand, Secretary of State William L. Marcy wrote to Governor Johnson, informing him that the president believed there were "insuperable obstacles" to providing the help requested. Other cabinet officers followed suit. Secretary of War Jefferson Davis instructed General Wool that the Army was not to interfere with California's domestic affairs except when necessary to protect federal government property. And the secretary of the Navy directed the commandant of the Pacific fleet to exercise "the most extraordinary circumspection and wise discretion to prevent collision between federal forces and the people of California."

At the same time, because another California Supreme Court justice was out of state, Terry's imprisonment for two months by the Vigilance Committee had prevented the California Supreme Court from deciding major cases, including some involving the financial interests of foreigners and citizens of other states. A French citizen applied to Circuit Judge Matthew Hall McAllister for a writ of habeas corpus to get Terry back on the bench. Owing to the distances involved, it is unlikely that Judge McAllister was aware of the president's directives for the military not to interfere with California internal affairs. Although Judge McAllister, after receiving assurances of support from the Navy, issued the writ of habeas corpus, it was never served, because Terry had been released the day before it was to have been served.

In the end, the most significant fact in saving Terry from the Vigilance Committee was Hopkins' recovery from his near-fatal wound. Terry's trial concluded on July 22 and was followed by two weeks of deliberation on the verdict and sentence. On a close vote, the Executive Committee persuaded the larger, more broadly-based Board of Delegates to accept a verdict of assault without intent to kill and to release Terry with only the recommendation he resign from the court. On August 7, the verdict was read and Terry was taken aboard the *John Adams*. He left for Sacramento and within a few days resumed his seat on the court.

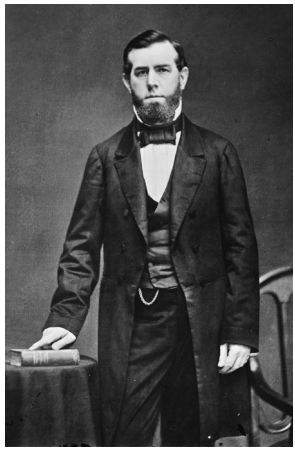


Chief Justice David Terry (center) at the California Supreme Court

INTERMEZZO: AN INCIDENT AT LAKE MERCED

NARRATOR 1: Before moving to the next Act, we pause to consider the one action for which Terry is best remembered — the killing of Senator David Broderick in a duel.

NARRATOR 2: As we have seen, Terry did not resign from the court as he had been urged to do by the Vigilance Committee. He remained on the court and thus, with the death of the Chief Justice Murray, became chief justice in 1857. Terry's party, the Know Nothing Party, collapsed, and the two factions of the Democratic Party — the pro-slavery Chivalry Democrats led by Senator Gwin and the anti-slavery wing led by Senator Broderick — fought for political control of California. By 1859 the struggle was intense and bitter as the nation drifted toward civil war.



U.S. Senator David Broderick

One morning in June 1859, Broderick was having breakfast in the dining room of the International Hotel. While reading the paper he came upon an account of a speech that Terry had recently given at a convention of the Gwin faction of the Party, in which Terry denounced Broderick in vitriolic language. Enraged, Broderick loudly proclaimed:

SENATOR DAVID BRODERICK: I paid three newspapers to defend him during the Vigilante Committee days and this is all the gratitude I get from the miserable wretch. I have hitherto spoken of him as an honest man — the only honest man on a corrupt Supreme Court, but now I find I was mistaken; I take it all back. He is just as bad as the others.

NARRATOR 2: The remark was reported to Terry who demanded a retraction. An exchange of letters ensued; Terry's final note concluded with the duelist's traditional formula: "This course on your part leaves me no other alternative but to demand the satisfaction usual among gentlemen, which I accordingly do."

THE DUEL AT LAKE MERCED — DAVID BRODERICK (LEFT) AND DAVID TERRY (CENTER)

Terry resigned from the court in advance of the duel, which was held near Lake Merced. Both men had been in duels before, and Broderick believed that he was a quicker and more accurate shot than Terry. Broderick thus insisted that the count be "Fire, 1, 2," instead of "Fire, 1, 2, 3" — the more customary count — which should have given him the advantage. Terry won the toss for the guns, which were French dueling pistols, with barrels about one foot in length. (The dueling pistols are now in a case in the basement museum of the Union Bank on the corner of California and Sansome Streets.) Broderick shot at "1," but his shot landed about ten feet before Terry; Terry shot before "2," and his shot hit the right side of Broderick's chest. While at first the wound was not thought to be life threatening, Broderick died two days later. A eulogy attended by thousands was given for Broderick in Portsmouth Square, with a two-mile funeral entourage to the burial site.

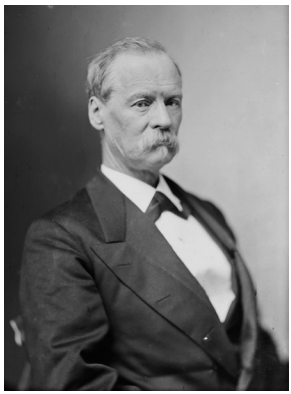
Ostracized, Terry moved to Nevada, and then left that state in 1863 to become a colonel in the Confederate Army. Returning to California in 1870, he began a long climb to respectability and financial security. He rebuilt his law practice, with offices in Fresno, Stockton and San Francisco. He resumed an active role in the Democratic Party, avoided duels, and was sufficiently restored in reputation to be selected as a delegate to the second Constitutional Convention in 1878, at which he was anti-corporate, anti-railroad and anti-Chinese.

ACT II: THE SHARON–HILL TRIALS

THE STATE TRIAL

NARRATOR 1: We now move to our second Act, when, in 1884, Terry becomes first the lawyer, and then the husband, of Sarah Althea Hill, a young woman suing United States Senator William Sharon for divorce. The two

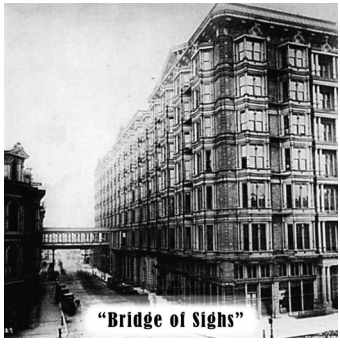
cases, and its violent aftermath, generated ten California Supreme Court decisions, nine Federal Circuit Court decisions, and two U.S. Supreme Court decisions. We will assess the key rulings from these courts. But first we should introduce the principals. Who was William Sharon?



U.S. Senator William Sharon

SHARON: I was born in Ohio in 1820. I studied law but didn't much care for the practice. In 1849, I moved to California and began investing in property. I did well, through hard work and a bit of good luck. In 1864 I became the manager of the Bank of California in Virginia City, capitalizing on the silver Comstock Lode. By 1875 I owned the bank, as well as a railroad, a newspaper, and some hotels. And in that year I was elected by the Nevada Legislature to the United States Senate from Nevada.

NARRATOR 1: Among the hotels that Senator Sharon owned was the Palace Hotel in San Francisco, one of the largest and most luxurious hotels in the world and the center of the city's social life. He also owned the Grand Hotel, directly across the street. The two hotels were connected by a covered bridge crossing over New Montgomery Street, commonly referred to as the "Bridge of Sighs." The reference was not to the famous bridge of that name in Venice. Rather, it was an allusion to the fact that a number of residents of the Palace Hotel kept their mistresses at the Grand Hotel, from which they could visit their clients via the enclosed bridge.



Grand Hotel and Palace Hotel (l.–r.) with "Bridge of Sighs"

REPORTER: In 1880 did you not have a young woman friend living at the Grand Hotel, who would visit your suite at the Palace Hotel?

SHARON: Yes, I did. Her name was Sarah Althea Hill. In addition to providing her a room at the Grand Hotel, I paid her $500 a month.

REPORTER: Who was Sarah Althea Hill?

SARAH: I was born in Missouri. The year is none of your business. My father was an attorney; my grandfather was a well-to-do merchant. Both my parents died when I was very young and I was raised by my grandmother. After I finished at the convent school, I left for San Francisco in 1870.

Sarah Althea Hill

REPORTER: Did you work in San Francisco?

SARAH: No, I had a small but adequate inheritance from my parents.

REPORTER: After you met Senator Sharon in 1880, did he make a romantic proposition to you?

SARAH: Well, I wouldn't call it romantic. He said that if I would let him love me, he would give me $1,000 a month. I was offended and told him he had made a mistake — that I was an honest girl and that he could not make love to me in that style for $30 million. I insisted that we be married.

REPORTER: Did he agree to marry you?

SARAH: Yes, but he said that we would have to keep the marriage secret for two years. I didn't like that but he explained that it would still be legal. And he said that he had a young woman friend who had a baby and whom he had moved to Philadelphia. If she found out that he had gotten married, she would create a scandal in Nevada and that could ruin his chances for re-election. So I agreed and after we had signed the marriage contract I moved into the Grand Hotel in the summer of 1880.

REPORTER: Did things change between you and Senator Sharon?

SARAH: They certainly did. Eighteen months later, Senator Sharon asked me to give him back the marriage contract. I refused, of course, because that would mean surrendering my honor. He then told me to move out of the Grand Hotel and to stop visiting him. When I refused to move, he had

the door taken off my room and all the carpets pulled up. So I wrote him a letter. It was very sweet:

> Oh Senator, dear Senator, don't treat me so! Whilst everyone else is so happy for Christmas, don't try to make mine so miserable. Let me come in after your servant has gone and be to me the same senator again. Or may I see you if only for a few minutes? You know you are all I have in the world, and a year ago you asked me to come to the Grand. Don't do things now that will make me talk.

REPORTER: Did you get any answer?

SARAH: No. So I wrote another letter later:

> My Dear Mr. Sharon: I have written you, and received no reply. I heard you said you were told that I said I could and would give you trouble. Be too much of a man to listen to such talk, or allow it to give you one moment's thought. I have never said such a thing, nor have I had such a thought. No, Mr. Sharon, you have been kind to me. I have said I hoped my God would forsake me when I ceased to show my gratitude. I repeat it. I would not harm one hair of your dear old head, or have you turn one restless night upon your pillow through any act of mine.

REPORTER: Any reply?

SARAH: No. Some months later, after I had moved out of the Grand Hotel, I heard that he was ill. So I wrote again:

> Senator: I hear you are quite ill. I should like it if you would let me come and read to you, or sit with you of evenings. Perhaps I may prove entertaining enough to help drive away both your cares and pains. You surely have not forgotten what a nice little nurse I proved myself in your last illness and you cannot but remember how willing I was to be with you. And I assure you, you will find me as willing and agreeable now. I should like to see you today anyway; it being the first of the month and I would like to get some money.
>
> I never heard from him.

REPORTER: Senator Sharon, do you recall what happened on September 8, 1883?

SHARON: I do indeed. I was arrested for criminal adultery. Sarah was behind it. She claimed that we had been secretly married. That story is a pure fabrication. I offered her $250 a month to be my mistress. She rejected it and I then offered her $500 a month and she crawled into my bed.

NARRATOR 1: In response, Sharon sued Hill the next month in federal Circuit Court in San Francisco, alleging diversity jurisdiction and praying for a declaration that the alleged marriage contract was a fraud. (At that time, federal circuit courts were primarily trial courts, with district courts primarily hearing admiralty cases.) Sarah then dropped the criminal case (with its higher burden of proof) and sued Sharon for divorce in San Francisco Superior Court, alleging adultery and desertion.

NARRATOR 2: The trial in the state court action began first, extended over six months and involved scores of witnesses. As the trial was about to begin, Sarah retained David Terry to assist her other lawyers. It became fashionable to attend the trial. When Sarah was cross-examined the spectators included a count, a marquis, a former mayor, a county supervisor, the police commissioner, and the president of the board of education in addition to the usual lawyers and City Hall employees. The City Hall steps and sidewalk were crowded each morning with reporters and celebrity seekers vying for a glimpse of the main players. Closing arguments took five weeks. Terry's final argument lasted five days with each day's installment published in full in the San Francisco Examiner. Terry called Sharon "the burro of the Palace Hotel" and a "miserable, lecherous, selfish old scoundrel." His closing line put the stakes for his client in stark terms:

TERRY: She goes from this courtroom either vindicated as an honest and virtuous wife or branded as an adventuress, a blackmailer, a perjurer and a harlot.

NARRATOR 2: San Francisco County Superior Court Judge J. F. Sullivan, a relatively young and inexperienced Superior Court judge, took the matter under submission for three months. The day before Christmas 1884, a crowd gathered in his courtroom to hear him deliver his judgment. It took two and a half hours to read. The judge first announced that the case was "disgusting beyond description . . . mess of perjury," by which he included much of Sarah's testimony. This, however, was offset because Sharon was a malevolent libertine, a man of

> uncounted wealth, possessed of strong animal passions that, from excessive indulgence had become unaccustomed to restraint. His passion may have been stronger than his judgment. He may have regarded as a trifle, light as air, the miserable bit of paper behind which a weak woman could shelter her virginity and her standing in the community.

NARRATOR 2: Although Judge Sullivan concluded that Sarah had perjured herself, he also concluded the marriage contract was genuine. He ruled that its having been entered into in secrecy did not prevent it from being enforceable under California law. Judge Sullivan accordingly granted Sarah her divorce, awarded alimony and attorneys' fees, ordering a referee to handle the division of community property. Sarah went shopping that Christmas Eve. Senator Sharon was defiant, pledging to:

SHARON: Fight it to the bitter end. Fight it in all the courts and fight it on all sides. I'll never give in to the last.

THE FEDERAL TRIAL

NARRATOR 1: The trial in the federal Circuit Court began about a month after Judge Sullivan's decision in Superior Court. The two judges assigned to decide the matter appointed an "Examiner in Chancery" to hear the evidence and compile a transcript for later review. The proceedings before the examiner consumed six months. While most of the witnesses were the same as those who testified in the state trial, Sharon's lawyers did present one new key witness: a handwriting expert who testified that the Senator's signature on the marriage contract was a forgery and that it had been forged by none other than the man who then served as Sarah's own handwriting expert in the state trial!

NARRATOR 2: During a hearing before the examiner, Sarah became incensed at testimony offered by an adverse witness. She began threatening one of Senator Sharon's lawyers, saying she would "cowhide" or shoot him and that "no jury will convict me for shooting him." She bragged about her skill with guns: "I can hit a four-bit piece nine times out of ten." When admonished by the examiner she then took a pistol out of her purse and pointed it at the offending lawyer. The examiner demanded she give him

the gun (which she did) and then reported the incident to the judges. Sarah was thereafter searched before each future session began.

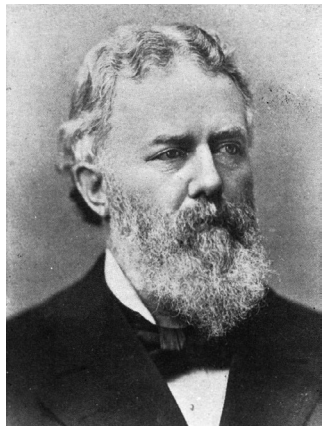
NARRATOR 1: The examiner submitted a transcript of over 1,700 pages to Judges Matthew Deady and Lorenzo Sawyer. There followed a month of selective readings from the transcript and legal argument, at the close of which the judges took the matter under submission for three months.

It took Judge Deady and Judge Sawyer nearly four hours to read their lengthy opinions in December 1885. (Judge Sawyer had been an associate justice and chief justice of the California Supreme Court in the 1860s and, as both a state and federal judge, contributed greatly to the development of California law.) They each came to decisions exactly the opposite of Judge Sullivan's. They found that Sarah was the senator's hired mistress, not his wife; that her claims were rooted in perjury; and that her documentary evidence (the contract itself and some letters from the senator to her) was crudely fabricated and forged. Judge Deady bolstered his conclusions about Sarah's credibility by the following reflections about the relative credibility of women versus men and rich people versus poor people:

JUDGE DEADY: Whatever deductions may be made from his credibility, on account of his participation in this transaction and interest in the result, must also be made from hers, and even more; for, in the very nature of things, this is a game in which the woman has more at stake than the man. And, however unfavorably the plaintiff's general character for chastity may be affected by the evidence in this case, it must not be forgotten that, as the world goes and is, the sin of incontinence in a man is compatible with the virtue of veracity, while in the case of a woman, common opinion is otherwise. Nor is it intended by this suggestion to palliate the conduct of the plaintiff or excuse the want of chastity in the one sex more than the other, but only, in estimating the relative value of the oath of these parties, to give the proper weight to the fact founded on common experience, that incontinence in a man does not usually imply the moral degradation and insensibility that it does in a woman.

And it must also be remembered that the plaintiff is a person of long standing and commanding position in this community, of large fortune and manifold business and social relations, and is therefore specially bound to speak the truth. On the other hand, the defendant is a comparatively

obscure and unimportant person, without property or position in the world. While a poor and obscure person may be naturally and at heart as truthful as a rich and prominent one, and even more so, nevertheless, other things being equal, property and position are in themselves some certain guaranty of truth in their possessor.



JUDGE MATTHEW DEADY, U.S. DISTRICT COURT

NARRATOR 1: Judge Deady concluded the decision with the following observation:

DEADY: I cannot refrain from saying, in conclusion, that a community which allows the origin and integrity of the family, the cornerstone of society, to rest on no surer or better foundation than a union of the sexes, evidenced only by a secret writing, and unaccompanied by any public recognition of each other as husband and wife, or the assumption of marital rights, duties, and obligations except furtive intercourse, more befitting a brothel than otherwise, ought to remove the cross from its banner and symbols, and replace it with the crescent.

NARRATOR 1: The Circuit Court gave judgment to Sharon, declaring the marriage contract to be "false and fraudulent" and enjoining Sarah from ever alleging its genuineness or validity or using it to support any rights claimed under it.

NARRATOR 2: Two events occurred within weeks of the federal court decision. A month before the decision, William Sharon died. A few weeks after the decision, Sarah Althea Hill married David Terry, whose wife had died shortly before the state court decision. Now that Terry was married to Sarah, it was not just his client's honor that Terry would be defending, but his wife's.

THE FIRST STATE APPEAL

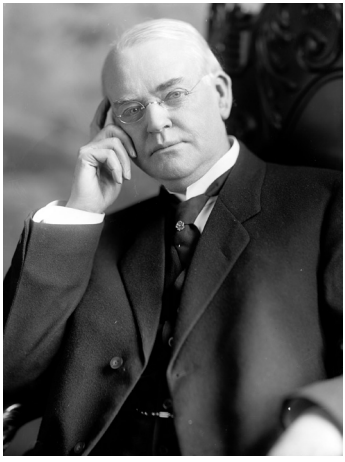
NARRATOR 1: Sharon filed appeals from three of Judge Sullivan's decisions. (Because California had no intermediary appellate courts, all appeals

were to the Supreme Court.) The first appeal was from the judgment in the underlying divorce action. The only question before the court was whether, as a matter of law, a marriage contract that contained a provision making the marriage itself secret, was valid under California law. In a 4-to-3 ruling, the court ruled that "the law does not make it indispensable to the validity of the marriage that the relation between the parties shall be made public." The court thus affirmed the divorce decree.

THE SECOND STATE APPEAL

NARRATOR 1: The second appeal was from Sullivan's denial of Sharon's motion for a new trial, which the Supreme Court decided in July 1889. By this time, the federal Circuit Court had (as we will soon see) recently granted the Sharon Estate's motion to "revive" its earlier ruling in favor of the senator. The lawyers for the estate now argued that the federal decision finding that the marriage contract was a forgery and prohibiting Sarah from making any use of it required the California Supreme Court to give effect to that decree. The court took notice, for the first time, of the proverbial elephant in the room. As California Supreme Court Justice John D. Works opined:

JUSTICE WORKS: Here are two courts of concurrent jurisdiction over the same subject-matter and the same parties. The federal court has first taken jurisdiction but this fact is not called to the attention of the state court in any legal way. And it proceeds to final judgment. Subsequently, the federal court renders a judgment contrary to and in direct conflict with that of the state court. Does this prove that the judgment of the state court is either void or erroneous? Not so. But as a matter of public policy, one or the other of these conflicting judgments must be held to prevail over the other, whether right or wrong; which one is not for us to say. Both of the judgments may be valid,



ASSOCIATE JUSTICE JOHN D. WORKS, CALIFORNIA SUPREME COURT

and as they may have been rendered upon different evidence, it may be that neither of them is erroneous. It is purely and solely a question, therefore, as to which one shall prevail over the other, and this is a question that cannot be determined on this appeal.

NARRATOR 1: So even though the elephant had been observed, it remained in the courtroom. But the composition of the California Supreme Court itself had changed dramatically from the court which ruled on the first appeal. Of the four justices who had ruled in Sarah's favor the previous year, three were gone. But all three of the dissenters from that earlier decision remained in place. Thus, the previous decision was now being scrutinized by three men who had disagreed with it and three others who had taken no part in it. And this newly constituted court found that it was unnecessary to resolve the federalism issue because a new trial was required simply as a matter of state law. Even assuming that the marriage contract was genuine, and not forged, the controlling question was whether Sharon and Sarah had assumed the marital rights and duties mentioned in the code. After reviewing the evidence, six members of the court were convinced "that this evidence shows conclusively that these parties did not live and cohabit together 'in the way usual with married people.' They did not live or cohabit together at all. They had their separate habitations in different hotels. Her visits to his room and his visits to hers were occasional, and apparently as visitors. They had no common home or dwelling place." In short, "Their acts and conduct were almost entirely consistent with the meretricious relation of man and mistress, and almost entirely inconsistent with the relation of husband and wife." Judge Sullivan's decision was reversed and remanded for a new trial in Superior Court. On retrial, Sarah would be permitted to produce any evidence she might have to show an open and public assumption of marital responsibilities.

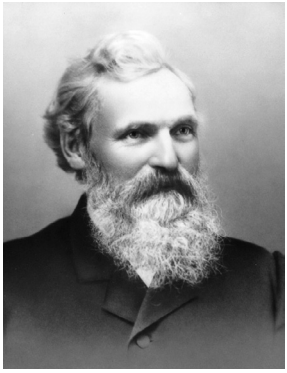
THE THIRD STATE APPEAL

NARRATOR 1: Before that new trial could begin, however, the California Supreme Court decided Sharon's third appeal and, in so doing, both settled the jurisdictional stand-off and delivered the death blow to Sarah's fading hopes. This third appeal was from Judge Sullivan's post-trial order

that Sharon pay Sarah the alimony awarded at trial, as subsequently reduced by the California Supreme Court on the first appeal (Sharon had obstinately refused to pay Sarah anything).

In June 1890, California Supreme Court Justice Charles N. Fox acceded to the priority of the federal court's 1885 judgment not because it was correct, nor on constitutional supremacy grounds, but simply because it was filed first.

JUSTICE FOX: The record shows that the Circuit Court of the United States (the court in which such action was brought) acquired jurisdiction of the persons and subject-matter before the commencement of this action. Consequently, no matter when its judgment was rendered, whether before or after the date of the judgment of any other tribunal subsequently acquiring jurisdiction over the same persons and subject-matter, the final judgment in that case became binding and conclusive as to that subject-matter upon all persons, and upon all other courts and tribunals whatsoever.



ASSOCIATE JUSTICE CHARLES N. FOX, U.S. SUPREME COURT

The judgment of the court below for alimony and costs was essentially based upon this identical contract or instrument; for the court expressly finds that it was the only contract or agreement of marriage between the parties. There could be no marriage without a contract or agreement of the parties. Without marriage there could be no divorce, and without this judgment for divorce, there would have been no judgment for alimony or costs. This judgment in the Circuit Court was and is the only final judgment on the question of the validity of the contract, upon which this alleged marriage depends.

Thus, we began the trial with the state court ignoring federal jurisdiction. Both state and federal trials continued on their course. After ducking the question several times, the California Supreme Court finally acceded to the jurisdiction of the federal court over the subject of the "marriage contract."

ACT III: TERRY'S DEATH AND THE *IN RE NEAGLE* EVENTS (1889–90)

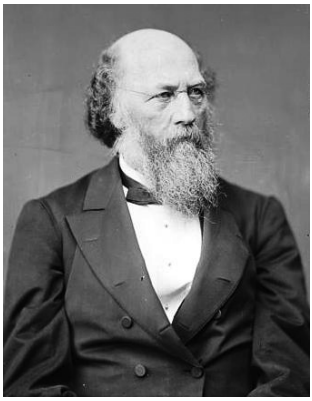
TERRY SENTENCED TO SIX MONTHS BY JUSTICE FIELD FOR CONTEMPT

NARRATOR 1: The third, and final, Act of our drama actually begins shortly before the California Supreme Court issued the two decisions in favor of Sharon that we just reviewed. And it plays out entirely in the federal courts.

You may recall that in 1885 the federal Circuit Court ruled that the "marriage contract" was a forgery, ordered Sarah to hand it over for cancellation, and enjoined her from ever asserting its validity or claiming any rights based on it. However, since Senator Sharon died just prior to the decision, the decree abated. In 1888, Sharon's son-in-law sought to revive the decision for the benefit of Sharon's estate. Terry argued against the "revivor" petition before a panel composed of United States Supreme Court Justice Stephen Field (sitting as circuit justice for the Ninth Circuit), Circuit Judge Lorenzo Sawyer (who was a protégé of Justice Field), and a District Court judge from Nevada.

NARRATOR 2: Terry could not have found a judge less likely to be favorably inclined to him, or his client, than Stephen Field. To begin with, they were polar opposites in background and training. Unlike Terry, who was raised in Texas and had no formal education after age thirteen, Field was born in Connecticut, spent two and one-half years touring Greece and Turkey before being admitted to prestigious Williams College in Massachusetts in 1832, where he graduated with the highest honors in the class. While Terry became a lawyer by apprenticing at his uncle's law office in Houston, Field apprenticed with his brother, David Dudley Field, a prominent New York City attorney. During his apprenticeship, Stephen Field helped his brother draft the famous "Field Codes" for New York that were adopted in California.

Field came to California during the Gold Rush in 1849, and was elected "alcalde," or justice of the peace, of Marysville. Field was subsequently elected to the State Assembly and then to the California Supreme Court. He served on the court with Terry for two years and succeeded him as chief



Associate Justice Stephen J. Field, U.S. Supreme Court

justice when Terry resigned to fight his duel with Broderick. President Lincoln appointed Field to the U.S. Supreme Court in 1863.

Terry had a low opinion of Field, saying:

TERRY: Field is an intellectual phenomenon. He can give the most plausible reasons for a wrong decision of any person I ever knew. He was never known to decide a case against a corporation. He has always been a corporation lawyer and a corporation judge, and as such no man can be honest.

NARRATOR 2: Terry had other reasons to doubt Field's impartiality. Field had been a political ally of Senator Broderick and a good friend of Senator Sharon. In fact, when Field came to California for Ninth Circuit business, he stayed at a luxury suite at Sharon's Palace Hotel. And Francis Newlands, Sharon's son-in-law who was the lawyer representing the Sharon estate, had been one of Field's close advisors during his unsuccessful campaign to win the Democratic Party's nomination for president in 1884.

Judge Sawyer, another member of the panel, had been one of the two federal judges who had issued the 1885 decision in favor of Sharon that was sought to be revived. And, to make matters worse, in the interval between the argument and the decision on the revivor petition, Terry and Sarah happened to be on the same train as Judge Sawyer. Sarah insulted the judge and, when he ignored her, she grabbed him by the hair and shook his head from side to side, while Terry laughed encouragingly.

On September 3, 1888, the Circuit Court decided whether Sarah would have any claim against the Sharon estate. Both Terry and Sarah were sitting at counsel table, normally reserved only for lawyers. Because of the hair-grabbing incident on the train between Sarah and Judge Sawyer, additional deputy marshals and San Francisco police officers were in the courtroom.

William Herrin, special counsel to the U.S. attorney, questioned U.S. Marshal J. C. Franks, about what happened at the September 3rd hearing:

SPECIAL COUNSEL WILLIAM HERRIN: Now; go on and state what occurred in the courtroom on that day, in your own language, commencing at the beginning and going to the end.

U.S. MARSHALL J. C. FRANKS: After Justice Field had been reading about ten minutes, Mrs. Terry rose up from her seat and addressed the court, saying that "everybody knows you have been bought; that this is a paid decision." The judge asked Mrs. Terry to be seated. She paid no attention to the order. She kept addressing her remarks to Justice Field, saying, "How much did you get; how much did Newlands pay you?" About that time Justice Field looked towards me and said, "Mr. Marshal, remove this woman from the court-room." Before I started, however, Mrs. Terry said: "I will not be removed from the court-room; you dare not remove me from the court-room."

HERRIN: That was immediately after the order was given?

FRANKS: Yes sir. Judge Terry said: "Don't touch my wife," or words to that effect. I immediately stepped up to Mrs. Terry. She turned facing me to strike me with both open hands, and said: "You dirty hireling," or "scrub, don't you lay your hands on me." As I attempted to take her by the arm to lead her out of the courtroom, Judge Terry threw himself immediately in front of me. I motioned to him again — perhaps touched his arm — or told him to stand by. As I did that, he struck me with his right hand a heavy blow.

HERRIN: Where did he strike you?

FRANKS: Right in the mouth, bringing out one of my front teeth. I immediately closed in on him and pushed him, and he attempted to draw a weapon. I pushed him with both my hands on his breast, and he fell back over a chair, the deputies and the citizens having hold of him pulling him down. She at the same time was striking me on the back. I think she had a parasol that she was hitting me with over the head. She resisted, kicked, whenever she got an opportunity, with her feet, and was scratching and resisting all that it was in her power to do. She struck me in the face a number of times. She scratched the skin off my face in a number of places.

HERRIN: Was she saying anything during all this time?

FRANKS: She was abusing the judges, Justice Field and Judge Sawyer, very bitterly. She called them "corrupt scoundrels," and that she would kill them both; that this was a paid decision, and that I was a hireling paid by the Sharons to do their dirty work.

I placed Mrs. Terry in the inner office of the marshal's office and returned to the courtroom to arrest Judge Terry. As I passed through the door to get there, I saw Deputy Taggart with a pistol, and heard him say, "If you come in here with that knife or if you attempt to use that knife I will blow your brains out." After the knife was taken from his hand, Judge Terry was placed in my inner office with his wife. He was very abusive, calling Judge Sawyer "a corrupt son of a bitch," and told me to "tell that old bald-headed son of a bitch, Field, that I want to get out of here and I want to go to lunch."

NARRATOR 2: Regardless of all of the commotion, Justice Field continued to read the decision, making it clear that the jurisdiction of a federal court, once legally obtained, cannot be evaded by commencing another suit in state court.

CIRCUIT JUSTICE FIELD: We proceed to consider how far the judgment therein is affected, or should have been affected, if at all, by the judgment in the state court. William Sharon, being a citizen of Nevada, had a constitutional right to ask the decision of the federal court upon the case presented by him, and it would be a strange result if the defendant, who was summoned there, could, by any subsequent proceedings elsewhere, oust that court of its jurisdiction and rightful authority to decide the case.

The jurisdiction of the federal court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction. Any subsequent proceedings there are null and void, and will be so treated by the federal courts. This doctrine we hold to be incontrovertible. It is essential to any orderly and decent administration of justice, and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other.

NARRATOR 2: Justice Field reconvened the court in the afternoon to deal with the Terrys' contempts. Field sentenced Sarah to thirty days in Alameda County jail, and sentenced Terry to six months in the same jail.

FRANKS: After the order was made committing him to six months for contempt, Judge Terry said, "Field thinks that when I get out he will be away; but I will meet him when he comes back next year, and it will not be a very pleasant meeting for him."

THE SHOOTING OF TERRY AND WRIT OF HABEAS CORPUS TRIAL

NARRATOR 1: Because word reached Justice Field that Terry had made threats against him, a deputy U.S. marshal, David Neagle, was appointed to accompany Field, then age seventy-three, on his trips to California to sit on the Circuit Court. Neagle was born on Telegraph Hill in San Francisco and, although he was only 5 feet 4 inches — almost a foot shorter than Terry — he was previously the chief of police in Tombstone, Arizona, during the time that Wyatt Earp and Doc Holiday won the gunfight at the OK Corral. He was also the man who had pulled Terry's Bowie knife from his hand in the Circuit Court following Sarah's removal from the courtroom. In early August 1889, Field held Circuit Court in Los Angeles, after which he and Neagle boarded the train to San Francisco, to hold Circuit Court there.

In his subsequent habeas corpus trial, Marshal Neagle testified as to what happened when the train stopped for breakfast in the town of Lathrop (near Stockton), as elicited by U.S. Attorney Special Counsel William Herrin:

SPECIAL COUNSEL HERRIN: Go on and state the events of that journey home from Los Angeles.

DEPUTY U.S. MARSHAL NEAGLE: After leaving Los Angeles, I watched the stations pretty closely that night. We arrived at Fresno. I got off the train and went out on the platform. I saw Judge Terry and his wife coming along about the hind end of all the passengers. I immediately returned to the sleeper, and told Justice Field they had got on the train. He asked me who I meant by "they." I told him "Judge Terry and his wife." He said he hoped they would sleep well. I did not go to sleep no more.

U.S. Marshal David Neagle

HERRIN: What did you do at Lathrop?

NEAGLE: As soon as the train arrived, we were one of the first that got off the train — Justice Field and myself. I assisted him off and proceeded into the dining-room.

HERRIN: You say you assisted Judge Field off the train?

NEAGLE: Yes, sir. He is lame, and getting down the steps I took hold of his arm naturally to help him.

HERRIN: What size man was Judge Terry?

NEAGLE: I guess he must have been a man 6-foot-3 or -4, and weighed 240 or 250 pounds.

HERRIN: What size man is Justice Field?

NEAGLE: I would not judge him to be over 150 or 155 or 160 pounds. He is a man about 5-foot-8 or -9.

HERRIN: Did you go to the dining-room?

NEAGLE: Yes, sir; I proceeded into the dining-room and went to take our seats. We sat down for maybe a minute or so, when Judge Terry and his wife came in. Mrs. Terry looked around and as she saw Justice Field she turned right around and started out of that door very fast.

HERRIN: Did you notice any expression on her face?

NEAGLE: Yes; she had a very vindictive and mad look on her face.

HERRIN: What did Judge Terry do?

NEAGLE: Judge Terry proceeded on and took a seat. He sat there for as much as three or four minutes, when he rose and came down this way.

HERRIN: He came down the aisle between yourself and Mr. Justice Field?

NEAGLE: Yes, sir.

HERRIN: About how far from Justice Field?

NEAGLE: He must have been within two or three feet of his back. When he got to about this point he halted. Justice Field continued eating his breakfast. Judge Terry kind of gave him a side look.

HERRIN: Was Justice Field's attention drawn to Mr. Terry at all?

NEAGLE: No; he was eating at the time.

HERRIN: Judge Terry turned?

NEAGLE: Yes, sir; and looked around.

HERRIN: Towards whom?

NEAGLE: To Justice Field, and hauled off with his right hand that way and that way [Neagle illustrates how Terry hit Field] and hit him. The two blows came almost together.

HERRIN: With his right hand and left hand?

NEAGLE: Yes, sir; both blows striking him about the same time.

HERRIN: Where did they strike him?

NEAGLE: The first blow must have struck him here [Neagle points to side of face], and the other one hit him at the back of his head. I told him to stop that. Judge Terry turned around. His hand was turned 'round in this position.

HERRIN: That is, he had his fist clinched?

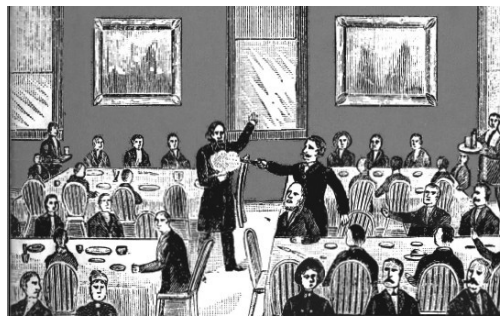
NEAGLE: Yes, sir.

HERRIN: Drawn back?

NEAGLE: Yes. I hollered "Stop that! Stop that!" and jumped between him and Justice Field. I said, "I am an officer." He seemed to recognize me at that point. He looked at me. His hand came right to his breast. It went a good deal quicker than I can explain it. He continued looking at me in a desperate manner, and his hand got there.

HERRIN: Where?

NEAGLE: To his left breast with his right hand. His hand got there and I raised my six-shooter like that, held it to him, and shot twice in rapid succession. He fell. I stood there for a second or two.



NEAGLE SHOOTING TERRY

HERRIN: What expression was there on the face of Judge Terry when you looked at him?

NEAGLE: The most desperate expression that ever I saw on a man's face, and I have seen a good many men in my time. It meant life or death to me or him.

HERRIN: From the motion you have described that Judge Terry made what did you believe?

NEAGLE: I believed if I waited another two seconds I should have been cut to pieces. I was within four feet of him.

HERRIN: Did you doubt the fact that he was then armed?

NEAGLE: No; I always knew — I was always satisfied that the man was armed. That has been his reputation ever since I can recollect of him.

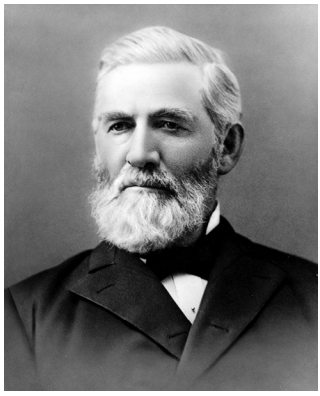
HERRIN: What did the motion that Judge Terry made with his right hand indicate to you?

NEAGLE: That he would have had that knife out there within another second and a half and trying to cut my head off.

NARRATOR 2: Neagle surrendered to a local police officer in Lathrop and was taken to jail in Stockton, where he was charged with murder. Field proceeded to San Francisco where a *Chronicle* reporter found him in his room at the Palace Hotel "as calm as though the killing of a man at breakfast were an everyday occurrence."

Field was by no means indifferent and most likely played a role in the preparation of a petition for a writ of habeas corpus directing the San Joaquin County sheriff to deliver Neagle to the jurisdiction of the federal court in San Francisco. The writ was issued by Circuit Judge Sawyer. A special train had been chartered by Neagle's protectors to take him to San Francisco. In the dead of night, at 3:30 a.m., the train pulled out of the deserted Stockton station.

The habeas trial proceedings, conducted by Judge Sawyer and a District Court judge, began on August 22, 1889 and lasted two weeks. Several witnesses testified, including Justice Field, who regularly attended the trial, sitting in the unoccupied jury box and frequently joining Judge Sawyer in chambers during recesses. On September 16, 1889, Judge Sawyer rendered his decision, in which he framed the issue thus:



U.S. Circuit Judge Lorenzo Sawyer

CIRCUIT JUDGE SAWYER: The homicide in question, if an offense at all, is, it must be conceded, an offense under the laws of the state of California, and the state, only, can deal with it, as such, or in that aspect. It is not claimed to be an offense under the laws of the United States. But if the killing of Terry by Neagle, was an "act done . . . in pursuance of a law of the United States," within the powers of the national government, then it is not, and it cannot be, an offense against the laws of the state of California, no matter what the statute of the state may be, the laws of the United States being the supreme law of the land. A state law, which contravenes a valid law of the United States, is, in the nature of things, necessarily void — a nullity.

NARRATOR 1: In determining whether Neagle acted "in pursuance of a law of the United States" when he killed Terry, Judge Sawyer asked two questions. First, was Neagle acting under a federal law and, second, if he was, was the killing of Terry in pursuance of that law. But there was no federal law that specifically authorized a U.S. marshal to protect a judge outside of the courtroom and, so the Sheriff of San Joaquin argued, because Terry was not killed in a courthouse, the State of California had jurisdiction over the matter. Judge Sawyer rejected this "geographical" notion of jurisdiction and, instead found that the federal law in question is one that can be implied in the power of the sovereign:

SAWYER: The power to keep the peace is a police power, and the United States have the power to keep the peace in matters affecting their sovereignty. There can be no doubt, then, that the jurisdiction of the United States is not affected, by reason of the place — the locality — where the homicide occurred.

The Constitution of the United States provides for a Supreme Court, with jurisdiction more extensive, in some particulars, than that conferred on any other national judicial tribunal. If the executive department of the government cannot protect one of these judges, while in the discharge of

his duty, from assassination, by dissatisfied suitors, on account of his judicial action, then it cannot protect any of them, and all the members of the court may be killed, and the court, itself, exterminated, and the laws of the nation by reason thereof, remain unadministered, and unexecuted.

NARRATOR 1: The second inquiry was whether the "the killing was necessary" for Neagle to discharge his duty of protecting Justice Field. After recounting the events leading to Terry's death, Judge Sawyer had no trouble in finding that the homicide was justifiable. Nevertheless, Judge Sawyer addressed an "eastern law journal" that came to a different conclusion:

SAWYER: It is not for scholarly gentlemen of humane and peaceful instincts — gentlemen, who, in all probability, never in their lives, saw a desperate man of stalwart frame and great strength in murderous action — it is not for them sitting securely in their libraries, 3,000 miles away, looking backward over the scene, to determine the exact point of time, when a man in Neagle's situation should fire at his assailant, in order to be justified by the law. It is not for them to say that the proper time had not yet come. To such, the proper time would never come. The homicide was, in our opinion, clearly justifiable in law, and in the forum of sound, practical common sense — commendable. This being so, and the act having been "done . . . in pursuance of a law of the United States," as we have already seen, it cannot be an offense against, and the petitioner is not amenable to, the laws of the state. Let him be discharged.

NARRATOR 2: When Judge Sawyer concluded the reading of his opinion from the bench, Justice Field sprang to his feet to shake hands with Neagle and presented him with a gold watch engraved with the inscription:

Stephen J. Field to David Neagle, as a token of appreciation of his courage and fidelity to duty under circumstances of great peril at Lathrop, Cal. on the fourteenth day of August, 1889.

NARRATOR 1: The San Joaquin County sheriff, supported by the California attorney general, appealed to the U.S. Supreme Court, challenging Judge Sawyer's decision that the State of California had no power to prosecute federal employees committing state crimes while acting within the scope of their federal duties. The Supreme Court deemed the matter significantly weighty to allow two days of oral argument. Zachariah Montgomery argued for the State of California.

ZACHARIAH MONTGOMERY: If the President has any such power . . . where does he get it? If the President has power, within the jurisdiction of the several states, to keep a bodyguard for every instrument of the federal government, he has power to place a marshal in the house of every American citizen in order to shield him from harm at the hands of his fellow citizens. And if it has come to this, what use have we for state government?"

NARRATOR 1: The U.S. Supreme Court issued its decision on April 14, 1890, with Field abstaining. The 6–2 majority led by Associate Justice Samuel Miller, turned around the question posed by the San Joaquin sheriff, quoting from a Supreme Court decision in an earlier case involving the reach of federal authority:

JUSTICE MILLER: Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace, while they are soliciting and entreating the parties and bystanders to allow the law to take its course? If we indulge in such impracticable views as these, we shall drive the national government out of the United States and relegate it to the District of Columbia. We shall bring it back to a condition of greater helplessness than that of the old confederation. It must execute its powers or it is no government."

NARRATOR 1: The majority agreed with this pragmatic approach:

MILLER: It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenseless and unprotected.

NARRATOR 1: On this basis, the Court concluded that Article II, Section 3 of the Constitution, directing that the president "shall take care that the laws be faithfully executed," gave him ample implied power to authorize

federal marshals to protect federal judges. Justice Miller's opinion is considered to be one of the broadest statements of the power of the federal government to immunize its officers in the performance of their duties:

MILLER: The result at which we have arrived upon this examination is, that in the protection of the person and life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that . . . he was justified in taking the life of Terry, as the only means of preventing the death of [Justice Field]; that in taking the life of Terry . . . he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California.

NARRATOR 1: The dissent was written by Associate Justice Lucius Quintus Cincinnatus Lamar, joined by Chief Justice Fuller. Justice Lamar had represented Mississippi in Congress but, upon the outbreak of the Civil War, he gave up his seat and joined the Confederate Army, later serving as Jefferson Davis' special emissary to Russia. After the war, he was elected a U.S. senator from Mississippi and served as secretary of the interior under Grover Cleveland who appointed him to the court. Given that background, he might be expected to be sensitive to the jurisdictional claims of individual states. Underlying the dissent is a concern about the effect of the decision "upon the autonomy of the States, in divesting them of what was once regarded as their exclusive jurisdiction over crimes committed within their own territory, against their own laws." The dissenters rejected the majority's expedient of implied constitutional powers. "The gravamen of this case is in the assertion that Neagle slew Terry in pursuance of a law of the United States. He who claims to have committed a homicide by authority must show the authority. The right claimed must be traced to legislation of Congress; else it cannot exist."

Nor were they impressed by the majority's reliance on that part of the United States Code that gives federal marshals and their deputies the same powers, in executing the laws of the United States, as sheriffs and their deputies have in executing state laws. The dissent pointed out that this statute only gave marshals powers to enforce *federal* laws and then asked:

JUSTICE LAMAR: If the act of Terry had resulted in the death of Mr. Justice Field, would the murder of him have been a crime against the United States? Would the government of the United States, with all the supreme powers of which we have heard so much in this discussion, have been competent to prosecute in its own tribunals the murder of its own Supreme Court justice? There can be but one answer. Murder is not an offence against the United States. The United States government being thus powerless to try and punish a man charged with murder, we are not prepared to affirm that it is omnipotent to discharge from trial and give immunity where he is accused of murder, unless an express statute of Congress is produced permitting such discharge.

NARRATOR 1: The dissent concluded that Marshal Neagle should be remanded to the custody of the sheriff of San Joaquin County, remarking that "we are the less reluctant to express this conclusion, because we cannot permit ourselves to doubt that the authorities of the State of California are competent and willing to do justice; and that even if [he] had been indicted, and had gone to trial upon this record, God and his country would have given him a good deliverance."

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THE JOADS GO TO COURT:

A True-Life Melodrama with Implications for Today

JOHN S. CARAGOZIAN*

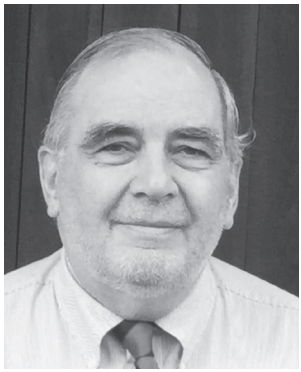
EDITOR'S NOTE:

John S. Caragozian prepared the following script for a program he presented on behalf of the California Supreme Court Historical Society at the California Judges Association midyear meeting in Monterey on March 13, 2016. At that time, he was vice president of the Society. The program was introduced by Contra Costa County Superior Court Judge Barry P. Goode, a member of the Society's Board of Directors. The program offers a dramatic account of the human, social and legal events surrounding the well-known U.S. Supreme Court case of *Edwards v. California*,[1] and it brings forth the case's lesser-known consequences. The following is a complete record of the event, lightly edited for publication, including the addition of footnotes.

—SELMA MOIDEL SMITH

* J.D. Harvard Law School; Vice President, Law and General Counsel, Sunkist Growers; member of the Board of Directors, California Supreme Court Historical Society.

[1] Edwards v. People of State of California, 314 U.S. 160 (1941), available at https://supreme.justia.com/cases/federal/us/314/160.



JOHN CARAGOZIAN

Our story starts during the Great Depression in 1939, with a baby's birth in Texas. As was all too common in the Great Depression, the baby's parents were poor. The baby's father, Frank Duncan, was among the 3.5 million otherwise unemployed Americans working at that time for the Works Progress Administration (or W.P.A.), earning an average of $40 per month.

Mr. Duncan had a brother-in-law, Fred Edwards, who was living in Marysville, California. Mr. Edwards drove to Texas to fetch his in-laws the Duncans, so that the Duncans and their new baby would have some place to live.

Fred Edwards of Marysville is the protagonist of our story, and he seems like a good guy. Mr. Edwards was a lay preacher and was willing to drive the 3,000 miles on those days' poor roads to and from Spur, Texas, in December 1939. When Mr. Edwards arrived in Texas, his brother-in-law had $20 to his name, all of which was spent by the time they arrived back in Marysville.

The Duncans and their new baby stayed with Mr. Edwards, but Mr. Duncan was not employed. After ten days, Mr. Duncan began receiving "financial assistance" — $20 per month — from the federal Farm Security Administration.

So far, we have an ordinary story.

Ordinary, that is, until Mr. Edwards became involved in the legal system and learned that no good deed goes unpunished. Literally. The People of the State of California accused Mr. Edwards of a crime for bringing his brother-in-law into the state. Technically, Mr. Edwards was prosecuted for violating California Welfare and Institutions Code section 2615.

Let me read that section 2615: "Every person . . . that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be . . . indigent . . . , is guilty of a misdemeanor."

Mr. Edwards was tried in the Marysville Justice Court and convicted of violating that section 2615, the evidence being that the defendant — Mr. Edwards — knowingly brought an indigent person, namely his

brother-in-law, into California. Mr. Edwards was sentenced to six months in jail, sentence suspended.

Let's pause our story about Mr. Edwards and talk about California during the Great Depression and, especially, about the migration of hundreds of thousands of poor refugees into the state. I want to give you some background here, because this California statute — often referred to as an "anti-Okie law" — and California's enforcement of the law, made some sense at the time. Historians often advise us to include then-contemporaneous standards as one perspective in viewing historical events.

Also, you all as judges know that there are always two — or more — sides to a story. Good grief, sometimes a single witness in your courtroom will tell multiple and contradictory sides of his or her own story.

California's side in the 1930s was that it was already suffering from the Great Depression. These sufferings, in turn, were especially acute in rural counties like Yuba County, where Marysville is the county seat.

Indeed, the nation's agriculture, including California's farmers, ranchers, and workers, had suffered for years before the stock market crash in 1929. Throughout the 1920s, overproduction in the United States, increased foreign competition, plummeting crop prices, and unserviceable farm mortgages all devastated agriculture.

In the following decade, the Great Depression worsened matters. Consumer demand dropped, and financial credit tightened. Moreover, starting in 1933 in the Great Plains, dust storms turned thousands of square miles into a true Dust Bowl, burying crops, suffocating cattle, and stripping away the topsoil upon which the region depended.

Beginning in 1934, prolonged drought and drastic heat killed crops, livestock, and people throughout the Midwest.

But Mother Nature was not the only villain. The federal government's well-intentioned New Deal policies aided and abetted the suffering. For example, the federal Agricultural Adjustment Act tried to remedy over-production by subsidizing farmers who took acreage out of production. Farmers complied by fallowing their worst land and continuing to farm the best. This worst land, though, was long the province of sharecroppers and tenant farmers, who constituted sixty percent of Oklahoma, Texas, and Arkansas farmers. Many of those farmers and their families suddenly found themselves dispossessed of their homes and livelihoods, however meager they had been.

In addition, mechanization began to reduce the need for farm labor, again setting adrift hundreds of thousands of poor families.

Finally, many of the Midwest's townspeople — including merchants, tradesmen (like blacksmiths and carpenters), and even professionals — saw their livelihoods disappear, too, as the region's entire economy withered.

Nationwide, the agricultural crisis resulted in two simultaneous migrations. These migrations comprised millions of people, such numbers being unprecedented in America's history.

The first migration was from the Deep South. In 1920s and 1930s, African Americans faced forced segregation and racial terror, as well as the broader deteriorating farm conditions. By 1940, 1.6 million African Americans — plus dispossessed whites — moved up the Mississippi to the industrial cities of the Midwest, St. Louis, Chicago, Detroit, and Cleveland, and to such other eastern cities as New York, Philadelphia, and Baltimore.

The second migration, which concerns us, was overwhelmingly white — probably ninety-five percent white — from the Midwest and Southwest. (For simplicity's sake, I will refer to this region as the "Southwest.") Between 1910 and 1940, over 2.5 million people migrated out of the Southwest, especially Oklahoma, Texas, Arkansas, and Missouri. Hundreds of thousands ended up in California, which offered at least the image of opportunity and the reality of higher welfare benefits.

While popular history — and our story of Mr. Edwards (remember Mr. Edwards?) — focuses on *The Grapes of Wrath* scenario of poor farm families, the Joad family in particular, driving their overloaded jalopies into the San Joaquin Valley, it turns out that most of the migrants into California had lived in Southwest cities and towns and headed for Los Angeles and California's other cities. Why? One reason was that cities offered better job prospects. Another reason was that Route 66, which was the main artery into California, ended where? Los Angeles? Actually, the Santa Monica Pier.

Various California officials tried to stem the migration. One notorious effort was the Los Angeles Police Department's so-called "bum blockade." In 1936, the LAPD sent 125 officers to various points along the Arizona border, with orders to turn back or jail migrants who appeared to be poor. One wonders what type of profiling was done to ascertain who was poor. In any event, the blockade lasted only a few weeks, but was widely reported

in newspapers, was the subject of legal challenges, and, later, was memorialized in *The Grapes of Wrath*. Less publicized was the LAPD's dispatch of officers clear up to the Oregon border — 650 miles north — to turn away poor migrants there.

Why this resistance to migration from Oklahoma, Texas, Arkansas, and neighboring states? Unlike the present-day debate over immigration, no racial, ethnic, religious, or language differences existed. In the 1930s, Californians were overwhelmingly white, of European ancestry, Christian, and English-speaking, and so were the migrants. Rather, the differences were almost purely economic. At that time, for example, California's per capita income was double that of Texas, and many of the Southwest migrants were poorer still.

But more than class snobbery was involved. In the 1930s, poor Californians' demands for public health, welfare, and what little public housing existed were all increasing. By the depth of the Great Depression, more than one in five Californians depended directly on public relief. At the same time, crop prices continued to drop, with California's farm income dropping by more than half, in just three years from 1929 to 1932. As a result, thousands of farmers — my own grandparents among them — lost their farms to foreclosure. Low prices and high foreclosures caused real estate values to drop which, in turn, led to lower property tax revenues. In those pre–Proposition 13 days, local governments — which were primarily responsible for administering public health and welfare — depended on property taxes. In sum, California's public sector was being squeezed: it was being forced to do more, but with fewer resources.

The deluge of poor migrants from the Southwest worsened this equation: the migrants needed even more public services — education, health, and welfare — but added nothing to the tax base.

As more and more migrants arrived in California, many ended up in camps. A dozen or so camps were operated by the Farm Security Administration, but most were not. These unofficial, makeshift camps were squalid, lacking decent shelter, sanitation, and — often — potable water and food.

In sum, Depression-era California had some rationale for trying to reduce the flow of poor people into the state. Enforcing section 2615 was one tool here, and various district attorneys prosecuted a score of section 2615 cases.

Our Mr. Edwards was one of those prosecuted. As I mentioned, he was tried, convicted, and sentenced for bringing his indigent brother-in-law into California.

Mr. Edwards appealed his conviction to the Yuba County Superior Court, challenging section 2615's constitutionality. The Superior Court conceded that it was a "close" question, but affirmed Mr. Edwards' conviction. Under California criminal procedure at the time, no further appeal existed. The Yuba County Superior Court was the end of the line for our Mr. Edwards.

Except, *except*, he could appeal the constitutionality of section 2615 to the United States Supreme Court. The civil liberties bar — embryonic in those days — had been interested in challenging the California law. Samuel Slaff, a well-known New York City lawyer, represented Mr. Edwards, and the Supreme Court agreed to hear the case. Thus, it came to be that *Edwards v. California* went directly from the Yuba County Superior Court to the United States Supreme Court.

Mr. Slaff, in appealing his client Mr. Edwards' conviction, made a two-fold argument to the Supreme Court: first, California's section 2615 unconstitutionally burdened interstate commerce; and second, freedom of movement within the United States is a fundamental privilege of national citizenship which cannot be abridged by a state.

The prosecution was originally represented in the Supreme Court by a private Marysville lawyer named Charles Augustus Wetmore, Jr., with Yuba County's district attorney also on the brief. In seeking to uphold section 2615's constitutionality and, hence, Mr. Edwards' conviction, Charles Augustus Wetmore, Jr. cited clear nineteenth-century Supreme Court precedent about a state's police power. That power, to protect that state's citizens' "health, safety, morals, and general welfare," included the right to bar indigents from a state. Mr. Wetmore then raised the problem of poor Dust Bowl migrants. Let me read from his brief: "Events of the last ten years [i.e., the 1930s] have made this problem increasingly acute because of the attraction to California of paupers from other States because of higher relief benefits, old age pensions, etc." Mr. Wetmore's brief then noted that

this migration "has developed [into] a problem . . . staggering in its proportions."[2]

So far, we might agree that Mr. Wetmore's arguments were reasonable, even if we would disagree with his conclusions. However, Mr. Wetmore's tone changed as he launched into the heart of his argument that California acted properly in keeping out indigent migrants and, therefore, acted properly in enforcing section 2615. Again, I am reading word-for-word from his Supreme Court brief:

> A social problem in the south and southwest for over half a century, the "poor white" tenants and sharecroppers, following reduction of cotton planting, droughts and adverse conditions for small scale farming, swarmed into California. These unfortunate people were usually destitute when they arrived. Their ordinary routine has been, upon coming to California, first to go on Federal Relief for one year and then on to State and County relief rolls indefinitely. After they earn a little money in the harvests they send back home transportation for their relatives, generally the aged and infirm, and these immediately become and continue public charges. They avoid our cities and even our towns by crowding together in the open country and in camps under living conditions shocking both as to sanitation and social environment. Underfed for many generations they bring with them their various nutritional diseases of the South. Their presence here upon public relief, with their habitual unbalanced diet and consequently lowered body resistance, means a constant threat of epidemics. Venereal diseases and tuberculosis are common with them and on the increase. The increase of rape and incest are readily traceable to the crowded

[2] Charles A. Wetmore, Jr., "Appellee and Respondent's Brief," April 12, 1941, in National Defense Migration, *Hearings before the Select Committee Investigating National Defense Migration, House of Representatives, Seventy-seventh Congress, first session, pursuant to H. Res. 113, a resolution to inquire further into the interstate migration of citizens, emphasizing the present and potential consequences of the migration caused by the national defense program. part 23, St. Louis Hearings, November 26 and 27, 1941* (Washington, D.C.: Government Printing Office, 1942), 10006; available at https://www.google.com/books/edition/National_Defense_Migration/li3RAAAAMAAJ?hl=en&gbpv=1&dq=inauthor:%22United+States.+Congress.+House.+Select+Committee+Investigating+National+Defense+Migration%22&printsec=frontcover.

> conditions in which these people are forced to live. Petty crime among them has featured the criminal calendars of every community into which they have moved. As proven by experience in agricultural strikes, they are readily led into riots by agitators although it must be said they stubbornly resist all subservient influences, being loyal Americans whose only wish is for a better chance in life.[3]

Ugly stuff. Before we move on, I can tell you that I have read the Supreme Court's entire file, and it is bereft of any facts that support these various accusations. Mr. Wetmore's brief then continued:

> Their coming here has alarmingly increased our taxes and the cost of welfare outlays, old age pensions, and the care of the criminal, the indigent sick, and the insane. Therefore, how can it be said that California should not have the power in the protection of the safety, health, morals and welfare of its people, to bar proven paupers . . . from our State?[4]

Mr. Wetmore concluded this argument with a flourish:

> Should the States that have so long tolerated and even fostered the social conditions that have rendered these people to their state of poverty and wretchedness, be able to get rid of them by low relief and insignificant welfare allowances and drive them into California to become our public charges upon our immeasurably higher standard of social services? Naturally, when these people can live on relief in California better than they can by working in Mississippi, Arkansas, Texas or Oklahoma, they will continue to come to this State.[5]

So the record stood after oral argument in April, 1941. The Supreme Court then ordered re-argument for October, 1941. This time, the prosecution was represented by California's attorney general and his staff. The attorney general repeated the clear precedent that a state's police power included the power to bar indigents. The attorney general added that section 2615 was not overly harsh, in that the term "indigent persons" is narrowly

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[3] *Id.*
[4] *Id.*
[5] *Id.*

defined: it only means that California may bar the bringing in of people who lack money and other resources *and* "who have no relatives or friends able and willing to support them."[6] Unsurprisingly, the attorney general's careful re-argument contained no reprise of Mr. Wetmore's bombast about "poor whites" who have been "underfed for many generations" and commonly have "venereal disease."

On November 24, 1941, the Supreme Court ruled: section 2615 was unconstitutional. All nine justices concurred, though for different reasons.

Justice James Byrnes — formerly a U.S. senator and later to become President Harry Truman's secretary of state — wrote for the five-member majority. He opined that California's statute violated the commerce clause:

> The grave and perplexing social and economic dislocation which this statute reflects is a matter of common knowledge and concern. We are not unmindful of it. We appreciate that the spectacle of large segments of our population constantly on the move has given rise to urgent demands upon the ingenuity of government. . . . The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true. . . .
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> . . . But, in the words of Mr. Justice Cardozo: "The Constitution was framed . . . upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."
>
> It is difficult to conceive of a statute more squarely in conflict with this theory than the Section challenged here. Its express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border. The burden upon interstate commerce is intended and immediate; it is the plain and sole function of the statute. . . . We think this statute must fail under any known test of the validity of State interference with interstate commerce.[7]

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[6] *Id*. at 10020.

[7] Edwards, 314 U.S. at 174.

Justice Byrnes then added:

> It is urged, however, that the concept which underlies § 2615 enjoys a firm basis in English and American history. . . . We do, however, suggest that the theory of the Elizabethan poor laws no longer fits the facts. Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. . . .
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> * * *
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> [T]he relief of the needy has become the common responsibility and concern of the whole nation.[8]

While the majority limited itself to the Commerce Clause, the opinion contained two important concepts, which we all may take for granted now but which were somewhat modern in 1941:

■ First, the nation is becoming more mobile. In particular, one's birthplace is no longer one's destiny.

■ Second, the Great Depression is being recognized as a national event, with national causes and a need for national solutions.

Justice William O. Douglas, writing for himself and Justices Hugo Black and Frank Murphy, concurred that section 2615 was unconstitutional. However, Justice Douglas disdained the majority's Commerce Clause rationale: "I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines."[9]

Instead, Justice Douglas opined that the right to move from state to state is a right of national citizenship. Accordingly, California's anti-Okie law violated the Fourteenth Amendment's privileges and immunities clause.

Finally, Justice Robert Jackson — later to be the United States' chief prosecutor at the Nuremberg Trials — wrote a one-man concurrence. Justice Jackson agreed with Justice Douglas that section 2615 violated Mr.

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8 *Id.*

9 *Id.* at 177 (Douglas, J., concurring).

Edwards's Fourteenth Amendment privileges and immunities. For example, Justice Jackson cited a 1915 Supreme Court ruling that, after an alien is admitted into the United States, the alien has the right "of entering and abiding in any state of the Union." Justice Jackson then reasoned: "The world is even more upside down than I had supposed it to be, if California must accept aliens in deference to their federal privileges but is free to turn back citizens of the United States unless we treat them as subjects of commerce."[10]

But Justice Jackson went further, with some critical thinking on economic class. Okay, okay, before I read more from Justice Jackson's concurrence, I know that you all may be wondering if I had one too many mimosas at breakfast, because, as anyone who has taken even introductory constitutional law knows, economic class is not a suspect category like race or religion. I concede the point, but listen to what Justice Jackson wrote seventy-five years ago:

> [H]ere . . . we meet the real crux of this case. Does "indigence" as defined by the application of the California statute constitute a basis for restricting the freedom of a citizen, as crime or contagion warrants its restriction? We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact — constitutionally an irrelevance, like race, creed, or color. . . .
>
> Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself. Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights. . . .

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[10] *Id*. at 184.

> I think California had no right to make the condition of Duncan's purse, with no evidence of violation by him of any law or social policy which caused it, the basis of excluding him or of punishing one who extended him aid.[11]

Justice Jackson's concurrence concluded with startling prescience (remember, he was writing in November, 1941):

> If I doubted whether his federal citizenship alone were enough to open the gates of California to Duncan, my doubt would disappear on consideration of the obligations of such citizenship. Duncan owes a duty to render military service, and this Court has said that this duty is the result of his citizenship. . . . A contention that a citizen's duty to render military service is suspended by "indigence" would meet with little favor. Rich or penniless, Duncan's citizenship under the Constitution pledges his strength to the defense of California as a part of the United States, and his right to migrate to any part of the land he must defend is something she must respect under the same instrument. . . .[12]

Thus endeth the Supreme Court's *Edwards v. California* opinions. But our story is not ended. Indeed, if you like irony — and maybe even some karma — let me give you three more endings.

The first ending is that the *Edwards* decision made no real-life difference in California. It meant nothing. How can that be? Within a fortnight after the Supreme Court announced its decision, Pearl Harbor was attacked by Imperial Japanese Navy torpedo planes, bombers, and fighters, and the United States entered World War II. California's economy boomed, and the state became the center of war industrialization.

When I say "boomed," I mean boomed. In northern California, for example, Richmond became the location of four Kaiser shipyards, which, during the War, built a total of 747 Liberty Ships, Victory Ships, and other ships in assembly-line fashion. To keep up this pace of turning out almost four ships a week, week after week, month after month, and year after year, the yards had to work around the clock. The yards also needed a lot of workers, eventually employing 90,000, and Kaiser had to actively recruit workers

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[11] *Id*. at 185 (Jackson, J., concurring).

[12] *Id*. at 186.

from as far away as Louisiana and New York. The town of Richmond alone quadrupled in population, from 24,000 before the War to 100,000 by 1945.

In southern California, aircraft manufacturing was the dominant industry. As but one example, Lockheed Aircraft's Burbank, California plant also employed 90,000 and produced almost 20,000 planes during World War II; like Richmond, Burbank's population quadrupled, from 17,000 to over 70,000. Douglas Aircraft, headquartered in Santa Monica, California, employed 160,000 people — mostly in southern California — by the end of the War.

Given this wartime manufacturing boom — plus a million Californians serving in the military and, accordingly, out of the civilian labor pool and over 100,000 Japanese Americans from California incarcerated in camps and also out of the labor pool — California went from trying to keep people out to trying to lure people in, from having a labor surplus to having an acute labor shortage. With higher employment and wages, Californians' per capita personal income doubled between 1940 and 1945, and California's total personal income tripled during those same years. (As a parenthetical, in 1942, California farmers' inability to obtain cheap labor led to the infamous — and, on occasion, inhumane — Bracero program, where up to 60,000 euphemistically termed foreign "guest workers" were brought in, mostly from Mexico. During the War years, over 300,000 of these braceros worked in California and elsewhere in the U.S., all under tight controls. End of parenthetical.)

Bottom line: even if the *Edwards* case had been decided the other way — if the Supreme Court had ruled that California could enforce section 2615 to keep out indigent migrants — California would not have used this enforcement power. Section 2615, regardless of its enforceability, would have been a dead letter. Why? Because the state's economic needs would have trumped its legal authority.

Edwards v. California's second ending reverses this meaninglessness. The Supreme Court's decision may have lacked any real-life effect in California, but a quarter of a century after it was decided, *Edwards*'s legal bases were resurrected during the Civil Rights era.

For example, in 1966 in *United States v. Guest*,[13] the United States Supreme Court reviewed a federal statute which made it a crime to interfere

[13] 383 U.S. 745.

with a citizen's "enjoyment of any right or privilege secured to him by the Constitution . . . ."[14] Several private individuals — apparently including Klansmen — were indicted for, among other activities, interfering with African Americans' right to travel on public streets and highways. In upholding the indictment, the Supreme Court held that the right to interstate travel is a privilege guaranteed by the Fourteenth Amendment; the primary authority for that guarantee is Justice's Douglas's concurring opinion in *Edwards v. California*. Justice Douglas's 1941 concurrence thus became the law of the land in 1966.

Also in 1966, the Supreme Court struck down Virginia's poll tax in *Harper v. Virginia Board of Elections*.[15] Wait, wait, wait, what does a poll tax have to do with *Edwards v. California*'s right to interstate travel? Ah, listen to what the Supreme Court ruled in the Virginia poll tax case:

> The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races. . . .
>
> We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.
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> . . . . Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . , are traditionally disfavored.[16]

What authority did the Supreme Court cite? "See *Edwards v. California*, 314 U.S. 160, 184–185 (Jackson, J., concurring) . . . ."

Think about the ironies here. *Edwards v. California* dealt with a statute aimed at keeping out migrants — overwhelmingly white as it happened — but it is cited as precedent to enfranchise African-American voters. *Edwards* involved a statute intended to keep out migrants from the

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[14] *Id*. at 747 (reviewing 18 U.S.C. 241 (1964 ed.)).

[15] 383 U.S. 663.

[16] *Id*. at 668.

Southwest, including from the old Confederacy, and now it is used within the old Confederacy. Most of all, look at how Justice Jackson's one-man concurrence about economic class resonated twenty-five years after it was written and a dozen years after the justice's death.

Other Civil Rights–era cases also cited *Edwards*. In 1969's *Shapiro v. Thompson*,[17] the U.S. Supreme Court struck down states' one-year residency requirements for welfare eligibility, holding that such requirements violated the rights of persons — including indigents — to interstate travel. *Edwards* was cited as authority for this travel right.

Three years later, in *Papachristu v. City of Jacksonville*,[18] the Supreme Court struck down state and local anti-vagrancy laws, again finding that the laws violated the right to travel as established by *Edwards*.

In sum, *Edwards v. California* established a constitutional right to travel and cast at least a little doubt on laws penalizing indigence. *Edwards*'s authority here, while not cited in 1941 or in 1951 or even in 1961, became an important principle as the United States finally began to protect civil rights. I doubt whether any of the *Edwards* parties, lawyers, or justices could have predicted these consequences. In tossing a pebble into a pond, you never know when and where ripples will appear.

Edwards has a third and final ironic ending. I mentioned that, in 1941, California's attorney general, on re-argument, urged the Supreme Court to uphold section 2615. As you now know, the Court disagreed, unanimously invalidating the statute. As you also now know, the Supreme Court, a quarter of a century later, cited section 2615's unconstitutionality in some of its landmark civil rights cases. The irony is that the California attorney general who urged section 2615's validity and the chief justice of the United States Supreme Court who cited section 2615's invalidity, these two opposite fellows — the attorney general and the chief justice — were one and the same: Earl Warren.

Thank you, and I will now be glad to answer questions.

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[17] 394 U.S. 618.

[18] 405 U.S. 156.

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CELEBRATING THE CALIFORNIA SUPREME COURT AND ITS HISTORY

EDITOR'S NOTE:

In 2016, twenty years of work by Professor Harry Scheiber and a team of distinguished authors made possible the publication of an authoritative history of the California Supreme Court, sponsored by the California Supreme Court Historical Society.[1] To celebrate the completion of this work, the Society organized a public symposium to discuss the past and present of the court, featuring Chief Justice Tani Cantil-Sakauye, former Chief Justice Ronald M. George, Professor Scheiber, and leaders of the Society. It took place in the Milton Marks Auditorium of the Ronald M. George State Office Complex adjacent to the Supreme Court in San Francisco on November 15, 2016. The following is a complete transcript of that event, lightly edited for publication, including the addition of footnotes.

—SELMA MOIDEL SMITH

[1] Harry N. Scheiber, ed., *Constitutional Governance and Judicial Power: The History of the California Supreme Court* (Berkeley: Berkeley Public Policy Press, Institute of Governmental Studies, University of California, Berkeley, 2016).

California Supreme Court Historical Society President George Abele opens the evening. Looking on (from left): Bob Egelko, legal affairs reporter for the San Francisco Chronicle, Charles J. McClain, vice chair of the Jurisprudence and Social Policy Program at Berkeley Law, Harry N. Scheiber, Society board member and professor at Berkeley Law, former Chief Justice Ronald M. George, Chief Justice Tani Cantil-Sakauye, and Society board members Daniel Grunfeld and Molly Selvin.

Photo: William Porter

GEORGE ABELE, SOCIETY PRESIDENT: Good evening, everybody, and thank you for coming. Welcome to what is going to be an extraordinary event. We are here to celebrate what is truly a tremendous accomplishment. For the past twenty years, we have been working on creating this tremendous scholarly work, and we're here tonight to celebrate all of the folks who helped put this book into publication and create it, both the authors and the editor, and all those involved. We're also here to have a conversation with our current chief and former chief, and we very much appreciate their coming and joining us. And we're going to learn a little bit of law and a little bit about history, and what it took to put this book together. This book will serve not only as an interesting historical read, but also a tremendous scholarly reference book for lawyer and non-lawyer

alike. It really gives a story of the history of the countless groundbreaking issues that our court and that our state have faced.

I'd like to start by remembering the passing of one of our former chief justices, Chief Justice Malcolm Lucas, who played such a critical role in our court's and our state's history. To do that, I'd like to invite former president of the California Supreme Court Historical Society Jennifer King to make a few remarks.

JENNIFER KING: Chief Justice Malcolm Lucas passed away at the end of October at the age of eighty-nine, and we pay tribute to his distinguished service on the California Supreme Court. Our tribute tonight is particularly poignant because Chief Justice Lucas had actually agreed to be part of the discussion this evening before he passed away, and so his presence is missed all the more. Governor George Deukmejian appointed him to the court in 1984, and he served on the court for twelve years, the last nine as chief justice.

The governor elevated him to chief justice at a critical historical moment after the voters had denied retention to three justices. In a statement at the time, Chief Justice Lucas said the removal of his colleagues "placed considerable pressure on our court as an institution." He said that "in the coming months" he "would attempt to take steps to heal some of our wounds and restore public faith in our judicial system." He remained confident "in the ability of the court to be one of the most respected courts in our nation."[2] By all accounts, he was successful in his efforts. According to Gerald Uelmen, Chief Justice Lucas's greatest legacy was "the giant strides he achieved to restore public confidence in the legal system at a time of historic peril."[3]

Chapter six of our history book is devoted to the Lucas Court. As chief justice, Justice Lucas wrote 152 majority opinions, more than anyone else on the court, and he had a less than 5 percent dissent rate. While that rate to an extent reflects the general conservativism of the Lucas Court, it also suggests that Justice Lucas had the ability to forge and maintain a majority in the cases that divided the court. His opinions were known for

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[2] Quoted in Jeremy B. White and Christopher Cadelago, "Former California Chief Justice Malcolm Lucas dies at 89," *The Sacramento Bee*, September 28, 2016.

[3] Quoted in John H. Culver, "The Transformation of the California Supreme Court: 1977–1997," *Albany Law Review* 61, no. 5 (Midsummer 1998): 1461–90.

respect for precedent and thoughtful analysis. Particularly in many of his civil cases, he would canvass the law in other jurisdictions, consider the views of commentators, and examine the consequences of his decisions. He authored what remain today as some of the most frequently cited civil cases. A 2007 study found that Chief Justice Lucas's decisions have had considerable influence on sister state courts, even more so than those from some of his well-known liberal predecessors.[4]

Beyond his judicial decision-making, he was also a skilled administrator. He reorganized the Judicial Council in 1992, and those changes were widely credited with elevating the council's role in court planning and policy making. As chair of the Judicial Council, he commissioned studies that resulted in ethical reforms. He was also focused on efficiency, working to reduce backlogs at the court, as well as the lower courts. Justice Lucas was born in Berkeley and grew up in Long Beach. He attended USC for both college and law school. He practiced law in Long Beach for several years before being appointed first to the Superior Court and later to the United States District Court. His wife, Fiorenza Cartwright Lucas, his two children, California State Librarian Greg Lucas and Lisa Lucas Mooney, and six stepchildren survive him. He will be remembered for bringing steady and principled leadership to the court. As our current chief justice recently said, "Chief Justice Malcolm Lucas was a man of great dignity and grace. He came to the court during a time of upheaval in the judicial branch and he brought stability, peace, and leadership to the court."[5] Please join me in a brief moment of silence to honor Chief Justice Malcolm Lucas. Thank you very much.

GEORGE ABELE: Before we start our conversation with our chief justices, I'd like to recognize and thank the authors and the editor who were responsible for putting this tremendous book together. Sitting to my right, Professor Charles McClain, in the center, is responsible for two chapters in the book. A professor at UC Berkeley School of Law since 1997, Professor McClain has authored and edited several books in the legal history arena and is a recipient of numerous awards and fellowships. To his right is Bob

[4] Jake Dear and Edward W. Jessen, " 'Followed Rates' and Leading State Cases, 1940–2005," *UC Davis Law Review* 41 (2007): 702 (Graph 4).

[5] Quoted in Maura Dolan, "Former Chief Justice Malcolm Lucas, who steered state's top court to the right, dies at 89," *Los Angeles Times*, September 29, 2016.

Egelko, a legal affairs reporter for the *San Francisco Chronicle* for over sixteen years. Prior to that, Bob spent thirty years with the Associated Press. He currently reports on various state courts and federal courts on legal issues for the *Chronicle*.

To my left, one of our interviewers is Professor Molly Selvin who serves as vice president of our Society and a member of its executive committee. Molly is also a legal historian and a professor who has taught at the Pardee RAND Graduate School, Stanford, and Southwestern Law School. Prior to that, Molly spent eighteen years as a staff writer for the *Los Angeles Times*.

Finally, Professor Harry Scheiber. Professor Scheiber served as both an author and an editor for many publications. He is the Stefan A. Reisenfeld Professor of Law and History at Berkeley, also the faculty director of the Institute for Legal Research, the author of fourteen books, also is a fellow of the American Academy of Arts and Sciences and twice has held Guggenheim Fellowships. Harry served as an author for one chapter as well as the overall editor.

We also want to thank and recognize two of our authors who are not here: Professor Lucy Salyer is a professor of history at the University of New Hampshire. She is currently leading a study-abroad program in Budapest for the university. And finally, the late Gordon Morris Bakken, who authored the chapter that covers the late nineteenth and early twentieth centuries, passed away prior to the publication of this book.

With a book like this, you can imagine there are many, many people to thank. Thank you to the authors, to Professor Scheiber as the editor. There are also others, people and organizations who have contributed to the book. The Berkeley School of Law, for one, has donated countless hours and resources to the book. The Berkeley Public Policy Press and Institute of Governmental Studies published the book, and Ethan Rarick is its associate director who's unable to be here tonight but spent many hours working on the book. David Carrillo is the executive director of the California Constitutional Center at Berkeley, and he also spent much time helping us put this book together. There are also many law firms who contributed to the event tonight to help us defray the expenses, so we thank them as well.

And with that, I would like to turn the program over to Molly and to Dan. Molly — you've heard about her tremendous accomplishments already; Dan Grunfeld is also a former president of the California Supreme

Court Historical Society. He currently heads the Western Litigation Practice for Morgan Lewis, and they're going to lead us tonight in our conversation with our chief justices.

DAN GRUNFELD: So, as Jennifer so eloquently stated, we are gathered today in the shadow of the passing of Chief Lucas. Why don't we start with you, what is it you most admired about Chief Justice Lucas?

TANI CANTIL-SAKAUYE: Thank you, Dan. Let me say that my stories of Chief Justice Lucas come from his many admirers in the court who would tell me stories about what he did and how he did it. But when I think of Chief Justice Lucas, what first comes to mind is, unlike many of us, he was a chief who walked into the office knowing exactly what issues lay ahead for him. And he first had to deal with a court that needed healing. He had to come in and bring a different side of his many talents to that role, and you don't often think that a chief justice would have to come in and work immediately with the people he works with to heal. But knowing now what I know about the court and what a family it truly is, and how we share our family, our personal stories, our trust, he walked into a situation that I can only imagine was challenging and hard, and he had to think about and feel how he was going to approach that, and he did with great poise and grace and thoughtfulness.

When people talk about you in the past, they could tell many stories because they have the gift of hindsight, but everything I've heard about how Chief Justice Lucas handled that was tremendously calming and kind and truly familial. And so my limited contact with him has really been in that same sense. I called him approximately a month and a half ago about this event and his voice — he was hearty and strong and joking and inquisitive and excited to be here. And he had his family support. Greg Lucas, our state librarian, was happy and ready to assist and facilitate in any way. And I looked forward to hearing *his* recollections, as well as Chief George's recollections. And I'm sorry that we're not able to, but I admire the man for his heart and for his leadership along with his many skills that are well known as a jurist.

DAN GRUNFELD: Chief George, do you have a favorite memory of Chief Justice Lucas?

RONALD M. GEORGE: Well, I do. There are many, and since the chief and Jennifer have touched upon substantive highlights of the chief justice's tenure, I hope I'll be forgiven if I relate a couple of amusing anecdotes that illustrate for me the keen sense of humor and fine hand that Chief Lucas had in dealing with counsel during oral argument and with his colleagues.

There was one case that preceded my tenure on the court that was famous by the time I had joined the court and that was the *City of Azusa* case, where Chief Justice Lucas and his colleagues were confronted with a challenge to a municipal ordinance that forbade fortunetelling, that made it into a crime. And when the counsel for the fortuneteller was about ready to rest his case, Chief Lucas leaned forward and said, "You know, there is one thing that's very troubling to me about this case, and that is that one side has a decided advantage over the other. . . ." [audience laughter] I think you know where this is going. When the defense counsel indicated that he was not aware of what that might be, Chief Lucas responded that it was obvious that she, his client, would know the court's thinking and would know how the case was going to be decided.

The other case was the *Nahrstedt* case, which I was witness to in oral argument.[6] The case involved the appropriateness of certain CC&R's that restricted pet ownership, and Mrs. Nahrstedt who owned three cats was trying to overcome the restriction that forbade that. One of the justices asked whether counsel was aware of a particular statute that had not been cited in briefs, so counsel acted puzzled and was pressed, and then the justice recited the statute which revealed that it dealt with seeing-eye dogs, and as that went on, and counsel's time was going off and was being spent on this, the chief justice leaned forward and asked counsel, "Is there anything whatsoever in the record that might suggest that any one of Mrs. Nahrstedt's three cats was a seeing-eye cat?" [audience laughter] Well, that put an end to that line of questioning.

And finally, one other anecdote, and that is on the rather grim night of the execution of Robert Alton Harris, Chief Lucas insisted that all of us be present in his chambers per the court's custom on an execution should there be any stay application or other proceedings that might emanate. So we gathered rather solemnly a few minutes before midnight. Some justices

6 Nahrstedt v. Lakeside Village Condominium Assn., 8 Cal. 4th 361 (1994).

had asked before, could they be excused, and Chief Lucas was quite firm, "No, I want you all here in case we have to vote." And time went on and on, and that was the night of various interventions by federal courts, and finally around three o'clock, Justice Mosk, who was just about turning eighty at the time, started looking at his watch, and Chief Lucas in a very kindly manner expressed concern, "You know, Stanley, it is getting very late; you must be quite tired, and if you really want to go home, that's all right; you can be on a telephone call." And Justice Mosk said, "Hell, no." He said, "I've got a tennis game at the Cal Club [California Tennis Club] at 6:00 AM, and it's gotten too late to cancel." So with that, Chief Lucas and the rest of us went home about 6:00 AM, and Justice Mosk went off to the Cal Club.

MOLLY SELVIN: Of course, we're also here to celebrate the publication of this court history book, so I'd like to ask you each, what sticks out in your mind as something you learned from this book, something that you had previously not known of, or perhaps not been as fully informed of? Chief Justice Cantil-Sakauye, would you start?

TANI CANTIL-SAKAUYE: Yes, it's a pleasure. Well, I have cherry-picked through the book — I will save the rest of it for later — and I did enjoy reading chapter three by Professor Salyer regarding the reforms from 1910 to 1940 in California, and that in 1910–11, there were twenty-three amendments to the California Constitution, including the gift that keeps on giving, the initiative [audience laughter], the recall of judges, the referendum, workers' comp, the PUC [Public Utilities Commission] — across the board, a number of changes — and the Progressive Movement that was replaced very briefly with the Conservative Movement. I found that all to be really quite interesting but so reflective of now and how the Supreme Court does in fact go in and litigate these thorny issues that are otherwise so emotional, that are put in motion by our legislature, and I continue to read and be surprised by truly how fascinating are the reforms that have reached all of our court.

RONALD M. GEORGE: I was interested in something I'd heard only bits about beforehand but had never really looked into much, and that was that at one point in the court's history, from the late nineteenth century into the 1920s, the court was actually organized into two departments. The chief justice could sit on either department. There were many opinions rendered

by the court, not en banc as they all are now but by department. This interested me because there always are proposals to try to increase the efficiency of the court system, particularly the California Supreme Court with its enormous caseload, and I looked at this and at the same time was being exposed, as president of the Conference of Chief Justices, to two states that had organized their high courts, not into departments but into separate courts of criminal appeals and civil appeals. Those two states are Texas and Oklahoma. In fact, I think Justice Mosk was intrigued by that precedent in those two states and was urging that our court get behind those moves, and I think, reflecting upon the experience of our court and the experience of those two other states, that it's not a good idea. But it was very illuminating.

TANI CANTIL-SAKAUYE: Thank you. [audience laughter]

MOLLY SELVIN: Sticking with the book and with history for another minute, which California Supreme Court justice would you have like to have served with, that you did not have an opportunity to serve with, and why, Chief?

TANI CANTIL-SAKAUYE: Well, I pick Chief Justice William Waste, and partly because I served on the Court of Appeal in Sacramento for six years, and the lore at the Court of Appeal — and former Justice [Dan] Kolkey can probably confirm this — was the story of how the court came to be built. So the story was that Chief Justice Waste came to Sacramento in 1927, in the summertime where it's very warm, and he came into the courtroom and he went to look at the construction of the new courthouse, the new California Supreme Court, and he went up to the fifth floor, top floor of that court, which is warm in anyone's imagination, and he asked, "Why is the courtroom in the attic?" That's all he needed to say, and all action ceased, and they rebuilt the exact same courtroom on the first floor. And you can still see that today. And so I've always been intrigued by a man who with one question could change construction and do it with such ease. But also because I admire Chief Justice Waste in that he was an assemblymember first, but he was also the chief justice at the time the Judicial Council was created, as well as the State Bar Act. And so, I would like to have served with him to find out, in his role as a decision-maker in the Capitol, and to be at the beginning of the creation of these two great entities, what were

the expectations of both, and what did he see as the purpose, and could he imagine it today? So I think that would have been a very interesting time to serve with Chief Justice Waste.

RONALD M. GEORGE: I would look back to the era of Chief Justice Phil Gibson because I think that he was truly the forefather of the modern court system and somebody who saw the inherent responsibilities of the chief justice as being truly chief justice of California and trying to organize a functioning judiciary. I know that he once wrote an article that impressed me when we were contemplating not just state trial court funding but the unification of what we had as three levels of trial courts — Superior Court, Municipal Court, and Justice of the Peace Court — the speech of Justice Gibson which was delivered and reprinted in the *State Bar Journal* amazed me.[7] He noted that at that time there were eight levels of court *below* the Superior Court, and he mentioned two — there was Township A, Township B, two types of Justice Courts; different Police Courts and so forth — and he said, "I challenged even the most experienced attorney to be able to specify what those eight courts are and their respective jurisdictions." But he saw the need to move ahead and a lot of the steps that he took, or that he at least contemplated taking and advocating, are things that came to fruition many years later.

DAN GRUNFELD: Chief, the court is often described as the second most important court in the land. Why is that, do you think, and are you concerned about developments or trends that may impact its future?

TANI CANTIL-SAKAUYE: Thank you, Dan. Well, I think for many reasons that the California Supreme Court *is* the second most important court in the land, and in part because of, first of all, its judicial excellence which really derives from its bar membership, the talented lawyers, but also a combination of items including the fact that California has always been a leader — we're the eighth largest economy — our state is diverse in terms of geography — our urban areas, our rural areas — our nature, our demographics, our nature of employment, our technology; our legislature is diverse and representative, and so we California courts have, as is evidenced by the book, truly an opportunity to address some groundbreaking issues

[7] Phil S. Gibson, "Reorganization of Our Inferior Courts," *Journal of the State Bar of California* 24 (1949): 384.

that other states in the nation have had no opportunity yet to achieve or to approach. And we bring talented members of the bar, and a talented Superior Court and Court of Appeal to the Supreme Court, so we have a refining process, a winnowing process as well, which I think tees up the important issues for the California Supreme Court to in fact resolve. So, to me, it is a number of dynamic factors that have to do frankly with the diversity-rich nature of California.

DAN GRUNFELD: Chief George?

RONALD M. GEORGE: Yes, I concur [general laughter] and would add a couple of other items. I think we are blessed with a constitutional provision that requires that decisions of our high court be in writing "with reasons stated therefor." And that may seem like something that we would take for granted, that's somewhat obvious, but in fact there are many state courts and federal appellate courts that issue what are basically per curiam or even memorandum opinions, so when you have a decision of the California Supreme Court, it is thought out, it borrows without apology from wherever wisdom can be found in other jurisdictions, and it is therefore more persuasive. And it's not just because we're the biggest state.

There's a very interesting study which has been alluded to in the 41 volume of the *UC Davis Law Review*,[8] coauthored by our own Jake Dear, who is present, and by Ed Jessen, the former reporter of decisions, and it actually documents statistically the citation of California Supreme Court opinions, and not just in string citations, no, but where the reasoning of the California Supreme Court opinion was persuasive in another jurisdiction adopting that. So I think for all of those reasons — and I would add another thing, too: I think the fact that we do have a central staff system here, where our central staffs cull out the issues that occur with great frequency, demonstrating their statewide importance, and therefore are able to present to the justices issues that really not only merit but demand resolution — all of that, I think, causes the court to end up with a work product that's quite exceptional compared to other jurisdictions. And I'll add one other thing: if it were just size, the article points out, why is New York, why is Illinois, not way up there, why is Washington State, and Colorado and Kansas, why are they way up there, following California in the decisions

[8] Dear & Jessen, *supra* note 4.

that are followed by other courts? It's because of their methodology, their attributes, and it isn't just a question of, we're bigger than the other states.

DAN GRUNFELD: So, here's a somewhat related question. Nationally, there are concerns about judicial independence eroding. And we've thought about this for a long time now. Do you agree, and if so, how concerned are you about the California court system, and what can be done to combat the causes of such erosion?

TANI CANTIL-SAKAUYE: I think the threat to judicial independence is real, and I think it's growing, and I took a page out of the playbook of Chief George when he created the Commission on Impartial Courts to ensure that California was aware and studied the best possible ways to ensure our independence from political money or outside money or the politicization of the courts and judges. Nevertheless, we see nationally this threat in the most recent elections, and now that I serve as well on the Conference of Chief Justices, I speak to my colleagues about the very real threat, and it's interesting that the threat comes from its own legislature, its own governor, as well as its public. And so, yes it is, and it continues to be so, and so my concern continues to be that we have to be aware because my view is that those outside forces are simply sharpening their teeth by the time they get to California. I do not believe that California is insulated by our retention elections because we've seen nationally, retention elections have not protected other jurists in other jurisdictions.

So, to me, the best approach can only be continued education, continued raising awareness, continued partnerships, with the best advocates we have, which are our lawyers, and which requires judges, I think, to do outreach, to speak to groups, to talk about the importance of an independent and impartial judiciary. It also means going into the Legislature and having to have that conversation every legislative year, as well as building on civics and reaching out and creating bridges and relationships with entities that are interested not only in democracy but the rule of law and how valuable that is. It is a never-ending fight, and I think that we continue to have to be aware, and we continue to have to be vigilant, and we need to work with our partners in ensuring that California's judiciary remains independent.

DAN GRUNFELD: Chief George?

RONALD M. GEORGE: I certainly agree that we're in a period in history — it's perhaps cyclical, where courts are more under attack and their independence is more in jeopardy than perhaps ever before — and yet, I would say that California's system is far superior, if that's any comfort, to that involved in many other states. I know in Texas, one year there were competing candidates for the Texas Supreme Court, backed by competing rival oil companies. In Ohio, it's traditional to have a candidate for the supreme court of the state backed by the labor unions and another candidate backed by the business community. There are many states where they run on political tickets and so forth.

That's not the case here. But Justice [Joseph] Grodin and I had a little chat before the program began here, and I think both of us are in agreement that something can be done and should be done to attempt to improve the system that we have here in California, even though it is a retention system. There's room for a lot of dialog on what that might be, but it is vital when you look at the fact that there were three justices, I believe, of the Kansas Supreme Court in recent years who were defeated at one election because of their vote on an abortion issue, and also a justice on the crime issue in Tennessee. I know that Justice [Ming] Chin and I faced a contested confirmation election in 1996 because of our position on the Planned Parenthood *American Academy of Pediatrics versus Lundgren* decision, which came out in '97 but had come out before rehearing was granted in 1996.[9] It was a major issue at our confirmation hearing; we were threatened with a contested retention election and it came to pass.

So, these are real threats, and I'll conclude by saying that I totally agree with the chief that the heart of this is really education. I think there are very serious problems in terms of our citizenry's understanding of the whole concept of separation of powers and that two of the branches are by necessity political branches, and the judicial branch is not supposed to be. And that's not something at all clearly understood, so we have a real job to make, and I'm very pleased that the chief is pursuing educational measures because that's at the heart of it, to get our school kids understanding, as they become adults, what their responsibilities are and how they can intelligently vote in elections involving the judiciary.

[9] 16 Cal. 4th 307 (1997).

DAN GRUNFELD: So one of the lesser-known powers of the California Supreme Court Historical Society is the power of do-over, and we have granted each of you a chance to go back in history, and you get to redo a decision of the Supreme Court at the time it was issued. What decision would you do over? [general laughter]

TANI CANTIL-SAKAUYE: I thought long and hard about this . . .

RONALD M. GEORGE: I hope it's not one of mine! [general laughter]

TANI CANTIL-SAKAUYE: Never, Chief. You know that, never. Well, I would bring up the story of poor Ethel Mackenzie (right? — *in the book*). Ethel Mackenzie was an accomplished San Franciscan, a woman of taste and a woman of means, and when she married a British national, she lost her American citizenship because there was a law at the time that said when a woman, *a woman*, marries a foreign national, she loses her American citizenship. The California Supreme Court upheld the law,[10] as did the United States Supreme Court several years later,[11] and it wasn't until about nineteen years later it was overturned. And so, if I had the do-over, and of course — right? Justice Werdegar, with a female majority on the California Supreme Court — not that that matters [laughing] — however, the do-over would be the meta-issue of women in the 1900s, not only labor issues, not only exclusion from unions, and exclusion from the Legislature and the above, but the entire concept of a woman's rights.

DAN GRUNFELD: Chief George, I'm pretty sure that was not one of your decisions! How would you answer that question?

TANI CANTIL-SAKAUYE: — 1913!

RONALD M. GEORGE: I don't go back quite that far. There are always decisions that justices of the court regret having been made by their predecessors, but I suppose the most embarrassing decision — if I could go around and rip it out of the casebooks — would be *People versus Hall* in 4 Cal., an 1854 decision.[12] In that case, the court was reviewing the murder conviction of a white defendant, and his claim of error was as follows: There was a statute that barred various races from being competent witnesses,

10 Mackenzie v. Hare, 165 Cal. 776 (1913).

11 Mackenzie v. Hare, 239 U.S. 299 (1915).

12 4 Cal. 339.

and it addressed specifically black citizens and mulattoes and some others. It happened, in this case, that the defendant was convicted in part upon the testimony of a *Chinese* witness, and that category of witness was not covered by the statute, so in addition to being racist and overturning the decision on that basis — because the court went on and enthusiastically embraced the exclusion of such witnesses, and commented in broad terms about the ethnicity of the witness and how proverbially persons of that ancestry could not be trusted as witnesses — the case was objectionable not only as a stark reference to racism but of judicial activism because the statute didn't even cover Chinese witnesses. But the court was quite activist and basically said, and I don't say this flippantly, that there were these other races that were just as bad as those that were specified in the statute, so . . . witnesses from *those* racial backgrounds should also be barred. If I had to take one decision of our forerunners out of the books, that would definitely be my first choice.

MOLLY SELVIN: Well, let's go in the other direction, staying with that theme of history here. Chief George, what do you think is the most important decision that the court has rendered, and why?

RONALD M. GEORGE: Well, I would go with a decision — and I admit having, you know, a somewhat personal stake in it, having endorsed it, but I think it was truly a landmark decision — and that is the decision in 1948 in *Perez v. Sharp*.[13] That case was the first decision to invalidate the anti-miscegenation statutes that existed very broadly through the United States, and it was several years before other states followed. Much ado, and it's well deserved, has been made of the *Loving* decision of the United States Supreme Court, but that took place in 1967,[14] coming to the same result, nineteen years after the California Supreme Court led the way. So that, to me, also illustrates what we were talking about previously of the California Supreme Court being truly a trailblazer, and the trailblazer in the most important areas, too.

I would add a second reason why I viewed that as a very significant decision and that is because, in authoring for the court, the *Marriage Equality*

[13] 32 Cal. 2d 711.

[14] Loving v. Virginia, 388 U.S. 1.

case,[15] I relied — as did those who joined the majority — on one decision above all, and that was our *Perez v. Sharp* decision because, if you go back and see the language in that opinion talking about the fundamental right of forming a union with an individual of one's choice — a person whom one loved and cherished — and forming a family unit, that language fit beautifully and perfectly into the decision that was before the court in the *Marriage Equality* case, and we therefore relied upon it very substantially in coming to the decision that *we* came to in the year 2008. So, for those reasons, I would pick out *Perez v. Sharp*.

DAN GRUNFELD: Has the more conservative U.S. Supreme Court of recent years resulted in a shift of power from the federal to the state court, or conversely, has the power shifted from the state to the federal court, in your view?

RONALD M. GEORGE: I'm not sure that there's been that much of a shift in the sense that it has always been, or least in recent times, the fundamental principle that we have independent state constitutional grounds. We've had four major figures in causing that to be recognized. We have Justice William Brennan. We have Justice Hans Linde of the Oregon Supreme Court, Justice Stanley Mosk — and our own Justice Joe Grodin [gesturing to him] who has written quite comprehensively on that subject. It is actually a conservative principle that we should act, as we do, first on statutory grounds without reaching the constitutional issue unless necessary, that we should look first to state constitutional grounds before we invoke federal constitutional grounds. And in the United States Supreme Court decision in *Pruneyard versus Robins*,[16] a conservative court, writing through Justice Renquist, noted that there was no principle of federalism that required a state constitutional provision to be interpreted in a manner consistent with its federal counterpart. Naturally, we all know that the federal constitution provides a *floor*, but the state constitution can provide a *ceiling* of additional rights. So, I think that's been a continuing principle, and interestingly enough it's a conservative principle that has often led to liberal results, as California, for example, has provided for women's reproductive choice that way antecedes *Roe v. Wade*, and if you go back to the

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

16 Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

federal decisions that have interpreted the Fourteenth Amendment by a process of incorporation, most of the Bill of Rights, most of the first ten amendments, have been incorporated by reference to apply to the states. So it's really a two-way proposition, and I'm not convinced really that there's a definite trend, and of course as long as 95 percent of the decisions made in courts in the United States are made in state courts, the states will inevitably play a very major role in lawmaking in this country.

MOLLY SELVIN: One last question for each you — apart from individual decisions, Chief Justice Cantil-Sakauye, what keeps you up at night these days?

TANI CANTIL-SAKAUYE: Well, let's see. [general laughter] I will notice your emphasis on *these* days and say, frankly, it's that California is undergoing so much change, and that change is reflected in the need for the judicial branch to be prepared and to anticipate the change. And, of course, the judicial branch, unlike potentially the other two branches, we don't move as quickly, for all of the reasons stated here, to our decisions. So what keeps me up is trying to anticipate the change in the administration of justice because the courts, the filings, our court users, the nature of our court users, have all changed, and we are a service to the people. So what keeps me up at night, just generally speaking, is ensuring that we are anticipating the change, that we are able to respond to the change, that we're able to timely deliver justice. I mean, cases are always keeping me up, but I think it's the bigger question of, are we as a branch providing the forums for justice that the public expects and that we are endeavoring to provide? And it comes in many different forms of change, that has the ultimate effect of providing justice. Of course, it's always about funding, but it's always about the use of the funding, and it's always about "Is this the best use?" And it's always about "Can we find a more efficient use to balance with due process?" And then, of course, there's the oversight of, and reporting to the Legislature of, the change, and so in many ways it's trying to walk a tightrope of providing justice, providing access, reporting it, and doing it on an ever-shrinking budget, recognizing how dynamic our users have become.

MOLLY SELVIN: Chief George, what kept you up at night?

RONALD M. GEORGE: Well, I won't parse the question the way the chief did, and substitute "who" for "what," but I will just say that I am very much concerned about access to justice as impacted by the reductions

in funding. I can understand that the courts have to do their part, even though I think that special consideration should be given to the courts as a separate and coequal branch of government, but I'm very, very disturbed when cuts are made, when millions and millions are taken out or so-called "borrowed" from our funds, and then are not restored when times become prosperous again. There seems to be an attitude among many in the other two branches of government that perhaps courts are a luxury and maybe even worse, that when we ask for funds we're asking for something for courts, for judges. We're not. We're asking for access to justice on behalf of our citizens, who paid their taxes to have a fair and accessible system of justice. I'm very, very concerned about this, and on my wish-list one day would be to have some sort of constitutional amendment that guarantees the courts a certain level of funding that cannot be invaded improperly and that would authorize them to have incremental growth in the number of judgeships. I'm really disturbed when I hear stories of people having to drive a hundred or more miles in our larger counties, like San Bernardino and Riverside, to put forth or defend their claim and then just decide they can't afford to do so, and they have to forgo their day in court. I think that is a very fundamental flaw in government, in society, and that's something that seems to be a trend, so that is what really does keep me up at night. Even though I don't have the responsibility for it anymore, it keeps me up at night as a citizen.

DAN GRUNFELD: So I would like, on behalf of all of us, to wish both of you less sleepless nights. In fact, I'd like to hope all of us will have less sleepless nights as we move foreword. Thank you for such an illuminating interview session, but even more importantly, for your role, both as chiefs and with the colleagues you served for, enhancing and adding yet more glory and respect to this very, very special institution. Thank you. [audience applause]

GEORGE ABELE: Thank you all for a truly enlightening discussion and conversation. We truly appreciate your contributions and thoughts on this issue. We have refreshments outside that we're going to return to in a moment, but we wanted to close the program by asking Professor Scheiber to say a few words about the book and what it means to him. I mentioned at the outset that the idea for this book was twenty years in the making

and that the person that's been there all along is Professor Scheiber. In the course of putting this event together, I was fortunate enough to be able to correspond with many people who have worked with Professor Scheiber and have been involved in the creation of the book, and there's one in particular that I want to share with you, from Dean Melissa Murray at the UC Berkeley School of Law, who was unable to be here tonight, but she asked that I convey her remarks. And I think this truly shows the determination and the will of Professor Scheiber.

> It is with great regret that I cannot be with you today to celebrate Harry's latest achievement. This edited volume is one for the annals, a meticulously curated celebration of the California Supreme Court. While the volume uses the court as a point of entry, in truth it goes beyond the work of the judiciary to celebrate the social, cultural, political, and economic achievements of the Golden State. That one book could cover so much ground is a testament to its editor, the indomitable Harry, an amazing legal historian and a much-beloved colleague. Congratulations, Harry. [audience applause]

So, Harry, I hate to put you between us and the drinks, but if you would comment for a few moments on what the book meant to you, that would be much appreciated.

HARRY SCHEIBER: Thank you. My doctoral advisor gave me very good advice when I was a graduate student all these many years ago and, among other things, told me never be the last one on a program because everyone wants to get over to the party.

I should begin by acknowledging some people other than those who George Abele so graciously acknowledged earlier. I could start with a little story about Chief Justice Lucas, actually, because he was chairman of the board of the Society at its founding. I was there a year after the founding. I think I attended the first actual board meeting, and he presided over it with Bob Warren, a very distinguished litigator with Gibson Dunn. He and Bob Warren together were really the great force in getting this thing moving, and he took a deep interest in it. He talked to me privately after one of the meetings when the board had approved the outline that I and others had agreed to present, and he very generously — a characteristic of

him; I have to say, to outsiders he was rather magisterial, but he was actually very approachable once you were in a common enterprise — and he said, "Harry, you can consult me on anything, of course. Don't hesitate if you have any questions or you need any help, except for one thing: don't ask me about water law!" [general laughter]

The project was endorsed and supported generously by the Society. A lot of individuals were involved in it, and they've been mentioned, but I really have to mention just a couple names. At various junctures, Justice Werdegar was particularly important to this project; she's been very dedicated to it and intervened at several times, and I want to thank her in this forum. And Selma Moidel Smith, who's sitting here, is now the editor of a journal for the Society [*California Legal History*]. It's just a fantastic accomplishment. It's become a treasure house of interpretative articles and edited documents and other materials and an inspiration in the field. Selma, we have to thank you for this, as for so many other things. On the academic side of what the Society does, she has been instrumental.

Part of the Society's major projects has been, and what I've been proud to be associated with as a member of the board — at one time, vice president, but since then just dealing with the academic side of things — is that oral history effort, and one of the great products of this, of course, was Chief George's book which came out a couple years ago and is such a rich source.[17] But the Society has been promoting the advancement of knowledge about the court across a broad front, including public programs, which I think are very important. We're very grateful for this effort, but in particular these oral histories, many of which are not open yet to researchers. They've been closed for a period of time, but they're going to be tremendously valuable, and it's another achievement of the Society that's important to mention.

Let me just turn to the book and say a few words about that. I had written — let me talk about it autobiographically for a moment — on various aspects of California law in relation to economic development. I was then a professor of history and chairing political science at the University of California, San Diego, which was in the '70s, and I happened to be the

[17] Ronald M. George and Laura McCreery, *Chief: The Quest for Justice in California* (Berkeley: Berkeley Public Policy Press, 2013).

chairman of the Advanced Placement board for American history, the national AP exams, for several years. In that capacity, I got to talk to a lot of high school teachers, and we had periodic meetings of these teachers to guide us in how the AP program should proceed. I asked them, almost accidentally, what do you do with the California Constitution, and I got complete blank looks, of course. So we conducted a survey, a formal survey, and the returns came in — very nice return, maybe 80 percent — and the percentage of teachers who actually mention the California Constitution was under 10 percent. So I became something of a fanatic about that, in terms of promoting it for high schools. Together with colleagues at the San Diego campus, we instituted what was called the Earl Warren Conferences, in which we brought literally hundreds of high school kids in to hear about the California court and other issues in constitutional law, but focusing particularly on California.

We got a lot of support for that, and that kind of effort carried over when I came to Berkeley in 1980. One of the first things that happened was that Justice Grodin invited me to be a speaker at a conference that, I think, a year or two late was celebrating the centenary of the 1879 Constitution. I think that it dates from the time of that conference at Hastings [College of the Law], that real impetus came to the study of the California Constitution in the law schools, where it had really atrophied to some degree — Bob [Egelko], you're nodding; I guess you agree with me — there was a remarkable lack of effort, with the exception of McGeorge and one or two other journals, I'm ashamed to say the *California Law Review*, which had been a great source of interpretation, had stopped doing its annual sessional analyses. That has turned around in a major way. I'm very happy about that, and major figures in the Society have had a great deal to do with that.

So I saw this book as a dual opportunity, first to do for California — and this sounds very boastful, when you think about it — do for the California court what's been done for the [U.S.] Supreme Court by the Oliver Wendell Holmes Devise, to have a really major, deeply researched, authoritative study of the history of the California court. Well, the Holmes Devise volumes are, I don't know, up to fifteen or something, and each one's about a thousand pages, so we weren't going to do that. After consulting with Chuck McClain, my colleague here, and others, and I think I did consult with you, Molly, with Charles McCurdy at Virginia, who's a

very distinguished legal historian in California, we worked out a plan that I presented to the board, and it was for a monographic effort, and one that would be readable, that would be a single volume, but not to be "history-light" but to be a serious, authoritative history. I think the board members, many of them, cringed when I would justify the length of time that we were taking by saying, "This is not going to be done again in our lifetime. We want something that's going to stand." It was very daunting for some of the people who we initially contacted. They looked at what was involved and backed off immediately. I was telling Dan this before; it looked like it was going to derail their careers for a couple years — and it did.

That brings me to the fact that the Society was really fortunate, I was really fortunate, that Molly and Bob Egelko, Charles McClain who did *two* chapters, Lucy Salyer who's been mentioned (a very "decorated" legal historian who was, by the way, Judge [Robert] Peckham's first non-J.D. clerk — he brought her as a Ph.D. in history to the court as a clerk), and the late Gordon Bakken, who had been writing in California legal history for a long time — it was a tremendous pleasure to be able to bring these very able people together and to have them make this kind of commitment. Bob Egelko, here, came in for the next-to-the-last phase of the project which was to do the Lucas Court, and then Molly came in to do the George Court, and so we have a huge span of California history.

Now I say our objective was to have an authoritative history. That meant a lot of deep digging in the sources. There are two different kinds of challenges here for historians. For the earlier period, really down to 1900 and to this momentous Progressive-Era flood of changes, interpretative sources — this really solid historical material was really lacking. There's very little, and the authors who undertook this really had a heroic job to do to find the sources and to work with them. For those of us who did the modern period — Chuck McClain on the Gibson Court, myself on what I call the "liberal court," 1964 through the Bird Court, and Molly and Bob — the problem was different. Here you just have a super-abundance of material to get through. It's almost overwhelming on any given subject. So we have that kind of challenge.

The second kind of challenge that each author had to cope with was: we're not just looking at this case and that case and in the conventional way saying, "Well, here are my wise and perceptive remarks on this case

and then eight years later my wise and perceptive remarks on how that case may or may not have drawn on the earlier case." We all were dedicated to the proposal that, interestingly, Justice Lucas set out in his introduction to the first volume of what was then our journal which I edited, called the *Yearbook* at that time, in which he said, "We want a history of the work of this court in relation to California's socioeconomic, cultural, political change." It's a big order. For the historians, you had to get on top of the literature of all these other fields of history in order to construct that context. So it was a very formidable challenge, and these authors have taken it on so admirably and, I think, with great success.

Then there is the further mandate: we wanted it to be readable and accessible. You know, historians are just as concerned about accessibility for their years of labor as you are for the courts to be accessible to the citizenry. We wanted it to be accessible; we didn't want to write a book that eight people were going to read and say it was wonderful and learned, and no one else would ever look at. Our hope — going back to the whole question of education in the schools and the colleges and even the law schools — our hope was that we would produce a book that could be used and would be a source of reference for a long time, as an authoritative source of reference that would be used in classrooms and in student research and so on. I was really pleased that part of [UC Berkeley School of Law] Boalt Hall's support of this project was to support graduate research assistants, and I think seven of them ended up publishing under their own authorship on the work they had done with us.

We are hoping that this would become an inspiration to students in seminars, both undergraduate and graduate, as well as in law schools to find aspects of California history that interested them. You just heard about a couple of these amazing periods of California history and the extraordinary problems that the court confronted and tried to resolve over time. This book is full of those. It's just remarkable, and you do come away from it as an author, I have to tell you, with your own favorite moments where you feel as though you've gotten into the court's history and you really do understand the efforts to confront these huge changes and to anticipate changes to deal with them. There are so many of these, ranging from the death penalty issue to tort reform, immigration, privacy — issues that in 1879, let alone in 1849, weren't even on the radar screen, let alone the

agenda. So it's a process of discovery for the authors, and we hope that will inspire the process of discovery for the readers, particularly in the schools and in the profession.

Then you come down to the nitty-gritty of getting it all right. He hasn't been mentioned, but I'll mention Jake Dear, who's here — on the court staff — who helped us in the very last phase, very diligently. He gave himself, made time on his own, to help with the technical details, and it was a last review which really was fun for me in the end, although it was torture at the time, of discovering certain things that I had to research anew. I think we improved and — to just give you one vignette on this, for example, the famous doctrine of the United States Supreme Court that a corporation is a person, which we now know is a person who has freedom of speech, guaranteed.

Well, that crept into the national constitution in a very curious way. Howard J. Graham, a historian of an earlier day had researched and found this story. Justice Field [Stephen J. Field, former chief justice of California] had been a great proponent of railroad exemptions from control, and when he went on the [U.S.] Supreme Court, these issues came before him. The *Santa Clara Railroad* case came before him,[18] among others, in which that dictum came down. But ironically, it wasn't even a dictum in the opinion part of it; it was in the headnote to the decision as published in the reports. And Graham had found years ago that this headnote had been written by the clerk, and the editor had written to Chief Justice Waite who was then in the hospital and not well and said, "Shall I put that in? It was mentioned by some of the justices." "Sure, put it in the headnote." Well, it was never in the opinion, but it crept from this curious beginning into a full-blown doctrine of law — another contribution of California to the great body of constitutional law. Graham suspected that it was because Field had pushed that idea over to the clerks behind the scenes. This is one of, I'd say, two hundred such little stories that actually reflect *very big* stories. I mean, the whole question of how railroads would be controlled in their corporate powers and their operational powers and their rate-making, was huge in the history of the court and the history of California and, of course, in the history of the nation's developing economy.

[18] Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394 (1886).

I know that everyone wants to get off to the reception, and won't keep you further, but I do have to say again what a privilege it was to work with these folks whom I've mentioned, and George has mentioned, with Dan Grunfeld and Jennifer King, [former Society President] Ray McDevitt, and others who have served the Society so well. Just speaking for my own period of the Wright Court and the Bird Court, I have enormous admiration for the contributions that have been made by many, as scholars, as well as a judge in one case, by, among others, Joe Grodin, whom we're all indebted to — all of us who try to do the history of the court and understand jurisprudence. Every lawyer would like to have something in his or her career, an achievement where the law was advanced as a result of his or her work, and every historian would like to have an achievement in his or her career where the understanding of a period or a problem or an institution was advanced. That's what we've tried to do, and we hope as we launch this ship on the turbulent seas of American society that it will have that effect. I do want to say in the end that it was a privilege and a joy to work with Molly and Bob and Chuck and the other two who have not been here, and I have to say it was a great opportunity for me to share in this mammoth undertaking with such dedicated and accomplished historians (and in Bob's case, journalists). It's been a terrific voyage. Thank you. [general applause] And we did cover water law!

CHARLES MCCLAIN: I know why he said, "Don't ask me about water law," because that was a very big part of the early history of the court and extremely difficult to understand. On behalf of the authors, I just wanted to extend an enormous word of thanks to you, Harry, for seeing this project through to such a successful conclusion. This was not an easy job at all.

GEORGE ABELE: Thank you. Thank you all again for your insights on the book and your thoughts about the current and historical aspects of California society. The California Supreme Court Historical Society would like to invite all of you for cocktails and snacks outside, so please join us for continued conversation outside. Thank you very much.

★ ★ ★

INSIDE THE COURT AND OUT:

California Supreme Court Justice Kathryn Mickle Werdegar

EDITOR'S NOTE:

After twenty-three years of service on the California Supreme Court, Justice Kathryn Mickle Werdegar retired on August 31, 2017. To give increased exposure to her distinguished career, the California Supreme Court Historical Society organized a public program in her honor. She was interviewed about her experiences on and off the bench by journalist/biographer Jim Newton at the Los Angeles Central Library's Mark Taper Auditorium on November 7, 2018. The following is a complete transcript of the interview, lightly edited for publication, including the addition of footnotes.

—SELMA MOIDEL SMITH

JOHN SZABO: Good evening, everyone. Thank you all so much for coming this evening. We are delighted you're here, and welcome to the magnificent Central Library, here in downtown Los Angeles. My name is John Szabo. I'm city librarian of Los Angeles, head of the L.A. Public Library. We are so delighted and honored to host the California Supreme Court Historical Society event this evening, "Inside the Court and Out." This is the iconic flagship of the L.A. Public Library. This building, along with seventy-two branches, serve the people of L.A. every single day. We are a very, very busy place, more dynamic and relevant than ever.

We recently celebrated the twenty-fifth anniversary of the reopening of this building. Some of you may remember that. It followed the devastating fire that occurred in 1986, and then there were a few years of construction, and then this library reopened. We're in the Tom Bradley Wing now, which was, of course, added on to the Bertram Goodhew–designed original Central Library, which this year turned ninety-two years old. It is a much-loved building as you all know, here in the City of L.A., and we have about 5,500 people a day that come into this building for coding classes, robotics, checking out thousands and thousands of books — of course, continues to be still a big part of what we do — incredible exhibits. It is a very, very wonderful and busy place. Also, if you're interested in the story, a fascinating story of the fire, there is a book that's currently on *The New York Times* Best Seller list, number one on the *Los Angeles Times* Bestseller list, called *The Library Book* by Susan Orlean. It is a story of the fire and of the wonderful rebirth of the building and the great success of public libraries in the U.S. So I encourage you to check it out or buy it in the library store at the Central Library.

I'm very proud to highlight two or three programs that we have here at the library that I think might resonate with you. We have a "Lawyers in the Library" program that provides free legal help twice a month with attorneys from Public Counsel at our Benjamin Franklin Branch Library in Boyle Heights and also at the beautiful Vermont Square Branch Library, which is one of three surviving Carnegie Library buildings — over a hundred years old — in our system. We also have a great partnership with the LA Law Library, where we provide remote access to databases for legal research, briefs, and information. And, our award-winning New Americans Initiative which provides immigration and citizenship services through

partnerships with nonprofit legal counsel providers and also community-based agencies, as well as library staff who have received certification to provide assistance on immigration issues. We started this program back in 2012 with the United States Immigration and Naturalization Service providing little spaces in all of our libraries with information on the naturalization process, and it has been replicated at libraries all across the country. Then we recently expanded it and rebranded it as the New Americans Initiative, and, of course, it's an incredibly successful and important program here in Los Angeles.

I'd also like to thank Linda Rudell-Betts, senior librarian on our staff, as well as Lisa Schloss, a social sciences librarian for their work in coordinating tonight's event. We have an amazing team at all of our libraries at L.A. Public Library. Again, thank you very much for joining us this evening. You may not have the time this evening because the library will be closing, but please do come back if you have not explored this amazing building. There are incredible collections, public art, great docent tours, an amazing exhibit on the second floor off of the rotunda that features some of Tom Hanks' typewriters that he has loaned us for the exhibit; he is a total typewriter geek and a collector, as well as a life-size walnut-covered elephant. I guarantee you have never seen a life-size walnut-covered elephant, and why it's there you have to go to the exhibit to see. Again, thank you all so much for being here. We appreciate it.

GEORGE ABELE: Thank you, John. Thank you very much for coming. My name is George Abele. I'm the president of the California Supreme Court Historical Society. We at the Society are very excited for tonight's program. Justice Werdegar has been a member of our Board of Directors for many, many years, and we are looking forward to the conversation with her tonight. We, on behalf of the Society, wanted to thank the library — John — very much for providing the venue and all the support for our program tonight. As you can see, this is a terrific venue. The reception was beautiful, and we couldn't have done it without their assistance. John mentioned Linda Rudell-Betts — Joyce Cooper — there are literally dozens of people I could name who have really helped out and got our program under way, and I'd like to thank all of them — in addition to Bob Wolfe, a member of our Board of Directors. Bob put a lot of time and effort into getting this together, and Francine Sheldon from our office at Paul Hastings helped

out tremendously as well. One other thank-you that I'd like to make is for Public Counsel; they are cosponsoring this program with us and helped to provide the MCLE for those of you who are interested in obtaining MCLE credit, so we thank them for that. If you are seeking MCLE credit, please do remember to turn in your evaluation forms at the end of the program. There's a box out front for that purpose.

I'll finish with one further introduction before we get to our speakers, and that also relates to Public Counsel. Margaret Morrow, you may know, is the president and CEO of Public Counsel, and she is here with us tonight. Public Counsel serves over 19,000 children, families, veterans, consumers, immigrants, and community organizations every year. The policy advocacy and the impact litigation that Public Counsel is involved in affects thousands of more folks who live in poverty, and the work they do is just tremendous, so we're honored to have Margaret Morrow with us. Prior to joining Public Counsel, she was a judge for eighteen years, and she has just done tremendous things for the city of Los Angeles, so please join me in welcoming Margaret Morrow.

MARGARET MORROW: Good evening, everybody. I have the distinct honor of introducing the individuals who will be participating in this evening's conversation, Justice Kathryn Mickle Werdegar and Jim Newton.

Justice Werdegar is a California native, born in San Francisco. After earning her bachelor's degree with honors from the University of California at Berkeley, began her law studies at Boalt Hall, where she was first in her class and the first woman ever elected to be editor-in-chief of the *California Law Review*. She completed her J.D. degree at George Washington University, where she graduated — you guessed it — first in her class. After serving with distinction in the Civil Rights Division of the United States Department of Justice in Washington, D.C. under then–Attorney General Robert Kennedy, Justice Werdegar was appointed professor and associate dean for academic and student affairs at the University of San Francisco School of Law. Following her stint in academia, she became a research attorney for the state Court of Appeal in 1981 and ultimately for Justice Edward Panelli on the California Supreme Court. In 1991, she was appointed by Governor Pete Wilson to the First District Court of Appeal in San Francisco. Her appointment to Justice Panelli's seat on the California Supreme Court followed shortly, in 1994. Justice Werdegar served

with great distinction on the Supreme Court for twenty-three years until her retirement in 2017. During her time on the bench, Justice Werdegar was known as a rigorous and thoughtful legal scholar, a consensus builder, and as someone who always placed the rights of people above politics and ideology. Throughout her tenure on the Supreme Court, and even today, Justice Werdegar has been an enthusiastic supporter of, and contributor to, the California Supreme Court Historical Society.

Joining Justice Werdegar on stage tonight is acclaimed journalist and author Jim Newton. Jim is a Dartmouth College graduate who began his career as a clerk for *New York Times* columnist James Reston. After working as a reporter at the *Atlanta Journal-Constitution*, he spent twenty-five years with the *Los Angeles Times* as a reporter, bureau chief, columnist, and editor. He was part of the teams of *Times* reporters who won Pulitzer Prizes for their coverage of the disturbances in Los Angeles in 1992 and the Northridge earthquake in 1994. He's the author of three bestselling, critically acclaimed books: *Justice for All: Earl Warren and the Nation He Made*; *Eisenhower: The White House Years*; *Worthy Fights: A Memoir of War and Peace* with Leon Panetta. In 2015, Jim joined the UCLA Luskin School of Public Affairs where he teaches communications studies and public policy and is the editor of *Blueprint*, a magazine that addresses the policy challenges facing Los Angeles and California. He's at work on a fourth book, who's working title is *Jerry Brown and the Creation of Modern California*. So Jim and Justice Werdegar, if you'll please come out. [applause] I'm going to turn this over to you, Jim.

JIM NEWTON: Thank you very much, Judge Morrow. More important than all her other accomplishments, Judge Morrow is also my friend and neighbor, so it's nice to have you here. Thank you.

Thank you all for being here tonight, for joining us for this evening. It's really a pleasure and honor to share the stage with you, Justice Werdegar. We're going to talk a little bit about the court tonight as you might expect, also California life and politics. First, though, we have to get the elephant out of the room, which is to say the events of today and yesterday. I know you come from the least political of our branches of government, but I wouldn't be an interviewer if I didn't ask for your thoughts on yesterday's midterms. Any reflections on what happened to the country?

JOURNALIST JIM NEWTON AND RETIRED JUSTICE KATHRYN MICKLE WERDEGAR.

Photo: Greg Verville/GV Photography

KATHRYN WERDEGAR: Well, you said "the elephant out of the room" — *the elephant and the donkey* out of the room, right?

NEWTON: [laughter] Very good.

WERDEGAR: It seems that each side, in some regard, is able to claim victory. That's what I'm hearing, and it makes sense to me. And how the new balance will play out remains to be seen, but holding on to the Senate strongly is no small accomplishment for the Republicans; taking over the House is a great achievement for the Democrats, and we'll just see. Another observation I'd make is that it's been said, and we know it's true, that this morning started the campaign for 2020, so if we think we're finished with the election because we cast our ballot and we got the result — no.

NEWTON: Well, you take a deep breath, probably. Okay, enough of that. Let's back up. We heard a little about your background from Judge Morrow. I wonder if you could talk a little bit about coming up as a law student and lawyer here in California, particularly at a time when there were not many women in your profession.

WERDEGAR: There decidedly were not women. When I went to law school, it was my understanding that in the United States 1 percent of attorneys were women. California, progressive as always, had 3 percent. It didn't dawn on me that this was going to be an issue or a problem. This was just an education that I felt would take me, I didn't know where, and I was happy to have the education. What was it like? When I came back from Washington — of course, the federal government does not discriminate, and it didn't at that time; I was hired in the Justice Department in the Civil Rights Division after graduation — but I came back to California, and the non-discrimination law hadn't been passed yet. Firms could actually say — they didn't to me, to my face — but they *could* say they weren't going to take a woman: The clients wouldn't like it; the senior partner wouldn't like it. Berkeley Law sent me over to one firm — they looked out for me a little bit, even though I had gone on to George Washington — and said there was one firm in San Francisco, a prominent firm, that was thinking of taking its first woman if the others could persuade the senior partner, and I had a lunch with them, but I just don't think I was the best interview. In any case, the senior partner wasn't persuaded. But I was mostly oblivious, Jim. It did not cross my mind about discrimination to be honest. I was very naïve, and maybe it wasn't discrimination. You don't know. You can't go into every situation thinking that's discrimination. They might have had another candidate.

NEWTON: And what about in school, Governor Wilson — later, Governor Wilson, your law school classmate, famous for having said that when he and his classmates started, they wanted to carry your books and ended by wanting to copy your notes? It may say more about Governor Wilson than it does about you [laughing] —

WERDEGAR: I appreciate that —

NEWTON: Does that indicate an attitude that you experienced at Boalt?

WERDEGAR: Again, I think I was oblivious, truly. I didn't sense any unwelcomeness, except from famous Dean Prosser who was on record as not wanting women. A woman of that era — you have to really go back — was thought to be taking a man's seat, a man who would need that seat, and the woman would not need it; it was frivolous. No, I think I was accepted by professors and students. It's only looking back that I realize how unusual my presence might have been.

NEWTON: You mention in your oral history, which I read with interest, different rooms. There was a room, a very small room —

WERDEGAR: The lounges.

NEWTON: Lounge, that's right.

WERDEGAR: Yes, there were two, the men's lounge, and the women's lounge, and you know, 98 percent of the individuals were hanging out in the men's lounge. We did have some women getting their master's in law, beyond what at that time was the LL.B. Yes, so when I'd go to my reunions, which I've only gone to a couple of times, but the *guys* would talk about this-and-that that they did in the lounge, and playing bridge and doing whatever — Oh! I had no idea. And going back to *The Paper Chase*, which came out afterwards — study groups. If they were having study groups, I didn't know about it. There was so much that perhaps was taking place that I was unaware of.

NEWTON: Do you feel like you missed something?

WERDEGAR: No. Well, I mean — no.

NEWTON: Let me ask you a question again that comes up in your oral history that I thought was provocatively referenced in here, which is to ask about the value of diversity on the bench, to ask it this way: would a smart, experienced woman decide a case any differently than a smart, experienced man?

WERDEGAR: Perhaps you're aware of Sandra Day O'Connor's comment. When I was appointed to the Court of Appeal in San Francisco, it was a nineteen-judge court, and at that time I was the only woman, among those eighteen males, and it came to my attention that Sandra Day O'Connor had said — her appointment was so historic — she had said, "A wise old man and a wise old woman will come to the same conclusion." And I thought, "Really, is this true?" A lot of women academics at that time were trying to discern if there were "a woman's voice." There were so few women on the bench, maybe a few more on the federal bench than on the state benches, so they were analyzing this minute material that they had to work with. So, I myself thought about that. Fast forward, I have now, on the Supreme Court, sat with five different women judges, over time, and I would say to you that we are as alike, or as different, as any two random judges of any sex.

NEWTON: The court that you left was a majority of women, was it not?

WERDEGAR: The court that I left, when I left, had had a majority, and now it's balanced, and we just don't know what's coming.[1] Yes, that was quite something, and when I joined the Supreme Court, I was the second woman, but as you say, we've had for many years a majority, including our chief justice.

NEWTON: How do you think it's appropriate to value prior judicial experience in evaluating the credentials or the qualifications of a nominee to the Supreme Court, either California or federal?

WERDEGAR: When you speak of judicial experience, are you thinking about the trial court, or any court, the Court of Appeal?

NEWTON: Well, I'd leave it to you to answer any way you want, but I guess I was thinking about either or both.

WERDEGAR: Of course, the appellate courts are so different from the trial court. But each governor has had a very different approach to this. Governor Deukmejian —preferably you'd been a D.A. before, and then you started in the Muni Court, and if you acquitted yourself all right there you'd be elevated to the Superior Court, and maybe if lightning struck you'd get up to the Court of Appeal, and there it went — that was his vision. When Wilson came along, I was his first judicial appointment — that was to the Court of Appeal — and he was breaking the mold there. When he appointed me to the Supreme Court, although I had sat on the Court of Appeal, I hadn't done all those boots-on-the-ground other things, I hadn't been a DA, I hadn't sat on the trial court. We all know that our current and former governor, Jerry Brown, has a very different attitude. Three of my new colleagues, by his appointment — he has a fourth coming up — three have never been on any court and are academics, really.

What do I think? I think you need it all, frankly. Most of our issues — except maybe in criminal law when you're dealing with a Batson-Wheeler motion (was there discrimination in a jury selection?), when having been in the court itself, you might have a feel for how those things go — otherwise, most of our issues don't deal so much with trial court procedure. Those

[1] A week later, on November 14, 2018, Governor Jerry Brown appointed Joshua Groban to fill the vacancy created by Justice Werdegar's retirement.

cases stop at the Court of Appeal. As all of you in this room I think know, we have discretionary review, and out of all the thousands of petitions for review that come to us, we might take 3 to 5 percent. Our issues are more philosophical, constitutional, policy. So professors have a lot to say about that. You want a complete mix, and with seven positions, you just can't have every ethnic and background mix that you would want. You want experience like — Marvin Baxter had a background in farming, and that was good, he brought that. He also had political experience. I sat with Stanley Mosk, which was great fun. He had a lot of political experience, you know, common sense. I don't think there's any clear answer, but you don't want all the same. You don't want all D.A.'s, and you don't want all professors.

NEWTON: Are other members of the judiciary resentful that Jerry Brown has not put experienced judges on the court?

WERDEGAR: I wouldn't know. But as I mentioned, in the Deukmejian days, you had a stepping stone, so that if you distinguished yourself as a judge in the lower courts, then if there were an opening on the Supreme Court, and you had some connections — the governor has to know something about you — you might have a hope that with all your hard work and your service you would have a shot, so in that sense, it's not speaking to what I know about people's attitudes, but it's natural they'd think, "Wait, we've been serving here for twenty-five years, and you pluck somebody out of some old law school!"

NEWTON: I would think! California has an unusual system for appointing and, of course, for retaining justices. We've just been through a round yesterday [in the confirmation hearings for the appointment of Brett Kavanaugh to the U.S. Supreme Court]. What is your assessment of the way California handles the retention, or deals with that as part of the judicial process?

WERDEGAR: I have said often, I think California has the best system. The judges at the appellate level are nonpartisan. They cannot run with any party affiliation or backing. They're nominated by the governor. They're reviewed by something called the Judicial Nomination Evaluation Committee, which is an arm of the State Bar, and if they pass all that, and the governor chooses to appoint them, there's a commission that reviews the nomination comprised of the Chief Justice of the state, and of the attorney general of the moment, and the most senior presiding judge of the Court

of Appeal. And, as you referenced, once appointed we are *retained* by the voters. It's not contested. If we're not retained, as happened many years ago historically — three justices in the Rose Bird era were not retained — nobody takes their place until the governor appoints someone. It's not a contested election. I've thought our system was excellent, actually.

NEWTON: Compare it, or contrast it, to lifetime appointment.

WERDEGAR: I don't think lifetime is good. I think as somebody has pointed out, when the United States Constitution established lifetime appointments for the United States Supreme Court, life expectancy was very different, and they didn't anticipate that anybody would be sitting for thirty-forty years. That's not going to change because it takes a federal constitutional amendment. Most of us here understand that's a most arduous process, and on this issue it would become very problematic and contentious, so it's not likely to happen. With respect to the states, the nightmare is contested elections, and you're probably aware that some states have that, and it's very political. It's terrible. We're supposed to be a sort of independent, neutral branch. I know that in various quarters across the country, it's moving away from that in the perception of the public. California, even though each governor appoints people that they hope will advance their policy — there was once a cartoon, did you see it?, I don't know what he did to deserve this, but it was a political cartoon and there were seven faces in black robes on the bench. They were all [Governor] Gray Davis's face, and the caption said, "I want my judges to reflect my vision," or something like that — so, the appointing authority hopes that you'll be in tune with their philosophy and their view of the world, but they don't have a lock on you, and we're free to do as our instincts and best judgment dictate.

NEWTON: You referenced the Rose Bird retention election, and the other two justices as well. Do you worry at all that that was an example of — are justices influenced by that case and the fear that they're not going to be retained?

WERDEGAR: Well, when it happened — I don't think it had ever happened in California history before — I was a staff attorney at that time on the court, and irrespective of your politics or your views of the court, those of us who were professional and worked there, I felt black bunting should be wrapped around the building. It was *shocking*. Maybe we were naïve. I think certain special interests will occasionally try to remove judges. As

you might know, that campaign I'm told was based on the Bird Court's alleged failure to affirm any death penalty judgments. It was a new death penalty law, and you could say they had to work through the nuances — whatever. But they reversed and reversed. It was pitched to the public that the court won't enforce the death penalty, which Californians at that time and maybe to this day still favor. But the *money* behind it came from business interests that didn't like the tort judgments that that court was advancing. So it was a very dark period in our history. Some years back, when Ron George was chief, he and Ming Chin who were on the ballot that year, did mount a retention campaign because there were certain interests that were threatening to throw them out based on their vote on the parental consent case, where the Supreme Court at that time said that the state law that required a minor to get parental consent or a judicial permission to have an abortion, that that law was an invasion of the minor's right to privacy — a very, very divisive issue, and it got a lot of people up in arms.[2] So Ron George and Ming Chin got campaign consultants and raised money, and they won, they were retained. It's not a perfect system. The role of the judiciary in our society is very complicated.

NEWTON: Point taken. Another quirk of California politics, the initiative. I know you've talked and thought a lot about the initiative process. How well is the initiative process wearing on California?

WERDEGAR: Well, you all voted. How did you like all those initiatives? [laughing] Shall we abolish Daylight Saving Time, shall we extend rent control, shall the dialysis centers be restricted — you know, I voted on these, and afterwards I read what they were supposedly about. The initiative, as we all know — it was a reform measure more than a hundred years ago, to go around the stranglehold on the state legislature that the railroad interests had. It was a populist move to give the people a voice. So it's direct democracy. You don't go through the Legislature to pass legislation; you do it yourself. As time has advanced, our state has grown — we're so much larger — and there are those who would say that the initiative process has been highjacked by the very special interests that it was intended to get around. Initiatives now are put on the ballot to advance certain special interests, and of course it takes a lot of money to get an initiative on the ballot now.

[2] American Academy of Pediatrics v. Lundgren, 16 Cal. 4th 307 (1997).

For legislation you have to get signatures of I think 5 percent of the people who voted in the previous general election, for a constitutional amendment, 8 percent, something like that. We're a huge state, and so you have to pay people to get those signatures. Good citizen groups, whatever they may be, don't have that money. It's complicated, and then people don't understand the initiatives. I often feel we're asked to vote on things we shouldn't have to be thinking about. That's what we have our legislators to think about.

One real difficulty with the initiative is, if in practice it turns out not to be working well, how can you amend it? Legislation — legislators can get together and amend the law. Initiatives — you have to pass another initiative, go through the whole process. The Three-Strikes initiative, which was extremely popular in its time, over the years people, entities, the public, began to feel it was too severe because a third strike — you'd read these stories of somebody who stole some golf clubs and it's his third felony, and he's behind bars for twenty-five years. In any case, reformers tried three times to ameliorate it, to modify the Three Strikes Law. It took three times. On the third time, the law was modified to say that the third strike can't be just a felony, it has to be a violent and serious felony. There are differences. The same with term limits. That was put in by initiative. People loved that at first, and then over time people began to feel this is too restrictive, too much revolving door. We want to modify that. They had to do it by initiative, and I think that took a couple initiative cycles. On the other hand, California has reapportionment by citizen committee. That was an initiative measure. In other states, the legislature, that's the legislature in power, does the reapportionment. You weren't going to get that reform through the legislature, so the initiative worked very well in that regard.

NEWTON: There's something I think that many people — certainly I — find uncomfortable about the initiative, particularly when it comes to criminal justice. There seems to be something sort of crude about it. I mean, if baseball had four strikes, would we have Four Strikes in California? There seems to be something that seems populist and kind of blunt-instrumenty about it, when it comes to something as delicate as sentencing.

WERDEGAR: There's no question about that. You're absolutely right. Again, these measures are broadly written, often by special interests, and often with the intention, I'm told, of getting certain segments of the

electorate to the ballot box — if you can get their blood up and get them interested in an issue, they'll vote, so it's a manipulative tool. Yes, for the general public to be dealing with matters of criminal punishments that require sophisticated insights, it's questionable.

NEWTON: Are there ways, do you think, that we could amend the initiative process that would preserve some of the benefits you're discussing while ameliorating some of the difficulties?

WERDEGAR: I'm not an expert on this, but there is an entity — one at least — called the Think Long Committee. Perhaps you've heard of it. And I understand the committee did recommend some reforms which I think are very good. One reform was that any proponent of an initiative would have to present it to the Legislature before it could go on the ballot, to see if the Legislature would respond, "Oh, you're interested; then we'll look at this issue," because they have hearings and they have experts, and would also to have put that proposed initiative online so citizens could comment. I think that has been implemented, but how it's worked out with any given initiative I don't know. The other reform, which I think is very helpful, is that the proponents would have to disclose the top — I don't know how many — several contributors, because who's behind an initiative often tells you what it's really about. The initiatives are very confusing, and the titles — now take initiative Prop 6. You all know what Prop 6 is? This was the gas tax. Well, the proponents wanted it to be called "Repeal Taxes." The opponents — this was going to repeal certain taxes that are imposed at the pump to build our roads and so forth — the opponents, and it's they who prevailed, and it's the attorney general who decides, wanted to call it "Eliminates Money for Road Repairs." [laughing] So you have, you know, "Repeals Taxes" or "Leaves Your Roads Rutted." And what's the public to do? It didn't pass, by the way.

NEWTON: I want to shift for a little bit and talk about life on the court. As a starting place, I wonder if you could talk a little bit about — you served with three different chief justices, right?

WERDEGAR: I did.

NEWTON: Will you take a moment and talk about the role of the chief justice and how those different chief justices managed the business of the court and the life of the court differently?

WERDEGAR: Thank you. The role of the chief justice is really administrative. And Ron George used to point to his robe hanging on a hanger back in his chambers and say, "That's the part of the job I love." But their role is administrative, going up to Sacramento and persuading the legislators to give us a proper share of the budget, for example. We are at the mercy of the legislators in our budget, and Ron used to say — you know there are fewer and fewer lawyers in the Legislature than there used to be traditionally — that some of them wouldn't know the difference between the judiciary and the DMV [Department of Motor Vehicles]. That was kind of a struggle for him. With respect to the interior workings of the court, well, the chief justice does assign cases, once we grant a case. And that assignment, you might think is somewhat of a power. But the chief's real hope is they will assign the case to somebody who can get a majority, who can write a decent opinion. Apart from that, the chief justice has no greater influence than anyone else on any given judge, no matter what. If somebody's obstreperous, if somebody's not producing their opinions — the chief has no special recourse. It's interesting — each judge is a constitutional, independent officer. The personalities: I came late in Chief Justice Lucas's career. I won't be the first to say he was right out of central casting, I mean tall, shock of white hair, ramrod, and poker face, but a very wry sense of humor, true gentleman, and just a delightful fellow was my experience with him. When Ron George came in, he came in just raring to go, high energy, a vision for the courts. He wanted to assure that the courts maintained, or re-achieved, their position as a coequal branch of government, and he was behind the consolidation — it was an initiative, I think — of the Municipal Court — remember Municipal Court? — and the Superior Court, and statewide funding for the courts, so he had an administrator's vision for the good of the courts. As a person, he was absolutely delightful. He, too, had a great sense of humor, and high energy, and he had a talent that our current chief also has: We can be kind of annoying, we members of the court. You know, the cases are contentious and certain issues come up, and we're not all buddies necessarily. He had a way, and our current chief does as well, of just this very neutral, cordial way of treating all of us. Something will happen in conference that you know has to be extremely irritating, but with neither of these chiefs would you ever know it. So Ron George was great at doing what he did. When he left, the Administrative Office of the

Courts, which is our administrative body, had about 800 people, and that had grown considerably under his tutelage. I will say that I happen to have known the very first ever administrator of the courts, Ralph Kleps. Do you know the name?

NEWTON: I know the name, sure.

WERDEGAR: In fact, our Administrative Office of the Courts, I think, was the first in the country. Ralph Kleps did start it, and when I knew him, he had a staff of about six attorneys. Well, fast forward, I'm still in the law, and Ron George is chief, and there are 800 employees, so there was a little feeling about that, that it had grown too much. He left that to our current chief. When Justice Tani Cantil-Sakauye came on, the state budget was in bad shape and the courts began to suffer fiscally, and that was a real problem that she couldn't have anticipated she was going to have to face, a very difficult problem. And also, a splinter group of judges came out called the Alliance for Judges that were in opposition to what Ron had been doing, or the Administration of the Courts was doing. This was new to me, that judges would have internal fighting, so she had to face that. As you all probably know, if you've ever heard her speak, she's gracious, she's articulate, she's poised, and I just think she's marvelous, admirably marvelous. And again, you know certain things happen in conference, or certain people say things, but to look at these chiefs you'd never know that they were flapped. I would say that California has been very fortunate. Each of those chiefs has been outstanding and very good for the time they served.

NEWTON: Yes, Justice Cantil-Sakauye was, I thought, very persuasive on the budget issues. I remember when she came through, when I was at the *Times* still, as a very effective lobbyist in the grandest sense of that.

WERDEGAR: She had no honeymoon period at all. She was appointed — it was very exciting — her appointment, but she really had to hit the ground running on fiscal issues.

NEWTON: Let me ask you about a couple of cases. You took, I think it's safe to say, a novel position in *Merrill versus Navegar*.[3] We talked about this a little bit. For those of you who don't know, it was a gun case, growing out of a 1993 shooting at a law firm in San Francisco that left eight people

[3] 26 Cal. 4th 465 (2001).

dead and six wounded. You dissented in that case, and you argued that Navegar, which was a gun manufacturer, had acted negligently — pardon me if I summarize this incorrectly — by marketing a military weapon to civilian purchasers — right? — not that the guns were faulty but that they were distributed negligently. I suspect a lot of people would find that argument quite compelling today. I had two questions from that. First, would your reasoning in that dissent stand the test later created by the *Heller* case,[4] federally, that concluded that individuals had a right to bear arms, an individual right to bear arms, and more generally, I guess I was curious whether you believe that the U.S. Supreme Court has left sufficient room for state and local governments to improvise in this area and to regulate weapons.

WERDEGAR: There's a lot in that question. Let me start with the last part — do I believe the Supreme Court has left enough room? That remains to be seen. There has to be a will in the individual states to do it, but whether there's room, I don't know. I think my argument, which addressed this just a little bit in the *Merrill versus Navegar* case — yes, still stands. What happened in the case was California had a statute that said gun manufacturers cannot be held liable for harm done by their product because of the way they designed it, you can't sue for design defect. Now that's a statute. There's an interesting history to this case, which was: We granted review, and the case was assigned to me. The statute said what it said, and I wrote a draft opinion saying there's no liability; that's the statute; we have no power to go beyond the statute. That circulated, everybody agreed, we had oral argument, we came off the bench, and my staff attorney came to me and said, "I heard something in argument, judge, that I want to discuss with you." What came out of it was: At the trial court level, the plaintiffs, who were the survivors or the loved ones left behind by this massacre, had at the trial court level advanced the theory — it had never been tried; it had been thrown out of court — that the manufacturer was negligent for the *marketing* tactics. These weapons were advertised in these gun-enthusiast magazines — *Soldier of Fortune*, what have you — as rapid-fire, fingerprint-proof, easy assembly, easy attachment of a silencer, and low cost. There's no place for weapons like that in civilian life — there isn't — maybe

[4] District of Columbia *v. Heller*, 554 U.S. 570 (2008)

in the military, maybe in law enforcement, but we don't need fingerprint-resistant, rapid-fire, rapidly reloading, attachable silencer weapons. This theory came to my attention, and I had the responsibility to write the opinion — the clock runs after oral argument — the case had been assigned to me, everybody agreed with the opinion that they expected I was going to do, so I wrote two opinions. One was my new theory, "Look, we didn't really get into this. These people should have the opportunity to go to trial on the issue." I didn't say that the manufacturer *could* or *would* be liable, but the plaintiffs ought to be able to have a trial on the question. So I circulated these two opinions, and *nobody* agreed with me. So the case was reassigned, and my second opinion became my dissent. That's how that case evolved. I think that theory of negligent marketing — I don't know what marketing is going on now — but there were written articles that that weapon was the most widely used by the criminal element. The manufacturers who are marketing this to the public are charged with knowledge of that. We have more guns in this country than we do people, I believe. I just read that. So I don't know where gun regulation is going to go. And what elasticity there is? I'm hopeful there might be some.

NEWTON: Completely different area of the law — same-sex marriage — you joined the majority that upheld same-sex marriage in California.

WERDEGAR: I did.

NEWTON: Have you been surprised by the speed with which that issue has evolved?

WERDEGAR: Definitely. Who hasn't? When I heard about domestic partnership, I thought, "Oh that's good; that's a really good idea; that works." And gay marriage — marriage? But it happened. It evolved so quickly, and it came to our court — I don't think we were the first — but Ron George's opinion in the *Marriage Cases*[5] came out saying — he did the same thing [that I did] in different circumstances: one opinion saying you can't have gay marriage, one opinion saying you can — circulating it. It's in his oral history. He wanted to give everybody the chance to consider both sides — but he turned out to be the swing vote because it was four-to-three. I was very surprised how rapidly thinking and awareness evolved, and then, of

[5] In re Marriage Cases 43 Cal. 4th 757 (2008).

course, talk about the initiative: In California, a bare majority of voters can overturn every constitutional decision of the California Supreme Court, so that went on the ballot, and the voters said, "No, a marriage is between a man and a woman."

NEWTON: Same ballot that Barack Obama was elected on, in fact.

WERDEGAR: So that was gone, but then it went through the federal courts and ultimately the United States Supreme Court held that there is, what, an Equal Protection right to same-sex marriage.[6] I was very surprised.

NEWTON: Do you approach, or did you approach writing dissents differently than majority opinions? You just described two with sort of unusual histories.

WERDEGAR: Very unusual.

NEWTON: In more normal cases, I've heard it said that sometimes a dissent is a more liberating act of writing. You don't have to worry about majorities. I'm curious.

WERDEGAR: Well, you're right about that because when you're writing what you hope's going to be a majority opinion you want to bring in as many people as you can, and when you're doing that you might leave out something that you personally want in there, but it's not critical, so that you'll get somebody's vote. Or you might put in different language just so somebody is more comfortable. Yes, you're free with a dissent. I don't use dissents to excoriate my colleagues or chastise them, but I'm very fond of my dissents. [laughing] I am, because you don't write a dissent unless you feel strongly about the subject. You don't have the time or the inclination, and so if you're writing a dissent, you're really invested in that point of view.

NEWTON: If you were to read back over your opinions over the years, would your dissents be the way to gain insights into your judging?

WERDEGAR: I think so, yes. Well, it would be one way. My majority opinions would be another way.

NEWTON: [laughing] Okay, note to historians! What are some of the areas of the law that you see developing in California today? I know you've

[6] Obergefell v. Hodges, 576 U.S. 644 (2015).

written a lot on environmental law, CEQA, maybe that's one? Or others? What's in play right now?

WERDEGAR: CEQA [California Environmental Quality Act] will be with us forever. It's such a complicated law. It's never going to stop because it's development versus the environment, and California is interested in both, and we have a law addressing how that's balanced. Privacy, water. Certainly, privacy is an area. California has a state constitutional provision guaranteeing privacy, so we can develop our law a little differently. But with all the electronics and so on, you wonder, do we have any expectation of privacy at all now? Water law will always be here.

NEWTON: Can I stop you here — I hate to interrupt, but back to privacy — what are your thoughts on that, when you say, the question of whether we enjoy any privacy at all?

WERDEGAR: Well, I've pondered the question. The issue when we were in law school was so simple; [laughing] I think the test in criminal law for an unreasonable, unlawful search, is whether you had a reasonable expectation of privacy, and the question now just philosophically is, who does? But, of course, we still pretend that we do. It's a brave new world.

NEWTON: And you mentioned water. I'm sorry to interrupt.

WERDEGAR: Of course, water is such a critical issue. There might even have been something in the initiative this time about —

NEWTON: Yes, water bond, one or two, I think —

WERDEGAR: Yes, and the courts will be called upon to resolve conflicting claims and so on.

NEWTON: Is that one where you see California really setting a standard for the country?

WERDEGAR: Well, we have particular water problems, indeed we do, so I don't know about setting a standard for the country.

NEWTON: Back to CEQA for a moment. Sorry to jump around, but overall, has CEQA been beneficial to California?

WERDEGAR: I'm not one to say. There are those who say it's a really obstructionist piece of legislation that people abuse by stalling projects they don't want, and I expect there's truth in that. But, on the other hand, it is

designed to have thoughtful, considered development with the least negative impact on our environment as possible. CEQA has a broad reach, and I want to explain this. One of my early cases was called *Save Tara versus the City of West Hollywood*.[7] "Tara" was a historical building in West Hollywood, and the city had, I think, voted to demolish it. The preservationists felt that was the wrong thing to do, so they sued the city for preparing an inadequate Environmental Impact Report. Every "project" has to have an Environmental Impact Report. It came to us, and our court said that the city had not properly addressed the environmental impact. That's all we said. It turns out, though, I recently read that Tara was saved. I love that name, Tara, and it's in a public park in West Hollywood.

One of the last cases I had involved what's been described as the largest land-use project in the history of California, where there was proposed a city of 20,000 people. Can you imagine the environmental impact issues in a project of that size? And, of course, litigation about it has been ongoing for years. So it finally came to us. It's very, very complicated, and not a unanimous opinion but a majority — more than a necessary majority — held that there were still inadequacies in the environmental impact report.[8] You have to consider the impact on water, the impact on traffic, the impact on wildlife, and now we have greenhouse gas emissions that have to be considered — I don't know how scientists project all this — but these reports have to consider those things. CEQA is beneficial because if the report is inadequate it goes back to the responsible entity to rethink it, and they can suggest additional mitigation. It's not that a project is stopped. Proponents are supposed to be as thoughtful as they can about mitigating environmental impacts. I had one case where the concern was the stickleback fish. Now I'd never heard of a stickleback fish — maybe some of you know what it is — but a staff attorney got me a picture of this little fish with little spines [gesturing]. They were moving it from its normal environment to another to do a project. Was this adequate mitigation of the impact on the little fish? So CEQA's complicated. The Legislature can modify it. It has done some modifications.

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[7] 45 Cal. 4th 116 (2008).

[8] Center for Biological Diversity v. Department of Fish & Wildlife, 62 Cal. 4th 204 (2015).

NEWTON: There are those who make the argument that it discourages businesses from moving here because it's so complicated.

WERDEGAR: I think that's probably true. That's one of the balances, and that's up to the Legislature. We need development in California; we can't stop it. Those kinds of issues are for the Legislature.

NEWTON: One other broad area that, obviously, confronts the court, confronts all of us really, is technology and science. And the court, I assume, everything from policing the Internet to climate change — these things must come up regularly. Is the court well equipped to handle a highly technical, scientific question?

WERDEGAR: Probably not. I mean, we certainly don't have any expertise that way. We get briefing and amicus briefs and so forth. You can't call up your science professor. I've often thought on the court, it would be so nice if I could call up somebody who really knows something besides the parties, but you can't. A lot of these issues belong more appropriately in the Legislature, and they're probably not equipped either, but they can get witnesses, they can do research. So science gets ahead of us. Technologically, as an institution, I think we've been a little slow, but I'm not the person to criticize because I'm a little slow. On the issues, for instance, here's an issue: how many mothers do you think a baby can have today? It can have at least three mothers: the egg donor, the surrogate mother who carries the baby to birth, and the woman who with her husband contracted to have that baby born. If the agreement falls apart, who's the mother? That's the kind of question the court's asked to decide. And stem cells. There's a case many years ago: you go in for surgery and tissue is removed, and you're healed and you go home. But the hospital retains, unbeknownst to you, your tissue and extracts certain cells from it and processes it, and all of a sudden they have an industry based on your biological material. Well, who owns that? Do you have a right to own it? Other technologies. I mean, these cell towers that tell everybody where you've been. Is that an invasion of your privacy? Does that require a search warrant to use it? There was a search-and-seizure case that I happened to author a dissent: you know, when you're arrested with a "search incident to arrest," they can take your wallet, your pocketbook, your address book. In this instance they took the individual's cellphone and held on to it for several hours, and then decided

they'd go plowing through it. So the case came to us.[9] Was that a search incident to arrest (and so always legal)? Well, the court held it was, but I dissented and I said, in this new technological era, this is not like your wallet, you're going into photographs, bank accounts, contacts — of course, that's what they wanted — and I lost, *but* the United States Supreme Court took the issue up later and they went the way that dissent went.[10] They said that your computer or your cellphone, smart phones, are different than your wallet.

NEWTON: It's an encyclopedia of your life, really.

WERDEGAR: It is. So the courts do the best they can — my colleagues who said it was fine, they were analogizing to, as I say, wallets and address books, or the drugs or the cigarette box that was in your pocket.

NEWTON: The reasoning by analogy is difficult in these technical cases.

WERDEGAR: It really is. I had a case where some disgruntled employee left the firm he was working at and inundated it with emails. The firm was very annoyed, and they sued for trespass to chattels. Chattels are things. An inundation of emails is not the same as damaging somebody's physical property, which is trespass to chattels, and we had to decide that.[11]

NEWTON: I know we want to leave time for you to sign some books outside, but let me ask you just a couple more. A lot of talk in Sacramento today, and probably more starting tomorrow, about California serving as some sort of base of resistance to Washington, particularly — obviously — in areas like climate change and immigration, where California seems to have a different set of policy perspectives than the Trump Administration, anyway. Is there room, legally, for California to chart an independent course from Washington in these areas?

WERDEGAR: Well, insofar as your question relates to political issues, I have no idea. But insofar as civil liberties, we do to an extent, because we have our own state constitution. And the California State Constitution has its own "Bill of Rights," and we tend nowadays to be more protective of individual liberties than some other states or maybe the national

9 People v. Diaz, 51 Cal. 4th 84 (2011).

10 Riley v. California, 573 U.S. 373 (2014).

11 Intel Corp. v. Hamidi, 30 Cal. 4th 1342 (2003).

government. In the past, we have been the first. We were the first to strike down laws against miscegenation (racial intermarriage),[12] long before the United States Supreme Court did it. Our Supreme Court was the first to apply the exclusionary rule to illegally seized evidence — that you couldn't put it in court.[13] We were one of the early ones to recognize gay marriage; we weren't the first. Of course, the voters threw that out. There's some room in that regard for California to be a leader. I can't speak about how it's going to go or what the policies are going to be about immigration. I'd like to say something about immigration. I think all of us, and certainly students, could benefit if we knew what the laws on immigration actually are. I mean, how many can tell us how a person can legally immigrate, how the process goes, who gets to do it — I can't, and I really intend to study it, so we know what all the hue and cry is about.

NEWTON: I suspect that the president probably can't answer some of those questions. Anyway, I won't make you answer that. Sorry. Two final questions, one obligatory and one, I hope, is more hopeful. First, and I apologize for feeling I need to ask you this, but I do. What do you think about the confirmation hearings for Judge Kavanaugh?

WERDEGAR: I thought they were terrible, painful to watch. Well, you might say, "In what way is it painful?"

NEWTON: Unfortunately, that's exactly what I was going to say. [both laughing]

WERDEGAR: I don't know where to start. It's a question as to — starting out at the beginning — whom do you believe? And people across the country had different takes on that. But moving then to his response, I think his response was very disturbing in the sense that it was so immoderate, intemperate, and when a nominee to the highest court in the land, retorts to a senator without answering the senator's question, asking the senator about her drinking habits, or her preferences, it's discouraging. I don't think the United States Supreme Court in the beginning was supposed to be so politicized, and I think politicized is a fair word. However, this is not new. When I was a little girl, there was the Earl Warren Court,

12 Perez v. Sharp, 32 Cal. 2d 711 (1948).

13 People v. Brisendine, 13 Cal. 3d 528 (1975).

and there were signs that said "Impeach Earl Warren," and there are people to this day who resent and think it's wrong, and illegal, what the Warren Court did with various criminal rights and civil liberties. So it's really not new. The court has really been political. When somebody takes the bench, do they change, do they take on a greater sense of responsibility as to the power they have? With any given judge, we look to see that.

NEWTON: Did you feel that, in your own work, in your own experience once you were on the bench? Did you feel differently about it?

WERDEGAR: Well, I certainly felt a responsibility, but I didn't come with anything that I had to put aside that would impede my being an objective judge. Judge Kavanaugh will have to. I mean, he made it very plain where he stands on many issues, and the question is, will he recuse himself? You know, you're not supposed to say how you feel, and he has on many things. We'll see how he comports himself on the bench.

NEWTON: It's hard to imagine, for me anyway, handling a case for a liberal civil rights organization, now that he's said so clearly that he's been the victim of those organizations.

WERDEGAR: We'll see. It's up to any given judge on the United States Supreme Court whether they choose to recuse.

NEWTON: Finally, and more hopefully, I believe my god daughter is somewhere in the audience here, and I imagine her sitting in your seat someday. She's a young lawyer here in Los Angeles. What advice or thoughts do you have for young lawyers, particularly young women, who are entering the profession now and want an illustrious career such as you've lived?

WERDEGAR: That's a broad question, but I would say, for someone who aspires to be a judge, well, where do I start? Can I talk about women?

NEWTON: You can talk about anything you want.

WERDEGAR: I think it's always best that you find a field of the law that you're passionate about, and you excel and you do the best you can. Now we're talking about aspiring to the bench. Please find a field that you love — if you don't love what you're doing, find another one — truly, because law can be marvelous. Some people hate it, and some of us just love it. So if you're not liking it, please find something you do like. For women, it is a challenge because even though younger men are much more egalitarian in

the home and so forth, women still tend to carry the burden of childcare or the ailing parent and so on, Ruth Ginsburg excepted. [laughing] She said, "This child has two parents, you know." She's quoted as saying that when the school would call her. And her husband Marty was just marvelous, did all the cooking and so on, but usually it's not the case. I would say, just carry on as best you can, keep your hand in the law, do what you love, and hope for the best. If you want to be appointed to the court, you have to be brought to the attention of somebody, the local bar groups, your activity in your community, someone politically influential. You have to do something beyond just handle your cases, I think. And there's a large element of luck. But I would say to any aspiring young lawyer, I hope you love it. I love it, and it's just a wonderful career. You can have such an impact on people's lives, really. When people need a lawyer, they really want a lawyer, and various causes need lawyers to advance them, too. The head of Public Counsel introduced us. [gesturing] Organizations like that can have such a wonderful impact. It's a wonderful profession.

NEWTON: Before we go, before I release you, a few thanks — to Public Counsel for cohosting tonight's event and for making Los Angeles safer and a more welcoming place; to the California Supreme Court Historical Society and yourself for cohosting and for preserving the history of this institution and state; all of you for making it out here after a historic and somewhat exhausting election; and finally, and most importantly, to you Justice, for being with us this evening, but far more importantly for dedicating your life to the service of the state and country. We're all in your debt.

WERDEGAR: Thank you very much.

NEWTON: I want to remind all of you that there are copies of the Society's history of the court that are available just outside this room that Justice Werdegar has agreed to sign. You'll also find copies of *Blueprint* magazine that I edit at UCLA. They're free, and I hope you'll take a copy and enjoy it. With that, I thank you all for coming. I appreciate your being here.

WERDEGAR: Thank you so much. [audience applause]

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ARTICLES

CALIFORNIA'S FIRST JUDICIAL STAFF ATTORNEYS:

The Surprising Role that Commissioners Played, 1885–1905, in Creating the Courts of Appeal

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 Courts of Appeal. As we'll see, the story unfolds like a Gilbert & Sullivan operetta:

♦ The Supreme Court, which was regularly traveling up and down the state hearing oral arguments in San Francisco, Sacramento, and Los Angeles,

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* Chief Supervising Attorney of the California Supreme Court. I thank court colleagues Hal Cohen, Neil Gupta, Kyle Graham, Norm Vance, Steve Rosenberg, and Ryan Azad (and former colleague Carin Fujisaki, now a Court of Appeal justice) for their always helpful comments on prior drafts. And I thank 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, I appreciate 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).

was chronically unable to keep pace with an increasing influx of direct appeals from numerous trial courts throughout the state.

♦ After the Legislature directed the court to hire "commissioners" to help with its workload, a few thousand opinions authored and signed by the court's new staff were published in the *California Reports* — and approximately 700 more were published, along with hundreds of other unreported Supreme Court opinions, in the reports of "*California Unreported Cases*."

♦ There were public accusations of overreaching by the staff commissioners and abdication of judicial responsibility by the justices, culminating in major litigation by a disgruntled appellate lawyer — ultimately upholding the court's authority to use legal staff.

♦ The hired staff commissioners and elected justices played musical chairs, trading places numerous times — appearing to confirm criticisms that they were inappropriately interchangeable.

♦ Meanwhile, and amidst growing calls for the state to create an intermediate appellate court, the Supreme Court remained backlogged even with help from the staff commissioners. At one point the court fell so far behind that all seven justices, unable to file cases within ninety days after submission, went unpaid for eight months.

♦ And finally, after nearly two decades, there was an agreement to jettison the criticized staff commissioner system, and to forbid its use ever again — paving the way for the voters' acceptance of a constitutional amendment to create the California Courts of Appeal. When the music stopped, all remaining staff commissioners became appellate court justices.

I. AN OVERBURDENED COURT TRIGGERS A LEGISLATED MANDATE: HIRE HELP

The Supreme Court bench, having been enlarged from three to five justices in 1862, was nevertheless severely backlogged by the late 1870s.[1] To

[1] *Current Topics* (July 20, 1878) 1 Pac. Coast L.J. 401 [describing the "long calendar of cases waiting to be argued" before the Supreme Court and calling for "more courts and more judges"]; Willis & Stockton, 2 Debates and Proceedings of the Constitutional Convention of the State of California (State Printing Office, Sacramento, Cal. 1880) at 950 [reporting that in the prior four years the court had been

cope with increased litigation in a growing and evolving state, the court resorted to strong measures. Taking advantage of its earlier conclusion that the Legislature could not force it to state the grounds for its decisions in writing,[2] the court frequently decided cases by cursory memorandum decision, instead of by full written opinion — and sometimes it decided cases with no written decision at all.[3] It published new rules[4] under which it was quick to find that parties had waived their right to appeal,[5] and attempted to shrink its docket by imposing costs when it deemed appeals to be frivolous.[6] And the court frequently avoided "the annoyance of petitions for rehearing" by simply making its judgments final immediately.[7]

Yet those and related palliatives[8] did not reduce the backlog. Instead they just upset and frustrated litigants and their attorneys — fueling existing calls for a constitutional convention.[9] And although a former justice proposed that the state create an intermediate appellate court,[10] that would not happen for another quarter century. In the meantime, the state's new Constitution,

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"unable to fully dispatch the business before it" although it had decided more than 2,200 cases through "an almost incredible amount of labor"].

[2] Houston v. Williams (1859) 13 Cal. 24. The court branded the statute mandating written decisions "a most palpable encroachment upon the independence of this department." *Id*. at 25. Indeed, the court said, an opinion stating reasons for a decision is warranted "in important cases." But "not every case . . . will justify the expenditure of time necessary to write [such] an opinion." *Id*. at 26. Moreover, the court viewed the statute as an impermissible incursion on its necessary ability to control and modify the opinions that the court did deem worthy of rendering. *Id*. at 27–28.

[3] 2 Willis & Stockton, *supra* note 1, at 950 [noting that in the prior four years the court had decided 559 cases without written opinion]; *see also* McMurray, *An Historical Sketch of the Supreme Court of California*, in Historical and Contemporary Review of Bench and Bar in California (The Recorder Printing & Pub. Co., S.F. Cal. 1926) at 22, 35–37.

[4] Set out in (1878) 52 Cal. 677.

[5] McMurray, *supra* note 3, at 35.

[6] *Id*. [noting that the court did so "with some liberality"].

[7] *Id*. at 34.

[8] The court also adopted a problematic rule, which in turn it frequently ignored, requiring the justices to prepare an official syllabus for each full written decision — and making that brief syllabus, and not the full opinion of the court, "the authoritative precedent." *Id*. [referring to 52 Cal. at 689, rule 39].

[9] McMurray, *supra* note 3, at 34.

[10] *Current Topics* (Apr. 20, 1878) 1 Pac. Coast L.J. 141, 142 [reporting former Supreme Court Justice Solomon Heydenfeldt's suggested creation of "three Courts of Appeal"].

approved by the voters in 1879, attempted to address the court's backlog through other incremental measures: It increased the Supreme Court bench from five to seven members, and adopted a novel procedure that allowed the court to designate some of its cases for decision by one of two departments of three-justice panels, with the possibility of rehearing in bank.[11]

Even with these reforms, and although the court was regularly resolving many hundreds of cases annually (most with written opinions; the *California Reports* for 1882 contain approximately 880),[12] it was still quite backlogged five years later, for various reasons. First, because the court's appellate jurisdiction was mandatory — if an appeal of any superior court decision throughout the state was filed, the Supreme Court was obligated to resolve the case — even such high productivity was insufficient in the face of increasing appeals. Second, in an effort to delay judgment against them, many litigants contested minor rulings arising from increasing numbers of trial courts.[13] Third, the Supreme Court's department decisions frequently were reconsidered by the full court in bank, meaning the court decided them twice.[14] And it could not have helped efficiency that the justices were, as a

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[11] Kagen et al., *The Evolution of State Supreme Courts* (1978) 76 Mich. L. Rev. 961, 975; McMurray, *supra* note 3, at 35–36. The department system was originally proposed for California in *Current Topics* (June 1, 1878) 1 Pac. Coast L.J. 261, 261–62 [reporting and describing the submission of trial court Judge Eugene Fawcett, of the "First Judicial District"]. The practice of sitting in departments (or divisions) apparently traced to procedures used by "the English Court of Appeal." Pound, Organization of the Courts (Little, Brown Co., Boston, Mass. 1940) at 165–66, 214. *See also id*. at 214–20 [describing practices in other jurisdictions that subsequently followed California's lead].

[12] Volumes 60–62 of *California Reports*, "Table of Cases Reported." *See also* Blume, *California Courts in Historical Perspective* (1970) 22 Hast. L.J. 121, 169–70 [describing a 790-case backlog in 1882].

[13] These problems became only more acute over the ensuing twenty-five years. *See, e.g., Notes* (1884) 1 West Coast Rep. 639 ["Seventy [superior court] trial judges are sending up a crop of litigation that no seven judges on earth could do justice to, and write the reason for their rulings"]; *The Witness* (Aug. 29, 1891) Vol. 7, No. 17 The Wave, at 8 [asserting that litigants filed appeals posing "the most frivolous questions," so as to "keep their legal antagonists out of their just deserts for years"]; *Appellate Courts Provided For by Amendment* (Aug. 15, 1904) San Francisco Examiner, at 6 [noting that although the Supreme Court resolved on average 650 cases yearly, it took in and was required to hear 1,000].

[14] Blume, *supra*, 22 Hast. L.J. at 169 [noting that cases remained on calendar for nearly two years prior to being heard] and 170 [the "'working power of the two

constitutional convention delegate described, "a Court on wheels"[15] — 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.[16]

In 1884 San Joaquin County Judge A. Van R. Peterson revived the earlier suggested solution to the backlog: create an intermediate court of appeal.[17] But instead, in March 1885, the Legislature adopted a stop-gap measure, directing the Supreme Court to hire help. It was to appoint "three persons of legal learning and personal worth" as "commissioners," who would 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."[18] This initial program was funded to last four years.

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departments [was] not much greater than that of a single court, for after a hearing in department many cases were heard in bank' "].

[15] 2 Willis & Stockton, *supra* note 1, at 954 [remarks of Mr. Hale, arguing against "cart[ing] . . . all over the state, and asserting that the court should "have some stability" and be based in Sacramento exclusively]. *See generally* Dear & Levin, *Historic Sites of the California Supreme Court* (1998–99) 4 Cal. Sup. Ct. Hist. Soc'y Y.B. 63, 72–74 [recounting the delegates' assessments of the merits and demerits of Sacramento, Los Angeles, and San Francisco — along with discussions of excessive heat, flooding, vultures, earthquakes, and the relative quality of available whiskey].

[16] Despite 1872 legislation directing the court's justices, clerk, and reporter to "reside at and keep . . . offices in the City of Sacramento (former Cal. Pol. Code, § 852), the court had returned to San Francisco for its headquarters in early 1874. Dear & Levin, *supra*, 4 Cal. Sup. Ct. Hist. Soc'y Y.B. at 71–72. That same year the Legislature retroactively gave its blessing to the court's move, instructing it to hold oral arguments in both cities. Acts Amendatory of the Codes, 1873–1874, ch. 675, § 1, at 395–96. In 1878 the Legislature directed the court to additionally hold oral arguments in Los Angeles. Acts Amendatory of the Codes, 1877–1878, ch. 142, § 2, at 22. *See generally* Blume, *supra*, 22 Hast. L.J. at 162.

[17] *Notes* (1884) 1 West Coast Rep. 639.

[18] Cal. Stats. 1885, ch. 120, § 2, at 102. *See generally* Bakken, *The Court and the New Constitution in an Era of Rising Industrialism, 1880–1910*, in Scheiber (Ed.), Constitutional Governance and Judicial Power — The History of the California Supreme Court (Berkeley Pub. Policy Press, Institute of Governmental Studies, Berkeley, Cal. 2016) 82–84; McMurray, *supra* note 3, at 38. Other states also initially adopted various commissioner systems in lieu of intermediate appellate courts, in attempts to deal with increasing demands on state high courts. *See* Kagen et al., *supra*, 76 Mich. L. Rev. at 975, fn. 33; Pound, *supra* note 11, at 201–13 [describing the various forms of commissions used over seventy years in nineteen states]. Previously, the California Constitution, both as amended in 1861 (art. VI, § 11) and thereafter under

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.[19] 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.[20] Henry S. Foote, son of a United States senator, had been a federal judge in Oklahoma.[21] 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, then a district judge, and then a state senator.[22]

For good and ill, they also reflected their times. Key parts of the 1879 Constitution were astonishingly racist.[23] These mirrored the prejudices of

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the 1879 charter (art. VI, § 14), permitted trial courts — first called district courts, and subsequently named superior courts — to employ "commissioners" to undertake some of the "chambers business" and other work of trial court judges. As observed *post* note 123, a corresponding provision remains today.

19 Johnson, 1 History of the Supreme Court Justices (Bender-Moss Co., S.F., Cal. 1966) 122 & fn. 4 [recounting the Supreme Court's plan to appoint former justices I. S. Belcher, W. W. Cope, and Jackson Temple].

20 Johnson, *supra* note 19, at 121–23. *See also generally* McKinstry, *Supreme Court of 1890: An Historical Overview* (Spring 1993) Cal. Supreme Ct. Hist. Soc'y Newsletter 8, 9. Regarding Belcher's election as president pro tempore at the constitutional convention, see 1 Willis & Stockton, *supra* note 1, at 38.

21 McKinstry, *supra* note 21, at 9.

22 Johnson, *supra* note 19, at 152–55. Searls was a "dyed-in-the-wool Democrat" who nevertheless admired President Lincoln. *Id*. at 153. *See also* Schuck, History of the Bench and Bar of California (The Commercial Printing House, L.A., Cal. 1901) at 494–95.

23 Some of the history and resulting provisions are related in *In re Chang* (2015) 60 Cal. 4th 1169, 1172–73 [describing the anti-Chinese sentiment that was a major impetus for the convention, and the ensuing constitutional provisions (1) denying the right to vote to any "native of China"; (2) directing the Legislature to enact laws to combat "the burdens and evils" posed by Chinese immigrants; (3) prohibiting any corporation or government entity from "employ[ing] directly or indirectly, in any capacity, any Chinese or Mongolian" and directing the Legislature to "pass such laws as may be necessary to enforce this provision"; and (4) directing the Legislature to "provide

the era, as already reflected in early case law and statutes.[24] Similarly, the justices elected to the court under the new state charter were overwhelmingly members of the xenophobic Workingmen's Party.[25] It seems probable that some of the hired staff commissioners held similar views.[26]

II. THE COURT'S USE OF COMMISSIONERS

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,

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the necessary legislation to prohibit the introduction into this State of Chinese" and to "discourage their immigration by all the means within its power"]. The convention delegates invested substantial time addressing these and related issues. *See* Willis & Stockton, *supra* note 1, at (vol. 1) 627–40; (vol. 2) 641–92; 695–721, 724–29, 739, 756; and (vol. 3) 1428–31, 1435–37, 1493–94.

[24] *See*, *e.g.*, People. v. Hall (1854) 4 Cal. 399 [finding a Chinese person to be an "Indian" under a statute that prohibited a "Black or Mulatto person, or Indian . . . [from] giving evidence in favor of, or against a white man," and reversing the murder conviction of a white man for killing a Chinese miner because the witnesses who testified at trial were Chinese]. Regarding *Hall*, *see*, *e.g.*, Nagel, *The Worst Statutory Interpretation Case in History* (2000) 94 N.W. L. Rev. 1445, 1459–68; Traynor, *The Infamous Case of People v. Hall (1854) — An Odious Symbol of Its Time* (Spring/Summer 2017) Cal. Supreme Ct. Hist. Soc'y Newsletter 2 [noting that on remand, the defendant escaped retrial] and *id*. at 6–8 [appended "colorful tidbits"]. Regarding corresponding and equally odious anti-Chinese early legislation, see Cal. Stats. 1858, ch. 313, at 295; Cal. Stats. 1862, ch. 339, at 462; Cal. Stats. 1872 (1872 Reg. Sess.) res. ch. 20, at 970 (Assem. Conc. Res. No. 3); and Cal. Stats. 1874 (1874 Reg. Sess.) res. ch. 29, at 979 (Sen. Conc. Res. No. 25). Statutory law also required segregated schools. E.g., Cal. Stats. 1870, ch. 556, § 53, at 838, & § 56, at 839 ["The education of children of African descent, and Indian children, shall be provided for in separate schools"]. The court in Ward v. Flood (1874) 48 Cal. 36, 52 found no constitutional problem with separate-but-equal schools.

[25] McMurray, *supra* note 3, at 37 [six of seven justices elected in 1879 "were nominees of the Workingmen's Party"]. McClain, In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America (U.C. Press, Berkeley, Cal. 1994) at 79–83, describes the influence on the constitutional convention of the Workingmen's Party, led by Dennis Kearney, whose slogan was "The Chinese Must Go!" One-third of the convention delegates were members of that party — "by far the largest voting block present." *Id*. at 81.

[26] As the constitutional debates disclosed, Belcher, like the vast majority of his fellow delegates, expressed (or at least acceded to) racist views concerning Chinese immigrants. 2 Willis & Stockton, *supra* note 1, at 715 & 727 [remarks of Belcher].

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.[27] 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.[28]

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[27] In order to avoid exercising discretion in the distribution of cases, the chief justice assigned all even numbered cases to one department, and all odd to the other. McMurray, *supra* note 3, at 75–76. Sloss, *M. C. Sloss and the California Supreme Court* (1958) 46 Cal. L. Rev. 715, describes how the department system worked in practice, and the chief justice's special role: "Each department, so far as its own work went, had a great deal of independence; it could adopt its own methods of assigning cases and announcing decisions. Each associate justice was for practical purposes a member of two separate, though interlocking, courts — his own department and the full bench. His most intimate association was with his departmental colleagues; and when . . . each department was operating harmoniously, its members influenced each other and a departmental view of legal issues was likely to emerge." *Id*. at 716. Moreover, the chief justice during most of the relevant period, William H. Beatty, "did not ordinarily sit in either department," and he wrote fewer "than the usual number of opinions in bank" because he "devoted much of his time to a painstaking study of the numerous applications for writs and petitions for rehearing." *Id*.

[28] At that time California Constitution article VI, former section 2 provided simply, and without reference to oral argument: "The presence of three Justices shall be necessary to transact any business in either of the departments, except such as may be done at Chambers, and the concurrence of three Justices shall be necessary to pronounce a judgment." By contrast, the procedure governing hearings in bank specifically contemplated oral argument: "The Chief Justice may convene the Court in bank at any time, and shall be the presiding Justice of the Court when so convened. The concurrence of four Justices present at the argument shall be necessary to pronounce a judgment in bank; but if four Justices, so present, do not concur in a judgment, then all the Justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four Judges shall be necessary." Today's corresponding provision (art. VI, § 2), which was revised in 1966 to eliminate the by then disused department practice, assumes the court will hear argument in bank, and states, "Concurrence of 4

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.[29]

Second, whereas today it is understood that attorney staff serve a behind-the-scenes research and drafting role for the justices,[30] 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 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.[31] 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

judges present at the argument is necessary for a judgment." (Even under this provision, however, in limited circumstances there is no right to oral argument. *See* Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 1253–61.).

[29] People v. Hayne (1890) 83 Cal. 111, 124 (Beatty, C.J., conc.) ["The cases which are referred by us to the commission are those which are fully presented on the papers"]; accord, *post* text at notes 49 & 50 [describing testimony of Justice Thornton and Commissioner Hayne]; *The Supreme Court, Justice Patterson Answers "The Witness"* (Sept. 5, 1891) Vol. 7, No. 18 The Wave at 8 [cases assigned to the commissioners were those "submitted on the briefs"]. *See also* Blume, *supra*, 22 Hast. L.J. at 170 [noting the court concentrated on deciding matters on the briefs and had little time for oral argument].

[30] *See post* note 122.

[31] *See generally* Pound, *supra* note 11, at 204–05 [describing how the commissioners were utilized by the court]. There were substantial variations. For example, sometimes the full court adopted an opinion issued by the commissioners. E.g., In re Asbill (1894) 104 Cal. 205, 208; Jones v. Board of Police Commissioners (1903) 141 Cal. 96, 98. And not infrequently, a divided in bank court adopted the commissioners' opinion, with some justices dissenting. E.g., Estate of Hugh J. Glenn (1888) 74 Cal. 567, 569; Yosemite Stage etc. Co. v. Dunn (1890) 83 Cal. 264, 269–70; Daley v. Russ (1890) 86 Cal. 114, 118; Tyler v. Mayre (1892) 95 Cal. 160, 161–70; Murray v. Murray (1896) 115 Cal. 266, 279. Less frequently, when a department panel of justices adopted the commissioners' opinion, a justice wrote separately to explain his own reasons for concurring. E.g., McLaughlin v. Clausen (1897) 116 Cal. 487, 492. And sometimes a department panel adopted an opinion written by a commissioner and concurred in by only one other commissioner. E.g., Pool v. Butler (1903) 141 Cal. 46, 54.

Court case set out in those volumes, complete with caption, abstract, headnoted text, and a disposition paragraph.

This process appears to have vested far more authority in the commissioners compared with the present system, under which a staff attorney or law clerk 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[32]), 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 twenty 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: "The Court. — For the reasons given in the foregoing opinion the judgment is affirmed."[33]

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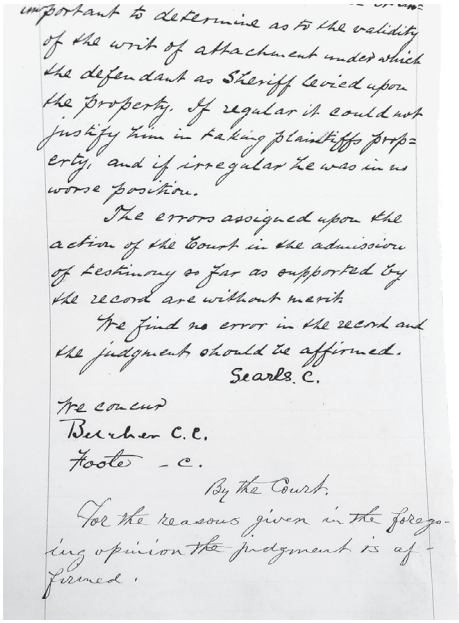
[32] Scollay v. County of Butte (1885) 67 Cal. 249 [Belcher represented Butte, and his client prevailed]. It is unclear whether, or to what extent, the commissioners were precluded from practicing law during their terms. The 1879 Constitution had adopted a provision barring judges and justices from engaging in the private practice of law while in office. CAL. CONST. art. VI, former § 22 [presently art. VI, § 17]. No similar prohibition appeared in any provision governing commissioners. The impetus for the judicial provision, in turn, might be traced to the practices of the earliest justices, two of whom "devoted a great part of their time while members of the Court to private affairs." JOHNSON, *supra* note 19, at 20. The first chief justice, Serranus Clinton Hastings, opted not to seek re-election at the end of his term, in favor of becoming attorney general, so that he could be even "freer to engage in private business." *Id*.

[33] As described *post*, text at notes 92–94, the phrasing changed periodically from case to case, and over the years, sometimes becoming more deferential on the part of the commissioners, and also becoming somewhat more transparent on the part of the justices, who eventually began signing their own names.


important to determine as to the validity
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 prop=
erty, 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.

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,[34] 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.[35] 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.[36] The court issued approximately 1,800 unreported opinions over the next twenty-five 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

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34 Cal. Stats. 1850, ch. 90. *See generally* Strauss, *Historical Study — Written Opinions* (1964) 39 J. St. Bar of Cal. 127. As alluded to (*ante* note 2), another early statute, which the court first ignored and later found unconstitutional, required the court to explain its decisions in writing.

35 The 1849 California Constitution's judicial article (VI) did not require that opinions be given in writing, much less that they be published. Article VI, former section 16 of the 1879 Constitution provided for publication as the court "may deem expedient." Currently, article VI, section 14, provides for publication as the court "deems appropriate"; and California Rules of Court, rule 8.1105(a), which was adopted by the court itself, mandates publication of all Supreme Court opinions.

36 Cal. Stats. 1860, ch. 132, 104.

found from the prior decades were retroactively rescued from archives and published in 1913, in the amusingly named reports, "*California Unreported Cases*." Both publications showed *Moore v. Moore* (1885) 7 Pac. 688, 2 Cal. Unrep. 510, as the first unreported commissioners' opinion case.[37]

III. CRITICISM OF, AND LITIGATION CHALLENGING, THE COMMISSIONERS

Even with the help of the three commissioners, a substantial backlog of cases remained years later.[38] Renewed calls to create an intermediate appellate court[39] again failed. Instead, in early 1889, the Legislature renewed the commissioners program for another four years and increased their number to five.[40]

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 perennial unsuccessful

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[37] The preface to 1 Cal. Unrep. highlighted "the extent to which the unreported decisions have been cited by courts and legal writers," and asserted that "the intrinsic value revealed in the opinions themselves . . . have placed the question of their importance to the practitioner beyond all controversy." *Id*. at "v." Such cases are equally precedential as other officially reported Supreme Court cases — *see* In re Harris (1993) 5 Cal. 4th 813, 849, n. 18 [and cases cited]. Regarding the earliest days of the *California Reports*, including fire that destroyed the original documents, see Bennett, *Preface* (1851) 1 Cal. vii–viii. Concerning various publishers of timely unofficial reports of decisions prior to the *Pacific Reports*, see Wood, *Legal Journalism in San Francisco*, in Historical and Contemporary Review of Bench and Bar in California (The Recorder Printing & Pub. Co., S.F. Cal. 1926) at 5; and McMurray, *supra* note 3, at 29–30. As observed *ante* note 3, until the practice was barred by the Constitution of 1879, the court also frequently issued decisions without any statement of reasons. At least one early unofficial publisher made available not only the unreported opinions of the court, but also provided sometimes detailed notes concerning the court's unwritten decisions. *See*, *e.g.*, (Apr. 20, 1878) 1 Pac. Coast L.J. at 145–55 [setting out nine unreported per curiam opinions], and 155–57 [setting out three "Notes of Unwritten Decisions"].

[38] *See Easing the Calendar, Proposals to Come to the Supreme Court's Relief* (Dec. 5, 1888) S. F. Examiner, at 5 [noting that the court's San Francisco docket was two to three years behind].

[39] *Id*. [describing a proposal to create an "intermediate Court of Appeals"].

[40] Cal. Stats. 1889, ch. 16, 13. Thereafter, the Commission continued to be periodically renewed, and ultimately a total of 16 commissioners were appointed. *See post* note 91.

candidate for political office,[41] sued the sitting five commissioners in a quo warranto proceeding in the San Francisco Superior Court, naming Commissioner Robert Y. Hayne the lead defendant.[42] 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.[43] Hayne's most recent ruling against Morgan, filed three months earlier, had commenced: "There is absolutely no merit

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[41] *See, e.g.*, *The Democratic Nominee for Congress in the Third District* (Sept. 12, 1888) Oakland Tribune, at 8; [noting that Morgan had unsuccessfully run for the state Senate two years earlier, and was the sole nominee for Congress after the preferred candidate declined]; *Joe McKenna's Opponent, The Democrats Nominate Benjamin Morgan, of Alameda, for Congress* (Sept. 13, 1888) Pacific Bee, at 8; *Our Portrait Gallery of Prominent Citizens* (July 26, 1890) City Argus, at 7 [promoting for governor "Ben. Morgan of Berkeley, . . . a fluent and forcible speaker, a close and exact reasoner, and one who would inspire confidence in the trust and sincerity of his views"]; *American Nominations* (Sept. 26, 1890) San Francisco Chronicle, at 8 [noting Morgan presided over the "State Central Committee of the American party," which nominated candidates for the California Supreme Court]; 2 The Bay of San Francisco: The Metropolis of the Pacific Coast and its Suburban Cities (The Lewis Pub. Co., Chicago, Ill. 1892), at 309 [noting that "Colonel Morgan" was born in Virginia, studied law in Georgia, immigrated to California in 1867, worked four years in Arizona, had been nominated the American party's candidate for Lieutenant-Governor in 1890 — and was "imbued with the spirit of 1776" and the idea that "Americans should govern America"]. According to the San Francisco Directories, Morgan kept law offices at, variously, San Francisco, Berkeley, Alameda, and ultimately, Inverness, in Marin County.

[42] *Coast Reports: Legality of the Supreme Court Commission Disputed* (Aug. 13, 1889) San Diego Union and Daily Bee, at 1. ["San Francisco, August 12. — A complaint was filed in the Supreme Court today by Ben Morgan, a lawyer of this city, against R. Y. Hayne, H. S. Foote, I. S. Belcher, J. A. Gibson and S. Van Cliffe, to determine their right to act as Supreme Court Commissioners. . . ."] Morgan's suit proceeded despite the Attorney General's subsequent opinion, rendered August 15, that the system was constitutional, and that Morgan's "request for leave to sue should be denied." *The Act is Constitutional* (Aug. 16, 1889) Sacramento Daily Union, at 3.

[43] Morrow v. Graves (1888) 77 Cal. 218 [opn. by Hayne, C., rejecting Morgan's assertion that a deed was fraudulently conveyed]; Drexler v. Seal Rock Tobacco Co. (1889) 78 Cal. 624 [opn. by Belcher, C. C., affirming an underlying judgment in light of Morgan's failure to file a brief]; Shain v. Belvin (1889) 79 Cal. 262 [opn. by Hayne, C., rejecting Morgan's defense concerning a promissory note]; Drinkhouse v. Spring Valley Waterworks (1889) 80 Cal. 308 [Department 1 opn. by Beatty, C. J., rejecting Morgan's choice of venue]. Regarding the latter case: Co-counsel with Morgan was 25-year-old Abe Ruef, who had been admitted to the bar only a few years earlier, and later became notorious as a corrupt political boss. *See generally* Thomas, A Debonair Scoundrel

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.[44] The court, augmenting its customary per curiam adoption language, ordered judgment accordingly.[45]

The *San Francisco Chronicle* noted Morgan's filing under the headline, "Usurpation Charged — Ben Morgan Takes a Tilt at the Supreme Court Commissioners."[46] 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.[47] Three times in his direct

(Holt, Rienhart and Winston, N.Y. 1962), at 11 [Ruef was then "small-time in the political swirl, primarily a lawyer with a political avocation"].

44 Shain v. Belvin, *supra*, 79 Cal. at 261–64.

45 *Id*. at 264. The court wrote: "For the reasons given in the foregoing opinion the judgment and order are affirmed; and, it appearing to the court that the appeal herein was taken for delay, it is ordered that there be added to the costs 20 per cent. of the amount of the judgment as damages by virtue of the provisions of section 957, Code Civil Proc."

46 (Oct. 11, 1899) San Francisco Chronicle, at 3. *See also Court Commissioners, Contention as to the Legality of Their Official Actions* (Oct. 11, 1889) Daily Alta California, at 1. The latter reported: "The Attorney-General, on the relation of Ben Morgan, has applied to the Superior Court for a writ of quo warranto, to be directed to the Supreme Court Commissioners, ordering them to appear and show by what authority they claim the right to exercise any judicial powers within this State, and particularly that of considering and determining cases on appeal in the Supreme Court . . . ."

47 *Court Commissioners, Proceedings to Declare the Office Unconstitutional* (Nov. 1, 1889) Daily Alta California, at 2. The article reported:

> Mr. Morgan appeared on behalf of the people, and Messrs. Garber and Wilson for the Commissioners.
>
> Justice Thornton and Commissioner Hayne were sworn as witnesses to show the duties which devolve upon Supreme Court Commissioners. It was shown that the Commissioners review briefs in cases, write their conclusions, and reasons therefor, which are handed up to the Supreme Judges, *who do not*

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."[48]

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.[49]

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review the briefs, but affirm or reject the recommendations of the Commissioners, and if accepted indorse the same as the opinion and decision of the Court.

Mr. Morgan contends, on behalf of the people, that the Constitution limits the number of Judges of the Supreme Court and designates them and that the Act of the Legislature providing for Court Commissioners to aid and assist the Judges in the performance of their duties is unconstitutional, and, therefore, void. On the contrary, it is contended by Messrs. Garber and Wilson that it is an inherent power of all courts to call to their aid such assistance from the outside as may be necessary, and to adopt opinions so received as their own if they so elect." (Italics added.)

See also Court Commissioners, Proceedings to Declare that They are Exercising Illegal Power (Nov. 1, 1889) Sacramento Daily Union, at 1.

The *Daily Alta's* characterization was sensational, but perhaps not wholly accurate. The actual testimony, set out in *People v. Hayne, No. 13666, Transcript on Appeal* (Jan. 18, 1890, on file at the California State Archives, Sacramento), shows that although Justice Thornton apparently was willing to do so, he was not permitted to answer whether the justices "re-examine the entire record of" each case when reviewing and deciding whether to adopt the commissioners' opinions. *Id*. at 14-15. There appears to have been no testimony concerning whether Thornton or other justices read the briefs filed by the parties.

48 People v. Hayne, No. 13666, Transcript on Appeal, *supra* note 47, at 15–16 & 18. To be sure, all three *had earlier* been judicial officers. As observed previously, Isaac Belcher had served as a justice on the Supreme Court. Robert Y. Hayne had, before becoming a commissioner, served as judge of the San Francisco Superior Court. *See, e.g.,* (1880) 57 Cal. at iv; Clarke (1928) *Robert Young Hayne* (San Mateo–San Francisco–Santa Barbara County CA Archives Biographies, available at http://files.usgwarchives.net/ca/sanmateo/bios/hayne973nbs.txt). Likewise, James A. Gibson, later a founder of the law firm Gibson, Dunn, and Crutcher, had served as a judge of the San Bernardino Superior Court. *See, e.g.,* (1883) 64 Cal. at vii; see biography set out in San Diego Yacht Club, available at https://sdyc.org/vewebsite/exhibit2/e21261b.htm. The title "judge" as used at trial may have been no more than polite deference (much as a former senator or president is often referred to by those titles), but given the circumstances of the litigation, one might have expected the commissioners, at least, to refer to themselves as just that, and not as judicial officers.

49 People v. Hayne, No. 13666, Transcript on Appeal, *supra* note 47, at 14.

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.[50] 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 brief per curiam statement to that effect.[51] Hayne added that some commissioner opinions and work product, after being sent to the justices, "go[] into the waste basket."[52]

The trial judge ruled for the defendants, rejecting challenges to the statute and the court's implementation of it.[53] 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.[54]

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.[55]

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[50] *Id*. at 18–19.

[51] *Id*. at 17–18.

[52] *Id*. at 18–19.

[53] The decision was widely reported. *See Court Commissioners, Judge Wallace Declares They Were Lawfully Appointed; A Very Important Decision* (Jan. 3, 1890) Daily Alta California, at 1 [reprinting verbatim Judge Wallace's approximately 2,500 word decision]); *Supreme Court Commissioners* (Jan. 3, 1890) The Los Angeles Times, at 4; *A Legal Body; The Supreme Court Commissioners' Case Decided* (Jan. 4, 1890) San Jose Daily Mercury, at 1. Thereafter, the press reported Judge Wallace's denial of a new trial. *Court Notes* (Jan. 11, 1890) San Francisco Chronicle, at 8 [relating that the motion had been denied "yesterday"].

[54] *See Court Commissioners, Judge Wallace Declares They Were Lawfully Appointed*, *supra* note 53, at 1.

[55] Langley's San Francisco Directory (May 1890) at 1331 [listing Superior Court Judge Wallace's chambers at "New City Hall," 799 Van Ness Ave.] & 58 [listing the Supreme Court's offices at 121 Post Street]. The court had moved to Post Street in 1884, and in early 1890 shared that building with numerous others, including The San Francisco Bar Association; Miss Isabella Gunn, dressmaker; and the Musicians' Mutual Protective Union. *See* San Francisco Directory, *supra*, at 90, 577, 987. Later in 1890

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.[56] 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.' "[57]

In addition to this revealing 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."[58]

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the court moved to 305 Larkin Street — a handsome and apparently then-new building that was located on the footprint of its future and present home, at McAllister and Larkin. Langley's San Francisco Directory (May 1891) at 63–64; *see also* Dear & Levin, *supra*, 4 Cal. Sup. Ct. Hist. Soc'y Y.B. at 75.

56 People v. Hayne, *supra*, 83 Cal. at 111. *See also post* note 72 [estimates concerning the number of cases affected]. In deciding to hear the matter, which went directly to the heart of its own functioning and as to which one of its own had already testified, it is possible that the court determined that the "rule of necessity" applied, although it did not address the point. *See, e.g.*, Olson v. Cory (1980) 27 Cal. 3d 532, 537 [a judge or justice is not disqualified from adjudicating a matter in which he or she has an interest if there is no other judicial officer or court available to hear and resolve the matter].

57 *Supreme Court Commission: Argument Heard on Judge Wallace's Decision, Remarks from the Bench* (Jan. 25, 1890) Daily Alta California, at 8. *See also The Court Commission, Argument in the Action to Oust Them from Office* (Jan. 25, 1890) San Jose Daily Mercury, at 1; *Pacific Coast, The Commissioner Case Is Argued* (Jan. 25, 1890) San Diego Union and Bee, at 1.

58 *Argument Heard on Judge Wallace's Decision*, *supra* note 57, at 8, italics added. The article also reported: "M. Wilson, who appeared for the respondent [the

The article reported that the "questions asked by the Justices . . . left an impression" that the court would "sustain[] the constitutionality of the act."[59]

The prediction proved correct. Justice Fox's majority opinion affirming the judgment was issued only twenty-seven days after the trial court's final ruling, and only twelve days after oral argument before the Supreme Court.[60] 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,[61] but not Justice Works, who, after being reprimanded by the chief justice at oral argument, appears to have taken ill.[62] Chief Justice Beatty penned a concurring opinion. As both documents showed, the justices were quite able to write their own. 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."[63] He described the

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commissioners], devoted most of his argument to the question how far does the work of the Commissioners affect or influence the Court, and would such influence be in any sense a usurpation of the judicial function. Mr. Wilson took the ground that the Commissioners were merely advisers of the Court. In support of his contention he referred at great length to the practice of the Judges of the English courts, from time immemorial, to call to their aid advice from a source competent to give it." *Id*.

59 *Id*.

60 People v. Hayne, *supra*, 83 Cal. 111 [filed Feb. 6, 1890].

61 In this respect, again, the court may have determined that the "rule of necessity" applied. *See ante* note 56.

62 Works is shown in volume 83 of *California Reports* as participating in other filed opinions on February 3, 1890. There's a notation in one opinion, issued that same date, that "Mr. Justice Works did not participate in the decision in this case." Russell v. McDowell (1890) 83 Cal. 70, 82. In yet another opinion filed February 5, he is shown as having signed. Cucamonga Fruit-Land Co. v. Moir (1890) 83 Cal. 101, 107. In the commissioners' case, People v. Hayne, *supra*, 83 Cal. 111, filed the next day, his absence is not noted. As observed in Johnson, *supra* note 19, at 160, Works "suffered considerable sickness through the years, particularly in the first half of his life" — a period that would have included this era.

63 People v. Hayne, *supra*, 83 Cal. at 118.

commissioners' work product as simply "*serviceable instrumentalities to aid us in performing our functions.*"[64] He reported that the justices reject "many" commissioner opinions that don't see the light of day, and others are adopted only in part.[65] And, he stressed, the commissioners' opinions don't become judgments unless we, the real judicial officers, say so.[66]

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[67] — 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.'"[68] But, he explained, this requires only that the justices *agree* on an opinion, not that they write one.[69]

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64 *Id*. at 121, italics added.

65 *Id*.

66 *Id*. at 122. Justice Fox rebuffed charges that the commissioners exercised undue influence over the justices. If that were true, Justice Fox intoned, that would not be a sign that the legislation is unconstitutional; instead, he wrote, that would be the justices' fault. But, he emphasized, the justices appreciate receiving well written draft opinions crafted by skilled and objective writers; and to the extent they are influenced by them, that is no more problematic than being persuaded by the well-reasoned prose of a self-interested retained counsel who acts "under spur of retainer, and in the direct interest of . . . clients." *Id*.

67 Beatty noted that the majority opinion, by relying on and distinguishing an Indiana case, could be read to suggest that the California Constitution "declares the duty of writing its opinions is specifically imposed upon the supreme court by the constitution." *Id*. at 123. And he conceded: "If I held to this view, I confess I could see no escape from the conclusion that the duties we assign to our commissioners, and which are performed by them, involve a delegation by us and a usurpation by them of judicial functions." *Id*.

68 *Id*. Language now found in California Constitution, article VI, section 14, is substantially similar.

69 Beatty said: "In order to comply with [the constitutional command], it is undoubtedly necessary that the court, or some member to whom the duty is assigned, shall in most cases prepare a written opinion, but there may be, and in fact are, many cases in which the labor of formulating a statement of the grounds of the decision has been performed in advance or may be properly delegated to others." *Id*. at 123–24. And he noted that the court sometimes had adopted opinions written by a superior court judge. *Id*. at 124. (The modern Supreme Court has done similarly, adopting, in whole or part, the opinions — or even the dissents — of the appellate court under review. *See*, *e.g.*, Bozung v. Local Agency Formation Com. (1975) 13 Cal. 3d 263, 267; Roe v. Workmen's Comp. Appeals Bd. (1974) 12 Cal. 3d 884, 886; Brandt v. Superior Court (1985) 37

After briefly sketching how the system worked (and yet avoiding directly addressing whether the justices reviewed counsel's briefs),[70] 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 trifling task.*"[71] And so yes, he explained, this saves us time and energy, "without any abdication or delegation by the court of its constitutional functions."[72]

Cal. 3d 813, 817 [adopting the dissent].) Indeed, Beatty observed, sometimes the court adopts the arguments of counsel verbatim. Is this a violation of the Constitution? He answered: "I think certainly not. The object of the constitutional requirement is not to compel judges to formulate opinions in their own language, but to put upon the record the grounds of their decisions . . . ." People v. Hayne, *supra*, 83 Cal. at 124.

70 He explained: "The cases which are referred by us to the commission are those which are fully presented on the papers. The object of the reference is to obtain a report containing a brief and logical statement of the material facts exhibited by the record, and of the legal propositions upon which the judgment depends. When that report is submitted in the form of an opinion by one or more of the commissioners, with a suggestion that for the reasons stated a particular judgment should be given, it then becomes the duty of the court to compare the report with the record and with the printed arguments of counsel, and to determine for itself whether the reported opinion ought to be adopted, modified, or rejected. If upon such examination the court finds that the facts and the law have been correctly stated by the commission, and it adopts the opinion as its own, the case is not different from those in which the opinion of the trial judge is adopted. The court, though not the author of the opinion, by adopting it, makes it its own." People v. Hayne, *supra*, 83 Cal. at 124–25, italics added. By his phrasing, Beatty left unaddressed whether all of the justices actually undertook the described duties. *Compare ante* note 47 [characterizing the trial testimony as establishing that the justices "do not review the briefs" of counsel].

71 *Id*. at 125, italics added. (Author's note: From my own experience, I very much doubt that the writing of opinions was a "trifling task" for many commissioners. After doing it for thirty-seven years, I find it a struggle and challenge, though ultimately a joy, every time.)

72 The court's validation of the program was widely reported. *See, e.g., Supreme Court Commission — Its Labors Are Declared Constitutional and Beneficial* (Feb. 7, 1890) San Francisco Examiner, at 7 [noting that the commissioners had previously "assisted the court by examining and preparing for decision over 1,200 cases" and that

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.[73]

IV. CONTINUING CRITICISM OF THE COMMISSION PROGRAM

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."[74] 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.[75]

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.[76] 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."[77]

"[t]he validity of nearly half the court's judgments depended on the decision"]; *The Act Constitutional; The Supreme Court Commissioners Again Win Their Case* (Feb. 7, 1890) Daily Alta California, at 2 [stating that the commissioners "have, unchallenged, assisted the Court in the examination and preparation for decision of over 1000 cases" and asserting that "[t]hese judgments would not have been valid if the commission was not a lawfully constituted body"].

73 Fulweiler v. Mining Co. (1890) 83 Cal. 126.

74 *Work Before the Legislature* (Jan. 19, 1891) The Los Angeles Times, at 4.

75 *Id.*

76 *The Witness* (Aug. 29, 1891) Vol. 7, No. 17, The Wave, at 8.

77 *The Supreme Court, Justice Patterson Answers "The Witness"* (Sept. 5, 1891) Vol. 7, No. 18, The Wave, at 8.

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."[78] It was unsurprising that, despite the court's protestations, many viewed the commissioners as "auxiliary judges."[79] Another observer asserted that the commissioners operated as "an auxiliary court in intent and effect."[80]

V. MUSICAL CHAIRS

Notwithstanding these ongoing debates, the commissioner system had become useful to the governor, the justices, and the serving 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.[81]

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

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78 Kagen et al., *supra*, 76 MICH. L. REV. at 975.

79 *Id*.

80 SCHUCK, *supra* note 22, at 495.

81 From the Supreme Court's inception until 1911 its justices were selected in partisan elections. GRODIN, IN PURSUIT OF JUSTICE (U.C. Press, Berkeley, Cal. 1989) at 164–66; *see also post* note 82 [example of political party ticket including a candidate for the Supreme Court]. And there was considerable resulting turnover. Cf. McMurray, *supra* note 3, at 37 [under the Constitution of 1879, "the judicial office was thrown back into party politics"]. Reform legislation in 1911 converted those election contests to nonpartisan affairs. CAL. STATS. 1911, ch. 398, § 5, subd. 4, at 774; CAL. STATS. 1911, Ex. Sess., ch. 17, § 3, subd. 4, at 71. By initiative measure in 1934 California amended its Constitution to become the first state to adopt a "retention election" system for appellate justices, under which a justice appears on the statewide ballot unopposed, and the voters are asked to vote simply "yes" or "no" concerning the judicial officer. CAL. CONST., art. VI, § 16, subd. (d); *see* GRODIN, *supra*, at 165–66; *see also* Uelmen, *Symposium, California Judicial Retention Elections* (1988) 28 SANTA CLARA L. REV. 333, 339–40 [history of the 1934 initiative, Prop. 3 — and the failure of a corresponding measure designed to extend retention elections to trial court judges]; Levin, *A Brief History of the Court of Appeal for the Third Appellate District* (Autumn/Winter 2005) CAL. SUPREME COURT HIST. SOC'Y NEWSLETTER 2, 3 [describing how a 1932 appellate judicial election contest helped spur the 1934 reform].

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."[82] 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.[83]

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. When that office expired he became a regular commissioner until 1898.[84]

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 thirty 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.[85]

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.[86] He served a full two years, producing again comparatively few opinions that a reviewer described as "distinguished only by their brevity."[87]

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[82] *Regular Democratic Ticket!* (Nov. 1, 1888) Pacific Bee, at 3 [advertisement].

[83] Johnson, *supra* note 19, at 154.

[84] *Id*. at 122–23.

[85] *Id*. at 115–17.

[86] Johnson, *supra* note 19, at 191.

[87] *Id*. After he departed the court as a justice, he ran for, and was elected to be, attorney general. When that term expired in 1899 the governor appointed him to the Los Angeles Superior Court. But when that term was up the voters preferred another

Finally, one last round of musical chairs: The voters elected Ralph C. Harrison, with no judicial or other public office experience, to a twelve-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."[88] Many of his opinions appeared in casebooks prepared by "the first names in scholarship."[89] He wanted to run for a second term that would start in 1903, but political party 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*."[90]

The latter and similar sentiments 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.

VI. 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.[91] 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.[92] Yet

candidate, forcing him to the last stage of his legal career: representing *The Los Angeles Times* under publisher Harrison Gray Otis. *Id*. at 192.

88 Johnson, *supra* note 19, at 185.

89 *Id*. at 187.

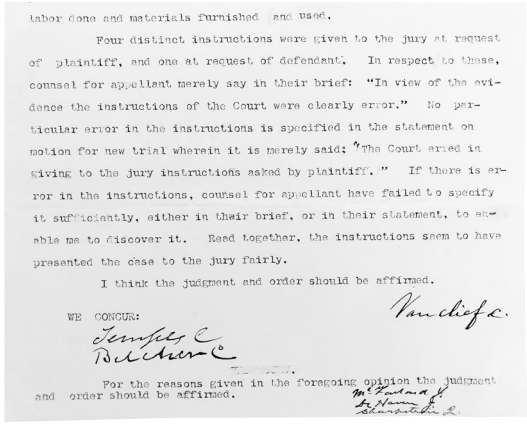
90 *Id*. at 187–88, italics added.

91 California Blue Book, or State Roster 1911 (State Printer, Sac., Cal. 1913) at 413 [listing six legislative renewals, and the succession of the commissioners appointed]. See the Appendix to this article for a roster of all 16 commissioners.

92 E.g., Meade v. Watson (1885) 67 Cal. 591, 595 ["think"]; People v. Monteith (1887) 73 Cal. 7, 9 ["advise"]; Lind v. City of San Luis Obispo (1895) 109 Cal. 340, 345 ["think"];

there was no standard language, and the original "should" form continued to appear frequently over twenty years, even after many if not most commissioner opinions eventually adopted more deferential phrasing.[93]

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: "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."[94]



labor done and materials furnished and used.

Four distinct instructions were given to the jury at request of plaintiff, and one at request of defendant. In respect to these, counsel for appellant merely say in their brief: "In view of the evidence the instructions of the Court were clearly error." No particular 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 error in the instructions, counsel for appellant have failed to specify it sufficiently, either in their brief, or in their statement, to enable 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.

Yndart v. Den (1897) 116 Cal. 533, 548 ["recommend"]; People v. Sears (1897) 119 Cal. 267, 272 ["recommend"]; Arques v. Union Sav. Bank of San Jose (1901) 133 Cal. 139, 144 ["advise"].

93 E.g., In re Asbill (1894) 104 Cal. 205, 208 ["should"]; People v. Town of Berkeley (1894) 102 Cal. 298, 308 ["should"]; People v. Slater (1898) 119 Cal. 620, 624 ["should"]; Allen v. Pedro (1902) 138 Cal. 202, 203 ["should"]; Jones v. Board of Police Commissioners (1903) 141 Cal. 96, 98 ["should"].

94 Joyce v. White (1892) 95 Cal. 236, 239, italics added. The original typed opinion, on file in the California State Archives, Sacramento, shows that the justices had to scrunch their signatures to fit at the bottom of the page. Beginning with *Joyce v. White* the justices' signatures appear regularly in the original filed opinions, and in turn are reflected, immediately after their unanimous adoption of the commissioners' opinion, in the bound volumes of the *California Reports*. (Curiously, no such notations identifying the justices by name appear in the corresponding "unreported" commissioner opinions later published in *California Unreported Cases* — *see ante* note 37.) And yet, as of this writing, electronic versions of the *Joyce v. White* opinion (and, significantly,

VII. CREATING THE COURTS OF APPEAL (ON THE SECOND TRY)

But even as some things changed, others remained the same: Still the court remained backlogged; there was criticism of the justices and their commissioners; and there were louder and more frequent calls to create 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."[95]

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 ninety days after submission.[96] The same article critiqued the commissioner

hundreds of similar subsequent officially-reported opinions) fail to include this information and other key language contained in the official version(s), as published in the bound *California Reports*. For example, the versions of commissioner opinions issued after mid-1892, as presented on Westlaw.com and LexisNexis.com, omit the justices' names immediately after the key paragraph in which they unanimously adopt the commissioners' opinion. This highlights pitfalls lurking for those who might rely exclusively on electronic research, rather than consulting the original hard copy volumes.

[95] *In Place of the Commission* (Feb. 4, 1897) San Francisco Examiner, at 6. By contrast, Roscoe Pound, although criticizing commissioner systems generally (Pound, *supra* note 11, at 213), lauded California's department system, and those of other state high courts following that lead. *Id*. at 214–20.

[96] *Supreme Court — Proposed Amendment is not Satisfactory — Matter is Referred to a Subcommittee* (Feb. 4, 1899) San Francisco Chronicle, at 2. The California Constitution then (art. VI, former § 24) as now (art. VI, § 19), prohibits a judge or justice from being paid if any matter remains pending and undetermined before the judicial officer more than ninety days after having been "submitted" for decision. *See generally* Cal. Gov. Code. § 68210 [codifying the rule and requiring an affidavit signed by each judicial officer]. It appears that the 1898–99 salary snafu led the court to adopt the expedient practice of delaying "submission" until it was ready to file an opinion deciding the case, rather than submitting the matter immediately following argument. Decades later (and in the face of litigation in 1979 and 1986 challenging that practice) the court began to honor the ninety-day rule by "submitting" its cases immediately after oral argument, and in order to do so, it adopted procedures under which

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.[97]

A few weeks later the Legislature finally adopted a proposed constitutional amendment that would revise the judicial article to provide for intermediate appellate courts. The would-be amendment also proposed to reduce the Supreme Court from seven to five justices and require 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.[98] Following litigation about whether the proposed amendment should appear on the ballot,[99] 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,[100] and another to double down on commissioners by increasing their number

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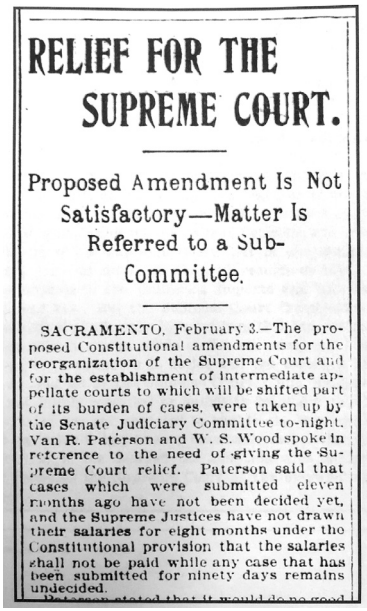
it "frontloads" some of its internal deliberation procedures. *See generally* Liu, *How the California Supreme Court Actually Works: A Reply to Professor Bussel* (2014) 61 UCLA L. Rev. 1246, 1252–58. The court nonetheless still can vacate submission and resubmit a case — something it occasionally does, usually in conjunction with post-argument supplemental briefing — an action that restarts the ninety-day period. Cal. Rules of Court, rule 8.524(h).

97 San Francisco Chronicle, *supra* note 96, at 2.

98 Cal. Stats. 1899, ch. 37, at 503 (Sen. Const. Amend. No. 22) (adopted Mar. 18, 1899), § 2. As observed *ante* note 16, the court had maintained its headquarters in San Francisco since early 1874 but, as instructed by the Legislature in 1878, had continued to hold some oral arguments in Sacramento, and later added oral argument sessions in Los Angeles. To this day the court keeps its headquarters in San Francisco, but regularly hears oral argument in all three cities.

99 In the meantime, the Legislature, having had second thoughts about some details of the proposed constitutional amendment, adopted a revised version of that amendment. In People v. Curry (1900) 130 Cal. 82, 90, the court held that the subsequent version, because it had been adopted at an extraordinary session that had been called for reasons other than to propose constitutional amendments, could not be presented to the voters, and hence the Secretary of State was required to submit the original version to the electorate.

100 *To Increase the Number of Justices — Senator Caldwell Introduces a Constitutional Amendment Changing the Personnel of the Supreme Court* (Feb. 5, 1901) San Francisco Chronicle, at 2. The proposal also would have abolished the Commission. *Id.*



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.

to twelve[101] — the Bar Association of San Francisco regrouped and proposed a new constitutional amendment.[102] A few weeks later, the *Los Angeles Times* breathlessly reported on an "important amendment" to that legislation, a sweetener: The measure would be revised to provide that "when ratified by the people the offices of the Supreme Court Commissioners shall . . . be abolished."[103] Three days later the Legislature adopted Senate Constitutional Amendment No. 2.[104]

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 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.[105] The voters overwhelm-

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101 *For Relief of Supreme Court — Measures to Be Introduced to Increase its Personnel* (Feb. 2, 1903) San Francisco Chronicle, at 2.

102 *To Revise Court System — San Francisco Bar Association's Plan for State Appellate Tribunal* (Feb. 4, 1903) San Francisco Chronicle, at 7.

103 *Courts of Appeal — Important Amendment* (Mar. 11, 1903) The Los Angeles Times, at 4.

104 Cal. Stats. 1903, ch. 38, at 737 (adopted Mar. 14, 1903).

105 *Appellate Courts Provided for by Amendment* (Aug. 15, 1904) San Francisco Examiner, at 6. Fewer than twelve months later, and after the amendment had passed, the Supreme Court itself recounted that "for years" prior to the amendment it "had been unable to dispose of the business before it as fast as it accumulated, and the cases

ingly adopted the measure at the November 1904 General Election,[106] 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")[107] commenced work,[108] and the last published Supreme Court commissioner case was filed in mid-1905.[109]

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.[110]

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were decided from two to three years after the appeals were filed." People v. Davis (1905) 147 Cal. 346, 349.

106 *Official Vote on Amendments* (Dec. 3, 1904) San Francisco Chronicle, at 3 [reporting "93,306 for and 36,275 against"].

107 As observed earlier, some prior proposals called for creation of a "court of appeals" — (note the sole plural) — a name akin to that employed for the federal counterpart, the "circuit court of appeals," as denominated in an 1891 federal act, 26 U.S. Stats. 826, ch. 517, § 2. But the drafters of the winning version of the amendment went with a singular word for "appeal" — ostensibly, I once read (but can't find the cite), because the cost-conscious state could not afford the "s." In any event, that joke helps one to remember, if not understand, the different terminology for the otherwise analogous intermediate appellate courts. Ultimately, although the word "district" was dropped from the title of California's appellate courts in the mid-1960s — *see* California Constitution Revision Commission, Proposed Revision of the California Constitution (San Francisco, Feb. 1966) at 90–91 [as approved by the voters at the General Election of November 8, 1966, via Prop. 1-a] — the singular "appeal" persists. Cal. Const., art. VI, § 3 ["The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions"].

108 In that early period, the new appellate court's jurisdiction was "narrowly limited" and its function was "primarily a device for assisting the supreme court by relieving it of very petty cases and giving preliminary screening to others. The Supreme Court continued to handle the major appellate load." Sloss, *supra*, 46 Cal. L. Rev. at 716. Regarding the early history of the Courts of Appeal, see N. P. Chipman, *The Judicial Department of California*, in California Blue Book, or State Roster 1907 (State Printer, Sac., Cal. 1907) at 657–60 [addressing backlogs, the Supreme Court Commission, and creation of the appellate courts].

109 Estate of Dole (1905) 147 Cal. 188.

110 *Compare* California Blue Book, or State Roster 1903 (State Printer, Sac., Cal. 1903) at 49, with California Blue Book, or State Roster 1907 (State Printer, Sac., Cal. 1907) at 53. The court also enjoyed services of a "Supreme Court Clerk" and deputies — yet at that time they were apparently not court employees. Starting with the

VIII. EPILOGUE — AND 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[111] — and it would not expend time and energy to correct "mere errors" made by those lower appellate courts.[112] Its new role would be to preside over the orderly

first California Constitution in 1849 (art. VI, § 7), the position of Supreme Court Clerk was a statewide elective office. The 1879 Constitution (art. VI, former § 14), as originally adopted and as amended in 1904, continued that approach. Moreover, at that point the Supreme Court Clerk was, at least according to one source, considered to be within the executive department. *See*, *e.g.*, California Blue Book 1907, *supra*, at 59 [listing, under the executive department, "Clerk of Supreme Court" and eight staff — five in San Francisco, two in Sacramento, and one in Los Angeles]. Prior and subsequent editions of that publication likewise listed the court's clerk and employees as executive branch officers and employees. Notably, and by contrast, each new district court of appeal was directed to hire its own clerk — *see* Cal. Const., art. VI, § 21 [as amended in 1904] — and those appellate court clerks and the staff were listed as employees of the judicial branch. California Blue Book 1907, *supra*, at 54. Eventually the Supreme Court was implicitly given the same authority over its clerk and related staff when article VI, section 14 was amended Nov. 4, 1924, to delete any reference to the Supreme Court Clerk as an independent statewide elected official. The currently operative provision concerning the Supreme Court Clerk is set forth in Cal. Gov. Code § 68842 [appointment of Clerk/Executive Officer of Supreme Court]. Regarding the Supreme Court's authority to hire staff, see, e.g., Cal. Stats. 1927, ch. 565, § 1, at 950 [authorizing the court to hire "employees as it may deem necessary"], and Cal. Stats. 1951, ch. 655, § 5, at 1835 [similar]. For the current provision, see Cal. Gov. Code § 68806.

111 People v. Davis, *supra*, 147 Cal. at 349. The court during this period exercised its oversight of the appellate courts' work primarily by way of the Supreme Court's "transfer" authority. See *post* note 120. Similar oversight is today exercised via both the transfer power (Cal. Const., art. VI, § 12(a)) and the power to grant review of a Court of Appeal decision (*id.*, § 12(b)), which, under an amendment effective in 1985, allows the Supreme Court to confine review to selected issues in the appellate court's decision. *See*, *e.g.*, Snukal v. Flightways Mfg., Inc. (2000) 23 Cal. 4th 754, 767–73 [describing the history of the appellate jurisdiction provisions]; Cal. Rules of Court, rule 8.516. As explained in *Snukal*, prior to the 1985 amendment, the Supreme Court's review had been plenary, amounting to review of the trial court's judgment, and proceeded as if the Court of Appeal had never acted on the case. The 1985 amendment allowed the Supreme Court to realize the full potential of the original amendment creating the intermediate courts of appeal, by permitting the Supreme Court to "accord review of selected issues" decided by the lower appellate court. Snukal, *supra*, 23 Cal. 4th at 773 [and authorities cited].

112 People v. Davis, *supra*, 147 Cal. at 347 & 350.

development of the law, by deciding important issues and resolving conflicts in appellate decisions.[113] Doing otherwise, or more, the court reasoned, would defeat the purpose of the recent amendment.[114] But, the Supreme Court cautioned, when it declines to intervene in an appellate decision, that doesn't mean it endorses that decision or opinion.[115]

And yet, even after the creation of intermediate appellate courts, the Supreme Court continued to struggle with an ever-growing backlog.[116] It used the criticized department system fairly regularly for nearly fifty years, until the late 1920s, when the court began hearing each case in bank[117] — except for two last instances in the early 1940s.[118] The obsolete department

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[113] *Id*. at 348 & 350.

[114] *Id*. at 349. The court added: "The state has done its full duty in providing appellate relief for its citizens, when it has provided one court to which an appeal may be taken as of right. There is no abstract or inherent right in every citizen to take every case to the highest court. The district courts must be deemed competent to the task of correctly ascertaining the facts from the records before them in each case decided therein, and they should be held solely responsible to that extent for their judgments." *Id*. at 349.

[115] *Id*. at 350. In this early period the court sometimes went out of its way to stress the point, occasionally writing brief, substantive opinions when denying a hearing, so as to expressly disassociate itself from parts of the appellate court's decision. E.g., People v. Bunkers (1905) 2 Cal.App. 197, 210 [specifying "we are not to be understood as approving" an identified portion of the court of appeal's opinion].)

[116] As predicted by the court itself in People v. Davis, *supra*, 147 Cal. at 349, it remained significantly backlogged during these years, and for "several years to come." *See also* Salyer, *The California Supreme Court in an Age of Reform, 1910–1940,* in Scheiber (Ed.), *supra* note 18, at 190 [recounting reports in 1918 that the court was twenty months behind — and that previously it had been "as much as five years behind in its work"].

[117] Prince, *The Composition and Jurisdiction of the Supreme Court of California* in Johnson, *supra* note 19, at 4; McMurray, *supra* note 3, at 36. The court began to sit mostly in bank in 1922. Pound, *supra* note 11 at 214. Yet it sporadically filed a few department cases in the mid-1920s, and then revived the department practice for about sixteen months, filing approximately 250 such opinions between December 1927 and March 1929. At first blush, Sterrett v. The Curtis Corporation (1929) 206 Cal. 667, appears to be the caboose — yet, as shown *post* note 118, it's not quite.

[118] The court issued two department opinions back-to-back in March 1941 — shortly after Phil Gibson became chief justice, and nine months after the Supreme Court library was presented by Arthur Vanderbilt with a copy of Roscoe Pound's 1940 book, *supra* note 11, in which (at 214) Pound lamented the demise of the practice. *See* Grolemund v. Cafferata (1941) 17 Cal. 2d 679 ["Department 2," opn. by Curtis, J., with Traynor, J., and Shenk, J., conc.]; Wiseman v. Sierra Highland Mining Co. (1941) 17 Cal. 2d 690 ["Department 1," opn. by Shenk, J., with Carter, J., and Edmonds, J., conc.].

provisions were finally removed from the Constitution in 1966,[119] when the judicial article was also amended to conform the appellate jurisdiction of both levels of appellate courts to longstanding practice.[120] Proposals to embrace a new version of the department system were made — but did not advance — in the early 1980s and late 1990s.[121]

Meanwhile, the opening pages of the *California Reports* continued to show the erstwhile department assignments of the associate justices through volume 64 (1966), and ceased doing so only after the department provision was removed from the charter. *See post* note 119.

[119] As recommended by the California Constitution Revision Commission, *supra* note 107, at 84, the provision was deleted at the General Election of Nov. 8, 1966 [Prop. 1-a].

[120] It was not until "about 1941 [that] the Supreme Court adopted the practice of referring virtually all [of its cases on direct appeal from the trial court] to the district courts of appeal." Prince, *supra* note 117, at 4. *See also* California Blue Book 1946 (State Printer, Sac., Cal. 1946) at 115 [the court's practice at that time was to "transfer to the district courts of appeal for determination all cases except appeals involving the death penalty, tax cases and other matters of importance affecting the public interest or requiring the interpretation of new laws, and proceedings on review from the Railroad Commission" — and in fiscal year 1944–45 "approximately 28 percent of the petitions for hearing" from decisions of the appellate courts were granted]. Decades later, those drafting revisions to the 1879 Constitution recommended modernizing article VI, section 11 (addressing appellate jurisdiction of the Supreme Court and Courts of Appeal) to memorialize and extend the "long-standing practice" of referring most matters — except, most prominently, capital cases — to the intermediate appellate courts. California Constitution Revision Commission, *supra* note 107, at 81; *see also id*. at 90. The Legislature agreed, and voters enacted that change at the General Election of Nov. 8, 1966 [Prop. 1-a]. *See generally* Sosnick, *The California Supreme Court and Selective Review* (1984) 72 Cal. L. Rev. 720, 726–30.

[121] Mosk, *Opinion: A Two-Part State Supreme Court* (1983) 11 Pepperdine L. Rev. 1 [proposing to increase the Supreme Court to eleven justices siting in two departments — with five justices hearing criminal cases, and five hearing civil cases]. *See* Kopp, *Changing the Court for a Changing California* (July 19, 1998) The Los Angeles Times, at B15 [lamenting the demise of the court's department system and advocating a renewed version of Justice Mosk's bifurcated court proposal, creating a new seven-justice "Court of Criminal Appeals" — Sen. Const. Amend. 31 (Feb. 26, 1998)]; George, Chief: The Quest for Justice in California (Berkeley Pub. Policy Press, Berkeley, Cal. 2013) at 528–29 [criticizing these bifurcation proposals]. *See also id*. at 530–31 [describing Chief Justice George's own proposal to allow the Supreme Court to transfer capital appeals for decision by the Courts of Appeal, thus freeing the court to better focus on important legal issues arising in both capital and review-granted cases]. Regarding the capital appeals transfer proposal, see also George, *Reform death penalty appeals* (Jan. 7, 2008) The Los Angeles Times, at A15.

The Constitution's vaccination against Supreme Court commissioners remained enshrined in the judicial article for fifty-two years, long after that court and the Courts of Appeal had adopted less controversial methods of utilizing judicial staff.[122] The vestigial provision explicitly

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122 By 1930, the justices of the Supreme Court and Courts of Appeal were using judicial legal staff more discreetly, in a behind-the-scenes manner, under job titles such as "legal secretaries," "law clerks," and "chief law secretary." Often these incumbents became long-term, or even career, employees. *See generally* Oakley & Thompson, Law Clerks and the Judicial Process (U.C. Press, Berkeley, Cal. 1980) at 31–33 & n. 2.86. According to Bernard Witkin, during this era the justices, including the first one for whom he worked, exercised little oversight concerning the opinions drafted by their law clerks, whom he labeled "ghostwriters." Bakken, *Conversations with Bernard Witkin* (1998–99) 4 Cal. Sup. Ct. Hist. Soc'y Y.B. 109, 111. By contrast, Witkin stressed, the next justice for whom he worked as law clerk starting in 1939, Phil Gibson (who became Chief Justice in mid-1940), was substantially engaged in the process, and would "argue" with him about the cases. *Ibid.*; see also *An Interview with Bernard E. Witkin for the Roger J. Traynor Memorial Collection* (Sept. 3, 1986) at 14 (unpublished manuscript on file in the Witkin Archives, California Judicial Center Library, San Francisco). Finally, Witkin described how Justice Roger Traynor, upon joining the court in mid-1940, and thereafter, employed bright and skilled law clerks as collaborators. *Id.*, at 19; see also Bakken, *supra*, 4 Cal. Sup. Ct. Hist. Soc'y Y.B. at 111–12 [Traynor used law clerks as "participants in the thinking process that led to the decision as well as in the articulation by the opinion"].

By 1950, each Supreme Court justice could employ one "research attorney" (a career position today denominated a senior judicial staff attorney) and one "research assistant" (a recent graduate, often not yet admitted to the bar, today denominated an annual law clerk). Oakley & Thompson, Law Clerks and the Judicial Process, *supra,* at n. 2.86. An extensive (albeit outdated) discussion of allocation of work between the Supreme Court justices and staff in the mid-1970s can be found in Stoltz, Judging Judges (Free Press, N.Y. 1981) 352–59. Meanwhile, California's professional appellate staff attorneys emerged from seclusion and commenced holding annual statewide educational conferences, now known as the Appellate Judicial Attorneys Institute (AJAI). *See*, *e.g.*, Witkin, *The Role of the Appellate Research Attorney — Past, Present and Future* (Oct. 13, 1988), Keynote Address delivered at the California Appellate Attorneys Institute, San Diego (on file in the Witkin Archives, California Judicial Center Library, San Francisco) [extolling the model of career attorneys who assist appellate justices]. These conferences in turn prompted a prominent commentator who perhaps had forgotten about the nineteenth century commissioner predecessors to assert: "There was a time . . . when these folks, who share a plenty big chunk of the responsibility for the operation of the courts, were faceless, nameless mushroom-like secret operatives, tucked away in the back recesses of the appellate courthouses. Their very existence was kept pretty close to the vest . . . ." Lascher, *Lascher At Large* (Dec. 8, 1989) S.F. Daily Journal. The AJAI remains very active today.

prohibiting Supreme Court commissioners was deleted from the charter in the mid-1950s.[123]

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,[124] 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.[125] 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 fifteen 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.

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123 Gen. Elec. of Nov. 6, 1956 [Prop. 17, removing art. VI, former § 25 from the California Constitution]. Yet as alluded to *ante* note 18, the state charter had long permitted trial courts to hire and use commissioners. That practice continued, and is reflected, as approved by the voters at the General Election of Nov. 8, 1966 [Prop. 1-a], in present Cal. Const., art. VI, § 22, allowing superior courts to appoint "officers such as commissioners to perform subordinate judicial duties."

124 E.g., *Many Ask Pardee For Appointment to New Bench* (Nov. 30, 1904) San Francisco Examiner, at 6.

125 Johnson, *supra* note 19, at 188. Two years later political machinations again intervened, derailing efforts to nominate Harrison to a full term. There being no Commission to which to return, he was forced to resume the practice of law, which he undertook with his son. *Id*.

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 VAN CLIEF
Commissioner, May 1889–Nov. 1896

JAMES A. GIBSON
Commissioner, May 1889–Jan. 1891

GEORGE H. SMITH
Commissioner, April 1990–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)

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2020 WRITING COMPETITION VIRTUAL ROUNDTABLE

For the first time, the California Supreme Court Historical Society met by video conference to congratulate the 2020 winners of its annual Selma Moidel Smith Student Writing Competition in California Legal History.

The award-winning students introduced themselves and presented summaries of their papers. Participating in the discussion were California Chief Justice Tani Cantil-Sakauye, recently retired Justice Kathryn Mickle Werdegar, Society President Richard H. Rahm, and Selma Moidel Smith who initiated and conducts the competition.

Each year, the competition is judged by distinguished legal historians and law professors. The 2020 judges were: Stuart Banner, UCLA School of Law; Christian Fritz, University of New Mexico School of Law (Emeritus); and Sara Mayeux, Vanderbilt University School of Law, who was the first-place winner of the competition in 2010.

The following is a lightly edited transcript of the video conference that took place on August 26, 2020.[1] The complete papers appear immediately following in this volume of *California Legal History* (vol. 15, 2020).

[1] The video conference is available on the Society's website at https://www.cschs.org/programs/student-writings or on the Society's YouTube channel at https://www.youtube.com/watch?v=ToP6rkZpaxU.

RICHARD H. RAHM: I've been asked to do a "welcome and introductions," so I'd like to welcome everyone here. Chief Justice Tani Cantil-Sakauye has served as Chief Justice of California for nearly ten years now and during that time the Chief has championed the cause of bail reform, she leads an initiative called "The Power of Democracy" to support civil discourse — education for students — and finally, perhaps most importantly, the Chief serves as chair of the California Supreme Court Historical Society Board of Directors.

Next up, I'd like to introduce Justice Kathryn Mickle Werdegar who's been a champion of environmental law, recently retired after twenty-three years as associate justice of the California Supreme Court. Last year, Justice Werdegar established, in honor of Selma Moidel Smith, a student travel grant to help fund California legal history research. Justice Werdegar continues to serve as a long-time member of the Society's Board of Directors.

Next up is Selma Moidel Smith, whom we all know, formerly of the law offices of Moidel, Moidel, Moidel and Smith. I hope I didn't miss anyone there. Selma has been a leader in the legal profession generally, as well as bar associations, local, national, and international. In addition to being a long-time member of the Society's Board of Directors, Selma is not only chair of the Society's Publications Committee, she is editor-in-chief of the Society's *California Legal History* journal. In 2007, Selma initiated the Society's writing competition, which was renamed in her honor in 2014. Now, although Selma turned 100 last year, her powers of discerning first-rate writing are not diminished. The winning submissions this year are the best I've ever seen, and this is a tribute to Selma and her legacy. Thank you.

Excuse me, Chris,[2] do we know if Taylor Cozzens is going to be coming?

SMITH: I just got a message from our first-place winner. He will join us now. You just asked, and you just got it at the very moment it happened. What delayed him, and I do want to share this with you — his wife just gave birth, and he's been very carefully being with her at this time. He confessed, "I completely forgot what time it was." She was in the hospital and the baby was just born. And he did not want to miss this, and I'm sure you'll be able to give him congratulations, I want to say "in person," but I

[2] Chris Stockton, CSCHS Director of Administration.

Virtual Roundtable Participants —

top, left to right: **Chief Justice Tani Cantil-Sakauye, Justice Kathryn Mickle Werdegar (Ret.), Competition Chair Selma Moidel Smith, and Society President Richard H. Rahm.**

bottom, left to right: **Winning authors Taylor Cozzens, Gus Tupper, and Brittney M. Welch.**

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can't say "in person" — but it will look like we're all in person. So, you see, we have something from beginning to end here.

Actually, I do want to thank Richard very much — he has done a very selfless kind of thing in being here with us because he already was scheduled for surgery —

RAHM: It's just knee surgery —

SMITH: Let us begin now, and again, thank you, Richard — and I just want you to see how much that means for everyone. Yes, at that point, I hand that over to you to do the guiding along of the rest of our program.

RAHM: Now we have the student presentations. Each one of you, starting with Taylor, Gus, and then Brittney, if you could introduce yourself and summarize your paper for a couple of minutes, that would be great.

TAYLOR COZZENS: Thank you very much. My name is Taylor Cozzens. I just completed a master's program in history at the University of Oklahoma, and I'll be starting the Ph.D. program this fall. The paper that I wrote looks at the California Rural Legal Assistance, a legal service agency from the era of the War on Poverty, and specifically the agency's efforts to help mostly migrant farm workers.[3] As I studied that agency, I first started by looking at their efforts to ban the short-handled hoe in California agriculture,[4] and from there I looked at their work related to environmental justice — protecting workers from pesticides and other environmental hazards.

But as I worked on those other projects, I kept coming back to this truly dramatic standoff between Governor Ronald Reagan and this agency. That's what this paper was about. It was about Reagan's efforts to discredit and ultimately destroy this agency that the federal government was funding. Ultimately, he was unsuccessful, but it was, to me, a very dramatic and important story because it gets at the legal representation of mostly Latino farmworkers who had not had representation prior to that point. I really enjoyed writing the piece. Thank you.

RAHM: Thank you, and then Gus, would you like to introduce yourself and your paper?

GUS TUPPER: Hi, I'm Gus, a 2020 graduate of Berkeley Law, and my paper is about juvenile transfer, which is the process by which the juvenile court waives its jurisdiction over a juvenile defendant and transfers their case to adult court.[5] In the paper I was trying to do three things:

The first part maps this theory called "the cycle of juvenile justice" onto transfer policy in California. "The cycle of juvenile justice" is a widely accepted understanding of the development of the juvenile court over the twentieth century, and I argue that California's transfer policy follows a similar arc. At the turn of the twentieth century, the lenience that the juvenile court was founded on basically meant there were no rules governing transfer at all, which led to all kinds of abuses, including what I identify

[3] Taylor Cozzens, "Ronald Reagan v. CRLA: Politics, Power, and Poverty Law," *California Legal History* 15 (2020): 175–206.

[4] Taylor Cozzens, "Defeating the Devil's Arm: The Victory over the Short-Handled Hoe in California Agriculture," *Agricultural History* 89, no. 4 (Fall 2015).

[5] Gus Tupper, "Breaking California's Cycle of Juvenile Transfer," *California Legal History* 15 (2020): 207–253.

as a transfer project where older "incorrigible boys" in California's early reform schools were surgically sterilized. And then harsher punishments arose out of the increased crime of the Great Depression. The transfer process became more punitive, so that it was easier to transfer kids to adult court, but the deaths of two Mexican-American boys, Benny Moreno and Edward Leiva, in state custody in 1939 Los Angeles led to calls for more lenient treatment. And then federally mandated procedural rules were supposed to help alleviate some of the excesses of juvenile court punishment, but in the middle of the twentieth century and with the tough-on-crime era in the eighties and nineties and early 2000s, some of the harshest punishments were brought back into vogue. In the last few years, we've entered a period of backlash to these tough-on-crime policies, including California's punitive transfer policy.

The second part of my paper is about S.B. 1391 which took effect in 2019 and made it impossible for California's juvenile courts to transfer kids to adult court until they turn sixteen. Prosecutors are currently challenging the constitutionality of that law, and the Courts of Appeal are split. The vast majority are in favor of upholding it, and I argue in the paper that that majority of the Courts of Appeal are right, and the Supreme Court is hearing the case and will probably decide in the fall.

But I think the most interesting question is how to break out of the cyclical pattern, and that's the subject of the third part of my paper. Thomas Bernard, who's kind of the father of this "cycle of juvenile justice" theory, casts it as inevitable, but I think there's real promise in abolitionist organizing in California right now, particularly recent successful calls to defund school police and reinvest money in transformative justice projects. I think movements led by groups like the Black Organizing Project in Oakland and Youth Organize California might actually be able to keep us in this current lenient moment in the cycle of juvenile transfer.

RAHM: Thank you very much, Gus, and then finally, Brittney.

BRITTNEY WELCH: Hi, I'm Brittney Welch. I was born and raised on a farm in northeastern Ohio, about an hour from Cleveland, and the farm is actually where I spent all of my summer while working remotely for the Department of Justice Antitrust Division. I'm currently a 3L at Moritz College of Law at Ohio State. I'm in Columbus right now. And I'm really

passionate about public interest work and I hope to have a career working in government someday. I'll actually be clerking for a state supreme court after I graduate, in Vermont, which is a place I've never been but as a history nerd I can't wait to go and dig into New England's history.

My paper was actually inspired by my 1L summer job. I worked for the Department of Transportation in D.C. I didn't work on the rule that I wrote about — I was in the Federal Highway Administration — but it was something that I heard about from afar. My paper is about the One National Program Rule, which is a rule that was promulgated by the current administration which destroys, in my opinion, the iterative federalism scheme created by California in the realm of environmental regulations in favor of a national fuel emissions standard, which is much less considerate to the environment.[6] It examines the deeply embedded aspects of federalism in California's Clean Air Act waiver, which they've had for quite a long time, and which has continued to enable California to be a leader in auto emissions regulations for half a century. California's high environmental standards of regulation don't only touch California. There are about 120 million people who reside in states that have adopted California's standards, and the number is even higher when you consider that states bordering those compliant states can sell the California-compliant cars as well. So, in my paper, what I do after discussing the history, is that I propose a framework that emphasizes the central role that federalism should play in any analysis of an eventual court's decision on the rules, and there are in litigation now some cases related to the rules. Overall, my paper concludes that the continued existence of California's ability to opt out of the Clean Air Act standards, and go above and beyond those with their own emissions standards, is not only essential to advancements in environmental regulations, but it's essential to the vitality of modern-day federalism.

RAHM: Thank you very much, Brittney. I'm going to go off-script just a little bit and ask a question. It's really interesting to me that Brittney, with your paper, and Taylor, with your paper, they're almost like bookends in that Taylor is writing a paper about the success of the federal government in imposing a

[6] Brittney M. Welch, "Stop! Turn the Car Around Right Now for Federalism's Sake! The One National Program Rule and How Courts Can Stop Its Impact," *California Legal History* 15 (2020): 255–290.

standard and not getting it overturned or somehow sabotaged by Governor Reagan, and then Brittney, with yours, you're basically touting federalism in that, "Gosh, these states should have the right to go do what they want to do" — kind of at odds with Taylor's paper. Any comments?

WELCH: Taylor, you can go ahead first.

COZZENS: It is ironic. The easy answer is that it's political, I suppose. Whoever is in the Oval Office, whoever is in Sacramento, their policies at different times disagree, but in different ways. In the case of California, after Reagan, Governor Jerry Brown — I'm thinking of Miriam Powell's recent book, *The Browns of California* — both of his terms were very fundamental in perhaps moving California toward the direction that Brittney's paper analyzes.

WELCH: I found it really interesting while I was doing my research that federalism is a term I've almost always associated with a conservative viewpoint — that's what you hear when federalism is touted — and I hadn't really been looking into the environmental space before, and it kind of amazed me how federalism is being used in a way that I had never looked at and I had never seen. So I think it was a learning lesson for me that sometimes — and again, federalism is great if you agree with the point of view, but at the same time it's really easy to flip back on the other side and be like, "Oh, actually I don't agree with that kind of federalism." So I think it's just been a learning lesson to me in a lot about how these tools can be used for things you might agree with and things you might not agree with.

RAHM: Very good, and Gus, does your paper fit in somewhere in between this, or is it a case study in and of itself?

TUPPER: The sort of federal interplay, I guess, comes in more with Earl Warren who was a really important player at multiple stages in the development of juvenile policy in California, first as attorney general when he instituted a lot of reforms including creating the California Youth Authority, which was the youth prison system through the rest of the twentieth century, and then obviously as governor and chief justice. He wrote some of the most important U.S. Supreme Court cases about juvenile law, including *In re Gault*, which guaranteed due process rights to juveniles. So that's sort of the federal line that I see, definitely some interesting federalism questions there, too.

RAHM: Very good. Well, thank you all. Going back onto the agenda — sorry about that, Selma — Chief, if you have some closing remarks?

CHIEF JUSTICE: Thank you. I know, listening to your descriptions of these distinguished works, that all of us will benefit because of that inspired writing. I found all of your subject matters very interesting, and hearing you describe them.

As a jurist — I know that Kay Werdegar also, probably — lightbulbs were going off in our heads thinking about what you wrote about, Taylor, regarding the struggle and conflict in power enforcing policy and how the relationship of the three branches of government makes a difference — and brute power or incentivizing action — and I think those of us who either still remember the Reagan years, or remember jurists from the Reagan years, or have dealt with policies in the Reagan years, will find it fascinating — fascinating actually, when you talk about CRLA. You know, Justice Cruz Reynoso is a founder and an awesome megastar of CRLA and served on our court, and then after he left our court, he went on to teach young minds in law school and is considered still today to be an iconic influence in California policy.

And then I think of Gus's subject matter about juveniles and, again, the federal government plays a role, in the sense that — while it doesn't fund it like CRLA — it certainly started with the *Roper–Miller* line of cases, where Kay and I are very familiar with the young, growing, juvenile mind and the way the courts have finally begun to humanize our approach to the juvenile mind and rehabilitation. So, we watch with fascination the entanglements of transfer now at the California Supreme Court, having to do with Prop 57 and others.

And then, of course, I seriously enjoy Brittney's emphasis on federalism because this is what I try to preach over at the Legislature when they get out of their lane, violate separation of powers, and try to tell the judicial branch what to do. Or, often I hear it when the judicial branch at the state level tries to guide the trial courts at the county level. I find federalism fascinating; I wish more people knew about it, more people respected it and thought about it in an abstract way. I think it would improve our policies, at least in California.

And so I'm greatly excited and inspired by your minds, thinking about this and your view and approach. All of these issues come to us at the

Supreme Court, brought to us by good attorneys like Richard and Selma, and this is what moves policy forward. So thank you for this opportunity. I'm excited and impressed.

RAHM: Thank you very much, Chief. Justice Werdegar?

WERDEGAR: Yes, well, I enjoyed the Chief's remarks, and I enjoyed the image of the Chief trying to educate the Legislature, but if anybody could do it, she could. First, I want to congratulate Taylor on a new baby, am I right?

COZZENS: Yes, the baby just barely arrived. Thank you very much.

WERDEGAR: My goodness! Is it a baby boy or a baby girl?

COZZENS: A girl.

WERDEGAR: Her name?

COZZENS: Eleanor.

WERDEGAR: Well, congratulations to your wife and to you, and we're glad that you could still make an appearance. At least you didn't have to fly to California. As said by the Chief so eloquently and completely, all your topics touch us in the judiciary, and us in California. I was interested that you looked to Ronald Reagan as governor, which so many people forget — that he was governor of the State of California before he became president — and I do remember when the CRLA was going into effect and the issues of that time.

With Gus telling us about the juvenile transfer cycle, as a judge, I've watched that, I've lived through it, I've suffered through it, and it's an ongoing issue that this state faces.

And finally, the federalism about Britney's paper, "Stop! Turn the Car Around": We are living that now, too. So these are very timely, very important, topics, and I congratulate all of you for coming up with these, and I think you know it's unprecedented that each and every one of you would be published in our California Supreme Court Historical Society journal, and that's because, in addition to the first-place winner, the other two are also worthy of publication and will get the exposure they deserve. So congratulations to all of you.

RAHM: Thank you Justice Werdegar. Selma?

SMITH: Many, many thoughts have already been going through my mind, as I'm sure it is with you. I wanted to say simply that this has been quite a learning experience. This is the first time, of course, by force of circumstances that we are in this particular mode of doing it, and I'm looking forward to our ability to return — on behalf of all of us — to where we can all sit together and enjoy each others' personal company as well, but I'm very grateful that we have this, and I shall have many occasions to look back.

As each of you spoke, I was making mental notes, and when I see your names again in any of your activities — without your even knowing it — I will have an extra heartbeat for your endeavors and accomplishments. So, I shall not lose you; I shall simply be adding to my large, well — I'm the eldest here — so, I simply want to take advantage of that by saying, as we go along, we also keep learning. And these examples that you've given are splendid examples of what is done at a particular level, and the opportunities you make use of, and what you are giving to your work. I'm going to be particularly proud because all three of you, your papers, I can assure you will be in the fall journal, our scholarly journal of which I'm editor-in-chief. I just want you to know that I will be thinking of you, and I appreciate so much your taking your time, your efforts, to come and share with us, and I look forward to these names again. Thank you, all of you, for coming.

I want to thank our Chief, who is always available to me at any time that I am going to make an honor of this nature, as the result each year of these particular competitions, this very one, which they were kind enough to — simply because I came up with it — they put my name on it, so they call it that.

RAHM: That's not entirely true —

SMITH: At any rate, I just want to say thank you, and I'll be thinking of each one of you, wishing the very best for you.

Chief Justice Tani, in spite of the fact that you are not at *that* point — you are at a different point — I want to see all the recognition possible for you, and for all the splendid ideas and the manner in which you conduct yourself, the manner in which you hold court. I saw you as you became chief justice, and I look back to that moment, of our first glance to each other, and you came up to me so kindly to introduce yourself, and I

appreciated that. And now, I appreciate this opportunity in a very public way, again, to say we're very fortunate here in California, very fortunate.

Chief, it's delightful to see you again, and I'm sorry that at this time, contrary to all the other times we've had, when we were actually meeting together, we can't just reach out and make a hug — which we know is practically our signal to each other.

CHIEF JUSTICE: Thank you, Selma. I don't have much to say except to tell you, of course, that I miss you, and it's wonderful to see you, even if onscreen and to hear your voice. I know that Kay [Werdegar] and I have always enjoyed this celebration of the students who win the award, the terrific work of the historical society, but particularly, Selma, your leadership with this program that mentors young students. And they get to meet you, and I hope that all of you, if you have not already, that you "Google" Selma, because if I were to tell you about her background, we would be here until midnight, and I think she's only giving me a few minutes. And I will also say I thank Richard [Rahm] for his leadership, and Chris [Stockton], because of how important it is to have this focus. I'm also grateful that, in looking at where you all hail from, these are truly national winners. Your topics sound very exciting and provocative. So, thank you, thank you for this privilege of being able to share this celebration of these honors with you, with the great Selma Moidel Smith.

RAHM: Thank you.

SMITH: Thank you. You see, that's who we have that we can be so proud of. When I have national meetings, I'm so pleased and proud to be able to say, yes, I'm from California, and, of course, we have our "Chief Tani."

RAHM: I agree.

CHIEF JUSTICE: Thank you, Selma. It's a privilege; thank you.

SMITH: As she also knows, my closing words will be with Kathryn. She has gone with me from one to another of the occasions in which we have had our annual students' competition. On each occasion, she has added her good thoughts, her kindness. It's the kind of friendship that lasts, and has, over years, all on the Board of Directors in the California Supreme Court Historical Society. So, like it or not, we become captive to our attributes, to our wishes, to our good thoughts for others.

I just want to say, if I could possibly do it all at one time, I would reach out and make a big hug and thank you for all the contributions.

WERDEGAR: And we'd reach out to you —

SMITH: We'll see your articles in our journal in the fall, and all of you will see your papers and you will see each others'. And I just want to tell you that you've made a bright day, and a bright year, and added to a bright life. Thank you so much to all of you. And Chris, thank you for guiding the technical process, and I want you to know that I expect you will take my thank-you back to your office. And Richard Rahm gets my absolute thanks because not too many people who are scheduled for surgery — thank you again for moving out your really personal matter — and I hope you're never in that spot again. I wish you the very best on your knee operation, and I'll have a good thought for you, as I'm sure we all will.

Thank you, thank you, thank you, in every language that ever existed and one that comes only from the heart. Thank you all.

RAHM: Thank you so much, Selma. Actually, you remind me of a quick anecdote. Once, when I was working on an article for the *California Legal History* journal, I was in my office sending emails to Selma around midnight, thinking, you know, that sometime the next day we would discuss them, and — bam! — immediately, she replied at midnight, and there would be emails waiting for me at 7:00 in the morning. So, I don't know when she sleeps, but — just absolutely incredible.

I want to thank you, Taylor, and congratulations — what fantastic news — and thank you for your paper; I really enjoyed reading it. And likewise, Gus. Thank you very much, and congratulations. And, finally, Brittney, thank you so much for your paper. And then, Chief, thank you for your remarks. Thank you for being here. Justice Werdegar, thank you so much. And again, Selma, thank you. Chris, thank you for putting this together online. With that, I think we've concluded.

SMITH: Have a lovely day. And also — when my heart is in it, there they go [gesturing a hug to everyone].

RAHM: Yes!

ALL: Yes, definitely [gesturing the same].

* * *

RONALD REAGAN v. CRLA:

Politics, Power, and Poverty Law

TAYLOR COZZENS*

On Christmas Eve, 1970, Lewis Uhler, director of the California Office of Economic Opportunity, shared a confidential 283-page report with Governor Ronald Reagan that catalogued four years and 127 cases of alleged misconduct by the attorneys of the California Rural Legal Assistance (CRLA).[1] Created in 1966 during President Lyndon B. Johnson's War on Poverty, the CRLA had eleven small offices throughout California in which federally funded attorneys provided free legal services to the rural poor, including many Mexican-American farmworkers. These attorneys, Uhler charged, were out of control. According to his report, they had been supplying inmates of the San Quentin State Prison with "subversive literature." They had also violated 1968 grant restrictions by working on criminal cases and by providing legal counsel to the United Farm Workers

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* M.A. 2020 and Ph.D. student, University of Oklahoma History Department.

[1] "Reagan, CRLA In Test: Governor Vetoes Legal Aid Funds, Charges Violations," *Long Beach Independent*, Dec. 27, 1970. Box 67, Folder 2. CRLA Records (M0750). Dept. of Special Collections and University Archives, Stanford University Libraries, Stanford, Calif.

Union. On a more trivial level, a CRLA attorney in a visit to a local high school had used the F-word in front of students. In another instance, an attorney had appeared barefoot in court. As a wild example, the report charged that, in an effort to defend juvenile delinquents, the CRLA had "spirited away" a fifteen-year-old girl to Tijuana, Mexico, so she could marry without parental consent.[2] To borrow Uhler's words, "these represent only a few of the alarming examples of CRLA's failure to accomplish its mission, comply with its grant conditions, or control the sometimes outrageous and irresponsible conduct of its employees."[3]

On December 26, 1970, with the report in hand, Reagan exercised his prerogative as governor to block the CRLA's annual funding package of $1.8 million from the federal Office of Economic Opportunity (OEO), the entity from the Johnson era that administered War on Poverty programs. Explaining this decision, Uhler declared, "The failure of the CRLA has been so dramatically brought to this administration's attention that there is no choice but to recommend the disapproval of CRLA funding."[4] Once the governor's veto became official, Uhler, Reagan, and other members of Reagan's administration looked ahead to the new year when, if all went as planned, the young poverty law agency would wither and die.

The matter was far from closed, however. While War on Poverty legislation gave governors authority to veto funding packages for federal programs in their states, the OEO in Washington retained authority to override such vetoes if it saw fit. Thus, Reagan and Uhler still had to convince Frank Carlucci, the new OEO director of the Nixon administration, that the veto and the report on which it was based were legitimate. They also had to prepare for the CRLA's response to their charges. As soon as the report became public, dozens of attorneys whom they had slandered would present their version of the 127 cases. Given Uhler's obviously one-sided accounts, the Reagan administration had to bank on some political favoritism from Carlucci and the conservative Nixon administration.

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[2] See Lewis K. Uhler, "A Study and Evaluation of California Rural Legal Assistance, Inc, 1971." Carton 78, Folder 24, CRLA Records, Stanford.

[3] "Lack of Direction was Reason for CRLA Veto," *Antioch Ledger*, Jan. 5, 1971. Box 67, Folder 2, CRLA Records, Stanford.

[4] Ibid.

For the CRLA, the Uhler report brought intense scrutiny from the federal government as well as the imminent possibility of termination. If the Nixon administration wanted to dismantle or change federal programs from the Johnson era, Reagan's veto made it easy to do so. The CRLA, therefore, not only had to respond to Uhler's charges, but it also had to demonstrate that it was providing an essential service to impoverished citizens. Consequently, what should have been a regular refunding cycle became a fight for survival. In its four years of existence, the CRLA had fought — and won — several large lawsuits, including suits against the Reagan administration, on behalf of California's rural poor (hence Reagan's desire to be rid of the agency). This battle for survival, however, became one of the agency's most significant cases.

By defending itself, the CRLA defended, by extension, California farmworkers' access to the legal system and their ability to use the law to protect their civil rights. More broadly, in the fight for its own survival, the CRLA defended President Lyndon Johnson's idea that federal programs really could lift American citizens out of poverty. This idea directly challenged resurging conservative voices that called for state autonomy and a small federal government. This case represented a clash of political ideologies, as well as a power struggle between farmworkers and their federal allies on one hand and growers and their state allies on the other. The outcome would shape rural California society for decades.[5]

In the study of modern California farmworkers, scholars and popular society have paid far more attention to Cesar Chavez and the public protest

[5] Reagan's battle with the CRLA has received limited scholarly attention. In 1972, Michael Bennett and Cruz Reynoso published a thorough, first-hand account of the CRLA's early legal strategy and self-defense; see Bennett and Reynoso, "California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice," *Chicana/o Latina/o Law Review* 1, no. 1 (1972): 1–79. During the next decade, other legal scholars examined the vulnerability of legal service agencies to political pressure; see: Jerome B. Falk and Stuart R. Pollak, "Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services," *Hastings Law Journal* 24, no. 4 (1973): 599–646; Angela F. Turner, "President Reagan and the Legal Services Corporation," *Creighton Law Review* 15 (1982): 711–32. Overall, these articles do not fully examine the history of the CRLA and Governor Reagan's veto in the larger context of the War on Poverty and California farmworker history.

of the United Farm Workers Union (UFW) than to the CRLA.[6] The CRLA was significant, however, because it gave farmworkers something that they had never had in the past two hundred years, regardless of union involvement — namely, free access to attorneys and, in turn, legal protection. From Native American workers on Spanish missions, to Chinese and Japanese immigrants, to Anglo-American transients (or "bindlemen"), to Mexican immigrants, farmworkers in California history were migrants, foreigners, minorities, or all of the above. As such, they lacked the full benefits of citizenship, including legal protection, and they were often treated, in historian Richard Street's words, as "beasts of the field."[7] In the early 1900s, one journalist lamented, "California has passed laws for the protection of migratory birds, but it can not [*sic*] pass laws for the protection of migratory workers."[8] This lack of legal protection contributed to the poverty of all farmworker groups and to their powerlessness against racism, injustice, and violence. In the 1930s, Carey McWilliams concluded that "the exploitation of farm labor in California . . . is one of the ugliest chapters in the history of American industry." He added, "time has merely tightened the system of [land] ownership and control and furthered the degradation of farm labor."[9]

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6 Scholarship on Chavez and the UFW has overshadowed the CRLA. Historians who have examined Chavez and the union include: Jacques Levy, Richard Jensen, John Hammerback, Miriam Pawal, Frank Bardacke, Matt García, and Randy Shaw. Shaw goes so far as to argue that the legacy of Chavez and the UFW set the course for virtually all social justice projects that followed. This argument and much of the scholarship often overlooks the parallel role of the CRLA. Indeed, scholar Ellen Casper's 1984 dissertation, "A Social History of Farm Labor in California with Special Emphasis on the United Farm Workers Union and California Rural Legal Assistance" (Ph.D. diss., New School for Social Research, 1984), is one of the only book-length pieces of scholarship that gives the CRLA equal attention alongside the UFW; published as Ellen Casper Flood, "A Social History of Farm Labor in California with Special Emphasis on the United Farm Workers Union and California Rural Legal Assistance," *California Legal History* 15 (2020): 293–516. See also Randy Shaw, *Beyond the Fields: Cesar Chavez, the UFW, and the Struggle for Justice in the 21st Century* (Berkeley: University of California, 2008), Preface and Introduction.

7 Richard Steven Street, *Beasts of the Field: A Narrative History of California Farmworkers, 1769–1913* (Stanford: Stanford University, 2004), xv–xxv.

8 *San Francisco Bulletin*, Quoted in Street, *Beasts of the Field*, 526.

9 Carey McWilliams, *Factories in the Field: The Story of Migratory Farm Labor in California* (Boston: Little, Brown, 1944[1939]), 7; for a discussion of vigilantism against minority farmworkers, see 134–51.

The three decades preceding the 1960s witnessed even more tightening and degradation. During the Great Depression, Dust Bowl refugee families who were desperate for work flowed into the state. Despite John Steinbeck's tribute that "their blood [was] strong" and McWilliams' argument that *these* workers, as opposed to immigrants, were "American citizens familiar with the usages of democracy," they faced tremendous bigotry, poverty, exploitation.[10] As with other farmworker groups, transience, along with poverty and prejudice, effectively barred them from using the legal system in their defense. As one Dust Bowl refugee said of California growers, "when they need us they call us migrants, and when we've picked their crop, we're bums and we got to get out."[11]

The following decade, Mexican immigrants became the main source of labor because, as scholar Joon Kim argues, the California Farm Bureau Federation and the American Farm Bureau Federation had long recognized that these workers were easiest to deport once harvest season ended.[12] The state's trend toward temporary Mexican labor culminated in the Bracero Program, a bilateral agreement between the U.S. and Mexican governments. The program began during World War II when U.S. businesses needed Mexican workers to fill the jobs left by military recruits. However, as Miriam Pawal writes, "the agricultural industry found this new workforce so cheap and malleable that growers successfully lobbied to extend the program long after the veterans returned home."[13] In the postwar years of agricultural expansion, tens of thousands of Bracero laborers entered California each year to weed, thin, and harvest the crops. To growers, they were ideal stoop laborers. They accepted low wages, lived

[10] McWilliams, *Factories*, 306; John Steinbeck, *Their Blood is Strong* (San Francisco: Simon J. Lubin Society, 1938), 7–9, 20–23; During the mid-1930s, Steinbeck worked as a journalist, documenting the experiences of migrant workers in California. His real-life accounts of poverty, malnutrition, and death inspired his 1939 fictional masterpiece *The Grapes of Wrath*.

[11] John Steinbeck, *The Harvest Gypsies* (1936), in Eric Foner, *Voices of Freedom: A Documentary History*, vol. 2, 6th ed. (New York: W.W. Norton, 2020), 165 (163–65).

[12] Joon Kim, "California's Agribusiness and the Farm Labor Question: The Transition from Asian to Mexican Labor, 1919–1939" *Aztlan* 37, no. 2 (2012): 47–72.

[13] Miriam Pawal, *The Crusades of Cesar Chavez: A Biography* (New York: Bloomsbury, 2014), 54–55. The term *bracero* was derived from *brazo*, the Spanish word for arm, reflecting the laborers' role as extra hands.

wherever their employers directed, came and went based on their employers' needs, and had virtually no legal recourse.[14]

Braceros, of course, were not the only labor source. Many growers and workers avoided the bureaucracy of the Bracero Program by using unauthorized channels for immigrant labor.[15] Additionally, a third group of farmworkers included domestic Mexican Americans, many of whom had been born in the United States, spoke English, and saw themselves as different from temporary workers from Mexico. In rural California, Braceros, undocumented workers, and Mexican Americans competed for work, and many growers used Bracero laborers to break strikes, depress wages, and avoid negotiations with Mexican-American crews.[16] For agribusiness, the Bracero Program helped create a golden age of labor; for workers, as Walter

[14] Despite these deplorable conditions, hundreds of thousands of impoverished Mexican men signed up for the program year after year, enabling its longevity. In many cases, these men had been landless agricultural wageworkers or small, struggling farmers in rural regions, and the Mexican state's agricultural policies of the mid-twentieth century, which benefited large growers, marginalized them even more. For these men, work in the United States, even stoop labor, meant increased earnings and a sense of progress or modernity. The Mexican government embraced the Bracero Program because, as scholar Alexandra Délano notes, it represented a "safety valve . . . to muffle problems related to unemployment and social tension in the country, and guarantee the entry of dollars through remittances," which totaled $200 million between 1954 and 1959. See Délano, *Mexico and its Diaspora in the United States: Policies of Emigration since 1848* (New York: Cambridge, 2011), 98; see also Deborah Cohen, *Braceros: Migrant Citizens and Transnational Subjects in Postwar United States and Mexico* (Chapel Hill: University of North Carolina, 2011), 11; Timothy Henderson, *Beyond Borders: A History of Mexican Migration to the United States* (Malden, Mass.: Wiley-Blackwell, 2011), 59–63, 88–90; Hiroshi Motomura, *Immigration Outside the Law* (New York: Oxford, 2014), 42.

[15] See Ronald L. Mize and Alicia C. S. Swords, *Consuming Mexican Labor: From the Bracero Program to NAFTA* (North York: University of Toronto, 2011), 40; see also Motomura, *Immigration*, 38–40.

[16] Throughout the 1950s, growers used Bracero workers to break the strikes of Mexican American–led organizations such as the National Farm Labor Union. Furthermore, as the work of Miriam Pawal illustrates, grower associations in collusion with state officials perfected the practice of hiring Braceros over domestic workers. See Pawal, *Crusades*, 52–62; see also See Ernesto Galarza, *Spiders in the House and Workers in the Field* (South Bend: University of Notre Dame, 1970); Dionicio Nodín Valdés, *Organized Agriculture and the Labor Movement Before the UFW: Puerto Rico, Hawaii, California* (Austin: University of Texas, 2014).

P. Reuther of the AFL-CIO argued, it used "poor Mexicans to still further impoverish poor Americans."[17]

In the 1960s, federal policy began to interrupt agribusiness's golden age. The industry's use of cheap, transient labor fundamentally clashed with President Lyndon B. Johnson's vision of a Great Society that beckoned its people toward "an end to poverty and racial injustice."[18] Furthermore, Johnson's War on Poverty, with its aggressive spending on poverty-reduction programs, threatened to destabilize industries that relied on large numbers of poor workers. In rural California, two principles of the War on Poverty combined in the creation of the CRLA, which growers soon labeled "agriculture's oldest antagonist."[19] The first idea held that the poor throughout the nation needed and deserved access to attorneys. The second involved the Johnson administration's focus on migrant workers, especially Mexican-American farmworkers.

Johnson's idea that the poor deserved attorneys built on the work of President John F. Kennedy. In June of 1963, in the wake of massive civil rights demonstrations and police brutality in the Alabama and other southern states, Kennedy had emphasized the need for "legal remedies" to racial injustice, and, to provide such remedies, he had called on Congress to enact civil rights legislation.[20] In addition to laws, Kennedy also recognized the need for lawyers. This same month, he created the Lawyers' Committee for Civil Rights and invited 244 attorneys to the White House for an inaugural meeting. At the meeting, Vice President Johnson and Attorney General Robert Kennedy called on these lawyers to use the legal system to help American society put civil rights law into practice.[21]

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[17] Letter from Walter P. Reuther to President Lyndon Johnson, Oct. 27, 1964. Box 18: Labor (GEN LA 5, 10/1/1964); Folder: LA 5 Migratory Labor–Seasonal Labor 10/1/64–12/25/64. Lyndon Baines Johnson Presidential Library, Austin, Texas.

[18] Lyndon B. Johnson, "Remarks at the University of Michigan," May 22, 1964, in Bruce J. Schulman, *Lyndon B. Johnson and American Liberalism: A Brief Biography with Documents* (Boston: Bedford/St. Martin's, 2007), 193 (192–96).

[19] Don Razee, "Agricultural Work is Unfit, CRLA Contends," *California Farmer*, May 18, 1968. Box 65, Folder 6, CRLA Records, Stanford.

[20] "John F. Kennedy, Speech on Civil Rights, 1963," in Eric Foner, *Voices of Freedom: A Documentary History*, vol. 2, 6th ed. (New York: W.W. Norton, 2020), 266.

[21] See Michelle D. Bernard, *Moving America toward Justice: The Lawyers' Committee for Civil Rights Under Law, 1963–2013* (Virginia Beach: Donning, 2013); Ann Garity Connell, *The Lawyers' Committee for Civil Rights under Law: The Making of a Public*

Following Kennedy's assassination, Johnson continued to support the Lawyer's Committee. In a 1964 letter to committee leaders, he wrote, "I hope you will convey to all of the members . . . my personal interest in the work you are undertaking. Lawyers are uniquely qualified to play a leadership role in their communities in [the fight for civil rights] and I believe their active participation should be encouraged."[22]

For Johnson, however, the Lawyers' Committee was only a first step. In his vision, all poor citizens, especially minorities, had to have access to attorneys in order to challenge injustices in an effective, nonviolent way. In 1965, the Department of Justice and the OEO organized a Law and Poverty Conference at which members of the American Bar Association discussed this goal. "Equal justice for every man is one of the great ideals of our society," declared future Supreme Court Justice Lewis F. Powell. "We also accept as fundamental that the law should be the same for the rich and for the poor. But we have long known that the attainment of this ideal is not easy." The challenge, Powell continued, is that "our system of justice is based in large part on advocacy — on battle, if you will, in which lawyers have replaced warriors. When there is no one to do battle for an individual, his chances of obtaining justice are lessened."[23] By the mid-1960s, the concept of legal services was not new, but existing agencies were few in number, understaffed, and underfunded. As Howard Westwood, an experienced poverty lawyer, argued in 1966, "no single step could be more effective in securing competent, hard-hitting representation [for the poor] than to get away from the pauper level of compensation for legal aid staffs."[24] The OEO under Johnson responded to this need by investing millions of dollars in over one hundred new or revitalized legal service agencies that began waging battles for poor

Interest Law Group (Washington D.C.: Lawyers' Committee for Civil Rights Under Law, 2003).

22 Letter from Lyndon Johnson to Mr. Bernard Segal and Mr. Harrison Tweed, Jan. 21, 1964. Box 41: Judicial–Legal Matters, Gen JL 6 12/6/67–1/20/69; Folder: JL 7 Lawyers–Legal Aid. LBJ Library.

23 Lewis F. Powell, "The Response of the Bar," *American Bar Association Journal* 51 (Aug. 1965): 751.

24 Howard C. Westwood, "Legal Aid's Economic Opportunity," *American Bar Association Journal* 52 (Feb. 1966): 129 (127–30).

individuals and groups.[25] The program quickly became, in the words of one journalist, "at once the most successful and controversial of the OEO operations."[26]

Of all the poverty law agencies, the CRLA was the largest and most controversial, and its client base reflected a second focus of the War on Poverty: migrant workers, most of whom were Mexican Americans. During Johnson's first year in office, the federal government established this focus. As the OEO reported, "Cognizant of a situation wherein more federal money was being allocated for the feeding and care of migratory birds than for migratory humans in the United States, Congress specified in the EOA [Equal Opportunity Amendment] of 1964 that OEO was to implement programs for them."[27] In the following years, federal authorities tried to fulfill this mandate, giving credence to the idea that, as one religious leader wrote to Johnson in 1965, "the *most* voiceless and voteless citizens in this land are migratory farm workers."[28]

Johnson's personal interest in Mexican-American communities lent tremendous energy to this federal initiative. As a young man, he had worked as a teacher and principal in the "Mexican school" of Cotulla in southern Texas. Later, as an administrative aid to Congressman Richard Kleberg during the Great Depression, he witnessed the way that government aid could lift poor, rural communities to new levels of prosperity.[29] These experiences shaped his approach to the presidency.[30] As the work

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[25] For a list of over 120 legal service agencies across the nation and their grant amounts, see "Justice: Report of the Legal Services Program of the Office of Economic Opportunity to the American Bar Association, Aug. 8–11, 1966," 25–31; Box 41: Judicial–Legal Matters, Gen JL 6 12/6/67–1/20/69; Folder: "JL7 Lawyers–Legal Aid," LBJ Library.

[26] Ridgeway M. Hall, Jr., "Advocates for the Poor: Legal Services, Inc.," *The New Republic*, May 29, 1971. Box 45, Folder 8, CRLA Records, Stanford.

[27] Report, "The Office of Economic Opportunity During the Administration of President Lyndon B. Johnson, November 1963–January 1969," 1969, 390–91; Box 1: Administrative History of the OEO, Volume 1; Folder: "Part 1: Narrative History," LBJ Library.

[28] Rev. James L. Vizzard, "Meeting the Needs of Migrant Workers," Nov. 17, 1964. Box 18: Labor, Gen LA 5, 10/1/1964; Folder: LA 5 Migratory Labor — Seasonal Labor 10/1/64–12/25/64. LBJ Library; emphasis in original.

[29] Robert A. Caro, *The Years of Lyndon Johnson: The Path to Power* (New York: Knopf, 1982), 166–73, 241–60.

[30] To be sure, Johnson was an insecure man who relished power, wealth, and recognition. However, he satisfied his desire for power and recognition by helping the

of Julie Leininger Pycior makes clear, Mexican-American communities formed a central part of Johnson's political thinking, and, while the relationship between the president and these communities was sometimes contentious, Johnson had a firm desire to use federal programs to help Mexican-American communities break cycles of poverty.[31]

One of the Johnson administration's first efforts to help these communities involved promoting and supporting Congress's decision to end the Bracero Program.[32] As Johnson himself explained, "One of the goals of the Great Society is to guarantee all Americans the dignity and economic security that flow from the full use of their talents. The termination on December 31, 1964, of Public Law 78 [The Bracero Program] marked an important milestone in our efforts to find jobs for more Americans. It also signaled the end of a system that all too often ignored basic human values."[33] Another effort to help Mexican-American communities involved the creation in 1967 of the Inter-Agency Committee on Mexican American Affairs and the appointment as chairman of Vicente Ximenes, a civil rights leader from southern Texas. To the new committee, Johnson prescribed a mandate to "assure that Federal programs are reaching the Mexican Americans and providing the assistance they need" and to "seek out new programs that may be necessary to handle problems that are unique to the Mexican American community."[34]

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poor. Along with African-American communities, Mexican Americans were at the top of his list. See Robert Dallek, *Flawed Giant: Lyndon Johnson and His Times, 1961–1973* (New York: Oxford University, 1998), 6; see also, Caro, *Path to Power*, xiii–xxiii.

31 Julie Leininger Pycior, *LBJ and Mexican Americans: The Paradox of Power* (Austin: University of Texas, 1997), xiii–xvi.

32 In 1963, Kennedy had responded favorably to the call from the Catholic Church and labor unions to end the Bracero Program, but the program was entrenched. See Délano, *Mexico and its Diaspora*, 98.

33 Letter from Lyndon B. Johnson to Reverend Cameron P. Hall, Apr. 17, 1965. Box 17: Labor (GEN LA 3 4/9/66); Folder: LA 5 Migratory–Seasonal Labor 11/22/63–6/2/65. LBJ Library.

34 See Letter from Vicente T. Ximenes to Joseph Califano, Dec. 17, 1967. Box: 386 (Ex FG 686A); Folder FG 687 Interagency Committee on Mexican American Affairs (11/22/63–12/31/67). LBJ Library; see also Michelle Hall Kells, *Vicente Ximenes, LBJ's Great Society, and Mexican American Civil Rights Rhetoric* (Carbondale: Southern Illinois University, 2018).

In California, Johnson's interests in farmworkers and in attorneys came together in the creation of the California Rural Legal Assistance. In May of 1966, the agency received its first annual federal grant of $1.27 million from the OEO, and, over the next six months, it began operating in eight field offices in El Centro, Santa Maria, McFarland, Salinas, Madera, Modesto, Gilroy, and Santa Rosa. Soon thereafter, the agency added an office in Marysville and established a central office in San Francisco.[35] Field offices corresponded to the highly productive agricultural valleys that were home to large numbers of rural poor: San Joaquin, Imperial, Sacramento, Salinas, Sonoma-Napa, and Santa Maria. To staff each office, CRLA directors recruited young lawyers who, in general, lacked experience but possessed talent and enthusiasm. In late 1966, the average age of a CRLA attorney was 30.5, and the average workday lasted more than fourteen hours.

Additionally, the CRLA hired bilingual community workers for each office, many of whom were former field workers. As CRLA directors explained, these individuals "were well acquainted with the problems and politics of rural California," and they could help the attorneys work with client communities. In its first six months, the CRLA handled 1,223 cases on behalf of approximately 1,650 clients. Many cases simply required legal advice and document preparation. Others involved court appearances.[36] As the agency became more widely known, demand for its services increased. In 1968, the central office lamented, "Every CRLA regional office has found that it is physically impossible to offer adequate legal services to all, or even a majority, of those who seek and are eligible for its services." This same year, the agency reported a potential clientele of some 577,000 people.[37]

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[35] In succeeding years, the CRLA opened offices in Arvin, Coachella, Delano, Fresno, Oxnard, San Luis Obispo, Stockton, Vista, and Watsonville. The Gilroy and McFarland offices were closed. See "Office Listing," California Rural Legal Assistance, Inc., https://www.crla.org/office-listing (accessed Jan. 20, 2020).

[36] "Report to the Office of Economic Opportunity and CRLA Board of Trustees on Operations of California Rural Legal Assistance, May 24, 1966–Nov. 23, 1966." Box 7, Folder 1, CRLA Records, Stanford; "A CRLA Casebook: Selected Clippings and Summaries of 1968 Cases." Box 28, Folder 1, CRLA Records, Stanford.

[37] "Report to the Office of Economic Opportunity and CRLA Board of Trustees on Operations of CRLA, Dec., 1967–Sep., 1968, in Support of Application for Refunding," 1968. Box 45, Folder 1, CRLA Records, Stanford.

While the CRLA served all sectors of the rural poor, approximately 50 percent of its clients were Mexican-American farmworkers, many of whom were migrants. CRLA attorneys recognized that farmworkers were the "largest and most cohesive group" of California's rural poor, and they quickly became specialists in problems involving housing contracts, immigration status, agricultural employers, and welfare. Given the vast number of individual cases, however, CRLA directors instructed community workers to handle these matters whenever possible. Attorneys, they stated, should "strive to take cases which affect a large number of people, will result in an important change in the law, or will prevent or rectify a great hardship or injustice."[38] As the lawyers followed these directions, they became, as one journalist observed, "ombudsmen for the poor," not only representing "individual indigents in minor court actions," but also "sue[ing] state and local governments on behalf of . . . large groups of [farmworkers]."[39]

Overall, around 80 percent of attorneys' time remained focused on day-to-day matters.[40] However, it was the other 20 percent, the large class-action cases, that marked CRLA attorneys as ombudsmen — and provoked the ire of growers and their government allies. In 1966, the lawyers of the McFarland field office issued formal complaints against the authorities of the nearby town of Wasco for providing the Mexican-American and African-American section of the town with unsanitary drinking water from an independent utility company, while the rest of the town enjoyed safe water from the municipal facility. If these administrative procedures did not yield results, the lawyers warned, "we will consider equity actions against the city of Wasco and damage actions . . . against the independent utility and the city."[41] With aggressive action of this kind, CRLA attorneys began shocking authorities who were not in the habit of worrying about or acquiescing to minority needs.

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38 "Report to the Office of Economic Opportunity," 1966.

39 "Poverty Law: Threat to the Ombudsmen," *Time Magazine*, Chicago, Illinois, Nov. 7, 1969. Box 65, Folder 6, CRLA Records, Stanford.

40 See Bennett and Reynoso, "CRLA: Survival," 19.

41 "Report on Operations," 1966. Box 7, Folder 1. CRLA Records, Stanford. Notably, while farmworkers received much of the CRLA's attention, the agency also helped other minority groups. In 1966 and 1967, the Santa Rosa office worked on cases for the Pomo Indian tribe involving job training and land rights.

The following year, the agency locked horns with Governor Ronald Reagan in the first of several battles. In November of 1966, Reagan had trounced two-term incumbent Governor Edmund "Pat" Brown, arguing that Brown, who had supported President Johnson, was doing "more and more for those who desire to do less and less."[42] He had further articulated an anti-welfare response to the liberalism of LBJ's War on Poverty. "We represent the forgotten American," he wrote, "— that simple soul who goes to work, bucks for a raise, takes out insurance, pays for his kids' schooling, contributes to his church and charity and knows that there just '*ain't no such thing as a free lunch.*'"[43] Making good on his campaign promise, the new governor immediately took steps to remove 1.5 million people from California's medical-assistance program. To his chagrin, the CRLA used litigation to prevent the removal.[44] Soon thereafter, the agency forced the governor to accept that there *was* such a thing as a free lunch — and it would be provided by his administration. Through its "hunger suits" from 1968 to 1970, the CRLA won victories that required the California Department of Agriculture to distribute surplus commodities to needy families and free milk to low-income school children, many of whom were Mexican American.[45] Again, Governor Reagan saw his policies thwarted.

The agency made even more enemies in the fall of 1967 when it used a lawsuit to end the Bracero Program for good. Although the federal government had officially ended the program in 1964, it had struggled to resolve growers' complaints of labor shortages. As a result, Secretary of Labor Willard Wirtz had been authorizing the importation of foreign labor (mostly Mexican) on a case-by-case basis for nearly three years. While some labor shortages did exist, California growers often exaggerated their severity because they preferred to import cheap Bracero laborers rather than

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[42] See Report by Marianne Means, Oct. 15, 1966. Box: 33 EX PL-ST 5 (6/15/64–9/30/64); Folder: PL/ST 5 (9/8/66–4/8/67), LBJ Library; see also Lou Cannon, *Governor Reagan: His Rise to Power* (New York: Public Affairs, 2003), 3–9, 160–61.

[43] "The Republican Party and the Conservative Movement," *National Review*, Dec. 1, 1964; emphasis in original, quoted in, Cannon, *Governor Reagan*, 132.

[44] "See "Poverty Law: Threat to the Ombudsmen."

[45] See Ron Taylor, "CRLA Creates Shock Waves in Hunger-Fighting Lawsuits," *Fresno Bee*, May 24, 1970. Box 65, Folder 6, CRLA Records, Stanford; see also, "Suit Settled: More Free Milk for State's Kids," *San Francisco Chronicle*, March 17, 1970. Box 65, Folder 3, CRLA Records, Stanford.

negotiating with and hiring domestic Mexican-American workers.[46] The CRLA exposed this strategy in 1967 by suing the Department of Labor in federal court for authorizing the entry of 8,100 Mexican workers for California growers. As the attorneys charged, these growers had not only overlooked Mexican-American workers, but they had actively discouraged the domestic workers by refusing to offer them minimum wages and written contracts and by "excluding [them] from local housing in order to retain such housing for braceros."[47]

At first blush, a suit against specific growers may have seemed more logical than a suit against the Department of Labor, which, during this time, was a fellow ally of farmworkers. In general, however, the CRLA demonstrated a proclivity for suing the entity in the highest position of authority. Plus, the agency surely foresaw less resistance from the Department of Labor than from California's agricultural industry. It was correct. In response to the CRLA's suit, Secretary Wirtz quickly rescinded the authorization for more Braceros and told California growers to hire the domestic workers. In an effort to subvert Wirtz's instructions, the Madera Union School District postponed the first day of school so that high school students could work in the fields. The CRLA nipped the plan in the bud by suing the school board and several employers.[48]

These growers and their allies were irate. Congressman B. F. Sisk wrote to the president, threatening to "take this matter to the Congress unless the intractable positions of the Department of Labor and OEO are reversed." "I cannot stand idly by while the Federal Government kicks my farmers around," he added.[49] Similarly, Senator George Murphy stated that, "the

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[46] See Letter from W. Willard Wirtz to James B. Utt, July 12, 1965. Box 18: Labor (GEN LA 5 10/1/1964); Folder: LA 5 6/24/65–8/26/65. LBJ Library.

[47] "Braceros in California: Summary of the CRLA Brief to the Department of Labor," Sep. 19, 1967. Carton 174, Folder 4, CRLA Records, Stanford. CRLA lawyers further charged that growers' blanket requirement that all employees be able to lift sixty pounds discriminated against domestic female workers, who, according to state law at the time, could only be required to lift twenty-five pounds. By the late 1960s, approximately one-third of all field workers were female, but many growers preferred the all-male ranks of the Braceros. The CRLA in this and other cases helped protect the rights of Mexican and Mexican-American women who wished to work in the fields.

[48] See Letter from Congressman Bernie Sisk to Lyndon Johnson, Sep. 22, 1967. Box 19: Labor (GEN LA 5 8/27/65); Folder: LA 5 6/11/67–1/31/68. LBJ Library.

[49] Ibid.

citizens of California have been horrified by the spectacle of CRLA lawyers, paid by their tax dollars, going to court against the Secretary of Labor . . . also paid by the taxpayers, in an action which will inevitably result in losses to farmers and higher food prices to American consumers."[50]

Neither Secretary Wirtz nor the OEO were intimidated. In fact, the OEO began to encourage aggressive litigation like that of the CRLA. In 1968, it required all legal service agencies in the nation to demonstrate, as a condition for refunding, a history of not only "routine legal services," but also of "law reform," which it defined as any "innovative [legal work] designed to make a substantial impact on more than an individual client and the cycle of poverty."[51] The CRLA preferred the term "impact cases" to "law reform" because it was not really reforming the law, but rather using the law to help large groups. But regardless of terminology, the agency led the way in this endeavor.[52] This same year, the American Bar Association and the National Bar Association named the CRLA the nation's outstanding legal services program, and OEO director Donald Rumsfeld increased its budget by $200,000.[53]

Many officials admired the CRLA's impact cases because they led to social change. The suit against the Department of Labor, for example, involved much more than 8,100 workers from Mexico. Namely, it challenged on a legal basis California's tried-and-true practice of glutting the labor market and pitting different farmworkers groups against each other. Likewise, it sought to ensure jobs and decent wages for the state's Mexican-American farmworkers. In so doing, the lawsuit attacked the entrenched and racist notion that Mexicans and Mexican Americans were uniquely suited to low-paying stoop labor. As Senator Murphy had stated three years earlier in his defense of the Bracero Program, "You have to remember that Americans can't do [field work]. It's too hard. Mexicans are really good at that. They are built low to the ground, you see, so it is easier for them to

50 U.S., Congressional Record–Senate 90th Congress, 1st Session, (Sep. 28, 1967), quoted in Bennett and Reynoso, "CRLA: Survival," 8.

51 Memo from Burt W. Griffin, [OEO National Director of Legal Services Program], "Priorities and Policies on Refunding," Oct. 1, 1968. Carton 75, Folder 8, CRLA Records, Stanford.

52 See Bennett and Reynoso, "CRLA: Survival," 3.

53 See "CRLA Background," in "The CRLA Commission Hearings." Carton 21, Folder 49, CRLA Records, Stanford.

stoop."[54] The War on Poverty espoused a fundamentally different vision for labor and laborers in the United States, and in California CRLA litigation forced this vision, to an extent, on politicians such as Senator Murphy and Governor Reagan.[55] Speaking of the agency's lawsuits, conservative journalist Amity Shlaes writes, "These were not mere thorns in the governor's side. They were body blows."[56] Indeed they were, but they were also blows against racialized poverty in rural California.

Opponents hit back. In 1967, Reagan urged Murphy to add a regulation in Congress that would prevent OEO legal agencies from suing government entities. Murphy tried to do so but the regulation did not pass.[57] The following year, under pressure from conservative politicians in Congress, the OEO prohibited legal agencies from accepting criminal cases.[58] Also in 1968, the California Office of Economic Opportunity, with support from the regional OEO office, mandated that the CRLA could not provide legal aid to the United Farm Workers Union.[59] With this restriction, the state OEO prevented the formation of a powerful farmworker coalition.[60]

While they succeeded in placing some restrictions on the CRLA, Murphy, Reagan, and other opponents could not prevent the agency's attorneys from working as ombudsmen. In 1969, these attorneys participated in lawsuits against the U.S. Department of Agriculture regarding growers' liberal

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[54] See Ruben Salazar, "Murphy Statement," in *Border Correspondent: Selected Writings, 1955–1970* (Berkeley: University of California, 1995), 153.

[55] To use Pierre Bourdieu's theory of social distinctions, the agency endowed farmworkers with social and cultural capital by allying them with credentialed, no-cost attorneys. The CRLA's bilingual staff catalyzed this attorney–farmworker relationship. Thus, in the legal realm, the agency removed the social and economic distinctions that had historically kept farmworkers from weighing in on policy. Many politicians resisted this change. See Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, translated by Richard Nice (Cambridge: Harvard University, 1984), 12–13, 114–15.

[56] Amity Shlaes, *Great Society: A New History* (New York: Harper Collins, 2019), 358.

[57] See Hall, "Advocates for the Poor."

[58] See CRLA Memo from M. Michael Bennett to all directing attorneys, Dec. 31, 1968. Box 45, Folder 2, CRLA Records, Stanford.

[59] Ibid. See also Letter from Joe P. Maldonado (acting regional OEO Director) to James Lorenz (CRLA Director), Nov. 2, 1968. Box 45, Folder 2, CRLA Records, Stanford.

[60] After all, Cesar Chavez and the UFW spent tremendous time and energy defending themselves in court from grower coalitions. CRLA attorneys could have helped them immensely.

use of the pesticide DDT.[61] They specifically emphasized the consequences of DDT exposure for pregnant mothers, especially those who worked in the fields.[62] In many ways, this case laid the legal groundwork for the environmental justice movement in rural California.[63] In 1969, the CRLA also sued the California Board of Education for its practice of placing farmworker children in classes for the "mentally retarded" because they did not understand English. This lawsuit eventually forced the board to administer IQ tests in Spanish, move thousands of farmworker children into regular classes, and begin bilingual education programs.[64] With this victory, farmworker families took a significant step in breaking the cycle of poverty.

As the agency continued winning cases, political opposition intensified at all levels. In 1970, the chairman of the San Joaquin Valley School Board verbalized the feelings of some officials regarding the CRLA's effort to protect farmworkers' right to education. "We've built this Valley to what it is and we've gotten to where we are because there's cheap labor around," he stated. "When you come in talking about raising the educational vista of the Mexican-American . . . you're talking about jeopardizing our economic survival. What do you expect, that we'll just lie down and let you reformers come in here and wreck everything for us?"[65] Another shade of opposition

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61 See Luke W. Cole and Sheila R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York: New York University, 2001), 221 n. 32; see also Julie Sze, "Denormalizing Embodied Toxicity: The Case of Kettleman City," in *Racial Ecologies*, eds. Leilani Nshime and Kim D. Hester Williams (Seattle: University of Washington, 2018), 111.

62 Ibid. See also "CRLA Press Release: July 27, 1969." Box 65, Folder 1, CRLA Records, Stanford.

63 The environmental justice movement, which, in name, began in the 1980s, addressed minority communities' disproportionate exposure to waste facilities and other toxic hazards, such as pesticides. The CRLA contributed immensely to this movement through its practice of "environmental poverty law," i.e. poverty law that addressed environmental injustice. See Luke W. Cole, "Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law," *Ecology Law Quarterly* 19, no. 4 (1992): 620–21, 635–36, 641; Ralph Santiago Abascal and Luke W. Cole, "The Struggle for Environmental Justice: Legal Services Advocates Tackle Environmental Poverty Law," *Clearinghouse Review: Journal of Poverty Law* 29, no. 4 (1995).

64 See Mary Ellen Leary, "Children Who Are Tested in an Alien Language: Mentally Retarded? *The New Republic*, May 30, 1970. Box 65, Folder 6, CRLA Records, Stanford.

65 See Fundraising letter from Alberto Saldamando to California communities, 1982. Box 279, Folder 1, CRLA Records, Stanford.

emerged as people questioned the logic of a government agency that paid attorneys to sue other parts of the government. As Fred Marler, Jr. of the California Senate wrote in 1970, "There is certainly a need for legal services for those who cannot afford them but . . . CRLA's activities have resulted in the taxpayer financing lawsuits against himself, a situation which I don't believe should be allowed to continue."[66] Though logical, this perspective failed to appreciate the fact that CRLA lawsuits represented virtually the first time farmworkers had exercised their voice to shape policy in rural California.

As the decade drew to a close, Johnson's decision to step down and the election of Richard Nixon, a conservative politician and former California senator, augured well for those who wished to be rid of the CRLA. In 1969, George Murphy tried to set Reagan up for a decisive victory by rallying the Senate to remove the federal OEO director's authority to override governors' vetoes. On the Senate floor, Edward Gurney of Florida accused OEO attorneys of "agitation," and Barry Goldwater of Arizona stated that they were "inciting trouble." Building on such sentiments, Murphy added an amendment to a poverty-law bill that gave governors absolute veto power.[67] The 1969 Murphy amendment, as it became known, passed in the Senate, but, fortunately for the CRLA, it was defeated in the House.

Reagan attacked anyway. For years, he had wanted to cut the CRLA's funding, but because of the Johnson administration's support of the agency, this move had not been possible.[68] Under Nixon, however, Reagan trusted that things would be different. If the Murphy amendment had passed, a governor's veto would have created a perfect storm for the CRLA, but since it had not, the governor had to hope that the OEO under Nixon would take his side. To make a convincing case for a veto, Reagan enlisted the aid of Lewis Uhler, the ultra-conservative director of the California Office of Economic Opportunity, to discredit the CRLA and, by extension, the entire OEO legal services program.

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66 Letter from Fred W. Marler, Jr. to Governor Ronald Reagan, Dec. 18, 1970. Carton 29, Folder 16. CRLA Records, Stanford.

67 "Poverty Law: Threat to the Ombudsmen." See also Hall, "Advocates for the Poor."

68 See CRLA Press Release, Jan. 17, 1967. Box 65, Folder 1, CRLA Records, Stanford; see also Hall, "Advocates for the poor."

Reagan's plan to defund the CRLA perpetuated a history of gubernatorial opposition to federally mandated civil rights reform.[69] In 1957, Governor Orval Faubus of Arkansas tried to defy President Dwight D. Eisenhower's executive order to desegregate Little Rock Central High School.[70] Six years later, Governor George Wallace notoriously blocked the Foster Auditorium of the University of Alabama in resistance to the Kennedy Administration's court-ordered desegregation.[71] It would be unfair to lump Reagan into the same category as these incorrigibly racist and confrontational governors. His opposition to the War on Poverty appears ideological and political, rather than racial. With respect to California's Mexican-American communities, however, Reagan nonetheless resisted federal initiatives that sought to grant them greater civil rights. His effort to defund the CRLA was his most concerted effort in this regard.

His plan moved forward swiftly. In the fall of 1970, Uhler distributed a "CRLA Questionnaire" to thousands of California communities and legal firms with the explanation that the state OEO was evaluating the agency and wanted to be "as thorough as possible." Far from thorough, however, the evaluation had a mere eight questions, each of which seemed designed to dig up dirt. Question 5 asked: "Are CRLA members in your community involved, on behalf of CRLA, in community activities of an activist or political nature? If yes, please explain or give details." Question 7 asked if the CRLA had represented individuals in criminal court or individuals whose income passed the poverty line.[72] While such questions bespoke a smear campaign more than a professional evaluation, they helped Uhler write the 283-page report that catalogued 127 cases of alleged misconduct by CRLA

[69] Admittedly, the main motive behind the federal government's previous efforts to address racial discrimination was a desire to avoid embarrassment on the international stage. In the context of the Cold War, U.S. leaders touted their nation as a beacon of democracy, while at home the experience of minorities was anything but democratic. See Mary L. Dudziak, "*Brown* as a Cold War Case," *Journal of American History* 91 (June 2004): 32–42.

[70] See Karen Anderson, *Little Rock: Race and Resistance at Central High School* (Princeton: Princeton University, 2010).

[71] See E. Culpepper Clark, *The Schoolhouse Door: Segregation's Last Stand at the University of Alabama* (New York: Oxford University, 1993).

[72] "California Office of Economic Opportunity: Evaluation of the California Rural Legal Assistance Program." Carton 29, Folder 14, CRLA Records, Stanford.

attorneys. Uhler shared the report with Reagan on Christmas Eve. Forty-eight hours later, the governor had issued his veto.

The secrecy of the report and the swiftness of the veto raised questions about due process, for neither Reagan nor Uhler gave the CRLA an opportunity to see and respond to the cases of alleged misconduct before the veto was issued.[73] In hindsight, it appears that the governor wanted to stay one step ahead of the CRLA. Given the lack of transparency, CRLA director (and future California Supreme Court Justice) Cruz Reynoso called the veto a "deliberate scheme on the part of the governor to sabotage CRLA."[74] The following month, however, Uhler had to release his report to the public, and when he did CRLA attorneys started working. Typewriters did not rest until the agency had provided its own version of the 127 cases — along with 3,000 pages of evidence. According to the CRLA, 119 of the charges were false, four were slanderous lies, and six discussed attorney misconduct that the CRLA had already corrected.[75]

Returning to some of Uhler's specific charges, the attorneys provided ample evidence that they had indeed visited inmates of the San Quentin State Prison but had not distributed literature. Never had a CRLA attorney appeared barefoot in court. While the agency had accepted criminal cases, it had done so prior to the 1968 grant conditions which established this limitation. In the case of the F-word, a CRLA attorney had been giving a lecture on free speech, and, as an example, he had written "F*ck Vietnam" on the chalkboard (asterisk and all). Regarding the fifteen-year-old, she was already married when she came to the CRLA for legal aid.[76] In every case, it appeared that Uhler had omitted details or fabricated accusations in what CRLA attorneys called a baseless "hatchet job."[77]

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[73] See Cruz Reynoso et al., in "United States Office of Economic Opportunity: Memorandum of Fact and Law in Support of Immediate Refunding of California Rural Legal Assistance, Inc." Box 45, Folder 6, CRLA Records, Stanford.

[74] "Uhler Denies Reagan 'Out to Get' CRLA," *Berkeley Gazette*, Dec. 29, 1970. Box 67. Folder 2. CRLA Records, Stanford. Ironically, Reynoso and Uhler had been classmates at UC Berkeley School of Law.

[75] "CRLA's Answer to Uhler Report." Carton 27, Folder 7, CRLA Records; see also "Report on California State Economic Opportunity Office, Mar. 8, 1971." Carton 75, Folder 6, CRLA Records, Stanford.

[76] "Report on California State Economic Opportunity Office, Prepared by CRLA," Mar. 8, 1971. Carton 75, Folder 6, CRLA Records, Stanford.

[77] "CRLA Report to Office of Economic Opportunity, Jan. 13, 1971." Carton 75, Folder 18. CRLA Records, Stanford.

Nevertheless, the new OEO director in Washington, the conservative Frank Carlucci, did not override the veto. But neither did he uphold it. As he told a colleague, "I'd hate to base a veto on that report."[78] Finding a middle ground, Carlucci formed a "high-level commission" of three state supreme court justices, and he assigned them "to complete a full and impartial review of the [CRLA]." Notably, all three appointees had been Republicans before their appointment as supreme court justices had necessitated political neutrality.[79] The commission's final report, it was understood, would serve as the basis for Carlucci's final decision to either support Governor Reagan or override his veto. In the meantime, Carlucci decided to refund the CRLA only through July 1971, which would give the commission time to conduct the investigation.

This temporary funding, as many saw it, left the CRLA "in death row status."[80] While Carlucci insisted that this temporary measure did not amount to a "phase out or transition grant," many believed that the agency's days were numbered. After all, it would come as no surprise if Carlucci and Nixon decided to discontinue controversial programs from the Johnson era. For his part, Governor Reagan assumed this would be the case. In February, he smugly stated that he was "very pleased and gratified" that the federal OEO had upheld his veto, and he announced a plan to replace the CRLA with "a more responsible" and "professional" program called "Judi-Care," which would operate through local bar associations.[81] In reality, Judi-Care was designed to help individual clients but avoid impact cases, especially suits against the government.[82] Meanwhile, the CRLA prepared meticulously, almost desperately, for the federal investigation.

Reagan's confidence, it turned out, was premature. After arriving in California, the federal commissioners made it clear that they would conduct a thorough and impartial investigation — and they would use Uhler's report as

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78 "Carlucci Opinion of CRLA Cited," *Oakland Tribune*, Apr. 27, 1971. Box 158, Folder 13, CRLA Records, Stanford.

79 "The CRLA Commission Hearings." Carton 21, Folder 49. CRLA Records.

80 "CRLA Press Release," June 29, 1971. Carton 66, Folder 21, CRLA Records, Stanford.

81 "California: CRLA Compromise," *San Francisco Sunday Examiner & Chronicle*, Feb. 7, 1971. Box 158, Folder 11, CRLA Records, Stanford.

82 See "Study Shows It Would be More Costly Than CRLA," *Sacramento Bee*, Feb. 26, 1971; see also Ron Taylor, "Judicare in Place of CRLA," *Fresno Bee*, Feb., 1971. Box 158, Folder 11, CRLA Records, Stanford.

a starting point. From late April through early June, they held hearings in multiple cities, including San Francisco, Salinas, El Centro, and Soledad, and they heard nearly two hundred witnesses and examined hundreds of documents.[83] As they did so, it became increasingly evident that Uhler's charges were baseless.

The greatest indication of falsehood was Uhler's inability to substantiate his own claims. In the first hearing in San Francisco on April 26, Justice Robert Williamson, head of the commission, asked Uhler: "Will you accept the responsibility to present and examine witnesses [and to] offer and lay foundations for evidence . . . and furnish counsel?" A lawyer by trade, Uhler responded with a vague, "It is well understood we will provide all possible assistance." Justice Williamson was not satisfied. "Answer yes or no," he said twice. Finally, Uhler declared, "we cannot perform or participate in the form outlined by those questions." Now, even less satisfied, Williamson stated that if Uhler was not prepared to substantiate his report, the hearings would proceed without his participation. Uhler walked out. He later told reporters that he and Reagan were "standing solidly behind our report," but that it was never his intention to present witnesses or evidence. "What is the point of retracing a report on which a veto has been sustained?" he asked flippantly.[84]

Uhler seemed to be the only one who did not understand the importance of evidence. As one writer summarized, "Mr. Uhler is in the position of a prosecuting attorney who insists on a conviction but refuses to present his case."[85] Because of the Reagan administration's lack of cooperation, one judge appointed to the panel resigned and another was appointed in his stead. A different judge criticized the governor's office for not "accepting its responsibility to call witnesses and present other evidence in support of its many and serious charges." In any criminal or civil case, the CRLA pointed out, "the unwillingness of the accuser to defend his charges would spell the instant conclusion of the proceedings."[86]

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83 See "Before the Office of Economic Opportunity Commission on California Rural Legal Assistance, Inc: Closing Memorandum of the CRLA." Carton 75, Folder 16, CRLA Records, Stanford.

84 Lee Fremstad, "Uhler Refuses CRLA Case Challenge," *Sacramento Bee*, April 26, 1971. Box 158, Folder 13, CRLA Records, Stanford.

85 "Editorial: U.S. Says 'Prove it," Reagan's Team Can't," *San Luis Obispo Telegram Tribune*, May 7, 1971. Carton 29, Folder 2, CRLA Records, Stanford.

86 "The CRLA Commission Hearings." Carton 21, Folder 49. CRLA Records. Stanford.

Feeling some embarrassment, Governor Reagan first tried to smooth things over by publicly correcting Uhler and promising the state's presence, participation, and full support in the hearings.[87] Yet Reagan had no more evidence than Uhler did. Once the commission began reviewing the charges, Reagan claimed that there had been a "misunderstanding" and that he had expected the commission to gather its own evidence against the CRLA. His complaint yielded nothing. Given his office's lack of evidence, any testimony against the CRLA would have to come from witnesses who voluntarily chose to participate. By contrast, the CRLA had a long and well-organized list of witnesses and documents in its defense. As the table turned, one CRLA attorney confidently observed that the main question now was "how forcefully . . . the commission is going to reject and repudiate [Uhler's] charges."[88]

In his deferential biography of Reagan, Lou Cannon suggests that the governor simply responded to a report that he had been given. Cannon points out that Uhler, a former member of the John Birch Society, had more extreme political views than the governor and that the two men were not close. In fact, Uhler had only joined the Reagan administration earlier in 1970.[89] While Reagan may not have known Uhler well, the idea that he did not realize the false and inflammatory nature of the report ignores his crescendoing conflict with the CRLA. In a way, too, it underestimates his intelligence. If the governor had even just glanced at the report (it was Christmas, after all) he would have known that it was concocted. The fact that the report came out right when the OEO was renewing federal grants, and that Reagan seized on it immediately, suggests that the governor had planned a way to get rid of the CRLA. In fact, the agency later charged that Reagan had brought Uhler into his administration for the precise purpose of helping him take down the CRLA, which was highly plausible.[90]

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87 "The State and the CRLA Hearings," *Los Angeles Times*, Apr. 20, 1971. Box 158, Folder 13, CRLA Records, Stanford.

88 "Reagan, Uhler Are Strangely Reticent Toward Inquiry Into CRLA Charges," *Sacramento Bee*, Apr. 28, 1971. Box 158, Folder 13, CRLA Records, Stanford. See also, "Fremstad, "Uhler Refuses CRLA Case Challenge."

89 See Cannon, *Governor Reagan*, 369–70.

90 See Fundraising letter from Alberto Saldamando to California communities, 1982. Box 279, Folder 1, CRLA Records, Stanford.

Relying on Uhler, however, proved unwise. As additional evidence, the San Francisco Bar Association appointed several lawyers to investigate his report. These attorneys first pointed out that in August of 1970 the CRLA had undergone a week-long evaluation by a team of attorneys and other professionals appointed by the OEO. The team had "warmly endorsed" the agency's activities and recommended refunding for the next year. In comparison to this evaluation, Uhler's report, which he wrote just two months later, was "misleading at best and false at worst." The lawyers added, "the Uhler Report is filled with half-truths, misrepresentations, misunderstandings, and recriminations. Some of its mistakes would be hilarious were the repercussions not so serious."[91]

The repercussions would indeed be great. In the commission's hearings and in the public debates that paralleled them, it became clear that at stake in the case was not only the legal protection of the rural poor but also the power of the state government. Regarding legal protection, hundreds of individuals and organizations wrote the governor's office to express their support of the CRLA, including churches, unions, clubs, businesses, teachers, and other residents.[92] "In the past, poor people had little opportunity to use the courts to enforce [their] rights," wrote one resident. "They lacked money or organization to engage attorneys. Under the Rural Legal Assistant program they now enjoy the same opportunity that affluent citizens and powerful corporations or associations have always enjoyed."[93]

Other individuals applauded the CRLA's success in restoring Mexican Americans' trust in America's promise of justice for all. During the late 1960s, as disillusioned minority groups around the nation turned to riots and other forms of violent protest, the presence of the CRLA in eleven offices across the state of California encouraged farmworkers to trust in the law and not resort to violence. As Mario Obledo, general counsel of the Mexican American Legal Defense Fund, declared during one of the commission's hearings, "For many years, the migrant was without legal

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91 *Barrister' Bailiwick*, February 1971, 3, 5. Carton 66, Folder 9, CRLA Records, Stanford.

92 See the letters of support in Box 25, Carton 23, and Carton 24. CRLA Records, Stanford.

93 See "Improve Legal Aid, Don't Ban It," *Santa Barbara News Press*, Dec. 15, 1970. Carton 23, Folder 25, CRLA Records, Stanford.

services. [He] had disrespect for the law and [he] didn't have faith in the judicial system. . . . The only way he knew the courts . . . and the lawyers was when he was a defendant in a criminal case." Then, Obledo continued, "the CRLA came along and [migrants] found out that they could . . . resort to the courts and not to the streets."[94]

Obledo's comments reflected more than idealistic rhetoric. In 1968, two UC Berkeley law students conducted a survey on how knowledge of the CRLA in Santa Carla, San Benito, and Monterey Counties influenced residents' attitudes toward lawyers, courts, and judges. In response, 52 percent of Mexican-American adults and 76 percent of Mexican-American youth said that because of the CRLA their attitude toward the legal system had improved.[95] During the hearings, R. Sargent Shriver, the original OEO director under Johnson, as well as CRLA director Cruz Reynoso further discussed how the CRLA helped farmworkers find a place in the existing political and legal system. "The poor whom we have represented have seen that the law can be a friend," said Reynoso, "[and] that the powerful, too, can be accountable."[96] Shriver added that agencies like the CRLA helped legislators and administrators within the system become more aware of injustices faced by poor and minority communities.[97] Considering these accomplishments, some residents lambasted the governor for attacking the CRLA. As one Monterey citizen wrote, "It would seem that the voices of Watts, Berkeley, East Los Angeles et al., would be audible to even the most self-serving and expedient politico. And yet, Reagan, with his . . . scuttling of the CRLA is saying in the words of Marie Antoinette, 'Let them eat cake.' "[98]

In the public debate, the most telling of all support letters came from Spanish speaking residents themselves, who were likely farmworkers. "To Governor Reagan," wrote Mariana Romero in handwritten Spanish, "As a poor person I write to respectfully ask that you do not take away the

94 "The CRLA Commission Hearings." Carton 21, Folder 49, CRLA Records, Stanford.

95 See study by Albert F. Moreno and Philip J. Jimenez, "Do Mexican Americans Get a 'Fair Shake.' " Box 65, Folder 1, CRLA Records, Stanford.

96 Fundraising letter from Alberto Saldamando to California communities, 1982. Box 279, Folder 1, CRLA Records, Stanford.

97 See Falk and Pollak, "Political Interference," 603.

98 Jim Brown, "Marie's Fate: Editorial," *Monterey Peninsula Herald*, Feb. 9, 1971. Box 158, Folder 11, CRLA Records, Stanford.

lawyers because they are the people who help us with our problems, and since we don't have money to pay another lawyer [in] any problem that may arise, we plead with you not to take them away."[99] In a similar tone, Guadalupe Serna wrote the governor (also in Spanish): "I am one of the low-income people who have received benefits through the CRLA program. They have helped me a lot when I have needed it."[100] Through the CRLA, the Johnson administration had achieved, at least to an extent, its goal of helping California's rural poor tackle certain aspects of their poverty. The letters from these individuals, and from all the other sectors of society in favor of the agency, underscored the argument made by Cruz Reynoso in defense of the agency: "The CRLA has proven that a degree of social and economic change is possible within the system [and] that the system is available and open to the powerless."[101]

In addition to legal protection and social justice, the case also involved the power of the state government itself. In a sense, the Uhler Report was a test to see how far the governor could go. In his statement at the hearings in San Francisco, William F. McCabe, an attorney for the CRLA, declared that Uhler's report "will stand as a monument to [Joseph] Goebbels' theory that if the lies which government tells are sufficiently outrageous, the majority of the populace will be inclined to believe them." At stake, in other words, was the power of the government to erase opposition to its policies and subvert federal initiatives by twisting facts. As McCabe predicted, however, the Reagan administration would soon find itself in check. "The reason [that Goebbels' theory] can never work in the United States," he declared "is that we have dearly preserved the right of people to challenge what government says and above all else we have insured that when a government official . . . makes charges of the kind Mr. Uhler has leveled against CRLA he had better be prepared to back them up."[102]

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[99] Letter from Mariana Romero to Ronald Reagan. Carton 23, Folder 25, CRLA Records, Stanford; translation by author.

[100] See Letter from Guadalupe Serna to Ronald Reagan. Carton 23, Folder 25, CRLA Records, Stanford; translation by author.

[101] CRLA Press Release, Dec. 27, 1970. Carton 29, Folder 54, CRLA Records, Stanford.

[102] "Before the Office of Economic Opportunity Commission on California Rural Legal Assistance, Inc: Closing Memorandum of the CRLA." Carton 75, Folder 16, CRLA Records, Stanford.

Uhler never could back anything up, yet he had seriously hoped the Nixon administration would back him. Although an attorney by trade, he wrote the report with the hope that the federal OEO would deliver the coup de grâce regardless of the facts. Reagan evidently hoped the same. They were mistaken. Unprepared for the high commission's close examination of their report, which hurt their image far more than it hurt the CRLA's, the two men tried to save face by protesting the commission's methods. Uhler maintained that the justices should conduct "an investigation of CRLA," apart from his report.[103] Reagan complained that the commissioners had demonstrated an "unwillingness to allow or hear testimony that might be detrimental to CRLA's activities," and as a result he had lost confidence in the federal investigation.[104] This latter complaint made the governor look childish. After all, it was Reagan and Uhler's refusal to follow through with their own fight that led to a greater showing of evidence on behalf of the CRLA. A political cartoon in May 1971 depicted a muscular CRLA boxer and a battered California OEO boxer in opposite corners of a ring. During a timeout, the slick-haired governor had stepped into the ring to scold the referee, the federal investigation commission. "Under my rules," Reagan contended, "you're supposed to fight the [CRLA] instead of playing referee."[105]

Despite Reagan's weak protests, numerous witnesses did in fact come to testify against the poverty law agency. Growers, understandably, attacked. In the hearings, the California Farm Bureau declared that Uhler's accusations were correct.[106] Likewise, many residents entered the public debate by expressing support for the governor's veto. "A vast majority of taxpayer-supported CRLA employees are carpet-baggers," charged one resident, "coming here from other parts of the country in order to stir up

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103 George Murphy, "CRLA Probers Set Ground Rules — 'Narrower Scope,'" *San Francisco Chronicle*, Apr. 1, 1971. Box 158, Folder 13, CRLA Records, Stanford.

104 Doug Willis, "Reagan Claims Nixon Panel Curbs Anti-CRLA Testimony," *San Diego Union*, May 19, 1971; see also "Pensive Governor," *Inglewood Daily News*, May 19, 1971. Box 158, Folder 15, CRLA Records, Stanford.

105 See Political Cartoon, *Modesto Bee*, May 4, 1971. Carton 29, Folder 3, CRLA Records, Stanford.

106 See "Scathing Farm Bureau Charges Against CRLA," *Berkeley California Gazette*, June 18, 1971; see also the articles from Farm Bureau magazine. Box 45, Folder 6, CRLA Records, Stanford.

trouble."[107] This accusation, along with the Farm Bureau's testimony, were as baseless as Uhler's report and almost as absurd as the hate mail that arrived on the desk of Cruz Reynoso: "Hello Comrad [*sic*], You are doing a good job. I am sure Comrad [*sic*] Mao is happy that you lawyers have started trouble in Soledad. And for tax money too."[108]

Slightly more legitimate were voices of opposition from city and county officials who, in response to an inquiry from Uhler, sent letters and passed resolutions urging the governor and the federal OEO to dismantle the CRLA. The Stanislaus Board of Supervisors described the CRLA as a case of "wasted money and manpower and duplication of efforts of existing governmental agencies."[109] The City of Madera accused the agency of "wantonly and viciously [using] its authority, money and ability to attack governmental administration of schools, welfare and health, thus devoting taxpayer's money to . . . harass local government[s]."[110] Other officials voiced similar opinions.[111] In many cases, it seemed that local authorities accepted legal services in theory, but they did not agree with the CRLA's lawsuits against government entities. Yet impact cases against existing institutions were a necessary part of systemic change. As E. Clinton Bamberger, former director of the OEO legal services program, argued at the San Francisco hearing, conflict between successful legal service programs and state and local governments was inevitable.[112] By and large, the Johnson administration had embraced this conflict. Carlucci's final decision regarding the CRLA would determine if the Nixon administration agreed.

On May 21, the investigation became more complicated when, at around 2:00 am, an unknown party hurled a crude firebomb into the

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[107] Editorial: "Carpetbaggers," *Peninsula Herald*, Sep. 15, 1971. Box 45, Folder 6, CRLA Records, Stanford.

[108] Anonymous letter to Mr. Cruz Reynoso, Apr. 10, 1971. Box 75, Folder 25, CRLA Records, Stanford.

[109] Resolution of the Board of Supervisors of Stanislaus County, Dec. 1, 1970. Carton 29, Folder 16, CRLA Records, Stanford.

[110] See Letter and Resolution of City of Madera to Lewis Uhler, Dec. 17, 1970. Carton 29, Folder 16, CRLA Records, Stanford.

[111] See, for example, letters from the district attorneys of Monterey and Madera Counties and from the mayor of Delano to Governor Reagan, Dec., 1970. Carton 29, Folder 16, CRLA Records, Stanford.

[112] See "Carlucci Opinion of CRLA Cited."

office of William Moreno and William P. Carnazzo, two private attorneys who had testified in the Salinas hearings against the CRLA. Specifically, Moreno had testified about the agency's ties with the UFW and, Carnazzo, about the agency's anti-eviction suits on behalf of farm strikers.[113] Moreno had also provided Uhler with extensive anti-CRLA fodder for his report the previous fall. While the bomb caused no injuries, it did cause considerable damage. As Salinas authorities investigated the arson, some observers, including Moreno, suggested that the bombing was an act of retaliation for their testimony against the CRLA and that perhaps the agency was behind it. In response, Dennis Powell, director of the CRLA's Salinas office, argued that "CRLA has everything to lose and nothing to gain by such acts." The crime could have been committed by a CRLA sympathizer, he admitted, but it could just as well have no connection to the agency or it even could have been committed by a CRLA opponent who wished to associate the agency with arson.[114]

Governor Reagan availed himself of the association. While he did not directly accuse the agency, he did paint the crime as opposition to true but unpopular testimony. In a telegram to Moreno, he wrote, "Our nation will continue to be strong only if men like yourself continue to speak out with the truth in face of threats and terrorism."[115] Reagan's idea of truth, of course, was relative. While the possibility of some association with the crime may have hurt the CRLA's image momentarily, Salinas authorities never found any connection, and, in the end, the incident did not bear on the high commission's investigation of the agency.

One of the most complicated questions involved the CRLA's relationship with the UFW. While federal regulations prohibited the agency from aiding the union, many CRLA clients were also members of the union. Moreover, the CRLA and the UFW were, in many ways, fellow advocates of California farmworkers. At the same time, however, the two

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113 "Firebomb Damages Offices of Witnesses Against CRLA," *Oxnard Press Courier*, May 22, 1971. Box 159, Folder 14, CRLA Records, Stanford.

114 "Bombing Causes Shock; Outrage Among Leaders," *Salinas Californian*, May 22, 1971; see also "Firebombing Probe Continues in Salinas," *Monterey Peninsula Herald*, May 22, 1971. Box 159, Folder 14, CRLA Records, Stanford.

115 "Bomb Hits Office of CRLA Foe," *Santa Monica Evening Outlook*, May 22, 1971. Box 159, Folder 14, CRLA Records, Stanford.

organizations used different strategies and fought separate battles.[116] In the commission's investigation, the justices heard testimony that two CRLA attorneys had participated in the union's picket lines in El Centro and Calexico.[117] Another witness, former CRLA clerk Ollie Rodgers, testified that ten to fifteen union members had slept in CRLA offices during a melon strike in El Centro and that two CRLA employees had been given full-time assignments to work with the UFW.[118] While these accounts did indicate that the CRLA office in El Centro had overstepped its bounds, the commissioners looked into all charges of illegal union involvement, and, overall, they found that the CRLA was keeping its distance. [119] Another accusation that required considerable energy involved the CRLA's involvement with Black activist Angela Davis and three Soledad Prison inmates. On this matter, too, the commission eventually found that Uhler's charges had "no merit" and dismissed them.[120]

By the summer of 1971, the federal commission was more than ready to side with the poverty law agency. In late June, the justices prepared their final report, noting that "no evidence whatsoever has been produced to support any claim of misconduct by the CRLA." Furthermore, "[our] evidence has overwhelmingly demonstrated that CRLA has operated effectively within the terms of its grant provisions to provide legal services to California's rural poor."[121] In a way, Reagan's veto had had the unintended consequence of showcasing CRLA attorneys' successful practice of poverty law throughout California. "The next time the Reagan administration starts making such charges," wrote one observer, "it should get itself a better attorney. There are a lot of good ones in CRLA."[122]

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116 See Lori Flores, *Grounds for Dreaming: Mexican Americans, Mexican Immigrants, and the California Farmworker Movement* (New Haven: Yale University, 2016), 172–84.

117 "Unionizing by CRLA Probed," *Los Angeles Herald Examiner*, May 22, 1971. Box 158, Folder 14, CRLA Records, Stanford.

118 "Chavez CRLA Help is Charged," *Fresno Bee*, May 22, 1971. Box 158, Folder 14, CRLA Records, Stanford.

119 See "Study Clears CRLA of Union Link," *Oakland Tribune*, May 18, 1971. Box 158, Folder 14, CRLA Records, Stanford.

120 "CRLA Charges Unfounded Says U.S. Commission, *Santa Cruz Sentinel*, May 21, 1971. Box 158, Folder 14, CRLA Records, Stanford.

121 "The CRLA Commission Hearings."

122 "Editorial: U.S. Says 'Prove it,' Reagan's Team Can't."

In explaining his final decision to override Governor Reagan's veto, Frank Carlucci was not quite so complimentary. "On the whole," he wrote, "California Rural Legal Assistance has provided a useful service to the rural poor . . . and is operating within existing statutory and administrative regulations." In a tribute to Reagan, however, he immediately added, "The Governor is determined that his Administration shall play a major role in finding new ways to improve the legal services program and expand its impact."[123] To Carlucci, the CRLA was "useful" but not essential; Reagan's veto was designed to "improve" legal services, not destroy them; and "expand[ing] the impact" of legal services meant eliminating impact cases. It was clear from Carlucci's statement that although he could not base a final veto on Uhler's smear report, he sympathized in many ways with Governor Reagan. While Reagan and Uhler had lost this match, the agency's future was still not secure. Yet as political debate over legal services continued, Governor Reagan's spectacular loss to the CRLA provided a convincing reason for many politicians to leave the program alone. The investigation had demonstrated that the War on Poverty, or at least the legal services program, was working in rural California — perhaps not perfectly, but it was working quite well. Thus, year after year, as the CRLA applied for refunding, it not only survived but expanded into what are now seventeen offices.

In her recent book on the shortcomings of the Great Society and War on Poverty, Amity Shlaes argues that President Nixon allowed Carlucci to override Reagan's veto solely to assert his own authority. "This was not about ideas," she writes. "A governor was attacking a part of Nixon's budget. Nixon was defending himself. For the Nixon Administration, CRLA was a simple turf war."[124] Perhaps there was an element of turf war between Reagan and Nixon, yet Shlaes' argument ignores the investigation of the federal commission, which was all about ideas. Count by count, these justices found that the CRLA really was helping the rural poor. Johnson's vision of lifting Mexican-American farmworkers out of poverty with the help of attorneys was, at least to an extent, coming to fruition. Conservatives such as Shlaes may echo Reagan's argument of the 1980s that the War

123 "Carlucci's Press Release." Carton 21, Folder 51, CRLA Records, Stanford.

124 Shlaes, *Great Society*, 370–73.

on Poverty actually impoverished people by increasing their dependence on the government and that, in short, "poverty won the war."[125] If they are honest, however, they must recognize that this was certainly not the case with the CRLA in California.

In addition to ideas about federal involvement in American society, the case had called into question the role of Mexican-American farmworkers in California society. By attacking the CRLA, politicians like Senator Murphy and Governor Reagan sought to remove Mexican-American farmworkers' most powerful ally and, in many ways, return the state's agricultural labor system to the 1950s. Yet try as they might to weaken, discredit, defund, and destroy the CRLA, in the end they could not return their state to the good old days of the Braceros. The poverty law agency had changed California society, and the change, though incomplete, lasted.

Legal scholar Mark Tushnet has argued that "litigation is a social process" that begins with recognition of an injustice and continues through legal proceedings and into the future as officials grapple with implementation of court rulings.[126] In California, the legal work of the CRLA, including its 1971 battle for survival, helped underpin the process of social change in which institutions and authorities began to take farmworker voices and farmworker needs into greater consideration. Perhaps this social change is best visualized in the CRLA's final battle with the Reagan administration. In 1973, through a petition and lawsuit against Reagan's Industrial Safety Board, the agency won a ban on the short-handled hoe, a tool that made workers stoop at a ninety-degree angle to thin and weed row crops and that caused debilitating back damage as well as constant humiliation. With this victory, along with other CRLA cases, farmworkers won the right to stand a little taller in rural California.[127]

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[125] Eleanor Clift, "Reagan Condemns Welfare System, Says It's Made Poverty Worse Instead of Better," *Los Angeles Times*, Feb. 16, 1986, https://www.latimes.com/archives/la-xpm-1986-02-16-mn-8585-story.html (accessed Apr. 25, 2020).

[126] Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925–1950* (Chapel Hill: University of North Carolina, 1987), 138, 143–44.

[127] See Taylor Cozzens, "Defeating the Devil's Arm: The Victory over the Short-Handled Hoe in California Agriculture," *Agricultural History* 89, no. 4 (Fall 2015).

BREAKING CALIFORNIA'S CYCLE OF JUVENILE TRANSFER

GUS TUPPER*

This paper was awarded second place in the California Supreme Court Historical Society's 2020 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

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Introduction

Frankie Guzman is a poster child for juvenile rehabilitation in California: he attended UCLA and UC Berkeley and used his personal story and law degree to advocate for young people — all after spending four years incarcerated in a juvenile facility.[1] Frankie was fifteen when he and a friend bought guns and stole $300 from a liquor store on a Saturday afternoon in 1995.[2] They were caught immediately.[3] Little did they know that the months separating their birthdays would send their lives in wholly different directions.[4] Frankie was tried as a juvenile and served four years.[5] But his friend, who had recently turned sixteen, vanished into the adult system after he was deemed unfit for treatment in the juvenile court.[6]

Between 2001 and 2016, prosecutors were able, at their discretion, to file charges directly in adult court against anyone over the age of fourteen, like Frankie and his friend. But recent changes to California law will shield many children from prosecution in adult criminal court. In 2016, Proposition 57 required that a judge (rather than a prosecutor) decide whether a young person be transferred to adult court — the process by which the juvenile court waives its jurisdiction over a delinquency proceeding and "transfers" the case to adult criminal court.[7] Two years later, SB 1391 established sixteen (rather than fourteen) as the minimum age of transfer. Since 2019, prosecutors' constitutional challenges to SB 1391 have divided the California Courts of Appeal.[8] Regardless of the ultimate decision about

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[1] Lisa Weinzimer, *From Juvie to Juvenile Law: Frankie Guzman's Unlikely Journey*, The Chronicle of Soc. Change (Oct. 4, 2016), https://chronicleofsocialchange.org/news-2/from-juvie-to-juvenile-law-frankie-guzmans-unlikely-journey.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] The transfer process is variously called "waiver," and "certification," but common parlance in California is "transfer," which is the term this article uses throughout. *See* People v. Superior Court (Lara), 4 Cal. 5th 299 (2018) (declaring Prop 57 constitutional and retroactive).

[8] *See* O.G. v. Superior Court, 40 Cal. App. 5th 626, 627–28 (2019) (collecting cases).

the new law's constitutionality, these recent changes have inaugurated a new era for juvenile transfer in California.

California's juvenile transfer history is little studied, but relevant to current and future decisions about transfer policy and juvenile punishment generally. The first juvenile court was a Progressive-Era institution intended to care for children; it originally had no formal process for transferring children to adult court. But transfer quickly became a way to punish and, in extreme cases, sterilize older boys whom the juvenile system deemed "incorrigible." Since then, the California Supreme Court has recognized that transferring a child to adult court is "the worst punishment the juvenile system is empowered to inflict."[9] Juvenile transfer became a cornerstone of racist punishment as politicians stoked racialized fear of young, so-called superpredators. However, recent popular movements have begun to undo the legacy of the "tough on crime" era — mobilizing against racist policing and incarceration and eventually inspiring legislative change.

These swings from judicial discretion and disparate treatment to strict procedural rules and harsh punishment lead to what scholars identify as a cycle of juvenile justice. Proponents see judicial discretion as a way for a juvenile court judge who knows the individuals and their circumstances to mete out appropriate sentences, but this often leads to disparate outcomes based on race, geography, and income level and has not reliably produced lesser sentences.[10] Increasing procedural justice is supposed to address some of the implicit bias inherent to discretion and cause judges to treat criminal defendants with neutrality and dignity, but often leads to inflexible rules that compound the inequalities already prevalent in criminal law.[11] In the cycle of juvenile justice, punishment is increased in response to a perceived "crime wave" or spectacular incident of violence and will

[9] *See* Marcus W. v. Superior Court, 98 Cal. App. 4th 36, 41 (2002) (citing Ramona R. v. Superior Court, 37 Cal. 3d 802, 810 (1985)).

[10] *See*, *e.g.*, Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 5 (2012) (describing problems with judicial discretion in the criminal and employment law contexts).

[11] *See*, *e.g.*, Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054, 2058–62 (2017) (reviewing the legal literature that privileges procedural justice over more transformative reforms).

then decrease in response to an instance of police abuse or when some other crisis causes a public outcry against the cruelty of the system.[12]

Thomas Bernard and Megan Kurlycheck propose that the cycle is triggered when the juvenile court is forced to choose between the harshest punishments and doing nothing at all.[13] Frank Zimring argues that transfer allows the juvenile court to provide lenient treatment and rehabilitation for "deserving" young people, while the "worst" can be transferred to a more punitive adult court.[14] But the history of transfer in California shows an unworkable procedure swinging from one extreme to another with the passions of the people, not the well-designed safety valve Zimring describes. Bernard and Kurlycheck write that the cycle

> cannot be broken by any particular juvenile justice policy since every conceivable policy confronts the same dilemma: after it is implemented people will continue to feel that juvenile crime is exceptionally high, that it was not a serious problem in the good old days and that it would not be a serious problem today if we only had the proper justice policies in effect . . . . Caught in this cycle, we are doomed to repeat history instead of learning from it and moving toward real progress.[15]

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[12] *See*, *e.g.*, J. Lawrence Schultz, *The Cycle of Juvenile Court History* 19 Crime and Delinquency 4 (1973) (discussing juvenile justice cycles in the first half of the twentieth century); Thomas Bernard & Megan Kurlycheck, The Cycle of Juvenile Justice (2010) (examining the cyclical pattern of "reform and bust" in juvenile justice on a national scale); Nell Bernstein, Burning Down the House: The End of Juvenile Prison, 204 (2014) (describing a pattern of juvenile prison officials' abuse leading to lawsuits and increased oversight); Paul Donnelly, The Cycle and Dynamics of Reform and Neglect in a State Juvenile Corrections Agency: The Texas Experience (2018) (unpublished Ph.D. dissertation, on file with the University of Texas at Dallas) ("What many observers see as new or improved insight, motivations, policies or practices are more accurately described as mere turns of the wheel. Reform initiatives, then, can be framed not as improvements but reactions . . . to critical events and calls for change by influential persons or groups . . . .").

[13] Bernard & Kurlycheck, *supra* note 12 at 3.

[14] *See* Franklin Zimring, *Juvenile or Criminal Court? A Punitive Theory of Waiver*, *in* American Juvenile Justice, 195 (2d. ed. 2019) (arguing that transfer is necessary and desirable when governed by strict procedural rules).

[15] Bernard & Kurlycheck, *supra* note 12 at 29.

California's 120-year history with juvenile transfer may support this bleak outlook, but modern groups like #BlackLivesMatter, the Black Organizing Project, and Youth Organize California are starting to create durable alternatives to juvenile courts and redirect resources to transformative projects with the potential to change what the law alone cannot.[16]

Organizers and movements like these recognize that court orders and legislation alone are not enough to achieve the lofty goal of California's original Juvenile Court Law: "to substitute for the inflexible system to which criminal courts must be subject, the sympathy and strength of personal influence."[17] For his part, Frankie Guzman says it was community college, not prison, that helped him.[18] "Instead of hundreds of thousands of dollars, it took a few supportive people."[19] New kinds of social services, inspired by decades of community organizing and made possible by current movements led by young people and people of color, have the potential to break this cycle of juvenile transfer.

Part I of this article describes California's historical transfer policies from the establishment of the juvenile court in 1903 to the present. Part II covers SB 1391, which raised the minimum age of transfer to sixteen, and recent constitutional challenges to the law. It argues that the California

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[16] *See Healing in Action: A Toolkit for Black Lives Matter Healing Justice & Direct Action*, Black Lives Matter (2018), https://blacklivesmatter.com/wp-content/uploads/2018/01/BLM_HealingAction_rl.pdf (describing restorative and transformative projects employed by the movement to address harm done within the community without resorting to police or prisons); *The People's Plan for Police-Free Schools OUSD Implementation Proposal*, Black Organizing Project (2019), http://blackorganizingproject.org/wp-content/uploads/2019/11/The-Peoples-Plan-2019-Online-Reduced-Size.pdf (proposing a plan for the divestment from the Oakland Unified School District's police department — the Oakland Unified School Board unanimously approved a similar plan on June 23, 2020); *Young People's Agenda*, Youth Organize California (n.d.), https://yocalifornia.org/ypa (outlining an agenda, written by young people, for less policing, prison abolition, and transformative justice).

[17] City and County of San Francisco, Ca., A Report on the Juvenile Court, S. 1–34, Special Sess., 4 (1906), https://babel.hathitrust.org/cgi/pt?id=uc1.b4093710;view=1up;seq=6 (establishing courts with jurisdiction over people under the age of twenty-one accused of a crime).

[18] Weinzimer, *supra* note 1.

[19] Robert Salonga, *Reformed Bay Area Teen Convicts Push Pending Bill to Spare Young Offenders*, Mercury News (Sept. 26, 2018, 6:00 AM), https://www.mercurynews.com/2018/09/26/reformed-teen-convicts-push-pending-bill-to-young-offenders.

Supreme Court is likely to find SB 1391 constitutional. Part III revisits the notion of a cycle of juvenile punishment and discusses the possibility of keeping young people — especially young people of color — and their communities safe without resorting to juvenile transfer at all.

I. TRACING JUVENILE TRANSFER'S CYCLICAL HISTORY FROM EUGENICS, THROUGH DUE PROCESS, TO SUPERPREDATORS

This part discusses the major phases in California's historical methods for transferring young people out of juvenile court and into criminal court. Section A describes the founding of California's juvenile court and its lack of clear transfer policy. Racist and pseudoscientific understandings of childhood marred the early decades of the juvenile court with exclusionary policies and violence, and eugenics was an early driver of the first official transfer rules. Section B covers the extension of due process to the juvenile courts and their transfer decisions. In the middle of the twentieth century, the U.S. Supreme Court decided its first modern cases about juvenile defendants and extended many protections of criminal procedure at the price of the traditional lenience of the juvenile court. Section C explains how the seemingly oppositional goals of improving conditions in juvenile prisons and of increasing punishment defined California's transfer policy in the 1970s, '80s, and '90s, and Section D discusses the turn toward lenience over the past few years.

A. EARLY JUVENILE JUSTICE: WHEN KIDS WERE DIFFERENT

In the Progressive Era, states revolutionized the treatment of children who committed crimes. Illinois established the world's first juvenile court in 1899.[20] Other states and countries quickly followed suit, developing juvenile courts that differed widely in scope and procedure, but shared an understanding that children who violated the law should not be treated as adults.[21] Asserting *parens patriae*, the legal doctrine that "the state must

[20] Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

[21] *Id.* at 107–8.

care for those who cannot take care of themselves,"[22] the California Legislature passed The Juvenile Court Law in 1903.[23]

Parens patriae explained the need for a juvenile court where "[s]pecialized judges, assisted by social service personnel, would act in the best interest of the child."[24] The new court, said one of San Francisco's first juvenile judges, was created "to teach the boy and girl, no matter how unfortunate, that society is trying, at least, to be his friend."[25] Tension arose immediately between the tenor of the law ("that the care, custody, and discipline of a . . . delinquent person . . . shall approximate as nearly as may be that which should be given by his parents") and its application to young people charged with especially egregious behavior.[26] From the outset, transfer practice reflected this tension.

Transfer practice has its roots in these first decades of the twentieth century, when total judicial discretion and a lack of oversight characterized California's juvenile court. Not until 1920 did the California Supreme Court conclude that juvenile courts actually had the power to waive their jurisdiction and transfer juvenile cases.[27] In that seminal case, a superior court magistrate — who would only have had jurisdiction over an adult criminal defendant — convicted sixteen-year-old Roy Wolff of murder after the juvenile court transferred his case.[28] The California Supreme Court approved the juvenile court's action, holding that on a finding of "incorrigibility," a minor could be transferred to adult court for trial.[29] At the

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22 Parens Patriae *Definition*, Black's Law Dictionary (9th ed. 2009), available at Westlaw. Some also argue that *parens patriae* is a meaningless phrase serving only to justify judicial overreach. *See* Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of Parens Patriae*, 22 S.C. L. Rev. 147 (1970). The doctrine legitimized state intervention in the parent-child relationship but made no distinction between children's criminal and noncriminal conduct. *See* Barry Feld, *Criminalizing the American Juvenile Court*, 17 Crime & Just. 197, 205 (1993).

23 A Report on the Juvenile Court, *supra* note 17 at 4 (1906).

24 Barry Feld, *Criminalizing the American Juvenile Court*, 17 Crime & Justice 197, 205–6 (1993) (internal citations and punctuation omitted).

25 A Report on the Juvenile Court, *supra* note 17 at 3.

26 *See Juvenile Court Law*, *in* California Laws of Interest to Women and Children, 152 § 27 (Friend Wm. Richardson, ed., 1912).

27 *People v. Wolff*, 182 Cal. 728 (1920).

28 *Id*. at 732.

29 *Id*. at 731.

same time that *Wolff* began a new phase of the cycle by explicitly allowing transfer to adult court for the first time, the Court left many questions unanswered. For instance, it did not decide a minimum age of transfer, nor set any standards for a juvenile court's transfer decision.

As the Progressive Era drew to a close and the early creative energy of the juvenile court faded, its reality became darker and more punitive. Eugenics underlay an informal transfer policy that resulted in the sterilization of many older teens. Eugenics is the most macabre version of *parens patriae*, in which the state controls the very genes of those it decides "cannot take care of themselves." This pseudoscience justified an extrajudicial form of transfer. Louis Terman, a Stanford professor and early proponent of eugenics, tested and sorted children convicted of crimes based on their "innate intelligence."[30] California's first juvenile prison, the Whittier State School, relied on Terman's classification system to determine which of its young wards to transfer to psychiatric hospitals.[31] In those psychiatric hospitals, these children were among the 20,000 people the state of California sterilized in the first half of the twentieth century.[32]

The informality of the early juvenile court — exemplified by the lax *Wolff* standard for transfer — allowed Fred Nelles, the director of the Whittier State School and a close friend of Louis Terman, to experiment with lenient treatment for boys he found deserving and to mete out surgical sterilization to "incorrigible" kids with little judicial supervision. Nelles believed that older boys (those sixteen and up) were usually "too old

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30 Daniel E. Macallair, After the Doors Were Locked: A history of Youth Corrections in California and the Origins of Twenty-First Century Reform, (2015), 90.

31 *Id*.

32 *Id*. at 91; *see also* Nicole L. Novak & Natalie Lira, *California Once Targeted Latinas for Forced Sterilization*, Smithsonian (March 22, 2018), https://www.smithsonianmag.com/history/california-targeted-latinas-forced-sterilization-180968567/ (reporting that of the 8,515 sterilization operations performed in the U.S. before 1928, 5,820 took place in California); E. S. Gosney, Sterilization for Human Betterment; A Summary of the Results of 6,000 Operations in California 1909–1929, 174 (1930) (describing in chillingly clinical terms the logic of eugenics at the time). California's eugenics victims were overwhelmingly women, Black, disabled, or Latinx, and almost exclusively poor. Miroslava Chávez-Garcia, States of Delinquency: Race and Science in the Making of California's Juvenile Justice System 47–48 (2012).

and too difficult to reform."[33] Nelles' beliefs led to Whittier's complicity in this perverse form of transfer that, like all eugenics projects, inherently privileged Whites over Black and Latinx people. Thankfully, budget constraints ended Nelles' classification and transfer system during the Great Depression.[34]

But Nelles' legacy is complicated — and few administrators of the juvenile system were better. While he enabled the reform school's horrifying eugenicist project, his research in psychology, pedagogy, and social work was cutting edge for its time, and he helped dismantle the traditional militaristic environment of youth prisons.[35] Nelles' experiments with smaller housing units — cottages — are a model to this day, and escape attempts decreased dramatically during his tenure.[36] He instituted solitary confinement but ended corporal punishment.[37] Despite embracing bigotry, hatred, and bad science, Nelles seemed to have a way with the kids he deigned to work with; escape rates "shot up" when the school came under new management upon Nelles' death.[38] At the end of the 1930s, the transformative rhetoric of the Juvenile Court Law in no way matched the harsh reality of cruel, mismanaged institutions and ill-defined transfer policy based on vague criteria like "incorrigibility" and "innate intelligence."

B. A LONG ROAD TO DUE PROCESS AND INCREASED EFFICIENCY IN JUVENILE TRANSFER

A series of tragic deaths and stories of guard misconduct in the late 1930s motivated major changes in juvenile law. On August 11, 1939, guards found thirteen-year-old Benny Moreno hanging in his cell at the Whittier State School.[39] Benny's family and friends claimed that he was either murdered or pushed to suicide by staff abuse.[40] An internal investigation found

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33 Chavez-Garcia, *supra* note 32 at 55.

34 *See* Macallair, *supra* note 30 at 122.

35 *Id*. at 55.

36 *Id*. at 123.

37 *Id*.

38 Chavez-Garcia, *supra* note 32 at 47.

39 Jennifer Uhlman, *Communists and the Early Movement for Mexican-American Civil Rights: the Benjamin Moreno Inquiry and its Aftermath*, 9 Am. Communist History 2, 111–12 (2010).

40 *Id*. at 112.

"beyond a reasonable doubt" that the prison and its guards bore no responsibility for Benny's death.[41] Another boy, seventeen-year-old Edward Leiva, killed himself months later while also imprisoned at Whittier.[42] The Whittier School's obfuscation about the deaths of the Mexican-American teens fueled outrage in Los Angeles' Latinx community and beyond.[43] Finally, an independent investigation led to public hearings documenting "widespread physical and sexual violence in all the state reform schools."[44]

These scandals prompted a quick government response that did not address any of the concerns motivating communities to protest the deaths of Benny and Edward: the creation of a new state-run youth prison system. California's Attorney General — and later Governor — Earl Warren drafted the Youth Corrections Act to create the California Youth Authority (CYA).[45] CYA's stated mission was to make juvenile corrections more scientific and developmentally appropriate, but it did not provide culturally specific treatment for Mexican-American youth as recommended by the committee that investigated the deaths of Benny Moreno and Edward Leiva, nor did it increase protections for young people in transfer

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[41] *Id*. at 114, 116–17 (arguing that the communists running the investigation "bungled" it).

[42] *See* Chavez-Garcia, *supra* note 32, at 152, 158. In dark irony, Edward Leiva and Benny Moreno both passed away in solitary confinement units designed by Fred Nelles. *See* Chavez-Garcia, *supra* note 32, at 158. Young people in adult prisons today are often held in solitary confinement to protect them from sexual and physical violence at the hands of older inmates, but isolation is recognized as traumatic, especially for kids. *See* Michele Deitch and Neelum Arya, *Waivers and Transfers of Juveniles to Adult Court: Treating Juveniles Like Adult Criminals*, *in* Juvenile Justice Sourcebook 241, 252 (Wesley T. Church, et al. eds., 2d ed. 2018); s*ee also Black August and the Struggle to Abolish Solitary*, Critical Resistance (Aug. 21, 2015), http://criticalresistance.org/black-august-and-the-struggle-to-abolish-solitary.

[43] Macallair, *supra* note 30 at 133–35; Chavez-Garcia, *supra* note 32 at 170–71.

[44] Chavez-Garcia, *supra* note 32 at 164, 168. Ultimately, two reform school administrators were criminally prosecuted for Leiva's death. *Id*. at 168. One of the saddest stories the investigation brought to light was that of an eight-year-old boy committed to Whittier for stealing a bike. He reported sexual and physical assaults too numerous to count by staff and other wards. He told school management, including the superintendent, many times, and nothing was done — he left Whittier traumatized. *See* Macallair, *supra* note 30 at 135.

[45] Macallair, *supra* note 30 at 139–44. As governor, Warren further centralized juvenile detention and probation services under CYA.

proceedings.[46] In addition to creating CYA, the 1939 Youth Corrections Act created the Welfare and Institutions Code, which merely codified *People v. Wolff*'s holding that on a finding of "incorrigibility," a minor could be transferred to adult court.[47] Like *Wolff*, the Code set no minimum age for transfer, and provided little guidance about what constituted incorrigibility.[48] Even as the juvenile prison system formalized and began to look more like its adult counterpart, the transfer process remained opaque.

A 1939 Court of Appeal case applying the new Code illustrates the failure of these new rules to limit judicial discretion. An adult court convicted a seventeen-year-old of grand theft auto without the juvenile court first transferring his case.[49] Sam Renteria, the defendant, testified that he had merely slept in the car and had not intended to steal it.[50] Sam had just been released from the Preston State Reform School and was living out of a suitcase trying to make enough money as a professional fighter to rent an apartment.[51] The probation officer, when asked whether Sam was, in fact, incorrigible, turned and spoke directly to Sam, saying that his two prior probation violations — both for running away from state reform schools — "rather settle[] my mind as far as you are concerned."[52]

The court's loose evidentiary standards meant this was enough to doom Sam. The jury was instructed to decide whether Sam was "incorrigible" based solely on the probation officer's testimony — a power supposedly

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46 *Id*. at 140–42.

47 Joel Goldfarb & Paul M. Little, *1961 Juvenile Court Law: Effective Uniform Standards for Juvenile Court Procedure*, 51 Calif. L. Rev. 421, 423 (1963). Hereafter, all references to the "Code" are to the Welfare and Institutions Code, unless otherwise specified.

48 *Id*.

49 People v. Renteria, 60 Cal. App. 2d 463 (1943). *Renteria* is not mentioned specifically in the literature as a watershed ruling or a catalyst, but it exemplifies many of the concerns motivating these "process" reforms. For more information, see Elizabeth Escobedo, From Coveralls to Zoot Suits: The Lives of Mexican-American Women on the World War II Home Front 22–24 (2013) (discussing Bertha Aguilar, the young woman who turned Sam Renteria in the first time he escaped from reform school).

50 *Renteria*, 60 Cal. App. 2d at 467.

51 *Id*. at 463–64, 467.

52 Probation reports were a new requirement of the 1939 Code. *Id*. at 427.

reserved to the juvenile court.[53] He was found incorrigible, transferred to adult court, convicted, and given the maximum sentence all at once, and all without the approval of a juvenile court judge.[54] The Court of Appeal upheld his conviction. It found that the probation officer's negative assessment of Sam's capacity to change overrode procedural concerns like the prosecution's uncontested failure to carry its burden of proof that Sam was unfit for the juvenile court. Just as Nelles exploited the lack of juvenile court oversight to sterilize children, the Court of Appeal was able to ignore scant procedural rules to declare Sam Renteria incorrigible. Continuing to overlook the Code's minimal requirements throughout the 1940s and '50s, juvenile courts often automatically transferred cases to adult courts when a child defendant contested the charges rather than admitting guilt.[55]

As governor, Earl Warren convened a special commission that recommended substantial changes to juvenile procedure, fulfilling one aim of the original Welfare and Institutions Code and setting clear rules for transfer.[56] The commission's main goals were to limit informality, impose clear standards, and allay concerns about disparate treatment in the juvenile court.[57] But Warren left California before these reforms came to fruition as the Arnold-Kennick Juvenile Court Act in 1961. The Act set the minimum age of transfer to adult court at sixteen.[58] In order to waive jurisdiction, a juvenile judge needed to make two findings: (1) that the charged offense would have been a felony if committed by an adult, and (2) that the young person was not "amenable to treatment in the juvenile court."[59] Prosecutors bore the burden of proving these elements by substantial evidence.[60] The cycle of juvenile transfer thus entered a new phase. Decision makers responded to complaints about unreasoned rulings by placing procedural

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53 *Id.*

54 *Id.* at 467–68.

55 Goldfarb & Little, *supra* note 47 at 442 n.134.

56 *Id.* at 421.

57 *Id.*

58 California Senate, Committee on Public Safety: Hearing on SB 1391, Apr. 3, 2018.

59 Goldfarb & Little, *supra* note 47 at 444.

60 *Id.* The Act also provided the first evidentiary standards for juvenile court proceedings, mandated privacy in juvenile court, and required an "informal nonadversary atmosphere." *Id.* at 442; California Senate, *supra* note 58.

burdens on prosecutors seeking transfer, without reevaluating the systems that punished and controlled kids. While the Arnold-Kennick Act's streamlined transfer procedure might have protected Sam Renteria, it also constrained judges' discretion to impose lenient sanctions and expanded the availability of harsh punishment to prosecutors.

The U.S. Supreme Court — led at that time by Earl Warren — issued several rulings in the 1960s that changed juvenile transfer practice in California. First, *Kent v. United States* required that juvenile courts make specific findings on the record before transferring a case to adult criminal court.[61] (California's still-lax transfer scheme under the Arnold-Kennick Act met this baseline.) While it imposed token procedural standards, *Kent* also recognized *parens patriae* and lenience as the foundations of the juvenile court.[62] Next, *In re Gault* guaranteed Fourteenth Amendment rights of counsel, confrontation, and notice to minor defendants in juvenile court.[63] But due process in juvenile court also threatened the informality that was supposed to foster rehabilitation.[64] It fundamentally changed California's transfer hearings, which now had to comport with many constitutional protections. *In re Winship* held that juvenile judges must find guilt beyond a reasonable doubt,[65] but did not affect transfer hearings because jeopardy has not yet attached, and the minor defendant's guilt is supposedly irrelevant.[66]

In 1967, in the wake of *Gault* and facing mounting criticism over the enormous discretion of juvenile courts, the California Legislature and courts again revamped the transfer process.[67] A new law maintained the minimum age of transfer at sixteen but gave juvenile and adult courts

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61 Kent v. United States, 383 U.S. 541 (1966). Earl Warren played an outsized role in California's transfer policy, from beginning the process that led to the Arnold-Kennick Act, to ordering procedural standards in *Kent*.

62 *See id*.

63 In re Gault, 381 U.S. 1 (1967).

64 Goldfarb & Little, *supra* note 47 at 422.

65 In re Winship, 397 U.S. 358 (1970).

66 *See generally* Ralph E. Boches, *Juvenile Justice in California: A Reevaluation*, 19 Hastings L.J. 47, 48–49 (1967) (describing procedure in California's juvenile courts).

67 *Id*. at 48–49 (1967); *see generally* Howard James, *Juvenile Justice: The Worst of Both Worlds*, Christian Science Monitor, May 10, 1967, (discussing the crisis caused by lack of procedural safeguards in juvenile courts nationwide in the 1960s); President's Comm'n on Law Enf't & Admin. of Justice: The Challenge of Crime in a

concurrent jurisdiction over people between eighteen and twenty-one.[68] Judges continued to apply loose, subjective standards in transfer hearings.[69] But in 1970, the California Supreme Court stepped up where the Legislature failed to act — requiring additional findings before a young defendant could be sent to adult court.[70] In that case, Jimmy H. had been transferred to adult court based only on his age and the gravity of the charged offenses.[71] The Supreme Court interpreted the new Welfare and Institutions Code Section 707, governing transfer, to require that the lower court, at the very least, consider behavior patterns, prior delinquent history, and the probation report before sending Jimmy to adult court.[72] After *Jimmy H.*, defense attorneys could present testimony about child clients' mental state and history of trauma.[73]

While *Jimmy H.* imposed a new set of procedural requirements to make transfer less biased and more respectful of individual circumstances, activists pushed legislators to keep children out of the court system altogether.[74] Around this time, Chicano Power student activists were leading the "Blowouts," a series of walkouts in Los Angeles schools.[75] Students called for "affirmation of community experiences in the curriculum" and demanded an end to other forms of institutionalized racism like discriminatory criminal punishment.[76] In response to intense organizing,

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Free Society (1967) (detailing procedural defects across jurisdictions, specifically in Tables 14 and 15).

68 Boches, *supra* note 66 at 96. Prosecutors could elect to file charges in juvenile court or adult superior court, and either court had the authority to transfer minor defendants to the other. Because of the difference in juvenile court vocabulary, these laws use language like "charged with an act which would constitute a crime if committed by an adult" but since the Welfare and Institutions Code relies on the Penal Code's definitions of crimes, it amounts to the same thing. *Id.*

69 *Id.*

70 Jimmy H. v. Superior Court, 3 Cal. 3d 709 (1970).

71 *Id.* at 713–14.

72 *Id.* at 714.

73 *Id.* The court even considered presuming children "fit for treatment" (as they are today) in the juvenile court, although it reserved the question. *Id.* at 709 n.1.

74 California Youth Authority, AB 3121 Impact Evaluation 24–25 (1978).

75 Emily Bautista, Transformative Youth Organizing: A Decolonizing Social Movement Framework 185–86 (2018) (unpublished Ph.D. dissertation, on file with Loyola Marymount University).

76 *See id.*

especially by young people of color, legislation prohibited sending young people to jail for status offenses like truancy or curfew violations.[77] This included all young people regardless of "offense history," even sixteen- and seventeen-year-olds.[78]

C. ABANDONING THE REHABILITATIVE IDEAL IN THE "TOUGH ON CRIME" ERA

In the 1970s and '80s, rather than committing to and experimenting with the promise of informality and rehabilitation outside of court, California embraced strict procedure and harsh punishment.[79] Youth prisons still paid lip service to the rehabilitative ideal and no longer openly promoted differential treatment based on race, gender, and ability. But at the same time, juvenile courts were recast in the retributive image of criminal courts to stem a perceived juvenile crime wave.[80] As it imprisoned more and more children in the 1970s, the California Youth Authority adopted criminal law scholar and incarceration advocate David Fogel's "justice model," the idea that rehabilitation is impossible and jails and prisons should focus only on incapacitating and punishing.[81] However, imposing these rigid rules and stricter punishments did not reduce crime.

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[77] *See* Stephen J. Skuris, *For Troubled Youth — Help, Not Jail*, 31 HASTINGS L.J. 539, 547 (1979).

[78] CALIFORNIA INTERIM COMMITTEE ON CRIMINAL PROCEDURE, JUVENILE COURT PROCESSES, REPORT, 1970 Interim Session 1 (1971) (report on AB 3121).

[79] Hicks v. Superior Court, 36 Cal. App. 4th 1649 (1995) (giving a thorough overview of the steady reduction in the minimum age of transfer and increase in punishment available for use against children).

[80] Ted Palmer, *Martinson Revisited*, 12 J. OF RESEARCH IN CRIME & DELINQUENCY 133 (1975).

[81] *See* David Fogel, *We Are the Living Proof: The Justice Model for Corrections* (1975); *see also* Letter from Attorney General George Deukmejian in support of Assem. B. No. 1374 to California Governor Edmund G. Brown, Jr. (Jun. 27, 1980) (expressing similar views). Another scholar, Robert Martinson, built on Fogel's work but focused specifically on juvenile justice in California in a report about the impossibility of rehabilitation in CYA. Palmer, *supra* note 80. While Martinson's thorough study and dismal assessment of California's juvenile system was interpreted to mean that mass incarceration was the only appropriate response to juvenile delinquency, his study made no such causal conclusions. *See id*. at 135. Decision makers could, and likely should, have interpreted it to mean that CYA was dysfunctional, that its methods were insufficient to help young people, and that perhaps incarceration made the "delinquency problem" worse.

In 1977 this punitive turn came to juvenile law — the Legislature amended the Code section governing transfer to include a presumption that people over sixteen and charged with certain crimes were "unfit for treatment" in the juvenile court.[82] Young people now had to overcome this presumption to avoid transfer, rather than prosecutors' carrying the burden of proving minors unfit.[83] In the next full year, juvenile courts in Los Angeles County saw a 318 percent increase in prosecutor-filed transfer petitions and a 234 percent increase in successful transfers.[84] Courts even broke from the tradition of privacy in juvenile proceedings — ordering that transfer hearings be held open to the press except in "extreme circumstances."[85] Then–Attorney General George Deukmejian supported a Welfare and Institutions Code amendment that Governor Brown ultimately signed, which opened juvenile proceedings to the public. Deukmejian wrote,

> Minors are committing more serious and violent crimes than ever before and are becoming more criminally sophisticated. The news media, victims of crime, and the public are entitled to have as much knowledge as possible about the juvenile justice system and what it is doing to better serve public safety needs.[86]

Id.; *see also* Macallair, *supra* note 30, at 195 ("it was in the Youth Authority I learned that there was no god because no god would ever put a kid through this.").

82 Boches suggested the opposite approach in 1967. *See* Boches, *supra* note 66 at 95 ("One helpful step would be to provide for a statutory presumption that any minor of 16 or 17 is amenable to the care, treatment, and training . . . of the juvenile court."). The California Supreme Court had considered adopting Boches' proposed rule in *Jimmy H*. but had reserved the question. *See* Jimmy H., 478 P.2d at 35.

83 People v. Superior Court (Steven S.), 119 Cal. App. 3d 162, 176 (1981).

84 Eric Klein, *Dennis the Menace or Billy the Kidd: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 Am. Criminal L. Rev. 371, 386–87 (1997).

85 Tribune Newspapers W., Inc. v. Superior Court, 172 Cal. App. 3d at 443, 450 (1985). Privacy in juvenile proceedings and records is a focal point for juvenile justice reform. *See*, *e.g.*, Sue Burwell, *Collateral Consequences of Juvenile Court: Boulders on the Road to Good Outcomes*, *in* A New Juvenile Justice System: Total Reform for a Broken System, 333 (Nancy Dowd, ed., 2015).

86 *See* Letter from Attorney General George Deukmejian, *supra* note 81. Governor Pete Wilson signed a law in 1995 that barred reporters from interviewing adult and child inmates in California correctional institutions. *See* Evelyn Nieves, *California Governor Plays Tough on Crime*, New York Times (May 23, 2000).

Deukmejian's letter encapsulates a driving force behind California politics for the next decades.

Many shared Deukmejian's perception that juvenile crime was increasing throughout the 1980s and 1990s and that transferring juvenile cases to adult court was the solution,[87] even though the same number of kids were arrested for violent crimes in 1980 and 1989.[88] During the same period, the population of the California Youth Authority — like the population of adult prisons — skyrocketed.[89] Republican Governor Pete Wilson campaigned on lowering the minimum age for transfer from sixteen to fourteen.[90] In 1994, he signed such a bill into law.[91] Juvenile law scholar Frank Zimring argues that states enacted tough legislation like California's 1994 reform because "the minimum punishment felt necessary exceed[ed] the maximum punishment within the power of the juvenile court."[92] Zimring warns that this dichotomy (society's perceived demands for harsher punishment and the juvenile court's inability to provide them) "leaves the juvenile court vulnerable to swift legislative change."[93]

Journalist and activist Nell Bernstein explains the same era a different way, writing that researchers in the 1990s twisted juvenile crime statistics and demographic projections to stir up racialized fears of young people of color.[94] John DiIulio, for example, proposed a new "breed" of young person, "morally impoverished" and so fundamentally *other* that rehabilitation was impossible.[95] This rhetoric harks back to the early 1900s and the

87 *See* Sara Raymond, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to Juvenile System and Reasons to Repeal It*, 30 Golden Gate U. L. Rev. 233, 241–43 (2000).

88 Martha E. Bellinger, *Waving Goodbye to Waiver for Serious Juvenile Offenders: A Proposal to Revamp California's Fitness Statute*, 11 J. Juvenile L. 1, 4 nn.7–9 (1990).

89 Macallair, *supra* note 30 at 201.

90 *Id*. at 214.

91 *Id*. at 214; California Senate, *supra* note 58; *see also* Hicks, 36 Cal. App. 4th at 1649–54 (discussing the legislative history and ultimately upholding the constitutionality of AB 560 (the 1994 bill that reduced the minimum age of transfer from sixteen to fourteen)).

92 *See* Frank Zimring & Jeffrey Fagan, The Changing Borders of Juvenile Justice 208 (2000).

93 Frank Zimring, Choosing the Future for Juvenile Justice, 199 (2014).

94 *See* Bernstein, *supra* note 12 at 72.

95 William Bennet, John DiIulio, & John Walters, *Body Count: Moral Poverty — And How to Win America's War on Drugs*, 82–84 (1996).

development of transfer practice — the first juvenile prisons claimed that certain older boys were "too difficult to reform" to justify their sterilization.[96] Not coincidentally, DiIulio is also credited with coining the term "superpredator" to refer to mostly Black and Latinx teenagers.[97] Pundits, First Ladies, and other powerful Americans adopted John DiIulio's racist terminology to justify increased punishment and more permissive juvenile transfer.[98] In spite of widespread disillusion with unchecked judicial discretion and indeterminate sentences of years past, opposition to the 1994 crime bill was fragmented.[99] Even the San Francisco–based Prisoners Union and other radical organizations supported the bill, and its opponents, like the National Center for Crime and Delinquency and the American Friends Service Committee, were not united around an alternative.[100]

Public perception of high crime rates reflected the divisive rhetoric of DiIulio and Deukmejian rather than the reality that juvenile arrests had peaked in 1994 and declined precipitously afterward.[101] Nonetheless, in 2000 voters passed Proposition 21, which gave prosecutors unilateral authority to file charges in adult court against kids as young as fourteen — a judge no longer had to authorize the decision and transfer hearings became

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96 *See* Chavez-Garcia, *supra* note 32.

97 *See* Robin Templeton, *Superscapgoating*, FAIR (1998), https://fair.org/extra/superscapegoating.

98 Kristen Savali, *For the Record*, *Superpredator is Absolutely a Racist Term*, The Root (Sept. 30, 2016), https://www.theroot.com/for-the-record-superpredators-is-absolutely-a-racist-t-1790857020. DiIulio attempted to retract the thesis of *Body Count* when the second President Bush appointed him director of the White House Office of Faith-Based and Community Initiatives: "If I knew what I know now, I would have shouted instead for prevention of crimes." Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators' Bush Aide Has Regrets*, New York Times (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html.

99 Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, *in* Sentencing and Society: International Perspectives 43, 47 (Cyrus Tata & Neil Hutton, eds. 2002).

100 *Id*.

101 Jill Tucker and Joaquin Palomino, *Vanishing Violence*, San Francisco Chronicle (Mar. 21, 2019), https://projects.sfchronicle.com/2019/vanishing-violence.

much less common.[102] Proposition 21 *required* that prosecutors charge a minor in adult court for certain crimes, while in other cases prosecutors had discretion to choose their preferred venue.[103] In addition to removing judges' discretion to hear transfer petitions, Proposition 21 removed probation officers' discretion to release minors charged with certain offenses.[104] Those kids instead had to stay in juvenile prisons. Furthermore, informal probation — one of the least restrictive methods of control in the juvenile system — was no longer available for kids charged with felonies.[105] And if a person committed a "serious or violent offense" after turning fourteen, their juvenile record could never be sealed or destroyed.[106]

Prop 21 also faced fervent opposition, but nascent social movements were not strong enough to fend off the initiative. For example, Critical Resistance Youth Force, an Oakland-based group, organized against Prop 21 and called for reinvestment in education and decarceration.[107] And in 2001,

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102 See *Text of Proposition 21*, Legislative Affairs Office (Mar. 21, 2000), https://lao.ca.gov/ballot/2000/21_03_2000.html; see also Diane Matthews and Kerri Ruzicka, *Proposition 21: Juvenile Crime*, Cal. Initiative Rev. (2000), https://www.mcgeorge.edu/publications/california-initiative-review/initiatives-prior-to-november-2005/march-2000-initiatives/proposition-21) (including a detailed catalog of Prop 21's other provisions and its legislative history. Such "prosecutorial transfer" is common in the U.S. and is problematic both because prosecutorial discretion is unreviewable and because it is disparately deployed against Black, Latino, queer, and rural defendants. *See* Josh Gupta-Kagan, *Rethinking Family Court Prosecutors*, 85 U. Chi. L. Rev. 743, 775 (2018); Kristin Henning, *Correcting Racial Disparities in the Juvenile Justice System: Refining Prosecutorial Discretion*, *in* A New Juvenile Justice System: Total Reform for a Broken System, 193 (Nancy Dowd, ed., 2015).

103 *See* Matthews & Ruzicka, *supra* note 102.

104 *See id*.; Richard Mora and Mary Christianakis, *Fit to Be T(r)ied: Ending Juvenile Transfers and Reforming the Juvenile Justice System*, *in* A New Juvenile Justice System: Total Reform for a Broken System, 234 (Nancy Dowd, ed., 2015) ("Racialized, 'tough on crime' policies, such as direct file laws, perpetuate racial and ethnic disparities across the system."); *see also* Mike Males, *Justice by Geography: Do Politics Influence the Prosecution of Youth as Adults?* Ctr. On Juvenile Crime and Crim. Justice (Special Report, 2016).

105 *See Text of Proposition 21*, *supra* note 102.

106 *See id*.

107 *See* Louise Cooper, *Youth Confront California's Prop 21*, Against the Current 81 (2000) https://solidarity-us.org/atc/86/p942/ (cataloguing and describing the social movements organizing against Prop 21); *It's the Prisons*, Critical Resistance (2000), http://collection-politicalgraphics.org/detail.php?module=objects&

San Luis Obispo Chief Probation Officer John Lum was so disgusted with conditions in the California Youth Authority that he refused to transport kids who had been transferred to adult court from juvenile hall to state custody.[108] Lum was fired after publicly denouncing Prop 21 and CYA.[109] While Lum's story is perhaps heartening to reformists, it also shows the alarming degree of discretion held by probation officers,[110] who, as agents of prosecutors and the police, tend to be *more* punitive rather than less.[111]

Furthermore, voters imposed harsher punishments on "serious delinquents" just as outrage was building about conditions in California Youth Authority prisons. The Prison Law Office (PLO) filed a lawsuit against California claiming that conditions in the Youth Authority violated inmates' statutory civil rights, as well as the First and Fourteenth Amendments to the U.S. Constitution.[112] Governor Gray Davis fiercely resisted the litigation.[113] After Davis was recalled, Governor Arnold Schwarzenegger created a commission headed by former Governor Duekmejian to study the youth corrections system and to coordinate with the PLO to attempt to reform

type=browse&id=1&term=Prisons+%26+Prisoners&kv=11511&record=21&page=1 (memorializing Critical Resistance's political art campaign against Prop 21).

108 Macallair, *supra* note 30 at 219.

109 *Id*. at 222.

110 *See generally* Rudy Haapanen, *Understanding Ethnic Disparities in Juvenile Probation: What Affects Decisions?* Dept. of Justice (unpublished report, 2017).

111 Jill Viglione et al. *The Many Hats of Juvenile Probation Officers*, 43 Crim. Justice. Rev. 252; Haapanen, *supra* note 110 at 84 (finding that 70 percent of first referrals to the juvenile court, regardless of their seriousness, resulted in probation rather than detention). For a discussion of the deeply negative impact probation officers can have, see Michelle Alexander, The New Jim Crow (2010) at 164–66; Xocheezy as told to Katrina Kabickis, *If We'd Had Housing Support, Maybe I Wouldn't Have Spent My Teen Years Locked Up*, Chronicle of Soc. Change (Oct. 26, 2018), https://chronicleofsocialchange.org/youth-voice/xocheezy-foster-care-juvenile-justice-crossover.

112 Macallair, *supra* note 30 at 222–23.

113 *Id*. at 223. During the 1999 election, Davis had received nearly a million dollars in contributions from the prison guards' union, the leading opponent to reform of the juvenile justice system. Joshua Aaron Page, The "Toughest Beat": Incarceration and the Prison Officers Union in California, (2007) (unpublished Ph.D. dissertation, on file with the University of California, Berkeley) (describing the immense influence of the guards' union and how it grew even as most public sector unions were in decline — as well as its entanglements with Gov. Davis). Davis was also one of few Democrats who supported Prop 21's more punitive transfer policy. *Id*.

CYA.[114] But in February 2004, two CYA staff members were caught on tape brutally beating two of the young people in their custody.[115] Deukmejian's Commission held hearings, and, much like the hearings in 2000[116] and 1941, they uncovered guards' shocking mistreatment of young people.[117] One parent's story of a child's suicide was "shockingly similar to that of Benny Moreno" in 1939.[118] After the attack, the hearings, and public outcry, California agreed to minor reforms, replacing CYA with the Division of Juvenile Facilities as part of a settlement with the PLO.[119]

Prosecutors held the power to decide in most cases which court would hear juvenile cases for the next sixteen years; "the worst punishment the juvenile system is empowered to inflict" became the norm.[120] Between 2003 and 2015, California prosecutors charged more than 10,000 children in adult court.[121] More than 70 percent of those cases were direct-filed,

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114 *Review Panel*, *State Auditor Release Report on California's Correctional System*, The Capitol Connection (2004), 4, http://www.courts.ca.gov/documents/CapCon0604.pdf.

115 Jennifer Warren, *Videotape of Beating by CYA Officers Is Released*, LA Times (Apr. 2, 2004); http://articles.latimes.com/2004/apr/02/local/me-cya2. Sue Burrell and Ju Seon Song, *Ending "Solitary Confinement" of Youth in California*, 31 Children's Legal Rights J. 42, 49 (2019).

116 Joint Oversight Hearing of the Senate and Assembly Committees on Public Safety Regarding the California Department of the Youth Authority (May 16, 2000), https://archive.senate.ca.gov/sites/archive.senate.ca.gov/files/committees/2013-14/spsf.senate.ca.gov/jointinformationalhearingonthecaliforniayouthauthoritymay162000/index.html; *see also* Daryl Kelly, *Arrests Prompt Call for CYA Resignations*, LA Times (Feb. 3, 1999), http://articles.latimes.com/1999/feb/03/local/me-4349. (describing male staff members' systematic abuse of young girls and female staff at the Ventura Youth Correctional Facility).

117 Macallair, *supra* note 30 at 224.

118 *Id*.

119 Burrell & Song, *supra* note 115 at 52.

120 See Marcus W. v. Superior Court, 98 Cal. App. 4th 36, 41 (2002) (citing *Ramona R. v. Superior Court*, 37 Cal. 3d 802, 810 (1985)); s*ee also* Manduley v. Superior Court, 27 Cal. 4th 537 (2002) (declaring Proposition 21 constitutional).

121 Martin F. Schwarz, *Children are Different: When the Law Catches Up with Science*, 59 Orange Cty. Lawyer 30, 33 (2003 was the first year data was made available, and 2015 was the last full year of prosecutorial waiver). In the same period prosecutors petitioned juvenile courts to transfer 3,095 additional children to adult court. Laura Ridolfi, *Youth Prosecuted as Adults in California: Addressing Racial, Ethnic, and Geographic Disparities after the Repeal of Direct File* 1, Burns Institute (2017), http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=9081&Inline=True.

meaning a prosecutor alone determined whether a young person would be tried in adult court.[122] Between 2006 and 2016, 50 percent of Latinx kids and 60 percent of Black kids who faced transfer hearings were transferred to adult court, compared to only 10 percent of White kids.[123] Unsurprisingly, young people of color also received longer sentences in adult court than White young people.[124] The US Supreme Court in this period again issued landmark juvenile law decisions: ruling in 2005 that minors could not be executed and in 2010 that they could not be sentenced to life without the possibility of parole for a crime other than homicide.[125] Some states took these rulings as impetus to entirely revamp their juvenile systems, but not California.[126]

D. A GLIMMER OF HOPE: LIMITING TRANSFER IN THE LATE 2010s

Finally, California began to relax juvenile punishments in response to organizing against mass incarceration and harsh prosecution, although the first steps were small and only tangentially related to transfer.[127] Perhaps anticipating the coming changes to the law, Governor Brown signed amendments to the criteria a judge must consider in a transfer hearing.[128] Welfare and Institutions Code Section 707 lists five factors that judges use to decide whether to transfer a case to adult court. The factors had not changed since 1975, but

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122 Schwarz, *supra* note 121.

123 Sara Tiano, *Bill Would Prohibit Californians from Sending Youth Under 16 to Adult Courts*, Chronicle of Soc. Change (Aug. 14, 2018), https://chronicleofsocialchange.org/news-2/new-bill-would-prohibit-ca-from-sending-youth-under-16-to-adult-courts/31931.

124 *See* Kareem L. Jordan & Tina L. Frieberger, *Examining the Impact of Race and Ethnicity on the Sentencing of Juveniles in Adult Court*, 21 Crim. Justice Pol. Rev. 185, 186–89 (2010).

125 Roper v. Simmons, 532 U.S. 551 (2004); *Graham v. Florida* 560 U.S. 48 (2010).

126 *See*, *e.g.*, Burrell & Song, *supra* note 106 at 49; Barry Krisberg, *A New Era in California Juvenile Justice: Downsizing the State Youth Correctional Facilities*, Berkeley Ctr. for Crim. Justice (2010); Cara Drinan, The War on Kids, 150 (2017).

127 For example, AB 703 allowed the Judicial Council to set minimum standards for court appointed counsel in juvenile cases. *See* Schwarz, *supra* note 121 at 34. The Council's new rule required that court-appointed attorneys receive eight hours of youth-specific training to better address common problems with mental health issues, sexual identity, undiagnosed learning disabilities, adolescent behavior among other factors. *See* Cal R. Court 5.664.

128 *See* Cal. Welf. & Inst. Code § 707; *see also* Schwarz, *supra* note 121 at 34.

new legislation explained them in greater detail and permitted defense attorneys to present mitigation evidence. Of course, in 2015 prosecutors charged most minors directly in adult court, and the new law only applied to those few transfer hearings actually argued before a judge.[129]

However, in 2016, Proposition 57 restored full judicial discretion to transfer hearings — requiring prosecutors to petition the court for transfer and prove that a kid was "not a suitable candidate for treatment in the juvenile court system."[130] Only 158 young people were transferred to adult court in 2017, the first full year after Prop 57, compared to 566 in 2015.[131] Judicial discretion still suffers from implicit bias, especially where it applies multi-factor tests about "criminal sophistication" and family support systems, but a judge's transfer decision, unlike a prosecutor's, is at least reviewable by extraordinary writ.[132] Prop 57 did away with California's "once an adult, always an adult" provision, which had required that defendants who were transferred automatically be treated as adults in subsequent prosecutions.[133] Juvenile defendants also previously had to rebut a "presumption of unfitness," but now prosecutors bear the burden of proving young people unfit by a preponderance of the evidence.[134]

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129 *See* Ridolfi, *supra* note 122 and accompanying text.

130 *See* Cal. R. Ct. 5.770(a); Cal. Evid. Code § 606. At the time, fourteen and fifteen-year-olds could be transferred at the discretion of the court if charged with one of thirty "serious felonies" enumerated in Code Section 707. SB 1391 removed this provision from Section 707 on January 1, 2019.

131 Division of Juvenile Justice Statistics, California Attorney General (2017); Division of Juvenile Justice Statistics, California Attorney General (2015).

132 Cal. R. Ct. 5.770. A juvenile court's decision to transfer a case can only be reviewed by extraordinary writ within twenty days of the jurisdictional order. Defendants have no opportunity to contest the transfer decision once convicted in criminal court. *See* People v. Chi Ko Wong, 18 Cal. 3d 698 (1976). The Court of Appeal reviews the juvenile court's decisions of law *de novo*, and its conclusions of fact for substantial evidence. *See* Haraguchi v. Superior Court, 43 Cal. 4th 706 (2008) (allowing reversal of a lower court only if its holding was "arbitrary and capricious").

133 Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. Dept. of Justice (2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

134 *See Rodrigo O.*, 22 Cal. App. 4th at 1297; J.N. v. Superior Court, 23 Cal. App. 5th 706, 711 (2018); *cf.* Jimmy H. v. Superior Court, 478 P.2d 32, 35 (1970) (declining to presume minors "fit for treatment").

The Legislature capitalized on the anti-carceral energy Proposition 57 represented. SB 1391, signed by Governor Brown on September 30, 2018, abolished transfer entirely for kids younger than sixteen.[135] Furthermore, young people can now stay in juvenile prisons or jails until age twenty-five.[136] But this legislation did not merely restore the pre-1994 status quo[137] — now, juvenile judges must make findings on the record to the five statutory factors in Section 707.[138] In 1994, each of the factors had to weigh in favor of the juvenile defendant, whereas judges now apply a totality of the circumstances analysis.[139]

A 2018 Court of Appeal decision exemplifies the state of the law at this historically anti-transfer moment.[140] The defendant, J.N., and two friends were hanging out in a public park when an adult gang member approached them with a knife. S.C., J.N.'s friend, took out a gun. The adult wrestled with S.C. for the gun, shots were fired, and J.N. and the other boy "stood frozen, nearby." The man died. But J.N. and his friends claimed they had

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135 SB 1391 Letter from Edmund G. Brown Jr., Office of the Cal. Governor, to the Members of the Cal. State Senate (Sept. 30, 2018). This was a symbolically important bill, but even without it no one under sixteen was transferred in 2017, the first full year of judicial waiver without SB 1391's age restrictions. Division of Juvenile Justice Statistics, California Attorney General (2017).

136 Welf. & Inst. Code § 1769 (as amended June 2018).

137 *Contra* People v. Lara, 4 Cal. 5th at 305), ("Proposition 57 . . . largely returned California to the historical rule.")

138 Cal. R. Ct. 5.770. Jeopardy has not yet attached at a transfer hearing, and guilt or innocence is supposedly irrelevant to a judge's decision to impose the most severe penalty available in juvenile court. Cal. Welf. & Inst. Code § 707(a)(1). Although this is true in every jurisdiction with judicial waiver, it is a legal fallacy for the judge to consider "the gravity" of a charged offense that may never have happened, and "whether the minor can be rehabilitated" before determining if they have even done wrong. This odd state of affairs has persisted since before 1961, when juveniles risked immediate transfer to adult court if they contested the charges. *See* Cal. Welf. & Inst. Code § 707; People v. Superior Court (Rodrigo O.), 22 Cal. App. 4th 1297, 1304 (1994) ("the criteria the court must use to determine fitness are based upon the premise that the minor did in fact commit the offense"); *see also* Goldfarb & Little, *supra* note 47.

139 *Compare* People v. Superior Court (Zaharias M.), 21 Cal. App. 4th 302, 308 (1993) ("the trial court must find that the minor is amenable to treatment under each and every one (not any one) of the five criteria set forth in § 707." (internal citations and emphasis omitted)) *with* Ridolfi, *supra* note 122 at 1 (describing current totality of the circumstances test).

140 *J.N.*, 23 Cal. App. 5th at 720.

no intention to kill anyone; they only wanted "to spray graffiti and go home."[141] Nevertheless, a prosecutor direct-filed murder charges against J.N. in adult court.[142]

The Court of Appeal reversed the lower court and held that J.N.'s evidence of childhood trauma and limited culpability rendered him suitable for treatment in the juvenile court. Three pages of the short opinion are devoted to J.N.'s biography: his mother had relationships with several men who were physically and emotionally abusive to J.N., his mother, and his siblings.[143] The family moved to a one-bedroom apartment in a new neighborhood, where there were frequent shootings and stabbings, and J.N. himself was shot three times in the leg.[144] Even though J.N. had previously been arrested for "strong arm robbery" — he allegedly took $25 from another boy at school — because he had served his juvenile sentence, returned with a "changed attitude," graduated from high school, successfully completed probation, and got a job, the court still found him suitable for juvenile court.[145] Even though at the time of the *J.N.* decision juvenile courts could only maintain jurisdiction until the twenty-third birthday, and J.N. was almost twenty-one by the time his case was decided, he was not transferred. The Court held that the prosecution had failed to carry its newly heavy burden of proving him unfit for treatment in the juvenile court.[146]

Also recognizing the anti-punitive turn in public opinion, the California Supreme Court later declared that Prop 57's requirement that judges, not prosecutors, make the transfer decision applied retroactively, calling transfer "too severe" a punishment clearly disfavored by voters.[147] Voter

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141 *Id*. at 711.

142 Seventeen months passed between the events at issue and the filing of charges. *Id*. at 711, n.1. After Prop 57 passed, the case was remanded to juvenile court for a fitness hearing. The judge quickly found J.N. unfit for treatment by the juvenile court. *Id*. at 706–8.

143 *Id*. at 712–13. No transfer decision issued between 2000 and 2015 discussed facts about a minor defendant's background or upbringing.

144 *Id*. at 720.

145 *Id*. at 715, 720.

146 *Id*. at 711.

147 *See* People v. Superior Court (Lara), 4 Cal. 5th 299 (2018) (disapproving all Courts of Appeal but one in declaring Prop 57 retroactive); *see also* Prop 57 itself — as "urgency" legislation it took effect immediately.

intent to impose a lighter penalty on criminal defendants can overcome the general presumption that laws do not apply retroactively.[148] When voters or legislators choose to reduce punishment, California courts interpret the new law to apply to as many cases as possible given the "obvious" inference that the old punishment was too harsh.[149] The Supreme Court found that Proposition 57 represented a reduction in punishment, comporting with the idea that transfer is the juvenile court's worst punishment. In explicitly deferring to voters' apparent desire for lenience, the California Supreme Court "protect[ed] the juvenile courts from political risk," by keeping them in step with public opinion — just as it had when it upheld Proposition 21's imposition of harsher transfer policy in 2002.[150] Having lost their challenges to Prop 57, district attorneys across the state are now challenging the constitutionality of SB 1391.

II. THE SUPREME COURT WILL LIKELY UPHOLD SB 1391 AND INAUGURATE A NEW PHASE IN THE CYCLE OF JUVENILE TRANSFER

This part discusses the pending constitutional challenge to SB 1391. District attorneys have challenged the constitutionality of this law and appealed transfer decisions to the California Supreme Court. The question is whether SB 1391 is a permissible modification of Proposition 57, with which voters authorized judges, rather than prosecutors, to decide whether people between fourteen and eighteen could be transferred.[151] Most Courts of Appeal have upheld SB 1391, with which the Legislature banned transfer of fourteen- and fifteen-year-olds, but the Second District (following dissenting justices in the Fifth and Sixth Districts) found SB 1391 unconstitutional

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148 Evangelatos v. Superior Court, 44 Cal. 3d 1188, 1224 (1988); *Lara*, 4 Cal. 5th at 312 (explaining that the court does not distinguish between electoral and legislative intent).

149 *Lara*, 4 Cal. 5th at 308 (citing People v. Superior Court (Estrada), 63 Cal. 2d 740, 748).

150 Zimring, Choosing the Future, *supra* note 95 at 212; s*ee also* Manduley v. Superior Court, 27 Cal. 4th 537 (2002) (declaring Proposition 21 constitutional).

151 *See* Sara Tiano, *Landmark Juvenile Justice Reform Challenged by California DAs*, The Chronicle of Soc. Change (20 Jan. 2019) (listing the cases filed up to that point that challenged the constitutionality of SB 1391).

because "the Legislature cannot overrule the electorate" by setting a higher minimum age of transfer than voters implicitly approved with Prop 57.[152] The great weight of authority favors upholding SB 1391,[153] and it is unlikely — though not unimaginable[154] — that the Supreme Court will strike it down. However the case comes out, the Supreme Court's decision will set up the next phase of California's cycle of juvenile transfer.

A. STANDARD OF REVIEW

Legislation cannot alter the scope or effect of an initiative like Prop 57 "whether by addition, omission, or substitution of provisions," without express language in the initiative authorizing such an amendment.[155] In invalidating SB 1391, the Second District found that SB 1391 unconstitutionally amended Prop 57 because it "prohibit[ed] what the initiative authorize[d]."[156] Even the Courts of Appeal that have upheld SB 1391 acknowledge that it is an amendment of Prop 57 — it prohibits transfer of fourteen- and fifteen-year-olds to adult court, which Prop 57 at least implicitly authorizes.[157]

The California Constitution still allows the Legislature to amend an initiative where the proposition expressly permits amendment, which

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152 *See* O.G. v. Superior Court, 40 Cal. App. 5th 626, 627–28 (2019).

153 At least eight Courts of Appeal have upheld SB 1391. *See* People v. Superior Court (Alexander C.), 34 Cal. App. 5th 994 (2019); People v. Superior Court (K.L.), 36 Cal. App. 5th 529 (2019); People v. Superior Court (T.D.), 38 Cal. App. 5th 360, 375 (2019); People v. Superior Court (I.R.), 38 Cal. App. 5th 383 (2019); People v. Superior Court (S.L.), 40 Cal. App. 5th 114 (2019); B.M. v. Superior Court, 40 Cal. App. 5th 742 (2019); Narith S. v. Superior Court, 42 Cal. App. 5th 1131 (2019); People v. Superior Court (Rodriguez), __Cal. App. 5th __, 2020 WL 2765766 (2020).

154 For example, the Supreme Court disagreed with all but one Court of Appeal in declaring Prop 57 retroactive. *See Lara*, 4 Cal. 5th at 308.

155 *See* Brown v. Superior Court, 63 Cal. 4th 335, 354 (2016); *see also* Michael Cohen, *Can Fourteen- and Fifteen-Year-Olds be Transferred to Adult Court in California?: A Conceptual Roadmap to the Senate Bill 1391 Litigation*, 67 UCLA L. Rev. Discourse 200 (2019), https://www.uclalawreview.org/can-fourteen-and-fifteen-year-olds-be-transferred-to-adult-court-in-california-a-conceptual-roadmap-to-the-senate-bill-1391-litigation/ (giving a detailed primer on the split in the District Courts and the constitutional question at issue in *O.G.*).

156 People v. Superior Court (*Pearson)*, 48 Cal. 4th 564, 571 (2010).

157 *See*, *e.g.*, *Alexander C.*, 34 Cal. App. 5th 994; *K.L.*, 36 Cal. App. 5th 529.

Prop 57 does.[158] Prop 57's Section 5 requires it be "broadly construed to accomplish its purposes," and allows all legislative amendments that are "consistent with and further the intent of this act."[159] A court reviewing amendatory legislation starts "with the presumption that the Legislature acted within its authority . . . if, by any reasonable construction, it can be said that the statute furthers the purposes of the initiative."[160] The court must resolve all doubt in favor of upholding the statute.[161] And courts may rightly consider other "indicia of voter intent" like the Voter Information Guide or a "general description of the initiative's purpose offered by its proponents."[162] The most relevant question for the Supreme Court is whether SB 1391 furthers the intent of Prop 57 — the Second District held that it does not.

B. SB 1391 IS LIKELY A PERMISSIBLE AMENDMENT OF PROPOSITION 57

Prosecutors' challenges to SB 1391 usually center on the claim that SB 1391 is an unconstitutional modification of Prop 57. *O.G. v. Superior Court*, the case before the Supreme Court, begins by framing the principal purpose of Proposition 57 as restoring judicial discretion to grant or deny transfer petitions.[163] It follows that SB 1391 is then a *restriction* on judges' newly reinstated power because it disallows juvenile courts to transfer fourteen- and fifteen-year-olds. This limitation would thus unconstitutionally nullify Prop 57's supposed intent to expand judicial discretion.[164] However, the Supreme Court has already found the intent of Prop 57 to be "ameliorating the possible punishment for a class of persons, namely juveniles."[165]

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158 Cal Const. art. IV § 1, art. II § 10(c).

159 Cal. Proposition 57 § 5.

160 Lockyer v. City and County of San Francisco, 33 Cal. 4th 1055, 1119 (2004); *People v. DeLeon*, 3 Cal. 5th 640, 651 (2017).

161 Foundation for Taxpayer & Consumer Rights v. Garamendi, 132 Cal. App. 4th 1354, 1365 (2005).

162 Robert L. v. Superior Court, 30 Cal. 4th 894, 900–1 (2003); Proposition 103 Enforcement Project v. Quackenbush, 64 Cal. App 4th 1473, 1490–91 (1998).

163 *See*, *e.g.*, *O.G.*, 40 Cal. App. 5th 626.

164 *See id*. at 628.

165 *Lara*, 4 Cal. 5th at 308.

Furthermore, Prop 57 lists five purposes in its text — the Second District focused only on one.

First, Prop 57 intends to "[p]rotect and enhance public safety."[166] As the United States Supreme Court has discussed at length, subjecting young people to the full force of adult criminal punishment undermines rather than enhances public safety by increasing recidivism.[167] The arguments in favor of Prop 57 in the voter pamphlet also discussed the broad consensus that the more lenient and evidence-based treatment of the juvenile system reduces recidivism.[168] So voters — theoretically — agreed that treatment in the juvenile system enhances public safety, which accords with the mission of SB 1391. Furthermore, Governor Brown considered a common argument against SB 1391 in his signing statement, writing that if a young person is considered a "threat," a prosecutor can petition for them to remain in custody beyond their original sentence.[169]

Second, Prop 57 was intended to "[s]ave money by reducing wasteful spending on prisons," a purpose SB 1391 indisputably serves.[170] It keeps kids out of adult court where they can be subject to longer sentences at much greater cost. Third, Prop 57 aimed to "[p]revent federal courts from indiscriminately releasing prisoners."[171] Reducing the number of prisoners in state custody and the lengths of their sentences does not undermine this purpose, and prosecutors have never argued the contrary. Fourth, Prop 57 aimed to "[s]top the revolving door of crime by emphasizing rehabilitation . . . ."[172] The juvenile system's mission is ostensibly rehabilitative, while the adult system's

166 Cal. Proposition 57 § 2 (1) ("Purpose and Intent").

167 *See* Miller v. Alabama, 567 U.S. 460, 467 n.5 (2012); *see also* Kristin Johnson et al., *Disregarding Graduated Treatment: Transfer Aggravates Recidivism*, 57 Crime & Delinquency 757 (2011).

168 *See* Cal. Atty. Gen., *Argument in Favor of Proposition 57*, Prop. 57 Criminal Sentences. Parole. Juvenile Criminal Proceedings and Sentencing. Initiative Constitutional Amendment and Statute. California Proposition (2016), https://www.courts.ca.gov/documents/BTB24-5H-1.pdf.

169 SB 1391 Letter, *supra* note 135.

170 *See* Cal. Proposition 57 § 2 (1) ("Purpose and Intent").

171 *See id*. Other sections of the initiative were meant to help the state comply with a federal court order to reduce the population of California prisons to 137.5 percent of their design capacity, which is not necessarily relevant to the constitutionality of SB 1391. *See* Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 962 (E.D. Cal. 2009).

172 Cal. Proposition 57 § 2 (1) ("Purpose and Intent").

is not. One Court of Appeal has considered a prosecutor's argument that an older kid would not be subject to juvenile court jurisdiction long enough to benefit from these rehabilitative services.[173] The Court ruled that this situation was not enough to justify invalidating SB 1391, which promotes juvenile rehabilitation in general. And again, the prosecutor can always petition the court to keep kids in custody beyond their original sentences.[174]

Finally, Prop 57 sought to "[r]equire a judge, and not a prosecutor, to decide whether juveniles should be tried in adult court."[175] Challengers read judicial discretion as the thrust of Prop 57's purpose and claim that SB 1391 undermines it by banning transfer of everyone under sixteen. Proposition 57, however, does not set any minimum age for transfer. It applies, by its own terms, to "[c]ertain categories of minors," and SB 1391 simply narrows the category of minors to which it applies.[176] Under SB 1391 a judge — and not a prosecutor — still makes every transfer decision.[177] To be sure, the ballot materials for Prop 57 made clear that fourteen- and fifteen-year-olds could be tried in adult court,[178] but the Supreme Court explained that Prop 57 sought to "ameliorate[] the possible punishment for a *class of persons*, namely juveniles."[179] The Supreme Court declared Prop 57 retroactive because voters had expressed such clear intent to reduce punishment,[180] and the same preference for the lenient treatment of the juvenile court underlies SB 1391.

The Second District Court of Appeal and other dissenting justices make various, less compelling arguments to strike down SB 1391. For one, an early draft of Proposition 57 set sixteen as the minimum age of transfer, but the initiative was revised during the public comment period.[181] The updated measure provided that "[t]ransfers were generally limited to minors

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173 People v. Superior Court (T.D.), 38 Cal. App. 5th 360, 373–74 (2019).

174 SB 1391 Letter, *supra* note 135.

175 Cal. Proposition 57 § 2 (1) ("Purpose and Intent").

176 *Lara*, 4 Cal. 5th at 305; Rodriguez, __Cal. App. 5th __, 2020 WL 2765766 at *5.

177 Rodriguez, __ Cal. App. 5th __, 2020 WL 2765766 at *5; T.D., 38 Cal. App. 5th at 373.

178 SB 1391 Letter, *supra* note 135; *see* Cal. Atty. Gen., *supra* note 168; *see also* Cohen, *supra* note 155 (discussing the district attorney's arguments in *O.G.*).

179 *Lara*, 4 Cal. 5th at 308 (emphasis added).

180 *See id*.

181 Brown v. Superior Court, 63 Cal.4th 335, 340 (2016).

aged sixteen or older, but were permitted for fourteen- or fifteen-year-olds accused of certain serious crimes."[182] Thus, prosecutors claim, SB 1391 imputes to Proposition 57 a provision intentionally rejected by the voters.[183] For this argument to hold water, prosecutors would have to prove that voters knew that a provision had been omitted from the final version of Prop 57 and relied on that omission more than the general ameliorative tenor of the initiative.

In *O.G.*, the Second District lamented other courts' failure to consider important precedent. However, the Second District misapplied its own chosen precedent.[184] In *Pearson*, the case the Second District cited to strike down SB 1391, the Supreme Court found that the legislative enactment at issue did not modify the relevant initiative.[185] Therefore, it had no reason to reach the question of whether the initiative, by its own terms, permitted such a legislative change.[186] But in the case of SB 1391, no Court of Appeal disputes that the Legislature modified Prop 57 — the only question that remains is whether that modification accords with the constitutional standard. Because SB 1391 matches so closely the purposes of Prop 57, the Supreme Court will likely uphold it.

III. MOVING BEYOND THE CYCLE OF TRANSFER

Even in the unlikely event that the Supreme Court agrees with the Second District and declares SB 1391 unconstitutional, California has entered a new phase in its cycle of juvenile transfer. Recent steps toward abolishing

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182 *Id.*

183 *See*, *e.g.*, SB 1391 Letter from Santa Clara Cty. Dist. Atty.'s Office, to Susan S. Miller, Clerk of the Court of the Sixth District Court of Appeal 11 (Oct. 10, 2018), https://yoloda.org/wp-content/uploads/2018/10/SB-1391-CHALLENGE-LETTER-MODIFIED-10-10-18-FINAL-FINAL-2.pdf, ("If the voters passed an initiative that increased taxes on all persons except those making under $10,000 dollars a year, and the legislature then passed a statute eliminating the exemption for those making under $10,000 dollars, would this Court have any hesitation in finding the statute inconsistent with the initiative notwithstanding the general thrust of the initiative was to reduce taxes? Of course not!").

184 *See* Cohen, *supra* note 155 for a thorough discussion of this argument.

185 *Pearson*, 48 Cal. 4th at 570–71.

186 *Id.*

transfer could be more than a new phase — they may represent an effort to allow something new to grow in the place of the juvenile system. The dire predictions of Bernard and Kurlycheck's cycle presume a largely unchanged juvenile legal system, with law making tweaks at the margins, for example, by imposing stricter conditions on a judge's decision to transfer decision or implementing racial bias training.[187] But tinkering is not the only option — the social movements of the spring and summer of 2020 and sustainable reforms they have already inspired around California may provide the impetus to break this grim cycle. This part discusses the promise and limits of law changes to ending the cycle of juvenile transfer and the necessity of extralegal organizing.

A. WHAT THE LAW CAN DO: GIVING KIDS AND FAMILIES SOME BREATHING ROOM

Scholars across disciplines and the political spectrum have recognized that criminal procedure and the prison system function to subordinate poor people, queer people, and people of color.[188] Some estimate that one in every three young Black men will spend part of his life in jail or prison.[189] Police, too, target Black people and people of color and use excessive force in response to the myriad social issues they are asked to address.[190] The

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187 *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 Georgetown L.J. 1479, 1513–17 (2016) (arguing that police training encourages, rather than discourages, violence); see also Alex S. Vitale, The End of Policing 8–11 (2017) (arguing that police training is ineffective and should not be considered a reform).

188 *See*, *e.g.*, Alexander, *supra* note 111; Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 Calif. L. Rev. 3 (2010); Andrea J. Ritchie & Delores Jones-Brown, *Policing Race, Gender, and Sex: A Review of Law Enforcement Policies*, 27 Women & Criminal Justice 21 (2017); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 Mich. L. Rev. 2018.

189 *See* Becky Pettit, Invisible Men: Mass Incarceration and the Myth of Black Progress 58 (2012) (interpreting statistics from the early 2000s).

190 Franklin E. Zimring, When Police Kill (2017) (discussing the explosion of research and critique into police treatment of people of color since the Ferguson rebellion); Allegra M. McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 Sup. Ct. Rev. 157 (2016) (discussing the virtually unchecked nature of police discretion to arrest and kill); Eisha Jain, *Arrests as Regulation*, 67 Stan. L. Rev. 209 (2015) (arguing that policing is a form of social control); Jeffrey Fagan & Garth

juvenile system suffers the same structural defects as adult courts and prisons.[191] Despite decades of "reform," a 2019 study found that California's juvenile prisons are still "hotbeds of violence and trauma" where officers often use physical force against youth and where "young people experience or witness fights, riots, or beatings on a regular basis."[192] One young person reports: "if you weren't bleeding or dying, you wouldn't get medical attention."[193] If years of progressive reforms and steadily increasing spending[194] have not improved the detention facilities or lives of incarcerated youth who leave state custody "unprepared for life after release,"[195] perhaps it is time to consider shrinking jurisdiction and directing money elsewhere.

Scholars of crime and punishment, including a growing group of legal scholars, propose an alternative to procedural fairness or unconscious bias training: the transformation of systems of punishment — what some call an abolitionist horizon for reform.[196] Abolitionists recognize that the

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Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 Fordham Urb. L.J. 457 (2000) (dissecting the racialized nature of policing); Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (2006) (cataloguing ways that police target the poor); Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 Harv. L. Rev. 1270 (1998) (giving an overview of the role of police in maintaining racial subordination of Black people).

191 *See*, *e.g.*, Bernstein, *supra* note 12 at x–xv, 110–13 (comparing adult and juvenile prison systems, and abolition movements).

192 *See* Maureen Washburn, *State Spending Soars to Historic Levels Amid Reorganization of California's Youth Correctional System*, Ctr. on Juvenile and Criminal Justice 1 (Feb. 2020), http://www.cjcj.org/uploads/cjcj/documents/state_spending_soars_to_historic_levels_amid_reorganization_of_californias_youth_correctional_system.pdf.

193 *Id*. at 52.

194 Mike Males, *Who Knows Why California Crime by Youth is Plummeting?* Juvenile Justice Info. Exchange (Oct. 23, 2019), https://jjie.org/2019/10/23/who-knows-why-california-crime-by-youth-plummet.

195 *See* Washburn, *supra* note 192 at 1.

196 *See Introduction*, *in* Developments in the Law — Prison Abolition, 132 Harv. L. Rev. 1568, 1568 (2019); Paul Butler, Chokehold: Policing Black Men (2017); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156, 1168 (2015); Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, & the Limits of Law (2d ed. 2015); César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U. Cal. Davis L. Rev. 197 (2018);

occasional instance of excess in policing, jail, or prison is not the fundamental problem with the criminal system, nor is the lone bad actor, nor a lack of resources and training.[197] When much of the violence of police and prison guards seems to be constitutional and sanctioned by the law,[198] the problem is the system of punishment itself.[199] The systemic issues manifest

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Amna A. Akbar, *An Abolitionist Horizon for Police Reform*, 108 Calif. L. Rev. __ (2020) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3670952; Priscilla A. Ocen, *Beyond Ferguson: Integrating the Social Psychology of Criminal Procedure and Critical Race Theory to Understand the Persistence of Police Violence*, *in* A Theory of Criminal Justice: Law and Sociology in Conversation (Sharon Dolovich & Alexandra Natapoff eds., 2017); *see also What Is Abolition?*, Critical Resistance (2012), http://criticalresistance.org/wp-content/uploads/2012/06/What-is-Abolition.pdf ("We take the name 'abolitionist' purposefully from those who called for the abolition of slavery in the 1800s.").

197 *See* Akbar, *An Abolitionist Horizon*, *supra* note 196 (deconstructing the idea that "giving more to the police" — in the form of technology, anti-bias training, and funding — actually improves outcomes, and instead arguing for divestment from the police).

198 For example, after the Baltimore and Ferguson rebellions in 2016 and incidences of police brutality and terror, the United States Department of Justice declared that police behavior comported with the law. U.S. Dep't. of Justice, Civil Rights Div., Investigation of the Baltimore City Police Department (2016); U.S. Dep't. of Justice, Civil Rights Div., Investigation of the Ferguson Police Department (2015); U.S. Dep't .of Justice, Civil Rights Div., Investigation of the Chicago Police Department (2017); *see also* McLeod, *Police Violence*, *supra* note 190 at 158–59 (arguing that law authorizes rather than limits police violence); Jamison v. McClendon, __F. Supp. 3d __ ; 2020 WL 4497723 (Aug. 4, 2020) (lamenting the inability of the law to redress an instance of police brutality).

199 This is the core claim of the penal abolition movement. *See Abolishing Carceral Society*, Common Notions 4 (2018), https://www.commonnotions.org/abolishing-carceral-society ("Today we seek to abolish a number of seemingly immortal institutions, drawing inspiration from those who have sought the abolition of all systems of domination, exploitation, and oppression."); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, *in Developments in the Law — Prison Abolition*, 132 Harv. L. Rev. 1575, 1578 (2019) ("abolition is not merely a practice of negation — a collective attempt to eliminate institutionalized dominance over targeted peoples and populations — but also a radically imaginative, generative, and socially productive communal (and community-building) practice"); Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California 242 (2007) (describing California's massive prison-building project and arguing that abolishing the prison institution is the only way to achieve the fundamental social reordering required to address the problem of mass incarceration); Angela Y. Davis, Abolition Democracy: Beyond Prisons, Torture, Empire 73 (2005) ("prison abolition requires us to recognize the extent that our present social order — in which are embedded a complex array of social problems — will have

throughout the criminal process: from the police officer who is five times more likely to arrest a Black kid than a White kid,[200] to the judge who, considering "whether the minor can be rehabilitated" or is "criminally sophisticated," transfers the same Black kid to adult court,[201] to the prison guard

to be radically transformed), Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 460–61 (2018) (proposing that legal scholarship focus on imagining solutions beyond dominant paradigms, beyond reforms to existing systems); Charlene A. Carruthers, Unapologetic: A Black, Queer, and Feminist Mandate for Radical Movements (2018) (recounting the history of Black radical movements in the U.S., centering the stories of unrecognized figures like movement organizers). The statements of the organizers themselves are arguably more important than the statements of the scholars who bring their words to the academy — though of course there is no clear line between movement organizers and movement scholars. *See*, *e.g.*, *About — What is the PIC? What is Abolition*, Critical Resistance, http://criticalresistance.org/about/not-so-common-language/; California Immigrant Youth Justice Alliance, https://ciyja.org/ ("CIYJA works tirelessly across the state to fight back against policy that attempts to criminalize undocumented youth and families"); *What is Abolition*?, No New SF Jail Coalition, https://nonewsfjail.org/what-is-abolition/ ("As a vision, abolition for No New SF Jails is about: Imprisonment, policing, surveillance & punishment of any kind cause harm, exacerbate oppression, and should not be used . . . ."); *Who We Are*, LA No More Jails, https://lanomorejails.org/about ("Because imprisonment is fundamentally violent, we are working to reduce the number of people locked up in Los Angeles . . . ."); Black & Pink, https://www.blackandpink.org/ ("Black and Pink . . . and is a national prison abolitionist organization dedicated to dismantling the criminal punishment system and the harms caused to LGBTQ+ people and people living with HIV/AIDS . . . ."); Incite! Women of Color against Violence, https://incite-national.org/ (INCITE! is a network of radical feminists of color organizing to end state violence and violence in our homes and communities . . . ."); Assata's Daughters, http://www.assatasdaughters.org/ ("our freedom looks like quality public schools; our freedom looks like universal healthcare; our freedom looks like living without fear of physical or sexual violence; our freedom looks like economic stability; our freedom looks like self-determination; our freedom looks like communities that practice restorative justice and that make police and cages obsolete; our freedom looks like the eradication of anti-Blackness and all forms of oppression.").

[200] *Compare Juvenile Justice in California*, California Attorney General 56 (2018) https://data-openjustice.doj.ca.gov/sites/default/files/2019-07/Juvenile%20Justice%20In%20CA%202018%2020190701.pdf (showing, in Table 3, slightly more arrests of Black youth than White youth) *with* Current Population Survey, Census.Gov https://www.census.gov/cps/data/cpstablecreator.html (narrow by "Age:0–17" and "Race") (showing California is home to more than five times the number of White minors than Black minors).

[201] These are some of the findings that Cal. Welf. & Inst. Code § 707 requires before deciding to transfer a juvenile case to adult court. Criminal sophistication is an inherently

who puts him in solitary confinement to prevent an "accidental injury" after his jaw is broken in a fight.[202]

SB 1391 could be one step toward finding less retributive, less costly, and more effective methods of addressing harm. At first glance it may seem like this law change merely tinkers with the edges of juvenile law by constricting adult court jurisdiction over a small class of children.[203] But by reducing sentences and keeping hundreds of people out of prison,[204] it may free up money and energy for communities and movements to work toward effective alternatives to prison and policing. Of course, SB 1391 still allows children to be prosecuted in juvenile court, and without other legislative action, limiting transfer might mean little. However, there are other important signs that the wind is shifting in California.

Another bill passed in 2018 established the minimum age of jurisdiction for the juvenile court at twelve years old.[205] In 2017, "almost all children arrested under the age of 12 were kids of color."[206] The importance of this legislation cannot be overstressed: it means that *no criminal court or penal institution* has jurisdiction over any Californian under the age of twelve. This new rule sets "counsel and release" as the official policy for police encountering kids eleven and younger and represents a major change to the law from 2015, when 687 kids under twelve, including one five-year-old, were prosecuted in juvenile court.[207] Santa Clara County has

racialized term, like "serious delinquent" and "super predator." *See* Geoff K. Ward, The Black Child-Savers: Racial Democracy and Juvenile Justice 258 (2012).

202 *See* Maureen Washburn & Renee Menart, *Unmet Promises: Continued Violence & Neglect in California's Division of Juvenile Justice*, Ctr. on Juvenile and Criminal Justice 54 (Feb. 2019), http://www.cjcj.org/uploads/cjcj/documents/unmet_promises_continued_violence_and_neglect_in_california_division_of_juvenile_justice.pdf.

203 *See* Marbre Stahly-Butts & Amna A. Akbar, *Transformative Reforms of the Movement for Black Lives* 4–5 (2017) (unpublished manuscript), https://perma.cc/6A24-H87Y.

204 *See* Cal. Welf. & Inst. Code §§ 601, 602, 1731.7; Penal Code § 1769 (establishing the minimum age of juvenile court jurisdiction at twelve and the maximum at twenty-five).

205 SB 439, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

206 Taylor Walker, *LA County Supes Seek to Establish A Minimum Age for Juvenile Prosecution*, Witness LA (Nov. 1, 2018) https://witnessla.com/la-county-supes-seek-to-establish-a-minimum-age-for-juvenile-prosecution.

207 *Id.*

already set the minimum age for juvenile court jurisdiction a year higher, at thirteen, and Los Angeles County is considering a similar move — Senator Holly Mitchell has made it clear that she "wholeheartedly embrace[s] expanding the minimum age" for the entire state.[208]

Young people can now stay in the custody of the juvenile court — and therefore in rehabilitation-focused, less crowded, less violent juvenile prisons — until they turn twenty-five.[209] This accords with neurological research often cited by courts showing that people do not reach emotional and neurological maturity until their mid-twenties.[210] Keeping people in juvenile court will fix neither the juvenile nor the adult system. But any public defender will report that juvenile court rehabilitation, however flawed, is preferable to more dangerous and more punitive adult court punishment.[211] These reforms, taken with SB 1391, mean that older kids and young adults will serve shorter, more "rehabilitative" sentences in juvenile facilities, and many more children will not be subject to court jurisdiction at all — what could be the first steps towards a fundamental transformation.

Two other recent events speak to the possibility for structural change in California juvenile law: the abolition of fees in delinquency cases and increasingly successful calls to defund the police. UC Berkeley's Policy Advocacy Clinic, working with local partners around the state, advanced legislation that "repealed county authority to assess all fees [charges aimed at recouping court costs, not at compensating victims or punishing youth] in the juvenile legal system."[212] This project is a good example of abolitionist organizing because it deprives the legal system of funds and leaves money in the pockets of the marginalized people who are most likely to be

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208 *Id.*

209 Washburn & Menart, *supra* note 202 (discussing AB 1812).

210 *See* Brief for Mental Health Experts as Amicus Curiae, 16, 36–37, Miller v. Alabama, 567 U.S. 460 (2012).

211 *See* David P. Farrington, Rolf Loeber, *James C. Howell, Increasing the Minimum Age for Adult Court: Is it Desirable, and What Are the Effects?* 16 Criminology & Pub. Pol'y. 83 (2017) (reviewing the medical and psychological literature to find juvenile court treatment is preferable from a medical and psychological perspective as well as being more likely to reduce recidivism).

212 Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. Rev. 401, 410 (2020).

policed, punished, and thus charged fees.[213] More importantly, it involved a sustained campaign that incorporated local groups and impacted populations, especially youth of color and their families, with an eye toward the future.[214] In explicitly recognizing that "governments and courts may find other ways to tax the same communities," and naming their fee project as one step toward "replac[ing] the juvenile and criminal systems," organizers set their sights on an abolitionist horizon.[215]

The spring and summer of 2020 have marked a renaissance of civil unrest in California in the wake of police killings of Breonna Taylor, George Floyd, Ahmaud Arbery, and many others.[216] In California, the protests have resulted in local governments taking action to reduce policing — the Oakland Unified School Board voted on June 24, 2020 to disband the Oakland Unified School District Police Department.[217] The Black Organizing Project (BOP) made an impassioned case to the Board, noting that Black students make up less than 26 percent of the school district's population

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213 *See* Jessica Feierman et al., *Debtors Prison For Kids? The High Cost of Fines and Fees in the Juvenile System*, Juvenile L. Center 8–9 (2016), https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf (discussing racial disparities in fine and fee assessment).

214 *See* Selbin, *supra* note 212 at 414 ("Race-conscious advocacy grounded in impacted communities is less likely to compromise on reforms that bake in such bias").

215 *Id*. at 418.

216 *See generally* Matthias Gafni, John King, & Mallory Moench, *Around the Bay Area, day 5 of protests demanding justice*, San Francisco Chronicle (Jun. 2, 2020), https://www.sfchronicle.com/bayarea/article/In-Bay-Area-a-fifth-straight-day-of-protests-15312298.php (covering the early days of protests in the Bay Area); Aida Chavez, *After Killing of 18-Year-Old Andres Guardado, LA Protestors Struggle Against the Limits of Police Reform*, The Intercept (Jun. 25, 2020, 3:03 PM), https://theintercept.com/2020/06/25/andres-guardado-los-angeles-police/ (discussing the radical potential of current anti-police mobilization in LA); Supriya Yelimeli, *Teenage Black Lives Matter protesters demand that Berkeley Hills residents 'wake up' and take action*, Berkeleyside (Jun. 24, 2020, 4:46 PM), https://www.berkeleyside.com/2020/06/24/teenage-black-lives-matter-protesters-demand-that-berkeley-hills-residents-wake-up-and-take-action (describing a recent action in Berkeley).

217 Brett Simpson, *District police eliminated from Oakland schools: Board votes to abolish agency*, San Francisco Chronicle (Jun. 25, 2020), https://www.sfchronicle.com/bayarea/article/District-police-eliminated-from-Oakland-schools-15364811.php. This success came after years of calls from the Black Organizing Project to defund the OUSDPD. *Id*.

and account for 73 percent of arrests in Oakland schools.[218] Similarly, in response to sustained public pressure, the San Francisco Unified School District ended its contract with local police.[219] The San Francisco School Board imposed restrictions on any on-campus interactions between police and students and promised to reallocate the money it will save to "school health and wellness programs."[220] Jessica Black, BOP's director, said: "Letting go of law enforcement that has oppressed our communities is historic."[221]

It is only organizing like this that will enable us to break the cycle of juvenile transfer. To avoid going back to the punitive transfer policy of the 1990s and 2000s, institutions need to make sure parents have the money to support their kids and provide communities the resources and the knowledge to help families without resorting to the juvenile system. However, these changes have taken place as the juvenile crime rate has been declining for decades[222] — a spike might lead to backlash and a more punitive turn, launching California back into a retributive iteration of the cycle. Real reform can happen only if there is a combination of limited transfer and sustained investment in developing alternatives that can keep kids out of courts altogether.

B. WHAT ONLY COMMUNITIES CAN DO: BUILDING ALTERNATIVES TO THE JUVENILE LEGAL SYSTEM TO RENDER TRANSFER OBSOLETE

Jurisdictional reforms alone will not bring the transformative change needed to break the cycle of juvenile transfer — that work will be done

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218 *Oakland school board abolishes its police force with unanimous vote*, SFGATE (Jun. 24, 2020, 9:56 PM) https://www.sfgate.com/news/bayarea/article/School-Board-Abolishes-Its-Police-Force-With-15364930.php.

219 Jill Tucker, *San Francisco schools sever ties with city police*, SAN FRANCISCO CHRONICLE (Jun. 24, 2020), https://www.sfchronicle.com/education/article/San-Francisco-schools-sever-ties-with-city-police-15363295.php.

220 Annika Hom, *San Francisco School Board votes to cut ties and funds from police*, MISSION LOCAL (Jun. 23, 2020), https://missionlocal.org/2020/06/san-francisco-unified-school-district-votes-to-cut-ties-and-funds-from-police.

221 *See* Simpson, *supra* note 217.

222 *See* Males, *supra* note 194; *see also* Washburn, *supra* note 192 (showing that despite decreasing crime rates, California's spending on the Department of Juvenile Justice has skyrocketed).

outside of the courtroom. Black-letter law, codes, and professional rules can only go so far toward what Michelle Alexander calls "critical political consciousness," a greater cultural shift that forces policy change. More effective and fair interventions in schools and communities could limit the use of juvenile proceedings — including transfer — because schools tend to punish the same young people that courts criminalize.[223] School should be a safe haven for young people, but it is often a site of violence.[224] Summarizing the experiences of female gang members, Meda Chesney-Lind and Randall Shelden write, "School is a road that leads to nowhere, and emancipation and independence are out of reach, given their limited family and community networks . . . avenues of opportunity for urban underclass girls are blocked."[225] Kids are the subject of a carceral state over which they have no control: queer kids, kids of color, and kids with disabilities more than others.[226] If the goal is breaking the cycle of juvenile justice, the process begins with restorative and transformative justice in schools and communities.

Restorative justice (RJ) can contribute to transformation by creating spaces for communities, outside the juvenile or criminal legal systems, to respond to harm caused by kids. RJ focuses on the harm, but also on the needs of the people harmed, their families, and the people who did harm

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223 *See*, *e.g.*, Michael Krezmien et al., *Marginalized Students*, *School Exclusion*, *and the School-to-Prison-Pipeline*, *in* Juvenile Justice Sourcebook 267, 269 (Wesley T. Church et al., eds., 2d ed. 2018) (showing that Black students, Hispanic students, and students with disabilities are suspended from school at disproportionate rates).

224 *See* Erica Meiners, For the Children? 109–10 (2016).

225 Meda Chesney-Lind & Randall Shelden, Girls, Delinquency and Juvenile Justice 64 (4th ed. 2014).

226 Shannon D. Snapp & Stephen T. Russell, *Discipline Disparities for LGBTQ Youth: Challenges that Perpetuate Disparities and Strategies to Overcome Them*, *in* Inequality in School Discipline 207–23 (Russell J. Skiba, Kavitha Mediratta, & M. Karenga Rausch, eds., 2016); Jennifer F. Chmielewski et al., *Intersectional Inquiries with LGBTQ and Gender Nonconforming Youth of Color: Participatory Research on Discipline Disparities at the Race/Sexuality/Gender Nexus*, *in* Inequality in School Discipline 171–88 (Russell J. Skiba, Kavitha Mediratta, M. & Karenga Rausch, eds., 2016); Jemimah L. Young, jamaal R. Young, & Bettie Ray Butler, *A Student Saved is NOT a Dollar Earned: A Meta-Analysis of School Disparities in Discipline Practice Toward Black Children*, 17 J. of Culture and Education 95 (2018); *see also* Alexander, *supra* note 111 at 199 ("Because black youth are viewed as criminals, they . . . are . . . 'pushed out' of schools through racially biased school discipline policies.").

themselves.[227] It seeks to fulfill the obligations of young people to their communities, and the obligations of communities to their young people, using inclusive, collaborative processes that also correct individual wrongs.[228] Contrary to the proposal that we "trust in government and experts,"[229] restorative justice urges communities to trust themselves. Even twenty years ago, the National Institute of Justice reported to Congress that restorative justice was the best tool to address the needs of young people and their communities, and RJ has only developed since.[230] One undisputed benefit is that RJ is cheap.[231] More numerous and more effective restorative justice programs affiliated with the juvenile court — or better yet independent of the court system entirely — can both help communities and convince judges that transferring cases to adult court is unnecessary.

However, some criticize programs that "rehabilitate" rather than shake the foundations of prisons and the carceral system. Some restorative justice programs fit that bill.[232] Juvenile courts around the country

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227 Restorative programming also generally produces lower recidivism rates than juvenile court. *See* Bouffard et al., *The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders*, 15 Youth Violence and Youth Justice 465, 495 (analyzing by race and controlling for prior criminal convictions). A 2006 study of an RJ program called direct victim-offender mediation (VOM) found that kids who participated in VOM were 34 percent less likely to recidivate than those formally charged in juvenile court. See William Bradshaw et al. *The Effect of Victim Offender Mediation on Juvenile Offender Recidivism: A meta-analysis*, 24 Conflict Resolution 1 (2006); *see also* Bouffard, *supra*, at 467–68.

228 Howard Zehr, Changing Lenses 270 (3d ed. 2005); *see also* Mark Umbreit, *Multicultural Implications of Restorative Justice* 63 Fed. Probation 44 (1999); Meiners, supra note 224 at 108 (explaining the origins of RJ in Native American cultures).

229 *See* Zimring, Choosing the Future, *supra* note 95 at 231.

230 *See* Thomas Simon et al. *Changing Course: Preventing Gang Membership*. National Institute of Justice (2013).

231 J. C. Tsui, *Breaking Free of the Prison Paradigm: Integrating Restorative Justice into Chicago's Juvenile System*, 104 J. Crim. L. & Criminology 635, 643 (2014).

232 *See* Dean Spade (Facebook.com, Apr. 7 2012) https://www.facebook.com/notes/dean-spade/seattle-youth-jail-rehabilitation-project-thoughts-on-thursdays-public-forum/405286129483770; *see also* Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson's Masculinity as Prison*, The Circuit 4 (2012) (critiquing a program that provided funding and training to jail guards who interact with LGBTQ inmates); Critical Resistance, *What is the PIC? What is Abolition?* CriticalResistance.org, http://criticalresistance.org/about/

have adopted the so-called Missouri Model of intensive therapeutic and allegedly restorative interventions in juvenile prisons. The Missouri Model has inspired glowing reviews from staff, politicians, and even former juvenile inmates.[233] But Erica Meiners, an organizer with the abolitionist group Critical Resistance and a former California educator, argues that RJ, especially when conducted in juvenile prisons as in Missouri, can incorporate to an unacceptable degree the structures of the prisons it should dismantle.[234] "While the goal of RJ, for some, is to disentangle young people from relationships with prisons and policing, the location of RJ programs in schools already inherently wedded to the carceral state poses significant challenges."[235] These are challenges that ongoing efforts to build out RJ will have to contend with, but it still has "the potential to negotiate some forms of conflict in schools and communities, and to reduce the roles that the police and courts play in the lives of young people."[236]

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not-so-common-language/ ("Abolition isn't just about getting rid of buildings full of cages. It's also about undoing the society we live in because the [prison industrial complex] both feeds on and maintains oppression and inequalities through punishment, violence, and controls millions of people"); *see also* Kathy Evans, *Restorative Justice in Education — Possibilities, but also Concerns*, Zehr Institute for Restorative Justice (Jun. 26, 2014), https://zehr-institute.org/resources/restorative-justice-in-education-possibilities-but-also-concerns.html (warning against restorative programs that are actually punitive or have otherwise "been completely co-opted").

233 *See* Bernstein, *supra* note 12 at 284–89.

234 Meiners, *supra* note 224 at 113–14.

235 *Id*. at 114; *see also* Samuel Y. Song & Susan M. Swearer, *The Cart Before the Horse: The Challenge and Promise of Restorative Justice Consultation in Schools*, 26 J. of Educational and Psychological Consultation 313, 322–24 (outlining the extensive training teachers and school staff will need to support effective RJ in schools); Paul J. Hirschfield, *The Role of Schools in Sustaining Juvenile Justice System Inequality*, 28 The Future of Children 11, 13–15 (2018) (describing disproportionately negative outcomes for Black students in school RJ programs); Anne Gregory et al., *The Promise of Restorative Practices to Transform Teacher-Student Relationships and Achieve Equity in School Discipline*, 26 J. of Educational and Psychological Consultation 325, 350–52 (covering many of the same challenges to productive use of RJ in schools but outlining how to use the practice of RJ to transform relationships and systems that support the school to prison pipeline).

236 Meiners, *supra* note 224; *see also* Jeanie Austin, *Restorative Justice as a Tool to Address the Role of Policing and Incarceration in the Lives of Youth in the United States*,

Meiners instead advocates for what she calls transformative justice (TJ). Some organizations conceive of TJ as distinct from RJ because rather than restoring some former status quo, it attempts instead to change the conditions that allow harm to occur.[237] For example, California teacher and transformative justice practitioner Mimi Kim suggests using general terms like "person who caused harm" (rather than perpetrator, offender, batterer, or thief), or first names to "allow the possibility of change, without assuming it is inevitable."[238] Kim founded and led an organization called Creative Interventions (CI), which exemplifies the promise and difficulty of transformative justice, important tenets of which are anti-institutionalism and impermanence.[239] CI produced a toolkit based on Kim and others' years practicing TJ and then closed up shop.[240] Similarly, Meiners notes that many TJ initiatives are suspicious of being catalogued or transposed into new places and recognize the difficulty of reproducing the personal, local spaces required for success.[241] That makes it hard to develop a clear roadmap for TJ (although CI's Toolkit is an excellent start).

However, organizations — especially youth- and people-of-color-led abolitionist organizations[242] — are increasingly organizing for transformative justice, whether they so name it or not.[243] Youth Organize (YO!)

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1 J. Librarianship and Info. Sci. 15 (2018) (discussing the implementation of restorative justice in a completely different context: San Francisco public libraries).

237 *See* Meiners, *supra* note 224 at 121; Esteban Lance Kelly, *Philly Stands Up: Inside the Politics and Poetics of Transformative Justice and Community*, 37 Social Justice 44 (2012) (discussing transformative justice as practiced by a Philadelphia abolitionist organization).

238 Mimi Kim, *Moving beyond critique: Creative Interventions and reconstructions of community accountability*, 37 Social Justice 14 (2012).

239 Creative Interventions, http://www.creative-interventions.org.

240 *See Creative Interventions Toolkit: A Practical Guide to Stop Interpersonal Violence*, Creative Interventions 3 (2012), https://www.creative-interventions.org/tools/toolkit.

241 Meiners, *supra* note 224 at 123–24.

242 *See* Eric Braxton, *Youth leadership for social justice: Past and present*, in Contemporary Youth Activism: Advancing Social Justice in the United States 25 (2016) (arguing that youth social justice organizing tends to center young people of color).

243 *See About Us*, YouthBuild, https://www.youthbuildcharter.org/about-us/ (describing the youth-led projects YouthBuild supports, including explicitly abolitionist campaigns around Los Angeles County jails — YouthBuild works with kids who

California calls for justice with "no prisons, criminalization, deportation, mass incarceration, state-sanctioned violence, or racial profiling in communities of color. Instead, young people and community members are embraced by a true community of healing and transformation."[244] YO! has been involved in recent successful campaigns to overhaul school discipline and defund police departments.[245] With the political energy of the moment,[246] expertise developed over years of restorative and transformative justice practice,[247] and money that cities and counties have pledged to redirect from police contracts,[248] TJ can become a cornerstone of a larger transformative project.

Bernard and Kurlycheck argue that restorative justice programs will not break the cycle of juvenile justice because they cannot change systemic causes of violence and wrongdoing.[249] But more transformative programs, like those outlined in Mimi Kim's Creative Interventions toolkit, seem tailor-made to respond to such a criticism.[250] Rather than inserting restorative programs into institutions like schools and jails, restorative practice can be a part of larger social and political

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have been expelled or otherwise removed from public schools and explicitly recognizes the negative impact of neoliberal charter school programs on public education in Los Angeles).

244 *Young People's Agenda*, *supra* note 16.

245 *See Welcoming & Safe Schools for All*, Advancement Project, https://www.advancementprojectca.org/what-we-do/educational-equity/k-12-education-policy/welcoming-safe-schools-for-all (describing the successful 2017 YO! California campaign for abolitionist school safety programs); *see also Fresno Announces Commission on Police Reform*, KMJNow (Jun. 19, 2020), https://www.kmjnow.com/2020/06/19/video-fresno-announces-commission-on-police-reform/ (listing Yo! members as participants in a commission that will make recommendations about the future of Fresno's police department).

246 *See*, *e.g.*, *Angela Davis on Abolition*, *Calls to Defund Police*, *Toppled Racist Statues & Voting in 2020 Election*, Democracy Now! (Jun. 12, 2020) https://www.democracynow.org/2020/6/12/angela_davis_on_abolition_calls_to (reflecting on the unique energy of the moment and the challenge of turning that energy into sustained momentum for change).

247 *See*, *e.g.*, *Creative Interventions Toolkit*, *supra* note 240.

248 *See* Simpson, *supra* note 217 (discussing the redirection of $2.5 million from Oakland's school police department to student services).

249 Bernard & Kurlycheck, *supra* note 12, at 200.

250 *See Creative Interventions Toolkit*, *supra* note 240.

transformation. RJ — perhaps TJ, too — has already decreased referrals to juvenile court.[251] Many teachers, schools, communities, and organizers, especially those run by and for Black people and people of color, have been working on this transformation for years.[252] And now California's families, schools, and communities seem to be ready.[253] School districts are pledging to stop calling the police to campus, cities are

[251] *See*, *e.g.*, Fania Davis, *Discipline with Dignity: Oakland Classrooms Try Healing Instead of Punishment*, 23 RECLAIMING CHILDREN AND YOUTH 38 (2014); David Washburn & Daniel J. Willis, *The Rise of Restorative Justice Programs in Schools Brings Promise, Controversy*, EDSOURCE (May 13, 2018), https://edsource.org/2018/the-rise-of-restorative-justice-in-california-schools-brings-promise-controversy/597393.

[252] *See*, *e.g.*, kihana miraya ross, Black girls speak: struggling, reimagining, and becoming in schools, 45–47, 83–83 (2016) (unpublished Ph.D. dissertation, on file with the University of California, Berkeley) (describing the risk, power, and opportunity of a pilot program of all-Black-women high school classrooms in the Bay Area); Chrissy Anderson-Zavala et al., *Fierce Urgency of Now: Building Movements to End the Prison Industrial Complex in Our Schools*, 19 MULTICULTURAL PERSPECTIVES 151 (2017) (drawing on a forum in Oakland: "Without Walls: Abolition & Rethinking Education" to discuss strategies to dismantle the "school-prison nexus"); Roam Romagnoli, Decarcerating California: A Critical Trans-politics Approach to Expanding Incarcerated Students' Access to Upper-Division Coursework (2018) (unpublished Ph.D. dissertation, on file with San Francisco State University) (asking a series of questions to judge the value of partnerships between schools and prisons: "is this tactic/reform/approach recuperating systems and institutions we want to dismantle? . . . Does it leave out an especially marginalized part of the affected group (e.g., people with records, people without immigration status)? Does it legitimate or expand a system we are trying to dismantle?").

[253] For example, the Black Organizing Project had called for dismantling the Oakland Unified School District Police Department for ten years before the school board suddenly, unanimously, agreed in June 2020. Sarah Ruiz-Grossman, *Oakland School Board Votes to Eliminate its Police Department*, HUFFINGTON POST (Jun. 24, 2020, 11:02 PM), https://www.huffpost.com/entry/oakland-schools-vote-eliminate-police_n_5ef3e6c0c5b643f5b22ee844?guccounter=1&guce_referrer=aHR0cHM6Ly9kdWNrZHVja2dvLmNvbS8&guce_referrer_sig=AQAAABY2FHrP1K3IsPL8e3ChMZgBRf5OzjgWfWq-1SCaUii49hBYXAHK2UJ53w0SJFwRQNEugxWTH9AOTtC0JbwgwZa_4jQMQJV-Pd3RORMum9FsZr1pF7mcFAANrNUbMWBG7mTYv6TS_ZyJU12XUPwFHq53tpH_XNO8F7IcRPtBjFpm. The superintendent of Oakland Unified School District said, "As an educator, I know that students and staff must be safe physically and emotionally. In reflecting over the past few weeks, it has become clear to me that we must answer this call and this moment in a way that fundamentally transforms how we operate." Chris Walker, *Oakland School Board Unanimously Votes to Disband its Own Police Force*, TRUTHOUT (Jun. 25, 2020), https://truthout.org/articles/oakland-school-board-unanimously-votes-to-disband-its-own-police-force.

defunding police departments, and Californians seem to be looking for alternative ways of living without resorting to policing, prisons — or juvenile transfer.

CONCLUSION

Juvenile transfer presents interesting legal questions about jurisdictional lines, but dark realities about prosecution and incarceration of young people. Despite the reforms of the last twenty years, Frankie Guzman and his friend might have the same experience if they were charged today. The few-month difference in their birthdays would make Guzman ineligible for transfer to adult court under SB 1391, while prosecutors could still ask the court to transfer his friend. And prosecutors are attempting to reinvigorate the juvenile court's worst punishment — their constitutional challenges to SB 1391 are the backlash to lenient treatment and show the formidable opposition facing anti-police and anti-carceral movements in California.

State and national history inform transfer rules, but the people set them and decide whether we need transfer at all. Perhaps community-based programming can engender a "fundamental shift in public consciousness" and end the transfer of kids to adult court.[254] Perhaps, even as we restrict the jurisdiction of adult courts over the oldest children, we can also limit juvenile court jurisdiction over our youngest children, until more and more young people are treated, held responsible, and made whole outside of any legal system. To avoid a more punitive turn in the cycle of juvenile transfer, and perhaps to end the cycle altogether, California should continue to explore the horizons of transformative change.

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[254] Alexander, *supra* note 111 at 222.

STOP! TURN THE CAR AROUND RIGHT NOW FOR FEDERALISM'S SAKE!

The One National Program Rule and How Courts Can Stop Its Impact

BRITTNEY M. WELCH*

This paper was awarded third place in the California Supreme Court Historical Society's 2020 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

* J.D. Candidate, The Ohio State University Moritz College of Law, 2021; B.A. Communications, Stockton University, 2017. My never-ending thanks to Megan Porter, for being the best of friends and always reminding me of the value of my work; Emily Sulka, for years of friendship and practice in crafting a good narrative; Jay Payne, for planting the idea of this paper in my mind during my summer at the Department of Transportation; Professor Christopher J. Walker, for supporting me through the note process; Professor Cinnamon Piñon Carlarne, for her expert eye; Professor Colleen Garrity Settineri, for the constancy of her kindness; Seth J. Barany and Stacey A. Dettwiller for many rounds of editing; and my family, who supported my struggling over the first and many iterations of this paper at the kitchen table.

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I. INTRODUCTION

It is late July — the dead heat of summer — of 1943.[1] Allied forces have just bombed Rome; Benito Mussolini has been arrested; and Italy is under martial law.[2] Across the world, Los Angeles residents believe they are being attacked by Japanese forces.[3] They can see no farther than three blocks as a thick fog envelops the city, stinging their eyes and making their noses run.[4] They think it is chemical warfare. But the culprit is not a wartime enemy — it is the first incidence of smog in California.[5] A local factory is shut down as Angelenos try to discern the source, and the mayor confidently predicts "an entire elimination" of the issue within four months.[6] This prediction did not come to pass.[7]

In fact, it did not become clear until the next decade that the "hellish cloud" in the city was smog, created primarily by automobile exhaust.[8] In 1960, to combat the impact of the smog and some of the "worst air quality in the country," California established a Motor Vehicle Pollution Control

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[1] Jess McNally, *July 26, 1943: L.A. Gets First Big Smog*, WIRED (July 26, 2018, 12:00 AM), https://www.wired.com/2010/07/0726la-first-big-smog (The first smog occurred on July 26).

[2] PBS, *Timeline of World War II*, PBS (Sept. 2007), https://www.pbs.org/thewar/at_war_timeline_1943.htm.

[3] McNally, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Kat Eschner, *This 1943 "Hellish Cloud" was the Most Vivid Warning of LA's Smog Problems to Come*, SMITHSONIAN.COM (July 26, 2017), https://www.smithsonianmag.com/smart-news/1943-hellish-cloud-was-most-vivid-warning-las-smog-problems-come-180964119. In 1948, Arie Jan Haagen-Smit, a researcher at the California Institute of Technology, discovered the source of the chemicals in the smog, which "were created when hydrocarbons produced by oil refineries and automobiles interacted with compounds in the atmosphere." Nat'l Sci. & Tech. Medal Found., *Arie Jan Haagen-Smit*, NAT'L SCI. & TECH. MEDAL FOUND. (last accessed Dec. 10, 2019), https://www.nationalmedals.org/laureates/arie-jan-haagen-smit; This particular smog is called photochemical smog, though it is also known as "Los Angeles smog," which is most common in urban areas with a large number of automobiles. The Editors of Encyc. Britannica, *Smog*, ENCYC. BRITANNICA (last updated Mar. 19, 2019), https://www.britannica.com/science/smog. Unlike the Angelenos' original assumption, it "requires neither smoke nor fog." *Id.*

Board.[9] In 1966, California enacted the first tailpipe emissions standards in the country.[10] A year later in an amended version of the Clean Air Act (CAA), the federal government preempted all states — except for California — from adopting emissions control standards.[11] The government has consistently reaffirmed California's emissions control standards for over fifty years.[12] Until now.[13]

The Trump administration wants to revoke California's ability to innovate and set its own automobile tailpipe emissions standards for greenhouse gas emissions, as well as its zero emissions vehicle regulations.[14] The Department of Transportation's (DOT) National Highway Traffic Safety Administration (NHTSA) and the Environmental Protection Agency (EPA) jointly proposed the revocation of the 2013 CAA waiver as a part of the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule.[15] After the comment period ended and California made it clear they did not plan to comply with future Trump administration automobile emissions standards, the administration issued a final rule on the waiver and preemption

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9 The Editors of Encyc. Britannica, *supra* note 8. Los Angeles smog results in many detrimental effects: "a light brownish coloration of the atmosphere, reduced visibility, plant damage, irritation of the eyes, and respiratory distress." *Id.* Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 Nw. U. L. Rev. 1097, 1109 (2009).

10 Carlson, *supra* note 9, at 1109.

11 *Id.*

12 California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2,112, 2,113 (Jan. 9, 2013) [hereinafter 2013 CAA Waiver].

13 David Shepardson, *Trump Administration Bars California from Requiring Cleaner Cars*, Reuters (Sept. 19, 2019, 6:10 AM), https://www.reuters.com/article/us-autos-emissions-trump/trump-administration-bars-california-from-requiring-cleaner-cars-idUSKBN1W4157. There was one denial, but the waiver was eventually granted. See discussion *infra* at text associated with nn. 111–13.

14 The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,174 (Apr. 30, 2020) [hereinafter SAFE Vehicles Rule]. Shepardson, *supra* note 13.

15 SAFE Vehicles Rule, 83 Fed. Reg. 42,986, 42,986 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, and 537 and 40 C.F.R. pts. 85 and 86) [hereinafter "Proposed SAFE Rule"].

issues, called the One National Program Rule.[16] One National Program withdraws California's 2013 CAA waiver and explicitly preempts the state's greenhouse gas emissions control program.[17] NHTSA also rolled back the Corporate Average Fuel Economy (CAFE) standards, which would put California's desired standards at odds with the new CAFE standards, the impetus for One National Program.[18]

The Trump administration's actions contravene the most basic principles of federalism: innovation, competition, state sovereignty, and fostering creative partnerships. Notions of federalism, the question of the proper division of authority between local and national governments, existed in the United States long before the Founding.[19] From the early seventeenth century and naissance of states, to a modern era of fifty states totaling 330 million people, the American tradition of federalism remains alive and well.[20] Spurning this long history, One National Program will impact the innovative and dynamic version of federalism that exists today — possibly impacting it indefinitely.[21] California's CAA waiver is an example of iterative federalism, which results in "regulations [that] are the results of repeated, sustained, and dynamic lawmaking efforts involving both levels of government."[22] California's existing standards, which focus on controlling greenhouse gas emissions, are a part of one of the most significant climate-related iterative federalism schemes in existence.[23]

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16 The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533) [hereinafter One National Program].

17 *Id.*

18 SAFE Vehicles Rule, 85 Fed. Reg. at 24,174. *See generally* One National Program, 84 Fed. Reg. at 51,310. U.S. Envtl. Prot. Agency, *Trump Administration Announces One National Program Rule on Federal Preemption of State Fuel Economy Standards*, U.S. Envtl. Prot. Agency (Sept. 19, 2019), https://www.epa.gov/newsreleases/trump-administration-announces-one-national-program-rule-federal-preemption-state-fuel.

19 James E. Hickey, Jr., *Localism, History, and the Articles of Confederation: Some Observations About the Beginning of U.S. Federalism*, 9 Ius Gentium 5, 6, 8 (2003).

20 *Id.* U.S. Census Bureau, *U.S. and World Population Clock*, U.S. Census Bureau (last accessed May 11, 2020), https://www.census.gov/popclock.

21 SAFE Vehicles Rule, 85 Fed. Reg. at 24,174.

22 Carlson, *supra* note 9, at 1099–1100.

23 *Id.*

This paper is a comment on the negative impacts the One National Program Rule and the SAFE Vehicles Rule will have on federalism. Part II examines the deeply embedded aspects of federalism in the origin of California's CAA waiver scheme. Part III discusses how the rules will harm federalism, with a focus on the new wave of liberal federalism. Part IV discusses the reasoning behind the rules. Part V proposes a framework that emphasizes the central role federalism should play in the analysis of an eventual court's decision on the rules. It concludes that the continued existence of California's waiver scheme is essential to the vitality of modern-day federalism.

II. THE ORIGIN OF CALIFORNIA'S WAIVER SCHEME & WHY IT IS ESSENTIAL TO FEDERALISM

Federalism is embedded in California's environmental protection scheme. California is the leader in air quality and emissions standards because of the troubles major urban areas like Los Angeles faced in the 1940s.[24] In 1947, California created the Los Angeles County Air Pollution Control District, the first in the nation.[25] But counties could not combat the problem of motor vehicle pollution at large, so in 1959, California created a Motor Vehicle Pollution Control Board to test vehicle emissions and certify any emission control devices.[26] California's approach prompted the adoption of the CAA of 1963, and the Motor Vehicle Air Pollution Control Act

[24] S. Coast Air Quality Mgmt. Dist., *The Southland's War on Smog: Fifty Years of Progress Toward Clean Air (Through May 1997)*, S. Coast Air Quality Mgmt. Dist. (last accessed Dec. 10. 2019), https://www.aqmd.gov/home/research/publications/50-years-of-progress.

[25] *Id*. The bill had fierce opposition from business interests, like oil companies and the chamber of commerce, which "opposed the repeal of a state law giving manufacturers the right to 'necessary' discharge of smoke and fumes, and the creation of an air pollution permit system." *Id*. However, after the creation of the first district, districts spread all over the state. *Id*.

[26] *Id*. Automobile makers at the time had to agree to make separate additions to car models made for California, like smog control systems (which are an emissions control device). *Smog-Control Unit Set for California in '66-Model Cars*, N.Y. Times (Aug. 13, 1964), https://www.nytimes.com/1964/08/13/archives/smogcontrol-unit-set-for-california-in66model-cars.html.

of 1965.[27] The federal Health, Education and Welfare Agency even issued emissions standards identical to California's standards for model year 1968 passenger cars.[28]

The CAA of 1967 included California's first waiver.[29] The act states: "No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this title," but also adds that "[t]he Secretary shall, after notice and opportunity for public hearing, waive application of this section to any state which has adopted standards . . . prior to March, 30, 1966."[30] The waiver exclusively impacted California, because of the state's pioneering emissions regulations.[31] The 1977 amendments to the CAA authorized other states to follow either the federal standard or their own standards if and only if they were identical to California's.[32] Congress granted this option with the "hope and expectation that California would pioneer air pollution control standards and technologies that could serve as models for the United States as a whole."[33] This is a classic example of incentivizing a state to serve as a laboratory of democracy, one of the main objectives of federalism.[34] Since 1967, under Democratic and Republican administrations, the EPA has almost summarily approved California's waiver requests.[35] These waivers enable

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27 Carlson, *supra* note 9, at 1110.

28 *Id*.

29 2013 CAA Waiver, 78 Fed. Reg. 2,112, 2,113 (Jan. 9, 2013).

30 Clean Air Act of 1967, Pub. L. No. 90-148, § 208, 81 Stat. 501, 501 (1967). This waiver does not apply if the state does not require higher standards than federal ones "to meet compelling and extraordinary conditions," or if the state's standards and enforcement of those standards are not consistent with Section 202(a) of the CAA. *Id.*

31 Cal. Air Res. Bd., *History*, Cal. Envtl. Prot. Agency (last accessed Dec. 10, 2019), https://ww2.arb.ca.gov/about/history.

32 2013 CAA Waiver, 78 Fed. Reg. at 2,113.

33 Richard M. Frank, The Federal Clean Air Act: California's Waivers — A Half-Century of Cooperative Federalism in Air Quality Management, *Hearing Before the Calif. S. Comm. on Environmental Quality* 4 (Feb. 22, 2017).

34 *See generally* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See *infra* text associated with note 60.

35 Frank, *supra* note 33, at 6 (Over 100 separate waiver determinations from the United States Environmental Protection Agency have been granted since 1967).

California's innovations in emissions control regulation.[36] Currently, the California Air Resources Board is responsible for the state's emissions regulation and innovation.[37]

This long and comprehensive history of emissions control and air quality regulation reveals the vitality and importance of this federalism model — in fact, the federal government continues to model many of its own emissions standards on California's.[38] A 1971 report on environmental quality recognized the importance of state and local governments, which are on the front lines of "essential planning, management, and enforcement."[39] It noted California as a harbinger for federal emissions laws, a laboratory for solutions, and a catalyst for federal action.[40]

As a part of one of the "most significant climate change initiatives to come from the state," California's iterative scheme has been the source of one of the "most innovative state responses to climate change."[41] Ann E. Carlson, the originator of the term "iterative federalism," posits that this innovation stems from the "repeated, sustained, and dynamic lawmaking

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[36] *Id*. These innovations include: a "[f]irst in the nation tailpipe emission standard for hydrocarbons, carbon monoxide, oxides of nitrogen and [] particulate matter emissions from diesel-fueled vehicles," catalytic converters, "check engine" light systems, the "nation's first greenhouse gas emission standards for passenger vehicles," and requiring manufacturers "to consider the combined effects of engines, transmissions, tire resistance, etc., on both conventional ('criteria') and greenhouse gas pollutant emissions." *Id*. at 6–7.

[37] Cal. Air Res. Bd., *supra* note 31. The California Air Resources Board consists of sixteen members, twelve of whom are appointed by the governor and confirmed by the State Senate. Cal. Air. Res. Bd., *About*, Cal. Air. Res. Bd. (last accessed Feb. 8, 2020), https://ww2.arb.ca.gov/about. The remaining four slots consist of two members who represent environmental justice communities, and two nonvoting members who conduct legislative oversight — these four are also selected by the California Senate and Assembly (two by each). *Id*. Altogether, the California Air Resources Board includes experts in the air quality field, leaders in local air districts, and concerned members of the public. *Id*. The staff of the California Air Resources Board includes a "professional staff of scientists, engineers, economists, lawyers and policy makers." *Id*.

[38] Frank, *supra* note 33, at 7.

[39] Council on Envtl. Quality, *Environmental Quality, the Second Annual Report of the Council on Environmental Quality* 37 (Aug. 1971), https://files.eric.ed.gov/fulltext/ED055922.pdf.

[40] *Id*. at 37–38.

[41] Carlson, *supra* note 9, at 1099–1100.

efforts involving both levels of government."[42] The CAA waiver enables California to act more freely to limit greenhouse gas emissions.[43] The ability of the states and the federal government to push back and forth over different iterations of automobile emission standards has strengthened laws and the lawmaking process in ways that the federal government alone could not achieve.[44]

Critics of this form of federalism, which uses iterations to strengthen environmental law, suggest that limiting California's waiver is not a federalism issue at all. Instead, they suggest that the waiver process is a coercive power grab by California.[45] This argument ignores the obvious. California is not the only state that follows its standards. The 1977 amendments to the CAA allow any state to adopt vehicle emissions standards that are identical to California's, as long as a waiver has been granted for the model year, and the standards are adopted two years ahead of time.[46] States *have* chosen to take this option, forgoing the federal standard in favor of California's. Almost 120 million people reside in states that follow California's vehicle emissions standards.[47] The combined population of all other states

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[42] *Id.* at 1099. Carlson describes this dynamic as one in which the federal government has "quasi-deputized" California to act, while also continuing to promulgate federal regulations. *Id.* at 1100. Then the back and forth begins, in which "one level of government — either the singled-out state actor or the national government — moves to regulate a particular environmental policy area. The initial policymaking then triggers a series of iterations adopted in turn by the higher or lower level of government. The process then extends back to the policy originator, and so forth." *Id.*

[43] *Id.*

[44] Carlson, *supra* note 9, at 1108–9 (Even California, the leader in these vehicle emissions regulations, has dragged its feet at times — and the federal law was what pushed the state to do more).

[45] Kenny Stein, *Limiting California's Waiver Authority is Not a Federalism Issue,* Inst. for Energy Research (Mar. 27, 2018), https://www.instituteforenergyresearch.org/regulation/limiting-californias-waiver-authority-not-federalism-issue.

[46] Clean Air Act of 1977, Pub. L. No. 95-95, § 177, 91 Stat. 750, 750 (1977). "Waivers do not expire; they are sometimes superseded by a new waiver approving more stringent standard." Stanley Young, *California & the Waiver: The Facts*, Calif. Air Resources Bd. (Sept. 17, 2019), https://ww2.arb.ca.gov/resources/fact-sheets/california-waiver-facts.

[47] U.S. Census Bureau, *State Population Totals and Components of Change: 2010–2019,* U.S. Census Bureau (last updated Dec. 30, 2019), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html. Maryland Dep't of the Env't, *States Adopting California's Clean Cars Standards*, Md. Dep't of the Env't (Last visited May 11, 2020), https://mde.maryland.gov/programs/air/mobilesources/pages/states.aspx (The

is around 209 million.[48] Therefore, the population of the states following California's standards is over one-third of the United States population. Moreover, California still impacts states beyond those following its standards. Any car dealerships in states bordering those following California's standards can sell cars compliant with the adopted standards.[49]

These states are the subject of "spillovers," which some scholars take issue with, because it means citizens of one state are living under another state's laws.[50] But, spillovers are where federalism blossoms — spillovers "give [people] the chance to see how other people live, to live under someone else's law, [and] try someone else's policy on for size."[51] Spillovers push issues into the national sphere, forcing governments to act.[52] This is exactly what California's emissions regulations do. Because states adopt California's regulations, and car dealers within these states sell cars compliant with California's regulations to noncompliant states, the framework goes far beyond just California.[53]

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entire group of jurisdictions following California's standards is as follows: California, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia).

48 U.S. Census Bureau, *supra* note 47.

49 Robinson Meyer, *The Coming Clean-Air War Between Trump and California*, The Atlantic (Mar. 6, 2017), https://www.theatlantic.com/science/archive/2017/03/trump-california-clean-air-act-waiver-climate-change/518649/ (They *can* do so, but it is not a must — it is an optional economic choice for the businesses to make). Currently 12 states border the states following California's standards, bringing the total number of states (and D.C.) that may be affected by California's emissions regulations to 27. Maryland Dep't of the Env't, *supra* note 47.

50 Heather K. Gerken & James T. Dawson, *Living Under Someone Else's Law*, 36 Democracy, A J. of Ideas (2015), https://democracyjournal.org/magazine/36/living-under-someone-elses-law.

51 *Id*. Gerken and Dawson state that "[a] well-functioning democracy doesn't require rigid uniformity; it requires us to deliberate about which departures from national policy are consistent with our norms and which are outside the bounds." *Id*.

52 *Id*.

53 Meyer, *supra* note 49. Because CAFE standards regulate new cars and trucks, car dealers are only affected if they are required to follow California's rules as per their state's adoption of them, and if they sell new cars. Benjamin Leard, *The Effect of Fuel Economy Standards on New Vehicle Sales*, Resources Mag. (Feb. 11, 2019), https://www.resources-mag.org/common-resources/effect-fuel-economy-standards-new-vehicle-sales. The concerns about the negative economic impact of more expensive fuel/emission efficient

California's scheme is essential to federalism. It is vital that states have control over how they choose to implement federal standards as well as the ability to exceed those standards should they choose to, especially in the environmental sphere. For example, the Obama administration gave states a great deal of leeway in their Clean Power Plan to determine climate policies.[54] This kind of allocation of authority is essential, because "[c]limate change is an area where a deep state of gridlock has settled in at the national level, and new ideas for political coalitions and alignments are desperately needed."[55] With this marketplace of ideas stripped away, innovations through iterative federalism's push and pull will be lost, and a productive area of federalism will be walled off forever by the federal government. Losing California's CAA waiver scheme doesn't just affect California — it has created an iterative scheme that flows through the federal government, and the governments of other states.

III. HOW THESE RULES WILL HARM FEDERALISM

Federalism is older than the Founding.[56] It stems from long-held preferences for local authority and a strong distrust of concentrated federal power.[57] This division of power between the federal government and state governments is most noticeable in the Tenth Amendment to the Constitution, which gives the states any powers not expressly delegated to the government.[58] Because any power not reserved by the federal government

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cars on spillovers states, as well as the states that have adopted California's standards, does not come to bear. *Id.* A study of new vehicle buyers found that 92 percent of those buyers would opt for a different new vehicle, if their first choice was unobtainable (perhaps due to price concerns). *Id.* So higher CAFE standards would only have a "modest effect" on the sale of new vehicles. *Id.*

54 Denise A. Grab & Michael A. Livermore, *Environmental Federalism in a Dark Time*, 79 Ohio St. L.J. 667, 672 (2018).

55 *Id.*

56 Hickey, *supra* note 19, at 8.

57 *Id.* at 8–9 (citation omitted). The distance between England and the colonies made it necessary for people in colonial America to make their own decisions and laws, establishing a pattern of local rule in town and county governments. *Id.* at 9.

58 *Id.* at 16.

goes to the state, states have a lot of power to regulate different areas of the lives of their people.[59]

One of the longest lasting statements on federalism comes from a 1932 Supreme Court case in which Justice Brandeis wrote, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[60] California and its CAA waiver experiment is a laboratory of democracy, as the continued existence of the waiver is vital to the health of federalism in the twenty-first century. Federalism has gone through many iterations. This note will now examine the intersection between new blue federalism and iterative federalism, as well as the path forward from imagining states as the laboratories to a new era of modern federalism.[61] Analysis will demonstrate the importance of California's continued ability to have a waiver, and how this ability is a federalism issue through and through.

A. NEW BLUE FEDERALISM

Federal and state governments have clashed since the founding.[62] In *McCulloch v. Maryland*, Justice John Marshall wrote, "[T]he question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist."[63] Federalism has not always been tied to liberal ideas like the expansion of environmental protections led by state governments rather than the federal

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59 U.S. Const. amend. X. *See also id.* at amend. XI.

60 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932). However, some scholars criticize the laboratory view of federalism as a relic of the last century, specifically the pre–New Deal conceptualization of it, saying that it is a threat to federalism itself. *See* Heather K. Gerken, *Federalism 3.0*, 105 Calif. L. Rev. 1695, 1696–97 (2017), and Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 Harv. L. & Pol'y Rev. 33, 35–36 (2009). Federalism must be "reconceptualized" to "maintain its progressive potential. Schapiro, *supra* note 60, at 35. "Society and social ills have become more complex. Further, the civil rights era demonstrated the dangerous potential of unchecked local power, and this threat must not be ignored." *Id.*

61 Schapiro, *supra* note 60, at 34–35. ("Blue state" federalism is federalism that pushes for distinctly liberal policies, including in the areas of student loans, climate change, and same-sex marriage).

62 Hickey Jr., *supra* note 19, at 6–7.

63 McCulloch v. Maryland, 17 U.S. 316, 405 (1819).

government.[64] Now, in a time when the federal government is "unable or unwilling" to take on climate change, liberal or "blue" states have stepped in to fill the gaps.[65]

This brand of federalism is often called "blue state" or "new" federalism.[66] In fact, federalism comes in many forms, and it's used to meet many different ends.[67] The concept of new blue federalism echoes Progressive Era reforms, before federalism became synonymous with conservative "states' rights" goals.[68] One scholar argues that in this new progressive era of federalism, the idea itself must be reconceptualized, keeping in mind past abuses carried out under the banner of federalism.[69] As a solution to the threat of unchecked local power, he argues for a creative partnership between states and the federal government.[70] While states can press forward with issues the federal government is not yet acting on, the federal government's help is still important to combating the challenges the nation faces.[71] This ensures that states are still able to problem-solve, without sealing themselves off completely from the federal government.[72]

B. NEW BLUE FEDERALISM AND ITERATIVE FEDERALISM INTERTWINED

The way new blue federalism and iterative federalism intertwine shows how different conceptualizations of federalism build off one another. The

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64 Schapiro, *supra* note 60, at 33. The "states' rights" movements of the last century are often tied to opposition to civil rights, a point of view that progressives are unlikely to want associate with their own principles. *Id.*

65 *Id.*

66 *Id.* at 34. Gerken, *supra* note 60, at 1696.

67 Gerken, *supra* note 60, at 1696. Paul D. Moreno, *"So Long as Our System Shall Exist": Myth, History, and the New Federalism*, 14 Wm. & Mary Bill Rts. J. 711, 715 (2005). California's fight with the Trump administration is only the most recent battle for a liberal end, and it shows why the need for support behind new blue federalism is more pronounced than ever. *See* Schapiro, *supra* note 60, at 34–35 (discussing other liberal-leaning federalism battles).

68 Schapiro, *supra* note 60, at 34.

69 *Id.* at 35. ("The civil rights era demonstrated the dangerous potential of unchecked local power, and this threat must not be ignored.")

70 *Id.*

71 *Id.*

72 *Id.*

mix of new blue federalism and iterative federalism is especially prevalent in the environmental realm. The federal government under the Trump administration has rolled back many Obama-era policies related to combating climate change.[73] While this is the complete opposite of the inaction that once spurred states onward to fill the climate change policy void, the existence and idea of iterative federalism's helpful push and pull still stands. It ties into the idea of new blue federalism in the way that new blue federalism pushes the federal government further.[74] Critics of new blue federalism and its iterations say limiting California's waiver is not a federalism issue.[75] One critic stated, "The California legislature and its Air Resources Board set these national standards without the opportunity for the governments and populations of other states to weigh in."[76] He believes Congress and the Trump administration should be the ones deciding national issues to create a coherency among the states.[77] The blame is aimed at the Obama administration's past decisions to increase the federal standards, and California is accused of engaging in coercive, rather than cooperative, federalism.[78]

Federalism is not always cooperative.[79] Taking power from the federal government to regulate differently than it does is an inherently

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[73] See Cinnamon P. Carlarne, *Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 Am. U. L. Rev. 387 (2019) for a discussion of the state of climate change law in the Trump era. Michael Greshko, Laura Parker, Brian Clark Howard, Daniel Stone, Alejandra Borunda, & Sarah Gibbens, *A Running List of How President Trump is Changing Environmental Policy*, Nat'l Geographic (May 3, 2019), https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment.

[74] Carlson, *supra* note 9, at 1097–99.

[75] Stein, *supra* note 45. The Obama administration matched California's standards, and then went further to raise CAFE standards, which this critic says hurt the automotive industry. *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id. But see* Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 Ariz. L. Rev. 799, 817 (2008) (discussing how the CAA was also the first modern environmental statute that used a "cooperative federalism framework" (referring to the waiver scheme and emissions control standards)).

[79] *See* Ilya Somin, *No More Fair-Weather Federalism*, Nat'l Rev. (Aug. 18, 2017, 8:00 AM), https://www.nationalreview.com/2017/08/limit-federal-power-left-right-can-agree/ (discussing federalism that takes more power away from the national government).

coercive act, as it pushes the federal government to concede the power or follow along. In iterative federalism, that push and pull forces a dialogue between states and the federal government and makes federalism stronger — not weaker. California has this power because it acted first in the 1940s, and, when the federal government acted, they limited their own power to recognize California's already-existing state powers[80] — a delegation of power given willingly and expanded to allow other states to follow.[81] Federalism does not cease to exist because the Trump administration does not agree with the direction it is going, and what happens to California may reshape federalism's direction entirely.[82] The intertwining of iterative federalism and new blue federalism has only made the country stronger.

C. FEDERALISM IN THE MODERN AGE, AND CALIFORNIA'S ROLE IN IT

One reconceptualization of federalism is what Heather Gerken calls "Federalism 3.0."[83] Gerken's reconceptualization is based on the idea that the legacies of two different federalism debates frame federalism in an outdated way.[84] In one camp are what she calls the "nationalists," who pride themselves on "solicitude for . . . dissenters," and put the most emphasis on the power the states have as agents of the government.[85] The other camp is full of federalism "stalwarts," who believe strongly that states matter the most,

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[80] 2013 CAA Waiver, 78 Fed. Reg. 2,112, 2,113 (Jan. 9, 2013).

[81] *Id.*

[82] This point of view might also stem from the fact that, to an extent, modern federalism has also moved into what scholars call "executive federalism," away from cooperative federalism, because of polarization and the rise of the executive branch and the administrative state. Michael S. Greve, *Bloc Party Federalism*, 42 Harv. J.L. & Pub. Pol'y 279, 280 (2019).

[83] Gerken, *supra* note 60, at 1718.

[84] *Id.* at 1696, 1718 (The two frames come from "the mistaken assumptions of the New Deal (that state and national power should be conceived of in sovereignty-like terms) and the civil rights movement (that decentralization is properly cast in opposition to the interests of dissenters and racial minorities).")

[85] *Id.* at 1696–97. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 Yale L.J., 1889, 1893 (2014). Solicitude for minorities and dissenters has echoes of new blue federalism contained within.

but rely on what Gerken calls an "archaic conception of state power."[86] Gerken moves beyond those characterizations. In this era of Federalism 3.0, there are no longer laboratories of democracy, but a system of iterative federalism, with "helpful redundancy" and "healthy competition," coming from states and the federal government working together.[87] By encouraging the devolution of power to the states, which are already embedded in the federal regime, the federal government benefits.[88]

In Federalism 3.0, the government still has plenty of power to tame the states, but states can push back and shape federal law — both cooperatively and uncooperatively.[89] The decades of iterative federalism in California fit right in line with Gerken's view of the future of federalism. This federalism is not the idealized laboratory, completely cut off from the federal government, but the sometimes-cooperative and sometimes-uncooperative partner of a federal government strengthened by its partnership with the states. California's CAA waiver scheme is a prime example of a blue state scheme that has grown and been strengthened by the integration of federal and state goals, culminating in the allowance given to other states to follow its plan.[90] To say California is practicing a harmful version of federalism is to misunderstand the workings of modern federalism itself[91] — a modern federalism that continues to build on different versions of the concept, continuing the ever-lasting and ever-changing ideal of federalism this country was founded on.

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[86] Gerken, *supra* note 60, at 1697. New blue federalism can also lie within this concept.

[87] *Id.* at 1720.

[88] *Id.* at 1720–21. A devolution promoted by both liberals and conservatives. *See generally* Somin, *supra* note 79.

[89] *Id.* at 1721.

[90] *Id.* at 1720.

[91] *See* Stein, *supra* note 45. And the principles of federalism themselves weigh against what the Trump administration is trying to do to California. Denise A. Grab, Jayni Hein, Jack Lienke, & Richard L. Revesz, *No Turning Back: An Analysis of EPA's Authority to Withdraw California's Preemption Waiver Under Section 209 of the Clean Air Act*, N.Y.U. Inst. for Pol'y Integrity 11–12 (Oct. 2018), https://policyintegrity.org/files/publications/No_Turning_Back.pdf (discussing the finding of revocation authority related to the waiver).

IV. A CLOSER LOOK AT THE ONE NATIONAL PROGRAM RULE & THE *SAFE* VEHICLES RULE

While federalism does require a healthy push and pull between states and the federal government, these rules are not a healthy push and pull — they are an inartful power grab by the executive branch. These rules break the mold of iterative federalism and cut off innovation completely. An examination of the One National Program Rule is necessary to determine why the Trump administration decided to release this rule before completing the rest of SAFE. And understanding why the administration revoked the CAA waiver helps us understand the administration's federalism motivations.

A. ONE NATIONAL PROGRAM

The One National Program Rule was issued in September of 2019, as a step toward finalizing the SAFE Vehicles Rule.[92] One National Program "enabl[es] the federal government to provide nationwide uniform fuel economy and greenhouse gas emission standards for automobiles and light duty trucks."[93] In a press release, the EPA called on California to continue to enforce its programs but stated that the enforcement must be in line with the new federal mandate, due to the revocation of the 2013 CAA emissions waiver.[94]

When the SAFE Vehicles Rule was first proposed, having one national standard for fuel economy and tailpipe CO_2 emission created an efficient regulatory framework for the entire nation.[95] One National

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92 U.S. Envtl. Prot. Agency, *supra* note 18.

93 *Id.* The EPA called One National Program (and the SAFE Vehicles Rule as a whole) one of President Trump's top priorities. *Id.*

94 *Id.* Secretary of Transportation Elaine L. Chao echoed critics of California's waiver program, stating that One National Program will ensure "that no State has the authority to opt out of the Nation's rules, and no State has the right to impose its policies on the rest of the country." *Id.*

95 Proposed SAFE Rule, 83 Fed. Reg. 42,986, 42,999 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, and 537 and 40 C.F.R. pts. 85 and 86). Of course, fuel economy standards were within an efficient regulatory framework before, when the Obama administration harmonized its standards with California's and decided to push further. *See infra* note 102. The Trump administration just believes those targets are too high. *See generally* Proposed SAFE Rule, 83 Fed. Reg. at 42,986. Fuel economy is defined

Program was released before the rest of the rule, in part, because of actions California took after the publication of the SAFE Vehicles Rule.[96] The EPA and NHTSA took issue with two specific actions in the rule.[97] First, California amended its compliance provision for manufacturers, stating that their greenhouse gas standards would only be satisfied by complying with Obama administration–era EPA standards.[98] Second, California announced a "voluntary framework" with four automakers "to allow those automakers to meet reduced standards on a national basis if they promised not to challenge California's authority to establish greenhouse gas standards or the zero emissions vehicle mandate."[99]

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as "use of less fuel." Merriam-Webster, *Fuel Economy*, Merriam-Webster (last accessed Dec. 11, 2019), https://www.merriam-webster.com/dictionary/fuel%20economy. The most useful fuel economy metric, the Combined Miles Per Gallon (MPG) value is the "weighted average of City and Highway MPG values that [are] calculated by weighting the City value by 55% and the Highway value by 45%." U.S. Dep't of Energy & Envtl. Prot. Agency, *Gasoline Vehicles: Learn More About the Label*, U.S. Dep't of Energy & Envtl. Prot. Agency (last accessed Dec. 11, 2019), https://www.fueleconomy.gov/feg/label/learn-more-gasoline-label.shtml. Non-gasoline vehicles are weighted slightly differently, but the fuel economy factor is a measure used on all vehicles. *Id.* Tailpipe emissions come from "fuel combustion in a vehicle's engine." U.S. Dep't of Energy, *Ethanol Vehicle Emissions*, U.S. Dep't of Energy (last accessed Dec. 11, 2019), https://afdc.energy.gov/vehicles/flexible_fuel_emissions.html. CO_2 is the most prevalent greenhouse gas in tailpipe emissions, constituting 99 percent of the tailpipe emission. Envtl. Prot. Agency, *Greenhouse Gas Rating*, Envtl. Prot. Agency (last updated Apr. 1, 2019), https://www.epa.gov/greenvehicles/greenhouse-gas-rating.

96 One National Program, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533).

97 *Id.*

98 *Id.* The Obama administration's fuel standards were projected to cut greenhouse gas emissions in half by 2025. Press Release, White House, Obama Administration Finalizes Historic 54.5 MPG Fuel Efficiency Standards, (Aug. 28, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/08/28/obama-administration-finalizes-historic-545-mpg-fuel-efficiency-standard. These standards raised fuel economy to 54.5 MPG for cars and light-duty trucks. *Id.* The last fuel economy increase prior to the 2012 increase was to 35 MPG in 2007, which was the first increase since the origin of these standards in the 1970s. Union of Concerned Scientists, *A Brief History of US Fuel Efficiency Standards*, Union of Concerned Scientists (last updated Dec. 6, 2017), https://www.ucsusa.org/resources/brief-history-us-fuel-efficiency.

99 *Id.* Four big automakers, Ford, Honda, Volkswagen, and BMW of North America struck a deal with The California Air Resources Board after secret negotiations in which they agreed to produce a more fuel-efficient fleet to obtain regulatory

Widespread deregulation is another big goal of the administration, so the One National Program Rule fits right in.[100]

The impetus for One National Program, in part, comes from the belief that the Energy Policy and Conservation Act (EPCA) preempts California's greenhouse gas emissions regulations.[101] The EPCA "broadly preempts"

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certainty. Juliet Eilperin & Brady Dennis, *Major Automakers Strike Climate Deal with California, Rebuffing Trump on Proposed Mileage Freeze*, Wash. Post (July 25, 2019), https://www.washingtonpost.com/climate-environment/2019/07/25/major-automakers-strike-climate-deal-with-california-rebuffing-trump-proposed-mileage-freeze/?utm_term=.6694edcc0b4d. The California Air Resources Board hoped that it would bring the Trump administration back to the table, but the administration quickly rejected the deal as a "PR stunt." *Id.* They said at the time that they would settle for nothing less than a single national standard. *Id.* This eventually comes to light through One National Program. *See* One National Program, 84 Fed. Reg. at 51,310. The Department of Justice (DOJ) launched an antitrust probe into the deal California made with automakers, which some called an abuse of departmental power. Michael Wayland, *DOJ Launches Antitrust Probe over California Emissions Deal with Automakers*, CNBC (last updated Sept. 6, 2019, 4:26 PM), https://www.cnbc.com/2019/09/06/doj-launches-antitrust-probe-over-auto-emissions-deal-with-california-wsj-reports.html, and Mark A. Lemley & David McGowan, *Trump's Justice Department's Antitrust 'Investigation' of California Deal with Car Makers is an Abuse of Power*, Stanford L. Sch. Blogs (Oct. 21, 2019), https://law.stanford.edu/2019/10/21/trumps-justice-departments-antitrust-investigation-of-californias-deal-with-car-makers-is-an-abuse-of-power. Again, deals like this are not new, and can be considered part of the innovative process. *See* N.Y. Times, *supra* note 26 (describing the deal automakers made with the state on installing smog control devices). DOJ eventually chose to drop the probe. Jessie Byrnes, *DOJ Dropping Antitrust Probe of Four Major Automakers*, The Hill (Feb. 7, 2020, 7:21 PM), https://thehill.com/homenews/administration/482114-doj-dropping-antitrust-probe-of-four-major-automakers.

100 *See generally* Office of Mgmt. & Budget, the 2018 Regulatory Reform Report: Cutting the Red Tape, Unleashing Economic Freedom (2018), https://www.whitehouse.gov/wp-content/uploads/2018/10/2018-Unified-Agenda-Cutting-the-Red-Tape.pdf. Nicole Goodkind, *New EPA Director is Working with Trump to End Auto Fuel Economy Standards,* Newsweek (Aug. 2, 2018, 4:36 PM), https://www.newsweek.com/epa-wheeler-emissions-deregulation-cars-trump-elaine-chao-1055135.

101 *See* One National Program, 84 Fed. Reg. at 51,312. The rule points to specific language from the EPCA: "Furthermore, EPCA states: 'When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.' 49 U.S.C. 32919(a). As a limited exception, a State or local government 'may prescribe requirements for fuel economy for automobiles obtained for its own use.' 49 U.S.C. 32919(c)." *Id.*

any state or local laws " 'related to' fuel economy standards or average fuel economy standards" — which both agencies say contain emissions regulation standards.[102] NHTSA and the EPA have also determined that the CAA waiver would not waive EPCA preemption anyway.[103] They state that "avoiding preemption under one federal law has no necessary bearing on another federal law's preemptive effect."[104] According to the Trump administration, this rule, and having a nationwide standard, achieves the goal of providing regulatory certainty.[105]

The rule also withdraws California's 2013 CAA waiver preempting federal standards for California's Advanced Clean Car Program.[106] There are several reasons why the waiver was withdrawn — first, the aforementioned EPCA preemption rendered the 2013 waiver "invalid, null, and void."[107] Second, the EPA reconsidered the grant of the waiver and withdrew it because California no longer needs the standards "to meet compelling and extraordinary conditions," one of the three scenarios in Section 209(b) where the waiver must not be granted.[108] The EPA states that it has the authority to withdraw the waiver in circumstances like this because

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[102] *Id.* at 51, 312–313. The phrase "related to" is essential to the administration's argument. In a fact sheet on EPCA preemption, NHTSA and the EPA state: "The tailpipe carbon dioxide (CO2) limits and zero emission vehicle (ZEV) mandate imposed by California and other States "relate to" fuel economy standards because CO2 is the primary byproduct of gasoline fuel combustion and compliance with the California rules and the Federal CAFE standards is assessed on the same basis: by measuring carbon emissions." U.S. Dep't of Transp. & U.S. Envtl. Prot. Agency, *Fact Sheet: EPCA Preemption*, U.S. Dep't of Transp. & U.S. Envtl. Prot. Agency (Aug. 2, 2018), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/fact_sheet_-_epca_preemption_final_clean_080218_v1-tag.pdf.

[103] *See* One National Program, 84 Fed. Reg. at 51,314.

[104] *Id.*

[105] *Id.* at 51,317.

[106] *Id.* at 51,328.

[107] *Id.*

[108] *Id.* According to the EPA, the concentrations of greenhouse gases over California and the rest of the United States is similar to the global average, and California's vehicle fleet size is not significant, so the fleet does not bear any greater weight on the amount of greenhouse gases over California than any other source of greenhouse gases. One National Program, 84 Fed. Reg. 51,310, 51,328 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533).

agencies generally have the inherent authority to reconsider their actions.[109] Because the waiver is not unlimited, and Congress has not expressly carved out a preemption for California that does not rely on an EPA affirmation, withdrawal of the waiver is within the EPA's rights.[110]

Important to the administration's argument is the fact that the greenhouse gas waiver was denied once.[111] In 2008, the EPA determined that Section 209(b) "was not appropriate for [greenhouse gas] standards," because the standards are not designed to address conditions specific to California — they were intended for global pollution problems.[112] The denial was reversed in 2009, and then the newest waiver was granted in 2013.[113] One National Program, therefore, is only the second time in history a waiver has been denied and the first time a granted waiver has been reversed, and serves to forever alter the statutory waiver scheme.

B. THE *SAFE* VEHICLES RULE

The SAFE Vehicles Rule was only recently finalized, after over half a year of delay.[114] The main feature of the SAFE Vehicles Rule are amended CAFE standards for passenger cars and light duty vehicles from model year 2021 to 2026.[115] In the rule, NHTSA and the EPA rolled back the previous CAFE

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[109] *Id.* at 51,331. They also say that there is "no cognizable reliance interest" to stop them from revoking the waiver. *Id.*

[110] *Id.*

[111] *Id.* at 51,330.

[112] *Id.*

[113] One National Program, 84 Fed. Reg. 51,310, 51,330 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533). *See* 2013 CAA Waiver, 78 Fed. Reg. 2,112, 2,112 (Jan. 9, 2013).

[114] The rule was supposed to be revised and finalized by the end of 2019, but the agencies were contemplating a new emissions reduction figure and had some issues with data analysis not backing up their claimed benefits. Samantha Oller, *Trump Administration Rethinks Emissions Freeze*, CSP Magazine (Nov. 1, 2019), https://www.cspdailynews.com/fuels/trump-administration-rethinks-emissions-freeze.

[115] SAFE Vehicles Rule, 85 Fed. Reg. 24,174, 24,174 (Apr. 30, 2020). *See* One National Program, 84 Fed. Reg. at 51,310. The model year of a vehicle is defined as "the manufacturer's annual production period . . . which includes January 1 of such calendar year, provided, that if the manufacturer has no annual production period, the term 'model year' shall mean the calendar year." 40 C.F.R. § 85.2302.

standards.[116] Meanwhile, California raised its fuel economy standards, leaving automakers at a compliance impasse.[117]

Therefore, CAFE standards intertwine with the CAA waiver California receives. The only way the country can have uniform CAFE standards is through One National Program's revocation of the 2013 grant of the waiver.[118] Over the years, the CAFE standards have been increased gradually, with the previous administration setting the standards to 54.5 MPG for cars and light duty trucks by model year 2025.[119] This increase was the largest for fuel economy regulations in the last thirty years, and they are the standards California wants to continue to follow.[120] The Trump administration decided to roll back the CAFE standards because "they are no longer maximum feasible standards," and because NHTSA's 2012 standards could not be final as NHTSA is prohibited from finalizing CAFE standards beyond five model years in one rulemaking.[121] The EPA & NHTSA state

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116 SAFE Vehicles Rule, 85 Fed. Reg. at 24,175. The CAFE and CO_2 standards will now increase in stringency "at 1.5 percent per year," which is significantly lower than the 5 percent per year set forth by the Obama administration. *Id*. *See also* Dan Goldbeck & Dan Bosch, *EPA, DOT Finalize SAFE Vehicles Rule*, Am. Action F. (Apr. 1, 2020), https://www.americanactionforum.org/insight/epa-dot-finalize-safe-vehicles-rule.

117 Megan Geuss, *17 Automakers Tell Trump That Fuel Economy Rollback Needs to Include California*, ARS Technica (June 7, 2019, 4:08 PM), https://arstechnica.com/cars/2019/06/17-automakers-ask-trump-to-hold-off-on-fuel-economy-rollback.

118 Green Car Congress, *US EPA and DOT Propose Freezing Light-Duty Fuel Economy GHG Standards at 2020 Level for MY 2021–2026 Vehicles; 43.7 MPG for Cars; 50-State Solution*, Green Car Congress (Aug. 2, 2018), https://www.greencarcongress.com/2018/08/20180802-epadot.html. The CAFE standards originated in the 1970s, when oil shortages created an energy crisis in America. PEW Trusts, *Driving to 54.5 MPG: The History of Fuel Economy*, PEW (Apr. 20, 2011), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2011/04/20/driving-to-545-mpg-the-history-of-fuel-economy. Brian C. Black, *How an Energy Crisis Pushed the Government into Creating National Fuel Efficiency Standards*, Pac. Standard (Aug. 10, 2018), https://psmag.com/environment/the-origin-of-fuel-efficiency-standards.

119 Press Release, *supra* note 98.

120 Umair Irfan, *Trump's EPA is fighting California over a Fuel Economy Rule the Auto Industry Doesn't Even Want*, Vox (Apr. 6, 2019, 8:30 AM), https://www.vox.com/2019/4/6/18295544/epa-california-fuel-economy-mpg. Geuss, *supra* note 117.

121 Proposed SAFE Rule, 83 Fed. Reg. 42,986, 42,986–988 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, and 537 and 40 C.F.R. pts. 85 and 86. The standards stretched all the way to 2025, though standards for model years 2012–2016 were already in place. Press Release, *supra* note 98.

that the SAFE Vehicles Rule, which went into effect on June 29, 2020, strikes a "reasonable balance" between market impacts and climate change.[122]

V. ADHERING TO PRECEDENT & DEFERENCE ARE KEY TO THE FUTURE OF FEDERALISM

One National Program is now embroiled in litigation that could take years to come to a conclusion.[123] All the while, California continues to make its own decisions related to how they want to conduct their own business, despite the EPA and NHTSA prohibiting these actions in One National Program.[124] This section will propose a framework for a future decision in this case — one founded on a bedrock of precedent and deference, focused on honoring the vital relationship between states and the federal government that forms the heart of modern federalism.

A. THE CURRENT STATUS OF THE LITIGATION

One National Program was immediately challenged in court by the attorney general of California, and the attorneys general of twenty-three other states, as well as the cities of Los Angeles and New York.[125] California

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122 SAFE Vehicles Rule, 85 Fed. Reg. 24,174, 24,174–76 (Apr. 30, 2020).

123 Matthew DeBord & Reuters, *California and 22 Other States are Suing the Trump Administration over Auto-Emissions Rules*, Bus. Insider (Sept. 20, 2019, 1:06 PM), https://www.businessinsider.com/california-other-states-sue-trump-administration-over-auto-emissions-rules-2019-9. SAFE is most likely next, with states and environmental groups stating they are planning on filing suit. Jennifer Hijazi, *Several States, Environmental Groups Vow to Sue Over Car Pollution Rollback*, Sci. Am. (Apr. 1, 2020), https://www.scientificamerican.com/article/several-states-environmental-groups-vow-to-sue-over-car-pollution-rollback.

124 One National Program, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533). Chris Isidore & Peter Valdes-Dapena, *California Won't Buy Cars from GM, Chrysler or Toyota Because They Sided with Trump Over Emissions*, CNN Bus. (last updated Nov. 19, 2019, 2:32 PM), https://www.cnn.com/2019/11/19/business/california-limits-purchase-automakers-emissions-rules/index.html. (California has declared it will only buy vehicles from automakers who recognize the California Air Resources Board's tougher greenhouse gas emissions standards, as well as pledged to only work with automakers who are "committed to stringent emissions reduction goals.")

125 Press Release, Office of the Attorney General, Attorney General Becerra Files Lawsuit Challenging Trump Administration's Attempt to Trample California's Authority to Maintain Longstanding Clean Car Standards, (Sept. 20, 2019). The group includes

argues preemption must be declared unlawful for several reasons: "it exceeds NHTSA's authority, contravenes Congressional intent, it is arbitrary and capricious, and NHTSA failed to conduct the analysis required under the National Environmental Policy Act ("NEPA")."[126] Their arguments rest heavily on the fact that Congress has frequently amended the law (like adding new EPCA and CAFÉ standards), leaving California's waiver untouched each time.[127] California's complaint includes a plea for the court to respect the vital role its innovation has played in our federalist system.[128] It states that NHTSA did not consult with the plaintiffs on One National Program, violating Executive Order 13132, "which imposes requirements on agencies that promulgate regulations with federalism implications."[129] This executive order requires agencies to consult with states "early in the process" of developing proposed preemption regulations.[130] NHTSA did

"Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, and the District of Columbia." *Id*. *See generally* Complaint for Declaratory and Injunctive Relief, California v. Chao, 1:19-cv-02826 (D.D.C. Sept. 20, 2019). This case is currently stayed, pending resolution of related litigation in the D.C. Circuit. Minute Order, California v. Chao, 1:19-cv-02826 (D.D.C. Feb. 11, 2020).

126 Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 4.

127 *Id*. at 17–25. Except for, of course, the denial in 2008, which was reversed after reconsideration in 2009. *Id*. at 25–26. The complaint also emphasizes the importance of California's greenhouse gas and zero emissions vehicles standards, which they claim are fundamental to protect the public health and welfare. *Id*. at 29. *See generally* EELP Staff, *CAFE Standards and the California Preemption Plan*, Harv. L. Sch. Envtl. & Energy L. Program (Aug. 24, 2018), https://eelp.law.harvard.edu/2018/08/cafe-standards-and-the-california-preemption-plan/ (discussing the relationship between the EPCA and CAFE standards).

128 Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 32.

129 *Id*. In Executive Order 13132, agencies are required to follow certain "fundamental federalism principles." Exec. Order No. 13132, 64 Fed. Reg. 43,255, 43,255 (Aug. 10, 1999). These principles acknowledge that issues that are not national in their scope/significance are best left to the government "closest to the people," reiterates the promise of the Tenth Amendment's reserved powers to the states, recognizes states as laboratories of democracy, states that the national government should defer to the states when it comes to actions that "affect[] the policymaking discretion of the States," and directs the government to act with "the greatest caution" in areas where there is uncertainty related to the authority of the national government. *Id*. at 43,255–56.

130 Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 32

not do so, claiming that notice-and-comment was enough to satisfy this requirement.[131] California believes it does not.[132]

The claim California makes under the National Environmental Policy Act is that NHTSA was required to undergo an environmental assessment or prepare an environmental impact statement before undertaking this action — NHTSA did not.[133] The purpose of the act is to make sure that the environmental impacts of an undertaking are known to the public before the action takes place, as while as during the action, so the utmost care is taken in regard to the environment.[134] Because NHTSA evaded the requirement to prepare an environmental impact statement for any rulemaking and regulatory action that is "likely to be controversial on environmental grounds" and for "proposed action[s] which ha[ve] unclear but potentially significant environmental consequences," they acted improperly.[135] Overall, California asks the reviewing court for a litany of relief based on these facts, and asks that One National Program be held unlawful and set aside, or that the court grant a permanent injunction so the rule cannot be implemented or relied upon.[136]

As the case has been stayed, the administration has not yet filed their response.[137] It is almost certain that their reasoning will be grounded in the language of the One National Program Rule. In One National Program, the EPA states that they have the authority to withdraw a waiver

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131 *Id.* at 32–33. NHTSA did not consult with California officials, or any other state that follows California's standards. *Id.* at 33.

132 *Id.*

133 *Id.* at 35–36. There would have been several avenues that would have forced NHTSA to conduct a National Environmental Policy Act analysis: first, finding that this was a major federal action that impacted the environment, and second, finding that this action is "likely to be controversial on environmental grounds," or "has unclear but potentially significant environmental consequences." *Id.* At the least, there needed to be an environmental assessment considering the problem and making no finding of significant impact, or that the impact would be at a minimum if the project were undertaken. Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 36.

134 *Id.* at 35 (internal citation omitted).

135 *Id.* at 36 (internal citation omitted).

136 *Id.* at 44.

137 *See* Minute Order, *supra* note 125.

like the one given to California, under "appropriate circumstances."[138] The EPA points to legislative history to support the claim that the waiver is revocable.[139] A 1967 Senate report states, "Implicit in this provision in the right of the [Administrator] to withdraw the waiver at any time [if] after notice and an opportunity for public hearing he finds that the State of California no longer complies with the conditions of the waiver."[140] The EPA also makes several alternative arguments as to why the waiver cannot be given: because under Section 209(b)(1)(B) California no longer has compelling and extraordinary circumstances, and because the EPCA preempts California's fuel emissions regulations.[141]

Several arguments are made beyond the legal sphere to explain why the rule is so important: the administration wants to "give consumers greater access to safer, more affordable vehicles, while continuing to protect the environment."[142] NHTSA and the EPA claim the rollback will reduce technology costs by $86 to $126 billion dollars, and consumer costs will be around $977 to $1,083 less per vehicle.[143] In the proposed rulemaking, they highlighted the fact that consumers are less likely to purchase cars based on fuel economy standards, and are more enticed by safety technology, infotainment systems, or a better powertrain.[144] NHTSA used a safety analy-

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138 *See* One National Program, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533).

139 *Id.* at 51,328.

140 *Id.* at 51,312, 51,328.

141 *Id.* at 51,312.

142 Elaine L. Chao & Andrew Wheeler, *Make Cars Great Again*, Wall Street J. (Aug 1, 2018, 8:40 PM), https://www.wsj.com/articles/make-cars-great-again-1533170415.

143 SAFE Vehicles Rule, 85 Fed. Reg. 24,174, 24,176 (Apr. 30, 2020).

144 Thus, the lower price of the vehicle caused by less extensive fuel economy related technology would entice more consumers to buy cars. Proposed SAFE Rule, 83 Fed. Reg. 42,986, 42,993 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, and 537 and 40 C.F.R. pts. 85 and 86). *See generally* Consumer Reports, *Cars with Advanced Safety Systems*, Consumer Reports (Feb. 22, 2019), https://www.consumerreports.org/car-safety/cars-with-advanced-safety-systems/ (Forward-collision warning, automatic emergency braking, pedestrian detection, etc.). *See generally,* Keith Barry, *Choose an Infotainment System You'll Love*, Consumer Reports (May 1, 2019), https://www.consumerreports.org/automotive-technology/choose-an-infotainment-system-you-will-love/ (Infotainment is a bundle of features containing audio, navigation telephone, and texting, usually contained on a dashboard screen). *See generally,* Autobytel, *What is a Powertrain Warranty?*, Autobytel (last accessed Dec. 15, 2019), https://www.autobytel.

sis to show the danger of older cars on the road and determined that, if cars cost less because of a reduced focus on costly fuel economy standards, people would be able to buy new cars more frequently and take older, more dangerous vehicles off the road.[145]

Some stakeholders of the automotive industry back the administration on these claims and support what the EPA and NHTSA are attempting to do with One National Program and SAFE. In a suit against NHTSA by the Environmental Defense Fund, a group called the Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc. joined as an intervenor on behalf of the Trump administration.[146] They state that the One National Program framework will reduce the industry's compliance burden due to "overlapping and inconsistent regulations," and will ensure consumers have "a wide selection of vehicles" to choose from.[147]

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com/car-buying-tips/warranty-information/what-is-a-powertrain-warranty-100466/ (Powertrain consists of "the components that get the engine's power to the wheels and down to the ground," the engine, transmission, and drivetrain).

145 Proposed SAFE Rule, 83 Fed. Reg. at 42,995 (Which lead to a 12,400 lives saved figure that the EPA and NHTSA claimed the SAFE Vehicles Rule would bring). They stand by their claim of reduced fatalities in the final rule, though they do not put a number to it. SAFE Vehicles Rule, 85 Fed. Reg. 24,174, 24,216 n. 80 (Apr. 30, 2020).

146 Environmental Defense Fund v. National Highway Traffic Safety Administration, No. 19-1200 (D.C. Cir. 2019). This is the case for which *California v. Chao* is stayed. *See* Minute Order, *supra* note 125. The Automakers within the Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc include: General Motors Company, Toyota Motor Corporation, Fiat Chrysler Automobiles N.V., Hyundai Motor Corporation, Mazda, Nissan Motor Corporation, and the Kia Motor Corporation. David Shepardson, *Several Automakers Back Trump in Two Other California Vehicle Emissions Suits*, Reuters (Oct. 31, 2019, 11:15 PM), https://www.reuters.com/article/us-autos-emissions-california/several-automakers-back-trump-in-two-other-california-vehicle-emissions-suits-idUSKBN1XB33K. However, not all automakers have joined — Ford Motor Company, Honda Motor Company, BMW AG, and Volkswagen AG are not a part of the suit, because they made a deal with California in July of 2019. *Id.* Honda is the only member of the Association of Global Automakers that has not intervened on behalf of the administration, and Ford and VW are a part of the Alliance of Automobile Manufacturers that will not intervene. *Id.* This split occurs as the trade associations "have been in merger talks for months." *Id.*

147 Motion for Leave to Intervene by the Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc., Environmental Defense Fund v. National Highway Traffic Safety Administration, No. 19-1200 i, 1 (D.C. Cir. 2019). Global Automakers' membership accounted for "40 percent of all U.S. production

Another supporter of the administration's SAFE Vehicles Rule states that critics must "move past their distrust of the Trump administration and automobile manufacturers" because sometimes a push for stricter standards will harm both consumers and the environment.[148] The balance between safety and affordability is a top priority for proponents of the rules, whether they be in the automotive community, part of the administration, or members of the public.[149]

The court should rule in California's favor for three reasons. *First*, the precedent for granting waivers favors California strongly. *Second*, ruling against the plaintiffs in this case would contravene deference based on federalism concerns and put almost any state regulatory scheme at risk of

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and 45 percent of all U.S. sales of passenger vehicles and light trucks," and states that this issue is of "central importance" to the intervenors. *Id.* at 3–4.

148 Jason Hayes, *Unreasonable Demands Stifle Real Environmental Progress*, Mackinac Ctr. for Pub. Policy (Sept. 25, 2018), https://www.mackinac.org/unreasonable-demands-stifle-real-environmental-progress.

149 *Id.* This focus on safety (personal and environmental) as well as affordability does not play out. Within the EPA, an internal email from the director of assessments and standards division stated that the proposed CAFE standards "are detrimental to safety, rather than beneficial," and would likely increase the number of highway deaths by seventeen annually. Ellen Knickmeyer, *EPA Challenged Safety of Administration Mileage Freeze*, Associated Press (Aug. 14, 2018), https://apnews.com/1a7551fca3294ec49029b93e994cd7f9. The SAFE Vehicles Rule will also substantially increase vehicle greenhouse gas emissions — which can pose a substantial threat to public health. Romany Webb, *Five Important Points About the EPA's "SAFE Vehicle Rule*, Columbia Univ. Earth Inst. (Aug. 7, 2018), https://blogs.ei.columbia.edu/2018/08/07/five-points-epa-safe-vehicle-rule. The rule, as it currently stands, would increase carbon dioxide emissions by 713 million metric tons, which is equivalent to nearly 40 percent of 2016 carbon dioxide emissions from the entire U.S. *Id.* High levels of greenhouse gases lead to planetary temperature increases, which contribute to "rising sea levels, population displacement, disruption to the food supply, flooding, and an increase in infectious diseases. Karen Feldscher, *Greenhouse Gases Pose Threat to Public Health*, Harvard T.H. Chan Sch. of Pub. Health (Nov. 1, 2011), https://www.hsph.harvard.edu/news/features/bernstein-greenhouse-gases-health-threat. The EPA and NHTSA have determined that there would be a $2,340 reduction in overall average ownership costs for new vehicles. U.S. Dep't of Transp. & U.S. Envtl. Prot. Agency, *MY's 2021-2026 CAFE Proposal – By the Numbers*, U.S. Dep't of Transp. & U.S. Envtl. Prot. Agency (Aug. 2, 2018), https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100V26H.pdf; Jessica McDonald, *Trump's False Auto Industry Tweets*, FactCheck.org (Aug. 27, 2019), https://www.factcheck.org/2019/08/trumps-false-auto-industry-tweets. The cost savings would only end up being around $390, a far cry from the supposed $2,340 reduction. *Id.*

being overtaken by the federal government. *Finally*, a ruling for the Trump administration would violate the principles of federalism that have been so vital to this nation, forever impacting the way federalism works. In order to protect the innovations brought on by federalism, a court should strongly consider this framework of factors in its final decision.

B. THE FRAMEWORK

1. *The Amount of Precedent Is Overwhelming*

Ruling against the Trump administration is the correct course of action for any court confronted by the issue.[150] The waiver has been in place for over half a century.[151] There is existing precedent for the continued grant of the waiver.[152] Agencies must "provide 'good reasons' for departing from prior policies and precedents that have 'engendered serious reliance interests that must be taken into account.'"[153] Reliance interests exist because the waiver has *never* been revoked — it is unlikely that anyone who looked at the midterm review of the standards had an understanding that review equals revocation.[154] The reliance interest does not only encompass the waiver for model year 2021–2025 greenhouse gas and zero emissions vehicle standards.[155] Serious federal reliance interests are also in existence here — "for the last decade, the federal government has harmonized its own greenhouse

150 "*No waiver* has ever been revoked and the one previous denial *was quickly reversed*." Young, *supra* note 46 (emphasis added).

151 Carlson, supra note 9, at 1109 (As of 2020, it has been in place for 53 years).

152 Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 34. Not only is "further justification demanded," but "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by prior policy." Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2126 (2017).

153 Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 34.

154 Young, *supra* note 46. For the government's argument against reliance, see One National Program, 84 Fed. Reg. 51,310, 51,334 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533).

155 One National Program, 84 Fed. Reg. at 51,334. The EPA and NHTSA unfairly limit the reliance interest in this way. *Id.* The reliance interest does not just attach to one waiver, even though the revocation is attached to one waiver — because the One National Program Rule pushes the waiver permanently out of existence. If a court buys into the arguments that the EPA and NHTSA make in the rule, then the CAA waiver will no longer be allowed to exist, because the argument that the EPA and NHTSA make is that the CAA waiver should not exist because of the EPCA and lack of compelling

gas emissions standards and its fuel economy standards with the California standards."[156] Precedent *can* be overturned, but the EPA and NHTSA would need to make a stronger showing to prove One National Program is more beneficial than the current scheme.[157] They do not.

Their concern over automakers' being placed in an "untenable situation of having to expend resources to comply not only with Federal standards, but also meet separate State requirements," is also weak, when precedent is considered.[158] In 1966, a year before the CAA waiver was set in place, California's Motor Vehicle Pollution Control Board approved smog-control devices.[159] Did the federal government stop this action on behalf of the automakers? No. Did the federal government try to control the market and the industry? No. Like California and automakers of the modern era, several manufacturers agreed to put the smog-control systems on their cars made to be sold within California.[160] California's cooperation with automakers is nothing new and is certainly not novel enough to be the target of a politically motivated investigation by the Department of Justice.[161] Just like there is precedent for the continued grant of the waiver, there is precedent for cooperation between California and automakers.[162]

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circumstances. *See generally id.* It would be impossible, or nearly impossible, to obtain a waiver ever again.

156 Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 6. And the federal government has chosen time after time to use California's emissions standards to model their own. *The Federal Clean Air Act: California's Waivers — A Half-Century of Cooperative Federalism in Air Quality Management: Hearing Before the Calif. S. Comm. on Environmental Quality*, *supra* note 33, at 7.

157 For a discussion of the principles of *stare decisis*, see Gamble v. U.S., 139 S.Ct. 1960, 1969 (2019).

158 The EPA and NHTSA are concerned that requiring automakers to develop and implement technologies to follow these standards is imbalanced. One National Program, 84 Fed. Reg. at 51,312.

159 N.Y. Times, *supra* note 26. This triggered a 1959 law, requiring installation of smog-control devices on 1966 car models bound for the state. *Id. See generally* Eilperin & Dennis, *supra* note 99.

160 *Id.*

161 Lemley & McGowan, *supra* note 99.

162 The automakers intervening on behalf of the administration support the One National Program Rule because they believe they will suffer a concrete injury if California continues to be allowed to have their own fuel economy standards — there would be no "regulatory simplicity and certainty." Motion for Leave to Intervene by the Coalition

2. *Deference is Crucial in This Case*

Precedent is not the only factor at play here. The concept of federal deference to state agency interpretations in cooperative federalism schemes is "unresolved," but one scholar proposed a framework to deal with questions of when a court should defer to the state, or to the federal government.[163] His solution is that courts should consider whether Congress, when passing the scheme in question, delegates authority to a state agency for "federalism" or "decentralization" purposes.[164] The level of deference due to that state agency's interpretation then varies depending on Congress' choice.[165] Federalism is for when Congress specifically wanted an actual cooperative federalism scheme.[166] Decentralization (also called managerial decentralization) encompasses the benefits that Congress receives from the delegation of administration to state and local entities.[167] Deference goes to Congress if the choice was related

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for Sustainable Automotive Regulation and the Association of Global Automakers, Inc., Envtl. Defense Fund v. Nat'l Highway Traffic Safety Admin., No. 19-1200, 1, 17 (D.C. Cir. Sept. 28, 2019).

[163] It tends to be unresolved because most of the action is occurring in lower courts, and the Supreme Court has not yet weighed in. *See* Ben Raker, *Decentralization and Deference: How Different Conceptions of Federalism Matter for Deference and Why that Matters for Renewable Energy*, 47 Envtl. L. Rep. News & Analysis 10963, 10963 (2017). *Id.* (citing Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 391, 394 (5th Cir. 2014), where, "[i]n response to a challenge by a wind power developer, the court granted deference to a Texas state agency's interpretation of a federal regulation, even though the federal agency tasked with implementing the act, the Federal Energy Regulatory Commission (FERC), disagreed with that interpretation."; citing Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 316 P.3d 1278 (Idaho 2013) "[A]n Idaho state agency had correctly ruled on a matter involving a different wind power developer. The majority opinion failed to mention a decision by FERC that had held to the contrary."; citing Grouse Creek Wind Park, 142 FERC ¶ 61187 (Mar. 15, 2013) "[S]olar energy developers in Montana found themselves on the losing end of a decision by a Montana state agency. FERC later held that decision to be improper under federal law, but the state agency has not changed course." *See also* Emily Stabile, *Federal Deference to State Agency Implementation of Federal Law*, 103 Ky. L.J. 237 (2015).

[164] Raker, *supra* note 163, at 10963.

[165] *Id.* Reliance on congressional intent, according to Raker, puts the deference decision back in "its proper place" – which is in Congress. *Id.* at 10975.

[166] Raker, *supra* note 163, at 10975–76.

[167] *Id.* at 10974. Raker states that the usual suspects to justify federalism are competition, experimentation, political participation, and separation of powers, and that

to managerial decentralization, and deference goes to the state agency when Congress was looking to experiment with a cooperative federalism scheme.[168]

Considering California's waiver scheme in this framework shows that Congress intended to create a cooperative relationship to govern these emissions standards, acting according to principles of federalism. Because of this, California's agency interpretation should receive deference. The federal government's hope for the cooperative federalism scheme was that California would become a leader.[169] They were not given the ability to waive out of federal standards for a managerial decentralization role — it was, and has been the fundamental purpose of the CAA that California have a waiver ability, and that that waiver ability cover any state that wishes to follow it.[170] Any court looking at this issue should take into account this decentralization/federalism framework and determine that California's interpretations, made by the California Air Resources Board and its other related agencies, should prevail over the federal government's One National Program Rule and the SAFE Vehicles Rule.[171]

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these justifications are benefits of decentralization, rather than any federalism specific benefit. *Id.*

168 *Id.*

169 *The Federal Clean Air Act: California's Waivers — A Half-Century of Cooperative Federalism in Air Quality Management: Hearing Before the Calif. S. Comm. on Environmental Quality*, *supra* note 33, at 4.

170 *See generally* 2013 CAA Waiver, 78 Fed. Reg. 2,112, 2,113 (Jan. 9, 2013). This is unlike the statute Raker discusses in his article, the Public Utility Regulatory Act (PURPA) of 1978, because "the enacting Congress simply chose to delegate administrative tasks to local organizations, not allow those organizations to alter the fundamental purpose of the statute." Raker, *supra* note 163, at 10963, 10979. The fundamental purpose of the CAA waiver in 1967 (and from that point onward) was to allow California to experiment and do their own work within the framework provided by the CAA — not to help Congress out administratively, but innovatively.

171 Currently, there is no agreed-upon deference standard in cooperative federalism schemes — some states and their courts do it differently than other states and their courts, leaving a patchwork of confusion. *See generally* Josh Bendor & Miles Farmer, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 Yale L.J. 1280 (2013). Adopting a test that makes Congress's decision central to the court's decision would ensure that they are following the original legislative intent.

3. Principles of Federalism

The importance of federalism is clear from the statutory scheme — it is interwoven though the scheme's history and the concepts of precedent and deference. And the singular innovative principle of federalism itself is important beyond those reasons. Federalism is widely debated but is continually reaffirmed as an important principle by our courts of law.[172] These rules would take away state power in favor of a national rule, defaulting to the new executive conception of federalism, becoming more common due to the expansive reach of the executive branch and the administrative state.[173] California's standards incorporate more than just California — over one-third of the United States population is covered by California's fuel emissions standards.[174] Federalism is not just an ephemeral idea that agencies should *try* to follow. Executive Order 13132 dispels any notion that agencies are not constrained by federalism concerns in these kinds of preemption actions.[175] Federalism is and should be a concern of any agency taking part in regulatory change that involves federalism implications.

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[172] Hickey, *supra* note 19 at 7–8. Hickey quotes Justice O'Connor, who stated, "The constitutional question (in this case) is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States." *Id.* at 7.

[173] *See generally* Greve, *supra* note 82.

[174] *See supra*, p. 10–11. And when one looks at the number of states that joined onto the multistate lawsuit led by California, the number of people who now have a vested interest in states' retaining their power is over 179 million, which shows that the federalism concern touches almost half of the states in the union, and well over half of its population. *See supra*, p. 10–11. This is not a battle between so-called "liberal" states like California and their so-called "conservative" counterparts; it is a movement for a better environment and standard of living that is brought on by clean air through California's waiver scheme and cooperative federalism.

[175] *See generally* Exec. Order No. 13132, 64 Fed. Reg. 43,255, 43,255 (Aug. 10, 1999). The Executive Order does not create an enforceable right or benefit, but it *does* require agencies to meet certain conditions before the promulgation of rules with "federalism implications." *See* One National Program, 84 Fed. Reg. 51,310, 51,327 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533); Envtl. Prot. Agency, *Summary of Executive Order 13132 – Federalism*, Envtl. Prot. Agency (last updated Oct. 17, 2016), https://www.epa.gov/laws-regulations/summary-executive-order-13132-federalism#:~:text=Executive%20Order%20(E.O.),issued%20by%20President%20William%20J.&text=The%20E.O.'s%20objective%20is,the%20Unfunded%20Mandates%20Reform%20Act. In One National Program, the agencies try to say that they comply with the Executive Order's mandates when it comes to preemption (in Section 4 of the Order), just because they satisfied notice requirements in relation to the

Accepting these rules sets an untenable precedent, essentially eradicating cooperative federalism schemes.[176] If the executive branch can reclaim power Congress has given away, why would the executive continue to allow states to do what it is now enabled to do?[177] If a court decides that Congress wanted to let the executive branch and its agencies step all over the cooperative federalism scheme it has set up, as the Trump administration would like it to do, that court further contributes to the imbalance of power between the two branches.[178] The benefits of the state's retaining its ability to set emissions standards through the waiver framework disappear, as does the choice Congress made to step aside and let the states continue to push and pull it with iterations that spur innovations.[179]

If a future court rules in favor of the administration, it will stem the exciting flow toward Gerken's modern federalism, Federalism 3.0.[180] The iterative federalism of Federalism 3.0, with its helpful redundancies and healthy competition will be gone, perhaps first in the waiver scheme, but perhaps disappearing from other places as well as time passes.[181] California will no longer be there to push the federal government to go further in its own fuel emissions standards and fuel economy regulation. In turn, California will no longer have the federal government pushing it back, either to think bolder, or to scale back a certain regulation. There will not even be a hint of Justice Brandeis's laboratories, so derided as outmoded

possibility of a conflict. One National Program, 84 Fed. Reg. at 51,327. But that does not invalidate the mandate of Sec. 4(a), which requires "clear evidence Congress intended preemption of State law." Exec. Order No. 13132, 64 Fed. Reg. at 43,257.

176 For discussions of cooperative federalism see generally Doremus & Hanemann, *supra* note 78. *See also* Frank, *supra* note 38.

177 *See* Benjamin Ginsberg, *The Growth of Presidential Power*, Yale Univ. Press Blog (May 17, 2016), http://blog.yalebooks.com/2016/05/17/growth-presidential-power/ (discussing the expanding presidential power, usually at the expense of Congress and its own power structures).

178 *Id*.

179 *See generally* Carlson, *supra* note 9 (discussing iterative federalism).

180 *See* Gerken, *supra* note 60, at 1718.

181 *Id*. at 1720. There are other cooperative federalism schemes in the environmental sphere that could next face the litigative gauntlet if a court decides cooperative federalism in one area is no longer valid. *See* Carlson, *supra* note 9, at 1100 (discussing another example of iterative/cooperative federalism, the Ozone Transport Commission).

by current scholarship.[182] This will not only hurt California. It will not just hurt the states that follow California's standards, or the ones defending them. It will hurt the federal government itself. And the push for one national standard by the Trump administration for regulatory ease and for the automotive industry will end up hurting the federal system in the long run.[183] The court that rules on this case cannot just look at the arguments presented and rule on those at face value — they must look at the long-lasting implications of a ruling against a scheme like this. Otherwise, the healthy growth and change of federalism may, at best, be set back and, at worst, closed off forever.

VI. CONCLUSION

The waiver that California receives through the CAA is essential to the continued existence of iterative and cooperative federalism schemes in the United States. The entire impetus of the waiver was to acknowledge how exceptional California was at recognizing, diagnosing, and addressing the problems that the early stages of climate change caused in the state. California has been able to drive the automotive emissions conversation for over half a century now, pushing the federal government to go further with its own regulations. And the federal government has been able to push back in its own ways — but never to the extent of demolishing the waiver for good — instead, pushing back in iterations to strengthen the bond between the state and federal government. Ripping away that ability will forever shape federalism and cooperative federalism in the environmental sphere as the concentration of power in the federal government and the executive branch grows. State power will shrink. The desire to innovate will also shrink, and the drive of states to go further and do more will dissipate.

The Trump administration has buckled to pressure from the automotive industry to make changes that are in the interest of industry rather than in the interest of the people of this country. The administration will irreparably damage a pillar of federalism if they succeed, and states and

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182 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932). For criticism see Gerken, *supra* note 60, at 1696–97, and Schapiro, *supra* note 60, at 35–36.

183 *See generally* One National Program, 84 Fed. Reg. 51,310, 51,310 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 and 86, and 49 C.F.R. pts. 531 and 533)

their people will not be able to innovate to make life and the environment better in their communities. Emissions standards have far-reaching impacts. It is now up to the judicial branch to protect federalism and the people of the United States, as the federal government will not take care to do so. The fate of federalism is in the hands of the courts — whether one ascribes to the laboratory conception, or Federalism 3.0 — and America's roots will be put to the test. For the sake of the United States, a return to federalism's roots and an adherence to its ideas is the best chance for federalism's survival.

* * *

BOOK SECTION

A SOCIAL HISTORY OF FARM LABOR IN CALIFORNIA

WITH SPECIAL EMPHASIS ON THE UNITED FARM WORKERS UNION AND CALIFORNIA RURAL LEGAL ASSISTANCE

A SOCIAL HISTORY OF FARM LABOR IN CALIFORNIA

With Special Emphasis on the United Farm Workers Union and California Rural Legal Assistance

ELLEN CASPER FLOOD*

* Professor Emerita, Marymount College of Fordham University and Adjunct Assistant Professor, Manhattan College. The work presented here is the author's previously unpublished Ph.D. dissertation (The New School for Social Research, New York, 1984), lightly copyedited but otherwise faithful to the original.

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FOREWORD

KEVIN R. JOHNSON*

"A Social History of Farm Labor in California" recounts the histories of two organizations — the United Farm Workers Union (UFW) and California Rural Legal Assistance (CRLA), both of which made important contributions to modern thinking about social change movements. Proceeding in chronological fashion in nine chapters, the study is chock-full of insights about parallel, but at times conflicting, social movements.

Headed by the iconic leader Cesar Chavez, the UFW drew national attention with its inspired activism seeking to end the shameful working conditions for farm labor. A civil rights leader rivaled in his generation only by Dr. Martin Luther King, Jr., Chavez relied on community organization in seeking to create a mass — not just a labor — movement to secure far-reaching social change.

The study also chronicles the emergence of CRLA, a legal services organization funded by the federal government as part of President Lyndon Johnson's great "War on Poverty." Through creative use of the law, CRLA hoped to spark the transformation of the lives of California's rural poor.

* Dean and Mabie-Apallas Professor of Public Interest Law and Chicanx Studies, University of California, Davis, School of Law.

The UFW and CRLA operated against a very different backdrop than many other reform organizations of the era, which made their efforts to change society all the more challenging: "Unlike the Jeffersonian ideal of the small family farm, . . . California's agricultural system is based on large tracts of land and an abundant, flexible labor supply to work them. The labor supply established and maintained in the system consisted of persons of color held in a subordinate position within a wage labor hierarchy." (p. 485)

In providing a comprehensive history of farmworkers in California, "A Social History of Farm Labor in California" chronicles in compelling fashion the emergence of the UFW and CRLA. The study considers the many challenges to the UFW's efforts to organize farmworkers, which was especially difficult in California with its history of large tract farming. But the real story is that the UFW sought to do much more than simply to organize labor; it hoped to mobilize a social movement and galvanize a generation.

In looking at CRLA, Casper Flood discusses the emergence and limitations in securing enduring social change through an arm of the federal government's legal services program. Federal legal services funding came with strings attached, limiting the legal activities of organizations funded by the Legal Services Corporation and barring the organizations from involvement in politically sensitive cases.[1] CRLA, for example, could not represent labor unions. (p. 426). That restriction, of course, created a natural divide between CRLA and the UFW, with Cesar Chavez desiring CRLA to, in effect, be the UFW's lawyer.

"A Social History of Farm Labor in California" offers a blow-by-blow account of the battles between workers, growers, and unions in California agriculture through 1984. It cogently explains the political, social, economic, and legal dynamics leading to the emergence of the UFW and CRLA and the subsequent complex, intersecting trajectories of the two organizations. To summarize:

> With the Civil Rights Movement at its peak, . . . the UFW introduced new ethnic and religious elements into the [farmworkers labor movement], and CRLA, with its legal tack, reinterpreted and invigorated basic liberal values. These two groups were successful as no other

[1] *See* Legal Services Corporation, LSC Restrictions and Other Funding Sources, https://www.lsc.gov/lsc-restrictions-and-funding-sources.

> group or combination of groups had been, but their attempted partnership failed. They, too, came into conflict with one another (p. 486).

To fully understand the terrain encountered by the UFW and CRLA, we learn about the history of California's unique agricultural industry, with large farms evolving naturally from the hacienda system historically in place in Mexico. Ensuring the availability of farm labor has been a constant challenge to agricultural production in the fertile fields of the West. Over the years, different groups of exploited laborers — from Native peoples to African Americans to Chinese, Japanese, Filipino, Mexican, and other immigrants, as well as Dust Bowl refugees from Arkansas and Oklahoma — at various times have populated the labor force of the fields in California history.

Casper Flood further documents how growers organized among themselves to protect common economic and political interests. Growers created groups such as the California Farm Bureau, Agricultural Labor Bureau of the San Joaquin Valley, and the Associated Farmers of California (at 319). Some of these groups exist to this day and, among other things, lobby for favorable governmental treatment.

THE UFW

Many contemporary readers no doubt will be especially interested in the analysis of the rise and fall of Cesar Chavez and the UFW. Casper Flood summarizes the early success:

> Chavez, leader of the [UFW], managed to channel the farm workers' discontent and chronic unrest into a sustained social movement that won legal recognition, bargaining rights, contract benefits, and political leverage for farm labor in California. With shifts in national political alliances and the emergence of new political actors in the 1960s, Chavez managed to broaden the issues involved in the farm workers' movement and to put them before a national audience (p. 306).

Chavez famously gained the support of Robert F. Kennedy, later martyred during a run for president in 1968, for the farmworker cause.[2]

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[2] *See generally* Steven W. Bender, One Night in America: Robert Kennedy, Cesar Chavez, and the Dream of Dignity (2015).

In putting the UFW in the national spotlight, Chavez's organizing strategy undoubtedly will be the subject of study for generations. "The ideology which animated the [UFW] cannot be separated from the person and philosophy of Cesar Chavez, his upbringing, his religious faith, and his experience as a community organizer . . . ." (at 393). Religion, race, and community organization are not the ordinary staples of labor unions. Among the distinguishing features of the UFW's social movement were the appeal to religion, such as Chavez's fasts (at 387) and the union's extensive use of "the Mexican patron saint of the campesinos, *La Virgen de Guadalupe* . . . ." (at 380). Ultimately, "UFW ideology was challenged by claims that Chavez and the UFW were leading a social movement, not a legitimate labor struggle, and were incapable of efficient administration of the contracts they had won . . . ." (at 397).

The law influenced the UFW's organizing efforts. The New Deal's National Labor Relations Act[3] protections did not apply to agriculture and farm workers, which made the organization of labor extremely difficult. Chapter 8 discusses the institutionalization of unions, which has had pros and cons, through the 1975 California Agricultural Labor Relations Act,[4] which dramatically changed labor relations.

The battle between the insurgent UFW and the conservative, pro–Richard Nixon International Brotherhood of Teamsters is a story for the ages. The prolonged fight prominently featured larger-than-life Teamster Presidents Jimmy Hoffa and Frank Fitzsimmons. With a reputation for aggressive — some might say ruthless — tactics, the politically conservative Teamsters long sought to organize farmworkers and were generally preferred by the growers to the more militant UFW.

As was the case with respect to management and labor, race was a dividing line between the warring unions. The UFW and Cesar Chavez expressly and exuberantly appealed to the Mexican-ness of the labor force and its Catholic roots. Forged in a different time and place for workers of a different background, the Teamsters did not. Indeed, one UFW leader bluntly described the racial divide, referring to the Teamsters as a "white man's union," (p. 418), a far cry from the Chavez-led UFW.

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[3] Pub L. No 74-198, 49 Stat, 449 (1935).

[4] Cal. Lab. Code §1140 et. seq.

Immigrant workers were often a central issue in union/management relations. Growers used immigrant workers to break strikes. At the same time, the UFW claimed that workers from Mexico brought to the United States under the Bracero Program[5] drove down wage scales for farm workers. Undocumented immigrants also were accused of undermining union efforts to organize workers. At the same time, although at times seeking to reduce immigration, the UFW aggressively sought to organize immigrant farm workers. The dual roles played by immigrant labor — in undermining the union cause and as potential union members (p. 494) — continues to this day.

To add to the drama, "A Social History of Farm Labor in California" chronicles how the local, state, and federal governments interact and, at times, engage in conflict. Local police at times helped to break strikes, through the enforcement of labor injunctions entered by the courts or brute force. Consider one memorable violent episode in the community of Arvin:

During a fight that pitted growers using gun butts against strikers with grape stakes, a shot was fired and a Mexican worker fell dead. "Growers claimed that a striker perched in a tree nearby had fired the shot that killed the worker. Police arrested several strikers on murder charges and others for rioting. The charges, however, had to be dismissed when an investigation revealed that no striker had a gun in his possession" (at 344) (footnote omitted).

CRLA

Almost immediately upon its creation, CRLA found itself embroiled in turbulent class struggle. After enjoying initial success in helping the rural poor through the courts, CRLA fought the administration of conservative California Governor Ronald Reagan, who sought to dismantle CRLA as a thorn in the side of growers. The federal government in the end rejected that effort. As legal services champion Sargent Shriver claimed, if Governor Reagan's effort to dismantle CRLA was not rejected, "we might as well turn the country over to the John Birch Society," an ultraconservative organization (p. 444).

One surprising omission in Casper Flood's study of CRLA was any discussion the role of Cruz Reynoso, a historical figure who later served

[5] *See generally* Kitty Calavita, Inside the State: The Bracero Program, Immigration, and the I.N.S. (2010).

on the California Supreme Court. Reynoso headed CRLA when Governor Reagan was dead set on eliminating the law reform group; Reynoso vigorously led the fight to save CRLA, which remains an important legal services provider serving (and civil rights advocate for) people in rural California.[6] That fight for survival was an important chapter in the history of federal legal services in the United States.

In looking at both the UFW and CRLA, "A Social History of Farm Labor in California" touches on the ongoing debates about the best way of securing social change. There were internal fights within CRLA about whether the lawyers should consider whether resolution of a particular lawsuit would be better, or worse, for the overall movement for social change. For example, a good legal settlement might not be the best outcome for the overall political movement. This created conflict with the UFW and Cesar Chavez: "Chavez began to realize that the lawyers' first loyalty was to their ideas of professionalism, not to the work of the UFW" (p. 438).

Along those lines, some CRLA lawyers thought that legal services organizations should focus on doing the best for their clients in individual cases, not larger political movements. Others thought that "impact" cases promoting deeper social change were preferable. This debate about the goals and intent of legal services continue through to this day.

CONCLUSION

"A Social History of Farm Labor in California" offers valuable insights into the continuing struggle over labor in the fields of California, efforts at social change, and the interrelationship between law and politics in achieving that change. The study will no doubt be an important resource for students of the history of the UFW and CRLA, two extremely important social reform organizations of their era.

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[6] *See* Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 Chicano L. Rev. 1 (1972); Kevin R. Johnson, *Justice Cruz Reynoso: The People's Justice*, 10 Cal. Leg. Hist. 238, 239 (2015); Jose R. Padilla, *California Rural Legal Assistance: The Struggles and Continued Survival of a Poverty Law Practice*, 30 Chicana/o-Latina/o L. Rev. 163 (2011).

PREFACE

I would like to thank Editor-in-Chief Selma Moidel Smith for the decision to publish my dissertation after all this time — thank you, that is, for an unexpected pleasure. In re-reading the manuscript, I realized how many days, weeks, months of my life I spent reading archived articles in newspaper offices in small towns in rural California, interviewing growers, lawyers, and labor activists, poring over sources in UC Berkeley's rare books collection, and just taking in the view as I drove from place to place in the Central Valley, Imperial Valley, etc., searching for information. And, I recall the kindness and generosity of Administrator Michael Bennett, who gave me access to CRLA's files. The sense of purpose I had then has come back to me as a series of pleasant memories.

ELLEN CASPER FLOOD

New York City
April 2020

Chapter 1

INTRODUCTION

This is a social history of farm labor in California, focusing on the persistent theme of unrest among the state's agricultural workers. For more than a century, California farm workers were outside the institutional framework of the society in which they lived and worked. They were effectively excluded from economic decision-making, political representation, and participation in the social mainstream. Because their wages were among the lowest in the country, they were peripheral to the wage and consumer markets. In the rural communities in which they lived, they were segregated and treated as inferiors. They were excluded from national labor legislation and many social welfare programs, and they were denied basic legal rights and civil liberties. As a consequence, California farm workers were restless and dissatisfied. They were powerless as well.

Indeed, the history of farm labor in California indicates not a pluralistic social and political structure confronting farm workers but the domination of farm workers by farm employers. During periods of labor unrest in particular, California's agricultural elite was backed by local communities and segments of the state and national governments mobilized to support its interests and prerogatives. The narrowly based and largely autonomous elite comprised of California's big commercial farmers did not act

cohesively with other elites on many issues. It was not part of a power elite in the sense of commanding the entire nation. On the contrary, it tended to pursue a policy of noninvolvement in the large issues of statesmanship, except when the issues touched its particular concerns. Its influence with government officials was not part of a conspiracy. Rather, its power over farm workers was based on its social and economic domination of local communities and its ability to define and control issues locally or to influence the exercise of government authority through private channels. Ultimately, however, the power of California's agricultural elite was rooted in the unique structure of California agriculture and its supporting ideology.

In their book, *American Sociology: Worldly Rejections of Religion and Their Directions*, Arthur J. Vidich and Stanford M. Lyman describe the unique character of California agriculture and reveal its ideological underpinnings. They point out differences between California agriculture and agriculture in other parts of the country.

> California's farming and agriculture did not develop in the same ways that they had in the South and the Middlewest where, respectively, the plantation and the family farm and the ideals associated with each had become basic norms. California's farm lands had been blocked out as large tracts during the Mexican period. The Mexicans had initiated California's style of land parcelization by incorporating the Spanish colonial hacienda system into their administration. The hacienda, comparable in many respects to the feudal manorial system, was a self-contained social and economic entity. Farm labor was thought of as a part of a much larger obligation of fealty to the *hacendado*. When, after 1848, the *hacendados* and the hacienda system were formally eliminated, the agricultural tracts remained intact, requiring management under another system. . . . Although the parallels between the hacienda and plantation system are by no means exact, both have large tracts of land and cheap labor as their economic foundation. The great agricultural valleys of California with their vast expanses of land and the intensive labor required for harvesting stood in contrast to small scale farming operations. . . . The ideal of the self-sufficient farmer, idealized in the Middlewest as upholding the values and

> virtues of sturdy independence, equalitarianism and direct-action democracy, did not develop in California.[1]

There were agrarian idealists in California who, through the nineteenth century, asserted Thomas Jefferson's model of the family farm; but the pattern of land settlement in California, combined with land speculation, industrialization, the growth of monopolies in banking and transport, and the rise of cooperative marketing ventures, undercut and effectively silenced the agrarian idealists. In addition, many of the agrarian idealists were xenophobes. They supported Jeffersonian democracy, but equated local control with local homogeneity and wished to keep out foreigners, non-Christians, and peoples of color. This touches on another fundamentally important aspect of the unique structure of California agriculture, the ethnic composition of California's agricultural labor force. Vidich and Lyman describe the type and supply of labor upon which California agriculture was predicated and indicate what the important issues were for those influential in the recruitment and organization of the farm work force:

> From its beginnings the labor force in California was recruited not from Europe, but from the countries and colonies surrounding the Pacific basin — China, Japan, Korea, the Pacific Islands, Hawaii, and Mexico. . . . [T]he critical issue was the availability, the quality, and the condition of the migrant agricultural labor force. The concern was not with assimilation or with saving souls, but with the recruitment of a stable agricultural labor force. This labor force was not conceived as transformable into a small-holding peasantry, moreover, it would have characteristics of neither the serf of the hacienda nor the slaves of the plantation.[2]

Vidich and Lyman also show how the labor force and the agricultural system in California were understood by those in position to shape and justify it. Their argument highlights the theories of Joseph Le Conte, a sociologist at the University of California at Berkeley, who defined the labor problem in California agriculture and directed Berkeley's powerful role in

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[1] Arthur J. Vidich and Stanford M. Lyman, *American Sociology: Worldly Rejections of Religion and Their Directions* (New Haven: Yale University Press, 1985), 242.

[2] Ibid.

maintaining the state's agricultural system. To Le Conte the labor problem was that of "organizing racial groups to labor in a post-slavery society."[3]

> Le Conte put forward an argument . . . to the effect that "slaves were not property, chattels, in the sense in which other things are," and, he insisted, "in fact they were never so treated in the South." Slavery, Le Conte observed, was simply a system of organizing labor power. With respect to Negro slaves, slaveholders had merely exercised "the right claimed . . . to their labor power." The postwar system meant only a change in social organization "from a slave-system to a wage-system." What had formerly been the market value of slaves would now pass to the land itself, "if the labor remained reliable." Wage labor, like the slave labor that had preceded it, was but another form of warrantable calling. Hence, Le Conte could argue — as he did in 1888 before the California Historical Society — that the South had no need to "repent" of any "sin" of slavery because it was a system of labor organization admirably suited to the condition of Negroes. Although Le Conte intended his comments to be applicable to the plantation system of the South, they were equally apt for the agribusiness of California.
>
> The special organization of agriculture in California — agribusiness — represents a rationalized plantation system wherein the slaves would be replaced by migrant workers and illegal aliens. In addition, under a wage system, the owner of the enterprise, unlike the plantation owner or the *hacendado*, is not responsible for the care and feeding of the laborer. Hence, the migrant worker is housed on the farm and may even be fed in a central dining area, but the costs of these services are borne by the worker, who leaves the farm when there is "no more work."[4]

It was these conceptions and the economic situation maintained by them that created a chronic condition of dissatisfaction among California's agricultural workers.

The dissatisfaction and unrest among California farm workers led to demands for justice, equality, and the right to organize. These liberal ideas

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[3] Ibid., 243.

[4] Ibid.

were advocated by a range of groups drawn into the farm workers' struggle throughout its history. They were responded to in a wide variety of ways. They were resisted, often with violence. At times, they were supported. Eventually, Cesar Chavez, leader of the United Farm Workers union (UFW), managed to channel the farm workers' discontent and chronic unrest into a sustained social movement that won legal recognition, bargaining rights, contract benefits, and political leverage for farm labor in California. With shifts in national political alliances and the emergence of new political actors in the 1960s, Chavez managed to broaden the issues involved in the farm workers' movement and to put them before a national audience.

An unusual aspect of the changing situation was the role of the Democratic administration in Washington. During the 1960s, the federal government took on the task of organizing unrepresented individuals into groups and absorbing their organizational representatives into the political bargaining processes. Chavez, by 1966, had managed an important breakthrough in the organization of farm laborers, but it was not clear that he could be made a part of the controlled network of benefits, party loyalty, and electoral support. Democratic politicians seized an opportunity to enhance their leverage in California politics by providing funding for California Rural Legal Assistance (CRLA), a legal services program under the umbrella of President Lyndon Johnson's War on Poverty. Gary Bellow, CRLA's first deputy director, pushed to make CRLA an organizing agent and partner in the farm workers' movement.

Growers called on allies at the state and federal levels to oppose CRLA. To combat Chavez, they turned to a national union more to their liking than the UFW: the International Brotherhood of Teamsters (IBT). Growers used the IBT, not only to contain the scope of the conflict generated by farm workers' grievances, but to put forth a type of legitimacy that could garner support for reinstating the privacy and independence of grower business dealings, including their labor policies. The Teamsters claimed to recognize the need for the extension of economic bargaining power to farm workers, but promised to deliver a more "businesslike" administration of labor contracts than the UFW, and to abandon Chavez's political-ideological approach to labor organizing. Growers, stung by charges of

callousness and injustice toward their employees, found in the Teamsters' arguments a legitimating ideology that carried weight with outsiders.

By the mid-1970s, the conflict was costly to everyone involved. The Teamsters and the growers had collaborated with each other, but were not really members of the same team. Their partnership was born of expediency and they quickly came into conflict with one another. According to growers, the fields were in chaos. The Teamsters were under fire from the AFL-CIO, the UFW's national affiliate, and it was clear that the unionization of field hands was not one of the IBT's vital interests. CRLA was fighting a Republican administration in Washington for its survival. The UFW seemed to be losing out to the IBT. And, despite a growing tide of criticism from UFW supporters, Chavez continued to resist stabilizing and professionalizing his organization to make it more efficient. As a consequence, California Governor Edmund G. Brown, Jr. was well-positioned to secure passage of legislation to regulate the conflict. In 1975 he managed to win agreement on a compromise bill to set up legal machinery to order farm labor relations and assure collective bargaining for California farm workers.

The farm workers' push to be included in political and economic institutions did not begin with the Delano grape strike of 1965, nor did it end in 1975 with passage of the Agricultural Labor Relations Act, as recent events have shown, but the decade marked off by those years was the period of greatest popular recognition and response to the farm workers' plight. The events of these years cannot be understood, however, without an appreciation of the history of the farm labor problem in California and a knowledge of the leaders and organizations that mounted organizing drives prior to World War I, in the 1930s, 1940s, and 1950s. This study tells the story of these groups and how they fought for liberal conceptions of justice, equality, and the right to organize. It focuses on the growers and their allied business interests, on the politicians involved, and on the labor unions, and tells the story of the two organizations just mentioned, the UFW, with its Mexican-Catholic elements and identity, and CRLA, with its emphasis on legalism and activism.

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Chapter 2

LABOR IN CALIFORNIA: THE SETTING

California is the nation's leading agricultural state. It accounts for 10 percent of the country's gross cash receipts from farming, produces 40 percent of the country's vegetable, fruit, and nut crops, and employs over a quarter of a million farm workers each year. The state is responsible for 90 to 100 percent of the total U.S. production of fifteen crops, including 92 percent of the grapes.

Virtually every farm crop produced in the United States is grown in California.[1] The mild climate and extended growing season make it possible to produce this wide variety of crops, and in some cases to harvest two, and even three, plantings a year; but these possibilities would not have become realities without a cheap and steady supply of water. This the federal government provided beginning in the 1930s with the construction of concrete dams and ditches that take water from the Colorado River and trap runoff in the Sierras, funneling it to the rich central valleys of California's agricultural heartland. About 75 percent of California cropland

[1] Lamar B. Jones, "Labor and Management in California Agriculture, 1864–1964," *Labor History* (Winter 1970): 23–40; U.S. Department of Agriculture, *Fact Book of U.S. Agriculture* (Washington, D.C.: Government Printing Office, 1970), 68–70.

is irrigated.[2] The productivity of California agriculture is indeed due to the remarkable climate of the state and the government-subsidized water projects that make so much of its land fertile, but this is only part of the picture. In contrast to states in the Northeast and Midwest, California was settled in vast mission estates and has a long history of large-scale land holding. These large holdings formed a base for the early and extensive development of industrial agriculture.[3]

Prior to 1848, government land policies under successive Spanish and Mexican regimes had created an aristocratic class of large landowners in what is now California. When Mexico broke up the early mission properties in 1833, it granted over 26 million acres to a mere 800 families. After 1848, when the Treaty of Guadalupe Hidalgo ceded California to the United States, Anglos replaced Latinos, often by fraudulent means, and upset the pastoral and aristocratic lifeways of the great landed estates of California's colonial period.[4] As a result, the American era did more than modify land use, it revolutionized it. Aggressive American entrepreneurs turned millions of rich acres that Spanish and Mexican owners had been content to use for pasture to commercial ends.[5] Bonanza wheat farming became a major industry. This method of farming was referred to as "mining for wheat" because it reflected the quick-profit mentality that so marked the behavior of miners during the California gold rush. "In one point of view, it is a manufacturing business in which clods are fed to the mill and grain appears in carloads. Such farming holds the same relation to society as does a manufacturing corporation."[6]

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[2] Robert C. Fellmeth, *Politics of Land* (New York: Grossman Publishers, 1973), 115–80; Paul S. Taylor, "Central Valley Project: Water and Land," *The Western Political Quarterly* 2, no. 2 (June 1949): 228–53.

[3] Paul S. Taylor and Tom Vasey, "Contemporary Background of California Farm Labor," *Rural Sociology* 1, no. 4 (December 1936): 401–19.

[4] U.S. Public Lands and Surveys Committee, "Mexican Land Grants in California," Hearings before a Subcommittee of the Committee on Public Lands and Surveys, U.S. Senate, 71st Congress, 1st session, April 2–6, December 5, 1929, February 6, and May 27, 1930, Gerald P. Nye, Chairman.

[5] Paul S. Taylor and Tom Vasey, "Historical Background of California Farm Labor," *Rural Sociology* 1, no. 1 (September 1936): 281–95.

[6] Quoted in Cletus E. Daniel, *Bitter Harvest: A History of California Farmworkers 1870–1941* (Ithaca and London: Cornell University Press, 1981), 21.

Even a brief discussion of the acquisition and use of land in California would be incomplete without reference to the Pacific Railroad Act of 1862. That Act, and a follow-up measure passed in 1864, gave the railroad a 400-foot right-of-way through the public domain; twenty sections, one square mile each, of federal land for each mile of the first twenty miles of line built; and construction loans at a rate of $16,000 to $48,000 a mile, on which no principal or interest had to be paid for thirty years. Through a variety of political and financial maneuverings, some legal, if unethical, and others illegal, the "Big Four" of the Central Pacific (later the Southern Pacific) Railroad, Leland Stanford, Collis Huntington, Mark Hopkins, and Charles Crocker, milked the state and the federal government for land and money. By 1882 the Central Pacific had acquired more than 10 percent of the state's entire acreage — a well-placed 10 percent that the "Four" used to support monopolistic practices.

"We don't ride the railroad," customers said, "the railroad rides us." Today the Southern Pacific is still the biggest single private landholder in California with 2 percent of the entire acreage of the state.[7]

With Americanization, the oligopolistic pattern of land ownership established under colonial rule continued. Even the Homestead Act could not undo the legacy of California's colonial past. ln the nineteenth century, the State of California disposed of more than 8 million acres through land policies intended to support small family farms, but the land went to anyone ready, willing, and able to acquire a piece of it. Successful strategies included fraud and force as well as settlement and work. As a consequence, big commercial farmers and businesses as well as individual homesteaders acquired land. Yet there was enough open space as late as 1914 to permit additional homestead entries for nearly 5 million acres with 21 million more acres of vacant public land still available. Indeed, small units of ownership and production are statistically significant in California. There were some 120,000 of them in 1965; but the network of family farms that arose in California with the help of the Homestead Act and other government policies influenced the character of rural California

[7] Fellmeth, *Politics of Land*, 3–25; Carey McWilliams, *Factories in the Field* (Hamden: Archon Books, 1969), 15–17.

far less than the agricultural giants whose presence had been established earlier.[8]

In 1965, along with the 120,000 small owners, there was the DiGiorgio Fruit Company with 11,000 acres of cropland in Arvin, California, and 5,000 in Delano. Also in the Arvin–Delano area, growers Jack Pandol, Martin Zaninovich and family, and Joseph Giumarra owned 2,200, 8,000, and 12,400 acres, respectively. The Irvine Ranch in Southern California claimed 97,000 acres. In the Tehachapi mountain range, El Tejon Ranch had expanded from its original 97,000 acres, acquired in a Mexican land grant, to 300,000 acres. The Kern County Land Company owned more than 1,900,000 acres in four Western states, easily dominating the California county for which it was named. The Newhall–Saugus Land and Farming Company cultivated thousands of acres near Los Angeles. In the central part of the state, the Spreckels Sugar Company, the successor of another Mexican land grant, claimed much of the Salinas Valley. The Boswell Company, engaged in cotton growing and cattle raising, owned or controlled 100,000 acres of land. The Salyer Farms, based in Corcoran in the lower San Joaquin Valley, farmed 30,000 acres, some its own land and some under lease.[9]

The Salyer Farms leasing arrangement was one of three typical patterns of agricultural use among large land holders in California. In the latter part of the nineteenth and early twentieth centuries, large and small holdings were developed into factory farms, mobile operations, and consolidated holdings. Factory farms

> own the land . . . usually in one or a few large tracts; the land frequently had heavy expenditures for improvements, including permanent plantings, labor housing, packing sheds, and processing plants; there is generally an effort to integrate the industry by

[8] Paul W. Gates, "The Homestead Law in an Incongruous Land System," *American Historical Review* 41 (July 1936): 652–81.

[9] Agribusiness Accountability Project, *The Directory of Major U.S. Corporations Involved in Agribusiness* (San Francisco: Agribusiness Accountability Publishers, 1976); Peter Barnes and Larry Casalino, *Who Owns the Land?* (Berkeley: Center for Rural Studies, 1972); Fellmeth, *Politics of Land*, 3–251; and Carey McWilliams, *Factories in the Field*, 11–47.

> getting control of box-making plants, processing plants, and distribution systems, and the units are usually incorporated.[10]

Mobile operations are business enterprises in which farmers specialize in one or two heavily soil-depleting crops and lease rather than own the acreage they plant. The leases run only for that period of time during which the land can produce the mobile farmer's special crop. Then the land is turned back over to its owner and the mobile farmer moves on. Mobile operations generally have some land that is owned outright and used for packing sheds, labor housing, and so forth. This style of industrial farming developed in the Salinas and Imperial Valleys of California in the early 1920s. It was associated with the lettuce, melon, and carrot crops, but has since spread to other crops and into other regions in rural California. Consolidated holdings are those which result from the joining of smaller tracts of land. Many approach the size of factory farms. That is, the more land a farmer owns, the greater the pressure placed on him to invest in a processing plant to keep costs down. Once the farmer has invested in a processing plant, he has added reason to buy more land and plant more crops to assure a steady flow of high-quality produce through his plant.[11]

We are able to list some of the largest farms and consolidated holdings in California together with the acreage they control, but the full picture of just who owns what land in California is not entirely clear. Statewide figures are not available — not even from those state and federal agencies which regulate land ownership, use, and development. In 1971, a study group was able to compile a statewide list of landowners from scattered local sources, however. According to the study, there were 11,815,000 acres of cropland in California. Twenty-nine farming businesses owned 21 percent of this land; 75 owned 27 percent; and 220 owned 35 percent of it.[12] A second estimate drawn from the 1964 U.S. Census of Agriculture indicated that 7 percent of the farms in California owned 79 percent of the agricultural land and

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[10] Walter Goldschmidt, *As You Sow* (Glencoe: The Free Press, 1947), 6.

[11] Ibid., 10–131; Walter Goldschmidt, "Small Business and the Community," in *Corporation Farming, Hearings before the Subcommittee on Monopoly*, U.S. Senate Select Committee on Small Business, 1968.

[12] C. V. Moore and J. H. Snyder, *A Statistical Profile of California Corporate Farms*, University of California Agricultural Economics Information Series 70-3 (Berkeley: University of California, December 1970).

employed 75 percent of the state's farm workers.[13] A look at local ownership patterns only emphasizes the picture of concentrated ownership. The top twenty landowners in each rural county were found to own from 25 to 50 percent of the private land. The top twenty owners and the government together owned from 50 to 90 percent of the land.[14]

Large-scale commercial wheat farming was widespread in California in the 1860s, but by 1870 a system of crop specialization had begun to prevail and since then crop specialization has intensified. Farming operations engaged in intensive, specialized cropping depended on a large force of seasonal workers. Historically, successive waves of impoverished immigrants supplied the manpower needed.[15] By the 1860s, the Indians who were used as near-slaves in Spanish California had all but disappeared. In agricultural regions, they had been largely replaced, after the Gold Rush, by Chinese labor, originally brought in to work on the Southern Pacific Railroad. But the Chinese were resented, especially by jobless whites for whom the Gold Rush had not panned out, and also by small farmers, who claimed they could not compete with what they termed a "cheap" labor force. (Recent scholarship has determined that what was thought to be "cheap" labor was not necessarily cheap when compared to prevailing wage standards.) Chinese immigration was virtually halted by the Chinese Exclusion Act of 1882, and after that the big farmers turned to the importation of Japanese. The Japanese, too, were soon bitterly resented because they undercut all other labor. Moreover, they were more effective farmers than the Americans; they bought and cultivated poor land that nobody else had bothered with; their labor gangs were self-dissolving migrant groups that transformed themselves into small-holders by bargaining to lease a portion of the land on which they worked as pickers. This situation was dealt with by the Alien Land Law of 1913, which prevented further acquisition of farm land by aliens.[16] The next waves of farm laborers in California contained

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[13] U.S. Department of Commerce, Bureau of the Census, *Area Measurement Reports, Areas of California: 1960*, Series GE-20, No. 6 (March 1965).

[14] Fellmeth, *Politics of Land*, 12–13.

[15] Paul S. Taylor, "California Farm Labor: A Review," *Agricultural History* 42 (January 1968): 49–53; Taylor and Vasey, "Contemporary Background," 401–19.

[16] Ping Chiu, *Chinese Labor in California, 1850–1880: An Economic Study* (Madison: University of Wisconsin Press, 1963); McWilliams, *Factories in the Field*, 103–33; Moses Rischin, "Immigration, Migration, and Minorities in California," *Pacific*

Hindus, Arabs, Armenians, and Europeans. The European and Armenian immigrants, less oppressed than other groups by the racial discrimination that had advanced the economy of California from the start, gained a strong foothold, and the parents of many of the Valley farmers of today were among those immigrants. Mexican peasants had always crossed the border more or less at will, and after the Mexican Revolution of 1910, starving refugees presented the growers with a new source of cheap labor. Filipinos were brought in during the 1920s and for a time the cheap Mexican labor was undercut by even cheaper Filipino labor. Most of the Mexicans were deported after 1929, when the "Okies" swarmed into California from the dust bowl. The Depression produced a heavy labor surplus among the native-born, and an effort was made to keep the border closed. Mexicans had been predominant in the farm labor force from 1914 to 1934, and in those years they had tended to be more tractable than other groups. For the most part, it was Filipinos and Anglos who staged the famous farm strikes of the 1930s. After the Philippine Islands Independence Act of 1934, the importation of Filipinos came to an end, and their numbers have been dwindling ever since. During the war years, many farm workers drifted into the booming war economy of factories and shipyards and the minorities that remained were not numerous enough to harvest the enormous quantities of produce that the war demanded. The farm labor emergency was met by a series of agreements with the Mexican government known collectively as the bracero program.[17]

In the agricultural economic market, the beginnings of class formation can be seen as farm laborers came together with others who experienced similar work conditions. Material conditions of existence separated the owners from the employees, throwing agricultural workers together in rural labor camps and drawing rural landowners and directors of agricultural corporations together in their round of business activities. These

Historical Review 41, no. 1 (February 1972): 71–90; Chester H. Rowell, "Chinese and Japanese Immigrants — A Comparison," *Annals of the American Academy of Political and Social Science* 34 (September 1909): 4–6.

17 Henry Anderson, "The Bracero system and the National Honor," Statement prepared for a Hearing of the U.S. Senate Committee on Agriculture and Forestry, on S. 1945 and H.R. 2010 (June 1961); Ernesto Galarza, *Merchants of Labor* (Santa Barbara: McNally and Loftin, 1964); N. Ray Gilmore and Gladys W. Gilmore, "The Bracero in California," *Pacific Historical Review* 32, no. 3 (August 1963): 265–82.

conditions shaped how people lived and in whose company. The precise nature of stratification within each community involved in the farm workers' struggle cannot be determined, but there is a community study that gives specific information on the stratification of groups within a California community where large-scale land holding and industrial agriculture formed the backbone of the economy.

In 1940–41 Walter Goldschmidt studied and compared two communities in the fertile southern San Joaquin Valley near Wasco.[18] Goldschmidt chose Dinuba because farming operations in the community were modest in scale, closer to the model of a network of family farms. Arvin, on the other hand, was a community where factory farms were the norm. In Goldschmidt's words:

> The small-farm community is made up of middle-class persons with a high degree of stability in income and tenure, and a strong economic and social interest in their community. Differences in wealth among them are not great, and people associate freely in those organizations which serve the community. Where farms are large, on the other hand, the population consists of relatively few wealthy persons and large numbers whose only tie to the community is an uncertain and relatively low-income job. Differences in wealth are great among the residents of this town, and social contacts between them are rare.[19]

Goldschmidt found a simple two-level class system in Arvin, the large-farm community, during his field work there in 1940–41. The upper class included whites long resident in the community, in many cases for several generations, who had helped create the community's institutions, and now controlled them and maintained the community's values and social ties as well. This dominant group Goldschmidt called the "social nucleus." Outside the nucleus, or below the dominant stratum, the lower class consisted of more recent arrivals to the community, who were excluded from the inner sphere of social activity and control. Goldschmidt called them "outsiders." Within each of the two principal groups Goldschmidt found further differentiation. The upper class embraced an elite, a middle

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18 Goldschmidt, *As You Sow*.

19 Ibid., 285.

group, and a marginal group, distinguished mainly by their occupation, income, prestige, and lateral links of consanguinity and friendship. The lower class, consisting principally of farm workers, was divided racially into three groups, Mexican Americans, Negroes, and whites. Among both Mexican Americans and Negroes, Goldschmidt found evidences of special institutions, such as the church and extended family. The whites appeared to possess little homogeneity, except in their constant aspiration to gain admission to, or at least acceptance from, the dominant nuclear community.[20]

The farming community's class structure seemed particularly bleak and polarized. Great was the social distance between the two groups, the one possessing the credentials of land ownership, or professional servicing of owners; the lower group lacking these credentials of social worth and status. In Arvin, Goldschmidt found that farm laborers in general were unwilling to identify themselves as members of a laboring class. This was due in large part to the composition of the farm labor pool at the time of Goldschmidt's study. Goldschmidt noted that union activity was foreign to the farm workers' background and temperament. White workers in particular strove for status as individuals. The group constituting the "social nucleus" had virtually complete authority to confer status on outsiders at the same time that outsiders had "no mechanisms for establishing and maintaining group identity."[21] Potential conflicts rarely flared into the open, since the informal controls over behavior exerted by the upper class were well established and recognized. Poor whites were striving for social acceptance while Blacks and Mexicans were socially ostracized. Goldschmidt claimed that the only recognizable bases for group identity among farm workers in Arvin were church activity and union activity, and in Wasco in 1940–41, these institutions failed to unify farm workers.[22] Community studies have not been done for every farming community

[20] By 1948, the whites appear to have been assimilated into the rural California communities to which they came during the drought-plagued Depression years: "As for the once tumultuous Okies, they have been pretty well assimilated into small stucco cottages on tiny farms or into jobs in farming-area cities, indistinguishable except for the drawling 'you-alls' that Californians hardly notice anymore." "Valley Workers Striking," *The New Republic*, June 21, 1948, 6.

[21] Goldschmidt, *As You Sow*, 70.

[22] Ibid., 71.

in California, but the evidence we do have indicates that in communities dominated by large farms, the class structure is highly polarized, with farm workers excluded and at the bottom.

Goldschmidt was able to specify the relationship between class stratification and a number of influences on life chances. Goldschmidt found that the small-farm community supported 62 separate business establishments compared to 35 in the large-farm community — a ratio of nearly two to one. People in the small-farm community had a better average standard of living than those living in the community of large farms. Less than one-third of the breadwinners in the small-farm community were agricultural wage laborers, while almost two-thirds were wage laborers in the large-farm community. Physical facilities for community living — sidewalks, paved streets, sewage and garbage disposal, and other public services — were more prevalent and of superior quality in the small-farm community. The small-farm community had three times the number of parks and five times the number of schools as the large-farm community had. The small-farm community had more than twice the number of organizations for civic improvement and social recreation as its large-farm counterpart. The small-farm community supported two newspapers, each with many times the news space carried in the single paper of the industrial farm community. Facilities for making decisions on community welfare through local popular elections were available to people in the small-farm community; in the large-farm community such decisions were in the hands of county officials. Goldschmidt did a follow-up study in 1968 and found that the distinctions between the two communities held.[23]

The pattern of group affiliation within California's agriculture communities, the stratification of groups there, the consolidation of stratification networks, and the links between community groups and institutional positions outside the local communities provide an explanation of the dominant position of farm employers, particularly in large-farm communities. United by common interests, farm employers formed strong groups, created organizations, and established institutional connections. Initially, farmers organized along occupational and regional lines, with the California State Agricultural Society and its network of district associations

[23] Walter Goldschmidt, "Small Business and the Community."

providing a platform for wider communication and cooperation. Of concern were general political and economic interests. Very soon, however, farmers' associations were created to promote the common business interests of farmers engaged in growing and marketing a given crop.[24] In the 1860s the wool growers and the wine makers each formed an association to keep themselves informed of prices, sales, and freight rates. After a decade and a half of partial and imperfect cooperation, the large-scale orchardists of the citrus growing regions of Southern California established an effective growers' association, the Southern California Fruit Exchange. In 1905, the Exchange expanded to include citrus producers throughout the state. The name of the association was then changed to the California Fruit Growers Exchange. At a convention of the Exchange in 1910, J. W. Jeffrey, the state commissioner of horticulture, advised his audience that the producers of each crop should

> have a league or a protective committee of some kind authorized and supported for the purpose of handling every proposition that has a general bearing upon the prosperity of the business, and to whom all could look in times of danger, or in the promotion of any measure of benefit to the whole industry. I earnestly recommend that this convention take up this matter of trades representatives, and urge every industry to make provision for the handling of its difficulties through some plan that will bring its every element into harmonious and effective action in the promotion of all its trade interests, and in protection from its perils.[25]

Farmers were indeed cooperating with each other and continued to do so. Early in the twentieth century, the central California beet growers formed an association, as did the California tomato growers, the California asparagus growers, the California Diamond Walnut growers, the California cotton producers, and many more. By 1920 growers' associations were

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[24] Daniel, *Bitter Harvest*, 40–70; H. E. Erdman, "The Development and Significance of California Cooperatives, 1900–1915," *Agricultural History* 32 (July 1958): 179–84; Galarza, *Farm Workers*, 47–55; and *Senate Reports*, No. 1150, "Employers' Associations and Collective Bargaining in California," 77th Congress, 2nd session, pt. 4, 407–672.

[25] From the Thirty-sixth Fruit Growers' Convention *Proceedings* (Watsonville: December 7–10, 1909), quoted in Daniel, *Bitter Harvest*, 42–43.

active in every branch of commercial agriculture in California and had established ties to the California Farm Bureau, yet another organization of farmers, which connected 500 local affiliates with the national farmers' lobby, the powerful American Farm Bureau Federation.[26]

Of all the farm employers' associations, however, three, the California Farm Bureau, the Agricultural Labor Bureau of the San Joaquin Valley, and the Associated Farmers of California, were particularly active in relation to the labor issue. The California Farm Bureau, formed in 1919 under the direction of representatives of the United States Department of Agriculture, has been a lobbyist in Washington for foreign labor contract programs and has consistently opposed legislation that would protect immigrant farm workers.[27] The Agricultural Labor Bureau of the San Joaquin Valley was formed in 1926 and continues to be supported by agriculturally-allied interests including chambers of commerce, oil companies, public utilities, and banking and investment interests, for the purpose of procuring and distributing seasonal labor, domestic and foreign, and establishing "prevailing wages" for its over 800 grower members in six counties. The ALB is larger but otherwise similar to over seventy-five grower associations operating in California.[28] They are the entities through which agricultural businesses have normally procured foreign contract labor. They have also been the enforcers of wage ceilings, called "prevailing wages," established before the harvest season by the associations. The Associated Farmers of California was founded in 1934 by the California Farm Bureau, Southern Pacific Railroad, Bank of America, the Canners League of California, the five largest banks in San Francisco, and the Standard Oil Company of California. Its purpose was to suppress migrant strikes and attempts at unionization among farm workers.[29] The impact of these organizations on government was enhanced by their coordinated efforts through the national structure of the American Farm Bureau Federation, sometimes

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[26] Clarke A. Chambers, *California Farm Organizations: A Historical Study of the Grange, the Farm Bureau, and the Associated Farmers, 1929–1941* (Berkeley: University of California Press, 1952), 1–8.

[27] Richard B. Craig, *The Bracero Program: Interest Groups and Foreign Policy* (Austin: University of Texas Press, 1971).

[28] *Senate Reports*, No. 1150, pt. 4, 417–18, 500–22.

[29] Ibid., pt. 4, 573–672.

the National Grange, and more recently the National Farm Labor Users Committee (NFLUC). The last group was formed as a result of the United States secretary of labor's establishment in 1947 of a Special Farm Labor Committee — composed of one farm labor employer delegate from each state — to advise him on foreign contract labor procurement. NFLUC represents some 300 groups in thirty-eight states, and works closely with the American Farm Bureau Federation and the National Grange on matters of national policy.[30] In the early 1960s, the Council of California Growers was created to become the chief public spokesman for California agricultural businesses. Its weekly confidential newsletters to growers stimulated communication among them regarding farm labor issues, and its "educational" outreach attempted to create a public opinion sympathetic to the needs of agricultural businesses in California.[31]

The expansion of farms into corporate enterprises provided a base for coordination too. In 1959, for example, the Sunkist growers operated 132 packing sheds employing over 12,000 workers to process its members' crops. It arranged loans, maintained storage facilities and processing plants, and spent $1 million on advertising to assure a wide market for Sunkist products.[32] For groups not affiliated with a corporate giant like Sunkist, this fuller range of coordination, reaching out to financial institutions, food processors, and advertising agencies, came through grower–shipper associations. In 1959 there were 59 grower–shipper associations in California coordinating the interests of growers of a particular commodity with other related functions.[33]

Members of different groups are tied together through their positions in institutional networks. This establishes a means of linking, if not necessarily unifying, distinct groups. It can also extend the group into institutional relations at a distance from the familiar personal networks of members' day-to-day lives.

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30 Chambers, *California Farm Organizations*.

31 Samuel R. Berger. *Dollar Harvest: The Story of the Farm Bureau* (Lexington: D. C. Heath and Co., 1971), 1–221.

32 Josephine K. Jacobs, "Sunkist Advertising" (Ph.D. diss., University of California, Los Angeles, 1966).

33 Daniel, *Bitter Harvest*, 42–43.

Relations with financial institutions were particularly important for farmers. Factory farms, mobile operations, and consolidated holdings typically require large investments of capital on a short-term basis since the farmer's normal practice is to finance his seasonal operations by borrowing. It is quite common for a grower who has had an excellent year to go out and spend instead of put money away "for a rainy day." Farmers tend to gamble, to take risks, and to be overextended. The typical pattern is for the farmer to borrow a large sum of money from a bank at the beginning of the crop cycle, use it to get his crops into the ground and oversee their growth and harvest, then repay his loan with sales revenues from the harvest. Between loan and harvest, the farmer's financial situation fluctuates under the influence of market forces and the whims of Nature.

With regard to borrowing, large corporate farms and small family farms operate in different capital markets. As a rule, local banks service the small farmer, while corporate farms gain access to sources of capital outside the local community. Agricultural conglomerates manage to issue securities and bonds and secure loans in national financial markets.[34] Indeed, the major California banks, the Bank of America in particular, are committed to the big commercial farms. The Bank of America finances 50 percent of California agriculture.[35] In a speech before the association of California Canners and Growers in 1968, Rudolph A. Peterson, president of the Bank of America, asked, "Why is a banker talking about agricultural policy?" then went on to answer his own question:

> Because Bank of America has a deep stake in agriculture. We are the world's largest agricultural lender with lines of credit for agricultural production running at about a billion dollars a year. Our total agricultural commitment is probably around $3 billion. We've been in agriculture a long time and we intend to stay in agriculture for a lot longer. In a very real sense, then, agriculture is our business.[36]

Agribusiness leaders serve as directors of major corporations and financial institutions and vice versa. In the 1960s, Robert DiGiorgio, president of

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34 *Senate Reports*, No. 1150, pt. 4, 262–96.

35 Fellmeth, *Politics of Land*, 81.

36 A. V. Krebs, Jr., "Agribusiness in California," *Commonweal*, October 9, 1970, 45–46.

DiGiorgio Corporation, was on the board of Pacific Vegetable Oil Corporation, Union Oil Company of California, New York Fruit Auction Corporation, Philadelphia Fruit Exchange Inc., Pacific Telephone and Telegraph, Bank America Corporation, and the Bank of America. President Peterson of the Bank of America was also on the boards of Dillingham Corporation, a construction and development firm, Kaiser Industries, Consolidated Food Corporation, the California State Chamber of Commerce, and the DiGiorgio Corporation. Peter Cook of Pacific Telephone and Telegraph was on the boards of several large insurance companies, Wells Fargo Bank, Western Pacific Railroad, and the Kern County Land Company. With Wells Fargo Bank there was Ernest C. Arbuckle, also a member of the executive committee of Safeway stores. Safeway's board consisted of men, including J. G. Boswell, who controlled approximately one million acres of California's richest agricultural land. And there was Edward Carter, chairman of the Board of Regents of the University of California, who was a trustee of the Irvine Foundation, on the boards of Southern California Edison Company, Pacific Telephone and Telegraph, and United California Bank, and president of Broadway–Hale department stores.[37]

The many grower associations extended their influence to establish relations with public agencies as well as financial and other private institutions. All of the various forms of cooperation and coordination eventually aimed at two things, control of prices and markets and leverage with government. Of particular concern to California farmers were cheap water and cheap labor. Government was most helpful in providing both. The "water problem" in California, the need for irrigation, was originally handled by private companies. Local irrigation systems were organized, expanded, and consolidated with less than 2 percent of their cost publicly financed.[38] In the early 1900s, the most prominent private water companies were Fresno Consolidated Canals, the Sacramento Valley Irrigation Company, and the Kern County Land Company's canal system; but the private companies were not meeting the demand for water. The farmers' desire for a regular supply of cheap water culminated in the California Water Plan of 1931. The plan called for a network of reservoirs, canals, and pumping stations to

[37] Agribusiness Accountability Project, *The Directory*.

[38] Carey McWilliams, *California: The Great Exception* (New York: Current Books–A. A. Wyn, 1949).

supply water to the Imperial and Coachella Valleys and eventually to the great Central Valley of California. It took thirty years to complete and was financed at taxpayers' expense.[39] Access to the water was made more available to large-scale enterprises than to small farms, not by the terms of the plan, but through California's water rights law. The law justifies

> giving water away substantially below cost, at the expense of taxpayers and utility consumers, in terms of a "regional development" theory that a water subsidy will return many times its value by stimulating the local economy. California's law of water "rights" and its philosophy that "water should be gratuity-free" underlie all forms of subsidy. Individuals establish their "right" to the state's water simply by taking it, first come, first served, and once they have a "right" to use a certain volume of water they can neither sell nor transfer it. Water obtained in this fashion tends to be wasted, since the holder of the free right does not necessarily put the water to as valuable a use as would someone who had paid for it. The water-rights system leads landowners to grab water resources and use them wastefully long in advance of need, in order to claim future rights, and benefits wealthy large landholders at the expense of their poorer neighbors since the rich can afford to grab water resources they do not need and sit on them, or use them to no benefit for a long time. Big landholders who can use the most "free" water get proportionally bigger subsidies — not only from the use of water directly but from the increased value of their land due to the water.[40]

Grape growers in particular are dependent upon government-financed irrigation. With the establishment of the grape growing business in the San Joaquin Valley demand for water increased dramatically. The growers drilled wells and began pumping water out of the ground. The water table steadily dropped until the cost of drilling wells and pumping water became prohibitively expensive. For all intents and purposes, the Federal Bureau of Reclamation's Friant–Kern Canal of the Central Valleys Project saved the grape industry. By the late 1960s it cost the government $700

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39 Taylor, "Central Valley Project," 239.

40 Fellmeth, *Politics of Land*, 54–55.

an acre to supply water to farms in the valley, while growers paid $123 an acre for it.[41] The negative balance was made up by taxpayers and those who used electricity powered by the Project. The Project was supposed to benefit the small family farmer, to allow him to stay in business as the cost of water rose. That is why a 160-acre limit was written into the legislation authorizing the Project. No owner was to receive subsidized water from the Project for more than 160 acres of land. This requirement has been very loosely enforced, however. In 1969, for example, the DiGiorgio Corporation was farming 4,600 acres with federally subsidized water, the Shenley Corporation, 3,500 acres.[42]

Government has also intervened on the farmers' behalf to "rationalize" the supply of labor. The 1933 Wagner–Peyser Act created an employment service to organize and direct farm placement. The California Legislature had to approve the Act. The legislation did not include regulations governing wages, housing, or transportation of agricultural workers — regulations that would have protected agricultural laborers — and it was paid for by unemployment insurance funds, which agricultural employers do not contribute to. For these reasons, the Wagner–Peyser Act was acceptable to California farmers and was easily approved by the California Legislature. Except for an interval of three years, the Farm Placement Service remained in the Labor Department, but its permanent field offices in forty-five California counties quickly came under the influence of local farm advisory committees established by growers. These advisory committees arose to provide "information" to the farm placement bureaus, which relayed the "information," amounting to growers' wishes, to the State Board of Agriculture, then to the governor and state legislature.[43] Individual growers had direct access to politicians in the state, but the organized influence of the various growers' groups and associations made them all the more powerful.

"Rational" government-aided control of the water and the labor supply was not enough for the California farmer. Growers wanted government to intervene in the free market on their behalf; and intervene it did. The

41 U.S. Department of Agriculture, *Fact Book of U.S. Agriculture* (Washington, D.C.: Government Printing Office, 1970).

42 Ibid.

43 U.S. Department of Labor, *Background Information on Farm Labor* (Washington, D.C.: Government Printing Office, 1965).

most outstanding example of government action on behalf of organized growers and handlers of agricultural goods is the Agricultural Adjustment Act (AAA), fundamentally unchanged since it was passed in 1933 in response to "special" circumstances: hardships created by the Depression.[44] Through marketing orders and commodity programs, the AAA manages farm income for the farmer. Marketing orders can be obtained from state and federal agencies to regulate the quality of goods marketed, as well as the quantity and the packaging of food. They can also be obtained to collect marketing information, to initiate federal inspections, to provide funds for advertising and research, and to prohibit "unfair practices." To get a marketing order, a group of growers must petition the secretary of agriculture and present its case:

> If growers and handlers of a crop in a given area think a marketing order might improve their income, they can get together, decide which provisions they want, and petition the Secretary of Agriculture for a hearing. In practice, usually only an established agricultural association will have the legal manpower and inside knowledge of the USDA or State Department of Agriculture to draft a marketing order. After hearing the proponents and opponents, the USDA or State Department of Agriculture will approve or disapprove the proposed order. Next, at least two-thirds of producers and at least half of the handlers, must vote approval. In practice, if a big growers' organization, like Sunkist for citrus or Sun Maid for raisins, wants the order, the order will be approved since the head of the organization votes for membership. An elected committee of growers will supervise the administration of the order, which will be financed by a per box or per ton charge on the crop. The USDA's Consumer and Marketing Service oversees the federal orders.[45]

In 1970 California had forty-five marketing orders covering approximately two-thirds of its $1.4 billion agricultural produce.[46] Commodity

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[44] Robert G. Sherrill, "Agribusiness: Reaping the Subsidies," *The Nation*, November 24, 1969, 561–66.

[45] Fellmeth, *Politics of Land*, 65.

[46] Ibid., 64.

programs consist of government support for farm prices. In 1967 the Boswell Company received $4,091,818 in cotton subsidies under the U.S. Agricultural Stabilization and Conservation Service Act. In 1968 it received $3,010,042 and in 1969, $4,370,657.[47] "According to the calculations of former Budget Director Charles Schultz, the annual cost of the farm subsidies exceed[ed] $10 billion [in 1969], or roughly the combined costs of all local, state, and federal welfare programs, including Medicaid."[48]

Research paid for by the taxpayers constitutes yet another form of government subsidy to California farmers. The use of public funds to support California's big commercial farmers is typical. Of $25 million spent on agricultural research in 1967, less than $1.5 million came from the farm businesses themselves.[49]

The dominant position of farm employers in rural California and their strategic access to state and national institutions had grave consequences for farm workers. In 1965, the year of the Delano Grape Strike, the average farm worker living and working in California earned $1.35 an hour for his labor in the fields. The average factory wage was more than twice that amount. Eighty-four percent of all farm workers in California earned less than $3,000 that year. Farm workers were exempt from the protections of the National Labor Relations Act, which guaranteed other workers the right to bargain collectively. They were excluded from the Federal Fair Labor Standards Act, which sets the basic minimum wage and maximum hours for industries engaged in interstate commerce. And, they were excluded from the Federal Unemployment Tax Act, which subsidizes 60 percent of the state unemployment insurance programs. At the state level, California farm workers were not covered by unemployment insurance, by a minimum wage, nor by a maximum hours provision. A farm worker's wife and children would have received a minimum hourly wage of $1.30 if they undertook farm work, but this rate did not apply to employers hiring fewer than five women and children, did not extend to 20 percent of the piece work performed for any one employer, and was not accompanied by maximum hour or overtime provisions. The State of California had extensive housing codes governing the operation and upkeep of labor camp

47 Sherrill, "Agribusiness," 561–62.

48 Fellmeth, *Politics of Land*, 68.

49 Krebs, "Agribusiness in California," 47.

housing. The State Labor Code required that shelter should be watertight, that each building should be provided with safe heating equipment to maintain a minimum temperature of 60 degrees, that each building should have sufficient windows to provide reasonable ventilation, and that all windows should be screened to keep out insects. A presidential Committee on Migratory Labor estimated that only a quarter to a third of the labor camps complied with these laws. Working conditions in the field were also regulated: employers were required to provide their workers with drinking water, toilets and hand washing facilities, and periodic rest periods. Yet, in 1965 fewer than 20 percent of the employers in the state complied with these requirements. The State Labor and Education Codes contained extensive regulations governing the employment, working conditions, and hours of minors, but inspectors from the Department of Labor found children working illegally on 60 percent of the farms they inspected. Farm workers bad the highest occupational disease rate in California, twice that of all other industries combined. Twenty-five percent more farm workers than workers in general were hospitalized for serious injuries suffered on the job. Thirty-six percent more babies born to farm worker as compared to other mothers died in infancy. In rural California, the percentage of family heads of households with only a grade school education is over three times greater than in urban areas of the state; 41.7 percent to 12.7 percent, respectively.[50] These statistics provide a measure of the farm employers' local dominance and support the contention that farm workers were defined and treated as outsiders in the communities in which they lived and worked.

Because the farm labor movement developed outside the mainstream of American labor history and has been characterized by special features of geographic and ethnic isolation, a grasp of the outlines of its historical course is essential. In the next chapter, the UFW will be set in the context of previous farm labor organizing in California.

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[50] California State Assembly Advisory Committee on Farm Labor Research, *The California Farm Labor Force: A Profile* (Sacramento: April 1969), 1–154.

Chapter 3

FARM LABOR ORGANIZING: THE BACKGROUND

From the beginning of the latter half of the nineteenth century until the Progressive Era in California, grower power over labor was highly impersonal and virtually unrestrained. Grower and labor interests would not extend rights and participation to the racial and ethnic minorities who worked as wage laborers on farms. The Chinese, who were imported to work on the Central Pacific Railroad and became available for farm work upon its completion, were considered a cheaper source of labor than slaves would have been. Supposedly, they would work for considerably less than American laborers, they could be dismissed during the off-season, and they were housed and fed at extremely low cost. Strong social and racial prejudice further weakened the farm employers' sense of responsibility. Ironically, the strong race prejudice that allowed commercial farmers to profit from Chinese immigrant labor, contributed to its elimination. Xenophobic feelings fed a national movement to have Chinese immigration cut off, which it was, in 1882. To some extent, white farm workers escaped the burden of prejudice heaped on "persons of color," but their circumstances were little better in other ways. The periodic depressions of the nineteenth century

generally managed to wipe out whatever meager economic foothold they were able to acquire.[1]

The Japanese, however, were something of an exception to the rule of farm worker powerlessness. The Japanese came to fill the seasonal agricultural labor market by about 1890. They organized to enter the labor market and initially seemed to accept extremely low wages in anticipation of driving other workers out. Then, with the crops ripening, they would threaten a work stoppage unless their demands were met. These demands included options to lease or rent small parcels of a grower's field. Despite the success of their labor associations, the Japanese were not interested in aggressive, sustained union organizing.[2] Agricultural landowners soon came to despise the Japanese tactics and to fear their industriousness and skill as horticulturalists, for the Japanese were very good at farming and making

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[1] Lamar B. Jones, "Labor and Management in California Agriculture, 1864–1964," *Labor History* (Winter 1970): 23–28.

[2] According to the U.S. Senate Subcommittee of the Committee on Education and Labor:

> The Japanese were not interested in the regular labor organizations, but operated independently as racial groups. Like the Chinese, they followed the practice of organizing themselves into gangs under the direction of a boss or contractor, providing their own food and housing at work, and living apart from the employer, the regular white labor force, and the migratory white laborer. It has been estimated that Japanese and Chinese approximated 50 percent of the employees on the larger farms. The Japanese laborers were used chiefly in berries, citrus fruit, deciduous fruits, grapes, sugar beets, vegetables, and nursery products, performing the usual stereotyped hand operations. Data available for this period indicate that the Japanese were not often hired for periods of less than 1 week or more than a season. The Japanese were influential in bringing about a change in the payment of wages from a daily to a piece-rate basis. They avoided the time rates and insisted on payment for piece work because of their ability to excel in the "stoop" work characteristic of the principal operations in the intensively cultivated crops that grow on or close to the ground. Gradually the differential between wages of white and oriental labor disappeared or became insubstantial. Working first at lower wages than the whites, the Japanese succeeded in increasing their wages during the decade 1900–1910. After 1910 they operated on approximately the same basis as whites.
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> U.S. Congress, Senate, Subcommittee of the Committee on Education and Labor, *Report*, No. 1150, Violations of Free Speech and Rights of Labor, 77th Congress, 2nd Session (Washington, D.C.: Government Printing Office, 1942), Pt. 4, 238–39 [hereinafter cited as *La Follette Committee Report*].

productive land that others had little use for. Race prejudice built and fueled a movement to limit Japanese entry into the United States and to bar them from land ownership. In 1906, the federal government negotiated a gentlemen's agreement with Japan and in 1913 the California state legislature passed the Alien Land Law,[3] accomplishing in part each goal.

Virtually no outside organization, local, state, or national, championed the farm workers' cause, but among agriculturalists within the state a great debate was under way between advocates of the family farm and supporters of large-scale commercial farming. It is fascinating to note that throughout the nineteenth century and into the twentieth, agrarian idealists were responding vigorously to the self-serving "progressive" ideology of the bonanza wheat farmers and their ilk. In 1854, the forward-thinking editors of the *California Farmer* asserted,

> California is destined to become a large grower of Cotton, Rice, Tobacco, Sugar, Tea, Coffee, and where shall the laborers be found? . . . The Chinese! And everything tends to this — those great walls of China are to be broken down and that population, educated, schooled, and drilled in the cultivation of these products, are to be to California what the African has been to the South. This is the decree of the Almighty, and man cannot stop it.[4]

In response, advocates of the Jeffersonian ideal of the family farm argued that such attitudes corrupted sacred American values. In speeches before the state Agricultural Society, agrarians supported a different image of American agriculture.

> The safety and well being of society depends on the intelligence and comfort of the laboring classes. . . . They are the workers, and by their numbers, under our form of government, they are the ones who choose rulers and determine the destiny of the Republic. They cannot fulfill the duties of citizenship on the wages of peons or coolies. Their relation to the State demand[s] of them education and virtue, which are only to be expected of those who have the

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[3] The enforcement of the Alien Land Act drove many Japanese into the cities. Carey McWilliams *Factories in the Field* (Hamden: Archon Books, 1969), 116.

[4] Paul S. Taylor, "California Farm Labor: A Review," *Agricultural History* 42 (January 1968): 50.

> means furnished by a fair share of the profits of capital in exchange for their labor and skill to bring education, comfort, and advancement within their reach. This has been the American theory. . . . It has fostered independence of labor; it has prevented class distinctions, it has been the parent of virtue, intelligence, and patriotism; it cannot be superseded and this country remain a Republic, where rights and benefits are reciprocal.[5]

Notwithstanding their opposition to the system that demeaned minorities, however, the rural traditionalists were frequently as racist as their "progressive" industrialist counterparts. In attacking large-scale commercial agriculture, they were attacking the influx of undesirable immigrants. As one prominent agrarian said, "I am not able to concur in the opinion that the immigration in large numbers of this people [the Chinese] is desirable. A slower growth of a community, with the elements in it only of Christian civilization, seems to me far preferable to rapid development by an alien, heathen population. Would not 25 stalwart German or Scandinavian emigrants, with their families, be better for the real interests of the State than the whole Chinese population of [Sacramento]?"[6] Notwithstanding their racial and religious preferences, agrarian idealists did wage a strong campaign against bigness and commercialism. As late as 1891, the president of the state Agricultural Society used the Society's convention as a forum for attacking the big commercial farms. As it turned out, though, the growing economic preeminence of the industrial farms was just too great. Industrial agriculture was highly profitable and thus attractive. The idealism of the agrarian traditionalists lost out to rural industrialization.

Before the Progressive Era, then, there was indigenous opposition to industrial farming and the labor system it depended on, and at least one group, the Japanese, had developed effective labor associations. Neither proved sufficient to upgrade the position of the farm laborer.

Between 1908 and 1917, urban industrial unemployment forced significant numbers of whites into the agricultural labor pool and for the first time the labor movement took an interest in farm workers. This

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[5] Quoted in Cletus E. Daniel, *Bitter Harvest* (Ithaca and London: Cornell University Press, 1981), 30.

[6] Quoted in Daniel, *Bitter Harvest*, 29–30.

phenomenon marks a second period in the history of outside involvement in the plight of the California farm worker. The labor organizations that took an interest in farm workers were the American Federation of Labor (AFL) and the International Workers of the World (IWW), known as the Wobblies. In 1903 the Central Labor Council of Los Angeles, AFL, passed a resolution calling for an organizing effort among migrant farm workers in California. According to the resolution, the drive was to be conducted without regard to race or nationality. It was quite apparent, however, that the AFL was neither a champion of farm workers nor an advocate of racial tolerance. What the AFL really wanted was to protect its urban organizing efforts. The AFL did not want impoverished, seasonally unemployed farm workers scabbing on industrial workers in the cities. The task of organizing farm workers was delegated to the California State Federation of Labor and its executive council — cautious, aristocratic, "racially fastidious" men keenly interested in friendly relations with farm owners. J. B. Dale, the man assigned the task of unionizing farm workers, did not even take his campaign into the farming regions, and in 1916 the AFL abandoned its interest in farm workers entirely.[7]

Unlike the AFL, the IWW did have a keen interest in farm workers; not because they were farm workers, however, but because they were such a good example of the callous exploitation of workers under a capitalist system. The Wobblies were issue-oriented, class-conscious missionaries. As a result, they got involved in an effort to establish their own right to free speech. Organizing got short shrift. The free speech issue came to a head in Fresno in 1910–1911 during the trial of a well publicized court case. The leftist ideology of the IWW evoked an extreme reaction.

Outside the courtroom a variety of repressive and violent tactics were used against the Wobblies by police and vigilantes, but the struggle ended with a compromise providing for limited free speech for the IWW. Meanwhile, the Wobbly campaign on behalf of farm workers had foundered. By the time they recovered from the decimating free speech fight and reoriented their tactics, it was too late. Their symbolic and practical achievements were overshadowed by their opposition to World War I and

[7] Harry Schwartz, "Organizational Problems of Agricultural Labor Unions," *Journal of Farm Economics* 8, no. 2 (May 1941): 456–66; Henry William Spiegel, "Trade Unions in Agriculture," *Rural Sociology* 6 (June 1941): 117–25.

resultant prosecution under the Federal Espionage Act and state syndicalist laws passed during the war years. The Wobblies attempted a comeback during the 1920s, but were never again a potent force in farm labor organizing.[8] These incidents were the first in a pattern that would become evident later on: the mainstream of the labor movement took little interest in farm workers, leaving the field to leftists whose ideological views, rather than group identification, drew them to the farm workers' cause.

The agricultural labor movement, such as it was, had collapsed, but progressivism was on the march. Interestingly, the Progressive coalition in California included a not insignificant number of farm employers, traditionalist agrarian holdovers. In 1914, when the coalition initiated a proposal for an eight-hour workday, farm owners organized a Farmers' Protective League to oppose it. They had little difficulty defeating the proposal, but one incident gave farm owners considerable difficulty, and Progressives leverage. In August, 1913, E. B. Durst, a hop grower, advertised in newspapers throughout California and Nevada for 2,700 farm workers to come to his ranch in Wheatland, California, to work the harvest. In reality, Durst needed only 1,500 workers. Twenty-eight hundred people responded to his ads. Half of them were aliens. Twenty-seven different nationalities were reported among 235 men in one work gang alone. Seven interpreters were needed to communicate with the workers. Those who could not obtain work were destitute, unable to move on, and overcrowded the makeshift labor camp set up to house those who were employed. Durst rented tents to the migrants for 75 cents a week. He prevented local merchants from making deliveries to the camp and in so doing forced the migrants to buy groceries and other necessities at the company store owned, of course, by Durst. Durst provided only nine outdoor toilets for the 2,800 residents of his labor camp and drinking water was not allowed in the fields. Instead, Durst's cousin sold lemonade there for five cents a glass. Another of Durst's relatives owned and operated a lunchtime "stew wagon." A veteran Wobbly organizer, Richard "Blackie" Ford, was present in Durst's Wheatland labor camp that August. He called a meeting in the workers' camp to protest conditions there and to call for a strike. At the meeting, attended by

[8] Schwartz, "Organizational Problems of Agricultural Labor Unions," 456; Sidney C. Sufrin, "Labor Organizations in Agricultural America, 1930–1935," *American Journal of Sociology* 43, no. 4 (January 1938): 549–50.

virtually everyone in the camp, Ford held a sick baby up to the crowd and shouted, "It's for the kids we are doing this." With that, sheriff's deputies waded into the crowd, one of them fired a shot to "quiet the mob," and a riot ensued. A district attorney, a deputy sheriff, and two workers were killed. The National Guard was called out, and all over California Wobblies were arrested. Ford and another Wobbly organizer, Herman Suhr, were arrested, convicted of murder, and sentenced to life imprisonment.[9]

In response, Hiram Johnson, political Progressive and governor of California, created a Commission on Immigration and Housing to investigate the causes of the Wheatland Riot. The chairman of the committee was Simon Lubin; the executive secretary, Carleton Parker. Both men fought hard to force agricultural employers to upgrade conditions on their farms. Lubin and Parker won some concessions, but had to compromise on what they considered minimum acceptable standards. Another Progressive commission, the Commission on Land Colonization and Rural Credits, was created in 1915. Members Harris Weinstock, Chester Rowell, and Elwood Mead led the committee, which issued a report the following year condemning industrial agriculture and calling for a democratization of the farm system. Acting on the Weinstock–Rowell–Mead recommendation, the state legislature allocated funds for two settlement projects, one in Durham, California, the other in Delhi. As time went on, however, these experiments in democracy failed due to administrative ineptness, poor funding, and an increasingly hostile social and political climate.[10] Another effort to reform the farm labor system was sponsored by agrarian reformers, a tax bill aimed at breaking up the large farms. But it was twice defeated when it came before the state legislature in 1916 and 1918.[11]

Progressives certainly generated publicity for the farm workers' cause — publicity associated with legitimate institutions and sober and restrained methods of protest. And Progressive reformers Lubin and Parker

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[9] Carleton H. Parker, *The Casual Laborer and Other Essays* (New York: Russell and Russell, 1967), 1–199; *La Follette Committee Report*, Pt. 4, 243–47.

[10] California State Assembly, "Report on Land Colonization and Rural Credits," November 29, 1916; McWilliams, *Factories in the Field*, 200–10; *La Follette Committee Report*, Pt. 4, 247–54.

[11] George E. Mowry, *The California Progressives* (Berkeley: University of California Press, 1951), 86–104; Spencer C. Olin, Jr., *California's Prodigal Sons: Hiram Johnson and the Progressives, 1911–1917* (Berkeley: University of California Press, 1968).

asserted an image of the industrial agricultural workplace that challenged the profound prejudices so common among farm owners and others in the nineteenth century. Their new ideology claimed that industrial working conditions breed psychological pathology; that the individual farm worker should not be held personally responsible for the conditions of his life. Parker wrote, for example, "As a class, the migratory laborers are nothing more or less than the finished products of their environment. They should therefore never be studied as isolated revolutionaries, but rather as, on the whole, tragic symptoms of a sick social order."[12] Neither Lubin nor Parker, however, and indeed none of the Progressives, were in favor of trade unionism. They vigorously opposed solutions which proposed to change the existing structures of economic and political power. Lubin and Parker's Commission on Immigration and Housing, in fact, supplied the Justice Department with the information it needed to crack down on the Wobblies at the time of the First World War.[13]

By 1927, the reformist energy of Hiram Johnson's tenure as governor had been spent. That year the state government was reorganized in accord with conservative interests. In the Johnson years, a significant change in the composition of the farm labor market had taken place. During the First World War, farm owners had claimed acute labor shortages, and under the banner of patriotism extraordinary measures were taken to assure that the crops would be harvested. Urban workers, women, and children (mostly teenagers) volunteered for field work. Mexican nationals were also used extensively. It was during this period that Mexicans began immigrating in large numbers, as did smaller numbers of Filipinos. Most of the Filipinos who immigrated were single males, since families were not then permitted to enter the United States. After the war, Mexican immigration supplemented by 30,000 Filipinos became the major source of supply. During the 1930s, however, 1,250,000 destitute white workers came to California to

12 Parker, *The Casual Laborer and Other Essays*, 88.

13 U.S. Congress, Senate, Subcommittee of the Committee on Education and Labor, *Hearings* pursuant to S. Res. 266, A Resolution to Investigate Violations of the Right of Free Speech and Assembly and Interference with the Right of Labor to Organize and Bargain Collectively, 76th Congress, 2nd Session (Washington, D.C.: Government Printing Office, 1940), Pt. 59, exhibit 9371, 21887–919 [hereinafter cited as *La Follette Committee Hearings*]; Melvyn Dubofsky, *We Shall Be All: A History of the IWW* (Chicago: Quadrangle Books, 1969), 445–68.

escape the drought in Texas, Arkansas, Oklahoma, and other southwestern states. Many entered the farm labor pool. These "dust bowl" refugees gained widespread attention though their migration was not as great as the non-white immigration in the 1920s, or for that matter, the 1940s.[14]

The early and mid-1920s were quiet, though, despite inflammatory conditions. World War I had created an enormous worldwide demand for American foodstuffs that carried farmers to their highest peak of prosperity. But in 1920 an inevitable slump began. Millions of soldiers in Europe and elsewhere in the world returned to their farms, and soon world overproduction of farm crops sent prices rapidly downward. The result was that farm income dropped from $10 billion in 1919 to $4 billion in 1921. There was some recovery afterward to about six or seven billion in the later 1920s, but the farm depression lasted until the middle 1930s.[15] Across the country, big business was in ascendance. Banks, utilities, railroads, and food processors expanded into farming, and farmers, in a burst of energy, sought to rationalize and control the price of farm goods and the agricultural labor market by stepping up the organization of cooperative associations and labor bureaus. The largest and most effective of the farm labor bureaus was the San Joaquin Valley Agricultural Labor Bureau organized in 1926.[16] Meanwhile, Mexican farm workers, particularly in Southern California, were developing organizations of their own. In various ways the Mexican government gave official sanction to these "mutual aid societies" and to more broadly based workers' unions established by Mexican farm laborers. The Mexican vice consul at Calexico, Carlos Ariza, for example, supported the founding of the Workers Union of the Imperial Valley (La Union de Trabajadores del Valle Imperial). The Workers Union recruited 1,200 workers and in 1928 participated in a melon strike, but the strike was unplanned and poorly led and consequently

14 McWilliams, *Factories in the Field*, 103–33.

15 "[O]ne fourth of all farms in California in the years 1930 to 1939 were lost by owners who were unable to meet debt and tax charges." *La Follette Committee Report*, Pt. 4, 289.

16 In 1942, the LaFollette Committee reported that the Agricultural Labor Bureau of the San Joaquin Valley had labor and set the wage rate for 30,000 workers in the cotton industry, many thousands in the grape industry, and hundreds in the other fruit crops in the valley. *La Follette Committee Report*, Pt. 4, 409.

failed. Available statistics indicate a sudden rise in union activity in 1930, reaching a peak in 1933.[17]

Widespread disturbances and spontaneous, short-lived strikes in Southern California attracted the attention of the Communist Party, marking a third period in the history of outside involvement in California farm labor issues. The strike that drew the Party in occurred on January 1, 1930, when a group of Mexican and Filipino lettuce pickers, disgusted with their wages and working conditions, walked off the job at several farms in the vicinity of Brawley in the Imperial Valley. This spontaneous act generated a full-fledged strike among 5,000 workers in the valley. Since most of the workers were Mexican and no leader emerged among the strikers, the Mexican Mutual Aid Society of the Imperial Valley, successor to the Workers Union of the Imperial Valley, was pushed into leading the strike. Ironically, communist organizers first heard of the strike by reading the *Los Angeles Times*, "the most staunchly antilabor, antiradical newspaper in the state" at the time. The Trade Union Unity League of Los Angeles (TUUL), an arm of the Communist Party, sent three organizers to the area. For several days Frank Waldron, Harry Harvey, and Tsuji Horiuchi kept a low profile, but after some preliminary work they established a branch of the Communist Party's Agricultural Workers Industrial League (AWIL) and announced their presence with handbills and leaflets setting forth demands and calling for farm workers to join them. Almost immediately, they were arrested, charged with vagrancy, jailed, and roughed up. This violation of the organizers' civil liberties provoked attention from the Southern California American Civil Liberties Union (ACLU) and, of course, from the International Labor Defense (ILD), the legal rights and propaganda arm of the Communist Party.[18]

Representatives of the ACLU went to the sheriff's office in Brawley, California, to protest the situation:

> Before the Reverend Clinton J. Taft and his associates had even finished voicing their protest, Sheriff Gillett was on his feet, punching, kicking, and shoving the two men through the door of his office

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[17] Charles Wollenberg, "Huelga, 1928 Style: The Imperial Valley Cantaloupe Workers' Strike, *Pacific Historical Review* 38 (February 1969): 45–58.

[18] Daniel, *Bitter Harvest*, 105–40; McWilliams, *Factories in the Field*, 213–19; *La Follette Committee Report*, Pt. 4, 210–17.

> and out into the street, where he continued to vent his rage, cursing his terrified victims and challenging them to slug it out with him. In describing the encounter several days later, Taft readily conceded that Gillett's office "richly merits the description which he himself has given it on the upper left hand corner of his official envelopes: "The lowest-down sheriff's office in the world [57 feet below sea level].' "[19]

The ACLU publicized the incident, but failed to free the men, though the ILD did manage to get them out on bail. Meanwhile, the strike was still on. Local authorities monitored all communication coming into the valley and thus managed to track the strikers' movements and prevent food, money, and other support from reaching them. The Mexican Mutual Aid Society cooperated with local officials to wreck the AWIL, and Mexican officials friendly to the growers began recruiting Mexican immigrants to fill the strikers' jobs. The strike collapsed. The Imperial County district attorney, Elmer Heald, with the help of Los Angeles Police Captain William Hynes and his "Red Squad," used the criminal syndicalism laws to go after strike leaders. They engaged three labor spies "to get the goods on them."[20] A roundup of AWIL members and militant farm workers ensued and some of the arrested were selected to stand trial in El Centro.

> To members of the jury, whose individual economic well-being was inextricably bound in one degree or another to the agricultural economy of the valley, and thus to the major growers in the region, it mattered little in the end whether the suppression of the AWIL and its agents was a product of crass economic self-interest or of genuine patriotism [i.e., anti-communism]. As their verdict would attest, jury members believed that the strikebreaking scheme hatched by employers and local authorities was fully justified as an act of self-preservation against upsetting ideas carried by men who were "outsiders" literally as well as figuratively. In

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[19] Frank Spector, *Story of the Imperial Valley* (New York: International Labor Defense, 1930), 18; also see testimony of Elmer E. Heald, *La Follette Committee Hearings*, Pt. 55, 20172–200.

[20] *La Follette Committee Hearings*, "Documents relating to the Intelligence Bureau or Red Squad of the LA Police Department," Pt. 64, 23507–17.

> testimony before a congressional hearing some months after the trial, District Attorney Heald noted that the fundamental objection of valley citizens to the El Centro defendants was that they were "*not only not residents of [the] valley, but not a single one of them ever had a job in Imperial County, ever worked there, never did a day's work — not a single one of them ever did a day's work in Imperial County.*"[21]

The defendants were convicted of all charges against them, many of which had been trumped up.[22] Given the political climate of the courtroom, the defendants' insistence on "hewing the Communist line" hurt them, but it is hard to know what might have helped, for as Hugh T. Osborne, a member of the Imperial County Board of Supervisors, and Charles E. Nice, the county indigent commissioner and secretary of the Brawley Chamber of Commerce, made abundantly clear, the major concern of the locals was to break any potentially successful unionization effort.[23]

Liberals and leftists in San Francisco and Los Angeles protested local official handling of the strike and the trial for years, but the result of all the controversy was a sharpening of the differences between the ACLU and the ILD as the former sought to defend the civil liberties of the strikers while the latter pursued agitation and propaganda.

After the El Centro trial, the AWIL changed its name to the Agricultural Workers Industrial Union (AWIU) and later to the Cannery and Agricultural Workers Industrial Union (CAWIU) when it joined a small independent union, the American Labor Union, on strike in Santa Clara. The Santa Clara cannery strike, involving 2,000 workers, was forcibly broken by the cannery's owners.[24] This, and other spontaneous strikes that were aided by the CAWIU and failed, led to a precipitous decline in CAWIU membership. But the communist organization was to have new life breathed into it by a young man "exiled" to the West by powerful older men jealous of his talents and offended by his brashness, determination, and success.

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[21] Quoted in Daniel, *Bitter Harvest*, 124 (emphasis added).

[22] George H. Shoat, "Imperial Valley Outrage," *Open Forum* (June 5, 1930).

[23] See the testimony of Hugh T. Osborne, *La Follette Committee Hearings*, Pt. 55, 20164, and that of Charles E. Nice, ibid., 20180.

[24] *La Follette Committee Report*, Pt. 4, 435–38.

In 1930, Samuel Adams Darcy was made Communist Party district organizer for the states of California, Nevada, and Arizona. Darcy had no experience working with farm laborers, but his astuteness and gift for organizing led him to believe that highly personal, bread-and-butter issues, grass roots organizers, careful planning, and efficient preparation were essential to a farm labor organizing drive. Darcy put his ideas forth at a meeting of District members in July, 1932. In the months following, CAWIU activists concentrated their efforts in the agricultural valleys around San Jose and worked hard to orchestrate rather than simply react to farm labor unrest.[25] After careful preparation, the CAWIU backed a strike at the fruit ranch of one of Vacaville's leading citizens, Frank H. Buck.

Buck had just been elected to Congress on the Democratic ticket headed by Franklin Delano Roosevelt. Before his election, Buck had announced that he would pay workers $1.40 for an eight-hour day for work in his orchards, and that if elected he would raise wages even higher. On November 8th, Buck was elected. On November 14th he dropped his workers' wages to $1.25 for a nine-hour day. In response to Buck's treachery, 400 Mexican, Filipino, Japanese, and Anglo tree pruners walked off their jobs and set up picket lines. One hundred and twenty-five of these men were signed with the CAWIU. The action spread.

Growers in the area set out to break the strike. The mayor of Vacaville, himself a grower, coordinated efforts between orchardists and local officials. In the court of public opinion, the CAWIU was charged with sabotage and generally defamed. Anti-communist rallies were held and local vigilantes actually kidnapped several strike leaders from jail, beat them, cut their hair, slopped them with red paint, threatened their lives, and ordered them out of town. As threats and violence increased, the picket lines came more and more to be manned by women and children. It was hoped that Vacaville's aroused citizens would be less likely to beat women and children than to beat men. Visiting AFL officials from the Sacramento Federated Trades Council lent public support to the growers.[26] After two months, the strike was broken, but the CAWIU had demonstrated staying power and its leaders had learned several valuable lessons. They had

25 Ibid., Pt. 4, 208–17.

26 Daniel, *Bitter Harvest*, 138.

learned not to call a strike during the off-season when growers are not threatened with the immediate loss of their crop. They learned to rely on the permanent and semi-permanent farm worker residents of a community rather than the apparently more militant migrants to sustain a strike. And they learned that organization in support of workers smarting from callous and unjust treatment could generate remarkable persistence.

Tactically, then, the communists were well positioned to begin again. By 1933 the communists under Sam Darcy had become accomplished organizers. The year 1933 has been called "The Great Upheaval" because labor unrest, strikes, anti-strike activity, and violence were widespread. In 1933 the CAWIU was in the forefront of farm labor organizing, not because its ideology was ultimately persuasive, but because it was the only organization with the leadership, structure, strategy, and persistence to maintain a continuing presence in the face of overwhelming odds.

The Mexicans, who were the majority of farm workers in 1933, were notably unpersuaded by communist rhetoric, as the following example will illustrate. In 1933 a berry pickers strike initiated by the CAWIU in El Monte in the San Gabriel Valley pitted Mexican farm workers against Japanese growers leasing roughly 700 acres from various white landowners. The Japanese were successful in bringing in scab labor, but were willing to negotiate with the Mexican strikers anyway. In an unusual move, they offered a significant wage increase and official recognition to the CAWIU. The Mexican workers did not like the CAWIU. Despite what appeared to be a major victory for the union — the extraordinarily generous terms offered by the Japanese — fewer than 10 percent of the strikers joined the CAWIU. The growers' offer encouraged Mexican members of the strike committee to break away from the CAWIU, and with the help of consular officials, they formed the Confederación de Uniones de Campesinos y Obreros Mexicanos (CUCOM). Mexican farm workers, given the opportunity, repudiated the CAWIU in preference for their own ethnic-based union. Local authorities used the split between the CAWIU and the CUCOM to get rid of the CAWIU, but when the CUCOM settled with the Japanese growers, there was little benefit to be derived because the Japanese refused to fire their "scabs."[27]

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[27] *La Follette Committee Hearings*, Pt. 62, exhibit 9576, 22536, and Pt. 53, exhibit 8751, 19693–96.

Nonetheless, it was the CAWIU that spearheaded the big organizing push in 1933. District Chief Darcy appointed Pat Chambers to lead the organizing drive. When Captain Hynes got wind of Chambers' activities, he wrote to Imperial Valley authorities warning them to be on the lookout for him. Judge Von Thompson, presiding judge at the El Centro trial and one of a number of officials to respond to the warning, wrote back to inform Hynes that Imperial Valley law enforcement officials were conferring "for the purpose of meeting the proposed activities and taking care of Mr. Pat Chambers in the proper way."[28] Chambers and active CAWIU organizers were indeed harassed and defeated by law enforcement officials, but they scored some victories, too.

All in all, the CAWIU had been orderly, nonviolent, and remarkably successful in gaining wage increases, but made little headway in the direction of union recognition and collective bargaining rights. In early September, however, the fortunes of the CAWIU began to turn. A poorly planned strike among grape pickers in the San Joaquin Valley near Fresno ended amid mounting arrests and incidents of intimidation and physical assaults.[29] A grape strike in the Lodi area was halted by vigilantes.[30]

The greatest single confrontation between farm workers and farm owners in California that year, or any other for that matter, took place "in the cotton" in the lower San Joaquin Valley.[31] The cotton strike is particularly significant for the light it sheds on the relationship between private local authority and public state and federal authority. In 1933, 75 percent of the agricultural work force was Mexican. There was a huge cotton surplus in the summer of 1933 and another bumper crop was expected. This made growers very uneasy. Nevertheless, commodity prices had actually increased slightly due in large measure to the Agricultural Adjustment Act (AAA). The Agricultural Labor Bureau of the San Joaquin Valley met and

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28 Ibid., Pt. 64, exhibit 10411, 23640–41.

29 Stuart Jamieson, *Labor Unionism in American Agriculture*, U.S. Bureau of Labor Statistics Bulletin no. 836 (Washington, D.C.: Government Printing Office, 1945), 8–21.

30 Ibid.

31 Daniel, *Bitter Harvest*, 75; Jamieson, *Labor Unionism in American Agriculture*, 8–21, 30–42; *La Follette Committee Hearings*, Pt. 54, 19899–20036; *La Follette Committee Report*, Pt. 3, 332–43; Pt. 62, exhibits 9574 and 9575, 22513–31; McWilliams, *Factories in the Field*, 211–29; Paul S. Taylor and Clark Kerr, "Uprisings on the Farms," *Survey Graphic* 24, no. 1, January 1935, 19–22.

set the price of wages. The piece rate for picking cotton was to be 60 cents per hundred pounds. The CAWIU planned to agitate for higher wages for cotton pickers and sought the help of well-known liberals, Lincoln Steffens and Rabbi Irving Reichert of the State Recovery Board. Rabbi Reichert's appeal to Governor James Rolph met with silence. A strike was called on October 4th. Growers responded immediately with force and violence. On October 5th, seventy-five growers participated in the eviction of strikers and their families from labor housing in and around Corcoran. Local police officials also joined in the illegal action — eviction from grower-owned housing without sufficient notice was against the law — and spelled out in words as well as deeds just how they understood their public responsibilities. As Kings County District Attorney Clarence Wilson said, "The sheriff and I told the growers not to worry much about the pickers' rights anyway. . . . [W]e could control the strikers because they didn't amount to anything and couldn't even vote, but the growers were well known and had lots of influence and we were much more afraid we couldn't control them.[32] Or as an undersheriff in Kern County said, "We protect farmers out here in Kern County. They are our best people. They are always with us. They keep this country going. They put us in here and they can put us out again, so we serve them."[33]

In Tulare, Kings, and Kern Counties, finance and ginning companies, chambers of commerce, the Farm Bureau, and the largest growers in the area advocated the formation of farmers' protective associations to drive the CAWIU out, and growers threatened to boycott any valley merchant who sold food to the hungry strikers and their families.

There was a public outcry against such tactics and a strengthening of the strikers' will to resist. By October 9th, approximately 12,000 workers were on strike in the three counties mentioned. State officials were critical of growers for refusing to negotiate with the CAWIU. On October 10th, forty armed growers came upon a meeting of strikers in Pixley. Pat Chambers, who was conducting the meeting, sensed danger and quickly disbanded the group, instructing the men, women, and children in attendance to move across the street to union headquarters. Eyewitness

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32 Quoted in Daniel, *Bitter Harvest*, 182.

33 Peter Matthiessen, "Organizer: Profile of Cesar Chavez," Part 1, *The New Yorker*, June 21, 1969, 42–85.

accounts confirm the following sequence of events. One of the growers fired his gun. A striker grabbed the barrel of the gun and pushed it down. Another grower then beat that striker to the ground and the first grower shot the striker to death. With that, the rest of the growers opened up on the crowd of strikers and continued firing until they had no more ammunition left. All this took place with a group of highway patrolmen and sheriff's deputies standing by watching. Unimpeded, the growers got into their trucks and drove off. Only then did the policemen set out after them. The police caught up with the growers, stopped them, collected a few of their guns and then allowed them to go on. Two strikers were killed in the melee and eight were wounded, including one woman.[34]

Another violent incident occurred on October 11th near Arvin. During a fight that pitted growers using gun butts against strikers with grape stakes, a shot was fired and a Mexican worker fell dead. With that, growers started using the other end of their guns. A deputy sheriff threw teargas into the crowd and broke up the riot. Growers claimed that a striker perched in a tree nearby had fired the shot that killed the worker. Police arrested several strikers on murder charges and others for rioting. The charges, however, had to be dismissed when an investigation revealed that no striker had had a gun in his possession.[35]

These two incidents in particular incensed public opinion. A variety of outsiders came into the area as a result: state and federal mediators, highway patrolmen, investigators, protest delegations, relief officials, and an honorary representative of the Mexican government, Enrique Bravo. On the other hand, locals prepared to handle the situation themselves. In Kern County, on October 13th alone, 600 permits were issued to growers allowing them to carry concealed weapons. Outside pressure did force Tulare County officials to take action against growers involved in the Pixley killings, however. Eight growers were arrested for their part in the incident. But, "[a]uthorities sought to mollify employers who were angered over the arrests by arresting Pat Chambers at the same time on a charge of criminal syndicalism. In keeping with the bizarre character of justice in the region, the criminal complaint leading to Chambers' arrest was lodged by another

[34] Miriam Allen deFord, "Blood-Stained Cotton in California," *The Nation*, December 20, 1933, 705.

[35] McWilliams, *Factories in the Field*, 221–22.

of the growers who had taken part in the Pixley attack."[36] Governor Rolph increased the number of highway patrolmen in the area and reminded valley officials that the rule of law would be upheld, but turned down a request for a special prosecutor, asserting that local officials could handle things. He did, however, instruct the State Emergency Relief Administration to provide relief to the strikers and their families.

The incidents at Pixley and Arvin had increased the militance of the workers and actually strengthened the strike. The CAWIU had responded to grower violence with restraint and consequently had won an unaccustomed measure of respect from the public. With the public engaged, the issue of the strike would not die. The federal government was forced to step in to try to settle things, marking a fourth phase in the history of outside involvement.

The New Deal was a watershed for the labor movement in America and yet farm workers were excluded from the benefits bestowed on labor in the 1930s. The Roosevelt Administration's response to the cotton strike explains why, at least in part. As Cletus Daniel argues in his history of California farm workers, the most serious difficulty New Dealers had in addressing the problems of labor in California agriculture was philosophical. They took a rational, paternalistic, and fundamentally anti-union attitude.

> The approach that New Deal brain trusters first chose to effect changes favorable to labor . . . reflected a fundamental antiunion bias. Theirs was clearly not the selfish and defensive antiunionism of most American employers, but an aversion based on a shared conviction that the class conflict that had necessitated unions was neither an inevitable nor a natural by-product of the capitalist system. Once capitalism had been purged of those exploitative features spawned by unconstrained economic individualism and infused with the ethic of the national welfare, the New Dealers argued, industrial conflict would disappear, and with it the need for strong unions. Franklin Roosevelt had first embraced this vision of a conflict-free capitalist economy during the Progressive era, and it remained with him as he assumed the presidency. In his clearest exposition of this theme, Roosevelt said, "There is no such

[36] Daniel, *Bitter Harvest*, 201–2.

> thing as a struggle between labor and capital. Not only is there no struggle, but there is and has always been the heartiest cooperation for neither can capital exist without the cooperation of labor, nor labor without the cooperation of capital. Therefore, I say there is no struggle between the two, not even a dividing line."[37]

The representative of the Roosevelt Administration who took charge of the cotton strike situation was George Creel. Creel had been given responsibility for implementing the Recovery Act in California. He was in favor of organization but opposed to "self-interest" and "militancy." Together with proponents of the National Recovery Act (NRA), he preached cooperation, while the CAWIU resolved "to develop struggles in every cannery, on every ranch."[38] Like so many other New Dealers, including Roosevelt himself, Creel was not only paternalistic, but authoritarian as well. As the cotton strike continued, with Governor Rolph and state government officials failing to intervene decisively, Creel saw his chance to become the architect of a New Deal for California agriculture, and took it. He had no legal authority to step in, since the agricultural workers had been excluded from the application of the National Industrial Relations Act, but that did not matter to Creel.

> He not only ignored the fact that the law did not apply to agricultural workers, but also ignored an administration decision in late September which transferred responsibility for the settlement of industrial disputes from the NRA to the newly created National Labor Board. . . . To overcome the extreme intransigence of both parties to the dispute, Creel . . . , always with dubious authority, [used] every imaginable level of federal power and influence.[39]

Creel applied as much pressure to each side and to influential third parties as he could manufacture. Creel maneuvered Rolph into creating a fact-finding commission staffed by Catholic Archbishop Edward J. Hanna of San Francisco, Tully C. Knowles, president of the College of the Pacific, and University of California labor economist Ira Cross, with Norman Thomas as an observer. Meanwhile, pressure that he had directed against

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37 Ibid., 168.

38 *La Follette Committee Hearings*, Pt. 54, 19965–66.

39 Daniel, *Bitter Harvest*, 204.

strikers — making relief conditional upon a return to work — backfired when several children of striking cotton pickers died of malnutrition. Relief was reinstated.

At public hearings before the fact-finding commission, the two sides confronted each other with a parade of witnesses who simply confirmed the previous positions of workers on the one hand and owners on the other. Strikers claimed that the wage of 60 cents per hundred pounds was too low to sustain them at even a minimal level of decency, while growers claimed it could and moreover that 60 cents was all they were able to pay. Creel consulted with officials of the bank financing the cotton crop and got the word that 75 cents per hundred pounds was the highest piece rate cotton growers could adopt and still make a profit, and this is what the fact-finding commission approved. Union recognition was not endorsed. The growers had "consented" to creation of the commission on condition that they did not have to approve the commission's findings nor accept its recommendations. Once the recommendation on wages was made, however, Creel regarded it as binding. Growers and strikers both denounced the wage rate — for opposite reasons, of course — but Creel set out to force both parties to accept it. He threatened growers with exclusion from New Deal farm programs and strikers with removal from relief. By October 26th, both sides capitulated to the commission's "recommendation." Thus was the cotton strike resolved. Both sides felt that the federal government had been the real winner. Growers were especially angry with the outside interference in their affairs.

> Less than a week after the cotton strike ended, Creel was in contact with citrus growers in Tulare County advising them how they might rationalize their labor policy in order to defeat unionism in the region. . . . Had the cotton growers practiced a more enlightened policy toward their workers, he insisted, it would have been impossible for "a small group of agitators to come in from the outside and win workers away from . . . employers."[40]

Creel's efforts to help growers keep outside agitators out were not appreciated. He, too, was considered an outsider. To Creel, collective bargaining meant government paternalism and, if necessary, authoritarian

40 Ibid., 217.

imposition of "rational" and "fair" standards. After the cotton strike, the leaders of both sides understood this and bitterly resented it.

Of the thirty-seven agricultural strikes reported in California during 1933, twenty-four were led by the CAWIU. Of the 47,575 farm workers involved in these strikes, 37,550, or 79 percent, we're under CAWIU leadership. And, of the total number of workers who struck under the union's auspices, 32,800 won higher wages. Only four CAWIU strikes, affecting 4,750 workers, ended in failure.[41] But the union was not in good shape at the end of the 1933 harvest. In October, the CAWIU had 12,000 determined supporters in the San Joaquin Valley. By mid-November it was virtually defunct in the area. New Deal labor policies may have done more to wreck the strike than growers. Growers, however, had realized that federal officials had no legal basis for intervening in farm labor relations and began to close ranks to keep the federal government out. Wages began to rise, ever so slowly, cutting into the rationale for labor militance, and it became clear that the Roosevelt Administration was not willing to risk a hardline policy with growers to have its rational paternalism prevail. The workers were exhausted and beaten down by the long strike. Growers elsewhere took their cue from the cotton strike and mobilized against union activity, employing new tactics as well as old.

In Los Angeles, Riverside, and San Bernardino Counties, an area threatened by a citrus strike, growers got anti-picketing ordinances passed, together with bans on the distribution of union literature, and they contacted local Roman Catholic priests in predominantly Mexican neighborhoods to get them to warn their parishioners against communist-inspired disruptions. Growers also raised wages to 25 cents an hour — the rate established by successful union action elsewhere. The citrus campaign barely got off the ground, so CAWIU activists returned to the Imperial Valley where they were again met with unrestrained physical abuse and arbitrary arrest after announcing a lettuce strike on January 8, 1934. In the physical confrontations that followed,

> representatives of the Los Angeles Regional Labor Board and the State Labor Commissioner were 'detained' by valley authorities

[41] Schwartz, "Organizational Problems of Agricultural Labor Unions," 456–66; Sufrin, "Labor Organizations in Agricultural America," 549–50.

> and subjected to hostile treatment. In reports to their superiors, the two men told of being confronted by a captain of the state highway patrol who warned in a threatening tone, 'You men should get out of here. You are hurting our work. We don't want conciliation. We know how to handle these people, and where we find trouble makers we'll drive them out, if we have to *sap* them.' "[42]

Growers had a lock on the area. The sheriff and undersheriff of Imperial County were growers. The police chiefs of Brawley and El Centro were growers. And the captain of the Highway Patrol in the valley was a grower, as was Brawley's justice of the peace. Farm workers were denied the right to picket or even to assemble. When ACLU lawyer A. L. Wirin, who had secured an order in San Diego Federal District Court enjoining interference with a workers' meeting planned for January 23rd, appeared in the valley, he was abducted by a group of vigilantes, beaten, robbed, and left barefoot in the desert. When he got back to El Centro, he was greeted by a mob of 300 armed vigilantes and escorted out of town.[43]

Reaction was strong. After all, a federal court order had apparently been violated. The Justice Department, however, took the position that technically, the court order had not been violated since Wirin, the principal speaker for the meeting, had been abducted before the meeting began. There had been, according to the Department of Justice, no interference with the meeting itself. The National Labor Board was spurred to action, however. Campbell McCulloch of the Los Angeles Regional Labor Board took the position that peace in the valley would not be achieved until there was binding arbitration of labor disputes. On January 26th, Senator Robert Wagner announced that the National Labor Board would launch an inquiry into the Imperial Valley situation. McCulloch was instrumental in getting Wagner to act. An exceptionally knowledgeable committee was assembled, studied the situation, and in very short order submitted its report and recommendations. The report was remarkable. It recommended that immediate action be taken to safeguard the civil liberties of the workers; that health, education, and housing programs be developed to assist agricultural workers; that subsistence farms and gardens be created to

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42 *La Follette Committee Hearings*, Pt. 54, exhibit 8765, 20037–41.

43 *La Follette Committee Report*, Pt. 4, 455–57.

maintain workers in the off-season; that a federal coordinator be appointed to regulate the labor supply in the area; that Mexican nationals working in the fields be sent back across the border; that both labor and owners be organized to promote orderly collective bargaining, and that a federal board be established to oversee the process. It did not say that workers should be free to join the organization of their choice, however, nor did it recognize the paramount position of the CAWIU in previous organizing efforts. Simon Lubin, the Progressive reformer, was a member of the committee. He put the committee's ideas into a few brief words when he said that what was necessary was "the thorough organization of labor and the thorough organization of business management" so that "both might cooperate to a common end . . . ."[44]

Officials in Washington did not support the report. Farm workers had no political clout in Washington, and growers, since the cotton strike, had been registering vigorous protests there over federal interference in their affairs. The National Labor Board bowed out, referring "interested parties" back to the state. Vigilantism intensified in the valley. The ACLU remained interested and active, but impotent. Attorney Grover Johnson, for example, was attacked in broad daylight by a group of men that included a county supervisor and the administrator of a county hospital, after obtaining the release from jail of two CAWIU members. Growers, with the support of Mexican Consul Joaquín Terrazas, allowed a Mexican farm workers union to be formed on condition that they could dictate policy to the union. Once again, pressure built for the federal government to step in, but instead of sending federal marshals to the scene, the Roosevelt Administration enlisted the help of the Department of Labor. The secretary of labor, Frances Perkins, thought of CAWIU activists as follows:

> I got this brainstorm and said to myself, "What kind of people are they? They're like children and children take comfort in authority. When children are having a tantrum when grandma, or Old Aunt Susan, who is a person of authority comes in, they calm right down, because Aunt Susan knows where she's going and what she intends to have. There isn't any of this fluttering like dear, kind,

[44] *La Follette Committee Hearings*, Pt. 54, exhibit 8766, 20044.

> sweet mama who doesn't seem to know what it is one's aiming at, trying to obey all the rules of child guidance and rearing."[45]

"Old Aunt Susan" turned out to be Brigadier General Pelham D. Glassford, appointed by Perkins as special labor conciliator for the Imperial Valley. Glassford felt that the CAWIU must go before the situation could be resolved, but his master plan for the area was akin to what Creel's had been in the San Joaquin Valley cotton strike. Glassford, however, had no power to compel the growers to do anything.

Glassford knew this as well as anybody, so he set out to win the growers' confidence and support by denouncing the CAWIU. Glassford then planned to use his relationship with the growers to try to influence the situation.

The ACLU was not pleased with the Glassford plan, especially when Glassford refused to condemn extralegal tactics used by growers against the CAWIU. The ACLU complained to Washington, demanding Glassford's recall. Glassford's response to his superiors in Washington was, "It is absolutely essential at the present time that they [the growers] believe me to be entirely under their control."[46] The Labor Department backed up Glassford, hoping that the Glassford strategy, to destroy the CAWIU and thus make valley growers amenable to reform, would work. But all of Glassford's later suggestions for reform were summarily rejected by Imperial Valley growers. Glassford reported back to Perkins that valley growers were by then so secure that they no longer felt obliged to deal with their own company union, the Mexican farm workers union founded with the support of Terrazas. Glassford finally understood the real state of affairs in the valley. The grower coalition had no intention of allowing any outside "interference" in its affairs.

Finally, Glassford broke with the growers, seizing his opportunity when an ACLU attorney in the valley, under the seal of Glassford's protection, was brutally assaulted on a railway platform in Niland. Glassford denounced the growers' actions in no uncertain terms:

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45 Quoted Daniel, *Bitter Harvest*, 240–41.

46 See the testimony of Pelham David Glassford, *La Follette Committee Hearings*, Pt. 55, 20135.

> Apparently a small group of owners and shippers who have set themselves up to rule Imperial Valley desire only to fog the issue with their doctrines of violence, intimidation, and suppression of the workers. They are placing themselves in the position of being the most dangerous "reds" ever to come to Imperial Valley . . . .
>
> Satisfied that there is little danger of a disturbance during the present melon season, the big growers and shippers apparently are content to do little or nothing toward ameliorating conditions of the workers.
>
> The feeling of security is enhanced by the fact that the principal labor agitators have been incarcerated. It is unfortunate that our courts of justice should be used as a means for eliminating the agitators from the situation, on what are apparently trumped up charges.[47]

Glassford left the valley shortly after making that statement.

In the wake of the cotton strike of 1933, leaders of the Agricultural Committee of the State Chamber of Commerce and the California Farm Bureau Federation were enlisting support from farm employers throughout the state in a campaign to squash the CAWIU. In March 1934, the Associated Farmers of California was created. Its activities were financed by railroads, utilities, banks, oil companies, and other antiunion industrial groups. The Associated Farmers launched a statewide anti-communist, anti-union campaign. Their strongest weapon was the California criminal syndicalism law. On July 20th, the arrests that the Associated Farmers had sought took place. Seventeen leaders of the CAWIU were arrested, including Pat Chambers. The Associated Farmers financed part of the cost of the prosecuting attorney's research and clerical work on the case. Eight of the seventeen defendants were found guilty on two of six charges — and sent to prison.[48]

The CAWIU's extinction, however, was due to a policy shift by the Comintern. In 1934, the Communist Party insisted on a more ideological stance and a shift from organizing independent trade unions to an effort to "bore from within" established trade unions. The Communist Party in the

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47 *La Follette Committee Bearings*, Pt. 55, 20136.

48 *La Follette Committee Report*, Pt. 4, exhibit I, 694.

United States, in compliance with directives from Moscow, disbanded its independent organizing drive among farm workers. In 1934 the communists applied to the AFL for several union charters, but their main concern was to involve the California State Federation of Labor in a comprehensive industrial union that would include packing shed and cannery workers as well as farm workers. The AFL's conservative, craft union–oriented leaders were not open to such efforts, but at the grassroots level in California, the communists won approval. Edward Vandeleur, secretary of the California State Federation of Labor, and Paul Scharrenberg, former secretary of the federation, both of whom opposed the communists' efforts, actually gave reassurances to the Associated Farmers that the AFL would not support the plan for a statewide agricultural cannery and packing shed workers' union. Vandeleur fired a non-communist farm labor activist much disliked by growers to curry favor with growers and to further undermine the communist group.[49]

At the national level, organized labor's lack of commitment to farm workers was clearly demonstrated by its failure to fight to have farm workers included under provisions of the NLRA passed in 1935. At that time, the powerful farm lobby successfully argued against including farm workers on the grounds that farming was "unique," and "special," and thus should be exempt from labor legislation. Farmers had in mind two characteristics of their industry, the seasonality of farm work, with its very uneven demand for farm labor, and the perishability of farm products. These characteristics make the agricultural industry extremely vulnerable to strike action, and farmers were adamant about curtailing the possibility. Farmers also argued that agriculture was the nation's most vital industry and that under no circumstances should it be disrupted. They painted a vivid picture of crops rotting in the fields while people went hungry. To buttress their position, farmers consistently claimed that farm labor shortages existed. Public records indicate that farmers complained of a general "scarcity of farm labor" during both the Great Depression when there were millions of unemployed laborers, and during the labor-scarce years of the Second World War. "The decision to exclude farm workers from the

[49] See the testimony of S. Parker Frisselle, *La Follette Committee Hearings,* Pt. 49, 17945–46; *La Follette Committee Report*, Pt. 4, 627.

benefits of the NLRA was made behind closed doors and without a single voice having been raised in their defense."[50] Political pressures to counter those exerted by organized farmers were simply not generated by organized labor or other interested groups.

Activism at the state level continued, however. Disgruntled activists representing federation locals and independent ethnic unions met in April 1937 and founded the California Federation of Agricultural and Cannery Unions (CFACU). Shortly thereafter, the CFACU, dominated by veterans of the CAWIU and other communist-led unions, opted to join the CIO when the AFL's rival indicated an interest in organizing a nationwide campaign among workers in agriculture and related industries. Meanwhile, a bitter struggle was going on within the AFL in California involving the International Longshoremen and Warehousemen's Union (ILWU) and the International Brotherhood of Teamsters (IBT).

The ILWU, under Harry Bridges, had formulated a plan to expand into the production, processing, packaging, handling, and transporting of the products handled on the docks in California. Combined with Bridges' radicalism and pro-CIO thinking, this made AFL officials nervous, and it incensed Teamster leaders who also wanted jurisdiction in those areas. The AFL executive council followed its fears and awarded jurisdiction over warehouse workers in the interior of California to the Teamsters. Bridges then split from the AFL and joined the CIO. The new organization formed to spearhead the CIO drive into agriculture, canning, and packing was the United Cannery, Agricultural, Packing, and Allied Workers of America (UCAPAWA). In the months that followed, the AFL and the CIO competed with each other in a jurisdictional contest. UCAPAWA adopted a strategy aimed at cannery and packing shed workers to the neglect of farm workers, and the conservative AFL developed cooperative relations with employers in the canning and packing industries. Reacting to a strike originated by AFL radicals at several major canneries in Stockton in April 1937, the State Federation of Labor declared the strike illegal. The federation ousted the radicals, then entered into negotiations with the cannery owners and came up with an exclusive contract for the AFL. The contract recognized

[50] Jerold S. Auerbach, "The LaFollette Committee; Labor and Civil Liberties in the New Deal," *Journal of American History* 51 (December 1964): 435–59.

the California State Council of Cannery Unions, a Teamsters affiliate, as the exclusive bargaining agent for 65,000 workers. After their Stockton triumph, AFL conservatives began a vigorous campaign against all radical-controlled agriculture and cannery workers' locals under its auspices. In cooperation with agricultural owners, the AFL undercut the CIO-affiliated UCAPAWA and radicals within its own organization.

> A key Federation advantage here has been its grip on the teamsters who control much of the flow of farm produce to market. AFL strength in many canneries has also been important. These strategic advantages have been utilized at times to fight UCAPAWA, and successfully so. In several cases growers have been deterred from signing contracts with or recognizing UCAPAWA because of AFL threats that such action would prevent their products from reaching market or being canned.[51]

Inter-union rivalry damaged the farm workers' cause, certainly, but the organization of community sentiment at the local level remained the major obstacle; and this, despite national publicity highly favorable to farm workers. The year 1939 saw the publication of John Steinbeck's *The Grapes of Wrath*[52] and Carey McWilliams *Factories in the Field*,[53] damning indictments of the abusive labor policies that prevailed in California's industrialized agriculture. The living and working conditions of farm laborers in California were also publicized by public hearings conducted by Senator Robert LaFollette's subcommittee of the Senate Committee on Education and Labor. Despite the widespread publicity, "Senator Elbert Thomas [who had participated in the hearings] expressed the unhappy truth that the agribusiness complex in California was an 'empire' whose 'impregnability' was not fully appreciated by those who believed that public exposure of the human degradation in which it trafficked would somehow guarantee reform. 'It is traditional in the West,' Thomas said, 'and is so much an ingrained habit that nothing this committee could say would even scratch that empire.' "[54]

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51 Harry Schwartz, "Recent Developments Among Farm, Labor Unions," *Journal of Farm Economics* 8, no. 4 (November 1941): 833–42.

52 John Steinbeck, *The Grapes of Wrath* (New York: Viking Press, 1939).

53 McWilliams, *Factories in the Field* (1939).

54 Quoted in Daniel, *Bitter Harvest*, 284.

Prior to 1956, the outstanding example of pro-grower, anti-labor government policy was the development of the Mexican contract labor program. The program was begun during the First World War. In the course of World War I, California growers and railroad interests lobbied successfully for the establishment, under federal auspices, of the first Mexican contract labor program. The arrangement was quite simple, involving no guarantees to Mexicans, but allowing the growers to avoid the $8.00 head tax normally charged immigrants at the border.

During the 1920s, the national issue was immigration quotas. Between 1927 and 1931, numerous bills were introduced in Congress to put Mexico under the quota system. Chief spokesmen in favor of quotas were a coalition of the American Federation of Labor that wished to protect domestic wages, various racist and patriotic organizations that wished to protect "American blood," and groups of social workers and public health officials who wished to better provide for Mexican immigrants already in the United States. Leading spokesmen against Mexican quotas were the California Farm Bureau, the Agricultural Labor Bureau of the San Joaquin Valley — which spoke for chambers of commerce and other groups allied to California agricultural businesses — and the Santa Fe, Southern Pacific, and Union Pacific Railroads, all of which were involved in the transport of California's agricultural produce. With the mood of Congress and the American public restrictionist in the late 1920s, it was a battle between anti-quota and pro-quota forces. The opposition forces were able to keep Mexican quota bills from coming out of both the House and Senate Immigration and Naturalization Committees until 1931, when a House bill passed, but died for lack of companion Senate legislation.[55]

During the 1930s, California agricultural businesses were supplied with an ample seasonal labor pool by the "Okies" and "Arkies" who migrated from the "Dust Bowl," but with the advent of World War II, a farm

[55] Carey McWilliams, *North From Mexico: The Spanish-Speaking People of the United States* (Philadelphia: Lippincott, 1949); N. Ray Gilmore and Gladys W. Gilmore, "The Bracero in California," *Pacific Historical Review* (August 1963): 265–82; Ernesto Galarza, *Merchants of Labor: An Account of the Managed Migration of Mexican Farm Workers in California 1942–1960* (Santa Barbara: McNally and Loftin, 1964); Sheldon L. Greene, "Immigration Law and Rural Poverty — the Problem of the Illegal Entrant," *Duke Law Journal* 3 (June 1969): 475–94; Ellis W. Hawley, "The Politics of the Mexican Labor Issue, 1950–1965," *Agricultural History* 40, no. 3 (July 1966): 157–76.

labor shortage developed as migrants were recruited by defense plants, shipyards, and the military; and so, in June of 1942, California Governor Culbert Olson wired the War Manpower Commission, the secretary of labor, the secretary of state, and the secretary of agriculture, Claude Wickard, saying that 20,000 Mexican workers were needed immediately and 159,000 would be needed by October, 1942.[56]

In late June, Secretary Wickard went to Mexico City as head of a U.S. delegation, which included the president of the American Farm Bureau Federation, to negotiate a contract labor program. The Mexican government demanded guarantees that its citizens would not be treated as badly as they had been under the World War I program. An agreement was signed on July 20th, whereby the United States government guaranteed the contract workers transportation to and from the border, the prevailing wage of the area in which they worked, employment during 75 percent of their contract period, and the same health and housing standards provided American farm workers. Since the "prevailing wage" had to be set prior to the importation of Mexican workers, the Department of Agriculture simply accepted as "prevailing" the wage level set seasonally by growers' organizations like the Agricultural Labor Bureau of San Joaquin County. The maximum number of Mexican contract laborers working in a California harvest under the wartime program was 36,000 — or 8 percent of the state harvest labor force in 1944.[57]

In 1946 agricultural business interests working principally through the American Farm Bureau Federation pressed for the establishment of a permanent contract labor program with Mexico. While federal officials negotiated with Mexico between 1946 and 1949, Mexican workers continued to be brought in under temporary agreements. There were protests against the arrangements. When a permanent program was agreed to in August 1949, both the American Federation of Labor and the Congress of Industrial Organizations protested that such a program would take jobs away from domestic farm workers and lower the wages of those who did work. Mexican-American organizations like the G.I. Forum also protested.

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56 Gilmore and Gilmore, "The Bracero in California," 269.

57 Ibid., 269–72.

Public sentiment was aroused by the national publicity given to 10,000 jobless domestic farm workers in California in the spring of 1950.[58]

The year 1947 marks the beginning of a fifth period of outside involvement in the farm labor issue, with organized labor essentially uncommitted, but involved tangentially. Several important characteristics define the farm workers of this period. First, the common bond of powerlessness that had linked them with other workers had been severed by the inclusion of other workers under the National Labor Relations Act. After 1935, farm workers were indeed a class apart. Second, farm workers were becoming more settled, less transient. Third, after the influx of impoverished whites in the Depression years, minorities, mostly Mexican Americans and Mexicans, were again predominant in the farm labor pool.

In 1947, Bob Whatley, a farm worker and veteran labor organizer from Oklahoma, who was then working in the Bakersfield area of California, wrote to H. L. Mitchell, president of the National Farm Labor Union (NFLU), asking for some literature and a speaker. The NFLU had evolved from the Southern Tenant Farmers Union (STFU), founded in 1934 by Mitchell and Clay East in Tyronza, Arizona. The STFU had been organized to resist some of the effects of the federal government's Agricultural Adjustment Act, in particular the eviction of sharecropper families from the land under Section 7-A of the Act.[59]

The STFU entered the American labor movement by way of affiliation with the United Cannery, Agricultural and Packinghouse Workers of America (UCAPAWA), heir to the radical unionism of the 1930s. This affiliation ended in March, 1939, however, when Mitchell and his supporters split with the UCAPAWA leadership whose ties were with the CIO. During the next six years, the STFU held its own in the South, relying not on organized labor, but on independent funds, and a few channels of communication with a national audience. Mitchell tried to get a charter from the AFL in 1940, but was turned down, principally for his socialistic leanings. He tried again in 1945 and succeeded due to the sponsorship of Patrick

58 Ibid., 273–75; Hawley, "The Politics of the Mexican Labor Issue," 158–60; Greene, "Immigration Law and Rural Poverty," 475–94.

59 Schwartz, "Organizational Problems of Agricultural Labor Unions," 461.

E. Gorman of the Amalgamated Meat Cutters and Butcher Workmen of America, who had ties to AFL President William Green.[60]

On receiving Whatley's letter, Mitchell went to Bakersfield, California, with his director of organizations, Henry Hasiwar, toured the area, and concluded that Hasiwar should remain in Bakersfield to work with Whatley. Eventually, leadership of the California local of the NFLU rested with Hasiwar, who had been an effective organizer in several industrial union drives during the 1930s, Ernesto Galarza, who had served as political liaison for Latin American unions and had a Ph.D. in economics from Columbia University, and James Price, a shed foreman at the DiGiorgio Ranch in Arvin.

The union's strategy was to enlist as many workers as possible from a single employer, call a strike, demand wage increases and union recognition, and picket to keep "scabs" out of the fields. American Federation of Labor affiliates would then provide strike relief and political support to keep the picket line going while church or student groups would furnish occasional money and boost morale. By August 1947, Local 218 of the NFLU had 1200 members, most of whom worked for the DiGiorgio Fruit Company.

When DiGiorgio ignored the union's request for union recognition and negotiations on wages and working conditions, a strike was called on September 30th. Despite the fact that most farm workers involved were residents, locals called the strikers "outsiders" and charged them with attempting to "make themselves the bosses of Kern County and eventually of all California agriculture."[61] The action against DiGiorgio was to last for three years. It eventually failed, due mainly to manipulation of the bracero program which provided growers with an effective strike-breaking weapon. According to provisions of the law, braceros were not to be employed except in instances of domestic labor shortage and never to be employed in fields where domestic workers had walked out on strike. Yet in two major tests of NFLU power, the DiGiorgio strike and the Imperial Valley strike of 1951, braceros undermined the strike effort of domestic workers.

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60 Ibid., 464.

61 *La Follette Committee Report*, Pt. 4, 268; also see the testimony of Joseph DiGiorgio, *La Follette Committee Hearings*, Pt. 48, 17658.

A number of events in connection with the DiGiorgio strike are significant. Joseph DiGiorgio called on his connections in and outside the community to put down the strike. Sheriff John Loustalot was prompt in responding, as was a representative of the U.S. Department of Agriculture. Together they "persuaded" the braceros, who had refused to cross the picket lines on the first day of the strike, to go back to work. Failure to work meant immediate deportation.

The union protested to the Department of Agriculture in Washington, appealed to the Mexican Embassy, and tried to mobilize support through a sympathetic congressman, Representative John F. Shelley, and the Washington labor lobby. It met with some success. The Department of Agriculture stalled, but did finally order the cancellation of all contracts, terminating its agreement with DiGiorgio on November 10, 1947. However, the six-week delay in removing the braceros broke the strike that season because by mid-November the harvest was over. Pruning had begun, but there were enough non-union workers for that task.[62]

The union then turned its attention to the local office of the California Farm Placement Service. Federal regulations under the Wagner–Peyser Act prohibited referrals for employment where a strike was in progress, but the Bakersfield office had refused to post notices that a strike was in effect and had continued to refer applicants to DiGiorgio farms. The union made some headway with the Farm Placement Service, too, but by November 20th, DiGiorgio was able to compensate for the loss of braceros and farm placement referrals through recruitment by its own agents. Persistent demands by the union for the removal of "wetbacks" used as strikebreakers did result in roundups by immigration agents in the spring, however.

At the end of November, Secretary of the Interior Harold Ickes published a syndicated newspaper column expressing his views on the plight of migrant farm workers, the "notorious Associated Farmers," and the DiGiorgio strike. In response, the Kern County Special Citizens Committee made its appearance speaking for the leaders of the community in agriculture, industry, finance, and newspaper publishing. The committee released a lengthy pamphlet entitled "A Community Aroused," in which the Ickes

[62] Ernesto Galarza, "Big Farm Strike: A Report on the Labor Dispute at the DiGiorgio's," *The Commonweal*, June 4, 1948, 178–82.

column was denounced. The economic life of Kern County, the pamphlet said, depended on uninterrupted production. The strike was an invasion of the community by outsiders who threatened "the pioneers who built Kern County . . . the people who made America great."[63]

The Central Labor Council of Bakersfield endorsed the strike and placed DiGiorgio products on a boycott list. DiGiorgio products also appeared on the boycott lists of major labor councils, including those of Los Angeles and San Francisco. Local Teamsters, supported by the winery workers, struck the DiGiorgio ranch, refused to deliver supplies, and joined the picket lines. On October 26th, the Executive Council of the California State Federation of Labor voted $1,000 for the strike fund and issued a statewide appeal to all affiliates. Additional cash contributions of over $80,000 came from all sectors of the labor movement throughout the nation. Meanwhile, the State Conciliation Service had made futile attempts to induce DiGiorgio to enter negotiations with the union. Nationally known religious and lay leaders, most of whom were supporters of the National Sharecroppers Fund, spoke out on behalf of the union. With this backing, the union attempted to expand within Kern County and into Tulare and Fresno Counties. It began setting up political committees and registering voters, and in May 1948, began construction of its own hall on an acre of land donated by Mrs. Bertha Rankin, a local union sympathizer.

In February 1948, DiGiorgio called on the California Senate Factfinding Committee on Unamerican Activities to investigate the NFLU. The Associated Farmers claimed that AFL officials were "suckers for a handful of out-of-state men who were using communist front groups." In paid advertisements, the Kern County Special Citizens Committee called H. L. Mitchell a former "official of a communist-dominated CIO union." And, Joseph DiGiorgio asserted, "all this agitation is communist inspired by subversive elements." No officer of the union had ever been a member of the Communist Party, however, and so the committee was not able to establish communist domination of the strike, but it did state that the National Sharecroppers Fund was a "communist front organization."[64]

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63 Ibid.

64 Ernesto Galarza, *Farm Workers and Agri-Business in California, 1947–1960* (Notre Dame and London: University of Notre Dame Press, 1977), 110–11.

Legal harassment was common during the strike. Union organizers were stopped in the streets by police and searched for weapons. Tensions on the picket line were high, and by spring 1948 the effectiveness of the strike had come to rest with a mere 100 men and women. The tense situation led to violence. On the night of May 17, Price, Hasiwar, and five other union members were fired upon as they sat in union headquarters discussing the strike. Price suffered a head wound, but recovered.

On November 12th and 13th, 1949, a subcommittee of the House Education and Labor Committee convened in Bakersfield to investigate the strike. DiGiorgio's lawyers walked in on the hearings to serve Mitchell and other union officials with a libel complaint asking $2 million in damages. The cause of the action was the showing of a film produced by the Hollywood Film Council, *Poverty in the Valley of Plenty*. Mitchell could not raise the funds to contest the suit and was forced to settle out of court, to recall all prints of the film, and to end the strike. Congressman Richard Nixon helped draft a report concerning the film which was used as propaganda against the union.[65]

The NFLU participated in limited action and strikes against other agricultural employers through 1952. In the Imperial Valley, the NFLU used citizen's arrests to enforce statutes prohibiting employment of braceros in labor disputed areas. However, local courts ruled against the tactic and the Immigration Service refused to remove alien "scabs" from the fields. Nor did affairs change when the bracero administration was transferred to the U.S. Department of Labor in 1951. Domestic workers were pushed out of crops by braceros, and braceros reappeared in the Los Banos strike of 1952 to break the union challenge.

In response, the NFLU launched a political challenge — a demand for termination of the bracero program, and, to get around the problem of ineffective strikes, requests for organized labor's support of boycotts. Neither demand found a favorable audience. Lacking strong labor or liberal support, the demand for an end to the bracero traffic ended in minor reforms in the bracero administration. As for the boycott launched in 1947, despite initial success, it collapsed when a court injunction was issued on the grounds that the NFLU was covered by the "hot cargo" provisions of the

65 Ibid., 114.

Taft–Hartley Act. The National Labor Relations Board initially concurred, despite the fact that farm workers were explicitly excluded from provisions of the NLRA, but later reversed its position.[66]

As the follow-up to the injunction, the Associated Farmers and their fellow lobbyists introduced a bill in the state legislature to prohibit the controversial "hot cargo" boycotts. The Teamsters Union saw itself as the chief target of the bill and sought to prevent its passage, and so entered into negotiations with the Associated Farmers, agreeing in 1951 not to support an NFLU strike in the Imperial Valley in exchange for grower efforts to kill the bill. Teamster President Dave Beck ordered Teamster officials in the Imperial Valley to abide by all contracts to transport products harvested, "regardless of any labor interference or other alibis."[67] California State Federation of Labor Secretary-Treasurer C. J. Haggarty commended the Teamsters for their willingness to confer with the Associated Farmers.

The Teamsters had the power to make or break a strike called by the NFLU. Teamsters, in accord with the position of the Central Labor Council of the San Joaquin Valley, had picketed in the DiGiorgio strike, but in a later action in Tracy, Western Conference of Teamsters officials waved union members through NFLU picket lines, and the Teamsters failed to support the NFLU melon strike in the Imperial Valley.

In 1952, the National Farm Labor Union was renamed the National Agricultural Workers Union, or NAWU. Shortly thereafter, the California State Federation of Labor removed the NAWU locals from its rolls for failure to pay per capita dues. Mitchell, meanwhile, redirected the union's resources away from California to the Deep South. NAWU activists remaining in California directed attention to the Mexican contract labor system.

In the period 1947–53, then, the institutional hegemony of the growers was challenged, but not broken. The farm workers' status within organized labor was marginal. The movement was underfunded. Violence was used against it. The bracero program was manipulated to undercut the farm workers' union. And stalling tactics successfully defeated farm worker efforts to have regulations enforced. The Teamsters also played a large role in defeating the farm workers' struggle to organize effectively.

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66 Ibid., 98–117.

67 Quoted by Murray Kempton, *New York Post*, June 22, 1951.

In 1959, a series of meetings of a liberal organization called the National Advisory Committee on Farm Labor influenced the AFL-CIO to create a new affiliate, the Agricultural Workers Organizing Committee (AWOC) to spearhead an organizing drive among agricultural workers.[68] Organizing committees were originally designed by CIO international unions to facilitate an aggressive opening sally on an unorganized sector of the labor force. In the case of farm labor in California, the situation was somewhat different because there already existed an AFL-chartered union, the National Agricultural Workers Union (NAWU), and a CIO union, the United Packinghouse Workers of America (UPWA).

The UPWA was the successor of the UCAPAWA and the radical left of the labor organizing movement in California agriculture. After World War II the UPWA was in active control of a significant number of fruit and vegetable packing sheds in California, but the Teamsters, then an AFL-CIO affiliate, claimed jurisdiction over shed workers too. Like the Teamsters contracts with shed operators, the UPWA agreements contained "no strike" clauses by which they justified their violation of NAWU picket lines in the late 1940s and early 1950s. The UPWA and the Teamsters were openly competitive with regard to shed workers, but both the UPWA and the IBT shrank from the problems of organizing harvesters and excluded field workers from their jurisdiction. The growers fought hard to cut the ground from under the UPWA. A major weapon was the bracero program. The UPWA locals in California, which held some seventy-five shed contracts at one time, were overwhelmed by new technologies that displaced workers, by competition from the IBT, and by grower use of braceros. By 1958, the UPWA had lost 3,000 packing jobs. As the number of domestic packers dwindled, so did their wages. By 1959 the situation was described by the union's "Packinghouse Worker" as "an uphill fight to hang on to the scattered outposts" of its organization. At that point, the UPWA began to show some interest in organizing farm workers.[69]

When the AWOC entered the field, then, the NAWU had been operating among field workers and the UPWA among employees of the packing

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[68] Lawrence T. King, "Pickets in the Valley," *The Commonweal*, October 14, 1960, 64–67.

[69] Ibid.; Grant Cannon, "Farm Labor Organizes: The AFL-CIO Makes Its Bid for Farm Labor in California," *Farm Quarterly*, Spring 1961, 60–65ff.

sheds and processing plants. The UPWA was ripe for a jurisdictional quarrel with the NAWU, however, because the UPWA had been making efforts to organize field hands. Shortly after John W. Livingston, the director of organization of the AFL-CIO, appointed Norman Smith director of the AWOC, Smith made it clear that the AWOC was the organizing agent for the two unions.

A part of Smith's strategy was to recruit pickets in the skid row areas of California's agricultural towns. Smith was a veteran of early UAW campaigns against the giants of the automobile industry. His experience with industrial plants in the East had confirmed for him the organizing potential in the crowds of men who gathered outside the gates of factories seeking work. Smith perceived a similar situation in the daily labor shapeups in the skid rows of places like Oakland and San Jose. So it was there — among the most transient and least skilled elements of the agricultural labor force — that Smith enlisted members for AWOC picketing.

Smith would disperse flying squads of pickets to besiege selected farms, large and small, while he and his assistant, Louis Krainock, maneuvered to negotiate with the owners. Smith and the AWOC challenged growers of cherries, peaches, tomatoes, apricots, and pears. Dozens of strikes were certified. If there was any pattern to these forays it was that the AWOC focused its efforts on highly perishable crops that required large numbers of seasonal workers for a short period of time and which were harvested mainly by experienced Anglo migrants. The AWOC demanded pay increases, job security, control of foreign labor, union recognition, and formal grievance procedures.

Smith had to deal with police surveillance, the importation of foreign labor under the bracero program, litigation and injunctions, government officials biased in favor of the growers, and a pro-grower publicity blitz. Essentially, the effort failed. The AWOC came out of these encounters with some economic benefits, but without collective bargaining contracts.[70]

Meanwhile, the AWOC was straddling a jurisdictional dispute between the NAWU and the UPWA. In the fall of 1960, Smith chose to

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[70] Henry Anderson, "Picketing in Perspective: An Editorial," Citizens for Farm Labor, *Farm Labor*, March 1966, 5–6; "To Build a Union," Citizens for Farm Labor, *Farm Labor*, June 1966, 11–28; August 1966, 13–25; September 1966, 1–25; Dick Meister, "Still in Dubious Battle," *The Nation*, September 24, 1960, 178–80.

redirect AWOC resources to support the UPWA in a lettuce strike in the Imperial Valley. Because the UPWA was actively recruiting field hands for the strike, Smith appeared to align himself with the UPWA in its jurisdictional dispute with the NAWU.

Big labor's internecine warfare was not confined to the ranks of the AFL-CIO, either. The Western Conference of Teamsters, major shippers of the produce, abided by a no-strike contract with growers, and refused to aid the UPWA-AWOC coalition. As the harvest ended in the Imperial Valley and the crews moved north to Salinas, the strikers followed. The threat of the strike, plus internal financial problems caused one big lettuce grower, Bud Antle, to sign a contract with the International Brotherhood of Teamsters covering his field labor operations. The Teamsters then loaned the company $1 million. The Salinas Growers–Shippers Association denounced the contract and expelled Antle from the Association.[71]

In the fall of 1960 in a legal battle with DiGiorgio Fruit Corporation over the showing of a film — the same film that the NFLU had been sued for showing — the AWOC was penalized $60,000. During the 1960–61 season, an additional $21,000 in legal fees and over $4,000 in fines were imposed on the flying squads in the strike of the winter lettuce crop in the Imperial Valley. AWOC's total budget for the year was only $100,000. These financial losses and the infighting between the NAWU and the UPWA hit the AWOC hard and it declined rapidly. In the summer of 1961, the AFL-CIO withdrew support, allowing AWOC's efforts to fail.[72]

After 1961, local initiative filled some of the gap left by big labor's pullout. A number of Anglo and Mexican fruit pickers had been operating independently at the local level. They and some of the AWOC central staff called a conference in Strathmore, California, to see what could be done to save the union. Two hundred workers attended the session. They voted to assess themselves $2 each and to send a delegation back to the AFL-CIO's midwinter convention in Miami Beach. Mrs. Maria Moreno, one of four delegates to go, reported the following, "Mr. Meany [AFL-CIO President George Meany] told us if we keep going we will soon have our union built.

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71 Ronald B. Taylor, "A Romance Rekindled," *The Nation*, March 19, 1973, 366–70.

72 "Tossed Salad," *Newsweek*, February 20, 1961, 26; "Violence in the Oasis," *Time*, February 17, 1961, 18.

He said there would be as much money as needed. He told us to tell the people back home he was going to back us all the way."[73]

Meany sent Al Green to replace Smith as director. Like Smith, Green found the shapeup on skid row the only visible target for his organizers. Green did not have much success building a farm labor union following this tactic. Few major strikes were attempted during this period. The only cohesive force within the AWOC during this period was a group of Filipino vegetable and grape workers centered in Delano. They were organized by Larry Itliong, Ben Gines, and Andy Imutan, and it was they who were responsible for initiating the Delano Grape Strike of 1965.

Once again, in 1958–1960, an attempt to organize California farm workers had fallen short. During the same period, however, the preconditions for an ultimately successful organizing drive were being prepared beyond California's borders, in the national arena. Two developments in particular should be remarked upon: the support long given to farm employers by agencies of the U.S. government was eroding; and new support for farm workers was emerging from liberal public interest organizations allied with big labor.

A major fissure in traditional support of farm employers by the federal government came with the appointment of James P. Mitchell as secretary of labor by President Eisenhower in 1956. Mitchell's unexpected appointment brought a "liberal Republican," a future protege of Nelson Rockefeller, and a former labor consultant to several New York department stores to the post of secretary. Mitchell adopted a policy of consultation and accommodation with major labor, becoming a formidable figure in the Eisenhower cabinet because of the success of his conciliatory policies.

In 1958, a major battle developed between the Taft and the Eastern wings of the Republican Party, with conservatives supporting a national right-to-work law. Mitchell emerged in this struggle as an effective advocate of unionism, and was seen as positioning himself for the Republican vice-presidential nomination in 1960.[74]

Mitchell remained a symbol and executor of elite-controlled reform, but the new vigor and visibility of his views made him more reliant upon

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[73] Anderson, "To Build a Union," 23–24.

[74] J. Craig Jenkins and Charles Perrow, "Insurgency of the Powerless: Farm Worker Movements, 1946–1972," *American Sociological Review* 42 (April 1977): 249–68.

liberal allies, and they brought increasingly heavy pressure to bear upon him to advance their objectives, which included greater recognition and protection for farm labor. In 1957, Mitchell ordered an internal review by the Labor Department of all its policies bearing upon farm labor questions. In response to liberal complaints about the effects of the recession of 1958–59, Mitchell pledged full enforcement of the 1951 law requiring farm employment be offered to domestic workers prior to the importation of braceros. In 1959 Mitchell went further, supporting reform legislation to extend the minimum wage to agriculture. In 1960, his reform efforts reached the end of their tether, when the secretary proposed abolition of the bracero program. State grower associations enlisted Ezra Taft Benson, secretary of agriculture, to defend the program in the cabinet and before Congress. The White House remained neutral. Mitchell withdrew his proposal.[75]

Nonetheless, his incumbency had coincided with an important shift in public and elite attitudes, a shift to which the secretary's conduct was bound both as cause and response. In 1956 the Democratic National Convention endorsed a platform plank calling for increased welfare benefits for underemployed migrant workers. The following year the National Council of Churches, already involved in the civil rights movement in the South, launched a study of migrant camp conditions and child labor in the fields. As a result, in 1958 the NCC brought public pressure to bear on Secretary Mitchell to strictly enforce existing law on migrant labor camps. The same year, the AFL-CIO, and several liberal interest groups, became directly involved in a call for abolition of the bracero program. In October of 1958 the National Sharecroppers Fund announced the creation of a National Advisory Committee on Farm Labor. The members of the Committee, Dr. Frank P. Graham, A. Phillip Randolph, Clark Kerr, Helen Gahagan Douglas, Mrs. Franklin Delano Roosevelt, Norman Thomas, and Dr. Maurice von Hecke, were close to the national leadership of organized labor. The committee sought to capitalize upon its influence by convening a national conference on the conditions of farm labor. The aims of the conference, which was held in February 1959, were to encourage new national legislation, and to stimulate big labor support for organizing farm labor. William

[75] Ibid.

Schnitzler, the secretary-treasurer of the AFL-CIO, at the closing session of the conference, acknowledged the "horrifying and degrading" conditions of farm laborers, and announced that "after some months of study and consultation, we have formulated a program for an organizing campaign." Shortly thereafter, the Executive Council of the AFL-CIO approved a document drawn up by Walter Reuther and H. L. Mitchell, entitled, "An AFL-CIO Program to End 19th Century Poverty in 20th Century Rural America." Funds were allocated for a four-pronged program: 1) the abolition of alien labor programs; 2) federal legislation to protect the health and welfare of farm laboring families; 3) education of the public to the plight of farm workers; 4) an organizing drive in the fields. It was in response to point four that the AWOC was established. Secretary Mitchell had been encouraged and probably coerced into moving the policy of the Eisenhower Administration in the same direction, although not with the same goals, as those set out by a liberal-labor coalition which was growing in numbers, recognition, money, and institutional support. By 1960, it was evidently too late for farm employers to arrest the fledgling farm labor movement and impose a settlement upon it on the local level. The lights were going down in a larger theater, and national actors were costuming themselves.[76]

In 1960, the Democratic party platform condemned the bracero program, but in 1961 President Kennedy refused to accept Labor Secretary Arthur Goldberg's advice that a two-year extension of the program be vetoed. Goldberg did, however, succeed in overturning the long-established practice of letting growers set "prevailing wages." Under Secretary Goldberg, the Department held hearings and set statewide minimum farm labor wages which growers would have to offer domestic workers as a precondition for receiving bracero certifications. By 1963, when the bracero legislation was up for renewal, the Kennedy Administration was developing the issue of poverty for the 1964 campaign and was counting the votes of minorities to whom the civil rights movement had given added stature and influence in the consortium of liberal constituency groups. A one-year extension of the program was won by an alliance of farm bloc states, whose representation was reduced by the decennial reapportionment and further threatened by Supreme Court apportionment decisions. Within the full

[76] Sue Keisker, "Harvest of Shame," *The Commonweal*, May 19, 1961, 202–5.

panoply of federal farm programs, the bracero program was small, serving a narrow beneficiary group, and drawing intense liberal opposition. Farm bloc congressional delegations consequently backed away from it, hoping to save more economically central federal farm programs. Thus, the sixth period of farm labor development drew to a close, with significant administrative and legislative victories. Those victories were secured by a combination of cooperation and pressure between federal officials, a reinvigorated coalition of liberal reform groups, and organized labor. These victories occurred without direct farm worker insurgency, but they broke the stranglehold of farm employers by moving the drama to a national theater and linking the farm workers to national leaders and national values.

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Chapter 4

FARM WORKERS AND THE UFW: GAINING ADMISSION

This chapter treats the first five years of the decisive decade, 1965–1969, which cover the founding of the UFW by Cesar Chavez, the beginning of the Delano Grape Strike, and the expansion of community organizing tactics to include devices employed by the civil rights movement — marches and boycott. During these years there was a rapid recruitment of liberals and intensive media coverage. The personal charisma and religious values of Chavez were brought to a focus in his fast for disciplined nonviolence.

In the next five years, liberal criticism of Chavez, which had been muted and isolated, became more prominent and concerted. Chavez and the UFW had to contend against the success of their contract signings with Delano and Coachella Valley growers, which disclosed severe weaknesses in the UFW's ability to carry out its contractual obligations to help administer the labor supply. More difficulties arose in the Salinas Valley, where Chavez at times appeared intransigent and the UFW's major target reasonable and accommodating. Salinas also pitted the UFW against a skilled, well-financed, unscrupulous rival union in the Teamsters, and the UFW lost a series of contests for worker support. Chapter five will deal with this latter half of the decisive decade. (The UFW often had acrimonious

relations with its putative liberal-supported ally, the California Rural Legal Assistance program. Since CRLA won a series of major court cases for farm workers, the UFW's conflicts with CRLA made Chavez and the union appear to many to be seeking personal and organizational glory and power rather than serving the farm workers' cause.)

Nonlocal groups and individuals were largely responsible for creating and sustaining the organizations that presented the greatest challenges to the community control exercised by growers and their allies prior to 1965.

Cesar Chavez, in turn, got his start with help from a nonlocal organization with institutional connections to the left wing of the labor movement. That assistance came from the Industrial Areas Foundation of the Community Service Organization, the brainchild of political activist Saul Alinsky.[1] In September, 1947, Saul Alinsky hired a man named Fred Ross away from the American Council of Race Relations, headed by the sociologist Louis Wirth, to organize in Mexican-American neighborhoods in the Los Angeles area.[2] From Los Angeles, Ross moved to San Jose where he met Cesar Chavez in June, 1952. When Ross met Chavez he recorded the following in his daily record of activities: "To carry on a hard-hitting program of civic action and militancy, you must have people who are of a certain temperament, who just cannot live with themselves and see injustice in front of them. They must go after it whenever they see it, no matter how much time it takes. . . . 'I think I've found the guy I'm looking for.' "[3]

Having "discovered" Chavez, Ross recruited him, then schooled him and promoted his career as a community organizer. The two projects that Ross concentrated on in San Jose were voter registration drives and citizenship classes. Chavez worked in both over a period of six years.

In 1958, Ross asked Chavez to take on a project suggested by Alinsky and Alinsky's friend, Ralph Helstein, president of the United Packinghouse Workers of America (UPWA). The Packinghouse Workers had been organizing in the lemon houses in Santa Barbara and Ventura counties.

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[1] Andrew Kopkind, "The Grape Pickers' Strike: A New Kind of Labor War in California," *The New Republic*, January 29, 1966, 12–15.

[2] Peter Matthiessen, "Organizer: Profile of Cesar Chavez," *The New Yorker*, Part 1, June 21, 1969, 42–85.

[3] Jacques E. Levy, *Cesar Chavez: Autobiography of La Causa* (New York: W. W. Norton Co., Inc., 1975), 95.

They had won elections in most of the houses, but in every case had failed to conclude contracts with management. The lemon companies had simply refused to come to terms with the union, and as a consequence, the union's new members were drifting away.[4]

The trio of Helstein, Alinsky, and Ross had only a vague idea of what Chavez could do to help the union. They simply thought that a lot of community organizing would be useful in some way. The union had enough confidence in the outcome of Chavez's proposed community efforts, however, to invest $20,000 in non-union organizing focused on the Ventura County community of Oxnard. As Helstein told Chavez, "Oh, well, you organize the CSO (Community Service Organization). We're interested in organizing farm workers. Maybe it will help there. If it doesn't help there, hell, it's helping the community anyway."[5]

In Oxnard, Chavez demonstrated the tactics he had learned working under Ross. Chavez's approach was to build a network of small groups based on personal contact, democratic participation, and service, then move to political action. The political action was aimed at creating an institutional opening for the particular and personal grievances shared by farm workers. In conducting house meetings, Chavez quickly found that jobs taken up by braceros were the main issue among farm workers in the community. Farm workers in Oxnard complained that braceros were taking jobs away from them. By law, braceros were supposed to be brought in only when there was a labor shortage and were not to be used to displace American workers, so Chavez organized a campaign to inundate the Farm Placement Bureau in Oxnard with requests by American farm workers to be hired, and the CSO lodged complaints with Governor Edmund G. Brown, Sr., Senator Alan Cranston, and appropriate state officials. Several investigations were started.[6] The situation heated up as job applicants and community members led by Chavez and the CSO staged protest marches. Chavez and a group of protesters seized an opportunity to picket Secretary of Labor James Mitchell at the Ventura airport. Chavez forced the issue to the point that growers agreed to hire people at the CSO office, which

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[4] Dick Meister, "Still in Dubious Battle," *The Nation*, September 24, 1960, 178–80.

[5] Levy, *Chavez*, 126.

[6] Ellis W. Hawley, "The Politics of the Mexican Labor Issue, 1950–1965," *Agricultural History* 40, no. 3 (July 1966): 171–72.

was turned into a kind of hiring hall. Chavez claimed that after thirteen months of activity every farm worker family in Oxnard was tied into the operation in some way.[7]

Under the glare of publicity, William Cunningham, Southern California director of the Farm Placement Service, was accused of taking bribes and dismissed. He was just short of retirement age and thus lost his seniority and his pension. Edward Hayes, head of the Farm Placement Service, was forced to resign as well. Shortly thereafter, Hayes got a job working for the growers' association in the Imperial Valley.[8]

Chavez wanted to build a union on the fertile ground he had cultivated in Oxnard, but the CSO would not allow it. The CSO's president even went to Oxnard to stop Chavez from creating a union. The CSO was not willing to risk its relations with labor in a jurisdictional dispute.[9] The operation was left to the UPWA, and Chavez was appointed national director of CSO and transferred to Los Angeles. Within ninety days the operation in Oxnard had fallen apart. In Chavez's words, "When I left Oxnard, two guys were hired as organizers. But soon after I left, a factional fight started which destroyed the effectiveness of that CSO chapter. We also left the operation to the Packinghouse Workers Union, and in ninety days . . . the whole thing was lost. Talk about factions — there must have been as many factions as there were workers."[10]

Chavez was most unhappy with the CSO's decision not to let him organize what would in effect have been a labor union. His anger smoldered. After a few years, he resolved to leave the CSO and try it on his own. In 1962, he left what was a well-paying job and went to Delano, California, where his wife's relatives lived. The choice of Delano was a practical one. He had a family and no money coming in. In Delano he could rely on relatives for his and his family's subsistence while organizing his National Farm Workers Association (NFWA).

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7 James L. Vizzard, "The Extraordinary Cesar Chavez," *The Progressive*, July 1966, 16–20.

8 Hawley, "Mexican Labor Issue," 174.

9 Levy, *Chavez*, 138–44.

10 Ibid., 143; and, as Chavez summed it up later: "The CSO meant well, but it didn't have the heart and courage that were necessary if something was going to be done for the farm workers." Cesar Chavez, "Nonviolence Still Works," *Look*, April 1, 1969, 55.

Chavez was a most effective agitator in the early stages of the formation of social unrest among farm workers in the early 1960s. A reasonable man who communicated with people in terms that they could easily comprehend, he pointed out the injustice of existing social institutions, creating among the people a focal point for the development of social unrest.[11] He would visit workers in their homes and simply discuss "conditions" with them. He would ask them what their biggest problems were, getting them to specify the service goals of an organizing drive. Then he would ask them what they thought of a union. He would collect stories of how individual workers had been mistreated. Everyone it seems had a story to tell. Then he would try to win them over to active participation in his association. Chavez used the same tactic on members of his own family when he recruited them. Cesar's cousin, Manuel Chavez, explained,

> I kept in touch with Cesar by letter, but I didn't see him again [after a year that Manuel and Cesar Chavez worked together in northern California's lumber industry] until he called for help [in organizing his National Farm Workers Association, later the United Farm Workers Union, asking his cousin to work without pay]. When I said, "You're crazy, I'm not coming to work for nothing!" Cesar started organizing me.
>
> He said, "Don't you remember when they left us in Corcoran, the contractor, and he didn't pay us?"
>
> "Yeah, I remember."
>
> "Remember when we were working with D'Arrigo in 1940. He was paying us thirty cents an hour, and that man died because he was all wet?"
>
> I said, "Yeah, I remember. We were mad."[12]

Thus was Chavez able to involve many who, for one reason or another, had been bystanders and did not want to get involved.

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[11] Matthiessen, "Organizer," Part 1, 42–45; Chavez, "Nonviolence Still Works," 52–57.

[12] Levy, *Chavez*, 164; Chavez's tactics were not new. They had been advocated and even published by Henry Anderson when Anderson was Research Director for the AWOC, AFL-CIO, in 1961, and they were reprinted in 1966: Henry Anderson, "To Build a Union," Citizens for Farm Labor, *Farm Labor* 4, nos. 4–6 (1966).

Three years after Chavez broke away from the CSO and established his own organization, what came to be known as the California Grape Strike started when approximately 800 AWOC workers led by the AWOC's Filipino organizers, Larry Itliong and Ben Gines, struck a number of Delano vineyards, including the huge holdings of the DiGiorgio Fruit Corporation.[13] When the AWOC went out on strike, Chavez's NFWA had only 200 dues-paying members. On September 16, 1965, notwithstanding the apparent weakness of the Chavez union, the NFWA voted to join the strike and to extend it to two other large growers — Schenley Industries, Inc., and Giumarra Vineyards, Inc. On September 20th, 1,100 more workers walked off the job.[14]

Chavez, seeking funds and volunteers, spoke at a number of colleges, including the University of California at Berkeley, just one year after the free speech struggles there, San Francisco State College, Mills College, and Stanford University, and appealed to CORE and SNCC for people with experience in confrontations to act as picket captains until the farm workers could be trained.[15] One of the SNCC volunteers was Marshall Ganz, the son of a rabbi and, as it turned out, one of the UFWOC's most important leaders. The response to Chavez's appeal, however, was mixed. At public meetings, he would be asked when he had last paid dues to the Communist Party. Once, he was actually pelted with eggs and tomatoes, but he kept right on with his speech, and before he was through the booing had changed to applause. Besides SNCC and CORE people, a number of clergymen of all faiths came to man the picket lines, and there also were volunteers from other groups, such as Students for a Democratic Society and the W. E. B. DuBois Clubs.[16]

Delano Mayor Loader responded to the strike with an offer to act as a middleman for growers and farm workers, but his offer was premature and naive. Growers soon let him know that his offer was not appreciated. Loader subsequently turned against the farm workers and supported growers

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13 Kopkind, "Grape Pickers' Strike," 12–15.

14 Thurston N. Davis, "Viva la Huelga!" *America*, April 23, 1966, 589–90.

15 "Viva la Huelga!" *Newsweek*, April 18, 1966, 42–43.

16 M. Vincent Miller, "Workers on the Farm After the Grape pickers' Strike," *Dissent*, November–December 1966, 645–55.

to the hilt.[17] Growers and their agents reacted in anger. Many hostile incidents were reported. One small group of pickets reported that a grower had pointed a shotgun at them, threatened to kill them, set their picket signs on fire, and blasted their signs with shotgun pellets. Loaded shotguns were fired into picket signs and over the heads of the strikers. Pickets were shoved and hit. Fistfights broke out along the picket lines.Growers drove their trucks directly at strikers, then swerved at the last minute, covering them with dust. Episcopal Bishop Sumner Walters reported being a victim of one of these attacks.[18]

Local police cooperated with growers, though some officers did not like what they were doing. Various investigations were launched into the suspected violations of the health, building, and fire codes at UFW headquarters in Delano. Chavez reported that the fire marshal "hated the politics of his assignment and told us so on more than one occasion."[19] The license number of every car that stopped at union headquarters was noted. Drivers were often stopped by local police and questioned. Police followed Chavez everywhere he went during the early days of the strike. After a few weeks, every striker on the picket lines was photographed and a field-report card was filled in on him or her.[20]

Chavez knew the strike would be crushed if growers were able to contain the controversy locally. He was continually developing strategies for countering local concentration of power. An early move was to contact a small group of liberals in Bakersfield and have them flood Delano authorities with complaints about the expense involved in official surveillance and petty harassment of UFW members: "[T]he first two years of the strike I [Chavez] spent most of my speaking engagements and my time getting support to get the growers and cops off of our backs. It worked. We once had over a hundred telegrams and maybe 300 phone calls to the Delano Chief of Police in a three-day period."[21]

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17 James L. Vizzard, "Grape Strike," *Commonweal*, May 27, 1966, 295–96.

18 "Victory in the Vineyards," *Time*, April 15, 1966, 59–60.

19 Levy, *Chavez*, 189.

20 "Victory at Delano," *America*, April 23, 1966, 579–80; Ronald B. Taylor, "Huelga! The Boycott that Worked," *The Nation*, September 7, 1970, 167–69.

21 "Victory at Delano," *America*, 579.

One of Chavez's first actions was to visit college campuses throughout the state. He spoke at UC Berkeley where memories of the Free Speech Movement disturbances of the previous year were still fresh, and he contacted CORE and SNCC seeking experienced organizers to work as picket captains. Chavez did not meet with unqualified approval wherever he went, of course, despite the fact that he began recruiting outside help by going to those groups thought to be most sympathetic to the farm workers' cause. But he did win many people over: "We're getting help beyond our wildest hope. The labor movement, the churches, the civil rights movement, student groups, are all getting behind us with physical, financial, and moral support."[22]

At first, Chavez concentrated on Schenley Industries since the Schenley name was known nationwide. Chavez and the NFWA launched a boycott of all the company's products. Big labor tended to look askance at Chavez and the NFWA, but it did begin to provide support for the strike. In October 1965, the San Francisco longshoremen respected the Schenley picket lines and, at an AFL-CIO convention in San Francisco, Paul Schrade of the United Auto Workers persuaded Walter Reuther to visit the strike. Reuther came to Delano to present a check for $5,000 to the NFWA. Chavez actually tricked Reuther into marching through the streets of Delano in defiance of a local order and, in a move that hinged on embarrassing Al Green of the AWOC, got Reuther to pledge $5,000 a month to the NFWA until the strike was over.[23] Other unions, notably the Garment Workers, the Seafarers, and the Packinghouse Workers, took up collections for the strike and contributions came in from churches, student groups, and other liberal organizations.[24]

In the spring of 1966, the Senate Subcommittee on Migratory Labor was persuaded to conduct a day of hearings in California. The chairman of the subcommittee was Harrison A. Williams, Jr., a Democrat from New Jersey, who had been supporting the interests of farm workers in Congress since 1959 — the year the subcommittee was established — and he was accompanied by Senator Robert Kennedy of New York and Senator George

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22 "Council of Growers' Statement on Delano," C*alifornia Farmer*, January 15, 1966, 11.

23 Ronald B. Taylor, *Chavez and the Farm Workers: A Study in the Acquisition and Use of Power* (Boston: Beacon Press, 1975), 154.

24 Miller, "Workers on the Farm," 645–55.

Murphy, a California Republican.[25] Kennedy recognized the NFWA and spoke at one of its meetings.[26] Chavez said the following at the hearings:

> Although we appreciate your efforts here, we do not believe that public hearings are the route to solving the problem of the farm worker. In fact, I do not think that anyone should ever hold another hearing or make a special investigation of the farm labor problem. Everything has been recorded too many times already, and the time is now past due for immediate action. Or, some people say education will do it — write off this generation of parents and hope my son gets out of farm work. Well, I am not ready to be written off as a loss, and farm work could be a decent job for my son, with a union. But the point is that this generation of farm labor children will not get an adequate education until their parents earn enough to care for the child the way they want to and the way the other children in school — the ones who succeed — are cared for. . . . All we want from the government is the machinery — some rules of the game. All we need is the recognition of our right to full and equal coverage under every law which protects every other working man and woman in this country.[27]

Chavez was referring to the fact that growers, unlike most other employers, were under no legal obligation to bargain with their employees, since farm workers had been specifically exempted from the terms of the National Labor Relations Act, and only a few farm workers have been affected by federal minimum-wage legislation. In the course of the hearings, Bishop Hugh A. Donohoe of Stockton expressed unanimous support for the strikers on the part of the eight Roman Catholic bishops of California and made an eloquent appeal for full collective bargaining rights for farm workers. The bishops' support for Chavez and the NFWA was extremely important. Not only did the bishops officially support the unionization

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[25] Hearings were conducted in Sacramento, Visalia, and Delano, California, as well as in Washington, D.C., and San Antonio, Texas. U.S. Congress, Senate, Subcommittee on Migratory Labor, "Amending Migratory Labor Laws," Hearings on S. 1864–1868, July 1965, and March–April 1966, 89th Congress, 1st and 2nd Sessions.

[26] Matthiessen, "Organizer," Part 1, 68.

[27] Peter Matthiessen, "Organizer: Profile of Cesar Chavez," *The New Yorker*, Part 2, June 28, 1969, 43–71.

effort, they publicly defended Chavez when Red-scare tactics were used against him. For example, Monsignor George Higgins, an important staff member of the Bishops' Committee, involved, not as official mediators, but as agents in bringing growers and the union together, was quoted as follows: "The Bishops' Committee totally disassociates itself from the view that Cesar Chavez is a communist organizer. [Chavez is] an honorable and dedicated man in the field of trade unionism." Higgins went on to say that the head of the committee, Bishop Donnelly, had been active in exposing and undercutting the communist caucus in the old CIO. Trading on Donnelly's unimpeachable credentials, Higgins asserted, "[N]o matter what paper makes such charges against Chavez, the Committee finds him to be a good and sincere advocate of social justice."[28]

On March 17th, the day after the hearings, Chavez set off on a widely publicized workers' march — or *peregrinación*, as he called it — from Delano to the steps of the Capitol in Sacramento.[29]

Sacramento had become the planned destination for the march the month before when William Bennett, a consumer advocate and member of the State Public Utilities Commission, had spoken in Delano condemning the California Fair Trade Act for underwriting Schenley Corporation's profits from the sale of liquor in the state. The *peregrinación* was inspired in part by the freedom march from Selma, Alabama, that had taken place a year before; but, like a fast that Chavez undertook two years later, it had a religious connotation as well. Its emblem was the Mexican patron saint of the *campesinos*, *La Virgen De Guadalupe*, and the *peregrinación* was to arrive at the Capitol steps on Easter Sunday. Chavez had suggested that the march

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[28] Bishop Floyd L. Begin of Oakland put the farm workers case most succinctly in asserting that all the growers needed to do was agree to "impartially supervised elections." Continued refusal, Begin asserted, "can only question the integrity of the growers' contention and induce more and more people to support the boycott." "Churchmen and Table Grapes," *America*, January 4, 1969, 4; "Bishops Support Cesar Chavez," *America*, May 30, 1970, 574; another strongly worded statement is the following, recorded in "California Bishops and the NLRA," *America*, August 30, 1969, 764: "We feel strongly that genuine, lasting peace will never come to farm management labor relations until farm workers are included under The National Labor Relations Act."

[29] Mark Day, "The Clergy and the Grape Strike," *America*, August 30, 1969, 114–17; "150 Striking Pickers, Delano, California, Begin 25-day, 300-mile Protest March to Sacramento," *New York Times*, March 18, 1966, 78; "March Continues," *New York Times*, March 19, 1966, 60.

should be penitential, like the Lenten processions of Mexico — an atonement for past sins of violence on the part of the strikers, and a kind of prayer.[30]

The growers had a different view of the march. Martin Zaninovich of Delano, for example, called the "pilgrimage" "a parade that is nothing more than a publicity stunt for the benefit of the news media."[31] Meanwhile, Al Green tried to get the AWOC not to have anything to do with the march. After it was underway, Green moved to Porterville and set up an office next to the Teamsters.[32] Sixty-seven strikers set off on the 300-mile march to Sacramento, where they hoped to meet with Governor Edmund G. Brown, Sr. The progress of the *peregrinación* was slow and ceremonial. As Chavez had anticipated, it received a good deal of support and participation from people along the way, in the form of food and shelter for the marchers. The mayor of Fresno, Floyd Hyde, actually arranged a special luncheon for the marchers with Chicano leaders in the town.[33] At one point during the march, Al Green engineered a local front-page news story to the effect that AFL-CIO members were boycotting the march.

Angered, William Kircher, national director of organizing for the AFL-CIO, contacted Green with the following curt order: "When this march reaches Modesto tomorrow, I want to see a massive AFL-CIO welcome. That's your home base, that's where you're from. I'll judge how much influence you have in the labor movement by what kind of reception there is for the marchers."[34]

The biggest rally along the march route was in Stockton. Five thousand people attended. That night Chavez got a call from Schenley representative, Sidney Korshak, who wanted to talk.[35]

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30 Davis, "Viva," 589–90; "Religious Motives in Demonstration," *New York Times*, March 25, 1966, 28.

31 Vizzard, "The Extraordinary Cesar Chavez," 19.

32 Ronald B. Taylor, "A Romance Rekindled," *The Nation*, March 19, 1973, 366–70; "Pickers Report They Set Up Strike Committees in Towns Along Route," *New York Times*, March 23, 1966, 48.

33 Levy, *Chavez*, 213–14.

34 Ibid., 213–14; "Union President Chavez Lauds Kircher Role," *New York Times*, April 7, 1966, 1.

35 "Battle of the Grapes," *Reader's Digest*, October 1, 1969, 88–92; "Marchers Rally, Sacramento," *New York Times*, April 11, 1966, 18; "Schenley Industries Agrees to Bargain with Pickers Union," *New York Times*, April 7, 1966, 1.

After twenty days on the road, walking from Delano to Sacramento, one of the marchers reportedly said, "If we get to Sacramento and Cesar says we go on to Washington, I say, 'okay,' I go to Washington."[36] The march lasted twenty-five days, and when they arrived on the Capitol steps, in the rain, on Easter morning, they were joined by thousands of supporters and some notable figures from politics and labor. Governor Brown had forsaken notables and *originales* alike in favor of a weekend at Palm Springs with Frank Sinatra. The occasion did not lack a climax, for it was then announced that Schenley had agreed to negotiate a contract. Schenley, it seems, gave in to Chavez and the union mainly to protect its nationally known brand name, but a widely accepted rumor had it that Robert Kennedy worked behind the scenes to get Schenley to sign a contract with the NFWA. The contract, which was signed in June 1966, provided an hourly wage of $1.75 and a union hiring hall.[37]

With the Schenley success, the strikers turned their attention to TreeSweet, S&W Foods, and the DiGiorgio Company, whose Sierra Vista Ranch occupied 44,000 acres near Delano. Suddenly the Teamsters union, which had provided important support for the strikers in the fight against Schenley, announced that it was prepared to represent the DiGiorgio workers, and the company quickly arranged an election in which workers could choose the Teamsters, Chavez's NFWA, or no union at all. William Kircher personally broke up a press conference arranged by the DiGiorgio Company to announce the election and sought a court injunction to prevent the use of the NFWA's name on the ballot, but the election was held anyway on June 24th. Chavez told his people not to vote.[38] Kircher and Governor Brown came up with the idea that an independent labor arbitrator should look into the situation. Governor Brown ordered an investigation of the situation by Ronald W. Haughton of the American Arbitration Association, and Haughton recommended that a second election

36 Vizzard, "The Extraordinary Cesar Chavez," 16.

37 "Victory at Delano," *America*, 579–80; "Schenley Pact and DiGiorgio Plan," *New York Times*, April 9, 1966, 24; "Schenley Industries Sign 1-Year Pact with NFWA," *New York Times*, June 22, 1966, 33.

38 Jerry J. Berman and Jim Hightower, "Chavez and the Teamsters," *The Nation*, November 2, 1970, 427–31; "DiGiorgio Corp. Polls Vineyard Workers at 2 Ranches," *New York Times*, June 25, 1966, 31.

be held.[39] Meanwhile, Governor Brown and Senators Robert Kennedy and Harrison Williams asked the DiGiorgio Company to hold off on negotiations with the Teamsters. The NFWA sought a court order to block negotiations between DiGiorgio and the Teamsters. Though both sides had agreed to accept Haughton's proposal and the rules laid down for conducting the election, two tense months of accusations, violence, reprisals, injunctions, and arrests followed. Just a few days after the DiGiorgio Company agreed to elections, the company laid off 190 NFWA people and Teamster muscle men allegedly beat up several people. Kircher called in some musclemen of his own — members of the Seafarers union — to protect NFWA pickets. Among those arrested was Chavez. Having persuaded ten workers to walk off the job at DiGiorgio's Borrego Springs property, northeast of San Diego, Chavez and two clergymen, one Protestant and one Catholic, accompanied them into the ranch to retrieve their belongings and were arrested for trespassing. All of them except the Catholic priest were stripped naked and chained together by some zealous sheriff's deputies.[40]

The Teamsters was the only union that had supported the retention of the bracero program, and, as Chavez saw it, the Teamsters had entered into an alliance with DiGiorgio to work out what is known as a "sweetheart" contract — one that would almost certainly benefit the union and the employer but not help the workers. Under these circumstances, Chavez concluded that he had no choice but to merge NFWA with AWOC, under the banner of the AFL-CIO.[41] Chavez became head of the new union, the United Farm Workers Organizing Committee (UFWOC). One of his first acts was to dissolve AWOC contracts with labor contractors in Stockton. He also made AWOC organizers work for $5.00 a week — the amount of money NFWA organizers had received. Larry Itliong was the only AWOC organizer to stay on.[42]

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[39] Berman and Hightower, "Chavez and the Teamsters," 427–31; "Labor Expert Will Probe Farm Election," *Los Angeles Times*, June 30, 1966, 27; "New DiGiorgio Vote by Aug. 30 Urged in Report," *Los Angeles Times*, July 16, 1966, 3.

[40] Jerome Wolf, "The Church and Delano," *Commonweal*, April 29, 1966, 168–69.

[41] "AFL-CIO Granting of Charter to United Farm Workers Organizing Committee which includes NFWA," *New York Times*, August 24, 1966, 26.

[42] AWOC organizers were not the only ones to leave when the two unions merged. In fact, NFWA supporters were divided on the merger issue. A number left when the NFWA joined the AWOC and became the UFWOC.

The merger took place in August, before the second election at DiGiorgio, and the last phase of the battle with the Teamsters was extremely vicious. The AFL-CIO, which had expelled the Teamsters in 1957, charged that the Teamsters were controlled by gangsters; and the Teamsters countered that the new organization, the UFWOC, was influenced by an international communist conspiracy.[43] Prevented from picketing at the Sierra Vista Ranch, the strikers held nightly vigils outside the labor camps, at a shrine set up in the back of Chavez's old Mercury station wagon. The workers, some of whom had been recruited by DiGiorgio from as far away as Juárez, Mexico, were proselytized when they came to pray. The second election was held at Sierra Vista on August 30th, and anyone who had worked there for fifteen days or more during the previous year was eligible to vote. The Teamsters already had a large California membership of workers directly dependent on agriculture, and the workers in the packing sheds voted 94 to 43 to join the Teamsters. But the field workers, some of whom had heard about the election in Mexico and had come back at their own expense, voted for the UFWOC by 528 to 328.[44] Martin Luther King, Jr. sent the UFWOC a telegram:

> As brothers in the fight for equality, I extend the hand of fellowship and good will and wish continuing success to you and your members. The fight for equality must be fought on many fronts — in the urban slums, in the sweat shops of the factories and fields. Our separate struggles are really one — a struggle for freedom, for dignity, and for humanity. You and your valiant fellow workers have demonstrated your commitment to righting grievous wrongs forced upon exploited people. We are together with you in spirit and in determination that our dreams for a better tomorrow will be realized.[45]

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[43] Russell W. Gibbons, "The Teamsters," *Commonweal*, August 10, 1973, 426–31; "AFL-CIO Aide Kircher Hints Company Favors Teamsters," *New York Times*, August 28, 1966, 58.

[44] "DiGiorgio Corp. Representation Election," *New York Times*, September 1, 1966, 25; "American Arbitration Association Reports UFWOC Won Right to Bargain for Field Workers at 2 DiGiorgio Central California Ranches," *New York Times*, September 3, 1966, 14.

[45] Levy, *Chavez*, 246.

After the DiGiorgio contract for the Sierra Vista ranch was negotiated the NFWA pushed for elections at DiGiorgio's Arvin ranch as well. The Teamsters opposed the NFWA's move, but the NFWA got a majority of workers at the Arvin ranch to sign a petition calling for an election, then presented it to Governor Brown on statewide television. The DiGiorgio Company did not respond. Chavez then came up with the idea of getting Brown to sign a letter to the Arvin workers stating that he had done all he could and suggesting that they take the matter up with the DiGiorgio Company directly. Governor Brown was campaigning against Ronald Reagan at the time. The NFWA did get Brown's signature on the letter, which was then sent to forty of the workers who had signed the petition. They were then called to a meeting and arrangements were made to transport the workers to DiGiorgio Company offices in San Francisco where they would be backed up by a picket line and demonstration when they met with DiGiorgio officials to request an election. The workers met with Robert DiGiorgio and two of his assistants who refused elections on the grounds that the workers were simply being stirred up by outside agitators. The workers who had come to petition for elections stayed in the DiGiorgio offices. They were joined by labor people from San Francisco. Finally, what Chavez had hoped for happened. They were arrested for trespassing, bailed out of jail, went back to the DiGiorgio offices, and were arrested again.[46]

On November 4, 1966, the DiGiorgio Company agreed to hold elections at its Arvin Ranch. The NFWA won the election, but winning only gave them the right to negotiate. Contract negotiations took several months. The contract then went to an arbitrator and was finalized, but enforcement of the contract became a huge problem. Over 100 grievances were filed in the first three months of the contract, many were never resolved.[47] In December 1967, the DiGiorgio Company started selling off its holdings in the Delano area and by 1968 had divested itself of all its holdings there. Consequently, the union lost its contracts.[48]

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[46] "United Farm Workers Wins Representative Election at DiGiorgio Ranch, Arvin, California," *New York Times*, November 6, 1966, 47.

[47] Harold T. Rogers, "On the Labor Front," *American Fruit Grower*, November 1968, 12–13.

[48] "DiGiorgio Fruit Sells Agricultural Holdings, San Joaquin Valley, California," *New York Times*, April 20, 1969, 56.

Nine days after the election at DiGiorgio's Sierra Vista ranch, the field workers walked out of the vineyards of A. Perelli-Minetti & Sons, demanding to be represented by the UFWOC. But the company signed a contract with the Teamsters who escorted three busloads of scabs onto the Perelli-Minetti grounds.[49] After another inter-union struggle, lasting 10½ months, in the course of which a UFWOC picket, John Shroyer, was beaten up, the Teamsters reversed their policy and came to terms with Chavez. In July, 1967, the appointment of Einar Mohn, director of the Western Conference of Teamsters, to the University of California Board of Regents by Governor Pat Brown in 1966 was alleged to have been part of an understanding that the Teamsters would not challenge the Chavez union jurisdiction; and, indeed, though the Teamsters gave the UFWOC trouble, they did not commit themselves to an all-out battle against the UFWOC in Delano.[50] Under a jurisdictional agreement mediated by Father Eugene Boyle, Episcopal minister Richard Byefield, and Rabbi Joseph Glazer, the UFWOC gave the Teamsters representation of certain shed workers in return for representation of all field workers, including those at Perelli-Minetti, whose union contract was at once transferred to the UFWOC.[51] After these developments, Gallo, Almaden, Christian Brothers, and the other large California wineries presented very few difficulties for Chavez. The big wineries, which sell their products under their own nationally advertised brand names, were especially vulnerable to a boycott, and by September of 1968, when the Paul Masson vineyards signed, almost all of them had contracts with the UFWOC.

Meanwhile, the growers of table grapes, who were less vulnerable, continued to resist, and they were unquestionably heartened in November 1966, when Ronald Reagan, who had spoken out against the grape strike from the start of his campaign, was elected governor. In that same month, the UFWOC won another representation election at the vineyards of Mosesian–Hourigan–Goldberg, a relatively small firm in Delano, by a vote of 285 to 38.[52]

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49 "American Farm Labor Replaces Braceros," *Christian Century*, February 1, 1967, 133.

50 "Breakthrough for la Huelga," *Time*, June 27, 1969, 18.

51 Gibbons, "Teamsters," 430–31.

52 "UFWOC has won Accords with Several Big Companies which Process Grapes into Wine," *New York Times*, October 2, 1967, 43.

After the Perelli-Minetti struggle, the UFWOC went after the table grape growers, starting with the largest, John Giumarra. The UFWOC organized among the workers and when it felt strong enough, started sending letters to Giumarra, requesting a meeting. Ralph Duncan of the State Conciliation Service got Giumarra to send a representative, Philip Feick, to a meeting in Bakersfield. Feick did not budge. The UFWOC initiated a strike August 3, 1967. Four days later Giumarra got an injunction against the UFWOC limiting pickets to two at each entrance to Giumarra property and preventing masses of people from congregating on the road most visible to workers in the fields. The injunction helped break the strike. With the strike broken, the UFWOC turned its energies to a boycott of Giumarra fresh grapes. Giumarra fought back by changing labels and multiplying the number of labels used on his fruit. In violation of Food and Drug Administration rules, Giumarra used the labels of other growers in an effort to circumvent the boycott.[53] It was then that the UFWOC decided to boycott all California fresh grapes, except DiGiorgio's HiColor brand. The boycott was an offensive tactic without the emotional stimulus of immediate action or direct contact with the opposition, but as will be shown, it was an effective economic weapon. In 1968, however, the UFWOC was making little headway. The first wave of representative elections had died out. The table grape growers were stonewalling Chavez and Chavez's followers were debilitated and demoralized by the apparent lack of progress.[54] There was also talk of violence among UFWOC members.

Chavez decided to engage in a ritual act of purification, a fast. At a meeting of the union at union headquarters in Delano, Forty Acres, Chavez announced that he was fasting until such time as everyone in the union ignored him or until union members rededicated themselves to nonviolence and started pulling together again. Chavez's announcement created an uproar. A number of people in the Chavez organization, including the union's

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[53] Mary Lou Watson, "Boycott Seeks to Aid Grape Workers," *Christian Century*, June 5, 1968, 769–70; "UFWOC 2-year Strike Centers on Boycott of Giumarra Vineyards Corp. Products," *New York Times*, October 2, 1967, 43.

[54] The plan growers formulated to take advantage of the UFWOC's stalemated position was reported in *Farm Quarterly* in 1970. It diagnosed the union's problems as they existed in 1968, "The Farm Worker," *Farm Quarterly*, Spring Planning 1970, 56–58.

secretary-treasurer, Tony Orendain, were offended, thought Chavez was playing "Jesus Christ," and left.[55]

Saul Alinsky was one of a number of liberals and leftists who were embarrassed by Chavez's decision and found it difficult to explain to allies of the farm workers' movement.[56] Chavez assessed the fast this way:

> After about three or four days, the spirit was definitely there. The Filipino women and the strikers painted the co-op windows with bright colors. They looked like stained glass. Things began to get cleaned up. Everybody began to get things done on their own. They began to think how to help. The rest was just like a miracle — not the fast, but the things that it did to people. It jolted everybody around. We got more than I ever bargained for. The good effects were way beyond my dreams. The work schedule began to pick up, dedication increased, and the whole question of using violence ended immediately.[57]

On the twelfth day of the fast, Chavez had to appear in court in Bakersfield on a contempt of court charge. Marshall Ganz and several of the ranch committees — organizations representing workers on the farms that had contracts with the UFWOC — organized a demonstration at the courthouse. Three to four thousand singing and praying workers entered or surrounded the courthouse. Judge Walter Osborne was reported to have said, "If I kick these workers out of this courthouse, that will be just another example of goddam gringo justice. I can't do it."[58]

Robert Kennedy attended the last of the daily masses — the one that marked the end of the fast — a full twenty-five days after Chavez had stopped eating. Kennedy's visit brought national television coverage. Just six days later, Kennedy announced his candidacy for president. Paul Schrade called Chavez and asked if he would endorse Kennedy and be a delegate to the Democratic convention.[59] The AFL-CIO had come out

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55 Levy, *Chavez*, 272–78.

56 Ibid., 272–78.

57 Ibid., 275.

58 "Chavez is Charged with Violating Picket Restrictions," *New York Times*, February 29, 1968, 20.

59 "Chavez, Upon Urging of Doctors, Agrees to End Fast," *New York Times*, March 6, 1968, 16; "Sen. R. F. Kennedy Backs Spirit of Movement," *New York Times*, March 11, 1968, 22.

strongly in support of Johnson. Chavez not only accepted Schrade's offer, but actively campaigned for Kennedy in the rural areas and in East Los Angeles, the Mexican-American neighborhoods of that city. Chavez, in fact, diverted a significant portion of his staff to a voter registration drive for Kennedy. After Nixon was elected, the UFWOC claimed it was "shut out by the feds."[60]

In 1968 the growers tried to back a company union to oppose Chavez, the Agricultural Workers Freedom to Work Association, AWFWA. By that time most growers had resigned themselves to the idea of working with a union of agricultural workers, but they did not want to work with Chavez's union. Most downright hated the man.[61] Jerry Cohen, a former CRLA attorney who had gone to work for the UFWOC and become its general counsel, worked with government people to try to have the AWFWA investigated, because the AWFWA had evidently been funded by growers, the John Birch Society, and the National Right to Work Committee through a dummy organization called the Mexican American Democrats for Republican Action (MADRA). Fear of a federal investigation ended MADRA.[62] Meanwhile, the table grape strike and the boycott were still underway.

The growers suffered severe damage in the course of the boycott. In the Coachella Valley, in five years the action reduced the number of growers from some 200 to around 60, and the acreage from 13,000 acres to 7,500.[63] "It took several years for the boycott to be that effective," recalls Lionel Steinberg, a Coachella Valley table grape grower. "It just gradually closed in like a noose around the necks of the vineyardists."[64] Steinberg was a longtime liberal activist as well, cochairman of Farmers for Kennedy and Johnson in 1960, and an appointee of both President Kennedy and Governor Edmund G. ("Pat") Brown to administrative posts having to do with

60 "Pres. Candidate Nixon Urges VP Humphrey to Withdraw Endorsement of 'Illegal' Boycott," *New York Times*, September 6, 1968, 32; "VP Candidate Agnew Scores Nat'l. Labor Boycott," *New York Times*, October 1, 1968, 30.

61 "More than 100 California Growers and Shippers File $25-million Suit Against UFWOC," *New York Times*, July 13, 1968, 28.

62 Taylor, "Huelga! The Boycott that Worked," 167–69; "On the Labor Front," 12–13.

63 "Contracts in the Coachella," *Time*, April 13, 1970, 21.

64 "Effectiveness of Union's Boycott in 1968," *New York Times*, June 19, 1969, 32.

agriculture.[65] Through their mutual friend, Congressman Phil Burton, Chavez expressed an interest in meeting with Steinberg, who had favored a grower settlement with the UFW. Late in May 1968, the meeting took place. One can only conjecture about Chavez's feelings as he noticed, in Steinberg's home, that the liberal grower had a collection of pre-Columbian art objects. It may have seemed that Steinberg was expropriating the past and culture, as well as the present labor, of the Hispanic farm workers. (In any event, Steinberg was deeply offended when in a later picket line confrontation, a clergyman supporter of Chavez retorted to Steinberg's statement that Chavez had conversed with Steinberg in his home: "Chavez is not interested in pre-Columbian art!"[66]) At the May meeting, Chavez proposed a unilateral agreement between the UFW and Steinberg, and the latter declined. Steinberg later charged that some of the leadership apparently mistook his conciliatory approach for weakness, and that on a "weakest link" theory his property and workers were singled out for abuse and harassment, threats, and sporadic violence, over the next several weeks. "[A]pparently Chavez didn't appreciate the effort," Steinberg noted dryly. "He was only interested in the end result, which was a contract. And anything else was not helpful. And he had his mind set on one thing — that was winning the battle, winning the strike, not making friends."[67] What is remarkable in this evaluation is not only its naivete. It represents the increasing ambivalence and disaffection of many liberals with Chavez in mid-1968. It represents the utter inability of many of the liberals who questioned Chavez's tactics to understand his hedgehog mentality, his single-minded moral intensity and strategic focus. And it provides a statement of characteristic liberal attitudes: soften and resolve social conflict through friendship, and by calling upon an "old-boy network."[68]

Steinberg reports that although he was forced during this period to sell some of his land and heavily mortgage the rest, he never doubted that the controversy would eventually be resolved to the satisfaction of both

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65 "L. Steinberg and J. J. Kovacevich Say they will Recognize Union as Collective Bargaining Agent," *New York Times*, June 15, 1969, 58.

66 Levy, *Chavez*, 298.

67 Ibid.

68 Joseph Bensman and Arthur J, Vidich, *The New American Society* (Chicago: Quadrangle Books, 1971), 63–115.

sides. He and others continued to press for ongoing talks through Representative Burton, Governor Brown, Senator Tunney, and Senator Edward Kennedy (heir to his now dead brother's interest in the issue). In 1968–69, the Delano table grape growers tried to arrange negotiations with Chavez through various state officials: Allan Grant, chairman of the State Board of Agriculture and president of the California Farm Bureau; Earl Coke, state secretary of agriculture; Jerry Fiedler of the State Department of Human Resources Development; and Ronald Reagan, who offered the services of the State Conciliation Services, but Chavez rebuffed them. As the year passed, those critical of Chavez came to include AFL-CIO President George Meany, Harry Bernstein, labor correspondent for the *Los Angeles Times*, and many of the church groups supporting the UFW table grape boycott.[69]

It was through a working group appointed by the national Catholic Bishops' Conference that talks were resumed. Archbishop Timothy Manning of Los Angeles, and Bishops Hugh Donohoe of Fresno, Joseph Donnelly of Hartford, Connecticut, Humberto Madeiros of Brownsville, Texas, and Walter Curtis of Bridgeport, Connecticut, made up the group, with Monsignor Roger Mahoney of Fresno serving as local secretary and Monsignor George Higgins of Fresno as staff person. The climate of opinion did not seem favorable. Larry Itliong, assistant director of the UFWOC, predicted that the men who had offered to negotiate would "be subject to scorn from certain growers who are determined to destroy the union at all costs."[70] The bishops, nevertheless, met "endlessly" with growers, one to one, and in small groups of various sizes. Meetings were also held with Chavez and his staff. The bishops took the position that they favored trade unionism and collective bargaining, but at the same time that they had no formula for settlement and would not serve as mediators within the bargaining process. The growers, wary of confrontations and media events, mindful of Chavez's access to the general public, were gradually brought around, reassured by the bishops' willingness to sit in on the talks as observers. Talks were resumed, first in the Coachella Valley, then in the Delano region, with Chavez seeming to observers to take evident satisfaction

[69] National support for Chavez and the UFW was widespread in 1969, and yet, important criticisms began to be voiced by the UFWOC's supporters.

[70] "Breakthrough for la Huelga," *Time*, June 27, 1969, 18.

in the fact that it was the growers who had sued for peace, and that the authoritative conciliatory stimulus and presence was not provided by the administration of Governor Ronald Reagan, to whose officials the growers had repeatedly appealed, but by the church, outside the official legal process, as the farm labor movement had been, and wielding moral authority on behalf of society, the authority to which Chavez had so often sought to appeal.

It was perhaps fitting that the talks be resumed under their form of community sponsorship, since the success of the boycott did not rest upon any demonstration of equivalent strength between the two contesting sides. The structure of support grew gradually but steadily. In some cases, the union forces even managed to drive a wedge between groups traditionally allied within the local community.[71] Church groups and college campuses were used to recruit people to picket markets and leaflet neighborhoods. Letters were written to newspapers. Churches and labor unions provided space for shelter and office quarters. Political candidates and public officials were lobbied to publicly endorse the boycott. Railway union members identified scab shipments. Teamsters refused to handle hot cargoes. A variety of local "secondary boycotts" sprang up, directed against markets and chain stores that handled boycotted grapes, including picketing and sympathy strikes by butchers' unions. The mobilization of the community was significant. Table grapes are very popular, particularly in California, but at the same time a specialty food that any household could forgo without hardship. Awareness and support ran high. The boycott, as Lionel Steinberg ruefully noted, "literally closed Boston, New York, Philadelphia, Chicago, Detroit, Montreal, Toronto, completely from handling table grapes."[72]

With the bishops as the crucial link between growers and the union, the UFWOC managed to sign K.K. Larson, Bruno Dispoto, and the Bianco Fruit Corporation, and ended up signing all of the Coachella and Arvin growers. Tenneco Corporation, which had been buying up table grape

[71] Lawrence T. King, "The Unjolly Green Giant," *Commonweal*, July 28, 1967, 461; James Lipson, "Victory," *Labor Today*, May–June 1970, 5–6.

[72] Ronald B. Taylor, "The Boycott and the NLRA," *The Nation*, May 12, 1969, 591–93.

orchards at a rapid rate, also signed with the UFWOC.[73] Strike fever hit the orchards and ranches throughout the Central Valley. When it looked as if the Delano growers would crack too, the UFWOC geared up for the lettuce crop in Santa Maria and Salinas.

Simultaneously with the successful end of negotiations with the twenty-nine Delano table grape growers, the UFWOC received word that IBT truckers, who had just ended a strike against lettuce growers in the Salinas Valley, were contemplating moving in and organizing field workers there. On July 24th, it was announced that the Teamsters had signed thirty contracts with growers covering field laborers in the Salinas Valley. With the Salinas Valley growers' coordinated action, what was to be a successful strategy of containment emerged full force. Before turning to the Salinas Valley phase of the struggle between farm workers and growers, however, the UFW's ideology will be discussed since it was so important to the organization's ability to widen and nationalize the conflict.[74]

The ideology that animated the United Farm Workers cannot be separated from the person and philosophy of Cesar Chavez, his upbringing, his religious faith, and his experience as a community organizer with the CSO. Ideology in this situation meant a set of beliefs, infused with passion, which sought to transform the conditions of life of a large and distinguishable group of people. It is the yearning for the triumph of a cause, implying the satisfaction of deep moral feelings, which for Chavez had taken practical definition from his work with Ross.[75]

Chavez is not an intellectual, much less a systematic thinker. Yet he is a keen observer, the possessor of strong opinions, tersely articulate, and inclined to cast his experience, as his mother did, in the form of lessons,

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[73] "UFWOC and 2 Coachella Valley, California, Growers Sign 1st Labor Contract Covering Table Grape Pickers," *New York Times*, April 2, 1970, 29; "UFWOC and 26 Growers Sign Contracts," *New York Times*, July 30, 1970, 1; "Labor, 1970," *The Nation*, September 7, 1970, 162–63.

[74] Allan Grant, "The Farm Worker Needs More than Unions," *Farm Quarterly*, Spring Planning 1970, 56–58ff; Don Curlee, "Shattering Table Grape Experience in 1965–66," *Western Fruit Grower*, January 1966, 19ff.; Allan Grant, "California Grapes and the Boycott — The Growers' Side of the story," *California Farm Bureau Monthly*, January 1969, 8–10.

[75] Nicholas C. Mills, "The Whip and the Bee: Diary from the Grape Strike," *Dissent*, Spring 1973, 203–4.

dichos, sayings or maxims.[76] In this form, the form in which he communicated his beliefs to his staff and supporters, it is worthwhile to examine the main contours of his ideology.

First, Chavez is a firm believer in the amplitude of time, and the need for that prime virtue of the poor, patience. He understands the large motionless landscape of poverty. At the same time, the patience he favors has two faces. One is passive, or more exactly a willingness to endure in the sense of the suffering servant, for the sake of what is right. The second face is linked to action and struggle on behalf of the right. It may be said that if Chavez does not believe in the inevitability of justice, he does believe that efforts on behalf of justice, even if immediately unsuccessful, do always produce consequences in the amplitude of time.

A second lesson Chavez learned and taught was the need for power to accomplish justice. "I have always had, and I guess I always will have," Chavez said, "a firm belief that if you muster enough power, you can move things, but it's all on the basis of power. Now I seldom like to go see my opponent unless I have some power over him. I'll wait if it takes all my life."[77]

A third counsel was the sharp distinction, and indeed opposition, between power and violence. Chavez recalled for an interviewer that his mother was illiterate, but a firm opponent of violence in all forms, that his father never fought, that his own research into his family tree could uncover no example of a soldier. His own nonviolence, he indicated, was, like his mother's, something he took for granted. He asked for a nonviolence vote and pledge before the first organizing strike of NFWA. When it was pointed out to him that some left-liberal religious spokesmen defended ghetto rioting as insurgency necessary to change the system, Chavez responded: "I don't buy it. How in hell can you get a theologian to accept that one or two or three lives are worth giving up for some material gain? It doesn't stop there; it's just the beginning." Nor was Chavez willing to distinguish between levels of violence: he roundly condemned anti-Vietnam protesters who would resort to even a limited use of violence.[78]

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76 Levy, *Chavez*, 19.

77 Ibid, 109.

78 Bob Fitch, *My Eyes Have Seen* (San Francisco: Glide Publications, 1972), 72; see also Cesar Chavez, "Creative Nonviolence," *Catholic Worker*, June 1969, 4.

A fourth *dicho* is the need for faith. "Today I don't think," he reflected, "that I could base my will to struggle on cold economics or on some political doctrine. For me the base must be faith."[79] Since Chavez was a devoted Catholic, does this mean that for him the base was some sort of orthodoxy? Not exactly. Chavez seems to stand on a boundary between church and world, a boundary that runs through his own life and allows him to judge the world in terms of the church, and the church in terms of the world. Of the church, Chavez says that it was slow in coming to the succor of impoverished farm workers, in providing specifically for their needs from its spiritual and economic treasuries. The Protestants, through the Migrant Ministry, were in the fields first, and faithfully. Yet in a profound sense Chavez contends, the Church is its people, and it is therefore the people's duty to demand the rightful use of Church resources, and to protect those whose courage as clergy or laity endangers them with Church authorities. "We don't ask for more cathedrals," Chavez said in remarks prepared during his twenty-five-day fast. "We don't ask for bigger churches or fine gifts. We ask for its presence with us, beside us, as Christ among us. We ask the Church to sacrifice with the people for social change, for justice, and for love of brother. We don't ask for words. We ask for deeds. We don't ask for paternalism. We ask for servanthood."[80]

Several of Chavez's lessons for life can be grouped under the rubric, "The dimensions of solidarity." First, he was convinced that people could be bound together through mutual aid. "Once you helped people," he observed, "most became very loyal."[81] At another point, he said, "I think solving problems for people is the only way to build solid groups."[82] Second, he believed that if the people themselves define the major goals of an organization, they will make it theirs. Policy participation cements solidarity. Third, an organization should recruit its leadership from new, freshly committed members "at the bottom." "Fred taught me in organizing," he recalled, "never to go to the so-called leadership, but to go to the grass roots and develop leaders there. Then we had people who hadn't sold out.

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79 Levy, *Chavez*, 27.

80 Cesar Chavez, "The Mexican-American and the Church," *El Grito*, Summer 1968, 9–12.

81 Levy, *Chavez*, 111.

82 Ibid.

We got a whole crop of leaders just as we did in the union later."[83]Fourth, a fellowship in poverty had the positive advantage of freedom from attachment to material goods and gain, and the motive of fear of loss that possession brings. At the same time, the sacrifices required of the poor are real and immediate, and less subject to sentimental falsification.[84]

A second series of Chavez's *dichos* can be viewed under the heading of "Leadership." Chavez saw the office of leadership in terms of morality and psychology, as well as power and strategy. Chavez spoke of the place of both shame and moral emulation, the negative and the positive functions of conscience, in exercising leadership. A good way to get people to do something is to shame them into it, he observed. Conversely, he asserted that the leader should never ask the rank and file to do anything the leader would not do. The leader should be willing to make any sacrifice, including that of his life. Willingness to sacrifice is a direct measure of commitment to a cause, is intuitively perceived by the rank and file, and hence is a true index of a group's vitality. The leader should be willing to absorb the attacks of others, Chavez believed, noting shrewdly that it can provide excellent opportunities for organizing. Here Chavez approaches Sigmund Freud's observation that a society's "cultural super-ego" is made up of the ideals of its despised and slain leaders and heroes. Chavez surely gained much attention and support as a man of peace who walked at the brink, a friend of two assassinated national leaders, who drew upon himself threats and gunfire and the hazards of fasting. One of the signal advantages of the UFW was that Chavez was the only major personality to emerge from the California farm labor organizing struggle — the growers had no comparable spokesman or champion. As Chavez himself lamented, people are drawn to a fight because of its analogy to violence, and miss the meaning and moral drama of principled nonviolent struggle.[85]

Chavez was very sensitive to the problem of goal displacement and organizational sclerosis. From one point of view, this might be seen as a compensation for his always casual and sometimes arbitrary attitudes toward group administration. His appreciation of the problems of an unresponsive organizational bureaucracy, however, goes far beyond lip-service. Indeed,

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83 Ibid., 117.

84 Ibid., 5.

85 Cesar Chavez, "Letter from Delano," *Christian Century*, April 23, 1969, 539–40.

he sees the triangular relationship between group goals, leaders, and members as the ultimate form of the question of the meaning of the UFW. Organizations are always tempted, Chavez says, to substitute economic and skills resources for commitment, and to expect the former to generate the latter. They are tempted to seek early and easy resort to protection of the state: "When you get into legislation you're playing with a borrowed bat."[86]

If the UFW remains a meaningful organization, it will see that *la causa* is only part of the large cause of social justice. It will refuse to recline silently on its own accomplishments, but will become "a sort of in-group gadfly," he said. It will see social consciousness as an instrument, carrying a responsibility for its use on behalf of other poor and disadvantaged groups. Perhaps the images that Chavez represents might be characterized as a diamond rather than a triangle: group leaders, group members, a range of goals and values that always lie beyond immediate or complete attainment, and alliances with other organizations whose members and leaders share concerns of social equality. Chavez noted that he was a frequent defender of unions, churches, and other reform groups, because of the good things that only organized groups can accomplish. "I've always been kind of — well, the word is not 'religious,' but church-related. I dig it. And so whenever they [the Migrant Ministry] had any meetings, when I could I would slip away and go to their meetings and be with them. It was relaxing. Besides being good people they were very committed and very strong. It was a joy to be there."

As will be shown in the next chapter, UFW ideology was challenged by claims that Chavez and the UFW were leading a social movement, not a legitimate labor struggle, and were thus incapable of efficient administration of the contracts they had won in the San Joaquin and Coachella Valleys.

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86 Fitch, *My Eyes Have Seen*, 71.

Chapter 5

CONTAINMENT OF THE UFW

In late July 1970, even as Chavez planned a march through the Salinas Valley, more growers were signing with the Teamsters.[1] In a quick study of the situation, the UFWOC targeted InterHarvest, a part of United Fruit of United Brands, Freshpict, which was owned by Purex, and Pic'n Pac, owned by S. S. Pierce Company, for its counteroffensive. To make matters worse for the UFWOC, on July 27, 1970, the Council of California Growers announced that 80 percent of the growers in the Santa Maria area had signed five-year contracts with the Teamsters.[2] Chavez had promised staff members working in the East that they could come home once the table grape growers signed with the UFWOC. Chavez felt committed to his promise. That meant replacing them with inexperienced people if the UFWOC planned to redirect its boycott activities against United Fruit, Purex, and S. S. Pierce. The UFWOC was in a very difficult situation. Strikes had never been successful against the growers and the union's boycott apparatus had to be reconstituted.

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[1] "Salinas Agreement Ends Lettuce Strike," *Los Angeles Times*, July 24, 1970, I-3; "Chavez: One Battle Ends, Another Begins," *U.S. News. & World Report*, August 10, 1970, 49–51.

[2] "Chavez Protests Teamster Pacts," *The Sacramento Bee*, August 2, 1970, A2.

There were some hopeful signs for the UFWOC, however. Three thousand people participated in a four-day march through the Salinas Valley, at the end of which 659 Salinas Valley workers signed UFWOC authorization cards,[3] two hundred strawberry pickers in Santa Maria went on strike and pledged their allegiance to the UFWOC,[4] and the Franciscans, together with a number of other religious orders, loaned the UFWOC $380,000.[5]

The UFWOC considered InterHarvest an almost-perfect boycott target for several reasons. United Fruit had expended a great deal of money to get name recognition for the Chiquita Brand not only for bananas, but for others of its agricultural products. The reputation of United Fruit had been badly damaged, at least among leftists and some liberals, because of the company's association with repressive practices in Central America. And bananas not only spoil quickly, but pop when overripe and tightly packed, as in the hold of a ship. The UFWOC, as a consequence, thought to launch a boycott against InterHarvest first, but events overtook it. Spontaneous work stoppages, as well as some orchestrated by UFWOC organizers, broke out in Salinas, Santa Maria, and Oxnard, and growers started firing workers who refused to support the Teamsters. In Salinas, 150 Freshpict workers were fired for refusing to sign up with the Teamsters. The workers met and determined to go on strike, and so Freshpict became the UFWOC's first strike and boycott target. The strike spread to include several hundred workers employed by Freshpict throughout the Salinas Valley.[6]

IBT opposition to the farm workers' cause had been inconsistent. Teamster locals in San Francisco and Los Angeles had supported the grape boycott, but in 1970, the IBT set a clear course in aggressive opposition to the UFWOC.

A bit of history must be recorded to put Teamster behavior in perspective. Food processing is the industrial base of the Teamsters union in California. When railroads made large-scale overland shipment of canned

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[3] "Farm Workers March in Salinas Valley," *Los Angeles Times*, July 31, 1970, I-22; "Chavez March Against Teamsters," *The Sacramento Bee*, August 1, 1970, A6.

[4] Harry Bernstein, "1000 Berry Workers Join Chavez Strike," *Los Angeles Times*, August 12, 1970, I-3.

[5] "Catholic Group Hits Reagan, Murphy on Grape Strike," *The Sacramento Bee*, August 7, 1970, A3.

[6] "Farm Workers Strike Salinas Grower," *The Sacramento Bee*, August 8, 1970, A3; "Chavez Calls Salinas Farm Strike," *San Jose Mercury*, August 8, 1970, 29.

fruits and vegetables possible, corporate food processing entered its modern period. The figures for 1925 and 1961 tell a story of impressive growth. Peak employment in the vegetable and seafood canneries increased from 23,000 to 72,000, the value of the product from $181 million to over $1 billion.[7] The substructure of this formidable industry lay in the fields where, in the 1920s and '30s, radical unionists in the tradition of the IWW were active. Their activities disturbed the leaders of organized labor no less than the agriculturalists. The leadership of the State Federation of Labor viewed the threat of "soap-box" organizers with alarm.[8] In 1937, the organizing drive to bring cannery workers into the ranks of labor began. It was swift, energetic, and successful, ending with the signing of a contract between cannery owners and the AFL-CIO. The direct beneficiary of that contract was the California State Council of Cannery Unions, affiliated with the Teamsters. The contract covered 65,000 workers and was signed, on behalf of all the major processors, by California Growers and Processors Incorporated, a consortium that represented the united front of the canning and processing industry.[9] The Associated Farmers gave the historic event their blessing, approving the conservative record of the Teamsters Union and disdaining that of the radical Harry Bridges and the CIO. The Teamsters became the most powerful union in the state, and with a solid base among cannery workers and drivers, guarded their jurisdiction jealously.[10]

The Teamsters were favored by trends in corporate agriculture. Mechanization was driving many harvesters from the fields and into the ranks of the Teamsters, who claimed jurisdiction over any form of agricultural production or processing on wheels. But the Teamsters stopped short of organizing the crop-gathering farm worker, who was seen as migrant and poor, continually threatened by the advance of the bracero system. They were undesirables in whom the Teamsters had little interest. In October 1948, Teamster President Dave Beck, at a meeting called to plan the

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7 Ernesto Galarza, *Farm Workers and Agri-Business in California: 1947–1960* (Notre Dame and London: University of Notre Dame Press, 1977).

8 Cletus Daniel, *Bitter Harvest: A History of California Farmworkers, 1870–1941* (Ithaca and London: Cornell University Press, 1981).

9 Ibid.

10 Harry Schwartz, "Organizational Problems of Agricultural Labor Unions," *Journal of Farm Economics* (May 1941): 456–66.

organization of the fruit, vegetable, and produce industries, enunciated the following policy: "We want to go back to a certain point and organize . . . so that we can control [the produce row] from the packing shed . . . straight through the consumer." But, he said, "We will not organize field labor. . . . Our union will not accept that jurisdiction.[11]

They had good reasons for this. The Teamsters held contracts with grower–shipper associations whose members were also employers of field labor. Low wages in the fields cushioned the costs of packing, processing, transportation, and warehousing. Organization of harvesters would have hardened the bargaining position of the employers against the Teamsters when their contracts were renegotiated. The labor pool that served the fields and orchards remained notoriously fluid. Teamster drivers depended on peak hauls during the harvest. Field worker organization would only introduce another uncertainty, that of potentially concerted action by the harvesters. Besides, their wages were lower by a wide margin than those the Teamsters had won in the other branches of the food industry, offering little incentive for costly organizing campaigns. Mechanization was making steady inroads into harvesting, demanding more skilled labor at higher wages, and thus creating the conditions which the Teamsters required for profitable organizing. The practical approach for them was to assimilate only those operations in which the harvesters tended the machines and to wait for farm workers to become upgraded technically and, thus, a desirable group to organize.[12]

Teamsters developed the concept of preventive organization, arguing, "if cannery workers can organize the fieldworkers they can prevent any stoppage at the cannery,"[13] but up to the 1940s, prevention was approached negatively. It consisted in combatting rival organizations or keeping them firmly in the hands of the traditionalists in the AFL establishment. Left-wing unionism, however, never disappeared altogether. It held isolated footholds in packing sheds under contract with UCAPAWA, a CIO affiliate, and its successor, the United Packinghouse Workers of America.

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[11] David F. Selvin, *Sky Full of Storm: A Brief History of California Labor* (Berkeley: University of California, Institute of Industrial Relations, Center for Labor Research and Education, 1966).

[12] Ibid.

[13] Ibid.

Against this threat, the Federation served the interests of the Teamsters through the control of charters, suspension of locals, and a rigid insistence on bona fide unionism as defined by Haggerty's predecessors in the state federation.[14]

The Teamsters' views on braceros evolved from hostility through tolerance to accommodation. In March, 1954, Dave Beck said that because of "the dismal failure on the part of the Federal Government of policing the border . . . this country is being flooded with cheap labor." He regarded the traffic in illegals as a threat to "the economic health as well as the security of this nation."[15] In 1954, the International Teamsters sounded an alarm, predicting that the braceros would eventually move into the canneries and processing plants.

In 1954, however, it was evident that braceros were undercutting the UPWA and the NAWO but not the Teamsters, so the Teamsters began moving toward the industry's position on the issue. Absent from Teamster statements of that period were criticisms of the bracero operation. This set the Teamsters apart since criticisms were coming from all other branches of organized labor. In 1964, the reversal of Teamster policy was brought out into the open. Einar Mohn, director of the Western Conference of Teamsters, expressed the new view of the IBT's preventive strategy. Mechanization was proceeding at such a rapid rate that skilled workers would soon become "a backbone of the labor force." His union, he predicted, would move in on farm workers in "a big way."[16] In an article published in the *San Francisco Chronicle* on December 30, 1964, Thomas Harris, an analyst for the Western Conference of Teamsters, stated that the Teamsters had a direct interest in the prosperity of the agricultural industry. In related employment there were 500 field workers, several thousand drivers, and some 60,000 cannery and frozen food processing workers who were members of the Brotherhood. "Approximately one-quarter of the 170,000 Teamsters in California are directly dependent for their livelihood and well-being upon

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[14] Ibid.

[15] Kirke Wilson, *A Brief History of the Bracero System and Its Impact on Farm Labor in California* (Pasadena: American Friends Service Committee, Farm Workers Opportunity Project, 1967).

[16] Martin Roysher and Douglas Ford, "California's Grape Pickers Will Soon Be Obsolete," *The New Republic*, April 13, 1968, 11–12.

the prosperity of agriculture in CA. . . . [T]he abrupt termination of the bracero program confronts our agricultural economy with a crisis which jeopardizes the economic security of some 70,000 Teamsters. . . . As for now, many crops can neither be raised nor harvested solely by domestic labor."[17]

Three years before the Harris testimony was given, the Brotherhood had worked out a model for the reorganization of the agricultural labor force. This model was set forth in a contract negotiated in the spring of 1961 with the Bud Antle Company of Salinas, the largest lettuce grower and shipper in California. On its own acreage the company harvested 8,000 acres of lettuce and 1,300 acres of carrots, apart from what it produced on more than 3,000 acres of leased land. The company recognized the Teamsters as the bargaining agent for all persons employed by it in growing, packing, and harvesting agricultural commodities.[18]

The Bud Antle Company had used braceros for several years before signing the Teamster contract. The Teamsters agreed "to assist the company in obtaining foreign supplemental workers for the Company in its harvesting operations." In the contract, such supplemental workers were placed in a special category as follows: "Foreign supplemental workers are not subject to any term or condition of this agreement except as they may benefit from the wage provisions thereof and shall be governed solely by the applicable provisions of Public Law 78 and the Migrant Agreement of 1951."[19]

In a model of inter-institutional coordination, the system of administered labor, proposed by agricultural businessmen and facilitated by a willing bureaucracy, now had the official endorsement of a powerful union.

To Antle, the contract meant a guarantee that his company would "continue to have available . . . an almost limitless supply of good, stable, competent, and willing labor."[20] From the point of view of the IBT, it protected the job security of 450 permanent employees and Teamster members, by

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[17] Thomas Harris, "The Teamster Position on Bracero Issue," *San Francisco Chronicle*, December 30, 1964.

[18] A. V. Krebs, Jr., "Agribusiness in California," *Commonweal*, October 9, 1970, 45–47.

[19] Ibid.

[20] Ibid.

keeping domestic harvesters under the discipline of the Teamsters and the braceros under that of the U.S. Department of Labor. On the Teamster side of the inter-union fight shaping up in the Salinas Valley in 1970–71 were William Grami, the Teamster executive who had negotiated the jurisdictional pact between the IBT and the UFWOC in 1967, Ted Gonsalves from the Teamster Cannery local in Modesto, and Einar Mohn, Director of the Western Conference of Teamsters. For the growers there were Herbert Fleming, president of the Grower–Shipper Vegetable Association, and an InterHarvest vice president, William Lauer.[21]

The UFWOC asked George Meany for AFL-CIO endorsement of its actions, but Teamster President Frank Fitzsimmons called him and got him to put it off by saying that the IBT didn't want to be in that "mess" out there anyway. Indeed, the Teamsters, despite their recent contracts, did sound as if they wanted to protect their interests in processing, packing, and trucking agricultural goods. On August 8th, Bill Grami contacted the UFWOC and asked for a meeting. At the meeting between Teamsters Grami and Pete Andrade, head of the IBT cannery division, and UFWOC leaders Chavez, Dolores Huerta, Manuel Chavez, Jerry Cohen, and Richard Chavez, Grami offered to negotiate a new jurisdictional agreement with the UFWOC.[22]

The Teamsters said they were convinced that technological developments in agriculture would decrease the number of farm workers in the fields and increase the number of jobs within their jurisdiction. The two sides finally agreed to let a bishops' committee moderate discussions among the growers, the UFWOC, and the IBT.

Grami led the bishops and the UFWOC to believe that his strategy was to establish contracts with as many growers as possible, offering them terms more favorable than what growers elsewhere had gotten from the UFWOC, then to bargain with the UFWOC, get the jurisdictional agreement the IBT wanted, and try to persuade the UFWOC to accept the terms

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[21] "Is Chavez Union on Brink of Defeat?" *California Journal* 4 (September 1973): 297–98.

[22] Harry Bernstein, "Chavez Union and Teamster Talks Revealed," *Los Angeles Times*, August 7, 1970, I-22; "Teamsters Seek Pact with Farm Workers," *The Sacramento Bee*, August 9, 1970, A4.

of the IBT contracts with growers in exchange for promising to bow out and hand IBT contracts over to the UFWOC.[23]

Later events indicate that Grami did not have the power to deliver IBT contracts to the UFWOC, and it is not clear that Grami ever intended to do so anyway. He may have been using the situation in the Salinas Valley to establish himself in a powerful position so as to advance his own career within the Teamster organization, to score points against Einar Mohn, his immediate superior. According to insiders, Grami and Mohn were allied with different factions within the Teamster organization. Certainly, many of the decisions taken by the IBT in the valley reflect intra-organization Teamster intrigue more than they reflect an interest in the representation of farm workers.[24] The UFWOC did not mind leaving in-the-field processing jobs to the Teamsters, but they did not want to accept the terms of Teamster contracts with the growers, and they did not like or trust Grami and the IBT. Meanwhile, a temporary restraining order was issued by a local judge ordering a halt to picketing at Freshpict, and the San Francisco Court of Appeals turned down the UFWOC appeal of the Freshpict injunction.[25]

After the UFWOC appeal was turned down, Chavez, in a move calculated to win public attention and support, drove to Freshpict headquarters to be served the restraining order personally. The press, of course, had been informed. When Chavez arrived, the doors to the company's offices were closed, but people were inside because it was a regular business day. Chavez wrote a note and held it up to the glass: "I am here to be served the order. Cesar Chavez." Chavez waited and the cameras rolled. The police arrived, then Freshpict President Howard Leach. Leach refused to serve the order, being a party to the action. Policeman Larry Myers refused to serve the order, saying it was the sheriff's job. Finally, Leach got someone from a business nearby to serve Chavez. Leach was extremely discomfited, as was everyone else at Freshpict. As a final public embarrassment, UFWOC

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[23] "Teamsters Struggle with Farm Workers," *The Sacramento Bee*, August 8, 1970, A3.

[24] William H. Friedland and Robert J. Thomas, "State Politics and Public Interests: Paradoxes of Agricultural Unionism in California," *Trans-Action*, May–June 1974, 54–62.

[25] "Farm Workers Begin Salinas Picketing," *San Francisco Examiner*, August 9, 1970, A13.

attorney Cohen got Leach to officially witness the action by signing his name to a statement that the order had been properly served.[26]

As to the negotiations with the Teamsters, Chavez recalled:

> The Teamsters agreed we had jurisdiction over all field workers, and Grami agreed secretly to get out. We asked Grami to go to the ranchers who had signed up with the Teamsters to get them to negotiate with us.
>
> In turn, he asked that we hold up the strike for a six-day period so that the ranchers would be able to tear up their old contracts and get together on the new one.
>
> We also came to an understanding that if progress was being made during those six days, we would be willing to extend the strike moratorium another four days.
>
> If there were any disagreements over the pact, the dispute was to be referred to the bishops' committee.[27]

UFWOC attorney Jerry Cohen spoke of the many things that Grami and the IBT agreed to but would not publicly commit themselves to:

> There were a whole series of secret agreements that were signed that Grami would not put into the pact for political reasons.
>
> So those secret agreements went to the extent that the Teamsters committed themselves to giving us individual rescissions of their contracts and to helping us in organizational activities. They said they had guys who could help us, and they agreed to honor our picket lines.[28]

Once the jurisdictional pact was agreed to, the UFWOC contacted growers, intending to use the six-day moratorium as leverage in its talks with them. UFWOC negotiations with growers were in the hands of Jerry Cohen, Marshall Ganz, LeRoy Chatfield, and Dolores Huerta. Chatfield immediately — in the middle of the night — called the chairman of United Brands Executive Committee who told him that Will Lauer, United Fruit's vice president of Corporate Industrial Relations, would be given two weeks

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[26] Jacques E. Levy, *Cesar Chavez: Autobiography of La Causa* (New York: W. W. Norton & Co., Inc., 1975).

[27] Ibid., 337–41.

[28] Ibid, 341.

to settle with the UFWOC. Meanwhile, United Fruit had warned every union local involved in handling of bananas that they would be sued for not honoring their contracts, i.e., for supporting a UFWOC boycott. The UFWOC used the threat of a boycott against Chiquita brand to get InterHarvest to respond.

In the first meeting between the UFWOC and InterHarvest, the two sides disagreed on just about everything. LeRoy Chatfield had insisted on a meeting with Lauer immediately. Lauer had been called in the middle of the night and was in contact with Chatfield at 6 AM to arrange an afternoon meeting. Chatfield, Cohen, and Ganz were present. Lauer was under the impression that he was to meet with Chavez, but Chavez did not come to the meeting. Chatfield claimed that the Teamsters had withdrawn, but Lauer said he had no confirmation and insisted on meeting with Grami before proceeding with the UFWOC. The UFWOC wanted elections supervised by the bishops. Lauer agreed but said that InterHarvest wanted the Federal Mediation Service involved as well. The UFWOC asked Lauer to use his influence with the other growers. Lauer responded that there was "most passionate" opposition to the UFWOC and that InterHarvest would have little influence under the circumstances.[29] Marshall Ganz accused InterHarvest of bringing in the Teamsters in the first place. Lauer argued that the Teamsters had come to them. LeRoy Chatfield accused Lauer of lying, but Lauer maintained his position. Ganz complained to the InterHarvest representatives that workers were being intimidated by the company's supervisors. Robert Nunes, InterHarvest vice president, asked for details and promised to take care of the complaints. Lauer asked if the UFWOC would refrain from strikes and boycotts during negotiations. Cohen responded, "For a time." When Lauer asked, "How long?" Lauer claimed negotiations would take several weeks, perhaps two months. Ganz yelled, "That's a lot of bullshit! You signed with the Teamsters like, boom!" and that two months would take it past harvest time.[30] Cohen angrily needled Lauer saying that if the workers were involved in negotiations rather than Allan Grant, the Farm Bureau president, a settlement could be reached

[29] "Freshpict Foods, Inc. Negotiate with Chavez," *San Francisco Examiner*, August 23, 1970, A1; "Grower Breaks Ranks, Talks with Chavez," *Los Angeles Times*, August 23, 1970, A1.

[30] Levy, *Chavez*, 346.

quickly because both sides would know just what the contract really meant. Lauer responded that InterHarvest expected to use the Teamster contract as a basis for negotiations, arguing that growers had made substantial concessions to its workers. Cohen responded that such an idea was an insult and that the Teamster contracts were sweetheart contracts. Lauer asserted that the growers in the area were upset with the whole situation, that some were preparing suits against the Teamsters, and that the Teamsters would probably sue InterHarvest if United Fruit were to develop a relationship with the UFWOC.[31]

The strike moratorium and especially the status of the Teamsters' secret agreements brought widespread confusion. The three parties to the negotiations, the UFWOC, the IBT, and the growers, responded as follows: The UFWOC refused to accept the terms of IBT contracts with the growers. The UFWOC discovered that the contracts had actually been signed before wage rates had been set, and as a consequence felt that the Teamsters had sold out the workers. The UFWOC used this to organize workers, turning them against the IBT's "sweetheart contracts." UFWOC strength among workers, however, was not as solid as it had been in the Delano area. There were many militant pro-UFWOC workers in the area, but a significant percentage of them were migrants and green-carders and by longstanding experience proved to be "soft" support, likely to disappear once a strike began to drag out.[32]

The UFWOC disliked and distrusted both the Teamsters and the growers. Especially after its heady success in the San Joaquin and Coachella Valleys among the grape growers, the UFWOC leadership was militant and contemptuous of the Teamster and grower negotiators in face-to-face encounters with them. The exception was Chavez himself. Chavez had gone on a fast at the beginning of the confrontation with the Teamsters in Salinas, but after only six days had had to call it off because he was too ill to continue. He then left Salinas and went to a Franciscan retreat near San

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31 "Rival Growers Lawsuit May Halt Chavez Talks with Biggest Packer," *The Sacramento Bee*, August 29, 1970, A2; Harry Bernstein, "Suit Stalls Chavez-Growers Contract Talks," *Los Angeles Times*, August 29, 1970, II-1.

32 Harry Bernstein, "5,000–7,000 Strike in Largest Farm Walkout in U.S. History," *Los Angeles Times*, August 25, 1970, I-1; "Farm Workers Continue Strike Causing Shortages and High Prices," *San Francisco Chronicle,* August 26, 1970, 1.

Juan Bautista to recuperate.[33] Chavez was there during the moratorium. He received phone calls and consulted with those directly involved in the negotiations, but he had removed himself from direct negotiation. In retreat, Chavez did penance and tried to come to his own conclusions about the situation in Salinas. Chavez was dogmatic, but it would not be fair to say that he was self-righteous and arrogant. Chavez believed that the farm workers' cause was absolutely just and that it was a question of coming up with the right tactics to achieve the ultimate goals of *la causa*. He distrusted both growers and Teamsters and felt each was deeply implicated in the self-serving and unjust system that oppressed farm workers.

The growers' response was mixed. The day after the Teamsters and the UFWOC signed their jurisdictional pact, growers from El Centro and the San Joaquin and Salinas Valleys met with Grami and Monsignor Higgins. Herb Fleming, the president of the Grower–Shipper Vegetable Association and head of one of the largest Salinas companies, was to try to get power of attorney from all the growers with Teamster contracts before the moratorium ended. At the end of the moratorium, Lauer and Higgins reported that there were still very severe problems among the growers. Some growers wanted legal action taken, against the Teamsters if the IBT rescinded its contracts, and against the Teamsters and UFWOC for conspiring to destroy the harvest in the Salinas Valley. Some growers were offended by the role of Monsignor Higgins and the Catholic Church and did not want to bargain through a priest. As Lauer stated it, the InterHarvest–United Fruit position was this: "Even if we get a release from the Teamsters we still take a risk of a suit from other growers. We're willing to take that risk."[34]

The Teamsters, however, had not let InterHarvest out of its contracts with them. Grami tried to blame the IBT's failure to rescind its contracts on the growers. Some growers had threatened to sue the IBT if the IBT did not honor its contracts, or rescind all of them together. But growers hinted that the IBT had threatened to sue them for not honoring the contracts. Lauer confessed that he could not understand the Teamster position on

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[33] "Chavez Ends Fast, Must Rest Three Weeks," *Los Angeles Times*, August 17, 1970, I-2.

[34] "Freshpict Foods, Inc., Negotiates with Chavez," *San Francisco Examiner*, August 23, 1970, A1.

rescission.[35] Grami seems to have wanted to retain and exercise as much power in the situation as possible and that meant hanging on to the contracts and taking personal credit for having engineered them, or getting Einar Mohn to put his name to the rescission order and thus take the blame for "losing" them.[36] From Lauer's comments and Grami's excuses, the UFWOC inferred that Grami had gone to the growers' meeting and conveyed the message that the IBT would not let growers out of their contracts with the union. Certainly, there were many growers whose animus for Chavez and the UFWOC was very strong and who did not want to do anything that would advance their cause.

Meanwhile, a new kind of trouble was brewing in Delano. The union hiring hall, one of the most important parts of the AFL-CIO's contracts as far as Chavez was concerned, was creating problems. Workers who had been loyal to the union were given priority over other workers, while others, including green carders and relative newcomers who might have found work through labor contractors were passed over or placed low on the union's priority list. Employers did not like it, and neither did many of the workers. The UFWOC was blamed. Labor contractors and foremen fought hard for their positions, which had been eliminated under UFWOC contracts, creating more difficulties. A plethora of administrative problems arose and not a few injustices were done.[37]

> There was more confusion to add to the confusion at the hiring hall. The workers had to come there to get a dispatch. We weren't even smart enough to say, "Continue working, we'll give the dispatches after all this is over.
>
> There were thousands of people waiting, everybody wanted to get dispatched at the same time. No one could work because there were people just squeezed in there. We would be announcing all

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35 Levy, *Chavez*, ch. 4, "The True Teamster Position," 352–57.

36 Edward J. Walsh and Charles Craypo, "Union Oligarchy and the Grassroots: The Case of the Teamsters' Defeat in Farmworker Organizing," *Sociology and Social Research* 63 (January 1979): 269–93.

37 "Chavez and Growers Experiment with Social Justice," *San Francisco Examiner*, August 2, 1970, A16; "Farm Labor Contractors Support Teamsters," *The Sacramento Bee*, August 11, 1970, A6; "Farm Labor Fight Hurts All," *San Diego Union*, August 28, 1970, B10.

> day long, sign over here, and get dispatch cards over there. Then the hiring hall had to match the worker with the card already signed in the field. But there were so many cards, they couldn't find them . . . .
>
> Finally things started getting better, They sent me two guys from Salinas who knew what they were doing. After about three or four weeks, it was down to normal.[38]

Back in Salinas, workers loyal to the UFWOC were anxious to strike, but the UFWOC leadership feared that workers in the area were not well enough organized to sustain a long campaign. Both the AFL-CIO and the Church believed that the UFWOC could get contracts with the growers if it held off on a strike and continued negotiating with the growers. They had evidence that Fleming was working with the growers to try to resolve the situation, and Freshpict and InterHarvest were both involved in direct negotiations with the UFWOC, but despite everyone's efforts, on August 21, 1970, the Salinas Valley growers announced they would honor their contracts with the Teamsters.[39]

The next day, however, Lauer contacted the UFWOC and, in a meeting with Cohen and Huerta, announced that the Teamsters had rescinded their contract with United Fruit. Lauer said that United Fruit would immediately arrange for an election to be held among InterHarvest workers to democratically determine which union would represent them. Cohen and Huerta then refused an election and demanded recognition of the UFWOC based on the number of authorization cards the UFWOC had gotten IH–United Fruit workers to sign. Higgins mediated once again and finally a UFWOC workers' committee and the InterHarvest representatives entered into contract negotiations. Bishop Donnelley flew in from the East to assist in negotiations.[40]

At a big rally, the UFWOC finally called a strike, excluding United Fruit–InterHarvest as a target, of course. Chavez, still at the Franciscan retreat, was worried about the boycott. He had kept UFWOC organizers in charge of the grape boycott on the job by stalling their homecoming,

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38 Levy, *Chavez*, ch. 5, "Bedlam in Delano" (Richard Chavez recalls), 359–63.

39 "New Chavez Strike Looms in Salinas," *San Francisco Chronicle*, August 22, 1970, 4.

40 "Breakthrough for Farm Workers," *San Francisco Examiner*, August 28, 1970, 1.

but realized that sooner or later he would have to honor his promise to let them come home and replace them with new people to run the boycott of corporations with holdings in the Salinas Valley.

The strike continued as talks with InterHarvest broke down and as growers filed suits against the UFWOC to restrain the UFWOC from picketing, In response, the UFWOC began to organize a sit-down strike among workers. Scattered violence erupted and became more and more commonplace. The UFWOC's general counsel, Jerry Cohen, was badly beaten on the Hansen Ranch by a man later identified as a Teamster.[41]

John M. Fox, chairman of the board and chief executive officer of United Fruit, flew in from the East Coast to meet with Chavez. Chavez talked tough and kept the pressure on. On August 26, 1970, Chavez initiated a boycott against Chiquita brand. Bill Kircher called Chavez to appeal for a delay of the boycott while IH-UF was still negotiating, but Chavez refused. Chavez also extended the strike to cover Bud Antle's farm. Antle had had a union contract with the Teamsters for ten years.[42]

Just as InterHarvest and the UFWOC finally reached agreement on the terms of a contract, Lauer got word that Pic'n Pac had obtained a court order requiring InterHarvest to show cause why it should not be permanently enjoined from signing a contract with any other union. The AFL-CIO, however, interceded with the Teamsters on behalf of United Fruit and got the Teamsters to promise to release UF from its contract with them.[43]

To actually get the rescission of the InterHarvest–Teamster contract that the Teamsters had promised, John Fox had to fly to California, cool his heels in Einar Mohn's outer office, and in general "come begging for it."[44] United Fruit wanted very much to sign with the UFWOC. The Teamsters wanted to hang on to their contracts, but the AFL-CIO exerted pressure on the IBT to sign the rescission agreement. Mohn exacted his pound of flesh from Fox and then notified Pic'n Pac at which time Pic'n Pac filed suit

41 "Reports on Violence Mar Salinas Farm Strike," *The Sacramento Bee*, August 30, 1970, A6.

42 "Chavez Seeks Support in Lettuce Ban," *The Sacramento Bee*, August 27, 1970, I-A2.

43 "Chavez Signs Pact with Large Salinas Farm Inter-Harvest, Inc.," *Los Angeles Times*, August 31, 1970, 1.

44 Levy, *Chavez*, 395.

against InterHarvest. But finally, on August 30th, 1970, InterHarvest and the union reached agreement.

One of the main things the company wanted was for Chavez to "clarify" statements he had made to the press about United Fruit, especially with regard to the company's dealings in Latin America. Lauer freely admitted that United Fruit had a bad image in labor relations," but asserted that it had been working hard to change the company's image, especially in Latin America, and it wanted Chavez to make it clear to the press that United Fruit had negotiated a liberal contract and that the company was a friend to the UFWOC — in fact the only corporate grower friend the UFWOC had in the Salinas Valley. Chavez admitted that signing such a good contract with InterHarvest made it more difficult to organize other workers. In fact, Chavez hesitated to sign for fear that only InterHarvest would sign with the UFWOC.[45]

Local grower reaction against InterHarvest's signing with the UFWOC was strong. "They're from Boston," local growers were quoted as saying. "It's a conspiracy to put the local growers out of operation. InterHarvest has no interest in the valley, just in making money."[46] Some Teamsters and smaller growers started picketing InterHarvest the day after InterHarvest and the UFWOC reached agreement on the contract. InterHarvest was completely shut down for nine days. Other workers began to worry that if they were under a UFWOC contract, they would not be able to work.[47]

As more rough-looking Teamsters began showing up in the Salinas Valley, members of the San Francisco chapter of the Seafarers Union were called in once again to protect UFWOC organizers. Threats and random, petty violence, bomb threats, rock throwing incidents, broken windshields, flat tires, nails dropped in driveways, were the order of the day. In early September the UFWOC was holding nightly rallies with Chavez in attendance most of the time, and Kircher was meeting Einar Mohn. Growers charged UFWOC pickets with intimidating their workers and engaging in violence. The Citizens Committee for Agriculture held a rally of its own

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45 "Chavez Signs Pact with Inter-Harvest," *The Sacramento Bee*, August 31, 1970, I-A1.

46 "Salinas Lettuce Strike in 9th Day," *The Sacramento Bee*, September 1, 1970, A2.

47 "United Farm Workers Contract Causes Inter-Harvest Plant at Salinas to Close," *San Jose Mercury*, September 1, 1970, 1.

which attracted 2,500 people. Teamster caravans of men cruised towns, spoiling for a fight.[48]

With regard to the other growers being struck, the UFWOC, AFL-CIO officials, Monsignors Higgins and Mahoney, and Teamsters Mohn, Grami, and Andrade met with inconclusive results. On September 11th, however, L. H. Delfino, an artichoke grower in Watsonville, recognized the UFWOC. On September 15th, Bill Grami told the press that the Teamsters were signing new workers and considering chartering a statewide farm workers local. Two more growers recognized the UFWOC, however.[49]

On September 16, 1970, Superior Court Judge Anthony Brazil granted permanent injunctions against picketing to thirty growers, on the grounds that the situation in Salinas was a jurisdictional dispute between two unions.[50] The UFWOC was thus forced to switch from picketing to boycotting. The UFWOC had been trying to use the threat of a boycott to force negotiations with growers, knowing full well that its boycott apparatus was not strong and that it would have to recruit new boycotters.[51] On September 18th, however, Pic'n Pac (S. S. Pierce) announced it was ready to recognize the UFWOC if its workers chose to be represented by the UFWOC. On September 21, 1970, a delegation of Salinas Valley growers met in Sacramento with Assembly Speaker Robert T. Monagan (R–Tracy) to ask for legislation on farm labor unions.[52]

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48 "Teamsters Strike Grower Who Signed Farm Labor Pact with Chavez," *Los Angeles Times*, September 1, 1970, I-3; "Chavez Calls Salinas Atmosphere 'Vigilante,' " *The Sacramento Bee*, September 6, 1970, A2; "Chavez Asked Attorney General to Take Over Law Enforcement," *Los Angeles Times*, September 6, 1970, A-A; "Salinas Police Deny Chavez Charge of 'Breakdown in Law Enforcement,' " *Los Angeles Times*, September 7, 1970, I-1.

49 "Purex Seeking Negotiations with UFWOC," *San Jose Mercury*, September 5, 1970, 29; "Freshpict Foods, Inc., Negotiates with Chavez," *San Francisco Examiner*, September 5, 1970, 3; "2nd Major Grower Will Talk with Chavez," *The Sacramento Bee*, September 5, 1970, A2; Harry Bernstein, "Large Salinas Valley Grower Agrees to Recognize Chavez," *Los Angeles Times*, September 5, 1970, I-1.

50 Nicolaus C. Mills, "Eagle over the Lettuce Fields," *Commonweal* (November 6, 1970), 140–41.

51 "Temporary Halt on Boycott," *America*, April 10, 1971, 362.

52 "Farmers in Salinas Area Have Little Defense Against Chavez," *San Francisco Examiner*, September 21, 1970, 1.

As the Salinas Valley harvest neared its end, the UFWOC had managed to sign contracts with InterHarvest, Brown & Hill Tomato Packers, Freshpict, Delfino, Pic'n Pac, and D'Arrigo, but the harvest season ended with violence and the jailing of Chavez. On September 23rd, in Santa Maria, three UFWOC members were arrested for shooting a Teamster organizer. The victim, shot seven times, recovered. Chavez in a public statement condemned the violence. Chavez, having violated the court injunction against boycotting Bud Antle products, was arrested and ordered to remain in jail until he had notified all UFWOC supporters to stop the boycott against Antle. Chavez refused.[53] The UFWOC organized a jail vigil, Coretta King visited Chavez in jail and, at the request of Paul Schrade of the UAW, so did Ethel Kennedy. After he had been jailed for twenty days, the California Supreme Court ordered Chavez's release pending a review of the case and later ruled the injunction unconstitutional.

After the violence and confusion of the fall 1970 harvest, the AFL-CIO engineered talks with the growers and the Teamsters the following spring. The UFWOC declared a moratorium on the lettuce boycott while the sides talked.[54] After five months of negotiations, the UFWOC leaders were convinced that the negotiations were not being conducted with an eye toward settlement. By November, 1971, the negotiations had collapsed completely.

In 1971, the UFWOC felt compelled to respond to a series of legislative initiatives sponsored by the Farm Bureau and other allies of the growers, not only in California, but in Oregon, Washington, Idaho, Arizona, New York, and Florida. Jerry Cohen spent time in Oregon lobbying and organizing to defeat that state's bill. Chavez himself moved to Arizona to fight what he defined as repressive legislation there. He moved into the Phoenix barrio and went on another hunger strike. Senator George McGovern, campaigning for president, visited Chavez there as did Coretta King. Chavez ended a twenty-four-day fast at mass attended by 5,000 people, including Joan Baez and Robert Kennedy's son, Joseph. Then it was back to

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53 "Salinas Farms Quiet as Lettuce Boycott Begins," *San Jose Mercury*, September 22, 1970, 1A; Harry Bernstein, "Growers Open Drive Against Union Boycott," *Los Angeles Times*, September 23, 1970, I-18; "UFWOC Pickets as Farm Talks Cease," *San Jose Mercury*, September 24, 1970, 55.

54 Ron Harley, "Labor Unrest in the. Salad Bowl," *Farm Quarterly*, November–December 1970, 58–60.

California to try to defeat Proposition 22, a ballot initiative written by the Farm Bureau.[55]

In February, 1972, the UFWOC received its charter from the AFL-CIO marking its change in status from an organizing committee to a full-fledged union. The UFWOC became the UFW, the United Farm Workers union.[56]

By 1972, the political climate outside California was beginning to take its toll on the UFW in behind-the-scenes maneuvers.[57] Three of the five members of the NLRB were Nixon appointees, and the NLRB's new chairman, Edward B. Miller, was strongly anti-labor. The UFW legal staff anticipated a federal effort against the union emanating from the Board. Cohen in particular suspected that the Board would try to prove that the UFW represented workers in commercial packing sheds in which case the NLRB could rule that UFW workers came under its jurisdiction and could outlaw use of the secondary boycott. When the UFW got involved in a boycott of nine small wineries in the Napa Valley, NLRB general counsel, Peter Nash, went after the UFW on just such grounds. The UFW's response was to attack the Republican Party, putting especially heavy pressure on Jacob Javits and Edward Brooke, two Republicans it thought would respond. Once again, the UFW appealed to its friends. Senator Edward Kennedy charged the Nixon administration with using federal agencies to harass the UFW, as did the Congressional Black Caucus, Spanish-speaking congressmen, and other liberals. Nash dropped the charges in exchange for a UFW agreement to stop the boycott.

The Teamsters had supported Richard Nixon in his 1968 bid for the presidency, and in 1971 Nixon, it is believed, worked out a deal with Frank Fitzsimmons to get Jimmy Hoffa released from prison. But to assure his release, Hoffa agreed not to participate in union affairs for a decade. A

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55 "Crippling Farm Workers," *The New Republic*, September 16, 1972, 10; Ron Harley, "The Furious Controversy Over New Farm Labor Laws," *Farm Quarterly* (September 1972): 26–27.

56 "United Farm Workers Organizing Committee is Accepted as Member Union by AFL-CIO," *New York Times*, February 22, 1972, 22.

57 The Nixon Administration's first proposal for bringing farm workers under a national labor relations law was reported in: "The Wrath of Grapes," *Time*, May 16, 1969, 24. Chavez's response is recorded in: Cesar Chavez, "Nonviolence Still Works," *Look*, April 1, 1969, 52–57.

measure of the chumminess between the Nixon White House, the IBT, and Nixon's long-term backers, the growers, was the fact that the White House set up a meeting between Fitzsimmons and the Farm Bureau at a Farm Bureau convention in Los Angeles just after Nixon's landslide victory in 1972.[58]

On December 29th, 1972, the California Supreme Court ruled that the UFW's Salinas Valley lettuce strikes had been lawful and the injunctions against the strike invalid. The language of the decision stated that it was an "uncontradicted" fact that it was the growers who approached the Teamsters, and that it was "undisputed" that the Teamsters "did not represent a majority, or even a substantial number" of the field workers.[59] Nonetheless, three weeks later, the Teamsters renegotiated their contracts with a total of 170 major vegetable growers including those under contract in the Salinas Valley. It was several weeks before George Meany denounced the Teamster action.[60]

In December of 1972, it became clear to the UFW that the Teamsters would move in on the UFW's contracts with the grape growers in the San Joaquin and Coachella valleys when they expired in April 1973. On April 15th, all of the Coachella Valley growers but Steinberg and Larsen signed four-year contracts with the Teamsters upon the expiration of UFW contracts.[61] Steinberg & Larsen signed one-year contracts with the UFW that provided for a hiring hall run jointly by the UFW and the company involved. The UFW called a strike April 16th, and the growers went to court to get injunctions against the strike. In five days, 300 UFW pickets had been arrested. The Teamsters were in the valleys and once again there were reports of widespread intimidation and violence. On July 22nd, there were reports that UFW supporters in jail in Fresno County were beaten. A few

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58 Ronald B. Taylor, "A Romance Rekindled," *The Nation*, March 19, 1973, 366–70; "Campaign to Boycott Lettuce," *U.S. News & World Report*, August 28, 1972, 51; "Boycott Report," *The New Yorker*, September 2, 1972, 20–21.

59 Taylor, "A Romance Rekindled"; "Campaign to Boycott Lettuce," 51; "Boycott Report," *The New Yorker*, September 2, 1972, 20–21.

60 "Farm Labor: New Phase," *The Nation*, January 29, 1973, 133; Taylor, "A Romance Rekindled."

61 Shortly after the agreements were signed, a packing shed owned by one of the growers who had signed with the Teamsters was burned to the ground. "Again la Huelga," *Time*, May 7, 1973, 79.

days later, Kern County deputies beat UFW pickets at the Giumarra Ranch, using billy clubs and mace as a confrontation between Teamster guards and the pickets broke out. Two hundred and thirty pickets were arrested. In all, 3,589 people were arrested including 70 priests and nuns who were jailed. Meany called the Teamsters' actions "the most vicious strikebreaking, unionbusting effort I've ever seen in my lifetime. We're going to do anything that's necessary to keep that union alive."[62] On August 9th, the Teamsters agreed to meet with Chavez. A great deal of pressure had been applied by top AFL-CIO executives, clergyman, and others. AFL-CIO general counsel Al Woll and AFL-CIO Vice President Joseph Keenan were there, but in the evening of the first day of talks, twenty-nine Delano growers signed contracts with the IBT. This was after Fitzsimmons had given his word to George Meany that no more contracts would be signed until after talks were held to try to resolve the conflict. The next day Fitzsimmons and Einar Mohn repudiated the contracts signed by the Teamster area supervisors.[63]

Violence ensued again. Two UFW supporters were killed, one of them shot. On September 1, 1973, the UFW called off its strike and dispersed 500 farm workers to cities across the country to participate in a boycott. The boycott was not a great success, and so Chavez and the UFW tried other tactics as well. During this very difficult period, the potentially divisive issue of race was raised in an aggressive and forthright manner by UFW staffers as a weapon against the Teamsters. Cohen began referring to the Teamsters as a "white man's union."[64]

In the following year, in an effort to solidify their power, the Teamsters began to change their tactics. By 1973, the Teamsters had seven field offices in California staffed with well-paid, experienced personnel to handle grievances and to provide a wide range of services to Teamster members. Teamster organizers were also beginning to consult with workers before negotiating contracts for them. In 1973, workers covered by UFW contracts

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62 "More UFWOC Members Arrested in San Joaquin Valley," *New York Times*, July 23, 1973, 21.

63 "Teamsters Union Repudiates its Contracts with San Joaquin Valley Grape Growers," *New York Times*, August 11, 1973, 52.

64 "Chavez Pickets Again," *Christian Century*, January 17, 1973, 64; "Chavez Strikes Again," *Newsweek*, January 17, 1973, 64ff.

numbered fewer than 5,000, whereas Teamster contracts covered 55,000 field workers during the peak harvest season. More and more, workers who had supported the UFW and "in spirit" continued to do so, came to prefer the Teamsters because the Teamsters could assure them work.[65] This was the context in which the AFL-CIO and the Teamsters continued to try to hammer out an agreement. The months of September, November, December, January, February, March, and April went by, the boycott continued, and the see-saw battle between Meany and Fitzsimmons over the UFW dragged on, punctuated by news bulletins that announced first an agreement, then a lack of agreement, then mutual challenges and criticisms.

On November 27, 1974, the *San Francisco Chronicle* reported the following:

> Former Modesto Teamsters Union leader Theodore J. (Ted) Gonsalves has been sentenced to one year in prison for illegally soliciting and accepting payments from growers to combat the UFW's organizing drive in the Salinas Valley four years ago. Gonsalves pleaded "no contest" to five charges of violations of federal laws concerning payments from employers to union officials.[66]

In December, the UFW took another tack, filing suits against the Teamsters for damages totaling $700 million, and the burden of UFW legal action against the Teamsters became a significant factor in the contest between the two unions.

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[65] Walsh and Craypo, "Union Oligarchy," 269–93.

[66] "Teamsters Leader Gets Prison Term," *San Francisco Chronicle*, November 27, 1974.

Chapter 6

CRLA: BROADENING THE CONFLICT

A leading consequence of the Civil Rights Movement was the decision of the Kennedy Administration to make poverty a central issue in the 1964 elections. Drawing upon a surge of feeling for national unity in the wake of the assassination of President Kennedy, Lyndon Johnson was able to draw upon broad support, although support was confined in Congress rather strictly to the Democratic party, to win passage of the Economic Opportunity Act of 1964. The act was designed to gain national commitment, high visibility, and assured funding for a range of complex and experimental programs designed to provide assistance principally in the fields of education, literacy, health care, and legal services.[1] Since the principle of "maximum feasible participation" of the poor entailed a transfer of political power from established institutions such as city governments, schools, and welfare agencies, the War on Poverty was beset by controversy and struggle from the outset, and within one year the Vietnam War was gravely undercutting its funding.[2] The Office of Economic Opportunity (OEO)

[1] Sar A. Levitan, *The Great Society's Poor Law: A New Approach to Poverty* (Baltimore: The Johns Hopkins Press, 1969).

[2] John C. Donovan, *The Politics of Poverty* (New York: Pegasus Press, 1967) provides an excellent analysis of Johnson's ill-fated poverty program. Daniel Patrick

shunned assistance to unionization efforts, but the chances of unionization were perhaps enhanced by OEO programs and the climate in which they grew. The impetus for unionization, however, would have to come from below and from outside government. Still, the OEO programs reflected a distinct stage in the progress of the farm workers' struggle for recognition and equal treatment. Fuller recognition of farm workers' rights as citizens and workers was something effective legal advocacy might achieve. To this task, California Rural Legal Assistance (CRLA) addressed itself.

With the creation of CRLA the federal government lent support to the farm workers' cause. The government's reasons for getting involved were highly political, but with the funding of CRLA, the government became an active participant in the spread of conflict. Though financed by the federal government, CRLA was conceived by private citizens — middle-class, liberal reformers who wanted to practice "preventive law" on behalf of farm workers. The original proposal to fund CRLA was drafted by James D. Lorenz and Daniel Lund. Lorenz was a Harvard Law School graduate in his mid-twenties who was, at the time, an associate attorney with O'Melveny and Myers, a prestigious corporate law firm in Los Angeles. Lund, also in his twenties, was a Yale University Divinity School student who had been organizing farm workers in the San Joaquin Valley. Lorenz had gotten interested in organizing a legal services program to benefit farm workers through his involvement, dating from June 1965, with the Emergency Committee to Aid Farm Workers. He wanted to do a survey of laws affecting farm workers, but had received little encouragement and assistance with that project and so turned to a consideration of a legal services program instead.[3]

The origins of CRLA stand in marked contrast to the origins of the UFW. Lorenz was interested in the legal problems of farm workers but initially thought only of doing a survey and analysis of the problems. He was quickly caught in the legal services movement, but the need for such an activist program as CRLA emerged from a professional, even academic, interest. He was eager to make a mark on his profession. He compared working at O'Melveny and Myers to "leaving footprints in wet sand" and

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Moynihan presents the case against community action in *Maximum Feasible Misunderstanding* (New York: Macmillan Co.–Free Press: 1969).

[3] Interview with James D. Lorenz in CRLA files, dated 1966.

chose the farm workers' cause to make his mark because "this was an area for a social entrepreneur."[4]

CRLA appealed to national legal standards. The original plan, as formulated by Lorenz, was to uphold the legal principle of formal equality for farm workers who were not getting fair treatment under state and federal laws. CRLA was set up to help the rural poor in general, but its focus was the California farm worker. A particular interpretation of the principle of equal justice was pushed by CRLA's first deputy director, Gary Bellow, a legal scholar and practitioner of poverty law. Bellow had earned an LL.B. at Harvard Law School and a master's degree in criminal law at Northwestern University. Intent on becoming a criminal defense attorney, he had gone to work for the Public Defenders Agency in Washington, D.C., where his talents were recognized, and he was rewarded with an appointment as deputy director. In 1964 Bellow was named Young Lawyer of the Year by the Washington Bar Association.[5] In Washington, Bellow met Jean and Edgar Cahn, attorneys closely associated with the fledgling legal services movement and advocates of political activism on the part of attorneys. Through the Cahns, Bellow became interested in the use of lawyers to help organize poor communities. When the United Planning Organization, a nonprofit corporation in Washington, decided in 1964 to sponsor a legal services program, Bellow helped write their proposal for submission to the Ford Foundation. The UPO's Neighborhood Legal Services Program (NLSP) was eventually funded, and Bellow persuaded a graduate school friend, Earl Johnson, to join it as deputy director.[6]

With his interest in legal services and community organizing heightened, Bellow left the public defender agency and joined the UPO in April 1965. As the UPO's administrative and later, deputy director, he was responsible for training community organizers, coordinating organizational efforts, and building political strategies around such issues as welfare, housing, and community planning. His work led him directly into such activities as organizing tenant groups and conducting rent strikes. Through

[4] James Lorenz, Daniel Lund, and H. Michael Bennett, "Proposal to Aid Farm Workers and Other Poor Persons Residing in the Rural Areas of California," submitted to the Office of Economic Opportunity in March 1966.

[5] Biography of Gary Bellow, document in CRLA files.

[6] Interview with Gary Bellow in CRLA files, dated 1967.

this experience, Bellow became convinced that the full potential of legal services as an organizing tool was not being effectively used. NLSP seemed to be misdirecting its energies.[7]

A debate ensued over the interpretation and application of national legal values. The original concept behind legal services can be called the "service model." Here the idea was to increase the. availability of legal services to poor people so that they would be adequately represented within the political and economic system. Neighborhood legal offices would help individual clients with problems stemming from such things as landlord–tenant relations, wage garnishments, welfare, consumer credit, and family relations. This model assumed that the social order was fundamentally sound, with the legal services program solely a means of ensuring that grievances of poor people were heard by the proper authorities. This has been the attitude traditionally adopted by the American Bar Association (ABA) and other bar groups.[8] The service model generally led to extremely heavy caseloads as legal services offices tried to help every client who came through the door. But a more fundamental problem, as Bellow saw it, was that lawyers who were overwhelmed by heavy caseloads might fail to see areas where the law itself would have to be reformed before the poor could obtain equal justice.[9]

This realization led many proponents of legal services to endorse the "law reform model." This model emphasized rule change and the representation of groups of poor people as well as service to individual clients. Based on the example of *Brown v. Board of Education*, the objective of legal services under the law reform model was to establish broad legal principles and change administrative rules in a way that relieved the plight of poor people. The basic instrument for this purpose was the test case, which was

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[7] Jerome E. Carlin and Jan Howard, "Legal Representation and Class Justice," *UCLA Law Review* 12 (1965): 381–437.

[8] Edgar S. Cahn and Jean C. Cahn, "The War on Poverty: A Civilian Perspective," *Yale Law Journal* 73 (July 1964): 1316–1341; Edgar S. Cahn and Jean C. Cahn, "What Price Justice: The Civilian: Perspective Revisited," *Notre Dame Law Review* 41 (1966): 927–60; Jerome E. Carlin and Jan Howard, "Legal Representation and Class Justice," *UCLA Law Review* 12 (January 1965): 417; A. Kenneth Pye, "The Role of Legal Services in the Antipoverty Program," *Law and Contemporary Problems* 31 (Winter 1966): 220–21.

[9] Ed Cray, "Social Reform Through Law," *The Nation*, October 14, 1968, 368–72.

brought to attack unfair practices of government agencies or private companies and to establish new rights for the poor.[10]

In 1964–65, most lawyers in the legal services community espoused some combination of service to clients and rule change, with increasing emphasis on the latter.[11] Gary Bellow, however, believed that both models were inadequate. He came at the problem from a different perspective:

> I had been a criminal defense lawyer and then had gone to UPO where for a year and a half we did street organizing . . . I saw legal services as an arm of community organizing — that is, the lawyer was to function as part of a political effort — at times as a lawyer, at times as an organizer, an educator, teacher, and PR man.[12]

Bellow was particularly sensitive to what he saw as the shortcomings of the test case law reform model.

> The worst thing a lawyer can do — from my perspective — is to take an issue that could be won by political organization and win it in the court. And that is what Legal Services did all over the country. They took the most flagrant injustices — the ones that had the potential to build the largest coalitions — and they took them into the courts, where, of course, they won. But there was nothing lasting beyond that.
>
> If a major goal of the unorganized poor is to redistribute power, it is debatable whether judicial process is a very effective means toward that end . . . "rule" change without a political base to support it just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism. California has the best laws governing working conditions of farm laborers in the United States. Under California law workers are guaranteed toilets in the fields, clear, cool drinking water, covered with wire-mesh to keep flies away, regular rest periods, and

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[10] "Law Reform Should be the Top Goal of Legal Services," OEO Press Release 67-51, March 18, 1967.

[11] National Legal Aid and Defender Association, "1966 Summary of Conference Proceedings" (Chicago: National Legal Aid and Defender Association, 1966), 45.

[12] Bellow interview.

[12] Bellow interview.

> a number of other "protections." But when you drive into the San Joaquin Valley, you'll find there are no toilets in field after field, and that the drinking water is neither cool, nor clean, nor covered. If it's provided at all, the containers will be rusty and decrepit. It doesn't matter that there's a law on the books. There's absolutely no enforcement mechanism. Enforcement decisions are dominated by a political structure which has no interest in prosecuting, disciplining or regulating the state's agricultural interests. It's nonsense to devote all available lawyer resources to changing rules.[13]

According to Bellow, the lawyer should devote himself to the creation of a mechanism that would produce substantial and lasting change in government and in private behavior.

> This is inevitably a political as well as a legal problem. We can try to generate pressures on the parties involved by bringing public attention to the problem, or try to develop sanctions for noncompliance with existing laws, or attempt to develop institutional mechanisms to keep the problem visible. Sometimes we can achieve these results with a law suit. Sometimes a legal decision can produce conforming behavior. But, what happens when we go away — when the pressure abates? Legal victories can be so easily circumvented. If one avenue is blocked, five other alternatives remain open.

Bellow believed that when lawyers left the communities in which they were working, they should leave behind poor people who were organized to keep the pressure on. He felt that legal services should be based on the model of the "lawyer-organizer" who would provide legal services to the effort to organize poor communities. In cases where no organizational efforts were underway, this might mean that the lawyer would himself function as the organizer. Bellow explained how he thought lawyer-organizers should operate. Even though they might use test cases and other tools of the law reformers, their aims and methods would be quite different:

> If litigation is directed toward the different goal of organizing, the potentials and methods in pursuing a law suit significantly change.

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[13] Bellow interview.

> In such a context, law suits can consciously be brought for the public discussion they generate, and for the express purpose of influencing middle class and lower class perspectives on the problems they illuminate. They can be vehicles for setting in motion other political processes and for building coalitions and alliances. For example, a suit against a public agency may be far more important for the discovery of the agency's practices and records which it affords than for the legal rule or court order it generates. An effective political challenge to the agency may be impossible without the type of detailed documentation that only systematic discovery techniques can provide. It is on this base that coalitions and publicity can be built, and that groups can be organized to limit previously invisible authority.[14]

Early in 1966, Bellow decided to look for a position where he would be closer to the actual delivery of legal services and would have a better opportunity to try out his ideas. He joined CRLA.

Sargent Shriver, then head of the OEO, decided to support the CRLA proposal. In fact, CRLA was funded at 50 percent above the amount originally requested only two months after the proposal was submitted. The grant, however, was not without restrictions, obvious concessions to powerful conservative political opinion on the subject of legal services and the farm workers' movement. CRLA was prohibited from representing any unions. It was expressly barred from having an office in Delano, California, headquarters of Cesar Chavez's farm workers' organization and the center of the grape strike that began in 1965. And CRLA was also limited to representing persons earning under $2,200 per year, with an additional $500 allowed for each dependent.[15]

CRLA was chartered under California law in 1966, the year of the election of Ronald Reagan as governor of California. It was to serve as one of some 250 OEO legal service programs. Although the board of the California Bar Association was unwilling to support the proposal drawn up by Lorenz and Lund, the proposal was backed by a number of liberal, farm

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[14] Bellow interview.

[15] *Justice for the Rural Poor Through California Rural Legal Assistance* (Los Angeles: CRLA pamphlet, ca. 1967).

labor–oriented groups, including the Mexican-American Political Association, the Community Service Organization, and the Committee to Aid Farm Workers.[16] CRLA's thirty-three-man board of directors, selected by CRLA Executive Director James Lorenz, included Cesar Chavez, Larry Itliong, president of the Agricultural Workers Organizing Committee, Oscar Gonzales, president of Alianza de Campesinos and the United Farm Workers union in San Jose, Violet Abscher, a farm worker, and a number of urban liberals — Irving Lazar, executive director, the Newmeyer Foundation; Abraham Levy, an attorney for the Agricultural Workers Organizing Committee; Cruz Reynoso, assistant counsel to the Fair Employment Practice Commission; Fred Schmidt, professor at the Institute of Industrial Relations, University of California, Los Angeles; Carlos Teran, judge of the Los Angeles Superior Court: and Gordon Winton, state assemblyman from Merced, California. CRLA's original board clearly represented organized farm workers and urban liberals.[17]

CRLA was able from the outset to offer premium legal services at low cost. Of its thirty-two attorneys serving in the home office and nine rurally located field offices, twenty-four graduated with honors, and twenty made law review. All of the nation's most prestigious law schools were represented on its staff. Whereas the average per-hour fee of associate attorneys in California in the late 1960s was $25, the "fee" or cost of CRLA attorneys, including overhead, was $10.43 per hour. The agency handled, in the late 1960s, 15,000 cases per year, approximately one-third concerned with consumer and employment problems. Clients were not charged fees, but had to meet an eligibility standard.[18]

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[16] Resolution adopted by the Board of Governors of the State Bar of California, April 21, 1966.

[17] Harry P. Stumpf, *Study of OEO Legal Services Programs: Bay Area, California, (OEO Contract 4096)* (September 15, 1968), vol. 2, 59.

[18] *Justice for the Rural Poor Through California Rural Legal Assistance*; CRLA, "Report to the Office of Economic Opportunity and CRLA Board of Trustees on Operations of the California Rural Legal Assistance, May 24, 1966–November 25, 1966, In Support of Application for Refunding," (December 6, 1966); CRLA, "Report to the Office of Economic Opportunity and CRLA Board of Trustees on Operations of the California Rural Legal Assistance, December 1967–September 1968, In Support of Application for Refunding," (October 1968); CRLA, "Narrative and Budgetary Portions of Refunding Request to the Office of Economic Opportunity for Grant Year 1970."

A number of things contributed to the eventual success of CRLA: one of the most important reasons for CRLA's success was the quality of the staff, but its scope of operation was vital as well. From the outset, Lorenz intended to establish a statewide operation. This structure dramatically differs from the typical neighborhood firm, or the neighborhood firm with university connections envisioned by the Cahns.[19] CRLA's statewide base insulated it from local pressures and the fact that Lorenz chose CRLA's initial board of directors afforded the agency independence from local bar associations. Lorenz argued that "any rural legal service program, if it is to be effective, must find some way of insulating its attorneys and clients from local community pressure."[20]

In his original proposal, Lorenz outlined his projected organization. The central office was to be staffed by an executive director, a deputy director, a community relations director, researchers, and various others including bookkeepers, legal secretaries, and clerk typists. The research staff would, at first, consist of one research supervisor, one attorney editor, one research aide, and one secretary. Lorenz proposed to staff the regional offices with one experienced directing attorney, one attorney, and four or five non-lawyers, community workers, investigators, legal secretaries, and clerk typists.[21]

The research staff would study long-range problems of the poor, and would also provide a vital service to the regional offices by writing appellate briefs, drafting legislation, preparing special forms and documents, and formulating "broad, but intricate, strategies" to aid the rural poor.[22]

Links to the client community were to be forged by bilingual community workers. They were to provide "valuable information on the problems, organization, and leadership" of the client community, and to acquaint the poor with the "programs and potential of CRLA."[23] The community workers, "most of them former farm workers, all of whom were well

[19] Harry P. Stumpf, *Lawyers and the Poor: A Comparative Case Study of Bar-Program Relations in Two Counties (OEO Contract 4096)* (September 15, 1968), vol. 2, 226–315.

[20] Lorenz interview.

[21] Lorenz interview.

[22] Lorenz interview.

[23] Lorenz interview.

acquainted with the problems and politics of rural California," were to act as investigators, translators, limited advocates, and middlemen to public agencies.[24] In effect, community workers were the link between CRLA's middle-class lawyers and the poor community. The community workers consisted largely of members of the United Farm Workers union.

Citizens' Advisory Committees were set up in each of the regional offices as well. These indigenous groups were to act as sounding boards for complaints, to provide information about the community and to consider office policies "peculiarly affecting the client community," especially in such areas as case load limitations, office locations, and hours.[25] Further, the Advisory Committees would aid in community education and attempt to bring poor people together around issues that affected them in common. Most of all, Citizens' Advisory Committees would help to satisfy national OEO's requirement of maximum feasible participation of the poor.

CRLA also intended to draw on the law schools to further its objectives. Law students and professors were to be a source of professional manpower outside the program. And it was hoped that they would create an atmosphere conducive to the teaching of poverty law within law school, which in turn would create interest in the practice of poverty law and provide a pool of qualified and informed lawyers from which legal services could draw their staffs. Individual legal scholars from various law schools became consultants to CRLA on specific cases or legal problem areas, and law professors were encouraged to assign pertinent research problems as paper topics for their classes.[26]

Soon after CRLA's original funding proposal was submitted to the OEO in March, 1966, the board of governors of the State Bar adopted a resolution condemning the proposal. The State Bar objected to CRLA's departure from "the concept of neighborhood legal service offices established and operated by residents of local communities," and CRLA's intention to offer "its services to political and economic groups as well as individuals." One strongly worded paragraph of the resolution read: "The proposal is basically one of militant advocacy on a state-wide basis of the contentions of one side of an economic struggle now pending. Ostensibly designed to

[24] Lorenz interview.
[25] Lorenz interview.
[26] Lorenz interview

furnish only legal services to the poor, the proposal encompasses the furnishing of political and economic aid."[27]

Clinton Bamberger, national director of the Office of Legal Services, commented at the time that "advocacy of the contentions of one side of an economic struggle now pending" was about the best one-line definition of the War on Poverty that he had heard. Sargent Shriver, director of the OEO, called the president of the State Bar, John Sutro:

> And Mr. Sutro said to me that these lawyers might be useful to and used by the poor in suits against the growers. And I said, well, I thought that was quite possible and that, in fact, that was the point, that what we were trying to do was give them help which would equalize or help the situation. And I said to him then what did he protest about that? I said, "Look, I'll make an agreement with you. If you will agree that no lawyers in California will represent the growers, I will agree that no legal service people will represent the pickers." And that was the end of the argument.[28]

Only the Santa Clara Bar Association recognized CRLA, six local bars took no stand, and the Stanislaus County Bar Association brought suit to enjoin CRLA from opening an office in Stanislaus County. The Stanislaus County Bar Association charged that it was illegitimate for CRLA to practice law as a corporation, that CRLA intended to hire non-attorneys to solicit business; and that CRLA was operating contrary to the intent of Congress in adopting the Economic Opportunity Act in that CRLA was not locally sponsored or subject to local controls. A temporary restraining order was passed, but the Bar's application for the injunction was denied.[29]

The Fresno County Bar Association originated an alternative legal services program, Fresno County Legal Services (FCLS), under the perceived threat that CRLA would otherwise locate one of its regional offices in Fresno County. FCLS policies were set by a governing board,

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[27] Resolution adopted by the Board of Governors of the State Bar of California, April 21, 1966.

[28] Office of Economic Opportunity Commission on California Rural Legal Assistance, Inc., *Hearings*, Reporter's Transcript (April 26, 1971) (hereinafter cited as *Commission Hearings*).

[29] Stanislaus County Bar Association v. California Rural, Legal Assistance, Inc., Stanislaus County Superior Court No. 93302, filed October 7, 1966.

whose members were principally drawn from the county bar association. It would not be unfair or inaccurate to say that FCLS was generally responsive to the values and goals of the county bar association, and more generally to the "influentials" in the civic life in Fresno County. The Fresno County Bar Association funded FCLS with the help of some federal funds.

In keeping with its orientation to traditional and private-sector values, FCLS relied upon the initiative of individual clients in seeking out the program's services. Allies of FCLS have included the conservative Fresno County Bar Association, the California state government administration of Governor Ronald Reagan, various members of the Fresno community, and the dominant organized interest groups of Fresno County, which are oriented to agricultural interests.

FCLS literature proclaims the organization's commitment to "the traditional time-tested American methods of organized local community action to help individuals, families, and communities help themselves."[30] FCLS took individual client-initiated lawsuits. With almost no exception, class action suits were not developed.

The organization's views on poverty and the law reflect traditional values concerning individual responsibility and initiative, client–attorney relationships, private property, and the entrepreneurial practice of the law. Local control, through the local bar association and FCLS's governing board, have meant that the larger social reform objectives of OEO Legal Services have been essentially ignored — even though FCLS adopted the coloration of reform through use of "Legal Services" in its title.[31]

CRLA did, however, negotiate an agreement of understanding with the California State Bar Association in 1967 that served as a basis for local bar association representation on CRLA's board of directors.[32]

CRLA's planners had two basic ideas: (a) that the law firm had to be organized on a statewide basis to insulate it from local community pressures and (b) that, anticipating political opposition, CRLA had to provide the

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30 Harry P. Stumpf, *Study of OEO Legal services Programs*.

31 Harry P. Stumpf, *Lawyers and the Poor*, vol. 2, 226–315.

32 Letter from A. S. Halsted, Jr., for State Bar of California, to James D. Lorenz, Jr., Director, CRLA, June 2, 1967; Response from James D. Lorenz, Jr., June 15, 1967.

highest quality legal representation and impeccable internal administrative, particularly budgetary, procedures in order to survive.[33]

By January 1967, nine CRLA offices were in operation up and down the state of California along with poor people's advisory committees to identify potential problems, act as a liaison with the poverty community and minorities, and to protect CRLA against those who might attack it in the name of the poor. CRLA quickly became embroiled in local political intrigue and opposition. In Marysville, for example, the local director of the Welfare Department, Mary Quitoriano, had been appointed by the local Board of Supervisors with the understanding that she would cut back on the welfare department budget. Quitoriano did indeed make cuts, but the methods she used were not within the letter of the law. CRLA's Marysville staff filed twenty-eight fair hearing appeals with the State Department of Welfare on behalf of clients who had been denied benefits by the Welfare Department. The first hearing upheld CRLA's client. Quitoriano appealed the decision. When the Sutter County Taxpayers Association got wind of the ruling and appeal, it convinced the Board of Supervisors to hire an attorney to represent Quitoriano, and persuaded the supervisors to write a letter to Governor Reagan charging CRLA with "harassment" of county officials and urging Reagan to cut off CRLA's funds. William P. Clark, Jr., wrote back to the Sutter County Board of Supervisors that the governor did not have the authority to cut off CRLA's funds, but reassured it that Reagan would keep an eye on CRLA and do what he could at the proper time. A measure of CRLA's competence and the need for its services is reflected in the fact that twelve of the first thirteen rulings made by the State Department of Welfare went against Quitoriano.[34]

Publicity over the cases caused Reagan considerable embarrassment. At a state Republican convention in Anaheim, on September 24, 1967, Reagan brought up the Sutter County Welfare Department situation, charging that CRLA had used "taxpayers' money [to harass] a county welfare office

[33] Bennett interview.

[34] "Reagan's Aide Pledges Look at Legal Group," *The Sacramento Bee*, August 9, 1967, A4.

to the point where that county's board of supervisors [had] to hire a lawyer at $35 an hour to protect its county welfare director."[35]

> At an October 3rd press conference in Sacramento, Reagan was asked by newsmen how he could construe CRLA's welfare appeals as "harassment" when his own State Department of Social Welfare had thus far decided 12 out of 13 appeals in favor of CRLA's clients. It would seem, said the reporter, that Reagan's quarrel was really with his own State Welfare Director.[36]

At the local level, CRLA also devoted attention to devising situations whereby the consciousness of the rural poor might be engaged and raised. When it became evident that a Bakersfield water company — a privately owned utility — would lose litigation to CRLA's clients, Chicanos who had been forced to pay virtually extortionate rates for non-potable water, while the same company provided pure water at lower rates to Anglos in the same city, the firm sought an out-of-court settlement. CRLA agreed, as long as the settlement included compensation of all Chicano users of the system and the company arranged and appeared before a mass meeting of the Chicano community in a large auditorium, explained the unjustness of the policy, apologized, and pledged never to resume the policy.[37]

CRLA was not content to fight its battles for the rural poor at the local level. CRLA's strategy was to exploit the possibilities for legal confrontation. A prime target was Republican Governor Ronald Reagan and his administration. In the summer of 1967, CRLA brought suit against the Reagan Administration to block the governor's cuts in California Medicare matching funds. The suit was filed in late August and decided in CRLA's favor by the California Supreme Court in November. The suit resulted in the restoration of a quarter billion dollars in state expenditures for the poor in California. The Governor received a considerable amount of unfavorable publicity in relation to the suit. In August 1967, Reagan had announced that the Medicare cuts were necessary because the program was running

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[35] Carl Greenberg, "Reagan Calls War on Poverty Spending in State Failure," *Los Angeles Times*, September 24, 1967, A1.

[36] "Reagan Backs Welfare Director, Hits CRLA," *Appeal Democrat* (Marysville–Yuba City), October 3, 1967, 1.

[37] CRLA, "Rural California: Hope Amidst Poverty," (San Francisco: CRLA document, 1969).

a projected deficit of $200 million. As it turned out, the program ran a $50 million surplus — after the cuts were restored.[38] CRLA made much of this, asserting that it revealed the basis for Reagan's policy in class bias, though CRLA was more tactful in putting it to the press.

Also in the summer of 1967, CRLA filed suit against the U.S. Department of Labor to get the department to fulfill the requirements of the law with regard to the importation of Mexican braceros. For many years, California growers had "imported" Mexican workers, called braceros, and then sent them back to Mexico after the harvest. This practice was halted by Congress in 1964, when it repealed the law under which the bracero program had been authorized. This action did not, however, end the use of the labor of Mexican nationals. There were several complicated ways in which Mexicans could work in California fields; one of the least complicated was authorized under the Immigration and Nationality Act. The secretary of labor could promulgate regulations under which the Bureau of Employment Security (BES) could authorize the issuance of temporary entry permits to Mexican farm workers, after determining that a sufficient number of domestic workers were not available at fair pay and working conditions. Mexican workers who entered the U.S. under such authorizations continued to be known as braceros.[39]

The UFW was concerned about the potential use of these braceros as strike-breakers. and barriers to union organization. Moreover, U.S. workers were being hurt by the growers' deliberate attempts to foster a shortage of domestic workers, and thus meet the legal criteria for certification of braceros. The growers often exercised their influence to deny housing to local workers, to pressure the county welfare agencies into cutting off benefits for unemployed workers, and also used other devices to drive unemployed farm workers out of their areas.[40]

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38 "Why Reagan's Mad," *The New Republic*, October 21, 1967, 13. The suit against the Reagan Administration and the U.S. Department of Labor was *Morris v. Williams*, 67 Cal.2d 733, 63 Cal. Rptr. 689 (1967). Don Harris, "Reagan Hit for Call to Ignore Court," *Los Angeles Citizen*, September 15, 1967, 1.

39 "Braceros in California," CRLA press release, September 19, 1967.

40 "Reagan Backs Prison Labor in Tulare Visit," *The Bakersfield Californian*, October 5, 1967; Harry Bernstein, "Few on Welfare Rolls Found for Farm Jobs," *Los Angeles Times*, October 9, 1967; "Braceros Use is Eyed if Harvest is Late," *The Fresno Bee*, May 12, 1967.

The union's concern meshed well with CRLA's sense that there was a need for a thorough exposé of conditions in the fields, as well as for a big dramatic case. Accordingly, early in 1967, CRLA lawyers began to gather evidence to attack the problem of braceros. It was clear to CRLA that most growers were not meeting the minimum standards outlined in the regulations. (Indeed, some CRLA lawyers, according to Gary Bellow, found it difficult to believe that the regulations were meant to be enforced at all, since they proposed standards that were known to be far beyond the level of the growers' practices.)[41] If the BES could be convinced that the growers were failing to meet the standards, it would be forced to deny any requests for certification. The Modesto office of CRLA made an agreement with G. E. Brockway, BES regional administrator, that Brockway would not act on any certification requests until he had notified CRLA. The lawyers would then have a chance, during the three-week period that the BES needed to check on growers' compliance with the law, to present their evidence of growers' failures to meet legal standards.

Requests for Bureau of Employment Security certification were officially made by the California Department of Employment, after it had evaluated growers' requests. In the late summer of 1961, the most urgent requests were coming from the tomato growers in the central part of the state, an area covered by CRLA's Modesto and Salinas offices. One Department of Employment request, dated September 6, was refused by BES for lack of supporting evidence. But on September 8, for reasons that are not clear, the regional administrator approved another application for certification for 8,100 braceros — without any supporting evidence and without notifying CRLA.[42]

This sudden action provoked a swift reaction from CRLA. The next day, Sheldon Greene of the Modesto office and Bob Gnaizda of the Salinas office went to court on behalf of nine farm workers who were not union members, but were sympathetic to Chavez, and filed suit against Secretary of Labor Willard Wirtz, claiming that the Labor Department had violated its own rules by making the certifications. They were granted a temporary restraining order, with a full hearing set for the 12th. In the Department of

41 Bellow interview.

42 "California Expects to Get by This Year Without Braceros," *The Fresno Bee*, September 27, 1968, B4.

Labor, from the secretary on down, there was a good deal of concern about the suit and the department entered into settlement negotiations.[43]

The CRLA lawyers were then faced with a very difficult decision as to whether they should settle. Their problem was compounded because Gary Bellow, deputy director and the lawyer closest to Cesar Chavez, was on the East Coast. He participated actively in the decision via telephone because the handling of this case went to the heart of CRLA's philosophy and its relations with the UFW. The issue was clearly marked out. The union's position was conveyed to the CRLA's lawyers by Dolores Huerta, UFW deputy director: go to court and get everything into the public record, even if that meant losing the court case. The CRLA lawyers involved in the case were split — all but Greene and Bellow wanted to settle. Bellow remembers that there were strong arguments on each side, as the issue was debated within the CRLA.[44]

The arguments for the union concentrated on the effect of the case on organizing efforts. First, it was important to make Wirtz look bad; only if the situation were highly polarized would there be public pressure on Wirtz to tighten up enforcement of the labor laws — not only about the use of braceros, but about the situation of several other classes of Mexican workers in the U.S. It was more important to Chavez to keep the situation polarized than to stop this particular group of 8,100 braceros. Moreover, the organizing effort would be hurt if it looked as though the U.S. government would win the workers' battles for them. Chavez was also suspicious of a settlement because he feared that it would not be effectively enforced.[45]

On a more positive tack, the union people argued that the suit itself presented great organizational potential. When the suit came to a hearing, busloads of workers would come in as witnesses to describe conditions in the fields. The experience would help to break down the workers' isolation, give them confidence, and advertise the efforts of the UFW.[46]

A divisive element in the argument was the union's questions about who was in charge here. The CRLA people were lawyers, but they were supposed to be serving the needs of farm workers. Since it was the workers

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43 Ortiz v. Wirtz, No. 47803 (N.D. Cal. 1967), filed September 8, 1967.

44 Bellow interview.

45 John Osborne, "The Poor Betrayed," *The New Republic*, February 13, 1971, 13–15.

46 Ibid.

who had to live with the consequences of any action, the union argued that it was their judgment of their best interests that should prevail. Moreover, Chavez believed that they would in fact win in court.[47]

The lawyers concentrated on their professional position in making their arguments for settling out of court. Most important to them, the affidavits, gathered that summer, describing conditions in the fields, were technically deficient. Almost all of them were too imprecise to withstand attack by a clever lawyer. The CRLA lawyers felt that they would be personally implicated in the presentation of a case with such weak evidence. They believed that they could get a good settlement since the Labor Department would not be aware of their doubts, and that such a settlement would be enforced.[48]

There was also a difference of opinion about tactics. Bob Gnaizda thought that a favorable settlement would be a good organizing tool. It would generate a great deal of favorable publicity and would show the farm workers that even the Labor Department now acknowledged their strength. The lawyers pointed out that there was more to lose than just one case. CRLA's leverage with the Labor Department and with other powerful groups would be sharply diminished if they lost on such a direct challenge. As Bellow admitted, "Our aura of invincibility was important."[49]

One of the lawyers' most powerful arguments concerned the welfare of the clients. The best interests of those individuals were more likely to be served by a reasonable settlement than by a losing court fight. And the lawyers' first responsibility was to their clients, not to the political potential of the suit.[50]

Bellow pointed out that other factors as well were important to the lawyers. The divided responsibility for the suit had triggered tensions between Sheldon Greene, who had been in charge of the investigation, and the lawyers at the Salinas office, who were now complaining about the quality of the evidence that had been gathered. Greene believed that the case was good and should go to court, but the defensive overtones of his response made his argument less convincing than they might have been. This general air of tension, added to great uncertainty about the outcome,

47 Bellow interview.
48 Bellow interview.
49 Bellow interview.
50 Bellow interview.

led people to want a quick end to the haggling. This attitude was evident in the reactions at CRLA's central offices. Dan Lund and Mickey Bennett wanted to contribute, but were frozen out of the decision-making because of the technical way in which the dispute was presented. Jim Lorenz, who was a lawyer, both understood the issues and was deeply torn by the disagreement. He used his energy to try to mediate within the organization.[51]

Bellow was the only lawyer who effectively espoused the union's position. He dealt with the other lawyers basically in lawyers' terms. He argued that CRLA *could* win in court, that the case as a whole was much stronger than the individual affidavits. He further argued that the union was the real client in the case, not the individuals. Bellow recognized the force of the argument he was opposing, however; he believed that no case should be "politicized" without the client's consent, or when such an action could work against the client. Bellow also worked to counteract the lawyers' worries about loss of credibility. He argued that the institutional position of CRLA depended on avoiding the label of "compromisers." The only way CRLA could work would be if "we were the people who were not afraid."[52]

CRLA decided to accept an out-of-court settlement. Bellow finally gave in to the other lawyers' concern about the quality of their case and their clients' welfare and then directed CRLA's efforts toward a good settlement.

CRLA was supposed to be able to present the evidence they had collected at a hearing in San Francisco on September 15, 1967. Bellow thought this was a coup for CRLA, that it would allow CRLA to generate publicity for the union's picture of the terrible conditions in the fields and would thus help to convince Chavez that CRLA was still interested in helping the organizing effort. Things did not, however, work out that way. At the last minute, the Labor Department announced that no outsiders would be allowed at the hearing, CRLA's witnesses responded by refusing to attend a closed hearing.[53]

The lawyers, although they had certainly behaved competently, had not, in general, approached the case from the union's point of view. Chavez began to realize that the lawyers' first loyalty was to their ideas of professionalism, not to the work of the UFW. The UFW became disenchanted

51 Bellow interview.

52 Bellow interview.

53 Bellow interview.

with CRLA as a consequence and the two organizations began to move apart. Chavez did not need CRLA. His tactics and attention were focused elsewhere. He began to see CRLA as a rival for publicity and public sympathy.[54]

At this stage, CRLA still had a strong defender in Washington, Sargent Shriver. Just after CRLA filed suit against the Department: of Labor, Labor Secretary Willard Wirtz called Shriver and said, "Those lawyers that work for you have just sued me in California."[55] Shriver responded,

> Well, Bill, don't you think they're right? If the Department of Labor has failed to fulfill the requirements of the law, shouldn't a suit be brought to require that you fulfill it . . . what these lawyers in California have done is, in fact, to sort of hold you up, you might say, to make you follow the legal process . . . . And I'm sure — well, I'm sure he agreed with that. And he said, as a matter of fact, "Now that I talk to you, I do."[56]

The growers' organizations, of course, attacked CRLA. O. W. Fillerup, executive vice president of the Council of California Growers, saw CRLA as a government-supported effort to aid farm worker unionization. He pointed to the fact that Cesar Chavez and Larry Itliong were both on CRLA's board of directors, and in the *Fresno Bee* complained, "The federal government, through the Office of Economic Opportunity, and the AFL-CIO now find themselves in a financial partnership in union organizing disguised as a legitimate social project to aid the rural poor."[57]

Congressman Charles Gubser from Santa Clara and San Benito Counties used the most colorful language to condemn CRLA, declaring the Department of Labor settlement with CRLA to be "tribute paid to a rump organization" and "a new low in groveling submission to blackmail by an agency of the U.S. Government."[58]

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54 Bellow interview.

55 *Commission Hearings*, 426.

56 Ibid., 426–27.

57 "Growers Score Legal Aid Groups as Unionizers," *The Fresno Bee*, October 17, 1967, B1.

58 Charles Gubser, "Taxpayer Money Is Financing the Unionization of Farm Labor," *U.S. Congressional Record*, House of Representatives, 90th Congress, 1st Session (September 21, 1967), 26447.

Fresno Congressman B. F. Sisk wrote a series of open letters to President Johnson, OEO Director Shriver, and CRLA. He complained to Johnson that CRLA actions were "destroying thousands of [his] constituents," and told CRLA that "your concern should be for individual people . . . ," that it was not CRLA's business "to litigate all of the major social problems of our society. . . ."[59]

But CRLA's friends in Congress surfaced, too, and its enemies were subjected, wherever possible, to personal or organizational pressure. Some senators — such as Robert Kennedy of New York — volunteered their services to CRLA, in the form of trips to California, addresses to the Senate, and other ways. Congressman Sisk, heavily dependent on moderate Chicano votes in Fresno County in order to defeat his Republican opponents, found himself under public attack from the Mexican-American Political Association. Faced with the prospect of active MAPA campaigning against him, Sisk found it prudent to halt his public denunciations of CRLA.[60]

An early attack on CRLA was mounted by the Kern, Tulare, and Kings Counties congressman, ex-decathlon star Bob Mathias, who charged CRLA with a variety of violations of OEO legislation and internal regulations, and succeeded in having CRLA investigated by the Government Accounting Office. In particular, Mathias wanted the relationship between CRLA and the UFW investigated. He claimed to have photographs, a police report, and signed statements demonstrating CRLA's illegitimate involvement with the UFW. After a three-month investigation of CRLA in 1966–67, however, the General Accounting Office found no substance in any of the charges.[61]

More assaults were launched by Senator George Murphy, who sought with strictly limited success to articulate what seemed to him a profound departure from American constitutionalism by CRLA, and to penalize the program accordingly. On the floor of the Senate, Murphy argued that it was an outrage for one governmental instrumentality (CRLA) to sue

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59 "Sisk Blasts CRLA Labor Department," *The Fresno Bee*, October 1, 1967, A4.

60 "MAPA Leader Says Sisk Aids Only Growers," *The Fresno Bee*, September 23, 1967, B1.

61 Comptroller General of the United States, Report No. B-161297, "Report on the Investigation of Certain Activities of the California Rural Legal Assistance, Inc., Under Grants by Office of Economic Opportunity" (May 29, 1968).

others (the U.S. Department of Labor, the governor of California). "The citizens of California," Murphy told his fellow senators,

> have been horrified by the spectacle of CRLA lawyers, paid by their tax dollars, going to court against the Secretary of Labor and his Justice Department attorneys, also paid by the taxpayers, in an action which will inevitably result in losses to farmers and higher food prices to American consumers. Poor old John Q. Public is paying the bill three times for this absurd three-ring circus.[62]

Senator Murphy's remedy was known as the Murphy Amendment to the Economic Opportunity Act. It would have barred all OEO legal services programs from taking legal action against governmental agencies.[63]

The infrastructure of CRLA support was mobilized, and Earl F. Morris, president of the ABA, lobbied for CRLA in Washington. The ABA president-elect, William Gossett, former general counsel for Ford Motor Company, worked intensively on Republican congressmen, especially Minority Leader Gerald Ford of Michigan. The Murphy Amendment failed 36–52 in the Senate, and never surfaced in the House. "Following the defeat of the amendment in the Senate . . . and its failure to be introduced in the House, most agreed that it was active lobbying of the ABA leadership which saved all of legal services from Murphy's attempted emasculation."[64] CRLA was now being discussed in *Time*, *The New Yorker*, *The New Republic*, *The Washington Post*, and the *St. Louis Post–Dispatch*. CRLA also reached out to organized labor, church groups, and civil rights organizations, and received enthusiastic support, both through lobbying by these organizations in Washington and through mail campaigns to California congressmen. During several months of the year 1968, mail to the California congressional delegation on CRLA outran mail on every other issue — Vietnam, pornography, and taxes, among them.[65] CRLA anticipated, and received, statewide and national attention which would otherwise never have come to it as a result of the very attacks mounted against it by Senator Murphy

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62 George Murphy, "The Farm Labor Situation," *U.S. Congressional Record*, Senate, 90th Congress, 1st Session (September 28, 1967), 27129.

63 Ibid.

64 "President Urged to Keep Backing Rural Legal Aid," *Los Angeles Times*, September 26, 1967, I-3.

65 Bennett interview.

and Governor Reagan. To an important extent, the governor and the senator were in the position of Br'er Fox and the Tar Baby. The more they struck it, and the more they insisted on the danger of the program, the more it adhered to them, drew on their visibility, and attracted the attention of other foes of the governor and the senator.

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Chapter 7

CONTAINING CRLA

The effort to contain CRLA came from the highest levels of state and national government. Ronald Reagan and Richard Nixon represented the interests of farm employers and their allies in a running battle with CRLA in the late 1960s and early 1970s. Knowing that Reagan was no friend of the farm workers, CRLA had challenged his administration and purposely provoked as public a confrontation with him as soon as possible, hoping to maintain public support as a counterweight to the governor's power over the program. CEO regulations gave Reagan, as governor of California, thirty days to veto grants made by the OEO for California. The Governor's veto could only be overridden by the director of the OEO.[1] CRLA's primary defense against a gubernatorial veto was influential nonpartisan support for exemplary performance of its prescribed tasks in accordance with nationally recognized legal principles.

For 1967 refunding, the veto issue was sidestepped because the director of the OEO continued to fund CRLA as a research and demonstration project, and research and demonstration grants were not subject to

[1] OEO regulations, 42 U.S.C., para. 2834 (1964).

gubernatorial veto.[2] When it came to refunding CRLA for 1968, however, the governor had a chance to veto the program and his executive secretary, William P. Clark, indicated he would. Clark said that CRLA had encouraged litigation and had "perhaps opened the door too wide to indigent clients" and that CRLA had "imposed burdens on rural courts by [its] incursions into social legislation" that "could be carried to all sorts of extremes."[3] CRLA countered that the Reagan Administration, "apparently looks with favor on helping poor people with legal services only if they are suing other poor people such as in divorce cases. . . . Any type of litigation by poor people to vindicate their rights against employers or government agencies [is] looked on with disfavor."[4]

As the public point and counterpoint continued, Clark sent a letter to OEO Western Regional Director Lawrence Horan, suggesting changes that would have put an end to CRLA's effectiveness in exchange for not vetoing the program. The conditions Clark sought to impose included local bar association approval in advance for providing legal services. Reagan, in other words, sought to instate local control over the federally funded agency realizing full well what it meant: control by conservative, pro-grower policies and anti-legal services attitudes. Reagan also sought to limit CRLA's power to sue public agencies.[5] Horan spoke immediately to Earl Johnson of the National Office of Legal Services, who in turn spoke to OEO Director Shriver about the Reagan proposals. Shriver's response was unequivocal: "If I don't override that veto, we might as well turn the country over to the John Birch Society."[6]

Johnson felt that "CRLA had become a symbol, clearly a symbol to all the legal services programs of the policies that we were attempting to advocate and to have other programs follow, and I was thoroughly convinced

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[2] Bennett interview.

[3] "Veto of CRLA Warned," *Appeal–Democrat* (Marysville–Yuba City), December 21, 1967, 1.

[4] Harry Bernstein, "Reagan Hit for Stand on Legal Aid to Poor," *Los Angeles Times*, December 22, 1967, I-16.

[5] Letter from Larry Horan to Governor Reagan, January 13, 1968, *CEB Legal Services Gazette* 2, no. 4 (January 1968): 98–100.

[6] Office of Economic Opportunity Commission on California Rural Legal Assistance, Inc., *Hearings*, Reporter's Transcript (April 26, 1971) [hereinafter cited as *Commission Hearings*], 265.

that if that symbol were destroyed there was no hope that the policy would be followed by other programs."[7]

On Monday, January 15, 1968, Horan held a press conference in Los Angeles, praising CRLA and indicating that Shriver would override a Reagan veto.[8] Between January 15th and Reagan's veto deadline, January 21st, the governor's staff met with staff members of OEO's Regional Office. Reagan let it be known that he would consider not vetoing the funding proposal if the OEO would agree to make some non-substantive changes in the program. Horan had a letter hand-delivered to the governor on the last working day before the veto deadline in which he put forth a set of changes — none of which were harmful to the program.[9] In a clever public relations move Reagan's staff kept the OEO at bay until the evening while it went to the press with the following statement: "OEO has exhibited a recognition of the deficiencies in the CRLA program . . . [and] on the basis of agreements reached for modification and careful monitoring, . . . it is felt CRLA will now meet sufficient standards of professional conduct and management."[10]

CRLA caught on to what Reagan was trying to do, however, and managed to get to the press with a rebuttal in time to make the late evening and early morning editions of the paper.[11] Despite his press statement, Reagan went ahead and vetoed CRLA's funding for 1968.

CRLA, denied support by the rural bar associations in the state, sought, cultivated, and received the backing of urban bar associations, the California State Bar, and ultimately the American Bar Association. When Governor Reagan, acting under the provisions of the amended Economic Opportunity Act, "vetoed" funding for CRLA in 1968, CRLA was vigorously defended by the National Advisory Committee for Legal Services, the presidents of the American Bar Association, the American Trial Lawyers Association, the National Bar Association, and the National Legal Aid

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7 *Commission Hearings*, 268.

8 *CEB Legal Services Gazette* 2, no. 4, 98–99.

9 Letter from Laurence P. Horan to the Honorable Ronald Reagan, January 19, 1968, *CEB Legal Services Gazette* 2, no. 5 (February 1968): 132–34.

10 Office of the Governor, Press Release No. 38, January 19, 1968.

11 Tom Goff, "Reagan to Accept U.S. Rural Legal Aid Grant: Says Objections Were Complied With; No Changes Made, OEO Director Claims," *Los Angeles Times*, January 20, 1968, I-3.

and Defender Association, in addition to the director of the OEO and the president of the United States. The deans of all of California's major law schools also expressed strong support.[12]

Reagan did not attempt to veto CRLA's funding for 1969. The OEO approved CRLA's 1969 grant in mid-November 1968, so that Reagan, who had to veto it within thirty days if he was going to, would have to exercise this right before Republican President Richard Nixon took office in January 1969.[13]

The second Murphy Amendment, introduced in 1969, passed the Senate. It would have effectively transferred policy and fiscal control of OEO legal services to the governors of the states in which the programs were operating, giving them blanket or "line item" veto powers not subject to reversal by the OEO director. At that time, Murphy's amendment was, of course, being considered by Congress under a Republican president. Murphy's strategy was the same as Reagan's: impose local authority and local control over the program. And his charges against the program were similar as well: CRLA was helping Cesar Chavez and the UFW in the strike and boycott the UFW was conducting in the San Joaquin and Coachella Valleys against table grape growers.[14]

Somewhat to the surprise of CRLA's staff, support again flowed. The Board of Governors of the ABA passed a resolution unanimously opposing the Murphy Amendment. John D. Robb, chairman of the ABA's Committee on Indigent Defendants said, "You don't often get unanimous resolutions by Bar Associations, but I have never seen such unanimity as I have seen directed against the Murphy Amendment."[15] Also, CRLA's coalition of supporters — minority groups, church groups, labor groups, civil rights groups — bombarded Congress with protest letters and telegrams, and numerous articles appeared in the country's major newspapers defending

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12 Leo Rennert, "Investigators Give Rural Legal Aid Group a Clean Bill of Health," *The Fresno Bee*, June 23, 1968, A12.

13 Bennett interview.

14 "Murphy Move to Give Governors Poor Legal Aid Veto Clears Senator," *The Sacramento Bee*, October 14, 1969, A3.

15 Quoted in John P. MacKenzie, "Murphy Loses Fight on Poverty Lawyer Veto," *Los Angeles Times*, December 17, 1969, III-1.

and supporting CRLA, legal services, and the War on Poverty.[16] The second Murphy amendment was deleted in the Senate–House Conference Committee.[17]

CRLA submitted its 1970 refunding proposal to the OEO in late September of 1969. President Nixon's new OEO director, Donald Rumsfeld, put a hold on it. Rumsfeld's excuse at the time was that an OEO ruling on the program's refunding would prejudice the House vote on the Murphy Amendment. By the end of November, before the House had quashed the amendment, CRLA threatened to deploy its supporters once again to publicize the fact that CRLA's existence was in jeopardy because Rumsfeld was "sitting on" CRLA's application for funds. Rumsfeld approved the grant and sent it to Governor Reagan's office.

Reagan was reportedly surprised and angry.[18] He had not expected a Republican appointee, and by implication the Nixon White House, to approve CRLA's refunding. He called Rumsfeld and said as much, but Rumsfeld responded that without valid reasons not to, he would override a Reagan veto.[19] The veto did not come. In 1970, Reagan failed to mention CRLA in his campaign for re-election against Jesse Unruh, but times were changing. Richard Nixon was in the White House, and California might be a pivotal state in a close 1972 election. Christmas week 1970, CRLA received its second veto notice from the governor, who announced he had massive documentation of flagrant violations of law and legal ethics by CRLA attorneys. This was clearly to be the most severe and protracted challenge CRLA had faced.

The charges against CRLA had been prepared by the state OEO office, a small agency designed by Congress for each state to ensure liaison and communication and minimize competition and duplication between OEO programs and any parallel state programs which might exist. Governor Reagan

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16 "Legal Aid — For the Lawyers," editoral, *New York Times*, October 29, 1969, 46; "Lawyers for the Poor," *The Washington Post*, October 22, 1969, A22; "The Poor Get It Again," *St. Louis Post Dispatch*, October 21, 1969, B2; "Legal Aid Restriction Bad Bill" (editorial), *Los Angeles Times*, November 10, 1969, II-6; "War on Poverty in Jeopardy" (editorial), *Los Angeles Times*, December 14, 1969, G6.

17 As a consequence, *The Fresno Bee* carried the following headline: "Governor's CRLA Veto Power Fails," December 19, 1969, 1.

18 Bennett interview.

19 "Reagan Backs Bill Overhauling OEO," *The Fresno Bee*, December 8, 1969, A4.

appointed, in July of 1970, Lewis Uhler to head the California State Office of Economic Opportunity. Uhler brought interesting credentials to his new post: he had served under the national director of Public Relations for the John Birch Society, John Rousselot. When Rousselot was elected to Congress in 1960, Uhler went to Washington. He had just finished serving, in June of 1970, as Rousselot's campaign manager, in the latter's unsuccessful bid to recapture his seat. Rousselot later publicly stated that Uhler's appointment to head the State OEO was directly aimed at the destruction of CRLA.[20]

Uhler's views on OEO legal services were clear. "What we've created in CRLA is an economic leverage equal to that of large corporations. Clearly that should not be."[21] Or: "The problem with the War on Poverty is that poor people are on the boards of directors."[22] One of Uhler's first acts as head of the State Office of Economic Opportunity was to abolish the poor people's Advisory Committees to the State OEO because, according to *The Sacramento Bee*, he did not believe poor people should be involved in making decisions at the state level.[23]

Uhler's staffing of the state OEO office was even more intriguing. In his first two months, he dismissed most of the agency's professional staff of accountants, attorneys, and administrators, replacing them with former agents from police departments, the FBI, the CIA, and the campaign staffs of Governor Ronald Reagan, Mayor Sam Yorty of Los Angeles, and Senator James Buckley of New York. The new staff was given a "cram course" in administrative investigation by the California Bureau of Criminal Investigation and was unleashed on CRLA.[24]

In August, 1970, the federal OEO conducted its annual evaluation of CRLA. Unknown to CRLA, Uhler's group was planning its own investigation. The federally sponsored evaluation was conducted by prestigious members of the legal profession, the most prominent being former associate justice of the United States Supreme Court, Tom C. Clark. After five days of inquiries

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[20] George Williams, "Lew Uhler, Epitome of the Reagan Aide, Directs the Fight Against CRLA," *The Sacramento Bee*, May 9, 1971, A4.

[21] George Williams, "Reagan Picked Uhler to Build State's Case Against CRLA," *The Sacramento Bee*, May 10, 1971, A4.

[22] Ibid.

[23] Ibid.

[24] Ibid.

in California, the evaluators concluded that "while not perfect, CRLA is an exemplary legal services program, providing a balanced approach between orthodox legal services and highly successful impact litigation.[25]

Just two days after Reagan was re-elected governor, Uhler sent a questionnaire to 3,400 California attorneys and judges. The questionnaire contained such questions as:

- Are CRLA members in your community involved, on behalf of CRLA, in community activities of an activist or political nature? (a) yes; (b) no. If yes, please explain or give details.
- Do you feel the main thrust of CRLA's efforts has been toward "causes" or class actions, or toward litigating or otherwise solving specific individual problems? Emphasis on: (a) individuals; (b) causes. Comments:[26]

Not only did the Uhler questionnaire ask respondents to give an opinion on the legal ethics of CRLA attorneys, it permitted them to answer anonymously. CRLA learned of the questionnaire within the week, sent letters of protest to OEO Director Rumsfeld, and State OEO Director Uhler, and had copies of the questionnaire made and distributed to attorneys attending an NLADA convention in Texas. Neither Uhler nor Rumsfeld answered CRLA's letter, but the NLADA issued a strong statement concerning the questionnaire and called on the State Bar Association "to institute proceedings against the State of California OEO and Lewis K. Uhler."[27] The NLADA's statement got widespread press coverage.[28] Uhler

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[25] Jerome J. Shestack, "Evaluation of the Salinas Office of the California Rural Legal Assistance Program," submitted to H. Tim Hoffman, Regional Legal Services Deputy Director (August 26, 1970), 20.

[26] National Legal Aid and Defender Association, "Resolution Urging Censure of the State of California Office of Economic Opportunity & Lewis K. Uhler, Director," in U.S. Congress, Senate, Subcommittee of the Committee on Labor and Public Welfare, *Hearings* on Legal Services Program of the Office of Economic Opportunity Before the Subcommittee on Employment, Manpower and Poverty, 91st Congress, 1st Session (Washington, D.C.: Government Printing Office, 1969), 483–84.

[27] Ibid.; "National Legal Aid and Defender Association Censures California Governor's Office of Economic Opportunity Misleading Questionnaire," NLADA press release, November 17, 1970.

[28] "State's Poverty Agency Assailed," *San Francisco Chronicle*, November 19, 1970, 8.

took the defensive, asserting that CRLA was attempting to intimidate the State OEO's investigation.[29]

Meanwhile, on November 20th, Rumsfeld, proceeding cautiously with regard to Reagan, but making rapid strides to put his mark on legal services at the national level, fired Terry Lenzner and Frank Jones, the director and deputy director of the National Office of Legal Services. Lenzner and Jones were fired because they supported an activist legal services program.[30] Both were very close to CRLA. Despite the firings, Rumsfeld released a press statement December 1st asserting that CRLA was "commonly recognized as one of the best Legal Services programs" and announcing a $205,539 increase in appropriations for CRLA in 1971.[31] CRLA's reading of the situation was that Rumsfeld was sending a signal to Reagan not to veto CRLA's 1971 grant as well as trying to reestablish his credibility with groups and individuals concerned about legal services, while getting rid of two people he did not want working under him.

> In broader perspective, the attacks on legal services appeared to be part of a pattern wherein the Reagan Administration was publicly criticizing programs — such as the Family Assistance Plan — backed by the Nixon Administration. If, as some political writers speculated, the Governor was positioning himself nationally to challenge the President in 1972, and if legal services was one of the issues Reagan was planning to use, there was no way we could head off a veto. We had no choice, however, but to show the Governor that such action would not be popular with all of his constituency.[32]

Again, CRLA got its friends and allies to pressure the governor to veto CRLA's 1971 grant. By late December the governor had received letters and telegrams endorsing CRLA from at least one judge in four of its service regions, as well as two associate justices of the California Supreme Court, a former chief justice of California, and numerous other trial and appellate

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29 "Lawyers Hit Probe of CRLA," *San Jose Mercury*, November 19, 1970, 1.

30 Bennett interview.

31 "California Rural Legal Agency Receives $1.8 Million Grant," OEO Press Release No. 71-43, December 1, 1970.

32 Bennett interview.

judges.[33] Also writing the governor on behalf of CRLA were the county bar associations of Los Angeles, San Francisco, Santa Clara (San Jose), Sacramento, Monterey, and Tulare, as well as the City of Beverly Hills and the Mexican Bar Association of California.[34] Supporting communications also went to the governor from hundreds of individual attorneys, including thirty- and forty-name petitions from attorneys with O'Melveny and Myers,[35] Gibson, Dunn, and Crutcher, and other of the state's most prestigious law firms.[36] And in an unprecedented action by the American Bar Association, John Robb, chairman of the ABA's Standing Committee of Legal Assistance and Indigent Defense, sent a telegram to Reagan urging CRLA's refunding.[37]

Endorsements also went to the governor from twelve Democratic state senators, twenty-five assemblymen (one Republican), numerous city councilmen, county supervisors and other local officials, as well as the coalition of Chicano, Black, labor, church, senior-citizen, and OEO-funded groups that had long supported CRLA.[38] Twenty-seven newspapers, including the *Los Angeles Times*, the *Santa Barbara News Press*,[39] and the McClatchy Bee papers,[40] published supportive editorials.

At CRLA's request, Uhler met with CRLA on December 10th. Uhler claimed it was too early to discuss specific allegations with CRLA, but promised to allow CRLA to review and comment on all allegations of misconduct before they were sent to the governor or released to the press. CRLA made an appointment with Uhler for December 21st to discuss the allegations. Uhler cancelled the appointment. On December 23rd Uhler told CRLA by phone that he was still not prepared to discuss the allegations

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33 Copies of letters and telegrams in CRLA files.

34 CRLA files.

35 Ibid.

36 Ibid.

37 Ibid.

38 Ibid.

39 "Equal Justice for the Needy" (editorial), *Los Angeles Times*, December 21, 1970, II-8; "Improve Legal Aid, Don't Ban It" (editorial), *Santa Barbara News Press*, December 15, 1970, D10.

40 "Equal Justice for the Needy" (editorial), *The Fresno Bee*, December 22, 1970, A14; "1970 Grand Jury's Reckless Action Against CRLA Program is Unbecoming" (editorial), *The Modesto Bee*, December 24, 1970, A10.

against CRLA. On Saturday, December 26th, Reagan announced that he had vetoed CRLA's grant "because of gross and deliberate violations of OEO regulations and (CRLA's) failure to represent the true legal needs of the poor."[41] Information supplied by Uhler in support of Reagan's charges accompanied his press release as did a copy of the governor's letter to Frank Carlucci, the new head of the OEO. Carlucci had been nominated to replace Rumsfeld, who left the OEO to join the White House staff.

CRLA still did not know the substance of the charges against it. Uhler had not kept his word. CRLA decided therefore to attack Reagan's motives in vetoing the program.[42] CRLA went to the press with the following three statements: (a) that the governor had attacked CRLA because he was opposed to having poor people fairly represented in the courts; (b) that Governor Reagan was angry because CRLA had won every major piece of litigation it had brought against him; and (c) that in attacking CRLA Reagan was supporting the growers who helped finance his political campaign. In assessing the situation, CRLA considered the following things.

The governor had not emerged from the 1970 campaign "lifted higher and higher."[43] Jesse Unruh, with woefully limited campaign funds, had cut the governor's 1966 electoral victory margin in half.[44] And Houston Flournoy, a "moderate Republican" college professor serving as state comptroller, had run 750,000 votes ahead of the governor.[45] John Tunney, who had repeatedly raised CRLA as an issue, had defeated George Murphy in the Senate race. And several centrist Republican legislators traveled to Washington to urge their old friend Robert Finch — all too ready to listen — that the president would have to distance himself from the governor and his policies to carry California (and perhaps to carry the nation) in 1972.

CRLA officials concluded,

> Our overall assessment, therefore, was that even if our refunding was decided on purely political considerations, we had a good chance. We believed the White House staff was looking for

41 Office of the Governor, Press Release No. 585, December 26, 1970.

42 Bennett interview and a long telegram sent by CRLA to Frank Carlucci, December 27, 1970.

43 Ibid.

44 Ibid.

45 Ibid.

> opportunities to move the President's image from the right toward the political center. If the CRLA decision received sufficient public attention, it presented just such an opportunity.[46]

CRLA's strategy, then, was to try to generate pressure on the president and members of his staff who would be overseeing the situation for him.

Frank Carlucci's confirmation hearing came before the Senate Committee on Labor and Public Welfare on December 30th. CRLA contacted Senator Alan Cranston of California who was on the committee, asking him to hold up Carlucci's confirmation unless Carlucci immediately overrode Reagan's veto of CRLA.[47] Cranston did just that, adding that an investigation of both CRLA and the California State OEO should be conducted as well.[48] Another important member of the confirmation committee, Senator Walter Mondale, exhorted Carlucci to override Governor Reagan's veto, as did the ABA in a telegram signed by the cream of the legal community.[49]

At the Senate confirmation hearing, Carlucci refused to override Reagan's veto, but said that Reagan had agreed to a thirty-day extension for CRLA to give the OEO time to study the evidence in the case.[50] Reagan and Uhler had not released the Uhler report, but promised to do so on January 6th. Cranston refused this compromise solution, arguing that other legal services programs had been allowed to die after thirty-day extensions.

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46 Ibid.

47 Bennett interview.

48 Leo Rennert, "Cranston Calls for Nixon Probe of Process Leading to Reagan CRLA Veto," *The Sacramento Bee*, December 29, 1970, A1.

49 Telegram from Edward F. Bell, John W. Douglas, Jacob D. Fuchsberg, John D. Robb, to Frank Carlucci, December 29, 1970; Letter from Louis Pollack, Chairman, and Cecil Poole, chairman-elect of the-ABA's Section of Individual Rights and Responsibilities, to Frank Carlucci, December 31, 1970; Telegram to Frank Carlucci from Abraham Goldstein, dean, Yale Law School; Derek Bok, dean, Harvard Law School; Bayless Manning, dean, Stanford Law School; Michael Sovern, dean, Columbia Law School; Bernard Wolfman, dean, University of Pennsylvania Law School (December 30, 1970); all in CRLA files.

50 U.S. Congress, Senate, Subcommittee of the Committee on Labor and Public Welfare, *Hearings* on Nominations to the Office of Economic Opportunity Before the Subcommittee on Employment, Manpower and Poverty, 91st Congress, 2nd Session (Washington, D.C.: Government Printing Office, 1970), 158–59.

Carlucci would not agree to the override, and Cranston blocked his nomination. At that point, CRLA was truly an issue of national importance.

Finally, on January 6th, Uhler presented his report to the federal OEO. The report was, according to Uhler, backed up by 9,000 pages of documentation — which Uhler did not bring with him to Washington.[51] The OEO demanded a copy of it. The document was replete with affidavits "making the case" against CRLA.[52] Although the governor's office refused to release a copy to CRLA, he did release 127 of the report's specific allegations to the press. CRLA attorneys, the report charged, had performed inefficiently and incompetently.[53] They had accepted fees.[54] They had appeared in court barefooted. They had used obscenities. They had engaged in homosexual liaisons with federal judges in order to obtain favorable rulings. CRLA was "ideological," "radical," and "revolutionary." They had arranged a visit for Angela Davis with George Jackson at Soledad Prison prior to the slaying of a judge in Marin County, in which Miss Davis's weapon was used by Jackson's brother. Indeed, the Uhler report was tailor-made for the media, as the following passage reveals: "Prior to the courthouse incident, . . . CRLA attorneys interceded at Soledad in an attempt to arrange a visit for Angela Davis to meet with the older Jackson brother."[55]

The governor expressed confidence that President Nixon would sustain the governor's "veto" of this malignant program.[56]

The Uhler report also charged that CRLA's "grand strategy is to organize and unionize farm workers in California into a labor monolith — a monopoly union — under the control and direction of UFWOC."[57]

For the most part, the Uhler report charges were false, and Uhler and his investigative staff guilty of either negligence or fraud. One of the conclusions reached in the Uhler report, for example, was that "CRLA attorneys ignored the proscription as to representation of those accused of

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[51] State Office of Economic Opportunity, Lewis K. Uhler, Director, *Study and Evaluation of California Rural Legal Assistance, Inc.* (1971) (hereinafter referred to as the Uhler Report).

[52] Ibid.

[53] Office of the Governor, Press Release No. 3, January 6, 1971.

[54] Uhler Report, 237–39.

[55] Ibid., 73.

[56] Office of the Governor, Press Release No. 3, January 6, 1971.

[57] Uhler Report, 156.

crimes." The prohibitive regulation in question, which was issued on January 15, 1968, stated: "Legal services programs may not henceforth undertake defense of any new criminal case at any stage following indictment or information . . . ." The regulation then listed seven exceptions:

> (a) a waiver is granted by OEO;
> (b) representation of arrested persons before indictment or information (and criminal cases where no indictment or information occurs);
> (c) parole revocation;
> (d) juvenile court matters;
> (e) civil contempt;
> (f) alleged mistreatment of prisoners after sentence and incarceration;
> (g) criminal cases which were undertaken prior to receipt of this memo.[58]

Of the twenty-four cases cited by Uhler, twenty-three were clearly not prohibited by federal regulation or conditions of CRLA's grant. Only one of the twenty-four alleged violations might reasonably be so construed, and it was not handled by CRLA staff. It was handled by a VISTA attorney working with CRLA's Marysville office.[59]

The falsity of the allegations against CRLA was most directly supported in a letter written by William J. Bradford, a former deputy attorney general of the State of California and someone who had defended the Reagan Administration in major suits brought by CRLA. Bradford wrote to Carlucci to reveal the "illegal" and fraudulent acts perpetuated by Reagan's staff to support his accusations against CRLA.[60]

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[58] Community Action Memo 79, Amendment to the Economic Opportunity Act (January 15, 1968), Sec. 222 (a) (3).

[59] California Rural Legal Assistance, by William F. McCabe, Jerome B. Falk, Jr., and Stuart R. Pollak, "CRLA's Memorandum on Procedures," Hearings Regarding the Veto by the Governor of the State of California of the 1971 Funding of California Rural Legal Assistance Before the Office of Economic Opportunity Commission on California Rural Legal Assistance," 4.

[60] Letter from William J. Bradford to Frank Carlucci, Jr., January 11, 1971, copy in CRLA files.

CRLA publicly responded that the allegations were "fallacious, fraudulent, and libelous," smacked of "McCarthyism," and had been arrived at in a way that denied CRLA due process.[61]

CRLA met with OEO officials on January 8th to refute Reagan's December 26th charges and to find out when the OEO would begin an independent investigation of Reagan's charges. CRLA spoke to Don Lowitz and Bill Walker. Walker had managed Rumsfeld's congressional campaigns in Illinois, and both men were close to him. CRLA therefore took what they had to say as coming from the highest levels of White House policymaking with regard to the CRLA issue.

> We were informed that OEO had no current plans to investigate the charges, that it was "too simplistic" to talk about a refunding decision being made "on the merits," that "political realities" were the important thing, and that we should be considering new grant conditions, the imposition of which would save face for Reagan without entirely destroying CRLA.[62]

Through a newspaper columnist, CRLA learned the White House scenario: a three-to-six-month extension for CRLA, during which an independent investigation would be carried out and at the end of which a report would be issued, changes — advertised as stringent new conditions under which CRLA would have to operate — which would save face for the governor, and CRLA would be refunded.[63]

One thing that became very clear to CRLA was that with regard to Ronald Reagan, the president wished to move with extreme caution. Nixon was far more afraid of Reagan's political power and influence, and his backers, than CRLA had imagined. Lowitz and Walker had made it clear to CRLA that the OEO under Nixon was much more concerned with "political realities" than with the merits of the case against CRLA. Reagan was governor of California and Nixon would be running again for president in 1972. As Lowitz and Walker told CRLA, "the practical considerations of

61 CRLA Press Release (January 7, 1972).

62 Bennett interview.

63 Ibid.

White House–Sacramento" politics had to be considered.[64] Since the decision to refund or not was an executive and a political one, CRLA sought to put on a brave front in the media to refute the charges which had been made public, and to hold its coalition intact. CRLA again won public support from a wide range of citizens, public officials, organization leaders, and members of the legal community.[65] But CRLA lobbied Congress very little and selectively. Most Republicans who supported CRLA, like Senator Jacob Javits, had little influence with the White House. CRLA concentrated its attention on Democrats of particular importance to the president: Abraham Ribicoff, valuable for the then-still-alive Family Assistance Plan, and Henry Jackson for military spending.

The governor met with the vice president, the attorney general, and the president in sessions where CRLA was discussed. The Nixon–Reagan meeting took place just one week before Reagan was to meet with the Republican State Central Committee to begin planning for the 1972 election. After the meeting, Reagan announced that he would lead a pro-Nixon delegation to the Republican National Convention in 1972. Rowland Evans and Robert Novack, in an editorial on Nixon's posture toward Reagan, said: "Don't attack Reagan in any ideological dispute with the President; what we need from the governor is control of the big California delegation at the 1972 convention; don't jeopardize that by fencing with Reagan over issues.[66]

Just what happened in the White House during discussions of the Reagan veto are not clear, but the players and the sides they chose are. On January 29th, John Ehrlichman was instructed by Nixon to effect a compromise on the issue so that both sides could claim victory and in such a way that Reagan would not be deeply offended. Attorney General John

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64 Bennett interview, "We were shown a publicized telegram from Uhler to Carlucci complaining that the State's witnesses were 'being harassed, intimidated and pressured' by CRLA 'to get them to change their stories.' Lowitz and Walker's point, apparently, was not that OEO believe Uhler's accusations but that because they came from the Governor's Office, they assumed a political significance with which we had to deal."

65 CRLA received copies of letters, telegrams, petitions, and resolutions from boards of supervisors, city councils, mayors, city managers, and school administrators, Chicano, Black, labor, and church organizations, and thousands of individual citizens.

66 Rowland Evans and Robert Novak, "The Nixon-Reagan Staredown," *The Washington Post*, February 3, 1971, A17.

Mitchell and Vice President Agnew were strongly opposed to an override of Reagan's veto. Carlucci and Lowitz and Walker were for the override. Ehrlichman did come up with a compromise proposal: to let the governor's veto stand "at this time" and give CRLA a six-month grant, while the Uhler Report and CRLA were investigated by an "impartial" commission.[67]

Reagan claimed victory. In his press statement after the compromise plan had been announced, the governor said that he had

> agreed with Federal OEO to permit a short-term extension of the grant for CRLA . . . [to] enable us to begin the transition from the present program to one which better meets the needs of the poor . . . . I have directed the State Office of Economic Opportunity to immediately move ahead with plans to develop a program of legal assistance . . . through local bar associations. In many cases, I am sure, it will be possible for this program to take over legal assistance for the poor even prior to the end of the temporary CRLA funding, and that will provide a smooth transition *when the CRLA is phased out next July* [emphasis added].[68]

Carlucci responded: "This is not a phase out or transition grant . . . . If the Commission finds that CRLA is conducting its activities in compliance with the OEO statutes and guidelines, I will, of course, refund it in full."[69]

CRLA hired outside counsel to negotiate with the OEO over the composition of the commission and its ground rules. The governor wanted the hearings held in Washington, in executive session, closed to press and public, with no set ground rules. CRLA wanted open hearings in California, held in an adversary format. CRLA won. The governor wanted a "mixed" commission, one member appointed by him, one by CRLA, and one by the president. CRLA wanted a prestigious commission, all of whose members would be considered men of stature and fairness by the legal profession. CRLA won, with the support of numerous newspapers (sixty-nine editorials favorable in California alone, members of Congress, and the ABA's Section on Individual

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67 David S. Broder, "CRLA — The Story Behind the Story," *Los Angeles Times*, February 21, 1971, F3.

68 Office of the Governor, Press Release No. 46, January 30, 1971.

69 "Addendum to Press Release on Funding of CRLA," OEO Press Release No. 71-62a," January 30, 1971.

Rights and Responsibilities).[70] The pressure on the White House and on Carlucci to accede to CRLA's requests came from the usual sources.[71]

The commission that was appointed on March 23rd, one day before Carlucci's second confirmation hearing, consisted of Robert B. Williamson, recently retired chief justice of the Maine Supreme Court, Thomas Tongue, associate justice of the Oregon Supreme Court, and Robert B. Lee, associate justice of the Colorado Supreme Court. Each of the three appointees was highly respected by the bar in his home state and each was a Republican. Cranston did not question Carlucci on the composition of the commission, but did ask Carlucci for a public commitment that the commission would hold public hearings in California.[72]

Reagan's representative did not even show up for the first scheduled meeting of the commission and the parties involved, and so the meeting was rescheduled. Uhler did show up for the rescheduled meeting. Commission members later recorded:

> Mr. Uhler strongly urged that the Commission function as an administrative investigative body which should adopt a fact-finding methodology, suggesting that the Commission staff should seek out evidence and present its own witnesses, holding hearings in private, executive sessions, including secret *ex parte* interviews throughout the State of California in all areas where CRLA has rendered services, and make general and comprehensive findings concerning all phases of the CRLA program, not limited to the a matters contained in the Uhler Report.[73]

Uhler also asserted that the State would not participate in public and adversary proceedings and that Reagan's veto of CRLA had been sustained and thus the State was not a party to the proceedings. That afternoon, during a recess taken by the commission, Carlucci, who was in Seattle, received

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70 Editorials on file with CRLA.

71 E.g., a telegram to President Nixon from Charles C. Diggs, Jr., Michigan; Robert M. C. Nix, Pennsylvania; John Convers, Jr., Michigan; Augustus F. Hawkins, California; William Clay, Missouri; Louis Stokes, Ohio; Shirley Chisholm, New York; Ronald V. Dellums, California; Parren J. Mitchell, Maryland; Charles B. Rangel, New York; and Ralph H. Metcalfe, Illinois (February 12, 1971).

72 *Commission Report*, 5–7.

73 Ibid., 11.

a phone call from Vice President Agnew's office requesting him to recall the commission and get Reagan's cooperation.[74] In a conversation with commission Chairman Williamson, however, Carlucci reaffirmed that the commission was to decide its own procedures and that public, adversary proceedings were acceptable to the federal OEO.[75] Uhler continued to refuse to participate in the hearings as a party and so the commission arranged to have anyone with complaints against CRLA come before it with his own counsel.

The commission held one day of executive hearings at Soledad Prison, fifteen days of open hearings, and took the testimony of 165 witnesses in ten cities.[76] The governor continued to attack the commission and refused to participate in the adversary format. Attorneys antagonistic to CRLA — fifteen in all — played the prosecutorial role, coordinated by the assistant general counsel of the California Farm Bureau, William L. Knecht, who worked in close cooperation with Uhler's staff.[77]

Reagan took his side of the issue directly to the media. On the first day of commission hearings, Uhler held a press conference, produced a letter from the director of the State Department of Corrections, and charged CRLA with involvement in prison disruptions.[78] At a news conference the next day Reagan said,

> I'm afraid [the commission] came here with the idea that they could sit at a bench while everyone else did the work and brought a case before them and they could sit back and make judgment. . . . This was not what they were supposed to do. They were to go into the field and investigate California Rural Legal Assistance. If they're unwilling to do that, they ought to resign.[79]

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74 Ibid., 15.

75 Ibid., 22.

76 The commission did not conduct hearings at McFarland, the CRLA base closest to Delano. McFarland witnesses presented testimony in Madera, 100 miles from McFarland.

77 California Farm Bureau Federation, William L. Knecht, "Concurrent Brief," Before the Office of Economic Opportunity Commission on California Rural Legal Assistance, Inc. (June 11, 1971).

78 George Murphy, "The CRLA Controversy is Argued at Two Levels," *San Francisco Chronicle*, April 27, 1971, 8.

79 "Reagan Asks Resignation of Unit Investigating Poverty Lawyers," *New York Times*, April 28, 1971, 28.

And at a press conference on May 5th, Reagan charged Carlucci with attempting "to curry favor with the 'poverty law establishment' and to appease certain ultra-liberal members of Congress."[80] On May 14th, Reagan charged CRLA with a "brazen" and "dishonorable" scheme to present false and misleading testimony to the commission.[81]

The same day that the commission, after concluding its hearings in Salinas, announced that three of Uhler's charges against CRLA were without merit,[82] Reagan held a news conference in Sacramento, calling the commission's proceedings "fun and games" and asserted that Nixon would not be influenced by the commission's findings.[83] The next day, Reagan complained that the commission "had imposed a virtual gag rule on CRLA witnesses."[84]

When the commission announced that the charges made against CRLA in connection with Angela Davis, the Jackson brothers, and the Soledad prison incident were "totally unfounded and without merit,"[85] Uhler responded that it was "abundantly evident" that the commissioners had been "primed" by federal OEO officials into a biased view of the charges against CRLA.[86] On May 24th, Reagan tried to link CRLA with the fire bombing of the office of someone who had testified against CRLA.[87] Meanwhile, a team of OEO officials was investigating the California State OEO. By early April, their investigation was finished and the report written. The report confirmed that the California State OEO was not performing its assigned function of providing technical assistance to poverty groups and other

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80 "Reagan Takes His OEO Fight to Nixon," *The Washington Post*, May 6, 1971, A21.

81 Tom Goff, "Reagan Calls on U.S. to Join State Probe of CRLA Memos," *Los Angeles Times*, May 15, 1971, I-1.

82 "Judge Finds No Merit, Three Anti-CRLA Charges Fold," *The Sacramento Bee*, May 18, 1971, A4.

83 Tom Goff, "Reagan Hurls New Attack at CRLA Probe," *Los Angeles Times*, May 19, 1971, I-28.

84 "Reagan Claims Gagged CRLA Probe Witness," *The Sacramento Bee*, May 20, 1971, A5.

85 Philip Hager, "Probers Absolve CRLA of Link to Angela Davis, Call Charges of Prison Misconduct 'Totally Unfounded,' " *Los Angeles Times*, May 21, 1971, 3.

86 Paul Houston, "OEO Leader Hits Federal Panel on CRLA Decisions," *Los Angeles Times*, May 23, 1971, II-1.

87 "New Reagan Move in CRLA Case," *San Francisco Chronicle*, May 25, 1971, 18.

OEO funded programs, but rather "performing investigative functions."[88] The credentials of Uhler's staff proved that. When the substance of the report on Uhler's office reached the press, Democratic state legislators seized the opportunity to try to cut the State OEO Office out of the budget.[89] Uhler was called before the California State Assembly Ways and Means Committee. After a heated discussion before 300 spectators, the assemblymen voted 4–1 to cancel all but $100 of the $69,899 Reagan had requested for the State OEO, making it impossible for the Uhler operation to receive nearly $1 million in matching funds from the federal OEO.[90]

Evans and Novack wrote on May 12, 1971, that the White House was "frantic" about the way things were shaping up in relation to the commission hearings and said that before a decision was made whether to refund CRLA or not, "the oval office will be steeped in the agony of decision making that contemplates the immense risks of 1972."[91] All that CRLA had to offset Reagan's influence with the Nixon White House was its grassroots support, its reputation in the legal community, the support of people who knew and respected that reputation, and a public disclosure of the facts.

> To get the facts before the public, we wanted the Commission's Report publicized *prior* to White House decision making. It would be very hard for the White House to allow our destruction if a body as eminent as the Commission was publicly on record endorsing us. But if the Commission's findings were treated like the January findings of OEO's Office of Inspection, the Administration could use any public excuse to uphold Reagan's veto. Some way, therefore, we had to get the Commission's Report before the public.[92]

CRLA went to CRLA supporters in Congress and those in the media who had followed the situation, to leaders in various local, state, and national bar associations, to the coalition of Chicano and other organizations

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88 Office of Economic Opportunity, *California State OEO Evaluation Report*, March 26, 1971, 60.

89 Carl Ingram, "OEO Fund Axed: Uhler Castigated," *Los Angeles Daily Journal*, May 4, 1971, B2.

90 "OEO Revision Ordered by Assembly Unit," *Oxnard Press Courier*, May 4, 1971, l.

91 Rowland Evans and Robert Novak, "Nixon, Reagan: Collision Seen," *The Washington Post*, May 12, 1971, A7.

92 Bennett interview.

that had long supported CRLA, and to the national official organizations of the League of United Latin American Citizens, the Mexican-American Political Association, the Community Service Organization, the American GI Forum, the NAACP, Common Cause, the National Council of Churches, and the National Council of Senior Citizens, informing them of the commission hearings and the June refunding schedule. Most were also asked for support in the form of letter writing campaigns and positive stories and editorials in their publications.

CRLA planned twelve events that could garner significant press coverage, including a public demand for an unprecedented seventeen-month grant and the release of a letter CRLA had received from the U.S. Civil Service Commission clearing CRLA of all charges referred to the Justice Department for investigation. CRLA never even knew what charges were referred to the Justice Department.[93] Unfortunately, the "Pentagon Papers" story blocked off a good deal of potential national news coverage.[94]

On June 28th, a federal audit of Uhler's operation published by Democratic Congressman Jerome Waldie indicated that Uhler had misspent $99,996 of federal funds — $2,102 of which was used to send telegrams "for the purpose of enlisting support for Senator George Murphy in the November 3, 1970 election."[95]

Carlucci received the commission report on June 25, 1971, and took the position that he would not release it until he announced his decision on the Reagan veto. CRLA filed suit to have the report released immediately. This, as well as the fact that a number of political officials were clamoring for copies, made the report newsworthy. As to what the report contained, OEO General Counsel Don Lowitz was quoted as saying, "It sure doesn't leave much room for equivocation, does it?"[96]

On June 29th, CRLA was called by Fred Speaker, the new director of the Office of Legal Services, and asked to come to an emergency meeting in connection with the commission report. Speaker told CRLA that

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93 Audit Division, OEO, Report No. 9-71-154, "Audit Report; State OEO, State of California, Sacramento County, Grant No. CG-0364, CG 9093 (March 17, 1971).

94 CRLA v. OEO, USDC for D.C., No. 184, filed June 25, 1971.

95 Bennett interview.

96 "U.S. Announces It Will Fund CRLA, Overrules Reagan," *Los Angeles Times*, June 30, 1971, 1.

the *New York Times* had a copy of the commission report and intended to start publishing it in the next edition, that Carlucci was working with the Reagan staff on a political deal that would allow CRLA to be refunded, and that Uhler had prepared a second report condemning CRLA and had forwarded it to the federal OEO. Speaker told CRLA further that Carlucci needed more time to negotiate CRLA's refunding before the commission report became public. If he did not get the time, Carlucci was sure the whole matter would fall to John Mitchell to settle. Mitchell would not allow CRLA to survive, no matter what. In a phone conversation with Carlucci who was in San Francisco, CRLA was asked to hold back the *Times* story. CRLA said it was not possible, nor was it in CRLA's interest, to call off the story. Carlucci had only a few hours to effect a deal with Reagan's people. Carlucci's planned press release was to announce a $2.5 million grant that would go to Governor Reagan to allow him to test a judicare alternative to legal services.[97]

The "judicare" alternative, favored by Governor Reagan and other conservatives in politics and the legal profession, would have provided statewide or national "coverage" of the poor, allowing them to obtain the services of an attorney gratis or at reduced rates, with the entire sum or the balance of the fee to be paid by the government. This approach had two clear advantages from a conservative perspective. First, it would have substantially increased the revenue of the legal profession. (There is an obvious parallel with the medical profession, in which, according to a study by John Colombotos, physicians' acceptance of Medicare rose from 38 percent to 81 percent in the three years following its enactment and implementation.) Secondly, it would have largely or entirely precluded "impact cases," or "class actions," which require the intensive and extended preparation that only a program (like a law firm) can provide. Stated conversely, the judicare program, as Governor Reagan and others envisioned it, would have hindered or obstructed the goal stated by Attorney General Kennedy in an address at the University of Chicago Law School May 1, 1964: the practice of "preventive law" on behalf of the poor, which could be likened to "preventive medicine."[98]

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[97] Statement by Frank Carlucci, Director, OEO on The Commission Report on the CRLA (June 30, 1971), 23.

[98] Bennett interview.

Carlucci had proposed twenty-three conditions for the refunding of CRLA. The conditions would have stripped the program of its effectiveness. In addition, Carlucci's proposed restructuring of CRLA would have permitted refunding only through 1971 and would have required an end-of-year evaluation conducted by the governor's office and the federal OEO. CRLA, of course, rejected the proposal, but in the last forty-five minutes before the *New York Times* was to go to press, Carlucci shifted his position, agreed to a seventeen-month grant, and provided CRLA with a copy of the report. Fifteen minutes later the OEO officials learned that the *New York Times* did not have a copy of the report.

The report left only one option open to Carlucci if Reagan were to save face. He would quite simply have to misrepresent the report to the press, and this is just what he did.

The commission report said:

> The commission finds that CRLA has been discharging its duty to provide legal assistance to the poor under the mandate and policies of the Economic Opportunity Act of 1964 in a highly competent, efficient, and exemplary manner.
>
> It should be emphasized that the complaints contained in the Uhler Report and the evidence adduced thereon do not, either taken separately or as a whole, furnish any justification whatsoever for any finding of improper activities by CRLA . . . .
>
> [Furthermore] the Commission expressly finds that in many instances the California Evaluation has taken evidence out of context and misrepresented the facts to support the charges against CRLA. In so doing, the Uhler Report has unfairly and irresponsibly subjected many able, energetic, idealistic and dedicated CRLA attorneys to totally unjustified attacks upon their professional integrity and competence. From the testimony of the witnesses, the exhibits received in evidence, and the Commission's examination of the documents submitted in support of the charges in the California Evaluation, the Commission finds that these charges were totally irresponsible and without foundation.[99]

[99] *Commission Report*, 84.

The Carlucci press release, however, implied that CRLA was guilty of numerous wrongdoings necessitating "the imposition of stringent controls on future operations" and portrayed Reagan as the hero of the legal services movement, committed "to improve the legal services program and expand its impact."[100]

The waters were indeed muddy by the time CRLA got copies of the report to the press. CRLA recommenced negotiations with Carlucci demanding that no restrictions of substance be attached to CRLA's refunding grant or CRLA would attack Reagan, Uhler, and Carlucci's fraudulent press release from one end of the country to the other. That same day, CRLA's demands were met. Thus, the situation was "resolved."

CRLA was refunded for an eighteen-month period, the longest ever for an OEO legal services program, and the Nixon Administration funneled to the Reagan Administration $2.5 million for a "judicare" program. The "liberal" Republican Ripon Society's *Forum* commented, "The latest joke going around the Office of Economic Opportunity asks, 'What can you buy for $2.5 million?' The answer, of course, is, 'The California Republican delegation.' "[101]

CRLA's success was quickly cast into the shadows, however, when the president won an overwhelming re-election, and appointed Howard Phillips acting director of OEO. On April 12, 1973, a Federal District Court found that Phillips and Office of Management and Budget director had acted illegally in denying continuing operating funds to legal services and other OEO programs. Instead of an advocate, the OEO had an executioner as its chief. Indeed, *The Washington Star–News* reported that about half of the top administrators brought in to dismantle OEO were former top officers in Young Americans for Freedom. Congress was at that point unwilling seriously to challenge any of the president's actions on OEO and allowed many of the legal services programs to expire July 1, 1973, although CRLA was refunded.

A recently concluded chapter in CRLA's history, but one not recorded in depth here, has been the effort by a coalition of OEO legal services programs and their weary supporters, headed by CRLA's former chief

100 Statement by Frank Carlucci, 23.

101 *Ripon Forum* VII, no. 8 (July 15, 1971): 1.

administrator, to have Congress create a Legal Services Corporation, which would provide an administrative umbrella for federally funded legal services programs for the poor, a pooling of their resources in regional "back-up" centers, and some measure of autonomy and continuity for these programs. The sticking issues have been the composition of the board of directors and restrictions imposed on the kinds of litigation permitted to be carried on by the participant programs.[102]

Just as the UFW's political struggle continued after passage of the Agricultural Labor Relations Act, with the UFW attacking the ALRB and pushing for its interpretation of agency regulations and election results, CRLA's battles with Washington continued.

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[102] Letter from Frank N. Jones, Deputy Director, Office of Legal Services, Washington, D.C., to Daniel Luevano, Chairman, CRLA Board of Trustees, October 12, 1970.

Chapter 8

INSTITUTIONALIZATION THROUGH THE ALRA

In the mid-1970s, farm workers and farm employers alike resorted to government intervention to resolve the conflict between them. In 1969, due to the steady persistence and measured success of the UFW, farmers began to press for legislation that would protect them against boycotts, which incorporation under the amended version of the 1935 NLRA would have done, and for legislation that would provide broader restraints on unions than those offered by the NLRA. Growers had become convinced that farm labor legislation was practical and inevitable.[1] Chavez, on the other hand, was reluctant to support farm labor legislation. He did not want legal limits on use of the secondary boycott, but he consented to pursue an institutional strategy because his organization had been devastated by the IBT's complicity with growers and because he saw no better strategy open to him.[2] The growers' wishes were embodied in several bills: the U.S.

[1] Chris Bowman, "Brown's Farm-Labor Coup," *California Journal* 6 (June 1975): 190–92.

[2] Sam Kushner, "Chavez and the NLRA: Something Is in the Wind," *The Nation* 220, February 22, 1975, 206; Varden Fuller, "Professor Proposes System of Mediation and Arbitration to End California's Farm Union Representation Conflict," *California Journal* 4 (September 1973): 299–301.

Senate bill authored by George Murphy in 1970,[3] the Cory–Wood–LaCoste California Assembly bill of 1971,[4] and the 1972 California election initiative, Proposition 22.[5]

Proposition 22 was a grower-backed initiative in support of unionization. It would have set up the legal machinery to regulate farm labor–management relations and assure collective bargaining for California farm workers. With Proposition 22, growers admitted the inevitability of agricultural unions and came to support their existence in hopes of controlling the rules governing their activities. By 1972, growers could not afford to identify themselves as a purely partisan group. They had failed to win enough support among legislators to have legislation similar to Proposition 22 passed in the California Assembly (Assembly Bills 964 and 9 in 1971 and 1972, respectively) and were forced to appeal to "the people" of California with their proposal. They organized themselves as the Fair Labor Practices Committee in support of the initiative and claimed the support of some farm workers. They also claimed the support of the California Chamber of Commerce, but were opposed by the California Labor Federation, the AFL-CIO, the Teamsters, and the UFW. The Fair Labor Practices Committee committed "upwards of $600,000" to a media campaign promoting passage of the initiative. The aim of the legislation, they said, was to "achieve a fair and equitable balance between the interests of the general public, the agricultural employee, and the agricultural employer."[6] The media effort was aimed at the state's urban population. The growers thereby acknowledged the need to win friends and approval from communities outside their historic sphere of influence. They bad been economically tied to urban institutions and had cultivated and maintained influence among select urban business associates for decades, but they had not felt the need

[3] The growers' inability to get an acceptable measure through the legislature led them to go directly to the voters in an effort to get from the people what they failed to obtain from the people's representatives.

[4] Varden Fuller, "Professor Proposes System of Mediation and Arbitration to End California's Farm Union Representation Conflict," *California Journal* 4 (September 1973): 299.

[5] "Farm Labor–Management Relations," *California Journal* 3 (August 1972): 231–32.

[6] "Farm Labor-Management Relations," 232.

to explain their business practices or represent them in a particular light to urban audiences before.[7]

The ballot initiative compelled growers to represent their interests as fair and impartial in a general way; that is, in a way that would appeal to outsiders, and it compelled them to define and address very precise and specific issues in concrete terms. The provisions of the initiative were weighted in favor of the growers, but they did outline specific issues dividing the two camps — growers and farm workers — and thus prepared the way for negotiation. It was a great political coup for farm workers to have forced growers to appeal to "the public" for a resolution of the conflict between employers and employees in agriculture. The issues outlined in Proposition 22 were as follows:

(l) Who would participate in elections if Proposition 22 passed and the act became law? Grower-backed Proposition 22 excluded most migratory workers.

(2) What employers would be covered by the Agricultural Labor Relations Board proposed in the act? Employers with fewer than six workers could choose to be covered by the act, but labor had no say in the matter.

(3) What would be the extent of the collective bargaining unit? Collective bargaining would be limited to an individual farm unit unless a different agreement was reached by employer and union. As consequence, labor argued, there would be no industry-wide bargaining.

(4) How would a union communicate with workers? The act would prohibit or discourage union representatives from visiting workers on farms, where many workers live, without an employer's permission.

(5) Could growers remove the threat of a strike at harvest time? The act provided for a sixty-day temporary restraining order which would severely limit strike activity during the critical brief harvest season.

(6) Could growers infringe on the union's ability to picket and boycott? Proposition 22 would permit strikes and picketing at the point of production, but not at the point of sale, thus eliminating the secondary boycott. It also limited consumer boycotts by outlawing the use of generic terms like

[7] Leland L. Bull, Jr., "Application of Christian Principles for the Promotion of the Rights of Migrant Workers and Refugees in the Field of Labor Rights in the U.S.A.," *The Catholic Lawyer* 20, no. 3 (1974): 233–53; Wayne Fuller, "Farm-Labor Relations," *Idaho Law Review* 8 (Fall 1971): 66–76.

"lettuce" and "table grapes" in boycott announcements, requiring identification of particular growers as the target of the boycott. In labor's view this provision would have rendered consumer boycotts practically impossible, since a number of major farm brands are cooperatives, like Sunkist, and comprise a number of growers, only some of whom may be specific targets of a boycott.

(7) How heavily would growers be penalized for arbitrarily dismissing an employee? Proposition 22 did not compel a grower to grant back pay to an employee found to have been fired without just cause. The act would compel the worker to be reinstated, but he would not receive back pay. Proposition 22 was defeated, but these same issues were the subject of debate leading to successful passage of the 1975 Agricultural Labor Relations Act.[8]

From 1969 on, growers were active in pushing for regulation of labor relations in the industry. They wanted to recognize the union on their own terms. Beginning in 1969, the UFW, without the formal concurrence of the national AFL-CIO, opposed all labor relations legislation except the original unamended NLRA. That is, the UFW supported the 1935 NLRA without its 1947 Taft–Hartley amendments which forbid secondary boycotts by official unions.

Actually, the UFW had had mixed feelings about supporting NLRA and NLRA-type legislation before 1969, when labor supporters in California and elsewhere in the nation argued for it on behalf of the new union. For the most part, UFW officials refrained from public opposition to such legislation for fear of alienating their liberal backers and their parent national union, but they clearly saw the relative advantages of activity outside the legal framework of NLRA legislation. They looked upon the organizing activities of the UFW as a political movement. Chavez was a political outsider who was powerful precisely because he could not be fitted into established political processes on someone else's terms. He was intransigent in the face of pressures of all kinds. Chavez knew that the secondary boycott, forbidden to unions covered under the provisions of the Taft–Hartley Act,

[8] California Initiative, Proposition 22 (1972 general election), rejected by California voters, November 1972; California Labor Relations Act of 1975, Cal. Labor Code, para. 1153 (c) (West. Supp. 1976), 1140–1166.3.

was one of his union's most powerful weapons, and he was more than a little reluctant to give it up. He did not want his union to be regulated out from under him — to be pushed, that is, by internal organizational pressures and external legal-liberal pressures to become like many of the older, established unions:

> The danger is that we will become like the building trades. Our situation is similar — being the bargaining agent with many separate companies and contractors. We don't want to model ourselves on industrial unions: that would be bad. We want to get involved in politics, in voter registration, not just contract negotiation. Under the industrial union model, the grower would become the organizer. He would enforce the closed shop system; he would check off the union dues. One guy — the business agent — would become king. Then you get favoritism, corruption. The trouble is that no institution can remain fluid. We have to find some cross between being a movement and being a union. The membership must maintain control, the power must not be centered in a few.[9]

Industrial unions, according to Chavez, focused on winning contracts and then gave up the larger struggle. They hardened and became conservative. His hope was that the UFW would be different. Chavez was forced to compromise only when the organizing momentum was no longer in the UFW's favor.

The 1973 harvest season was a critical time for the UFW union. The Delano Grape Strike begun in 1965 proved to be the first successful attempt to create a farm workers' union in California. The Teamsters Union had for some time represented workers in jobs closely related to field labor — food processing, warehouse, and transportation workers who handled agricultural goods. The Teamsters had made some efforts to organize farm field labor prior to the successful efforts of the UFW, so the potential for a jurisdictional fight between the two unions was present early on. In 1967, however, an agreement was reached between Chavez's AFL-CIO affiliated union and the Teamsters to the effect that Chavez's union would have exclusive rights to organize field workers while the Teamsters would represent

[9] Jacques E. Levy, *Cesar Chavez: Autobiography of La Causa* (New York: W.W. Norton & Co., Inc., 1975).

processing, warehouse, and transportation workers associated with agriculture. After another three years of hard organizing in the Coachella Valley and in and around Delano, Chavez was forced to move his operation to Salinas and confront the Teamsters in a jurisdictional fight for field laborers. In 1970, Chavez was at the peak of his power, having won 182 contracts covering 42,000 lettuce, grape, and soft fruit workers, but his position was seriously threatened.[10]

The outcome of the competition with the Teamsters was devastating to the UFW. By harvest time 1973, the UFW held only 12 contracts covering 6,500 workers, most of whom were wine grape employees.[11] Growers had gone to the Teamsters and negotiated contracts with them directly. In Washington, George Meany initiated negotiations with Frank Fitzsimmons in an effort to bolster the flagging UFW. All this time, growers were pushing hard for pro-management labor legislation. In San Francisco, representatives of the two unions headed by Chavez on the one hand, and by Einar Mohn, head of the Western Conference of Teamsters on the other, began peace talks in hopes of hammering out another jurisdictional agreement. The 1973 harvest, however, saw 4,000 striking farm workers and UFW supporters jailed for defying court orders, two UFW pickets killed, and another Chavez fast. With the organizing momentum collapsing under him, Chavez began to revise his anti–farm labor legislation position.[12]

In the aftermath of violence during the 1973 harvest, Chavez and his union filed a number of civil suits against the Teamsters. If the suits had gone to court, the Teamsters would have had to produce what were widely believed to be damaging private records for court review. At the time, the Teamsters were being scrutinized by investigators looking into the Teamsters' pension fund and the mysterious disappearance of Jimmy Hoffa. The UFW was, in addition, accusing Teamster "goons" of brutality and murder.[13]

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[10] Bruce Keppel, "The Bitter Harvest," *California Journal* 6 (November 1975): 377–79.

[11] Ibid., 379.

[12] "Is Chavez Union on Brink of Defeat?" *California Journal* 4 (September 1973): 297–98.

[13] Edward J. Walsh and Charles Cravpo, "Union Oligarchy and the Grassroots: The Case of the Teamsters' Defeat in Farmworker Organizing," *Sociology and Social Research* 63 (January 1979): 269–93.

Farm workers, the poorest paid work group in the country, were not very valuable to the Teamsters. From the outset, the Teamsters had been more concerned with jobs in packing sheds and processing plants, jobs historically controlled by Teamsters and allocated to them in their original jurisdictional agreement with the UFW. They had entered the fray primarily to protect their own workers who could be hurt by a major harvest-time strike, or so they said. They were considerably less interested in new Teamster recruits. In addition, Teamsters were persuaded that mechanization would dramatically reduce the number of field labor jobs and that this trend would be exaggerated by wage increases due to unionization. This has proved to be true.[14]

Once Meany began talking to Fitzsimmons, a more "useful" form of communication between the UFW and the Teamsters was possible. At the national level, the conflict was seen as one union fighting another — an anti-labor phenomenon. At the local level, the Teamsters had more in common with farm management, particularly the big agribusiness firms, than they did with the UFW, which they saw as a political movement led by an intransigent, disdainful messiah — a civil rights leader, not a labor leader.[15]

When Governor Jerry Brown took office in 1975, there were two major farm labor bills before the legislature. One was authored by Democratic Senator George Zenovich of Fresno and backed by grower and Teamster interests.[16] The other was a UFW bill introduced by Chicano Assemblyman Richard Alatorre.[17] In April 1975 Brown introduced a compromise bill,[18] but Chavez quickly refused to support the governor's proposal in a letter to Zenovich, stating that the UFW would back only Alatorre's bill. All others were "unacceptable, unworkable, and unamendable."[19] Despite the UFW's quick rejection of Brown's compromise bill, however, it was clear that the UFW needed legislation to insure openly competitive elections on farms and in areas where the Teamsters were undermining its organizing efforts. In a long battle of perseverance and attrition, the UFW

14 Ibid.
15 Ibid.
16 California Senate Bill 308.
17 California Assembly Bill 1.
18 California Senate Bill 813.
19 Bowman, "Coup," 190.

might well have beaten the Teamsters in the field, but if Chavez wanted an immediate advantage, legislation held the best promise of giving him that advantage. Legislation enabling the UFW to call for elections and to take action against growers and Teamsters for engaging in unfair labor practices was the best immediate strategy to end Teamster–grower collusion, or so Chavez had grudgingly come to believe.[20]

Realistically, Brown's bill or an amended version of his bill was the only measure that could pass the legislature, since it provided assemblymen with a way to enact legislation without appearing to choose sides. Consequently, the governor took additional steps toward compromise. He instructed Rose Elizabeth Bird, his secretary of agriculture and services, to analyze the issues at stake in the farm labor bills before the legislature. Bird then met with growers and UFW representatives, the Teamsters having declined to participate. Messages were relayed back and forth between Bird, the governor, the legislature, the growers, and UFW representatives. Soon, the governor was directly involved, discussing labor legislation issues with legislators and growers in the privacy of his office.[21]

Brown wanted to persuade the various parties that his compromise bill was different from previous approaches to the problem of enacting farm labor legislation and he wanted to narrow the range of disagreement to specific issues — "leaving rhetoric aside."[22] Actually, Brown was dealing with essentially the same set of issues that had divided growers and farm workers on the problem of farm labor legislation in 1969. Brown had ready access to the UFW through Leroy Chatfield, one of his aides who previously had worked for Chavez, but he needed to draw growers and grower-related interests into the negotiations in a positive way. He managed to do this by creating the impression that a compromise could be reached, that he was willing to go out on a limb for it, and that a political atmosphere of power brokering would surround the negotiations. Brown was able to assure growers that practical, and not ideological, issues would be discussed, that values would be stripped from the process and the mechanics

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[20] Jeff L. Lewin, "Representatives of Their Own Choosing: Practical Consideration in the Selection of Bargaining Representatives for Seasonal Farmworkers," *California Law Review* 64, no. 3 (May 1976): 732.

[21] Bowman, "Coup," 190–91.

[22] Ibid., 190.

of implementing unionization emphasized. The growers knew that Brown had close contacts with the UFW. They assumed that Brown and Chavez were friends and concluded that Brown knew that Chavez would deal. They knew that Brown was taking a risk, but they figured that he would not gamble on a political issue of such magnitude if the odds were against him. A compromise, then, was likely. With negotiations underway, Brown could not afford to he openly partisan. Growers saw Brown as a mediator in a straightforward political struggle. Even if negotiations collapsed, Brown would be compelled to smooth things over. He might then have to go directly to the more conservative grower-related interested in the legislature, thus creating opportunities for bargaining and concessions on other issues. Growers, then, had little to lose. The key to Brown's ability to engage growers, however, was their by-then longstanding support of farm labor legislation and Brown's promise that tough bargaining would replace rhetoric. The silent power-broker style of negotiation would hold sway over public denunciations of the immorality of growers by Chavez and the UFW. Chavez would not be able to "drag religion into it" if negotiations were conducted by the governor's office.[23]

The talks centered around three main issues: (1) the size of the bargaining unit, (2) jurisdictional disputes between unions, in particular, the disposition of existing Teamster contracts, and (3) the use of the secondary boycott. A compromise solution was reached in each instance. The definition of the bargaining unit in the ALRA of 1975 was the same as its definition in the UFW-backed Assembly Bill (AB 1) authored by Alatorre. The employer unit, rather than the craft unit or the farm unit was to be the bargaining unit in a given contract negotiation unless the employees worked in non-contiguous areas, in which case the Agricultural Labor Relations Board was to pick the bargaining unit (from among the employer, craft, and farm units).[24]

One of the sticking points in the negotiations concerned jurisdictional rivalries between the UFW and the Teamsters. The Teamsters feared that the proposed labor legislation would automatically invalidate all of their existing contracts. When Brown's proposed bill was first unveiled,

[23] Interview with Johnson, August, 1978.

[24] Cal. Labor Code para. 1156.2 (West Supp. 1976).

the Teamsters held 400 contracts with growers covering more than 50,000 workers. Bird assured the Teamsters that their contracts would remain in effect until new representation elections were held under rules established by the proposed act. If the UFW, for instance, obtained a show of interest among workers on a farm, and if a representation election was held according to guidelines established by the act and the UFW won, then and only then, would a Teamsters' contract be invalidated and replaced by a contract negotiated between the grower and the UFW. The building trades within the AFL-CIO were also concerned about the potential effects of the proposed legislation. They were afraid that the ALRB would allow farm workers rather than building tradesmen to be hired for construction jobs on farms. On May 19, 1975, Brown negotiated a compromise giving the Teamsters and the building trades union the protective language they desired and promising Chavez that the bill would be enacted prior to the 1975 fall harvest season.[25]

Perhaps the major compromise reached in the negotiations concerned use of the secondary boycott by unions. The parties eventually agreed to prohibit secondary boycotts before a bargaining unit was certified, but to allow secondary boycotts by a certified union. That is, the secondary boycott could be used as a collective bargaining tool (by a certified union), but it could not be used to force a grower to recognize a particular union.[26]

The UFW publicly opposed Brown's original compromise and continued to oppose it even in amended form until the final night of negotiation. Jerry Cohen, the UFW's principal attorney, called the bill "deceptive" and three Chicano legislators, Art Torres, Richard Alatorre, and Joseph Montoya, accused Brown of adopting a "racist" farm-labor policy. Behind the scenes, however, the UFW was pressing for the most favorable law possible, having embraced the need for legislation that would make it possible for farm workers to challenge Teamsters' contracts. The Western Conference of Teamsters, on the other hand, praised Brown's original proposal, but withheld endorsement of it, and later opposed the measure when they realized that the legislation might invalidate their contracts with growers.[27]

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25 Bowman, "Coup," 191–92.

26 "California Compromise," *Time*, May 19, 1975, 18.

27 Bowman, "Coup," 191.

Brown made changes in the bill during the negotiations in an effort to please both Chavez and the growers.

The growers accepted the bill for several reasons: Chavez's important strategic weapon, the secondary boycott, was limited by the legislation; the bill provided for a "no union" option in representation elections; and the alternative to legislation seemed to be more years of unregulated labor strife in the agricultural industry in California. If the act passed, there would be legal pressure for Chavez to conform to standard labor union practice. The compromise was a victory for Chavez and the UFW, assuming the UFW could win big in the representation elections. The UFW could call strikes at harvest time, it could get secret elections to challenge Teamster contracts, and it could still conduct limited secondary boycotts.

The basic provisions of the Brown compromise bill were as follows:

(1) Workers' representatives were to be selected by secret ballot elections with a "no-union" option entered on the ballot.

(2) Elections were to be held within seven days after the filing of an election petition and, if possible, within 48 hours after filing, if the majority of workers were on strike.

(3) Employees eligible to vote were to include all employees on the payroll immediately prior to the filing of an election petition, all employees discharged after the petition filing, and all persons displaced by strike activities immediately before and after filing.

(4) A union could appeal to consumers not to patronize a neutral employer where no representation election had been held in the last twelve months or where no union had been certified in twelve months and a union could lobby consumers not to buy a specific product at a neutral employer's place of business; but a union could not force employees of a neutral employer to strike or to cease work to pressure an employer to stop doing business with a primary employer.

(5) Picketing to get an employer to recognize a union was allowed for up to thirty days before filing an election petition only when no union was certified or where no election had been held within the last twelve months.

(6) The bargaining unit was to include the employer unit unless employees worked in non-contiguous areas, in which case the board picked the bargaining unit.

(7) The legislation permitted contracts in force when the act took effect to be challenged through election.

(8) Twenty-four-hour notice had to be given before court orders could be sought to ban pickets.

(9) Parties hurt by a board order could obtain a review in the Court of Appeal.

(10) The Agricultural Labor Relations Board was to consist of five full-time members. Board members were not required to be representative of any particular set of interests. That is, the act did not specify board member qualifications.[28]

The act went into effect on August 28, 1975. Newly appointed board members had less than a week to prepare to conduct the first of the secret ballot representation elections scheduled for September 2nd. By the end of the first month, the agency had had to conduct 200 elections and at least as many unfair labor practice complaints had been filed. By contrast, the NLRB in its first year of operation handled something like 35 elections. Ninety-one employees were hired during the first month of operation. Three were required to conduct each election. One office alone ran 17 elections in a single day. The demand for services was extraordinarily high, and the amount of funds and staff hours necessary to do the work was grossly underestimated. In addition, agency personnel had been hired quickly and in some cases the screening process was not exacting enough. In Salinas, a regional director of the ALRB was dismissed after complaints were lodged against him. The most time-consuming aspect of the work being done by the agency, however, was investigating complaints, holding hearings on contested ballots, and issuing findings.[29]

Brown and the board were engulfed in a flood of criticism of the agency's work. The governor responded with an excuse and a bit of philosophy. The agency, Brown, said, had had to deal with "unprecedented elections under unprecedented conditions."[30] Controversy surrounding the agency

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[28] Lewin, "Representatives," 732–92; Herman Levy, "The Agricultural Labor Relations Act of 1975," *Santa Clara Lawyer* 15 (1975), 783; Lucinda Carol Pocan, Comment, "California's Attempt to End Farmworker Voicelessness: A survey of the Agricultural Labor Relations Act of 1975," *Pacific Law Journal* 7 (January 1976): 197.

[29] Harrington interview.

[30] Bowman, "Coup," 90–92.

raised "the question of the limits of government in terms of expectation." What's more, a piece of legislation could hardly be expected to "resolve the disputes of decades."[31]

The UFW was one of the agency's chief critics. Chavez called Walter Kintz, the board's general counsel, "evil," and on September 15th called for his dismissal.[32] Charges and countercharges were daily reported in the papers, tensions between board members surfaced, and so the governor sent Lew Warner, an aide, to investigate relations between Kintz and the board. Meanwhile, the (pro-grower) Board of Agriculture called on the legislature to investigate implementation of the new act. The Teamsters picketed the ALRB's Fresno office to protest agency actions, and the UFW picketed the board's headquarters in Sacramento to protest agency inaction.[33]

By October Kintz had hired ten additional investigators and attorneys to work on complaints and began brushing up the agency's tarnished image with brave statements to the press.[34] The board's $1.3 million initial grant, meanwhile, was fast disappearing under the pressure of very heavy expenditures.

Conflicts and tensions were exacerbated by the early elections returns. Of the 218 elections held as of October 14, 1975, 103 had been won by the UFW and 80 by the Teamsters. In 10 elections, a "no union" vote came out on top. The UFW tallied 13,841 votes, the Teamsters, 7,903. "No union" got 4,406 votes. The UFW won the right to represent 11,695 workers, but the Teamsters were a close second with 9,556. One thousand four hundred and ten workers chose to go unrepresented. Tens of thousands of votes were challenged by both the UFW or the Teamsters, and the beleaguered ALRB was charged with investigating these cases of alleged vote fraud and voter ineligibility.[35]

The agency ran out of funds and officially closed its doors on February 6, 1976. A massive backlog of work had piled up and many agency

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31 Ibid.

32 Ibid.

33 Ibid.

34 Ibid.

35 "Rendering to Cesar: Election Results," *Time*, September 22, 1975, 32; Veral M. Seagraves, "Cesar Chavez and the Farm Workers: Victories, Yes, But the Struggle Goes On," *Christian Century*, December 17, 1975, 1160.

employees continued to work without being paid. These "zealous" staffers prompted cries of outrage from some groups who pointed to this kind of die-hard enthusiasm as proof that there was something wrong with the agency, that the agency had hired the wrong kind of people for the nonpartisan administrative work required. People who would work without pay in an atmosphere of virtually nonstop criticism and bitter political controversy were clearly fanatics. Long after the 6th, as agency personnel continued to staff the office, a collective and companionate style of work relationship emerged.

Employees pooled their checks and helped each other out in what some of them viewed as an atmosphere of "siege." These staffers had come to define their work as a cause. A final order came down, however, demanding a stop to agency activity. Agency property was "reclaimed." Door locks were changed and agency files were seized. As a consequence, a significant number of 1975 election returns were not officially processed, and many 1975 unfair labor practices charges went unresolved.[36]

The feeling at the time the agency ran out of money was that the legislature would not let the agency die — that Brown would fight for more funds to allow the agency to continue its work. The agency had already borrowed $1.75 million from the state treasury and was unable to borrow more. Various compromises were talked about but nothing more happened.

Growers seized the opportunity to push for changes in the basic law as a condition for approving additional funds, but Brown and key legislative leaders refused to make changes.[37]

In the meantime, the UFW began circulating initiative petitions to reenact the law with several changes and to direct the legislature to fund the ALRB. Within twenty-nine days the UFW had secured the 750,000 signatures necessary to qualify the proposition for the November ballot. The speed with which signatures were collected conveyed the message to the legislature that something should be done, that there were political risks

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[36] "California Farm Board Throws Out Results of Three Ranch Elections," *Los Angeles Times*, January 29, 1976, I-25.

[37] William Endicott, "Grower-Backed Farm Labor Bill Gains," *Los Angeles Times*, March 4, 1976, I-26; Bill Stall, "Brown Claims Gains for Farm Board Revival." *Los Angeles Times*, March 6, 1976, 8; "Grower-Backed Measure on Farm Labor Act Killed," *Los Angeles Times*, March 10, 1976, I-3.

in taking a no-ALRB approach. The legislature compromised on the funding by requiring legislative oversight of agency activities and did so before Proposition 14 was put to the test in the November election.[38]

In the election, the proposition failed by a 2-to-1 margin statewide. In fact, the initiative carried only two counties, Alameda and San Francisco. Afterward, there was a significant backlash over board actions. The election returns had provided new grounds for criticizing the ALRB. Some groups claimed that the board was trying to administratively impose the kinds of motions and procedures that were at least partly contained in Proposition 14 and which had been defeated in the election. They argued that the people rejected things that the board continued to do.[39]

The ALRB was out of business from February 6, 1976 to July 1, 1976 when additional funds were made available for the fiscal year 1976–77, contingent upon the establishment of a legislative committee to oversee the functions of the ALRB. Once established, the legislative committee called public meetings in various places throughout the state and invited all interested parties to speak out about the agency and the legislation. As one ALRB attorney put it, public forums were created for people "to tell their horror stories about the agency." The committee was "representative" in that committee members with opposite points of view were included. Assemblyman Alatorre, a UFW backer, and Howard Berman, who, along with Senator John Dunlap, had managed the original ALRA through the legislature, were on the committee as was Senator John Stull, one of the strong political forces in opposition to the agency. In 1977 Stull tried to amend the ALRA to forbid use of "the access rule." The access rule is not, in fact, part of the legislation, but rather an administrative ruling permitting a union access to workers on private farm property during certain times in the day. The agency was refunded for fiscal year 1976–77, but it was not a permanent part of the state structure with yearly budget guarantees.

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38 Tom Goff, "New Effort to Fund Farm Board Slated," *Los Angeles Times*, March 16, 1976, III-8; Larry Stammer, "Panel Votes Emergency Funds for Farm Board," *Los Angeles Times*, March 17, 1976, I-3.

39 Harry Bernstein, "New Charges Hit Farm Board," *Los Angeles Times*, February 17, 1977, II-2.

Its continued existence in the form in which it had been created was still up in the air.[40]

The ALRA of 1975 established a system giving farm workers the right to select unions to represent them in bargaining with employers. In the language of the legislation, the agency was directed to promote this right. The agency, of course, was not to indicate a preference for one union over another. There is little doubt, however, that a large majority of the individual members of the agency were sympathetic to the UFW. One central office staff attorney, when asked who the ALRB's allies were, responded: "There used to be a reaction which would say that it was probably the union, the UFW. I think institutionally that's still correct."[41] It was not easy for the liberal, socially conscious, institutionally-based ALRB attorneys to look upon the UFW as an adversary.

The UFW, on the other hand, could easily count the ALRB among its enemies when agency actions ran counter to its interests. The 1977 elections in the Coachella Valley are a good example of the context in which the union could view the ALRB as an enemy. The union did poorly — certainly what they considered to be poorly — in the Coachella Valley elections. The UFW lost some elections, and others were stalemated by large numbers of challenged ballots. In some cases, elections were not conducted because the union failed to get a 50 percent showing. Before the agency could conduct an election, it must have evidence that at least 50 percent of the currently employed employees wanted to have an election. Evidence consists of signatures on authorization cards of election petitions. The union felt the ALRB was largely to blame. Union people blamed the ALRB on a personal basis. UFW organizers went to the ALRB regional office and literally screamed their accusations at staff members. The union charged Coachella Valley growers with large-scale manipulation of the work force just before the elections were to take place. Large numbers of workers, it claimed, were being laid off so that they would not be able to vote. The UFW further charged the ALRB with sanctioning grower manipulation by not acting affirmatively to stop the firings, by not aggressively investigating charges brought to its attention by UFW representatives, and by failing to

[40] Harry Bernstein, "Lawmaker Supports Farm Board Aide," *Los Angeles Times*, February 18, 1977, II-3.

[41] Harrington interview.

provide assurances to farm workers that they could engage in organizing activities without fear of losing their jobs.[42]

The Coachella Valley became the testing ground for an agency regulation passed in the fall of 1977. The practice had been for the union to receive a list of the names and addresses of current employees after an election petition had been filed. Under the new regulation, a pre-petition list was to be drawn up by the growers; the UFW was to have access to a list of the names and addresses of current farm employees prior to the filing of an election petition. The union needed a list to organize an effective petition campaign, i.e., to get their 50 percent showing. The growers opposed the regulation and turned to the courts to fight it.[43]

In the rural Superior Courts, growers were largely successful in gaining injunctions against the new ALRB regulation and in resisting a variety of attempts to enforce it. They tied the UFW's organizing efforts up for weeks.[44] Since organizing is really only effective during the harvest season of 8–12 weeks, the growers managed to delay and thus defeat the UFW's organizing efforts for another year.

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[42] Theo J. Majka, "Regulating Farmworkers: The State and the Agricultural Labor Supply in California," *Contemporary Crises*, April 1978, 141–55.

[43] Ibid.

[44] Harrington interview.

Chapter 9

CONCLUSION

California agriculture has distinctive characteristics, and as a consequence the farm labor problem in California is unique. As this history has shown, each of the groups involved with farm labor in California understood the agricultural system from its own point of view, and each misrepresented the system's features to itself and to others. Unlike the Jeffersonian ideal of the small family farm, which was approximated by the pattern of land settlement in the East and Midwest, California's agricultural system is based on large tracts of land and an abundant, flexible labor supply to work them. The labor supply established and maintained by the system consisted of persons of color held in a subordinate position within a wage labor hierarchy. The ideologies of workers, labor organizers, and political reformers did not accurately reflect these facts. Nor did the growers as they consolidated their position and struggled to contain the conflict generated by American democrats and farm labor reformers.

The growers allied themselves with corporate interests and strove to promote the prerogatives of business, denying all the while that they were corporate giants whose base of support extended beyond local communities. Effective political support for the farm workers came late, as a by-product of the Civil Rights Movement. Reform politicians of earlier

periods had established civic peace as their primary goal and thus lent support to business interests generally. Against great odds, the unions fought for control of the labor force. But the unions also fought each other, and the mainstream of the labor movement sided with business against radical labor organizers. The early union power struggles ended with an alliance between big labor and big business. With the Civil Rights Movement at its peak, however, the UFW introduced new ethnic and religious elements into the situation and CRLA, with its legal tack, reinterpreted and invigorated basic liberal values. These two groups were successful as no other group or combination of groups had been, but their attempted partnership failed. They, too, came into conflict with one another.

As often as not in our story, allied groups worked at cross purposes, and indeed, progress seems to have come from unintentional, if not completely inadvertent, factors. It is the marked changes in the social perspectives of American democrats and reformers engaged in the farm labor issue that I have documented, together with grower efforts to contain the conflicts they generated. My principal conclusion is that each group understood land tenure and the position of agricultural workers in reference to its own views and acted accordingly, with unexpected consequences. First to be considered were the agrarian idealists.

The agrarian idealists tenaciously clung to Thomas Jefferson's model of the family farm, however rapidly land speculation, industrialization, and monopolies in banking and transport raced ahead. Jefferson believed that farm labor was the ultimate form of self-reliance, and the family farmer the ultimate autonomous citizen, immediately dependent upon God and his own toil; not part of the stream of commerce, polluted by greed. A nation of family farms would check the development of predatory commerce, finance, and manufacturing, and the growth of extremes of wealth and poverty. Democracy and farm labor in a system of small farms would guarantee one another. By the turn of the century, however, the agrarian idealists were grossly outnumbered by those who profited from the special organization of agriculture along the lines of a rationalized plantation system.

Progressives in California had their major impact on farm labor from 1911–27, beginning with the inauguration of Hiram Johnson as governor. The Progressives were influential reformers, but they opposed unionization. They documented the evils of farm labor life and helped advance the

education of elite and public opinion. They saw the social conditions of farm labor as pathological, and this was radically new, but they did not seek solutions involving new structures of economic or political power. Hence, their characteristic solutions, when they ventured beyond immediate relief and welfare measures, became diffuse and symbolic. During this period, the only systematic efforts at organizing farm labor came from the International Workers of the World, whose efforts were crushed, with Progressive cooperation, under criminal syndicalism laws enacted during World War I.

The Communist Party, during the 1930s, encountered obstacles similar to those faced by the IWW, and met with a similar fate in its attempt to organize California farm labor. These obstacles included grower unity, judicial hostility, police repression, and the isolation entailed by reliance upon an ideology extrinsic to the situation of farm workers. Underlying these obstacles were firm and persisting economic realities: (a) a system of concentrated ownership of very large parcels of land, often held by single families, (b) the industrialized form of agricultural production, utilizing mechanization, chemicals, a seasonal but concentrated work force, and high speed processes of handling and transport, and (c) a network of relationships with the larger institutions of American life, through interlocking corporate directorates and government subsidies.

The larger developments in American society in the 1930s, the coming of the New Deal, legal recognition of collective bargaining, and the organizing success of mainstream labor in crafts and trades and industries, did not advance the cause of farm workers because New Deal labor policy was largely paternalistic and conservative, and did not allow for protracted hostile and competitive relations between workers and management. Where labor organizing would increase social conflict before it would diminish it, New Deal officials and AFL leaders alike shunned it.

The early and mid-1930s, then, saw the burial of ideological movements and the selective protection of labor. In the final three years of the decade, 1937–39, *The Grapes of Wrath* appeared, Senator Robert LaFollette's subcommittee held hearings on farm labor in California, and the AFL, supporting its affiliate, the Teamsters, cooperated with growers against CIO attempts to organize farm workers. While awareness of the farm workers' desperate conditions was rising, their organization was still held hostage

to conflicts between larger actors. Effective institutional support and assistance from beyond the localities was still missing.

The import of outside power structures is underscored in another period of reform activity, covering the years 1947–52. During this time, the National Farm Labor Union, under the leadership of H. L. Mitchell, launched a sustained effort to organize farm workers in the southern San Joaquin Valley. Mitchell's drives, directed chiefly at organizing workers on the DiGiorgio holdings, utilized many of the same tactics later employed by Cesar Chavez, but to no avail. Farm strikes, boycotts supported by organized labor, and demands for legal protections that were endorsed by various liberal groups, as well as skilled organizational techniques — all these tactics were brought to use. The national political system, however, during these times of postwar economic boom, and a return to war in Korea, was not engaged with groups and issues of high salience to the farm workers' cause. Under these circumstances, the superior resources of the farm employers prevailed.

During the years 1956–64, the preconditions for successful farm worker organization may be seen finally to emerge. In the late 1950s, liberal organizations and the AFL-CIO joined forces to form a National Advisory Committee on Farm Labor, which led to the creation of a four-point program to abolish "alien" worker programs, enact health and welfare laws to cover farm workers, educate the public, and organize farm workers. During this critical time, two successive secretaries of labor, under Republican President Eisenhower and Democratic President Kennedy, supported termination of the bracero program, an objective not achieved until Lyndon Johnson was in office. Secretaries Mitchell and Goldberg did advance other protections for farm workers, including a somewhat more meaningful minimum wage.

Chavez's success depended vitally upon the ideology that he and the UFW developed and came to represent. At the same time, the group alliances that Chavez and the UFW struck, though they did not last, were crucial to the success of the farm workers' movement in California. Beginning in the late 1950s, the Civil Rights Movement had steadily inched toward the center of liberal awareness. The struggles, defeats, and victories of this movement manifested a number of features which became characteristic of the approach of Chavez and the UFW. The Civil Rights Movement was

led by a single dominant and charismatic figure, Martin Luther King, Jr. King appealed to values that he traced to Christianity. He espoused nonviolence as a principle and a tactic. He utilized the tactic of boycott. He led large marches. He drew national media coverage of local elites responding to peaceful protest with abuse and violence. He became a moral hero as well as a political leader to millions of Americans. In all these respects the progression of Chavez and the UFW replicates King and the Southern Christian Leadership Conference.

The War on Poverty was an attempt to rationalize a series of parallel programs which served traditional but not always allied constituencies of the Democratic Party; the poor in the cities and in the countryside alike. Michael Harrington's book, *The Other America*, which helped advance American awareness of the poverty issue, called particular attention to rural poverty. Edward R. Murrow's television program, *Harvest of Shame*, aroused indignation. A major thrust of the administrative umbrella of the War on Poverty programs of the Office of Economic Opportunity was community organizing and participation of the poor. This sensitized liberals to the need for both, and it made Chavez and the UFW seem to be serving national interests.

A second major thrust of the OEO was legal assistance to the poor. This was to serve the two-fold purpose of protecting the poor and vindicating the integrity of the legal system. Liberals ardently supported both objectives, particularly the first; attorneys and conservatives were drawn to support the second. The OEO legal aid programs, often called the best in the nation, were specifically designed to serve the legal needs and interests of California's rural poor. CRLA demonstrated the contribution the courts could make to admitting farm workers to full and equal stature within the American legal system by appealing to constitutional provisions embodying basic national values. With the use of class-action cases, CRLA attorneys, at one and the same time, raised farm worker consciousness and public awareness of the rural poor as a distinct group.

Nevertheless, Chavez maintained support among activists and voters who supported the Civil Rights and poverty movements long enough to win important concessions from the growers. His support was based on an appeal for a more adequate implementation of basic standards of fairness and equal treatment. California growers had lost control of the

political environment due to redistricting following the 1960 census, due to reapportionment decisions, and due to the strength of the liberal–labor coalition that was mobilized to support farm workers. By 1969, rather than struggle for uncertain outcomes in an uncertain legislative process to protect marginally greater profits, growers preferred stable and predictable recognized bargaining that a business-oriented labor union would advance. They wanted to avoid damaging political and economic actions directed against them. The success of Chavez rested partly upon the process of labor organization as an extension of the rationalization and control of the economic world undertaken from opposed but convergent perspectives by California agricultural businesses and national organized labor. And so it was that progress was a result of factors not directed by the social movement organized to achieve it. Progress came from an unanticipated and unintended array of things.

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CODA

The United Farm Workers' movement has been remarkably successful. After a century of exclusion, many California farm workers are now unionized and protected by strong labor legislation. The farm workers' union is a political and economic power. It uses a portion of its membership dues to finance a substantial lobbying effort in Sacramento, and, in 1979, it conducted the best organized strike in its history, involving 4,100 workers in an action against ten companies in the Imperial Valley. When the strike was settled, seven months after it began, the union had won a 57 percent increase in wages from the nation's largest lettuce grower.[1]

In the most recent phase of reform activity, however, the farm workers' movement has come up against a fundamental limitation, a Weberian-style dilemma, brought on by passage of the Agricultural Labor Relations Act, diminished public interest in the farm workers' cause, and the routine concerns of farm workers as workers. Chavez has continued to use the strategies and tactics of a charismatic social movement, but he has been less successful with them than in the past. The union must administer the contracts it has.

[1] "Pioneer Farm Labor Act is Imperiled in California," *New York Times*, May 22, 1983, A24.

Adversaries and allies alike demand that this be done in an efficient, professional manner. Chavez, however, has continued to maintain his staff as volunteers who subsist on pocket money and live communally in a converted tuberculosis asylum in Keene, California, a tiny town in the foothills of the Tehachapi Mountains near Bakersfield. The union is regulated by a tough labor law. Concessions were made to Chavez and the UFW when it was framed, but the law is interpreted and enforced by "designated authorities," and as a consequence, more and more of the farm workers' battles are taking place within a legalistic framework. The union is being shaped by regulation it cannot avoid. Administrative forums are the new arenas of conflict.

Much of the UFW's early success, especially in winning the support of liberals, stemmed from its role as a downtrodden David battling the corporate Goliaths of the farming industry. That changed as former UFW members found they could live with the Teamsters and as liberals lost interest in Chavez and the UFW. "We were — maybe in our hearts we still are — with Chavez. We were members of his union for two years, good years. Then the Teamsters came. We were on the picket lines last year, striking against the growers who got the Teamster contracts. But we signed the Teamster petition this year. It was printed in Spanish for a change. We work regular now."[2]

Public support for Chavez and the UFW has subsided, too. A San Francisco woman, who once worked as a volunteer in Chavez's boycott of the chain stores, was quoted in *The New York Times* as follows: "I was really a believer. My kids had never even tasted grapes, and for three years I used spinach to make salads. I still wish Chavez well, but I'm out of it now. Maybe Vietnam, the civil-rights thing, Watergate and all the rest of it wore me out. I worry more now about the price of a head of lettuce than the issue of who picked it."[3]

Passage of the ALRA in 1975 helped Chavez and the UFW stage a comeback, but it forced the UFW to become more like a conventional labor union and political pressure group. The union's most recent activities provide ample evidence of this. At the annual convention of the UFW in September 1983, Chavez told reporters that he had formed what he called a "Chicano lobby" to help Democratic candidates and that the union had ordered computerized direct-mail equipment to help spread a political message to members

[2] Winthrop Griffiths, "Is Chavez Beaten?" *New York Times Magazine*, September 15, 1974, 22.

[3] Ibid., 18–20.

and supporters. He also indicated that the union was interested in representing the needs of Hispanic Californians as well as its traditional constituency, California farm workers. At the convention, Chavez did give details of a previously announced effort to resume a consumer boycott, but the boycott was to be backed by "the use of computers and demographic studies to select people who are most likely to support a boycott." Once the union had a list of such people, plans were to "attempt to change their buying habits by altering the image" of the union's principal boycott target, the Lucky supermarket chain. Chavez called the union's plan "the new consumerism" and pledged one-third of the UFW's annual income of $3.5 million to it.[4]

The press used to emphasize Chavez's almost shy charisma and the Catholic-Latin spirituality associated with the movement. Increasingly news reports have focused on the kind of activities that many associate with established unions, such as occasional reports of violence during strikes, assertions by dissident members that their rights have been abused by the union leadership, and disclosures that the union's lobbyists have become contributors to state legislators in Sacramento. In describing the union boycott of 1983, for example, the *San Francisco Chronicle* printed the following: "[T]he union has launched a new campaign that is being planned by one of the brightest political strategists in the state. Placards and marching are being put aside for the electronic tools of the corporate and political worlds — television advertising, census studies and carefully edited direct mail into selected households."[5]

The union's high technology campaign is a response to legalistic maneuvering on the part of its adversaries. In Sacramento, Governor George Deukmejian, a Republican who received large campaign contributions from farmers, sharply cut the budget of the Agricultural Labor Relations Board, which enforces the Agricultural Labor Relations Act. One result, farm union officials say, is a huge backlog of unresolved complaints against growers by workers. Board members serve four-year terms. Governor Deukmejian will not be able to appoint a majority until 1986, but soon after his inauguration in 1983 he appointed David Stirling, a conservative Republican friend, as its general counsel. The board's general counsel is its chief staff officer. Stirling quickly moved to change the agency's direction. He transferred staff

4 "UFW War on Lucky Stores," *San Francisco Chronicle*, July 25, 1983, 1.

5 Ibid., 5.

members whom growers had criticized out of key positions and began seeking to reduce some of the cash penalties levied against growers. One board member, Jerome Waldie, asserted that Deukmejian was trying to dismantle the ALRB. "Agribusiness, Deukmejian's biggest contributor, has long had as its primary objective elimination of the board. He's trying to do the same thing that his tutor, President Reagan, did with the EPA, if he can't repeal a law, he'll enforce it at the minimum level, or maybe not enforce it at all."[6]

Farm workers are no longer outsiders. They have been admitted to the system, but they have been admitted under pressure. The earlier tactics of growers against farm workers — notably the use of undocumented temporary workers — continue. The UFW estimated that 35 percent of the farm laborers working in the Imperial Valley in 1979 were illegal aliens. No one disputes these figures. Other tactics — in particular, the mechanization of planting, cultivation, and harvesting — have been sharply stepped up since the UFW won its major victories. The farm workers' allies have fallen away, as admission to the system has complicated and interwoven the problems faced by farm labor. The intensified awareness, the canons of conscience, the opportunity for popular participation and support, all have receded.

Unionization, then, has borne bitter fruit for the farm workers. Their ideology and tactics are disarmed; having attorneys and administrative forums, their leader has no dramatic cause to place before the bar of popular conscience. The questions that formed the group out of urgent human need are now cast in legal terms, in courts, board hearings, and meetings. Adversaries press ahead with a mix of old tactics and new. The system to which the UFW has gained admission is a pressure system, with strong tendencies for power to be transferred upward. It is a system that offers farm workers protections they did not have before. It is a system that is overtly rule-based and nonviolent. Yet it is a system in which the powerful use the rules — and the weak.

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[6] Harry Bernstein, "State's Organized Labor Can Look Forward to Four Rough Years," *Los Angeles Times*, January 26, 1983, I-3; Robert Lindsey, "Pioneer Farm Labor Act is Imperiled in California," *New York Times*, May 22, 1983, 24.

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PART 2: UNSIGNED ARTICLES AND PAMPHLETS

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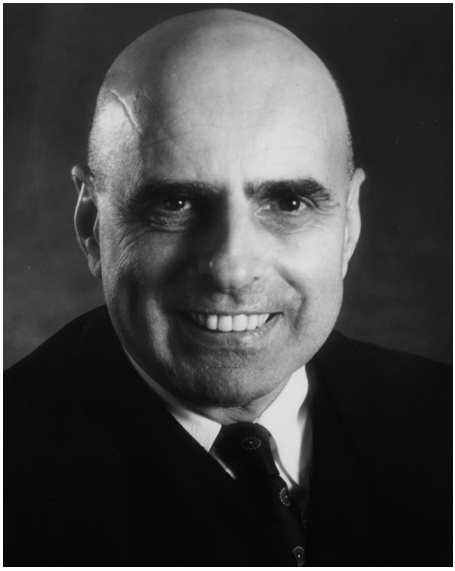
ORAL HISTORY

JUSTICE ARMAND ARABIAN

ASSOCIATE JUSTICE
CALIFORNIA SUPREME COURT
1990–1996



Armand Arabian,
Associate Justice, California
Supreme Court, 1990–1996

Oral History of

JUSTICE ARMAND ARABIAN

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Preface to the Oral History of

JUSTICE ARMAND ARABIAN

LAURA MCCREERY

In the spring of 2005, the idea began to take shape for a possible series of oral history interviews centered on Governor George Deukmejian's appointees to the California Supreme Court. Of his eight appointments in eight years — a great number by any measure — two, Justices Joyce Kennard and Marvin Baxter, were still serving on the court. Another two, Justices Marcus Kaufman and David Eagleson, had died in 2003 without having had the chance to add their spoken recollections to the archival record of California's judicial history.

But four of the justices appointed by Governor Deukmejian had retired from the bench and returned to private law practice in California: Chief Justice Malcolm Lucas and Associate Justices Armand Arabian, John Arguelles, and Edward Panelli. With scholarly guidance from Professor Harry N. Scheiber, Stefan A. Riesenfeld Professor of Law and History at Berkeley Law School, I designed the California Supreme Court Oral History Project with them in mind, reasoning that interviews with several justices who served in overlapping time periods might yield a richer historical record than interviews with one or more justices in isolation.

In addition, such a series of interviews might shed new light on the unusual period before, during, and after California's November 1986

statewide election, in which voters — at odds with the California Supreme Court's handling of death penalty appeals — declined to retain three sitting members: Chief Justice Rose Bird, Associate Justice Joseph Grodin, and Associate Justice Cruz Reynoso. (Although Chief Justice Bird recorded no oral history before her death in 1999, her two colleagues have been interviewed by others,[1] and Justice Grodin also authored a book, *In Pursuit of Justice*, about his experiences.)

The 1986 election and its aftermath changed dramatically the makeup of the court and its leadership. Not only did three new justices join the court in 1987, but all three retired within two to four years, allowing Governor Deukmejian the opportunity to replace them, too, before his second term expired.

Happily, all four of the retired justices did, in time, consent to participate in the California Supreme Court Oral History Project. Scholars, students, and the bench and bar owe a debt of gratitude to each of them, as they have immeasurably enriched the record of California's judiciary. It was an honor and a personal pleasure to explore in detail their lives and careers, a lengthy process that each justice bore with dedication, humor, and kindness.

My discussions with each interviewee naturally varied in scope and style, but I urged them all to recall in some depth their entire judicial careers, not only their time on the California Supreme Court. Without exception the justices revealed a wealth of experience in California's court system over time. All four had been trial judges, and each emphasized the importance of that experience to their work on the state's highest court. I spent substantial time exploring their personal stories as well, so that future researchers may better understand who they were and why they made certain choices in their lives and careers.

Each justice had been retired from the bench for at least ten years at the time of interview. Users of this material should know that, as interviewees, they had the disadvantage of chronological distance from events they discussed. But while the human memory is imperfect, all four justices demonstrated remarkable recall, even across so many years.

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[1] Justice Grodin's oral history and a condensed version of Justice Reynoso's oral history were published in the 2008 and 2015 volumes (nos. 3 and 10), respectively, of *California Legal History*.

My third interviewee was Justice Arabian, whose law office in Van Nuys was the setting for our six meetings in the spring of 2007. Although he was much in demand by phone during our proceedings, in between calls Justice Arabian focused like a laser, putting his feet up and giving me a full, straightforward, smart, and savvy take on every subject I raised. We laughed often as he put his indelible stamp on key facets of judicial history. He made few changes to his transcript, generously leaving intact the great majority of our discussions.

This project could not have begun in 2005 or continued thereafter without the financial support of the California Supreme Court Historical Society. The officers and board members have been true partners in a shared historical effort, as have the attorneys statewide whose individual contributions make the Society's programs possible. I thank them all.

I also acknowledge a personal debt of gratitude to Professor Harry N. Scheiber. He alone, through graceful and effective leadership at crucial moments, made it possible to complete the project.

In turn, he and I jointly acknowledge Professors Bruce Cain and Jack Citrin, former director and current director, respectively, of UC Berkeley's Institute of Governmental Studies, the project's administrative home. The staffs of the IGS library and business office helped immensely at every phase of my research.

The justices themselves are, of course, the heart of the California Supreme Court Oral History Project. Any success achieved in the service of history accrues to them, while any errors are mine alone.

Institute of Governmental Studies
University of California, Berkeley
December 2008

Introduction to the Oral History of

JUSTICE ARMAND ARABIAN

ELLIS J. HORVITZ*

I first became acquainted with Armand Arabian in 1979, not in his role as a jurist, but as the author of an op-ed piece in the *Los Angeles Times* remembering the Armenian holocaust of 1915, in which the Turkish government killed more than a million Armenian men, women, and children. It was a powerful article and deeply personal, involving Armand's grandmother and father. Indeed, it is still timely today.

When I finally met Armand years later, he was already on the California Court of Appeal. Our paths crossed regularly in oral arguments, at bar functions, as co-panelists at MCLE programs, guest lecturing his class at Pepperdine Law School, and the like. We got to know each other pretty well.

On the bench, Armand is perhaps best remembered for his early, eloquent and persistent advocacy supporting women's rights, particularly the law relating to the credibility of rape victims and the standard of proof required to convict. In 1980, he conceived and created for the first time in the history of the law an entirely new sexual assault counselor–victim privilege, which protects a confidential communication from entering the courtroom.

* Founder of Horvitz & Levy; formerly a member of the Board of Directors of the California Supreme Court Historical Society.

Less well known is his day-in and day-out productivity — hundreds of opinions in the California Court of Appeal and more than a hundred in his six years as a member of the California Supreme Court. In his twenty-four years on the bench, Armand always delivered full measure. At my firm, we always regarded the panel of the Court of Appeal on which he served as one of the most active in oral argument, well prepared with lots of questions. Counsel were rarely left in the dark about the court's views.

By the same token, in personal and professional matters, Armand is direct and unambiguous. What you see and hear is what you get. He has strong opinions off the bench, and no hesitation in voicing them. Do you want to quarrel with him about politics? Law? Social issues? Public personalities? He enjoys a lively exchange.

When Armand retired from the bench in 1996, he told me he wouldn't have missed his judicial experience for anything in the world. At the same time, he said he had other things he wanted to do, starting immediately.

And indeed he did. Armand hit the ground running. He is into everything, at least those things that interest him. Since leaving the court, he has served as an arbitrator, legal counselor, expert witness, law professor, temporary trustee of The Albert Einstein Correspondence Trust, and more. He is active in politics and has been deeply involved with his church and with the governmental and judicial system in Armenia. To each of these activities, he brings seemingly endless energy and enthusiasm, as well as an openness to new situations and new people.

In a reflective mode, Armand expressed his gratitude and love for this country, which offered him opportunities his immigrant parents could not have imagined. But these opportunities ignited Armand's imagination and became his launching pad into an active, productive and joyous career. At the same time, he has never forgotten his roots. He remains intensely devoted to his family, his heritage, and his church. They are all beneficiaries of his loyalty and enormous energy. He still has much to do.

Encino, California
December 2007

Oral History of

JUSTICE ARMAND ARABIAN

EDITOR'S NOTE:

The oral history of California Supreme Court Associate Justice Armand Arabian (1934–2018) was conducted in 2007 by Laura McCreery of the Institute of Governmental Studies at UC Berkeley,[2] with funding from the California Supreme Court Historical Society. It is presented here in slightly condensed form, intended to focus on matters directly related to his life and the legal history of California. It has received minor copyediting for publication, including the addition of footnotes.

Justice Arabian directed that his oral history be sealed for two years following his death (which occurred on March 28, 2018). Permission to publish was requested from the Bancroft Library at UC Berkeley on March 18, 2020, and the Library was closed the following day by the statewide coronavirus closure. Preparations for this volume continued throughout the year, but permission was not received until October. As a result, the first portion (through page 564) appears in print, and the full version appears online at https://www.cschs.org/publications/california-legal-history and at https://home.heinonline.org.

— SELMA MOIDEL SMITH

[2] "An Imprint at Every Level: Twenty-Four Years of Judicial Service at the California Supreme Court and in California's Municipal, Superior, and Appeals Courts, 1972–1996," reprinted by permission of the Regents of the University of California.

MCCREERY: This is Laura McCreery. I'm with Justice Armand Arabian at his office in Van Nuys, California, on behalf of the California Supreme Court Oral History Project. Justice Arabian, could you state your date of birth and say a few words about where you were born?

ARABIAN: I was born on December 12th, 1934, on the East Side of New York City, to an immigrant family. I was the firstborn. They had survived the Turkish genocide, and my grandmother had been placed on a death march. She had two young boys with her, and they were taken out of their town of Chengeller, Turkey, where they were prosperous farmers. My grandfather was firing-squaded, along with some of the leaders in town.

Grandma had to leave one daughter at a roadside, took the two boys with her, and they got to the banks of the Euphrates River. The gendarme told her, "You are only going to swim once," so as I have called it, "Sophie's choice." She had to figure out which son she was going to save. She took the eldest, ten-year-old Ovannes, which means John. They swam across together, and little four-year-old Oskian was left on the other bank. He never saw his folks again, and we never knew whatever happened to him.

After they reached Baghdad, of all places, in safety, they went to Alexandria and then to Paris. In Paris, they had really reached what they would term safety, finally, and my dad entered into an Italian tailoring school. He received his diplôme de coupeur in tailoring at the I Napolitano School of Tailors on Rue Bergère, not far from the Folies. I visited that location, and the building is still up. He then came to Ellis Island with his mother and reached the safety of America.

MCCREERY: What year was that, do you know?

ARABIAN: I'm going to say — I can track it back down, but at the moment — 1915 is when the whole thing started, and then they went to Paris, and he went to the school and so forth. But I was born in '34. He was married in '32, and '32 is when he went back to Paris to this school for orphans, where he saw this beautiful young lady, Aghavnie, which means dove. He married her on the steps of the Le Raincy City Hall. I have visited there and met the present mayor. So I would say if that was '32, I'm going to say around '27 or '28, my best recollection, is when they hit Ellis Island. He married her, came to New York, and I was the firstborn on December the 12th, 1934.

MCCREERY: Was all of this family history discussed very much while you were growing up? When and how did you learn it?

ARABIAN: The answer is very much yes. My dad, although he had not had formal education, was an avid reader. He read everything he could lay his hands on, *National Geographic*, any Armenian publication, of which there were a few — extremely well read. The conversation was always in our home — I had two sisters after me, then a brother, and then another sister. Every one of us, as I have put it, was weaned on the mother's milk of genocide.

He had an oil painting that he produced, showing that moment where his little brother is on one side of the river and they're on the other, with his hands outstretched. So the pain of what the Turks did to us is still very much in our souls and in our hearts. Hrant Dink, the journalist, was just assassinated. Last October I had dinner with him, along with a few others, in Philadelphia, where we had the Armenian Bar Association meeting. He knew who I was. I didn't have a chance to sit down and discuss my genocidal history with him, but I think he may have known about it.

Then we brought him out here to the Armenian Collection, and listening to him I wondered how, as he was expressing pain, but in a hopeful way of maybe reconciliation down the line, how he could go back to Istanbul with a wife and three kids — he was fifty-two years old — and survive. Well, my fears proved to be accurate, and they gunned him down.

The other day I picked up a newspaper. It said after his arrest, four Turkish police officers were smiling in his presence, acting as if he were a hero, and they allegedly lost their jobs. This is a major coverup from Turkey, because they know the pain of what they did to us in 1915 and earlier has not gone away. I have appeared in Times Square, New York, a couple of times and told everybody what I thought about what they'd done in the city of my birth, of course. So that tragedy continues on.

We were all raised with the pain of the genocide, me probably more than any, because I was their first, and I had quite an opportunity to be told by my dad what had happened on the roadway. I have credited my interest in rape reform to the treatment that the Armenian women received at the hands of the Turks on that death march and how they unleashed the Kurds, who were like hired mercenaries, to do the dirtiest of the dirty work, and now they can't get along together. What goes around comes around.

So the pain in my heart is ever constant from what happened to my family, and I think it has come out of me on the bench in a nice way. I think that I have cared more for victims than maybe I would have without it. Certainly the rape reform work is tied to it, and I've acknowledged that.

MCCREERY: Thank you for mentioning that connection. Tell me a little bit more about the rest of your father's life and whether he ever returned to Europe.

ARABIAN: My father, who we always called a master tailor, when he landed in New York got into the garment business, which was fairly inundated by Italians and Jews. There were no Irish, to my knowledge, and those Armenians who knew how to get by in the tailoring trade were welcomed into it. So he worked for a firm on the East Side of New York, about three or four floors up in a building. The man's name was Stanley Christiani who owned that place. I would go up there and see the tailors and long rows of sewing machines.

After he got established, he wanted us out of the tenements of New York, because he didn't see that as the greatest place to raise a family. So he was finding a vacation spot forty miles out, towards the east of Long Island, forty miles from the city, right about in the middle there, called Wyandanch. It was named after an Indian chief of the Shinnecock Indian tribe, which still exists further out towards the Hamptons. He was renting a little cottage, and he just loved Wyandanch. It had a railway station which took you to New York in less than an hour.

So we rented, and then he bought a little place, and then he physically moved that first home about a half a mile to a property that he purchased. That was the house that he continued to increase the size of until the original became a rental, and the rest of the place was where he was raising the family. We had about, between the property itself in front and behind, probably about an acre of ground.

That's where we were raised, on Long Island, in a wonderful little town. It had a great grammar school, and once we got through grammar school there was no high school, so they had to bus us — we were early bus people — seven miles to the south to Lindenhurst, where they had a high school. We were just very warmly welcomed by the new crowd. They had grown up

together, and here's this influx of a few people coming from Wyandanch. We had an outstanding four-year experience there and then went on to college.

MCCREERY: Did either of your parents ever return to Europe in their lifetimes?

ARABIAN: My dad went a number of times back. The first time that I told you about is when he met my mother outside Paris. But I would say he probably went back, I'm going to guess, at least six times, because he had some cousins and people back there, and he enjoyed going back to Paris.

He also went to Armenia, brought a few of his family over to America. There are a few folks that are around here from those visits, as he never forgot that part of his life. My mom never went back.

MCCREERY: Tell me a little bit more about her background up until he met her.

ARABIAN: She had a brother named Setrak. I found out about this recently, because one of her classmates of that childish little orphanage is still alive in Connecticut, and she communicates with me. They were like sisters, the two little kids. Mom was orphaned by the Turks in Ordu and picked up by these charitable folks who were scooping up Armenian orphans. They brought her to Istanbul, and from Istanbul they were going to create Turkish citizens out of these young kids, who they knew had no family.

Incredibly, in the middle of night, a young Armenian hero, Arshag — it means Archie around here — shows up, and there were about eight or ten of these kids being housed in a particular location of an Armenian charitable group. He sneaks them out with their toys and their shirt on or dress on their back and puts them into a coal tender out of the harbor in Istanbul.

Because there were so many orphans that were trying to be placed somewhere, the only place he found available was in Corfu, Greece. The British Organization for the Protection of Armenian Orphans was the name of this, and it existed for a number of years, and they had a wonderful facility. Those kids were welcomed there.

The boys were kept separate from the girls, and so my mom never saw her brother after that, I don't think. Then as years went by, they moved them to Marseilles, into French protection, and then into Le Raincy. That

orphanage is now a school run by the Armenian General Benevolent Union, AGBU. It's like the B'nai B'rith.

I visited this school. I had lunch where my mom ate and gave them a donation a few years ago. That's where she was kept until Dad shows up, and the reason he shows up, his uncle was in charge of buying the provisions for these young girl orphans. She's graduating from there, and he takes her to the city hall. He marries her and brings her to America.

She was an absolutely beautiful person, physically and emotionally, was like a big sister in a way, very supportive. She died four years ago on Christmas Day, sang Happy Birthday on the telephone to me and checked out in Ohio. But she lived long enough to see me, and she's in the pictures of Malcolm Lucas swearing me in to the Supreme Court. So coming from where she did, to watch that, was something else.

MCCREERY: You mentioned how much you enjoyed growing up on Long Island, and I wonder if you could just say a bit more about what it was like there at that time. You were in the Depression and then the war years.

ARABIAN: It was a beautiful place to be as a young person. We had a Boy Scout troop there, which took us under their wing at the age of twelve. Summers we'd go to Camp Baiting Hollow on the north shore of Long Island off the Sound, and we'd spend a week there.

Church was the Catholic church, which was right across the street from the grammar school, because the nearest Armenian church was forty miles away in New York. That was Christmas, Easter, and a couple of times a year, although we'd been very close to it when we lived in New York City before the move.

Beautiful weather. You had the snow and all the good stuff. Friendships, it was like a U.N. My best friends were a Black, a Jew, an Italian, and a couple of German boys. It was, you know, if somebody was slandered, we all were slandered. We grew up like that. You called somebody some kind of a dirty name, you were calling it to me.

MCCREERY: In this very diverse community, in the terms we use today.

ARABIAN: In a little tiny town, that's how it was, and it was just beautiful growing up there. The Hamptons were not well known at the time. On rare occasions you might venture out there as we got older. We would take a car and go out to Montauk Point or Orient Point, which is the northern point,

much less known. But Bridgehampton, South Hampton, the Hamptons were just so far out that nobody really paid much attention to them. Today it's chi-chi-ville. [Laughter] So it was a nice place to grow up, very clean living.

MCCREERY: What sort of child were you?

ARABIAN: I was very athletic. I liked to play baseball, soccer, football somewhat, basketball a little bit. I liked to read. So it was this small group of friends, very interested in school activities, sports and so forth, and it was just a collegial atmosphere in which to raise up, and that's really what it was about. We went though the eighth grade together, and then nine, ten, eleven, twelve was in Lindenhurst, where we had a whole additional collection of folks to have some fun with.

Growing up on Long Island was an absolute joy. I can't think of a bad moment, with the exception of a couple of hurricanes that came up and knocked the place around, and they still have those.

MCCREERY: Did your interests change much in high school, or your activities?

ARABIAN: I was captain of my wrestling team, and then I had a varsity letter at Boston University wrestling later on. I just liked sports a lot. Academically, I was probably a B student most of the way and never good in math. I loved history and English, and I was one of the leaders in the creative writing class. I used to love to articulate, and that, I never realized, would come into play later on.

MCCREERY: As I'm sure it did very much indeed, in your legal career.

ARABIAN: Yes. Really, I'm looking back at that and I'm going, isn't that something? In my high school graduation book the teacher writes, "To my best creator," or something like that, because she just spotted something.

We had our fiftieth reunion a couple of years ago, and I was asked to say something to the crowd because I had gone to the Supreme Court. Most of them led more mundane lives, and I praised her for mine. I said, "Louise Samsel lives in my opinions," because she was the one who lit that spark for me and said, "Listen. You've got a talent for this kind of thing." No one had ever said that to me.

MCCREERY: I wonder, which other adults were influential to you as a young man?

ARABIAN: Strange as it sounds, there was an insurance person who had an office in Wyandanch, named Harold Isham, I'll never forget it, sold insurance policies. He would come to your house and go over the policies with your family, and was like a doctor making a house call. But what I liked about him was he always drove a Cadillac, and he was always dressed in a suit and tie. He just looked like somebody that you'd want to emulate. He was a successful — I didn't know any lawyers or any judges.

So when I went to Boston University College of Business Administration, I was an insurance major. Most places don't even have that, but we had one there. And it was Harold Isham who was the spark in my eye at that time. I said, "You know, this is not a bad way to go. This guy has got a great life." In fact, I'll show you a plaque later on some of the women lawyers put together for me as a result of this story. But he was not what I would say a direct influence by speaking to me or anything, but just a role model by way of what he appeared to look like and how he lived a life. That was one of those things.

Then we had a little input from a fellow named Robert Seklemian. He was in charge of real estate for RCA. The head of it now escapes my memory, but whoever the head of RCA was, and he was well known, this fellow was his real-estate guy. He lived on Long Island, not far from us. Being Armenian — he had a non-Armenian wife — they were very close to my father and family.

So when it came time to pick a school to go to, my dad went to him and he said, "Bob, Armand's seventeen, going to go to school, wants to go into business school. Where would you recommend?" He checked it out and he came back and said, "Boston University." It was only a four-hour drive. I'd never been to Boston, and at the age of seventeen I was on a highway heading north, and that's what started the Boston adventure. But we had a lot of trust, and I had a very high regard for him as a role model of the corporate world, so he was one like that.

I think my Boy Scout leaders were wonderful in: "trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent," okay? When you learn that from somebody who you look up to, you don't forget it. So being a Boy Scout was quite an influence in my life. I'm getting an award for civic contributions. Where would you learn that quicker than in the Boy Scout Handbook, which I still have? It says,

"Do a good turn daily." See a little old lady and there's a water puddle there, put something down so she won't get her feet wet. It came from that sort of thing. So if you had a hero's book, it was the Boy Scout manual for me.

MCCREERY: Before we leave your childhood, just tell me a little bit more about your life at home. I'm wondering, for example, were you involved in your father's tailoring business very much?

ARABIAN: Very little; on occasion. He had a little store in Wyandanch for a while, and while he was doing other things, I would come home from school and go there and keep it open till six o'clock or whatever it was, but beyond that, no.

The house was a very lovely home, because it was about a block and a half from the railroad station. It was a mile away from the grammar school, so you'd have to walk to school. I had the two sisters that came up after me. They're both college graduates and extremely accomplished in things that they did.

My grandma was the matriarch of the family. She ran the place. If Mom was working, and at times she was in the tailoring business also, Grandma fed us and watched over us till everybody got home at night. So it was one of those families, very close-knit, everybody cared for one another. They were all into scholastic or athletic things. It was a very lovely upbringing.

MCCREERY: What language did you speak at home?

ARABIAN: I started out in New York City speaking nothing but Armenian. When I went to kindergarten, I didn't know ABC or one, two, three, but I knew the equivalent in Armenian. One day my mom was walking me to school, Public School 63, it's still there. It's right across the street from the most famous police station maybe in the world, because it's the one *N.Y.P.D. Blue* would show you. That's across the street from P.S. 63, and there were police cars all over the place.

So as we're walking the few blocks to go there, I look up at the side of this big, tall, brick building and I say, "Mom, Twenty Mule Team Borax," and she almost collapsed. They had this big sign up there with the mules and the soapsuds. That day she knew her son was doing English pretty well. By the third grade in Wyandanch, I was winning every spelling bee. There was nobody who could beat me in spelling, and I don't care what the words were.

At the end of the line as you got eliminated, I'd be the one standing. It just came to me. I just enjoyed it. So that's what life was like.

MCCREERY: What about your sisters and your brother? Did they also grow up speaking Armenian?

ARABIAN: Every one of them. Every one of them.

MCCREERY: And learning English in school?

ARABIAN: Yes, because Grandma raised everybody, and you were going to learn Armenian, because she didn't speak English. So if you wanted to eat, you'd better know how to ask for it. [Laughter]

MCCREERY: You mentioned the family was close to the Armenian church back in New York City, and then had to go to the Catholic church on Long Island. What was the role of religion, though, in your upbringing?

ARABIAN: Very little. In New York my grandmother was part of the Ladies' Society, as they call it. She would cook cakes and put frosting on them and things like that. That church is still around, on Second Avenue and 27th Street, St. Illuminator's church. It's still there. I was baptized there. They had a downstairs. It looked very much like the setting in one of the *Godfather* movies, "Mama morte!" when he gets the letter. That Godfather scene could have been filmed on the stage where he played the mandolin and she did folk dancing. That was part of the entertainment of that inside group, so they were very involved with that church.

But when you go forty miles away, and you've got a family to raise and all, are you going to run down an eighty-mile run to New York on Sundays? That's just not going to happen. So the religious experience really went south. If there was Christmastime and things like that, mostly Christmas, otherwise we'd be at the Catholic church paying our respects to God.

MCCREERY: What did your parents tell you, or communicate, about the idea of a career or what sort of life they wanted for you and your sisters and brother?

ARABIAN: That's a great question. As I'm growing up, I had conversations with my father about that. He would tell me two things that I never forgot. One is, don't cross the line in your personal conduct. In other words, there's a line here and a line here, and don't go above or beyond that line, because you're going to be in trouble. Don't step over that line. It was one of his philosophical expressions.

The second one was, whatever you become, if you're proud of yourself, I will be proud of you. He never said, "You're going to be a lawyer, a doctor, an Indian chief," or anything else. He never said, by a label, never suggested what that was going to be. But the rule was, if you are happy and proud of yourself, I will be, too.

And that line, as I told you in this insurance situation, was in my mind when I got to select my fraternity, Sigma Phi Epsilon. It's one of the larger ones in the country, and I became president of the fraternity as I went along. One of the folks that you see in the tape I showed you is Ernest Tsouros. And what does he tell me? He was my big brother. We were rooming together, just off the Charles River.

He was a year ahead, so I said, "Ernie, what are you going to do?" He says, "You know, I think I'm going to become a lawyer." It's the first time I gave that some kind of thought, because I really admired him, and we're still in contact.

I said, "Ernie, a lawyer?" He said, "Yes." He said, "I've been thinking about it. I think that would be a great way to go." The spark kind of got into my head. Strangely enough, I become a lawyer, and he goes into insurance. [Laughter] He retired after thirty years. That's what happened, a complete flip around. He knew I was going for insurance.

MCCREERY: But he planted the seed in you, didn't he, of a law career?

ARABIAN: He did. He did. Later on, as I'm a lawyer, I went back to Boston for some business, but I was there when they were swearing in a Greek to the Supreme Judicial Court. He was my criminal law professor, Paul Liacos, a bald-headed, thin guy, and smart as could be. As I'm going into the court, down the hallway to where the swearing-in session is going to take place — I had never been there before in my life — I'm going down this long, paneled hallway, and I'm looking at the photographs of the justices, from the early days right up till now, such as we do in California.

As I'm walking down this hallway, I'm by myself, I'm looking at Justice A, B, C, D, whoever it was, and something inside of me said, oh my God, wouldn't it be something if you tried to become a judge. So this is probably around, I'm going to guess '67, '68, somewhere in there, because I became a judge in '72, and I started trying with applications in around 1970, so I know it was slightly before that.

But that's where the spark hit me, when I saw the elegance and the prominence and the tradition that was being created by service like that. I then said to myself there were two kinds of books to be considered. One is a passbook with your money account in it, which will be remembered for about two days after you pass away, because it'll be depleted and they'll go, "Well, gee, that was nice. Armand Arabian left x behind."

Or more importantly, the casebook, where your name will live forever. They'll read back on some opinion you wrote, or some act that you took, and that lives on further than any passbook could ever live. So that was sort of the choice I made, because to become a judge was taking a pay cut in those days, for me. I was driving a Cadillac with a phone in it, and a Municipal Court judge was earning $32,500 a year, okay? Now, in comparison to what I started out with as a deputy district attorney was $500 a month, so you got two paychecks of $200 apiece.

But I was doing rather well as a sole practitioner, and I'm saying to myself, how am I going to do that? I was probably making in excess of $100,000 in those days, and it's like a two-thirds pay cut. But I thought it over, and I said I think that's the way to go. I think somebody's pointing you in that direction; it's coming from inside.

MCCREERY: Okay. I know you served in the U.S. Army before you went to law school, so maybe we could talk about that for a few minutes.

ARABIAN: I went to summer camp in the senior year of undergrad, and then graduated, as I told you, as a distinguished military graduate. So what happens, the West Point infantry class of 1956 was going to go to Fort Benning, Georgia, for their basic Infantry Officers' School. They needed about twenty or twenty-five other people to fill out the class that they were going to comprise, so they were looking at DMGs, distinguished military graduates, to fill up, because they figured those are the ones that would be able to cope best with the West Point types, and so I became one of those.

You'll see on the wall over there a picture of me and Stormin' Norman Schwarzkopf. He was a classmate for three months with me. We didn't see each other after 20 December '56 until a couple of years ago. That's in Beverly Hills, where that photograph was taken. The first thing he does — my nickname was Army. I introduced my wife Nancy to him. He hasn't laid eyes on me in all those years. The first thing he says, and this is the

band-of-brothers concept, "Nancy, Army was chasing all the single broads at Benning." [Laughter] We took this picture together, and I put that in the caption of it, "Arabian said to General Schwarzkopf, 'We are living proof that old soldiers never die, they don't even fade away.' " [Laughter]

MCCREERY: After all those years.

ARABIAN: Funny? I mean, funny! You lined up alphabetically, so I was in the A side of it, he was way down the line. I used to see him. He was a real quiet guy then. Several of them got to be generals out of that class, and unfortunately, a few are on the stone wall up there in Washington who were wonderful people that got hit. But Stormin' Norman went to the top of the top. He did a heck of a job, so I'm proud of him.

MCCREERY: Talk about for a moment your ROTC preparation and how that fed into this.

ARABIAN: They would pay you. I forget, it was like a thirty-dollar check, I can't remember now. It was some small amount of money to be a member of ROTC. Then you'd have weekly trainings and classes. It was part of your educational process. Then you'd go to Fort Bragg, North Carolina, for six weeks, which was like going to prison. They really worked you over, and then they tried to talk you into a career in the military. Most people felt like that's not going to happen to me. So we did the six weeks at summer camp, and then it was graduation time.

It was a learning experience. You had wonderful sergeants and colonels or whoever was in charge of you down there, and you got commissioned. They put the second lieutenant pin on you, and off you went. Well, in my case I went right down to Benning and met up with Stormin' Norman and his class. So we did that and then came home on leave for Christmastime. Then you got assigned someplace, and I was assigned right back to Fort Benning as part of the cadre there, in the infantry training group at the base. I was executive officer and company commander for a short time. I did my time.

Meanwhile, I had gotten that spark from Ernie about going to law school, and they didn't have an LSAT in those days. You just applied. About six months after I was in the military I got accepted to the Class of '58, so I knew where I was going to go. I started defending court martials, people accused, to get some realistic training. I had quite an experience doing that.

MCCREERY: How did that work exactly?

ARABIAN: They appoint officers — you're up against a lawyer, the prosecutor there, but they don't have the other side, like a public defender. You're the public defender, in effect, so you go out, you investigate. They'll assign someone, a sergeant or somebody with you, and then you go in to the hearing and defend.

MCCREERY: How did you like that?

ARABIAN: I loved it. I had some great experiences there, and I've got some letters from mothers of folks that I acquitted, and it was interesting. Then, of course, I went to Airborne School. I went to Jumpmaster School, these are the guys that see you out the door. Then between first and second year in law school, I went back for the elite Pathfinder course, and I took that. Those are the people that jump in, like on D-Day they'd go in first, set up the drop zone, flares, lights, smoke, whatever, and then the aircraft see it and that's where they drop the troopers.

MCCREERY: What started your interest in jumping?

ARABIAN: At times they'd call me the maverick. I didn't know that that was always appropriate, but it's one of those things where it's almost an extension of being a Boy Scout. You're going to do something good, you're going to do something different, and to me the idea of wearing a jump wing was it. I said, if anyone's going to test your mettle, going out that door is going to be one of the first things they're going to think about twice before they mess with you, because everybody won't go out that door. So I just loved Airborne School. I just loved it.

Then I've done, in subsequent years, parachute jumps with Israelis in the Negev. I've done Dominican Republic, Taiwan, and the Commie-Chi in Beijing. I've done about four countries. I just stopped; I think the last one was '93, somewhere in there. But it's exciting, it's really exciting to step up into that door and go out. You talk about getting a charge. That really is one.

MCCREERY: That's a very special preparation, isn't it, when you're in the army?

ARABIAN: It's all volunteer. If you don't volunteer, you don't go to Airborne School, so that's what happened.

MCCREERY: Other than that, it was a fairly low-key time to be serving in the armed services?

ARABIAN: It was. You were in between wars. I wanted to fight someone somewhere, but it never happened on my watch. I did my two years, and it was between A and between B, and my buddies in B went down and got killed in Vietnam. Korea had ended, and we were in between. I don't say I regret it, but I, in a sense, was looking forward to it, I really was. That's part of it. When they took out the World Trade Center, I was ready to get my M1 and go back out again. I was just outraged. So the soldier in me is never going to go away.

MCCREERY: How do you think that army experience changed you, if at all?

ARABIAN: You had to get up and be a leader at different times. As executive officer of advanced officers, you're ordering whoever the men are under your jurisdiction. You have to get along with senior officers, because those are the ones you are in charge of as executive officer, of making sure everything's okay with them. Their wife calls up, they're in the field, someone had a baby, and all the things that go on in their lives. So you were almost in a supervisory capacity over a couple of hundred senior people, which was a real responsibility. If they loved you at the end of the day, then you know you did something good, and they did. They'd give me a desk set, inscribed "With Appreciation." So that was quite an experience.

One of them was Major Louis Millet, who later lost his son in one of these crash-commando acts, and he was a Medal of Honor winner. He was a dear friend of mine. People like that. Where do you get close to a Medal of Honor winner who looks at you and talks to you like you're his young son. I mean, it was just beautiful. It was quite an experience.

But other than that, it was a fun time. We were bachelors living in a BOQ, Bachelor Officer Quarters, and had a bunch of good friends to hang out with. Dining in the officers' club and having a few beers, and going into Columbus, Georgia, which was the hangout down there, dated a few nice gals along the way, and two years came and went.

MCCREERY: So you were discharged as a first lieutenant?

ARABIAN: As a first lieutenant. After eighteen months I was promoted.

MCCREERY: Thank you. So you were all set, then, to go back to Boston U. for law school?

ARABIAN: Ready to go.

MCCREERY: Did you have particular interests in the law at the outset?

ARABIAN: Because of my experience in the military, I thought criminal law was up my alley. I saw myself as a prosecutor kind of guy, going on the right side of the coin. When I went back, back to the same Miles Standish dormitory where I started out my freshman year, I was now a floor counselor, with a half-a-floor jurisdiction over wise guys from New York and anywhere else they came from. They were going to mess with the wrong guy, because they were ready to mess with you, bringing booze in or whatever.

MCCREERY: You had to go to law school, too. What about course work?

ARABIAN: Law school was a blast. You had to take the MTA down to near the statehouse, where the old law school was, 11 Ashburton Place. It was right around the corner from the state capitol. Oliver Wendell Holmes, in the late 1800s, had laid the cornerstone for the school. It was an older building, but it was just really done well.

F. Lee Bailey was a year ahead of me, and Barbara Jordan of Texas was two years ahead of me, just two that came from there. [William] Cohen of Maine, who was secretary of defense, he came a little afterwards, so we had some players there.

You'd go down to the school in the morning, from nine to twelve normally, and then take your books and either go to the library, or in my case, I used to like to come back up to the main campus to the School of Theology. Now, this is the place where Martin Luther King got his diploma. The beautiful thing about it was they had these little carrels to sit in, and because they're going to be reverends, they are extremely quiet. They don't go shooting their mouth off like they would up at the law school library. [Laughter] It was a quiet place to study, so I normally would go there and study, or go to my room if I wanted to do that.

Then I ran for class president. I won that. I ran for permanent class president. I won that. I became the first chair of the medico-legal committee of the American Law Student Association and wrote an article in one of their magazines on one of those subjects.[3] I went to one of the national ABA meetings where I took part in one of those sessions. I think it was in St. Louis, Missouri, if I remember right.

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[3] Armand Arabian, "Some Basic Facts about Medico-Legal Photography," *Student Lawyer Journal* 6, no. 4 (April 1961): 20–24.

So law school was very active. I was studying, I was dating, I was leading, I was having a good time in the city. It was a wonderful three years. After that, in Easter break of senior year I came out here. My aunt, who was the little deserted girl who had been picked up by some people back there in the genocide, she had married in New York, Brooklyn.

MCCREERY: This is your aunt on which side?

ARABIAN: My father's sister. Instead of grandma having the two boys with her, she would have had her girl but she was so small they left her. She was living in Woodland Hills, and she was very close to me before they moved out west. So I came to visit. I'd never been here before. I went up to see Mel Belli's office in San Francisco. It was Belli, Ashe & Gerry, and Ashe was a B.U. law grad. I went up to see the office, and I just fell in love with this place. No one has a lawyer. They don't know anything about having an attorney. It was one of those things. So I decided I'm coming out here, and that was the whole — I would have loved to have stayed in Boston, because I loved Boston. New York, I don't think I would have hung out there, as much as I think it's a great city.

MCCREERY: Before we get you out of law school, let me ask you to talk a little bit about the faculty there.

ARABIAN: The faculty there, as I told you, one went to the Supreme Judicial Court, Paul Liacos. Another one taught contracts. He later became the dean of the school for a number of years. They had some almost starchy, bow-tied, great teachers there along the way.

Dean Elwood Hetrick was the dean of the school at that time. William Schwartz was the contracts professor who later became the dean for a number of years. He's still active, I think, at Yeshiva University in New York. It was like that. We had some terrific people, and they poured it out to you. It was just a great school to go to. It's still a great school.

MCCREERY: Did you maintain your interest in criminal work?

ARABIAN: No. Well, you can't do that. I took criminal law, of course, and evidence and all those good things, but after that, when I came out here the interest was alive, because I asked my aunt, I said, "I'd like to visit with the district attorney's office." She said, "We know this Armenian gal, Lily Balian, who works for Bill McKesson," who was the D.A. As a result of

that, I wind up interviewing, an informal interview, with a fellow named Davey Feldman, who was out of Brooklyn. He and I just hit it off, because we're two eastern types talking about the law. After I left that conversation of about a half an hour, I was convinced that when I got ready to get a job out here I was going to apply for the D.A.'s office, and that's what happened.

MCCREERY: Did you have to do anything else to get that job?

ARABIAN: No. You interviewed for the public defender, the D.A., and the county counsel at the same time. There was a representative of every one of those in a room, and then you would come in. I had no interest in the county counsel's office. The public defender I could have done in a New York second. But I wanted that shiny badge of being a D.A. out there, and Ted Sten, who was the head of the Long Beach office, was a cutthroat kind of a character. This guy was tough. Don't mess with Ted Sten. He ran Long Beach with an iron hand.

Well, my luck, he's in the room that day, so he starts in on me. I guess he saw the spark and he says, "Well, Mr. Arabian, between prosecuting and defending, does one side of the badge seem shinier than the other?" [Laughter] That's one question I remember, so I had to answer that one. In effect, I told him I liked that one side a little better.

So then he starts in on me, and this is before the days of discovery. He says, "Let me ask you this. Suppose you are a D.A. and you have some information that's helpful to the other side, and they don't know about it. What do you do about it? Do you turn it over? Do you volunteer it?" even though there was no responsibility for that.

And so I try to answer it the best way I know under the circumstances at the time, and I'm not a D.A. yet. I don't know exactly how to handle that. He keeps on pushing me, keeps on pushing, turning the screws down tighter. Finally, when he's really got me down, there's nothing left to be said, I looked at him and I said, "Sir, the only way I can additionally answer your question is to tell you from the days of our Anglo-Saxon jurisprudential history, that the crown does not win or lose a case, it merely sees that justice is done." And with that, the gas went out of him, and I was a D.A. in a couple of days. [Laughter]

MCCREERY: My gracious. How did you come up with that in that circumstance?

ARABIAN: He kept pushing it, and I figured, well, there's nothing left to be said. If you don't believe in honesty, truth, and justice, then there's something wrong here, so let me tell it to you the way I know it, okay, from law school. So that's what happened. I was sworn in right away, a group of four of us. But the valley only had, I think, 550,000 people, and right now they're pushing about two million. So four people, of which three were really actually going to court; we could handle it. We had a handful of judges there. So it was a very collegial operation.

The judges couldn't have been nicer to us, and they were lifelong friends. It was a great one year to spend like that, and then I decided, well, I've had enough of this. I think I'll strike out on my own. You heard Frank Brown say he picked me up, took me up to his office.

MCCREERY: What really caused you to leave the D.A.'s office and go into private practice?

ARABIAN: There was this ex-cop named Frank Brown. He was a defense lawyer, and I would run into him at the courthouse, and I just liked something about him. He's a big guy, had a couple of boys, and I guess he was divorced. I don't remember the whole story there. But he and I just hit it off. His office was over here near the fire station, and he was going to move over to Vanowen Street. He said, "We have an extra room over there." He says, "If you want to leave, we'll cut you out a nice deal, and my secretary will do your work if necessary." That's what started it.

So my wife went to work for a law firm downtown, to help support things, and I went into the private practice. And lo and behold, you say, if you hang your shingle out, who's going to come to you? Well, the first people who came were police types who knew about me and who liked me, and if there was a divorce or an accident or whatever —.

MCCREERY: But you did have quite a reputation already, after being only out here for a year or something.

ARABIAN: I know, but they liked me. They knew in that one year, they just liked me and I liked them, and they were good people.

MCCREERY: It was a good match?

ARABIAN: Yes. So that's how it started, and he mentored me. If there were two defendants in a case and you couldn't do both of them, he'd see to it

that I got the second guy, and we'd go down to the courthouse together. As much as I have tried to mentor people, he was my one and only mentor. He really took me under his wing. So we did that for a while, and then I decided I'm going to do for myself, and I moved up to Gilmore Street over here in a little corner office and had my own secretary.

Then from there, this building was available. I was walking by it one day on the way from court and I saw a "For Sale" sign. I said, oh, my gosh. And there was no such thing as a civic center here. We had, way back when, a little two-story court. Through the years, of course, we now have two major Superior Courts, a police station, a library, a federal building, a state building. It's all grown up around here.

So I made an offer on the building. I borrowed some funds from my dad. In terms of what this building cost in those days, you couldn't buy a car for it. Then I put the hallway down the one side of it and cut out this area first. It had double doors where we're seated. The secretary was here, and then I cut out some other offices down the hallway. I had a wonderful practice here until 1972, when the efforts that started in 1970 came through.

William French Smith, who was Governor Reagan's lawyer, called me up, and that was the predicate to getting the final call. After I got that phone call, I called one of the local judges and I said, "I got a call from William French Smith." He says, "You did?" I said, "Yes. What's the big deal?" He says, "You're going to be a judge by tomorrow. Don't go out to lunch." [Laughter]

Sure as can be, at 12:20 I'm sitting over here at the desk. The phone rings, and it's Ned Hutchinson, who was the appointments secretary — passed away playing tennis one morning later on — and said, "Governor Reagan would like to know if you'd like to become a member of the Municipal Court." I said, "I certainly would." He says, "You're on."

But the William French Smith thing was really funny. He sent me a beautiful letter later on. He starts talking to me about one thing or another, and we get chatting and he says, "How do you look at this process of putting in an appointment application?"

I said, "Mr. Smith, recently I got a phone call from George Deukmejian, and I asked him how it looked, and he answered me with two words, 'Cautiously optimistic.' I said, 'What the hell does that mean?' "

He started to roar at the other end. He says, "You've got a point there. What does that mean?" Cautiously optimistic. I never used that expression later on in my life. But when we got through — he talked to me for about twenty minutes — and he said, "You sound like a great guy. I'm going to recommend favorably for you. Good luck." The next day — I didn't know it, but that's how it went. He would call you; you got past his phone call, you were in.

MCCREERY: Did you run across any death cases in your private practice?

ARABIAN: Yes, I represented a couple along the way. I didn't have to go to trial, because I disposed of them short of a death situation. But I was a part of three executions in the Supreme Court.

MCCREERY: I realize that after you became a judge and had a different role in that whole process, your own views may have come into play in a different way. But can I ask, when you were just a practicing attorney coming up against this issue, may I ask how you viewed it at that time?

ARABIAN: I'm a true believer in the death penalty, always have been, and am to this minute. I was the only member of the court in its composition, during the timeframe we're dealing with, that had, to my knowledge, ever represented a death-penalty defendant.

So before it passed the reasonable evidence test, or beyond a reasonable doubt test, or anything else, they'd have to go through the Arabian test, because I'd have to be a firm believer that this all happened the way it was said to happen, and this was a deserving person. So when I signed off on one of those, from my heart I knew that somebody had to die.

MCCREERY: Did you find that it was useful to have been a trial lawyer, facing that issue at a different level? How important is that to a judge?

ARABIAN: Very, very, very much so. I'll tell you, when you're sitting next to a defendant in a case like that, and the prosecutor says to the witness, "Do you see the defendant here in the courtroom?" and that finger comes right by you and lands on the accused, that's a heavy moment, because you're in deep soup now. You've got a very serious responsibility, and you're going to go forward.

That's why a lot of people won't take death cases, because they don't want that heat on them, especially at the appellate level. That's why it's two

or three years before you see a lawyer on a death case, and the shame of our system is that the death penalty is basically nonexistent in California, even though we have it, and on occasion somebody gets it.

But when you have hundreds of people on death row, they're dying of old age.

They're not dying of representation and going down to the execution room.

One of the reasons is with all this pro bono business that takes place, these lawyers don't want the responsibility of them having, as competent as they may be, to go in and say, "Oh, my gosh. I did my best, and they fried him last night." They don't want that. And that's a personal choice. You can't force anyone.

MCCREERY: A lot of people draw a distinction about the fact that in the death cases, the penalty itself is so serious compared to other penalties.

ARABIAN: Well, it is. But it goes to the Supreme Court directly. We have direct jurisdiction over it, and you've got all kinds of people looking at it. Hopefully you've had good lawyers along the way pointing the way. But it had to go through the Arabian test. It was one of those. I took a special interest in making sure in my own heart and mind, whether it was my case or somebody else's.

MCCREERY: You seem to have a pretty clear view that you developed early and haven't changed. I can guess, but do you know why you felt so strongly that you were a believer in the death penalty?

ARABIAN: Yes. It's a very personal view, and I think it's a realistic view. If I am the anticipated transgressor of someone else's life and liberty. Someplace, if I have half a brain, I ask myself, "If I commit this act of homicide, do I want my own life taken away by the process?" And to me, if there is a chilling answer to that that says yes, that's the one thing. You want to live as long as you can, and you don't want to cut your own throat by cutting somebody else's throat.

That to me is a deterrent, if you have a half a brain. That, in my view, justifies the existence of it. If it will prevent one person from killing somebody else, because they don't want to die at the end of the day, it's worth it. That's how I look at that.

All the defenses — they should all be available to you. But at the end of the day, is it justified for someone who goes down to San Diego, steals a

kid's car, eats his hamburger, and says, "Die like a man." — Robert Alton Harris? I say, "You go." And he went on my watch, the first one in twenty-five years. I'm proud to have been part of the court at that time.

MCCREERY: I wonder, among judges who have not themselves been trial lawyers and run across this, how important is it to have some personal experience with those kinds of trials? Can you generalize or not?

ARABIAN: I think it's an asset, but it's not necessarily a liability. The law is the law, the facts are the facts. You don't have to get emotional about it. You do your job, whether you were there and smelled it up close and personal or you looked at it from the top. It all is the same responsibility.

MCCREERY: Were there any surprises to you about the life of a judge that you didn't anticipate?

ARABIAN: Not really. The one thing you had to be careful of was the certain prohibitions, like don't raise election money from some person that you're not supposed to be involved with, that kind of thing, and shooting off your mouth on pending matters or stuff like that. But it didn't really — I never really had a problem with it.

When it came to rape reform, you're dealing with the change of the law. I think that's your responsibility, so I had no problem in being very out front about that. But other than that, it's a respectable, quiet life. You have a certain ambit of friendship or places that you socialize and do things with. I didn't go to the track and gamble. I didn't have any of those problems, and I wasn't growing marijuana, or charging hookers on credit cards, so that kept me in pretty good shape. [Laughter] I had to put that one in, because those are two cases. Those happened, as you might remember!

MCCREERY: That's right. That's not lost on me. Thinking back to when Governor Reagan first appointed you, and then now let's talk about when he elevated you to the Superior Court, what happened to get you there so quickly?

ARABIAN: George Deukmejian is really the answer to that. I had known him in his political life. I had known him as a fellow Armenian in that life. He helped me get the first one. He wanted to have the "honor," quote, unquote, of having the first Armenian go to the Superior Court, and we hadn't had one down here, so he was interested in doing that. He knew I had good support amongst whoever was around, so when it came time,

rather quickly — in fact, my local line was, "I walk with God, but I ride with the Duke."

So the next thing you know, I was elevated with another collection of really fine colleagues, and I hit the ground running. And that was the predicate to rape reform, because I hadn't been on the bench long. I got there, as I recall, on the brink of '74 when *Rincon-Pineda* was tried, so I hadn't been up there very long. *Rincon-Pineda* had had a hung jury the first time around. It was the rape of a Tarzana woman, and now it's back up for seconds and I hear the case, a jury trial.

Two wonderful deputy D.A.'s were involved. One was Harold Lynn. He was the calendar deputy in Department S and a very good friend of mine, and Arnold Gold, who was the deputy putting the *Rincon-Pineda* case on. Sam Gordon was the public defender, and he's another friend of mine. So there I am. It comes time to instruct the jury. Harold Lynn asks to see me in chambers with the defense counsel, and he says, "Judge, you can't give 10.22 CALJIC" [California Jury Instruction Code]. That's the one that says the charge of rape is easily made; once made, difficult or impossible to defend against. Therefore, the law urges that you watch what she says with caution. You wouldn't give that on a purse snatch or an auto theft, but you're going to give it in a sex case.

So I hadn't really thought about it. It was a standard instruction, had been given since 1856 in *People v. Benson*.[4] The court made it up of its own. They took it from Lord Hale's commentaries from the 1600s in England. So this wasn't legislative. Had it been legislative, there might have been a problem in doing this, because you're not going to usurp a branch, the co-branch. But this was judge-made law; I checked into it.

I'm saying to myself — I went home at night and I'm going, this is outrageous. This is the second time this woman's come to court. This is an illegal guy who did her in. They caught him promptly. There's no identification problem. She's testified twice now under oath as to what the occurrence was. Why am I going to single her out and tell this jury, "Watch what she says with caution?" What for? There's no reason for this.

So that night I went home and I wrote what was my first written opinion. Little did I know what that was going to lead to. But I put down my

[4] 6 Cal. 221.

thoughts about it, and I took the bench the next day and I read it into the record. I found it discriminatory, unwarranted by law or reason, outdated, whatever, fattening, and too caloric. I made my first statement on the record about not giving it. I told the public defender, "You're not going to argue it. You can argue what you want, but don't tell them I'm going to instruct them that way, because I'm not."

So he gets convicted. I put him in state prison. That made the papers, of course, along the way. Meanwhile, Bob Kingsley, former dean of USC law school, he's on the Court of Appeal, sitting in his bed with a typewriter, they tell me. He types out a short opinion, conviction reversed. As he put it, "It's not for us to decide whether that's appropriate or not." Well, had it been legislatively done he would have been right. It wasn't. It was judge-made law. Now a judge can unmake it, as far as I was concerned, especially after 150-some-odd years or whatever.

Now it goes up on appeal to the Supreme Court, which grants review. Donald Wright is the chief justice. It's now 1975. I'm in chambers on another rape case, and Paul Geragos, Mark Geragos's father, is one of the defense counsel. He's in there doing his thing. He says, "Do you really think you should serve on a rape case? After all, you've said this and done that."

Just then the telephone rings. God's watching. I have them leave the room, and it's the deputy attorney general on the phone, who's representing the people. He says, "Judge, you did it." I say, "I did what?" He says, "*Rincon-Pineda* was just decided. They said it was harmless error. They affirmed the conviction, and never again will 10.22 be issued in this state."[5] "Thank you very much."

I called counsel back in. I told them that story and I said, "Now do you think I'm fit to serve?" And they copped out. [Laughter] That was the end of that. So that was the one moment in my life, in my career, that if I deserve to have my nameplate put on the statue of Fernando — we were in the shadow of Fernando when that case went down, and Fernando was standing over where he is right now.

So when that happened, some of the hotshots decided they're going to run against me, they're going to do this, they're going to do that. They all fell by the wayside. But because I was taking heat on behalf of the women, I decided to go forward. I wrote an article, "The Cautionary Instruction in Sex

[5] People v. Leonardo Rincon-Pineda, 14 Cal. 3d. 864 (1975).

Cases: A Lingering Insult," *Southwestern Law Review*,[6] and put in who's in and who's out. In the passage of time no state dares have an instruction like that. *Rincon-Pineda* broke the back of what was laying around.

Now I'm being asked to speak. The National Association of District Attorneys called me to Kansas City to lecture on, "The Renaissance of Rape." Kelly Lange has me on *The Sunday Show* out in — I'm trying to think of the little town. I've never been there before or since. It might come to me. Yaphet Kotto was on the show with me. I had a nice conversation with him. Maybe El Segundo; it was out that way somewhere.

From the time I showed up and had makeup put on till the time I left, and I was interviewed for one half of that show, four women came up to me, four women that I didn't know came up to me, one nicer than the next, and said, "Judge, I want to thank you. Let me tell you, I was raped." None of them had reported it. Four women raped, they didn't want to go through it. It just touched my heart that day more than other days, because I said, "Oh, my God, this is bigger and worse than I ever thought about." The only problem that was around at that time that was terrible also was child molestation, which no one stepped up to the plate about. Anyway, so now Robbins Rape Evidence [Law; Chapter 569, Statutes of 1974] comes in, copying the Michigan law.

Then I get a phone call from George Deukmejian. He says, "Armand, we don't have coverage for what we call artificial rape." In other words, Spade Cooley was convicted of a broomstick death of his wife, and Fatty Arbuckle, the Coke bottle situation, where Virginia Rappe — she was crushed by his weight, but they had claimed a Coke bottle insertion. So he said, "We need protection for that type of offense. Can you do it?" I said, "I'll let you know."

We didn't have Lexis and Nexis and solar plexus in those days. You had to have student externs look through the states. So mine picked up all the jurisdictions which had coverage. They printed it out for me. I took the best language of everything I could find. "Insertion of foreign object, substance, instrument, or device," became 289 in the Penal Code. Jerry Brown was happy to sign that into law, so we accomplished coverage.

Then the pièce de résistance on all of this — *Rincon-Pineda* will never be topped, but this one is in its league — I'm at a national conference of

[6] Vol. 10, no. 3 (1978): 585–616.

district attorneys. It was '79 in Kansas City. Two women come up to me, and in those days there was nothing known as the rape-crisis centers such as we understand to be today. It was just a fledgling thing.

These two women were early rape-crisis counselors in Pueblo, Colorado. They said, "A rape victim came in and told us her story in our office. We wrote it down and counseled her. When defense counsel found out that we had interviewed her and had notes, he went to court and got the court to order our turning over those records, which we considered confidential. We took it from her. We refused. He put us in jail. We sat there for three, four days and decided — we had families, so we decided we'd have to turn it over under the court order. What could we do?"

So I said, "Look. The only way you can be protected is with a privileged communication. You're not a doctor, you're not a lawyer, you're not a priest, so you had no protection. You had to turn it over. You had no alternative." I said, "Let me think about this."

I sit down and I draw language up to define what a counselor is, define what a center kind of looks like, and then that any communication received in that relationship be deemed a confidential communication, protected from disclosure.

Now, the other three privileges came to us from common law. We don't know who created those. But it was pursued. Jerry Brown signed it into law around 1980, so we've had it for much more than a quarter of a century now.

At this date there are about twenty-eight states that have the so-called Arabian privilege, which is in the evidence code and protects that kind of a communication. Some are a little different than ours. Ours is called the sexual assault counselor–victim privilege.[7]

At any rate, that was a real feather in my cap, to create a privilege to protect that situation, because if you're a rich woman and you get raped, you go to those other three places. Your conversation doesn't come up into the public light. But you're a poor woman, and you go down to the Reseda Sexual Crisis Center, or wherever it might be, and you don't have that protection. What kind of a situation is that going to be about? The only way out was to elevate that status to a privilege, and that's exactly what happened.

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[7] See Armand Arabian, "The Sexual Assault Counselor-Victim Privilege: Jurisdictional Delay into an Unclaimed Sanctuary," *Pepperdine Law Review* 37 Special Issue (2009): 89–104.

So next to taking *Rincon-Pineda* on, the creation of that, and with God's help more than twenty-eight states, and we've had a bunch of years now to get done with it, but there's a group of states just sleeping on their rights. I don't even know if they know what's going on. I would like, if I have enough time — I have the research done — to contact women's groups in those states and say, "Wake up. Your people need this protection, like your sisters anywhere else." So that's one that's on my deck.

MCCREERY: It's fascinating, too, that on the original case, the *Rincon-Pineda*, where you started working on this issue, that it came up to you, and by comparing it to other kinds of cases you just said, "It doesn't make sense."

ARABIAN: Why would you pick one category? In other words, a witness false in one fact, maybe *Falsus in uno falsus in omnibus*. That applies to everybody and everything. Why, out of all the panoply of criminal conduct, are we picking off this one? Why? Because it's sexist and it came from the 1600s. Is that the rationale? Every judge for 150-some-odd years, or whatever it was, has just been regurgitating this because they were told that that's the law. Finally, somebody had to wake up and say, wait a minute. Where are we today? Are we back there in the 1600s, giving this kind of sexist garbage out? Why are we picking on her? We don't pick on her for any — they take your purse, you don't say, "She identified this guy, watch what she says with caution." I mean, come on. So that's the logic of it.

I received a beautiful letter from Chief Justice Wright, which I have, complimenting me on my courage for having done it. He says, "With his tenacity, he saw it through." I mean, it was a beautiful letter.

MCCREERY: Chief Justice Wright, I think, did author the opinion in that 1975 case.

ARABIAN: Yes, unanimous, a unanimous opinion. He told me, he said, "I wrote that opinion complimenting your courage and your bravery." He said, "But my colleague, Peters, came over to me and said, 'If you pat him on the rump, it's going to be encouraging judicial heresy.' " He said, "I had to take that out, and so I wrote it all as harmless error and got rid of it." [Laughter] It's so funny.

MCCREERY: So that's how it came to be harmless error. Okay.

ARABIAN: Yes. He was just going to flat out destroy the thing and say what a nice guy judge we had down there, he said, but [Justice Raymond] Peters came over, he says, "Look. You're supposed to give the law. This was the law. He didn't give it, and we know the reasons. Let's get done with it." It was so funny.

MCCREERY: Let me ask you as an aside, how well did you know Chief Justice Wright?

ARABIAN: I knew him from the days when he used to be in Department 100, way back when, a long time ago. So we knew each other by face and by name. I had never had a dinner with him or anything like that. I probably shook hands with him twice in my life socially someplace. But when this baby rolled up to him, he knew, and he took it for himself. I mean, this was a major case.

MCCREERY: I wonder, as a practical matter, did it accomplish what it set out to accomplish, this change in the laws? Was it fully effective, as far as you have been able to tell?

ARABIAN: Well, *Rincon* killed off the instruction everywhere. That's done and over with. It changed the impetus of rape reform. This was a major spark. This is where the Gloria Allreds came to light, and the consent issue, and background prohibition, and all these things. They were sparked right around the time of *Rincon-Pineda*. I'm not taking credit for the whole thing, but this was a major spark. And then the Robbins Rape Evidence Law, that was in '75 [1974], Michigan, as I recall, did it first. He [state Senator Alan Robbins] copied it. But to his credit, at least he picked up on it.

The whole thing changed. They got dignity that they had not had for a century plus, and all of a sudden they were seen for what they were, victims of a horrible crime. You cannot right the un-rightable wrong, but you can put the guy who did it in prison.

MCCREERY: But I would imagine that for the general population, seeing them as victims, that took some time. That was a switch in our thinking, wasn't it?

ARABIAN: It evolved, it evolved. Then you had *A Case of Rape*. You had movies being — *Lipstick*. She's on my wall in there. She passed away, Hemingway, Margaux Hemingway. People were making movies now

about it, on television. I think *A Case of Rape* they said about ten times, "A judge is going to tell you to watch what she says with caution." This was bedrock for knocking off a victim, bedrock. When that little bedrock got taken away, now we're back down to some common sense here, ladies and gentlemen. Let's look at this thing. We don't tag her for being a suspect.

Then one other one, Gloria Allred was in on it with me. They had a law here called the *Ballard* case. It wasn't as old as other ones, but it was out there, somebody created it. And it said that you could order the claimed victim of a rape to a psychiatric consultation, not to determine if she was telling the truth but whether she was capable of telling the truth. I refused to give it.

Gloria Allred was in on that with me, and with the help of Robbins and others — [state Senator] Diane Watson was up there — that got taken off the books. You cannot do that anymore. So that's how far it went. You could even send her to a shrink. Who else could you do that to? This is how bad the prejudice was.

MCCREERY: That's right. This was certainly a different sort of subject matter for the law-and-order folks to consider.

ARABIAN: The law-and-order folks loved it. On their ratings I was right up at the top of the pile or someplace. They'd rate you exceptionally outstanding.

MCCREERY: Here you became a representative for some aspects of the women's movement, and the idea that there are all kinds of rights that haven't been recognized. But this was such a tangible one, wasn't it?

ARABIAN: What happened was there's this Project Sister out of the Pomona area. They have a Healing the Heart Award in my honor, and they give it to someone who's done something outstanding in rape reform. The D.A., Steve Cooley, and different people have gotten it. That comes up once a year, the Healing the Heart Award. They got more dignity out of the whole project that they were into, and they can point to something and say, "We have this special award for you, Mr. So-and-So, or Miss So-and-So, because you've done something in the spirit of what Arabian did here."

MCCREERY: You mentioned Gloria Allred, and I wonder how you worked with her throughout this whole time.

ARABIAN: She has been a friend. I got the first award from the Women's Education and Defense Fund — I forget the whole title of that — when they honored me one year. Then she stood up against the *Ballard* rule with me, so we've maintained a friendship through the years, and I'm very respectful of her. I think she's helped victims out in all kinds of situations.

MCCREERY: How long did it take, do you think, for the public thinking to catch up with this idea, that that was a discrimination?

ARABIAN: I would say the critical years were '75 to '80. In those years, not only *Rincon* went down, *Ballard* went down, background stories went down, Robbins Rape Evidence, rape by artificial means. All these things came in about that five-year run. It was actually during Jerry Brown's time around. I'd be surprised to tell you that, but he was signing on, because he knew what was right and what was wrong.

MCCREERY: Before we get too far from the early stages of your career, let me ask you to say a little bit, briefly, about what prompted you to go back to school at the University of Southern California and take the Master of Laws degree in 1970.

ARABIAN: My roots, of course, were on the East Coast in New England. When I got here I truly enjoyed the rooting process, if I can call it that, of becoming a deputy district attorney, and joining a fantastic law firm, having a badge, and belonging to this area. I loved the area so much that I said, you know, Boston University is a Methodist school, not that that all matters, but there's a Methodist school out here that's got a great reputation also, and that's USC.

So I started to check into the programs that were available. I was a sole practitioner at that time. I was over on Vanowen Street, and I found out, lo and behold, that they had a Master of Laws program, which you could do at night. I thought that afforded a tremendous opportunity to become rooted academically on the West Coast. I went for it and made application.

There were a couple of district attorneys. Joe Bush, who later became the district attorney, was taking courses there, and Jim Kolts, who was a Superior Court judge. They were taking classes there at night. There were a number of them. It was a short ride for them from their downtown office over to the 'SC campus. For me, I was coming in from Van Nuys. But I started doing it, and I was very much into it.

I took some medical-legal types of courses. You needed twenty credits, and I got through the first sixteen in very good shape. Then my practice got to be demanding, and it became harder and harder to take that time off to drive all the way downtown and come back at night, with a family. So there was a hiatus there.

Very unfortunately, the two fellows that I mentioned to you, they had the same situation in their case. They got the first sixteen done, and then needed the last four. You had to do a thesis for the four credits at the tail end. They were doing different subjects in the criminal world, because that's what they knew, and some professor just kept torpedoing their efforts. They were not having the documents accepted as a final work. So they were stymied. They weren't finishing up. In fact, to my knowledge neither of them ever did get the LL.M.

I was in the same situation, and a couple of years went by, and I was irritated with myself. I said, you started out this project and you're so close to the end of it. Let's see what can happen. So I called the school up and I explained the hiatus. Dorothy Nelson was the dean at the school at the time. I spoke with her, as I recall, directly, and explained the situation, and she said, "Why don't you file a petition with the school and explain what the circumstances are and see what they'll do?"

So I did, and sure enough, they sent back a notification that said, "Call us up. We grant your request, and we're going to assign you to Professor So-and-So. Meet with him and see what you can work out." So I called Professor So-and-So, whose name I no longer recall, who had clerked for a U.S. Supreme Court justice. He was a very scholarly person.

He said, "Armand, I'm going to drop out to the valley and see you. You don't have to come down here." I said, "Fine. Come on over." So he shows up at my office, and the day he shows up, the phone is going off the wall. One woman calls and says, "My husband just got out of jail. He's supposed to stay away from me. He's been threatening to break the door down. What should I do?" I tell her and hang up.

The phone rings again. "There's a bench warrant out for my arrest. There's no bail on the warrant. What am I going to do?" So I advise him as to perhaps a surrender situation, and we can work it out. Things like that. This professor is sitting there, really not having had a practice of law that dealt with crime and family law and personal injury and all that kind of

thing. He's an academic fellow, and he just sat there absolutely enthralled. At the end of about twenty minutes he looks over at me and he says, "Well, I can see you're a busy man." He said, "I'm not going to make it hard on you. I just want to know what you have in mind."

I said, "Well, professor, I'll tell you, I've been giving it some thought." It was 1969. My son had just been born. I said, "There's very little written about the criminal responsibilities of corporations. They will go after the president and vice president, but they don't go after the corporation as an entity."

So he said, "That sounds very interesting." I had come up with that because I knew of a fellow who was a shady player, who had used the corporate structure to do his "misdeeds," quote, unquote, and the corporation, which should have had a problem, was just standing on the sideline watching the show. I said, there's something wrong here. At any rate, I drew up an outline. He said, "Fine. Let's proceed." So I spent time going through whatever law I could find on it, and there was not much going on at that time, and I wrote it up. I took it to him, he read it. He called me back and he said, "I'm just going to suggest about three minor modifications." I followed the advice, I did it, and he said, "Accepted."

So as you'll look on the wall over there, the University of Southern California Master of Laws. In 1970 I walked across the stage, and I was, to my knowledge, the last person to get a Master of Laws at night, because they had terminated the program. I was just being given the courtesy of finishing up what was no longer available, and to this day they don't have that program. Shirley Hufstedler was the person handing out the diplomas that day at 'SC, and mission accomplished, because I wanted the West Coast credential of academia, and that's how that happened.

MCCREERY: Can I ask why that seemed important to you, to have that West Coast grounding in academics?

ARABIAN: It was just a thought that was important to me. I just thought, you're an East Coast person. You're going to live out here. It would be nice to say that you were also educated out West, and that was the way that I could accomplish that.

MCCREERY: I noted that you had been an instructor at Mid-Valley College of Law in 1975. Say a little bit about how that came up.

ARABIAN: There was a deputy district attorney who was the dean of that nighttime program, and it was for, let's call it disadvantaged students who were not able to go downtown or get admitted to USC, as an example. But they could go over here in the valley and take courses and become lawyers. So I thought that was a very worthwhile thing to do. I went there for a couple of semesters and taught some subjects, and then it disbanded. I lost track of it, or they were absorbed by some other school. But I'm sure there are a few lawyers today around here that went through that situation.

MCCREERY: How did you like teaching?

ARABIAN: I liked teaching. Up until a year or two back, I was teaching appellate advocacy at Pepperdine law school at night. I felt very comfortable teaching appellate advocacy to law students at Pepperdine, because I'd been involved in the process at the Court of Appeal and at the Supreme Court for six years. They had a lot of interest in listening to me.

The hard part was, it took two hours to prepare for it, two hours to drive there and back to the Malibu campus, two hours to teach it. Now, that's six hours each week for about fifteen weeks nonstop. That is a major commitment, because when you're busy it's really tough. So I did it for several semesters, but I found it was just counterproductive to try to keep doing that, so I stopped.

I really enjoyed doing it. They had given me an honorary Doctor of Laws degree. I love the school, and I've been very supportive of it. I hated not to go there and teach some more, and the students, I'm sure, would love to have continued, but I just felt that the stress was a little too much.

MCCREERY: How has that law school developed since you've been affiliated with it?

ARABIAN: They're just doing unbelievably well. They have a tremendous faculty. They get other tremendous people from other academic worlds, and they have no shortage of people wanting to go there. It's the most beautiful law school campus in the United States. They care about their students. They have a moral atmosphere about the school. It's just a beautiful place to be, and I enjoy going there.

MCCREERY: Has Dean Starr wanted to make any particular major changes of direction?

ARABIAN: Absolutely. They are very much involved in putting together funds to attract even greater scholars to come there, to expand the facilities, and all kinds of projects that are underway. He's very active. He's a very dynamic person.

I donated the judges' chambers there in honor of my son, and they have an endowed Armand Arabian Appellate Advocacy Tournament, which happens in the first semester. They get a stipend, winner and loser. He brings in leading people from the law world to sit as a panel of three. I sat with him once. It's done on parents' day, so the place is packed with family looking at show time.

MCCREERY: Since you mentioned your son, it's reminding me that we didn't really talk about your own family, so maybe we can just fill in, going back to your wife's background, and how you met her, and when you married.

ARABIAN: Yes. I was in the tail end of the last year at law school, and I came to visit that aunt that I told you about who was in Woodland Hills. I found out there was an Armenian dance in Hollywood at Assyrian Hall. Armenians didn't really have many facilities at that time, such as we have in abundance today. So I had a rented Ford, a Mustang, and I found my way over to the place. Lo and behold, a fellow that had grown up in New York with me, who I knew had moved out here, was there.

A whole bunch of young folks were present, but I didn't know anyone but him. I walked over, as his family and my family had been very close in New York. We lived not too far from each other, way back in the tenement life. He introduced me to a deputy district attorney who was a friend of his. I'm walking around and having fun, and meeting a few people, and I saw this gal, and she just caught my eye, but I didn't see her again.

The next day my aunt said, "Anything happen?" I said, "Yes. Well, I saw Leo," who was our friend. His last name is Aregian. He moved up to Oregon. He became a member of the bar later in life. So I said, "I had a great time." I went back to school and graduated, came back out.

There was an Armenian picnic, of which there's no shortage today, in Streamland Park in Pico Rivera. I have probably never been back to that place since. My aunt and I get into my little Volkswagen, and we go out to the picnic. Lo and behold, there's Leo and the district attorney again, wandering around looking — neither of them are married. All of a sudden I see

this gal and wow, that's the same gal from that dance months ago. So now I ask Leo, "Do you know who she is?" He says, "Yes, Nancy Megurian." I ask, "What do you know about her?" "Oh, she's a great church girl, ACYO," the Armenian youth organization. I said, "Leo, do you know her well enough to introduce me?" He says, "Sure. Come on over."

She's there with four or five of her best girlfriends. Here I am in shorts, it's a warm day, and I walk over. Leo introduces me to her, and we start chatting. This chat goes on for about a half an hour, and all of her girlfriends are standing on the side here wondering, what in the world has happened to Nancy? Where did this guy come from? We don't know who he is, we have no idea what's going on, and she's really having a chat with this person.

So, long and short of it, I got her name, and she lived in Lynwood, which from Woodland Hills is thirty-five miles or so. That's like going to Worcester from Boston! That's a major haul. So we started dating. She had a wonderful family, a brother and a sister, and her father was in the soap-packaging and bleach-manufacturing business. It wasn't long after I put my fraternity pin, the Sig Ep pin, on her, and not long after that there was an engagement, and not long after that there was a marriage.

So I was a young D.A. We're married. She's working for a law firm downtown to help make ends meet. That was in '62. In '65 we had a beautiful daughter born, Allison Ann Arabian. She wouldn't go to sleep until Daddy got home. I was in private practice. She today is an appellate lawyer with Lewis Brisbois [Lewis, Brisbois, Bisgaard & Smith LLP]. She has three offices, one in L.A., one in Costa Mesa, and one in San Diego, and two beautiful children with David Demurjian, a deputy district attorney in Orange County.

Then in 1969, the same time as I'm going downtown to finish up at 'SC law school, Robert Armand Arabian is born. He graduates from Cal State Northridge and goes to Pepperdine Law School. He meets and marries a lovely young lady, Jennifer, and they have two beautiful children. He becomes a deputy district attorney in Ventura County for about three years. But his law-and-order background, hanging around with me, just drove him back to law enforcement in a more direct way, so he joined the Simi Valley Police Department. There was a sergeant's exam available after he was down the roadway a little bit; he took it, came in first, so he's a sergeant

there now. He practices family law and estate planning out of my office, so he's got a dual mission in life.

MCCREERY: He's still got his foot in the door of the law on that side, too.

ARABIAN: He hangs out here, as you saw this morning, on occasion.

MCCREERY: I had the pleasure of meeting him this morning before we started.

ARABIAN: He's really a fine person. The same Foothill police division which became notorious for the Rodney King beating gave him the Reserve Officer of the Year Award for saving somebody's life. He's very dedicated to the human condition, so I'm very proud of him and my daughter and their families. Both of them are really, really wonderful issue, they really are. That's basically a thumbnail of that.

MCCREERY: Where did you and your wife Nancy settle when you were first married?

ARABIAN: Since I was always a valley type, we had an apartment not far from here, and a second apartment not far from here. Then there was a house in foreclosure in Granada Hills. I knew one of my fraternity brothers who was in the bank that had foreclosed on it. I went over to look at it, and boy, it just looked like a really nice place. It had easy access to the freeway, and shopping centers, and so forth. So I bid on it and got it. I improved it, put up a block wall, and to this day it looks great. I pass by it on occasion. So we lived there for a while.

In 1965 Allison came to that house. But by 1969, I think around '67 we had moved to my present location in Tarzana. I'd been looking for a larger place, and there was this development high on a hill looking over the valley. I just fell in love with this particular house. It was French Regency, which is the style I like. As hard as it was to do, I bought it. We put the pool in and raised everybody up. They'll carry me out of there with a toe tag from the coroner, because I'm not leaving. [Laughter]

MCCREERY: So you've had both your home and your office for many years now.

ARABIAN: Yes, and I expanded that from about 2,800 feet to 6,400. We had two earthquakes and a fire there along the way, so a few things happened.

But I have a beautiful library overlooking the whole valley, and it's a nice place to sit and think and do whatever you're going to do.

MCCREERY: On your bio form you mentioned that your wife was born on the island of Cyprus. Could you say just a few words about her family background and how they got here to California?

ARABIAN: Yes. There was religious clergy in her background in Cyprus. Her mom wound up in Cyprus, being of Armenian background. Her father was from Constantinople, Istanbul, not far from where my folks were. We were at the south end of Marmara; he was at the north end. He somehow had migrated over to Cyprus, and I don't know to this minute all the details of how that happened, but they had relatives there, I believe. So he met Angel Kodjababian and married her, and Nancy was the firstborn of that marriage.

He came to the United States, and he had to leave them there, because the wartime was on. But he went back as an American citizen. She was a little kid. They had a U.S. military escort bring them into New York harbor, and so he wound up in New York, like most people did at that time. But he migrated to California, and with his wife's brother they went into Electro-Bleach Corporation. That's where they were doing the packaging of soap and bleach. So he had established himself nicely in Lynwood.

MCCREERY: Let's turn back to your judging career. We talked about a range of things last time, and I do have some more questions about your time on the Superior Court. We've mentioned the name of George Deukmejian already a number of times, and I think your quip was, "I walk with God, but I ride with the Duke."

ARABIAN: Right.

MCCREERY: But tell me, really, from the beginning, how you got to know him, and how influential he was to your career.

ARABIAN: I see this political person whose name is difficult. "Deukmej" is Turkish for the tinsmith, so i-a-n means the issue of a tinsmith. That's what Deukmejian translates out to. Arabian would be the issue of the Arab. I don't know how we got there, but that's what that is. So he went from Assembly to Senate, and with his name — and he had come from New York, upstate and in the city by way of background and education — his main supporters were going to be, logically, Armenian.

So he had rounded up a few of them who knew him and liked him. Along the way I wound up on the other side of a divorce case with him, just like the story I'm telling you about with Hennessy. So we're talking on the telephone. He didn't do much of that, but he happened to have this one, and we resolved it over the telephone. We got to like each other, so I said, "I'm going to go to the next event that he has at one of the Beverly Hills hotels," and I did.

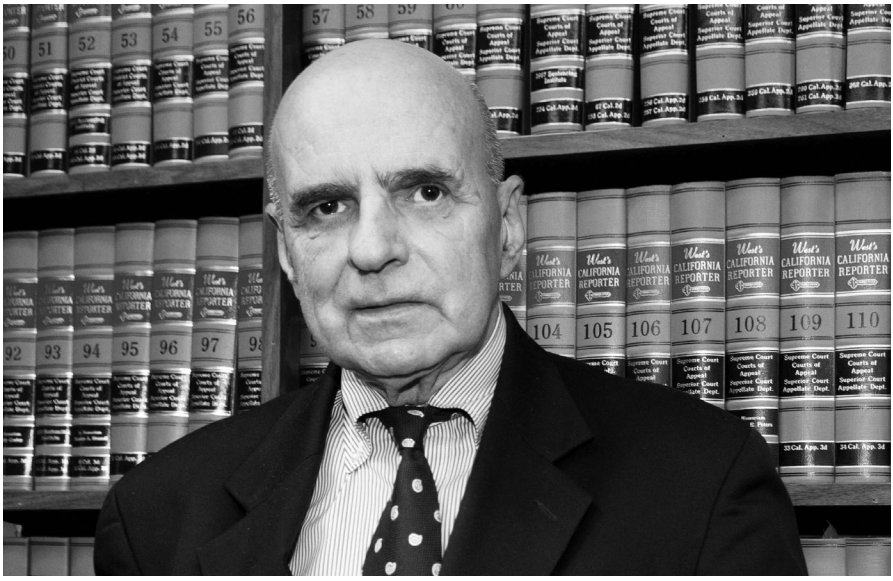
We just hit it off fabulously, and I became part of his kitchen cabinet. There were rubbish folks in there, there were business people, a couple of lawyers, probably about eight men. Once a year they always established a night where we would get together and decide, where was he going, and how was he going to get there, and what could we do about it? That's how that whole thing started.

Now, that was in the late sixties. So around '68 I'm thinking in terms of would it be nice to go on the court? So who am I going to talk to? Him. So I call him up and I said, "George, we have one Armenian on the bench." That had happened — I'm trying to remember for sure. I think Richard Amerian — he's passed away — was on the court in '70, so this conversation is around then, because I know there was one judge, and we didn't have any other one. But the thought process started around '68. But right around the time frame we're talking about, I said, "What are my chances of becoming a judge?"

He says, "Armand, I wouldn't tell you to walk across the street and lick a stamp for someone. I wouldn't tell you to donate a nickel to anybody. You will go into this as who you are and what you are."

I said, "My support people would be the police officers of the valley, and they know me well." So that's how it started. I put together letters of support from five, I think it was, valley divisions of L.A.P.D. Those are the people who knew me best. Art Van Court, who I think is still around, was an L.A.P.D. detective who knew me well, and now he was right among Reagan's bodyguards. He knew who I was very well. So as I understand it, the packet went directly to Art Van Court, and Art Van Court took it in to Reagan's folks up in Sacramento.

So comes 1972, I'm sitting here in my office, and the story of the phone call from William French Smith, and I became a judge. Thereafter, fifteen months later, without any urging on my part, next thing you know my name is in the hopper for Superior Court. So the little nasty deal was, the people who had supported Richard Amerian, who was a friend of mine, decided there was a little political play going on between someone who to



Armand Arabian in his Van Nuys office, January 10, 2011.
Photo: Thomas Wasper

this day doesn't like Deukmejian and myself, and he was going to try to one-up Deukmejian, now that there were two of us at the Muni Court.

The question being asked was, "Who should go to Superior Court, Amerian or Arabian?" which was a terrible thing to do, put two Armenian young judges against each other. He hadn't served in the military, so he was a couple of years younger than I was. At any rate, long story short, I got the nod and went to Superior Court. He got there later with Jerry Brown, went to the Court of Appeal, and he retired from there. Sadly, he passed away three, four years ago at a young age.

So the friendship with George always remained intact. I was the comic at his swearing-in ceremonies in Long Beach. That shows you the relationship that was in existence. After we swore him in I went over and I hugged him. I said, "In four years, you're going for governor." He looked at me and smiled, and that's exactly what happened. So he runs for governor. I'm still toiling around, and I opened up the San Fernando court. He put me on the Court of Appeal and then up to the Supreme Court.

MCCREERY: In those early days, what kind of a guy was he as you were getting to know him?

ARABIAN: The best. Very, very courteous. If he was passionate, you wouldn't see it by way of external expression, you know, somebody smashing his hand into the tabletop, saying, "I'm going to get even with you." You'd never hear that from George Deukmejian. It's like talking to a preacher, real calm, composed, intelligent, thoughtful.

I have said this publicly: I have never in all my time with him, from the late sixties to today, I have never heard him utter a four-letter word, never, not once. There are people in public office, and I'm not excluding myself, who throw that stuff around pretty good when necessary, when they feel like it. Not George Deukmejian. He's the only person that I have had anything to do with that I could say that about. Not once under any condition, goaded beyond remedy at some times. Not a word. That's the kind of person he was, and he was a steady hand for the eight years of governorship. Everything was thought out and well-intentioned.

MCCREERY: When he was a legislator himself, what were his interests in those days, as you perceived them?

ARABIAN: The interest that I joined up with him was mandatory sentencing for rapists, and things that had to do in my life with rape reform, but he had a panoply of other things that he was into. I was not really that involved with all of that. But everything he did was for the public good, and thought out well.

MCCREERY: I note that while you were on the Superior Court he put you on, I guess they called it a judicial advisory commission on crime victims, and I know that victims' rights, of course, as his career played out, became very important for him.

ARABIAN: Yes. There was a group that I was a member of, and some of those folks wound up on the court benches along the way. But that was his interest. He was very much into protecting the public, and that's how it went. Then probably more importantly, I was part of his what they called JSAB, Judicial Selection Advisory Board. There were about eight or nine folks, all male, that would meet to discuss any particular person who wanted to go on the bench. You could have the blessings of the bar associations,

you could have the clearance from any commission there was. But until you cleared JSAB, you weren't going anywhere, because those were the people he trusted.

Malcolm Lucas was one of them, and I was one of them, Dave Eagleson was one of them, people like that. We would meet about once a month for the time that he was governor, and those names would come through. If necessary they'd say, "Who knows Joe Blow, the D.A. in Torrance?" "I do." "Check him out and report back next month." There would be a check out. The person assigned to that would call up people that they knew and said, "What's this guy all about?" If it came back with a clear "Go for it," that would happen.

Or other times they would ask Marv Baxter, who's now on the court, who was [the governor's] appointments secretary. We were really close, and he would call me and he'd say — I was on the Court of Appeal — "There's Judge So-and-So. We're considering this woman judge for a spot, and we like her paperwork, but we want to know a little bit more about her. Will you check her out?" "Sure." I'd call up the candidate, and we'd go to lunch and get a fix on what that was all about, then report back and I'd say, "Boy, she's something else. She's great!"

MCCREERY: So you would actually interact with the candidates, if need be, and give your thoughts?

ARABIAN: I would personally visit, if it was important enough and they had so little background on a person. I would check it out.

MCCREERY: I take it this JSAB would on occasion dissuade the governor from appointing someone who otherwise looked good up until that point?

ARABIAN: Absolutely. Absolutely. There's no question about that. If you were dinged by this group, that was the end of that.

MCCREERY: How often did that happen?

ARABIAN: The dinging? [Laughter] We're talking about eight years. I can't tell you that one. I just don't remember. Usually if they were intelligent enough to put their application in with a governor who they knew was a conservative — you were not going to have some member of the ACLU coming in there looking to get a judgeship, because they probably figured that wasn't going to wash. So you had people that were coming in

as prosecutors, a lot of them. They flew through, most of them that I recall. You had people from major firms who had terrific backgrounds in civil law. So the ding jobs were there, but I'm not telling you that there was a rash of it. I just don't remember it like that. But there were on occasion — "He's got real problems."

We would have a collective meeting. Everybody would brainstorm. At the end of it, it was yea or nay, and then that yea or nay would go to the appointments secretary, and he would take it in to the governor. The governor was never involved in these things personally. No, it was strictly this committee, JSAB.

MCCREERY: Then likewise, because Governor Reagan appointed you to both of your first judicial posts, when and how did you first meet him?

ARABIAN: There was a person named Richard Gulbranson, who owned North Hollywood Glass, if my memory comes back at this point. He was a real leading Republican conservative political type. He had a beautiful home, I think around Toluca Lake Estates. So I went to the reception in his backyard. He knew who I was, I knew who he was, and Ronald Reagan was in the backyard. That's the first time I got to actually meet him, and I don't remember the date of that. I wasn't a judge at that time.

MCCREERY: First impressions of him?

ARABIAN: Just as you would love him in a movie, you've got to love him walking around a yard. I mean, he just, he'd light up the place. He was one of those guys. Then I got the appointment, both times, through George Deukmejian's sponsorship.

But the time that was really important was when Jerry Brown was running against him for president of the United States, and Mike Curb had this reception at his home. He and Nancy Reagan both showed up, and he, of course, was right up to the minute on what was Armand Arabian doing, fighting Jerry Brown in his absences from the state.

So that day he just made a beeline for me and came right over. He says, "Judge, keep it up. You're doing a great job." And I said, "Thank you." [Laughter] So, what are you going to say? It was just, "I know you love me." It was one of those things. I have letters from him, "I'm so pleased that I appointed you," and so forth. So that was the one time that it was really up close and personal. Other than that, I've seen Nancy Reagan a number of

times, including the commissions twice of the aircraft carrier, but that was the one-on-one Reagan that I'll never forget. It was really something.

MCCREERY: As a judge, as time went on, I wonder if your methods evolved at all, or your approach to things, your views?

ARABIAN: I would say that was fairly consistent. I don't think so. I treated them all with dignity, all meaning all the lawyers, all the defense, and so forth. I was not a fool. They knew not to take too many shortcuts with me. They knew not to abuse one another; that wasn't going to last. And they knew they'd get a fair trial, and if there was a conviction there was going to be a just sentence. That was the make on me. As you heard Bill Littlefield say on the [video] tape, "If somebody deserves a break, he'll give it to him. If he doesn't, look out."

MCCREERY: One of the other things at the state level while you were on the Superior Court was, of course, that Chief Justice Don Wright, whom we talked about last time, retired, and Governor Jerry Brown selected Rose Bird to take his place as chief justice. Can you tell me how you reacted to that at the time?

ARABIAN: I remember going to a reception for her when she just took office, down on Wilshire Boulevard in one of the old hotels. It was on Wilshire not far from where the court was. No one really knew anything about her. She's kind of a tall person, bushy kind of hair. I said, "Hello." Everybody's wondering, my God, where'd she come from? We were maybe hoping that it would be somebody seasoned that had worked their way up through the years, like Chief Justice Ron George. This was a bolt out of the blue. Nobody had ever heard of her. We didn't know anything about her.

But as time passed, when she started to show her colors, which were completely out of the "norm," quote, unquote, when nobody should be liable for a homicide, much less suffer the death penalty, and on and on and on, she just drove the place into total distraction and disgust, is a better word for it. We were pretty upset with what she was up to. She had a person that hung around with her all day long whose name I've long since forgotten and don't want to remember, but it was these two wandering around doing their thing, and it was not a happy time.

She came down and swore me in to the Court of Appeal. I suggested to her that we have a cup of coffee together and maybe talk about how respect

could be restored. She looked at me like I was crazy. That was in '83. In '86 she was gone. You could just see the handwriting on the wall, because the state wasn't going to put up with this too much longer, and she took out two good justices with her.

But on a personal level, the rare times that I got to speak with her, she was always very cordial. As I now recall, she said to me one day, "I really enjoy the way you write opinions." I said, "Oh, Chief, all the good stuff's been done long ago," and started to laugh. [Laughter] But I felt very bad that she passed away at sort of a young age, but her brains were gone. After her ouster she just went into oblivion, led a reclusive life. People didn't even know who she was.

I think Jerry Brown caused a complete tragedy in the life of a human being that probably deserved something different. He should never have done a deed like that, to put someone with very little experience, a total, committed, ideological misfit as far as the rest of California was concerned and make chief justice out of such a person. That was outrageous. It was outrageous. That view is not simply mine. That view is shared by a lot of people who were my contemporaries. It's not an aberrational thought. The people of the State of California agreed. Imagine getting kicked out of office.

MCCREERY: Governor Brown made quite a number of judicial appointments and I think was said to express the view that it was time to bring more diversity into the judgeship and that sort of thing. Did anyone see this coming?

ARABIAN: I can't tell you that one. When you say diversity, diversity's fine. Everybody likes diversity. I'm a diversity person. I have nothing to say about that. But when you go and you pick up somebody and make a chief justice out of that person, with absolutely no credentials that anyone would really look at, and say, "Oh, wow, this is terrific. What a background." There was none of that. That's not promoting diversity. That's promoting your own self-interest and your wacko view of how the court's going to be run. It was terrible.

MCCREERY: It must have been quite a difficult position to be put in, too.

ARABIAN: For her, absolutely. I felt for her because this was way over her head, and she's in there doing her thing like "It doesn't bother me." But I'm sure it did bother her." She knew she was being held in disrepute in many,

many places, and that's why she got voted out. They had a whole case, easy to make, on her. That's what did it. But it shouldn't have ever happened, in my view.

MCCREERY: What about the idea of groups getting together to try to press the electorate to get rid of judges? We've had other occasions of that happening since. It's not a common thing, but it's not unknown, either.

ARABIAN: It's the people's right. It's their privilege. If they have a reason to do it — they didn't have a reason to oust Dzintra Janavs recently. There's nothing wrong with her, but sometimes your name harms you. Arabian? I got the lowest confirmation rate of any of my colleagues for no reason other than we're fighting Desert Storm. So you see Dzintra Janavs, or Abraham Kahn — they voted him out. They both got put back on, fortunately. A name can harm you, even though you can walk on water every other day. So that's out there. But it's a voter's right. They want to be discriminatory; they showed it in my election. I think I got, like, 53, 54 percent of the vote. Why? There was no opposition to me. They just went into the voting booth and, "I don't like that name." Well, that's their choice. Lucky for me they didn't win.

MCCREERY: When the '86 election came around, am I right that Governor Deukmejian himself publicly suggested that he would not vote for her?

ARABIAN: There was no secret as to who her opponents were. It was widely spread that they were outraged by what she was doing and were going to try to get rid of her, and that's what happened.

MCCREERY: Was it viewed as her personal opposition to the death penalty, as opposed to legal reasons for turning back those executions? How did you in the legal community see what was happening?

ARABIAN: I think it was a complete ideological overtaking of her responsibilities to the law. She knew what the law was, and she knew what the evidence was. Now, if you can't conclude that fifty-seven stab wounds of an innocent person constitutes enough in the law and in the evidence to justify the penalty, then there's something wrong with you. There's nothing wrong with the case, and that's where she was. So it was an ideological resistance, that she was going to impose her own philosophy, even if she was going to stand alone on a given case, and that's what she would do.

MCCREERY: As you mentioned, Justices Joseph Grodin and Cruz Reynoso were also voted off at the time. What's your comment about those two?

ARABIAN: There was nothing wrong with those two. There really wasn't, except they were tied in along with her by way of having voted along with her in certain instances. It was Jerry Brown appointments that made them a clique, so to speak, and so they weren't just going to go after her. They were going to go after two of Jerry's other appointments, her colleagues, and that's what happened. There was nothing wrong with those two justices, nothing. They're both fine people.

MCCREERY: In the early stages of all this, Justice Mosk was said to be something of a target, too, and he managed to separate himself, shall we say. Do you have much view of how he accomplished that?

ARABIAN: I loved Stanley. Stanley was a dear friend to me in my six years, and sadly I went to his funeral. God rest him. I loved Stanley Mosk. People would say, "How can you, a conservative, like a liberal like that?" I loved Stanley Mosk, and he loved me back. We were just really good friends.

He wrote a note to me on one of my dissents, and he said — that was *Smith v. Regents*.[8] I have his note. He says, "I'm pleased to sign it. I wish I'd written it." That's the kind of guy he was.

But he was very adept at defusing anger. He didn't want to get involved with that trio, and he didn't really need to get involved. He was, in my view, not a fan of Rose Bird. In fact, they should have made him chief justice. At the end of the day people were saying that, which a lot of logic to it, and I would say amen to that thought. Stanley would have been a good one, a great one.

So that cut him loose. They weren't going to — they figured, I think, that taking him on was really going to be overdoing that concept. So it was easier to leave him alone. He'd been around a long time, people liked him. He's a great jurist, so we're not going to package him up with those other three, and that's what happened. So he took a clean walk. [Laughter] I loved that guy. Really, I miss him.

MCCREERY: What's the lesson in all this, the '86 election?

[8] Smith v. Regents of University of California, 4 Cal. 4th 843 (1993).

ARABIAN: The lesson is, we are a government of laws, and not of men and women, all right? You take a job like that, you're supposed to, just like my dad said, "Don't cross over the line." Well, they were crossing over the line, not they so much, but her. When you do that, you're going to pay the consequences. You can err, that's human. To forgive is divine. You can do that a number of times, but you can't do it every day. So the lesson here is, if you're an ideologue, don't put a robe on. You don't belong here. And if you do, they'll probably get hold of you, and that's what happened.

MCCREERY: Of course, much was made of the fact that she herself had not been a judge before this time, although, of course, there are many other examples of very prominent people who haven't been judges, such as U.S. Chief Justice Earl Warren. But give me your thoughts on that, the importance of bringing that kind of background to the high court.

ARABIAN: I think it's very important, I really do. You can do it [appoint people without prior judicial experience]. They still do it. Take somebody who's in the loop and say, "Oh, we're going to put you on the Court of Appeal." I don't think it's a good idea, because I think there's something to be learned, especially in the days where we had Municipal Court. Of course, the job is still there. But people's court, you're looking in faces, you're doing a lot of decisions that impact a lot of people. I think that's important.

My answer is very simple: Ron George. There's an example. He was a prosecutor, municipal, superior, appellate, supreme. With that background, you know everything that's moving around. You know what you're supposed to be doing. You know what the codes of conduct are, and how to deal with colleagues, and on and on and on. You get awards from all over the United States, because they like what you're doing. That's the difference.

So it's the preparation. You're not going to be a neurosurgeon unless you work your way through the clinics and the emergency rooms until you finally get to where you're going to go. You can't just take somebody because they have a law degree and make them a chief justice or anybody else. It just helps to have that grounding, and that's how it is in the military, okay? You start out here and you work your way up. You're a lieutenant, second or first lieutenant, captain, major, lieutenant colonel, and general, okay? What does the army do? That's how they do it, with good reason.

MCCREERY: What else is important for getting to that level? What are the important things to bring in the way of experience?

ARABIAN: I think a, quote, unquote, "people person" is important. I think if you've lived in a little shelf somewhere, in a sheltered life, you're not going to more easily understand the plight of someone less fortunate, just because of your background. Maybe you'll get there, but the person who's been there knows the pain and suffering of the homeless and the drug addict and a few other things. So I think that's part of it.

I think you've got to have a sense of humor, because that job will kill you. We've had public defenders jump out of windows and commit suicide and a few other things, because it just overwhelms them, if you will. You have to have a sense of humor, I think, and I've always tried to maintain that.

You have to have a mindset of collegiality. You can't be a bully, or a smart idiot. We've had smart idiots who tried to get elevated, and they can't get two votes, because everybody knows that they're smart, but they're idiots. They want to hold you in contempt because they don't like how many pages you present in the morning, instead of saying, "Change it." So there are those kinds of things that are factored in. So your personality counts, I think, substantially, in whether you're going to be a good one or not a good one.

MCCREERY: We touched upon this idea of diversity, which is kind of an overused word at this point. But how important is it on a body of, let's say, seven on the Supreme Court, to have a range of backgrounds and views represented?

ARABIAN: I think it's absolutely essential. You look at seven white men, or nine white men or whatever it is, and you go, "Where's the rest of me?" as Ronald Reagan said in the movie. "Where's the rest of me?" So all of a sudden you have a couple of women, you have an Asian or two, you have a Black person, an Armenian, a Basque. You have a mixture that's important, because they bring a lot of background with them, and it's diverse, and they don't always see everything the same way. Someone will have a different view and say, "Wait a minute. If you go over to an abortion clinic and you do this, and you prevent that —" or "How many feet are sufficient to stay away?" and all these things. A woman may have a totally different

view of that than a man. So these are the things that get factored in, and it's important.

I remember the one case that really comes to mind, *Citizens of Goleta Valley v. Santa Barbara*.[9] This had to do with a proposed — I think it was a Hyatt Hotel — was going to put a big hotel down off the ocean in Santa Barbara. The citizens of Goleta Valley, being NIMBYs, didn't want any of that. You know how difficult it is to get permission from the Coastal Commission.

Well, these folks were determined to put a hotel up there, which would have been very classy. They had a fight. They fought it out. The developers would win, and then it would go to the Court of Appeal and the NIMBYs would come charging out. "There's some blue-spotted turtle out there," that no one's ever seen or heard about, but that's going to have a problem if the swimmers are here. They would come up with all kinds of stories, and it would get knocked down. They'd go back down and fight it out again.

It got to the point where it was so ridiculous they were saying, even though the property is on the water, "Go to the hillsides over here," which are not for sale and are not adequate for the purpose here, "and see for an environmental impact report if those are available as an alternative to the ocean." Now, this is how wacko it got. They went up and down a couple of times. This whole trip took about a decade.

It came up to us in the Supreme Court. The developer had lost again down below. It was assigned to me. It was one of those cases where I wrote one of the typical Arabian opinions, something to the extent that said, "An environmental impact report may not be used as a weapon of oppression in order to delay," and I listed the types of growth — I called it industrial, or whatever I called it; I had a bunch of words that would be common — to advance the community by way of putting something up. So I used that expression "as a weapon of offense, to delay, hinder, or obstruct," something like that.[10]

Before it was complete, Stanley Mosk came in and he says, "Armand, you've got this word in here that's giving me a little problem." "Well, what

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[9] Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara County, 52 Cal. 3d 55 (1990).

[10] The concluding sentence of the unanimous opinion written by Justice Arabian reads, "Concurrently, we caution that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement."

is that word, Stanley?" Allen Broussard, "Armand, how about this paragraph over here? I've got a little problem with that." "Okay, Allen."

I took those two things out, which didn't bother me or anybody else. It got to the goal line and was done, and they won a unanimous decision, because I had to cooperate with diverse interests, a Jewish person and a Black person talking to an Armenian person, to get the thing done. That's diversity, okay? That opinion gets quoted a number of times in these environmental impact fights. But the delay was so long that it made no economic sense, and that hotel never, ever got built.

MCCREERY: Justice Arabian, we were talking over lunch a little more about your time on the Superior Court here in L.A. County, and I was asking about Judge Joseph Wapner, who was the presiding judge of that court. I wanted to ask you to talk a little bit about him.

ARABIAN: He wrote the book *A View From the Bench*, and it's calling him ". . . of *People's Court*," and he did a terrific job with that.

This book was published in 1987, and in chapter three — it's called "The Heart of the City" — he recounts an actual event. It's got a different name for the defendant, but he says, "Johnny Archer was by no means a lucky young man when he came before me in 1965." He tells the story about this young Black fellow who was in Los Angeles and thinks he could become involved in the movie industry, and that doesn't happen. So he's thinking about going back home, down South, and that's going to be in Ozark, Alabama.

So since he doesn't have much money, and he's living, I think, with an aunt in L.A. He starts to hitchhike. He's downtown, and somebody picks him up in a Volkswagen down around Spring Street or right down in the middle of town. There were these parking lots that used to house a lot of cars. A Caucasian fellow says, "Come on, hop in. Where are you going?" He says, "I'm going south." He says, "Come on in, I'm going south," and he doesn't tell him that he's going south towards Tijuana in a stolen car. So they get down on the freeway heading towards San Diego, and they run out of gas.

This fellow is asleep in the front seat. The thief goes out to siphon some gasoline, or he's going to try to get a can of gasoline somewhere. Of course, by now the police have been tipped off to a hot car, and they're looking for it, and there's this car on the side of the roadway. So they go over and

they arrest this fellow, who we will continue to call Johnny Archer, and the other fellow, who's wandering around looking for gas.

They're incarcerated in the old Hall of Justice jail for about six months, and because of a conflict, the public defender was assigned to the main thief, and they needed another person to defend the passenger, Johnny Archer. In that court as deputies for Judge Wapner was a fellow named Marvin Part, who's one of my dear friends, he's retired now, and Paul Geragos, Mark's father. So between the two of them, they told Judge Wapner, "How about Armand Arabian?" "Oh sure, fine."

I got appointed, and I go up to see the defendant in the old county jail, and he tells me this story. I said, "We're going to go to bat soon," and we did; a jury trial in the old Brunswick Building downtown. The jury was hearing this case, and a person says he parked his car, it was stolen, et cetera, and the police say what they saw. Archer, I didn't even put him on the stand to testify. He's just a shy young guy, and there was really not much to be said. But it's a cold Friday afternoon, it's rainy outside, and I look at the jury and I tell them that his only crime was that of poverty, and that's all he was guilty of. He'd already done six months sitting in a lockup.

I looked at the jury and I said — I could feel the chill in the air. I said, "If Johnny were to die today, his entire estate would consist of that thin white shirt on his back. Send Johnny home." I sit down.

The jury goes out to deliberate. We're all in chambers with Judge Wapner. It's getting towards four or four-thirty on a Friday, and everybody's ready to go home. He says to Rusty, the bailiff, who was his real bailiff in those days and later appeared on television with him, "Rusty, go in the jury room and find out what's going on." Rusty goes into the jury room. We're still all having a good time in chambers. He comes back and says, "Your honor, they have arrived at a verdict." Judge Wapner says, "What's keeping them in there?" He says, "Well, they're taking up a collection of money so Archer can go home."

With that, the judge brings out the jury, they find the thief of the car guilty, and they find my client not guilty. It's a little different in the book, because Judge Wapner did not order him into custody, because he was free to go and he did go, but he ordered him to return on Monday. Now we go to the book. [Laughter]

McCREERY: You're going to quote here.

ARABIAN: Yes, I'm going to quote it. He says,

> The speech worked wonders. Not only was Archer acquitted, but the jury, while deliberating, took up a collection for him. They called the Greyhound terminal to find out how much a bus ticket back to Ozark, Alabama would be, and they collected it among themselves to give to Johnny Archer to get him back to a place where he could cope more easily with real life.
>
> When I saw and heard what the jurors had done, a feeling I had about Archer gelled inside me as well. "What size are you?" I asked him as he stood before the bench.
>
> "Around a forty," he said.
>
> "All right," I said, "the jury has found you not guilty. I have no further legal jurisdiction over you."

And then it says, "I order you to stay in jail." That didn't happen. "I went home confident, and at least hoping that Archer would not get into any further trouble over the weekend." Well, this sounds more consistent with letting him out, because he wasn't going to get into any trouble in jail.

> I found a suit that was still serviceable, a shirt, socks, and a tie. I could not give him my shoes, because I wear special orthopedic shoes because of the twenty-millimeter tracer fragment still in my foot.
>
> But on Monday I called Archer before me and gave him my former clothes, the jury's bus ticket, and my contribution of money for shoes.
>
> "As soon as you get your shoes," I said, "I suggest you head back home. I'm sure your friends miss you."
>
> Johnny Archer went back home. I hope he ignores the next man who tells him he's handsome enough to be a movie star.
>
> As for Armand Arabian, to this day he tells our mutual friends that on his first case before Judge Wapner, he not only got his client off, but he got the shirt off the judge's back."[11] [Laughter]

Isn't that funny? That's true. So when you asked me earlier, what does it take to be a judge, there's sort of a description of the kind of a heart it takes

[11] Joseph A. Wapner, *A View from the Bench* (New York: Simon & Schuster, 1987), 45–46.

to be a good judge. Judge Wapner was truly one of those. And so the kid went back home.

MCCREERY: Tell me a little more about Judge Wapner. He wasn't a household name in those days. How did he run things?

ARABIAN: No, but I didn't know him any better than what I'm telling you, because this was the one case where I got in chambers with him, and got to talk with him, and see what kind of a human being he was. Through the years, he liked me to the point where when his son, Fred, was thinking about going to law school, he called me. I took Freddy around to the court complex over here to show him what the courtrooms looked like. He's now a judge of the Superior Court. So I saw him when he was a young lad. That's the kind of confidence he had in me. Of all the people he was going to send his son out for the day with, he picked me.

Last year we gave him the Justice Armand Arabian Leaders in Public Service Award, one of six, and it was just a thrill to have him back up in front of the crowd, which hadn't seen him in a while. It was just delightful. He's a sweetheart of a person.

MCCREERY: Can you say a few words about *Court TV* and this trend of having courtroom dramas for public consumption like that?

ARABIAN: When Joe Wapner started *People's Court*, he was the first one, to my knowledge, who did that. Then Bill Keene, who was one of his colleagues, was doing *Divorce Court*. Both of these men were savvy people of experience, and they knew about dignity and decorum and demeanor of a judge. So when those shows first started out, I just enjoyed them. I thought it was a pleasure to watch.

But in the ensuing years, I'm totally disgusted at what the circus has turned into. I don't care if they were real judges, or they're lawyers pretending to be judges, or whatever the combination is. It has really gotten out of control. It's show biz. Get up there, and look itchy, and start screaming and hollering and telling people off and acting like a fool. The sad part is that it's an educational process of citizens which is misleading. It does a disservice to the whole place, and I refuse to watch those shows. There's not a single exception to what I said today, none.

MCCREERY: This is a different issue, but it leads me to ask about the whole idea of cameras in the courtroom in regular court settings. What are your views on that?

ARABIAN: There's a situation right now where Judge Larry Fidler is considering cameras in the courtroom in a prominent case, and it's under submission, I guess, at the moment. But generally speaking, I don't think it's a good idea, because it is a distraction, in essence. But in certain cases, where the public has an interest — the Lance Ito situation, where you have a prominent case, I think the public is served by showing on a limited basis certain cases like that. I think there's an educational process, where they get to see the real thing, as opposed to this foolishness that we just got through talking about.

At the Supreme Court in the six years I was there, I think we televised two arguments. Reapportionment and term limits may have been the two, to the best of my memory. So it's not just done because you're out there to perform or entertain. It's done because it's of such widespread impact that everyone wants to see how did it go, what was said. So in limited circumstances, I think it's beneficial.

MCCREERY: As you say, you didn't know Judge Wapner or the downtown people all that well, but talk just a little bit more about your colleagues here in the valley on the Superior Court and how you all worked together.

ARABIAN: When I went up the three floors from the Municipal Court to the Superior Court, I was welcomed onto the top floor by three of the most wonderful, more senior jurists that a young fellow could hope for. I was thirty-eight years old, and in that collection, on the one side of me was Judge William Rosenthal, a former assemblyman. He was the one who sponsored the legislation which established UCLA law school. He was like a father-grandfather figure to me, and there were times when I conferred with him on something that was very stressful by way of punishment, what his sage advice would be.

One time I went in to see him and I said, "Judge, I've got a police officer who was drunk, going up Topanga Canyon at night. He swerved and he hit a vehicle in the oncoming lane. He hit a woman and a couple of kids, and he seriously hurt them. He's never been in trouble before. He's surrendered his badge, and they are asking for a severe punishment." I said, "What's your advice?"

He said, "Son, it could be the brother of the Lord himself. If you do as much damage as he did, you get to do a bullet," which meant nine months actual time, with a one-year county jail sentence, "as opposed to anything less than that or more than that." That's the kind of sage advice he would give, and that's exactly what I imposed by way of judgment. So that's the kind of a resource I had on one side of me.

At the other end was Judge Charlie Hughes. Both of them put robes on me at one time or another. Charlie had no son in his real life, had no children at all, and we had just the warmest relationship. I helped him as he was running for Superior Court when he was a municipal judge, and I just, I adored him, and he looked at me like his own. He was up at the other end. As it turned out, if you affidavitted one of us for prejudice, you'd get the other guy, so it wasn't much use in doing it. They call it Ping and Pong. [Laughter] Then Judge [Harry] Peetris, who was where Judge Rosenthal is at the time of this story, was in the master calendar on the other side of me.

Judge Peetris was the fellow that I think I told you about, had the Greek flag hanging in his chambers. He was in the master calendar court, and just the most gracious, warm person, to this very, very day.

MCCREERY: You were saying the other day, not on tape, but that you all went to lunch together every day. Tell me a little about that.

ARABIAN: We used to. Yes, we used to walk four or five blocks up the street, up to Victory Boulevard, and there was a guy named Max O'Dresan, who had the Patio Restaurant. The main part of it was, obviously, open to the public, and then he had a side room which he would save for private parties and things. That was reserved for the judges every day. He had no real use for it. So we had a table to ourselves, and eight, nine judges would be eating in there every day, five days a week. He had a wide menu, and had a sense of humor that was just incredible, funny as could be.

MCCREERY: But you had a group of peers that you could go to, not only on a personal level, but in connection with your work?

ARABIAN: Absolutely. Not often, but whenever you wanted, whatever you needed. But on my floor I didn't need to go anywhere else, ever. I didn't do it often, but they were there. In *Rincon-Pineda*, I didn't ask anybody. That was mine. But on a few occasions, usually a sentencing situation, where you're trying to do the right thing and it's a little tough.

MCCREERY: Let me ask you about a change that was coming down during that period when you were on the Superior Court, and that is the determinate sentencing. How did that change things?

ARABIAN: In the old days you got convicted of robbery first degree or something, and then it was just a wide-open thing, five-to-life or whatever the sentence was. So they would do the minimum five, and then they could come up for parole.

Some people didn't like that, because it left a lot at the other end of it, in case they wanted to keep you there for a while. So the Legislature got involved, and they said, "Okay. Now rape is two, three, and four. Low term two, middle three, high four, plus enhancements, should there be any," and so forth. I think the idea was for uniformity, for one thing, which — that's important. You don't want to go in front of different judges, and as we said, the cream puffs and the law-and-order crowd — they wanted to take that kind of thing out of it. If you got convicted, you were going to do time, and everybody was going to give you a similar kind of a sentence, so that was a beneficial part.

There was some disagreement whether too high or too low, and as time would go by, they could amend it up or down. But my memory of that is that there was no abhorrent reaction to it. In other words, it was thought out, it was discussed. The Legislature had a right to be involved in it, and the judiciary was bound by the rules. So there was no real serious upheaval about that.

MCCREERY: Before we let you off the Superior Court, I want to ask you about being invited to establish the North Valley Courthouse. Tell me that from the beginning.

ARABIAN: Okay. I'm sitting in my chambers over here in Van Nuys, and this is 1983. I've been through the Brown wars and all of that. I'm figuring I'm out to pasture pretty well, and Judge Peetris, he's now presiding judge of the Superior Court downtown. So one day I get a phone call from him in the afternoon, and he says, "Armand? Harry." "Yeah, Harry." He says, "I want you to consider something." I ask, "What?" He says, "I know you've been in Van Nuys forever." But he said, "You know we've got this new courthouse in San Fernando." I said, "Sure I know. That used to be my early beat out there, when I was a D.A." He says, "I need a supervising judge, presiding judge out

there, and so I'd like you to consider going out." I said, "I'll tell you what, Harry. It might be of interest to me, but since I haven't seen it, I'll have a bailiff drive me out and I'll call you back." He says, "Fine."

The sheriff drives me out there that same afternoon. They unlock the place. It's all dusty, but completed. The responsibility is to letter the departments, to bring out a crew and all of that. But the building was beautiful. I called it Fort San Fernando. It really looked like something else. It's got that Spanish look to it.

Anyway, I went out and looked at it, and I just fell in love. I thought, if I'm going to finish out my career, this is probably as good a spot as any. I came back and told Harry, "Fine. But one thing, I want a fighting crew of really good judges. I don't want rejects, leftovers, or has-beens. I want to go out there with a strike force and do business." I called the public defender up, and I called up the D.A., and I said, "I don't want your slackers up here. I want people that are ready to do the right thing."

So we opened it up. The Elks Club had a big reception for me. We had a public ceremony on the grounds, and we hit the ground running. I was in the master-calendar court. I wasn't there three months until I went to the Court of Appeal. A real short time. I barely got the place going.

MCCREERY: Right. So you didn't get too long to be the supervising judge up there? Had you stayed, what did you hope to accomplish, being in that location now, the presence in that community, and all that?

ARABIAN: I felt a connection to the community, because I had been out there all those years ago. I thought that if we put the right players together, that it would serve the function that it was designed for, which was to move cases in an expeditious way. I had the right team. We could accomplish that.

So that all got put together, and I was ready to finish out my career there. I would not have moved out of that courthouse, if I had anything to say about it, until I retired. My eyesight was, until the Deukmejian phone call, I was going to retire out of it. That's why I went out. I said, this is really home. I'm going to enjoy this.

I was out there about a week or two ago for a visit on a case, and it looked great. After the earthquake hit, I went out to see it with a steel pot on my head, because it really took a hit. The side of the building on which my chambers were didn't get hit too hard, but the other side, it's a good

thing nobody was in there. Books were all over the floors, and it was just a mess. So they took a while to fix it, but they fixed it. I donated the Armand Arabian Attorney Resource Centers, and one of them is there on the first floor, on the way to the cafeteria. I just loved the place. I would have loved to have stayed there. I just really liked it, but that wasn't in the cards.

MCCREERY: It sounds as if trial judging was a good match for you.

ARABIAN: I loved the criminal court. It was show time all day long, and you're watching it go down.

MCCREERY: Is there anything else you'd like to say about your time on the Superior Court?

ARABIAN: It's just that a lot of cases went down, and a lot of jurors got to visit with me presiding. To this very day I'll be somewhere and someone will come over, "Judge Arabian, you don't remember, but I was on jury duty in such-and-such." It was a very rewarding time, I would say. The Court of Appeal is isolation-ville. I mean, it's really quiet. You're away from most people. The Supreme Court is isolation-ville, but it's at such a high level that you're charged with your responsibility. So every one of them is a little different.

But Superior Court is where the rubber meets the road. You may win, you may lose, Good-Time Charlie may get the blues, but there's somebody up there with the agony of judgment making sure it's done right. That's the responsibility, and it's a challenge, and you're tired when you get out of there. But my rule was, whatever you do, when you go home at night and put your head on the pillow, you sleep good — that you didn't mess something up so terribly that you were going to lose sleep over it. That was my rule.

MCCREERY: Any regrets from those years?

ARABIAN: None. None whatsoever. Not a day.

MCCREERY: Let's just quickly get you onto the Court of Appeal. But you talked about the phone call from the governor. I guess you ran into him at an event. "Are you going to be home? I'll call you tomorrow, on Saturday."

ARABIAN: Right. It was B'nai B'rith honoring him. He calls me on Saturday, and he tells me he's going to put my name in. Unlike the hatchet job that was done on me after Jerry Brown, this was very smooth sailing, and I had a nice confirmation hearing. I joined a good group. Joan Dempsey Klein, who's still there, was presiding justice, and I had George Danielson,

who's married to an Armenian, former congressperson, former FBI, the best of colleagues, Elwood Lui, and Walt Croskey. He's still there, just a real good guy. People like that. So, again, several of us would have — whether it was from that group or another group — we'd have lunch together up the street on Wilshire Boulevard. A good six and a half years there.

MCCREERY: Let's see. You took that oath November 14th, 1983, so Governor Deukmejian was in his, really, first term, start of his second year there. Knowing that the two of you had already a long history together, what were your interactions with him once you joined the Court of Appeal?

ARABIAN: Just socially from time to time at something or another. I went to the inaugural and stuff like that, but nothing out of the ordinary. He was busy. He was up north. You're busy, you're down here doing your thing, and six years goes by real quick, in a way. It was very interesting work. I had good colleagues. The whole building had really good people in it, 3580 Wilshire Boulevard.

MCCREERY: Tell me something about Justice Klein and how she ran your group.

ARABIAN: She was very easy to live with. I knew her from days in Municipal Court. You have your own little enclave. You have two research lawyers with you, and everybody interacts, and you're in very close quarters. You're just one door apart, two doors apart. You're clustered together, all four justices. We had great collegiality. When I left to go to the Supreme Court, for months she told people, "The joy and laughter has left my life, because Armand's not around anymore." I used to make her laugh all day long. I teased her all the time. So we had a very collegial situation. It was fun to work with the colleagues there.

As Justice Lester Roth once put it to me, he said, "Son, this is the best job in the world." I said, "Lester, why is that?" He says, "Nobody knows who you are, nobody knows what you do. You go, you come, and it's a quiet life." And he was absolutely right.

MCCREERY: What is it about that, that people don't know who you are and what you do? What is it about our system?

ARABIAN: Who knows who's on the Court of Appeal around here? The lawyers, most of them know; maybe not all of them know. You know what

I'm saying. So it's not like saying, "Oh, well, there's Justice Kennard said this the other day at the Supreme Court." You don't have that spotlight on you. It's just a quiet job. It's important, because only a handful go up to the Supreme Court. You're doing a big body of business. It's important, and there are those cases where you're setting some kind of a standard, or a rule that's going to hold up and all that, so it is a really fun job from that side of looking at it. Nobody's going to bother you. They don't run against you. It's just one of those things. You come and you go in peace, and Lester Roth was absolutely right.

MCCREERY: How did you adjust to the quiet life, though? You'd been used to being in front of everyone.

ARABIAN: Yes. I like the action zone, but you mature. Your pace can slow down. You love the dignity of the position. You love the importance of the work. You love going to work. So it's shifting gears. That's all it is. Instead of getting hammered down there with bodies looking at you all day long, you're not. You're in the intellectual side of life.

MCCREERY: Yes, you were in your very early fifties at that time.

ARABIAN: I enjoyed every minute of it. I thought it was a wonderful place. If you don't leave there, and some of them never do, they love every day of it.

MCCREERY: Talk just a little bit more, if you would, about the other judges. We mentioned Justice Klein. Tell me kind of what their styles and personalities were.

ARABIAN: George Danielson, for example, had really been a worldly person in Congress. My only sad memory of him is, with all of his experience and background, he wanted to write a book, and he never got to do it. I was out of town when he passed away, and I couldn't even go to his funeral, which really irritated me. But he was just the warmest colleague. He got up at my confirmation to the Supreme Court and he said, "I guess I've heard about *A Thousand and One Arabian Nights*. I think I've had a thousand and one Arabian lunches." [Laughter] I'll never forget that. It was hysterical. Everybody roared. It probably was true. I just had the best time with him. He was worldly. He had real good common sense, whatever the case might be. So I really enjoyed my time hanging out with him.

MCCREERY: How did his FBI background affect his work, if at all?

ARABIAN: I would say he knew what law and order was about. He could be a social liberal, but when it came to criminal cases, he knew what a bad guy looked like sideways. He was really good. I enjoyed him every day. I had a lot of lunch with him. Thax Hanson, while he was on the court, again, I had taken over Department S from him, and that relationship never, ever changed. It was just the warmest thing.

MCCREERY: But he wasn't on too much longer?

ARABIAN: He was on for a while. I remember the extent of it. Bob Devich was a very close friend, and always a good friend and lunch mate. So basically, you're somewhat detached even lunch-wise. You had a couple of people you'd walk up the street with, but that was about it. Justice Klein and I probably had very few lunches together, maybe at some event. Of course, you'd go to those together, but as far as walking up the sidewalk, she wouldn't do that, and a few others would. That's how it was.

MCCREERY: And Judge Elwood Lui was on?

ARABIAN: Yes, Lui was on. I wasn't very close with him. He was in his own world there, but a very fine jurist and did the right thing. He's in a major firm today.

MCCREERY: Once you got into the work a little ways, was it what you expected, or did you find some surprises there?

ARABIAN: Since you haven't done it, of course there are some surprises. What am I doing here? How do I do it? But there was no shortage of information on how to do it. You had people working up the matter for you, and then you'd put your imprint on it. You had to have one more colleague join with you, of course, and most of the time it was three colleagues in unanimous.

The oral arguments were fun. There was one I remember, early in the morning, first case. This lawyer comes in, and he is absolutely in a dither. He looked like he must have been running. He came in. His jacket, armpits were soaked, which meant his shirt had been soaked before that, and his undershirt prior to that. Now, you're wet. This fellow, he walks in, puts his papers down. The other counsel is there. Justice Klein is presiding. This fellow starts to speak, and it's Martian or gibberish, I couldn't tell you which combination. He's talking, but there's no comprehension of anything he's uttering. I

don't even think he knows what he's saying. So I looked at him and I said, "Counsel," sort of usurping the day. I said, "Counsel, can I ask you to do something?" He says, "What?" I said, "Go back out through that door. You're going to see a water fountain right next to it. Go out there, take a drink of the water, take a breath, and then come on back in." "Oh, thank you, judge."

Turns around and he walks out, does it. He comes back in, now he's talking English. I used to use that example in teaching appellate advocacy. If this isn't your bag, hire somebody to do it, because this person was completely out of his league. How he could sweat that much at nine in the morning, don't even ask me, but that's the kind of stress he was under, or whatever happened to him. But that's one of them that comes to mind about some of the things that were going on by way of interesting experiences. But it was fun to watch it.

MCCREERY: It seems to me that judges really differ in how much weight they put on oral argument, or how important it is to their decision making. Where were you on that scale?

ARABIAN: I'm a very big believer of oral argument. That's why I instructed on it. There are people who pooh-pooh it and put it down, and, oh, well, it's this, it's that, it's the other thing. I think Clarence Thomas, for example, in his first year didn't ask a single question, so I don't know about that. But for me, the art of advocacy is at that moment. This is your show time. You have to step into that pit and answer those things, or you're in trouble. I gave weight to oral argument.

There were certain cases where you could blow it on oral argument, especially in the Court of Appeal. All you need is a vote there. I always called it show time. I'd go, "Let's go, show time." We'd go up the back stairway and take the bench. I just enjoyed the appellate argument. I always loved it. I always got involved with it. I asked questions when I felt like asking questions, and I know in a certain number of cases that it made a difference, either in the total flip, or in parts of the case, where you kicked the tire and the car fell down. That's the analogy I used to use with George Danielson. "George, we kicked the tires. You see what happened?" "Yes."

MCCREERY: How were your colleagues in terms of their relationship with oral argument as part of the process?

ARABIAN: Same thing. They were all very involved with it, every one of them. There was no case where you'd say, or a morning worth, "Where was George this morning?" None of that. Everybody —

MCCREERY: Nobody was hanging back all the time.

ARABIAN: No. They were right there pitching. Supreme Court, everybody asked questions. That's part of it. You want to be sure that if you have some inquiry, or you want to convince somebody up there, maybe it's one vote difference, maybe the answer given might change somebody, and on occasion it could, it does.

MCCREERY: What about the standard that everything should be in the written record beforehand? How could you really augment what was there?

ARABIAN: It is in the written record, but there are areas of that written record that may be causing you a problem, and that's where you're going to ask the question. "Did she consent in the back seat of the car? According to so-and-so, the answer is yes. What do you say?"

MCCREERY: How did you approach the writing of an opinion, if it got that far?

ARABIAN: Oh, well, it gets that far. There's a written opinion in these cases. So you tell the lawyer, the staff person in charge, you say, "Look." Of course, they're there listening to it. We already have a draft opinion by the time we get out there. "These are the facts. These are the questions." I've already gone through all of that. Now I want to maybe augment something, strengthen something, or maybe put some of the Arabian fingerprints on it when I get through with it, and that's what takes place. You've got ninety days to do that. Goodbye. Somebody signs off, and you've got an opinion.

MCCREERY: I can guess, but what would be the Arabian fingerprints?

ARABIAN: The Arabian fingerprint would be some eloquence that was prompted that would be a catchy expression or something a little more flowery than normal. A lot of cases would not get that. They're just mundane and whatever. But there are those where you say, "This needs — ," as Emeril would say, "We've got to kick it up a notch," and we want to put something in there. That's what I would do. I did a lot more of that at the Supreme Court than I did at the Court of Appeal, but it was still there.

MCCREERY: How did you use your staff in the writing part of things?

ARABIAN: They write, basically, the whole draft of it. They know what the facts are; that's out there. They know what the issues are. They know what the law has been, or we've developed as we've gone along, so they put the body of it together. They're really the craftspeople of it, but then you get into it. It's got to be your result, that's the main thing. Beyond that, you move things around, or you strike things, or you change words, or you add whatever. But the final product has got your name on it, so you'd better know that you like it.

MCCREERY: Can you give me an idea, in this particular group, Presiding Justice Klein and so on, how did you tinker with each other's opinions when you were in that process?

ARABIAN: If a case is assigned to you, you run a draft of it. You send it to the other two chambers that are on that case. They may just sign off, say, "No problem." Or they may say, "I've got a problem with this thing here." So the two staff people would first try to work that out. If they can't go with you they say, "I'm going to dissent," in which case they'd be my guest. As long as you have one other player, you have an opinion.

From the point of view of schmoozing, it's done in a very informal way. "George, did you see that one on Smith?" "Yes." "They went in there at night, and I think there was a little question about knock notice, but I think they were okay." "Yes, I think it's okay, too. Goodbye."

MCCREERY: All right. But did I hear you correctly earlier to say that many or most of the opinions were unanimous?

ARABIAN: I would say yes. In the Court of Appeal, yes, quite a few were.

MCCREERY: What about the idea that you sometimes hear batted around, that the law clerks, because they're doing the initial writing, have too much power?

ARABIAN: Not with me. They work for me. There's no such thing as too much power. They have an administrative, ministerial function, which they carry out. The decision-making is mine, the fluid aspects are mine, the fingerprints are mine, the gathering of a judgment that's satisfactory is my responsibility. So I don't go with that. You hear those kinds of things,

maybe at the U.S. Supreme Court or other places, but that wasn't a problem with where I was.

MCCREERY: And with the other justices?

ARABIAN: Same thing.

MCCREERY: What about the makeup of the caseload itself? What were you seeing at that level? Like the criminal, civil.

ARABIAN: It's pretty well rationed out on an equal basis. If there's ninety cases, everybody gets one-third or one-quarter of the load, whatever that is, with the exception of, if they knew I had a special interest, for example, in rape reform, that would probably be offered to me as a right of first refusal, because they knew I knew more about it than somebody stepping in cold. Why recreate the wheel?

Of course, in the Supreme Court, you know the chief justices when dealing these things out, they can keep what they want for themselves. But the workload is the workload. You want to get done with it, and you want a competent conclusion that you have a majority with. That's the end of the game. There's no bonus.

MCCREERY: What about the California court system as a whole while you were on the appeals court? Were there many changes coming down to the overall setup?

ARABIAN: The thing of interest is if you have two appellate courts coming up with opposite conclusions. That's an invitation for the Supreme Court to grant review, so you keep an eye out for that, because it obviously happens on occasion. So that's of interest to you. Other than that, if you're in one building and there's four divisions in there, you're all collegial, you all have your work to do, and you all do you work. Everybody's in their own little world.

MCCREERY: We talked about the 1986 election and how that changed the makeup of the Supreme Court. I wonder if you could just say a few words about the three appointees who came in through Governor Deukmejian to replace those who went off the court, as you were sitting on the Court of Appeals and saw this happen. Justices Arguelles, Kaufman, and Eagleson.

ARABIAN: All three, in my view, were outstanding replacements. They were put in there as sort of a bridge between A and B. They knew that.

They were further on in their careers. They were not going to stay there for twenty more. They were solid, savvy, well-experienced. Probably every one of them went through Muni, Superior, if I'm right. They were all superior types, and they were just excellent choices. No one, to my knowledge, had a bad word about any of those guys, especially if you knew them in any way at all. I knew Kaufman the least, because he was down around San Bernardino, but his reputation was a real solid guy. Eagleson I knew pretty well up close, and Arguelles I knew somewhat well, so those two guys I knew would serve the Supreme Court in the same way they'd been serving all along. So those were just excellent people to put in, and that's what Governor Deukmejian did.

MCCREERY: Of course, he chose Malcolm Lucas to be the next chief justice. I just wonder how you and your colleagues saw that move?

ARABIAN: It seemed extremely natural. First of all, they'd been law partners together way back when. They were from the Long Beach area, their wives knew one another, and they knew each other extremely well. He had had federal experience and all the good stuff, so that was like a no-brainer as far as anybody I was around was concerned. That was a great selection.

MCCREERY: Were you acquainted with Chief Justice Lucas?

ARABIAN: Only from the JSAB business. Very collegial, very proper guy, and really I liked him a lot.

MCCREERY: Just in terms, then, of rebuilding the court and kind of reestablishing public confidence, shall we say, what was the talk among you and your fellow judges about what needed to happen and how that was going? Do you recall?

ARABIAN: There was no conversation like that. In other words, what you did, what your acts represented was going to impact what the court looked like, did, or was perceived as doing, so there was no conversation about, "If we're hard on rape, somebody's going to like that." There was nothing like that.

MCCREERY: I guess I didn't mean that. I just wondered how you viewed the changes at the Supreme Court level, what you were looking for.

ARABIAN: There was nobody looking for anything. Everybody was looking to do the best they could, opposite to what they had been in the past,

and let's go from where we are right now. That's it. There was no other thought. You're here to do the job, let's do it.

MCCREERY: When we were talking about your time on the California Court of Appeal, we spent a little bit of time talking about your immediate colleagues in Division Three, but I wonder if you could reflect for a few minutes about some of your colleagues in the other divisions — what is it, seven divisions at that time? — and what that whole second district looked like.

ARABIAN: We were in a rented building at 3580 Wilshire Boulevard, right in the middle of things there. Actually, the clusters are separate law firms. That is the way you've got to look at it. In each cluster you have four, and then down the hall there may be other clusters, or they might be on another floor. So there's not a big social byplay between one and the other unless you go out of your way to have that happen.

So you got to be pretty good friends with those that you were eating lunch with. Other ones, you did your work, they did their work. You'd see each other in the hallway, of course, you're coordinating opinions throughout the day, and then you're in the argument session. That's how six and a half years went by. It's one of those things.

MCCREERY: I note that three of the divisions on this Court of Appeal had women as presiding justices. That strikes me as kind of interesting, as early as the early eighties. Was that something to note particularly?

ARABIAN: Pat Brown, I think, had a hand in that, and Jerry Brown had a hand in that, and they all did a fine job. Joan Klein, you couldn't ask for a better P.J. She was terrific.

MCCREERY: In the video that was made about you, the tribute video that you very kindly donated a copy of, Justice Klein was saying something to the effect that she thought you could take some credit for there being more women on the bench over time. What was she referring to there?

ARABIAN: She was right, because she happened to know about it. What was happening was very qualified women lawyers who wanted to go on the court sought my advice. Three of them happened to be Armenian, but they weren't the only ones.

Candy [Candace] Cooper, who's now a presiding justice of the Court of Appeal, she was on the Muni Court and wanted to get elevated to the

Superior Court. Without me she would have never gotten there, because there was a whole groundswell of people taking shots at her. She'd made a donation of a modest amount of money to Tom Bradley. It was like a hundred dollars, and that was being held against her. I was outraged, and I kept on fighting and fighting. She gave me the honor of swearing her in to Superior Court, and now she's presiding justice of the Court of Appeal, has done a great job at every level. So some folks figured I had a hand in trying to get a little justice done to them.

Another young lady came over one day, just crying, and why? She had a public prosecutor spot, and shots were being taken at her in the Jenny Commission for this and that and the other thing. She came up to chambers and she was crying in the Court of Appeal. I'm hugging her, and I knew her. I said, "Slow down. Tell me what's going on." So she tells me. I said, "I'm looking into that one." She's a judge today, probably getting near retirement.

There was another one who came to me as a law clerk when I was over here in Van Nuys, Maral Injejikian. She was Kirakosian along the way and got divorced. But she started out as a law clerk for me. She became a public defender. I took her to a Deukmejian event, and the rest is history. She was just outstanding, and he put her on the Muni Court. I just hand carried her to the event and said, "This is a person to be considered."

There were others like that. Joyce Kennard. Nobody knew who she was. She was a clerk across the hall. Brought over a cake one day and introduced herself to me, and she went municipal, superior, appellate, and supreme ahead of me. Nobody knew who she was. That was all done right across the hall. So those are the ones that come to mind. I know there are others, but that's why Klein said what she said.

MCCREERY: I wonder, how would your advice to a young woman aspiring to a judgeship differ from your advice to a young man, if at all?

ARABIAN: There's no difference. I would just tell them, let's see your track record. Put the resume together. In those days, because I was involved in the process of clearing candidates for the Deukmejian folks, I was in a position to take a real good look at it. Judge Judy Stein over there in Beverly Hills, I was the one to interview her. I was the one to promote her. She retired not long ago. So I knew what they were looking for, and if you were

smart, and you were dedicated, and you had good character, I was going to support you. They would usually thank me by letting me swear them in. So that's why Justice Klein said what she said, because she knew these things were going on.

MCCREERY: Talking a little bit more about your colleagues throughout the whole of District 2, I wonder if there were any natural leaders or legal stars that you were either drawn to, to learn from, or who stood out, as the appeals business was practiced there.

ARABIAN: I led my own life there. I tried to be the star if I could be one, and I made every effort to be one. As far as anybody that I would look up to, Justice [Thaxton] Hanson was like an older brother to me, not to the point of saying, "Gee, how would you approach this?" on any regular basis, but just our friendship and collegiality and brotherhood was very important to me until he passed away. That's the one person in the entire place that I really had a real bond to.

MCCREERY: Yes. Are there particular cases that stand out to you as — maybe not the details of the cases themselves — but as thematically important during that period?

ARABIAN: Just off the top, nothing really sticks to me. We just ate up a lot of cases. A lot of them weren't published, some of them were. But unless I look at the sheet of it, I can't answer that one.

MCCREERY: That's fine. But let's talk about depublication, since you've alluded to it. Give me your rap on that and where that fits into the whole process.

ARABIAN: Let's say that we've issued an opinion, and let's just say it was unanimous at the Court of Appeal. We'd deliberate on whether it's worthy of publication, because if we don't step out to say that it ought to be published, it's not going to be published. So we would have a roundtable about that and say, "Does this present an interesting, unique case and authority that would be helpful for the law books of California and for the future?" If we determined that it had that going for it, then we would order it published.

Now, that's subject to the Supreme Court ordering it depublished, if they feel like doing that, and on occasion they would do that. So it's not a big, major event for them to step in, but it happens on occasion. We're not

thoughtless about urging a publication of a case unless at least two of the three — normally, all three would agree that it ought to be published. But it's just a small percentage of the work that you're doing each year.

MCCREERY: I think it's perhaps hard for the outside public to grasp, and even for me to grasp, the kind of fine points of why something would be published or not. There are sometimes charges that by not publishing, there's something being hidden, or something like that. It's kind of a unique facet of California's system.

ARABIAN: There's one other important criteria. Let's assume that our opinion is in conflict with another one. Then we're going to publish it. You're looking for that fight to be taken on, so who's right? So in a conflict with another appellate opinion, that's a big boost for doing it, and so one of the first criteria is, does it cause a question of collision someplace? And in that event, it's going to get published.

MCCREERY: But you're saying in other matters, it's just needing to be something of interest to the development of California law to be worthy of publication? Is that how to look at it?

ARABIAN: Yes. In other words, is this going to stand up as time passes and be of help to a similar situation amongst other players in some other setting? If it does that, it's worthy of going into the books.

MCCREERY: That leads me to bring in the factor of the great volume of cases and opinions you're working on. This court deals with the vast majority of all appellate matters in the state.

ARABIAN: A lot of material comes through there. "No, I'm going to appeal that." Okay, well, there you are. It may be totally frivolous from any real look at it, but someone's going to have to look at it and dispose of it. That's what happens. Then of the remaining pile, the Supreme Court only takes a small percentage of what's out there.

MCCREERY: Why do you suppose the appeals court is invisible, more or less, in the total system?

ARABIAN: The spotlight is really on the last court, okay? If the Supreme Court of the United States says, "We're going to set aside the huge multimillion-dollar judgment against Phillip Morris, because it did violate the

corporate rights," everybody knows about it, because the press is going to carry it. It's groundbreaking.

In the Court of Appeal, you're just going through a lot of volume. There are some cases that will catch the public eye, and say, "Oh, my gosh. They said this on that one. You know the Supreme Court's going to look at that." That sort of thing. But otherwise, it's a cog in the machinery. You're doing a heavy volume of work. Most of it's not going to jump out, and reporters looking around to see what you've said about it. So it's just, you're in the middle there. The Superior Court gets a lot more attention, because they're sentencing someone to death or whatever. There's plenty of spotlight on, "Let's televise the trial of this movie type case." Everybody reads about that one. But who knows what the Court of Appeal did last week? Nobody.

MCCREERY: A few moments ago, you mentioned Justice Joyce Kennard, and the fact that you knew her back from the time she was a senior research attorney, is that right, for Judge Edwin Beach?

ARABIAN: Yes.

MCCREERY: You say she brought a cake over one time? Tell me how you got to know her.

ARABIAN: I had seen her in the hallway. She was on the other side of the floor. Buck Compton, Justice Buck Compton, came over one day, and he's a little hot under the collar. He comes banging in on my chambers. "Hey, Buck, how you doing?" "Armand, there's a wonderful research lawyer on the other side, working for Beach. Name is Joyce Kennard. We're trying to get her a judgeship, and no one's waving at it. I've talked to [Robert] Philibosian. It's not going anywhere."

Philibosian was involved in the process of Deukmejian appointments with me, and I said, "I don't know much about her. Why don't you ask her to come over and introduce herself?" So the next morning she comes across with a cake in her hand, with white frosting on it, and delivers it to me in my chambers. She sits down and we start to chat, and I said, "Compton was over here yesterday, and he tells me you're trying to become a judge. Your application and so forth," I said, "I'd like to see it." And that's how it started.

We became very, very good friends. I just had a real soft spot for her, and she did for me. She had a very tragic background. She had lost a leg

above the knee, which was a real debilitating thing. So I went to support her. That's another one that Justice Klein was referring to. The next thing you know, I swore her into the Municipal Court; next thing you know, Superior Court; next thing you know, she's on the floor with me at the Court of Appeal, and then she goes up to the Supreme Court ahead of me. To this day, we are cordial when we see each other. She lost her husband. Her whole life is the life of being a justice, and she dedicates herself to it very, very deeply. That's how that all happened.

MCCREERY: Do you know much about her style when she was a trial judge and how she took to that role?

ARABIAN: I didn't know how — I never heard anything negative about her in the lower courts. Then she came to the Court of Appeal. She was doing a standard job up there. When she got on the Supreme Court, there was a perception that her true liberal colors had finally come to blossom, because she was never perceived as a liberal in all of the other positions that she'd held. Eyebrows were being arched about, "Why is she saying some of this?" and "We've never seen this side of her," and so forth.

So I think she did step out to show the world who she was and how she truly felt, which is something you can do. It's something you're supposed to do. It surprised some people when she did all that. But as time passed, as I look back at it now, she's quite in the mainstream of the activities of the court. I can't point out and say, "Oh, yes, well, Kennard's a liberal on the court." She has her days of being liberal on the court, but I had mine, too. But I think she started out trying to set a little stand for herself in that side of it, probably a little from her background, probably from other things. But as time has passed — and she went on there in '89 — been up there quite a while now, she's quite mainstream from what I can tell you.

MCCREERY: In one of the written things you shared with me, I think at the time when Justice Kennard was being promoted to the Supreme Court, you delivered lovely remarks on her behalf. But in a related article, or perhaps in those remarks themselves, you, I think, referred to her as a waif of destiny.

ARABIAN: The wondrous waif of destiny.

MCCREERY: Was that sort of a phrase that you'd been using, or where did that come from?

ARABIAN: No, that's something I would have put in an opinion if I thought about it. [Laughter]

MCCREERY: Your writing is outstanding, once again.

ARABIAN: That's the kind of writing that you like to do. For example, these catchy lines that you learn, "The risk reasonably to be perceived defines the duty to be obeyed." This is poetry from *Palsgraf* case, I think it was.[12] You just don't forget them. Here she was with all of the things that had happened to her that would have been tragic to anybody. And to rise above it!

MCCREERY: It's a marvelous phrase.

ARABIAN: The women lawyers — or judges, I think it was women lawyers — gave her a big silver tray one day, and they put that on there. "To the wondrous waif of destiny." I thought that was classic. [Laughter] They liked it, too.

MCCREERY: To what extent were you a mentor to her?

ARABIAN: I really wasn't her mentor in the sense of what she was doing by way of work. I was her promoter. I was her advocate for advancement, and I'm proud of having done that, to this minute.

MCCREERY: While she was on the Court of Appeal with you, how close were you on an everyday basis?

ARABIAN: As difficult as it was for her to walk, we'd walk a block or two. She would join the lunch club as often as she could, and we'd go to lunch together. We'd go to bar meetings together. We were very socially close. We enjoyed each other's company. She was a terrific colleague.

MCCREERY: I know you enjoyed very close, happy relationships with a lot of the other judges.

ARABIAN: You're working together, you're living together, you're doing the same job, and it's a lonely life. You want to have a couple of friends in your day, and those are your friends. You want to have some friends you can go eat with and talk with, and share common problems with. So collegiality really is important in the appellate world, to me.

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[12] Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (1928).

MCCREERY: How did you develop as a judge during that appellate court period? Was there any change or evolution in your thinking that you can spotlight?

ARABIAN: First you have to learn the job, and you go to the classes and schools and whatever else. I went to NYU judges' college a few times. But I think you're born with style or you're not born with style. I think if you love the written word, you're going to spend extra time to make it palatable to somebody as they're reading your opinion. So that comes from within. To me, to be an appellate justice is not like putting car tires on. It's just not. To me, you're creating the drive train. You're super-punching up the engine.

I think that "the music of the night" is an expression that comes to me. When I was in San Francisco for the six years, and I was living by myself most of the week there, especially in Pacifica, which was right there at the oceanside. You could hear the waves coming in, and I'm sitting there all alone three nights, four nights a week. There you're composing the music of the night. You don't have a cat or a dog or a canary. You're there by yourself. You have music on, and you're listening to the ocean crashing around, and you get into the mood of saying, okay, I've got this opinion. Now I want to put on the Arabian fingerprint. I'm going to put some interesting language in the beginning of it, about how I would describe the State of California in a given case, about how many miles of shoreline, and the mountains and the deserts, which went into one of them.

Or a conclusionary paragraph. That's often the place where I would focus for the fingerprint. That's where I would try to come up with the wondrous waif of destiny kind of a thought, and put that in there, because the lawyers and judges love it. If you just author some mundane hundred opinions a year, nobody cares. They say, "Okay, somebody won, somebody lost."

But if you leave them with a line that's quotable, that says, "An environmental impact report is not to be used as a method of oppression and resistance to growth," this pops up from then on. They'll go, "And as Justice Arabian said in *Citizens of Goleta Valley v. Santa Barbara*, an environmental impact — ," and they go on from there. So that's what you try to create in the music of the night. It's not going to be in every case. But in those that are serious, in those that you say, this one's going to have a lifespan that's going to run for a while, those are the ones where you put the fingerprint. That's how I did that.

MCCREERY: What kind of music did you like to listen to, may I ask?

ARABIAN: I'm a Sinatra fan. Frank Sinatra kept me alive for two years in the military, and he's kept me alive until this morning. [Laughter] I had the pleasure of meeting him once, and it was the best fifteen minutes I can tell you about, in Vegas one time. I just adored him. He was a New York–New Jersey kind of guy, and came out here. Of all places, he's buried in the Coachella Valley, in Cathedral City. Who would have guessed that? He loved the desert. I read a story about how he found it. He's a legend. He wasn't perfect, he was far from it, but I just loved his appetite for life, and the way he sang, and how that, to this moment, he will impact your life in how you get through the day. "I did it my way." It's [Paul] Anka's words, but it's Sinatra's voice.

MCCREERY: Thank you. Let me return to the subject of Justice Kennard, and ask you, how did you first learn that she would be promoted to the Supreme Court by Governor Deukmejian?

ARABIAN: That's not a secret. At some point, because if there's an opening, numbers of people are going to be bandied about as to who's a potential appointment. So these names will come up, and then it may be three or four names. It's usually not just one. Then people are being asked about, "What do you think about this? What do you think about that?" The Jenny Commission, people are making phone calls. So you know it may happen, and then all of a sudden the announcement is made, and you've got to come up for the confirmation hearings. So it's not a secret. It's out there while they were cooking it, and now it's on the table. Then they're going to vote on it, and that's that.

MCCREERY: It may have been surprising to some that she was promoted before you were.

ARABIAN: I was surprised, to be very honest about it, because she really had no connection with the governor, personally, along the way. I had been in his kitchen cabinet, and my wife had walked precincts for him, promoting him in Long Beach and efforts like that. But no matter what your thought process is, first of all you understand it's the governor's choice, and he can do what he wants to do, number one.

Number two, there are other considerations besides friendship and loyalty and long-time experience. For example, do we need a woman on the court? Do we need a woman minority on the court? These kinds of things. Politically, does it have impact? So there are a lot of considerations that go into an appointment, and that's how you look at it. Everybody has his or her day in the sunshine, and it depends on how the sun is that day. [Laughter] So that's how that went down.

MCCREERY: Who else was being considered at that time?

ARABIAN: Oh, I can't remember that. I just don't remember. It struck a lot of people as out of the blue, honestly, at that time, because she was one [appointment] a year, one a year, one a year. You say, well, it's going to stop after the third one or something. But she hit a grand slam. It was really something.

MCCREERY: That was 1989, and early in the very next year, 1990, you were elevated. Tell me the story of that, please.

ARABIAN: It's a little funny. I'm the only person, I think, that was appointed to the Supreme Court who was not interviewed by Marvin Baxter, who was later my colleague on that court. But he was the judicial appointments secretary, and you'd normally have to fly up there, or he'd see you down here someplace, and go through some questions with him so he'd know who you were and where you were coming from. In my case, the governor knew me extremely well. I had met Marvin along the campaign trail here and there, and we were social friends but didn't really know each other very well. There were a handful, again, being considered, and all of a sudden you get the phone call, "You're it," and that's it. That's what happened.

MCCREERY: So the phone call really was the first direct, serious —

ARABIAN: You're told. Somebody's going to have to tell you. "The governor's announcing he's nominating you tomorrow morning," or whatever it is, and that's what happens.

MCCREERY: As well as you knew the governor by then, I'm still wondering, do you recall what he said in that phone call?

ARABIAN: I didn't get it from him, as I recall. I think Baxter called me. That's my memory of it. He saw me socially just before he put me on the Court of Appeal and told me, "Be by your phone." But for the Supreme

Court, I don't recall a phone call from him. I knew I was being considered, but he never called up and said, "Hey, tomorrow morning I'm doing yours." [Laughter]

MCCREERY: You were replacing, of course, Justice Kaufman, so the second of that early trio of Deukmejian's appointees — meaning Arguelles, Kaufman, and Eagleson — the second of those to step down in a fairly short time. This was February 1990. Presumably, you didn't have to hesitate. What were your thoughts upon being made this offer? Was there any consideration?

ARABIAN: I was happy that it was happening, and I thought I was ready for it. I'd worked my way up through all the steps, and if it didn't happen then I probably was going to guess it wasn't going to happen. So I was thrilled that it was going to take place, and I was looking forward to it. There's a challenge to it. You've got to move up north and leave your wife and two kids behind. But if you're going to go in the judicial world, you're going to go as far as you can go, and this is it.

MCCREERY: You referred a few minutes ago to your apartment in Pacifica, and as you're saying, it's a huge change in your family life. Tell me a little bit more about how you worked all that out.

ARABIAN: What happened was I went up there to look for a place to stay. Arguelles had an apartment at Fox Plaza, Kennard had an apartment at Fox Plaza, and others had lived in there. So the logical place was to go check out an apartment. I think I was on the twenty-second floor. I found a nice place looking down Market Street towards the Ferry Building. It had a balcony, and it had a living room, bathroom, walk-by kitchen, and one bedroom. It was very comfortable, and it was about a two-block walk to the court. That's why people liked that place so much.

So I lived in there for about a year and a half, and then my judicial secretary said — she lived in Pacifica, which is about twelve miles south — "There's a couple of condos for sale. I think you might take a look at it." So I said, "Well, fine, let's go."

She drives me down there, and I looked at a couple up on a hilltop, in just a huge cluster. I didn't want to get into that. Then I see a "For Sale" sign down below. There were only thirteen condos in a cluster, right at the edge of the cliff. I said, "I have to go see this one." The person who had it had three of

them in different parts of California, I think he was a builder, and wanted to sell this one, and that was the end of that. I just fell in love with it.

I moved in, and for the next four and a half or so years, put all granite in, and recessed this and that and the other thing. It was just a showplace, and I was really comfortable. I looked forward to going up north every week, because I knew where I was going to be sleeping at night. It was wonderful, very close, about a quarter mile from a shopping center, so you could either go to a deli or whatever. The laundry was there and all.

It was just wonderful, and I entertained some of my crew there on occasion. We'd go to the ballgame. So I loved it, and I hated to sell it, but when I got off the court in '96, nobody wanted to go up there on a steady basis, and the first couple that came in bought it. That was that. But that part of my existence was just absolutely wonderful. I loved it.

MCCREERY: And your commute wasn't too bad into town?

ARABIAN: You'd have to fly up on Monday morning. I'd have a car at SFO, drive in to the court, and then Thursday, usually, in the afternoon I'd drive it, leave it at SFO. I had my other car, my own car down here at Burbank Airport, and go home. That was my six years of back and forth.

MCCREERY: How about the effect on your family back here? How did they do without you?

ARABIAN: It's a little tough. They were in school and doing what they do. The wife is home taking care of them. She knows you're going to be home probably for sure Thursday night, sometimes Friday, and you've got the weekend together. The Hollywood Bowl and all the social events would go on over the weekend, so it wasn't that you were dropping out of sight completely. And then Monday through Thursday, you're gone again. So that was it. I'm a guy who likes flying, but there's a limit to everything — people kicking your chair and coughing on you. [Laughter]

MCCREERY: All right. Just to get you started on the work of the court itself, the record shows you were confirmed by the Commission on Judicial Appointments March 1st, 1990, and took the oath the same day. What were the matters of getting started, the physical setup and so on, at the court itself? Where were you?

ARABIAN: The first thing is, you have to pick a crew. I get up there and I start interviewing the people Justice Kaufman had. In fact, Justice Kennard has written some remarks in recollection of Justice Kaufman and how pleased he was because I had hired most of his folks. Then I interviewed — I think there was an open spot, or somebody was doing something different, I don't recall. But I picked up a wonderful lead attorney, and he had been the lead attorney for Justice Kaufman, so he knew exactly what was happening.

I hired my own judicial secretary, who was with me the whole time. I had five people, so I had a crew that was ready to roll from day one. We hit the ground running. So that part was really easy. We were in temporary quarters for a while. Then we moved over to another location for the rest of it. The rehab of the court was not done until after I left.

McCREERY: The Marathon Plaza?

ARABIAN: Yes. We were at Marathon Plaza, but this is when they went back. I went to the original court, and saw the dedication there. So I never really sat in the original courtroom. It was always in temporary ones.

McCREERY: Where was your chambers in relation to the others?

ARABIAN: I was next door to Justice Mosk, and on the other side of me was first Panelli and then Werdegar when she replaced him. It was on the side that was looking towards the water. It was a lovely chamber, and I really enjoyed my time there.

But on Wednesday mornings when we had conference, I would take my pile of paperwork and go down and stop in Justice Mosk's doorway. He'd be at his desk surrounded by photos of presidents. I'd say, "Stanley, show time." "Oh, okay, son." He would pack up his papers, and we'd walk in together. That went on for almost all of our time together. I adored him. We had a wonderful, collegial time. We didn't hang out socially too much, but we just liked each other.

McCREERY: You mentioned that, and, of course, if he was right next to you perhaps that aided getting to know him. But why do you think that connection was so good?

ARABIAN: We wouldn't hang out with each other. I wouldn't go down there and say, "Hey, Stanley, how are you doing?" It wasn't that way. He was busy, working away.

It was always in the connection of, did you appreciate this other person as a human being? Did you respect this person for his humanity and as a jurist? If you did, that was going to be the relationship. We didn't go out drinking together, but he just knew I had a real fond spot for him, and I knew it was the same way. That's how it was. I just admired him as a soldier and a real standup person.

MCCREERY: I take it you hadn't known him before you went on the court?

ARABIAN: Very little.

MCCREERY: He'd been attorney general and all those things, had been on the court since '64.

ARABIAN: No, very little. I think I had a lunch next to him someplace, at a lawyers' event, and chatted with him, but other than that I had really no prior relationship.

MCCREERY: He was, of course, very much the senior person in that group, and then, of course, stayed on the court until his death in 2001.

ARABIAN: Right. I went to his funeral; just a terrific guy.

MCCREERY: Being that he was so senior, what was his role amongst that group, kind of unstated [role]? Was there any particular spot for him in things?

ARABIAN: No. When you're sitting around the conference table, the chief goes last, and the senior person goes first. So Stanley would be the first one to say, "In Smith v. Smith I'm of the view that we ought to grant that case," and then what his view was, or his thoughts, and so on. Then it worked around the table. So Wednesday was show time for what are we going to do here, what cases are we going to take, and he would speak first.

In the event that it was three-to-three out of the first six, then the chief would be the tiebreaker, but he would have heard everybody's remarks by the time it came over to him. So from that perspective, you heard from Stanley first. But for that event, weekly, everybody just did whatever they did. If he didn't like yours, he'd write a dissent, and that was fine. If you wanted to join him, wonderful.

MCCREERY: But his tenure on the court didn't mean any particular thing?

ARABIAN: No, very little about that. There's just none of that. Everybody's an equal.

MCCREERY: Let me ask you to talk briefly about your other colleagues when you first went on, starting with Justice Broussard, who also had been there for some little time.

ARABIAN: He was the warmest guy. I didn't know him. I went over one day and I gave him a first-day-of-issue Jackie Robinson stamp. I thought he would like that. I happened to have it, and I thought, I think I want to give that to him. If there's one guy up here would like that, it's him. It was just a sign of such friendship that he just probably never thought I was going to be doing to him.

So he turned around and he gave me a glass paperweight. It was etched with the statue of the lady of justice and, "Supreme Court of California." I don't know where he got it. I'd never seen one before or since, but he was going to give me something, and that's what he gave me. I have it to this day, and I treasure that. That was a moment of gift swapping which was totally unexpected. From then on it was always collegial. Again, not a social situation after work. He was doing whatever he was doing, and I was doing the same. But when it came to the work and the cooperative nature, he was just a perfect gentleperson. I just really liked him, and I was very sad when he passed away.

MCCREERY: What sort of presence was he in the group situations?

ARABIAN: Again, everybody minds their own business. You say what you've got to say in writing, and you can orate about it in the meeting, at conference, or if you're going to go visit — on rare occasion would I do that. I was not the gerrymandering ward heeler, "We're going to wander around and get your vote." I didn't believe in that. I didn't do it.

MCCREERY: Were there some of those in that group?

ARABIAN: Yes, but I was not one of them. I didn't believe in it. If you have a question, come ask me, but don't go trying to break my arm and say, "Do this, do that," because I didn't buy into it. I never did, and I didn't ask anybody to do it. So that was about it.

MCCREERY: You said Justice Panelli sat on the other side of you.

ARABIAN: He was on the other side, yes.

MCCREERY: Had you known him before arriving at the court?

ARABIAN: Very little. I think I walked a few blocks with him in San Diego at some conference one time. I really didn't know him. He was a hard worker, put out a lot of cases. Then he left ahead of me, I forget exactly when. I left in '96, so I'm sure it must have been '95, '94.

MCCREERY: Ninety-four, I think.

ARABIAN: Yes, it could have been in there. And then Justice Werdegar, who used to work for him, got the spot, so that was a transition on the other side of me.

MCCREERY: Did you get to know Justice Panelli very well?

ARABIAN: Not really, no.

MCCREERY: You had a short overlap with Justice Eagleson before he retired and knew him a little bit beforehand?

ARABIAN: I knew him because he was involved with the Judicial Selection Advisory Board, JSAB, for Governor Deukmejian. I knew him from Superior Court days down here, not real well, but we always had a nice relationship. When I got up there, he immediately became a big brother to me and showed me where things were and took me to lunch.

MCCREERY: That's wonderful. I was wondering who kind of helped you get going.

ARABIAN: He was the main one. He really was. Kaufman, because he hung out up there for a while, he had an apartment there, he was very helpful also in answering any questions, or telling me about the staff, and things like that. His wife was very sweet to my wife and all. I unfortunately went to his funeral out in San Bernardino, too, along the way. And Justice Eagleson passed away. I couldn't get to his for some reason. But they were the two who were really very helpful to me, and I really appreciated them.

MCCREERY: Then I suppose once they were gone, you were pretty well established and so on, but I wonder, who were you close to in that group?

ARABIAN: Baxter. Baxter was the one that I was close to. We would probably have lunch, on the average, three times a week. We'd walk somewhere together. We had a similar background, both Armenian, both liked shish kabob, [Laughter] and both Deukmejian people. So as close as I was to anybody, it was him up there.

MCCREERY: We haven't talked yet about Ron George coming on the court a little bit later on, appointed by Governor Pete Wilson. What did he add to the mix?

ARABIAN: Ron and I go way back. We were both put on the Muni Court in '72, went to judges' college together at Berkeley. So this goes way back with him and progressed through the steps. He's probably set a new record for appointments by governors: Brown, Deukmejian, and Reagan, Wilson, twice by Wilson. But he and I, we've always been collegial, always, never had a cross word with one another to this minute. He has a wonderful son who's practicing in Beverly Hills, who I just think the world of.

MCCREERY: Then we spoke briefly about Justice Werdegar, but, of course, after Justice Panelli retired she came on, and so there was a second woman on the court.

ARABIAN: I didn't have much to do with her. She was next door. She was a nice person, friendly as could be. If you wanted to chat with her, she was there, but it was not a heavy acquaintance with her.

MCCREERY: Then let's talk just a little bit about Chief Justice Lucas. He had by now been chief justice for a little while before you arrived. How did he lead this particular group, in your view?

ARABIAN: First of all, if you went to central casting for a chief justice, you'd pick Malcolm Lucas for that spot. He looked like a chief justice, white haired, tall, stately kind of a guy, and nice sense of humor. I can use the word elegant with him. There was no question who was in charge. If he sat there and ran your Wednesday meeting, he was in charge. He controlled that session. From then on, it's like anybody else. He did his, you did yours, and the opinions were flying around. Basically, everybody liked him. He got along with everybody.

MCCREERY: Can you talk specifically about the Wednesday conferences and how those proceeded under his hand?

ARABIAN: The funny thing was — and I have a photo of this somewhere — but I show up at the first conference in San Francisco, and there are a stack of petitions about two-and-a-half-feet tall in front of every justice, to the point where you look and you can't see somebody across the way from you, because of all this pile of paper.

So I walk into the conference, and this is the A-list, and the B-list, and all the petitions, and I naively say, "Colleagues, is there some way to eliminate this pile? We're not going into it. It's here. On a rare occasion somebody might want to look into one of them, but if you did, bring that with you. But why are we here with this mountain of paper? We can't even see each other."

The piles disappeared. That was the first thing I did, make that remark, and everybody looked at each other and said, "He's right. Why is all this stuff in here?" That's been coming in there since the court was probably created. I walk in there in March, and the first thing I say is, "This is intolerable. They're not even on the floor. They're on top of the table. I can't see — ." If I find the picture I'll show it to you. It was just ridiculous. So that went away, to their credit. They bought that one real quick.

The second thing was, I said, "Why don't we have cell phones? Every bookmaker and druggie has one. We're up here in earthquake country. We have death-penalty cases." No cell phones. This is 1990, and I'm shaking my head. There's something wrong. "Oh, well, tell the head clerk. Let him look into it."

Well, in about three weeks, sure as heck this big Norelco — it looked like when I was a lieutenant in the military, a walkie-talkie that we used to have was three times the size of it. But this was pretty big. So we wind up with these Norelco walkie-talkie sub-jobs. But as time passed, that changed.

But it was so important, because the night of the first execution in twenty-five years, Robert Alton Harris, Justice Baxter and I are sitting at an Italian restaurant in Little Italy in North Beach. If we didn't have the cell phones, we wouldn't know what was going on. We were up the whole night, and on again, off again. The cell phone was sure handy that night, and it was always handy.

But I was stunned at those two things. First, the piles of paper that were totally useless in our conference. Why was tradition forcing this to happen for so long? "Because that's the way it was." Nobody ever thought about not having that pile in there with them, and no one's using it. Now you can see across the table. That was a big lift to the process. And then the cell phone. That was from my hand. If I hadn't done it, I don't think they still wouldn't have them, but it was 1990. I couldn't believe it. So that got put into place.

MCCREERY: What were you bringing to the group, coming in with that fresh eye? Any thoughts on that?

ARABIAN: Stanley Mosk — I don't know if I said this before, but we were coming back from a meeting down in the shady part of town, the red-light district. We all had lunch somewhere down in that area, and we were coming back to court. The bailiff was driving, Justice Mosk and myself were in the back seat, and I'd only been up there about a month. He'd seen my activity so far. From his heart he just said, "Son, I've been here forever. We've had people up here who for the first two years couldn't find where the bathroom was. Boy, you hit the ground running. I'm really proud of you." I said, "Stanley, coming from you, that is a major compliment."

And that's how it started. He didn't have to say that. But he just looked at me like, here's this young, cracker-jack up here, and he's doing it, he's right there with us. He's figured out what this is all about, and he's got no questions, and he's going straight ahead like we want him to be and not wandering around in a state of confusion. Coming from him, he'd seen so many people come and go, I thought that was pretty nice.

MCCREERY: Very nice. I can imagine that for some people it takes a long while to get established. Of course, you were perhaps among the more experienced in terms of your trial and appellate court experience coming into it, but also, you did take to it pretty quickly?

ARABIAN: I loved it. This is the top of the pile. Let's go. Death penalties are here, all the heavy matters are. There's just a handful of you handling the entire state, and it's a heck of a job. I respected what had happened to me, and I was going to live up to it, and that was about it.

MCCREERY: In a group of seven — that's just kind of a nice number. It's a larger group than you had been with, of course, but still manageable in size.

ARABIAN: Very much so.

MCCREERY: How did it hold together as a group?

ARABIAN: At the time I was there, for six years to the very day, whoever was in and whoever was out, it was just a very collegial event. You didn't have to agree with each other all day long and weren't expected to. If you dissented, it was done in a respectful way. It could be forceful, but it was

respectfully done. People liken me to Scalia. He could bite you if he wanted to, but it's done in a scholarly way, and it's not mean.

MCCREERY: Justice Arabian, you just showed me a little memento you got upon the day you were sworn in to the California Supreme Court, March 1st, 1990. Can you talk about that and then read from it, please?

ARABIAN: Yes. This is a special little remembrance. It says, "Supreme Court of California" on the cover, with the state seal on it. It opens up and on one side it says, "I, Armand Arabian, do solemnly swear that I will support and defend the Constitution of the United States and the Constitution of the State of California, against all enemies, foreign and domestic, and I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California, that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties upon which I am about to enter."

On the other side of it, where it's a blank page, it's dated March 1, 1990. "Dear Armand, March 1st and you have come in like a lion! I know you will be a great associate justice, and I am delighted to have you aboard." It's signed by the person who gave me the oath, Malcolm M. Lucas, Chief Justice of California. So it's a special remembrance.

MCCREERY: Do you remember much about your swearing-in ceremony?

ARABIAN: Yes. The archbishop of the Western Diocese was up on the platform when I took the oath. My mother was alive and was there. My wife was there. My son and daughter were there, and one of the town leaders, who's passed away, Archie Dickranian, who was very prominent in Beverly Hills and in charity. He had put the robe on my back in Superior Court ceremonies. The chief administered the oath, and quite a few people were there watching, a reception thereafter, and off to work we went.

MCCREERY: We were talking this morning about the kind of force you were upon this court as a new member, and that you were able to take a fresh look at a couple of seemingly minor things that had been in place a long time. What else do you do to get yourself oriented and started as the junior member of this group?

ARABIAN: It was not a situation where you were going to learn something brand new. Obviously, it was very much like being a justice of the Court

of Appeal. You had a larger staff. You had to organize the workload with them and put into place when we would meet, which would be on a Tuesday before the gathering on Wednesday. That was done by most chambers, not all of them.

You would keep an eye on the progress of each of the people working for you, to make sure that if it was a death-penalty case, that it was moving along, because those take a lot of time from each person that's involved with it. Then getting acclimated to the city, which was something new. Sacramento was sort of a pit stop. You went there twice a year, and you were not there very long. But San Francisco was now your home, so to get to kind of know what the city was about, and meeting local lawyer types. I was taken under the wing of about four women lawyers who once a week would take me out and show me the different restaurants and gathering places.

MCCREERY: How did that get started?

ARABIAN: I really don't remember. Somewhere along the way I ran into somebody who was very active up there, and she had a collection of about three others. In fact, I know one of them is a judge today. They would hang out with me about one night a week. We'd go out to some restaurant, and they would introduce me around. They introduced me to the Queen's Bench, which was a leading women-lawyers group, so I'd end up at their events. They were just a real comforting factor. That went on for quite a while. They were wonderful to me.

Things like that. Getting to sustain yourself by way of eating at night, and what events you were going to go to. I loved the city. The city was great. Pacifica was just a nice, quiet, foggy city that I loved a lot. So that's, basically, what was happening. It was not a real big learning situation.

Of course, the change was when I bought the place in Pacifica, having to move over to that part of California, near the water, which was just delightful. The days went by, the years went by. Next thing you know, it was getting right up to the anniversary of six years, and I decided on that very day would be the day I would leave. I put a sign on my door, like Kilroy, "Gone fishing. — Justice A." and I left. [Laughter] That was it.

MCCREERY: That's jumping the gun a little bit, but since we're on the subject, how did you decide the timing of your retirement in 1996?

ARABIAN: That's a good question. Number one, I was going to have two weddings inside of four months coming up in 1996. The joke was, if I hadn't retired then they were going to do a movie about my life, and it was going to be *Two Weddings and a Funeral*. So I knew there were going to be some financial considerations coming down the roadway. That was one thing.

Secondly, the building that we're in, the tenants' lease was running out right about that time, so it was a good time to evict the restaurant that was in here and take over the building again. That just worked out perfectly.

MCCREERY: Here in the Van Nuys office?

ARABIAN: Right here, right in my Van Nuys building. Then, there's that thing about, "Leave when you're hot." You've been there, seen that, done that. I thought I had done in six years pretty much what I felt I would like to have contributed. I could have done it longer, but I thought that twenty-four years of that kind of service, plus one year as a D.A. — twenty-five years of one's life is enough to dedicate to the public interest in that sort of a career. So everything just kind of gelled and said that it was time to leave. Coincidentally, it was the sixth anniversary, and I made my quiet announcement, and then I made a public one and left.

MCCREERY: As it happened, Justice Lucas retired very shortly thereafter. Did you know his plans, and did those have any bearing on your own decision?

ARABIAN: Not whatsoever. As I recall, I thought he was going to leave, but I wasn't sure about it. I never discussed it with him. Justice Panelli had gone to JAMS, and I had heard along the way that they were going to try to talk Chief Justice Lucas into joining up, which he did. That was one place I wasn't going to go, so I really had no interest in any of that.

MCCREERY: Why do you say that?

ARABIAN: When JAMS started out, they wanted half of the pay and all kinds of good little things like that. At my press conference statement I said, "I love my mother, but I wouldn't even give my mother half of what I make," and got a big laugh out of the reporters. But that's about what they were doing at the time, which I thought was off the chart. I'm sure they modified it after that. But I had a good feeling about Triple-A, American Arbitration Association, and that's where I went.

MCCREERY: Let's return, though, to your early time on the court, if you're willing, and just talk a little bit more about court process. We spoke a while ago about the Wednesday conferences. What else can you tell me about how it was decided which cases to take?

ARABIAN: First of all, you had a central staff of professionals who were looking at these petitions that would come in, and they were pretty adept at listing the A-list and the B-list, and the A-list was the hot stuff where you were likely to be interested in the question that was presented to the court. The B-list was mundane business that was processed by the Court of Appeal, and they just thought we'll take one more shot at it, and let's go roll it up to the Supreme Court. So that collection wasn't going to go anywhere; petition denied, denied, denied. So that was the big pile in the B-list. You would look through there and on occasion see something of interest, but that was rare. So with the A-list, we would have a discussion in each of the chambers with the crew as to what they thought about those, and they were numbered one through whatever. That's where the action was.

So first I would meet with my staff, listen to what they said, have my own opinion about what I thought was happening. Obviously, if there's a conflict between two divisions, you're probably going to take that one. But there were other impact situations where the law had to be established. For example, do you have a right to terminate force feeding of an inmate, and things like that. So when you went into the conference, you had a pretty good idea of what you were going to vote to grant on. You'd start out with Justice Mosk, and he'd say, "I like this one. I vote to grant," and we'd go around the table. Then later that day the chief's office would distribute in an even way the cases that had been granted, so everybody had their fair share of work.

MCCREERY: Chief Justice Lucas, then, would decide who got what?

ARABIAN: Yes. He and his staff would spread them out.

MCCREERY: How did he use that power to assign cases? Any views about that?

ARABIAN: The only thought I have about that is, if it was a rape situation, it was common knowledge that I would probably be interested in taking the first shot at that. So that's how several of them wound up with me. But for that, he could obviously keep for himself dramatic things such as

reapportionment or term limits. They could keep that for the chief, and likely they would. The rest of it, I don't know what they did. All I know is we got our supply.

MCCREERY: Was there ever any difficulty about who got assigned what, or the range of subject matters and how they were spread out?

ARABIAN: No. You took what was dealt out to you, and if you had a majority opinion you had a majority opinion. You didn't, you might be a dissenter down the roadway. That depended.

MCCREERY: Talk a little bit more about the role of the central staff.

ARABIAN: There was a collection on criminal and civil, and some of them had been there for quite a while. They were very talented. They had their own process of distribution, and they would go through it with a pretty good-tooth comb. You seldom found a problem with what they were doing. They were very helpful.

MCCREERY: Am I right, though, that it would be their job to prepare those initial conference memos?

ARABIAN: They would go through it, make their recommendations. Then it would go to each chamber, and our own people would look at it and see what they thought about it, and then they would discuss it with me and I would go through it. At the end of the day, when you went into the conference room, you had a pretty good idea what your thought might be, not definite, but you're pretty sure on the grant.

MCCREERY: I was just trying to establish the role of central staff in some of the writing tasks.

ARABIAN: The writing is in the chambers of the court of each judge. They prepare a memo and tell you what's going on.

MCCREERY: You talked about the senior justice speaking first, so Justice Mosk and around the table. Was there any occasion where people could speak in a different order because of the nature of the matter at hand?

ARABIAN: It went around the table in seniority. If Justice Mosk said something, and somebody wanted to say something about it, that was fine. But when he got through, you went to the next person. So it was done that way.

MCCREERY: I guess what I'm asking is, how much discussion was there as you went around?

ARABIAN: As much as you wanted. You were there from, let's call it nine to twelve. That's three hours. There's a lot of time for discussion in three hours, and everybody said what they wanted to say. There was no shortcut in any statement from anyone. You can say what you wanted.

MCCREERY: How about Chief Justice Lucas himself, again in the leadership role in this room with the others. How did he operate?

ARABIAN: He was in charge of the process. He would listen to what everyone had to say, and it came down to him. Most of the time he was not a tie breaker. It was pretty well set forth that they had enough votes to do something or another, and he would cast his own vote and sign off, granted or denied, and go from there.

MCCREERY: The atmosphere in those meetings?

ARABIAN: Very businesslike. There was a little humor here and there, but basically, you're there to get through that list, and that takes a while. It's business. You're dealing with serious matters.

MCCREERY: Yes. When you went back to your own staff after those Wednesday conferences, how did you reveal to them what had gone on? What level of detail would there be about the conference itself?

ARABIAN: I'd probably meet with the head of the five, and I'd say, "Lenny, they granted three, four, and five. They didn't have enough for this other one," and so forth, and it was, see what we get. There was no secret. Inside, everybody knows what was going on.

MCCREERY: And your process, then, with your own staff?

ARABIAN: Between myself and the head of my staff, we would distribute. We'd try to make sure everybody had the fair share of death cases, because those were very time consuming. You can't pile that all on one person, so everybody had one or more on their slate. They really take up a huge chunk of time. Three months go by, and they're still working on something, if it's really a huge matter, so that's a lot of time.

MCCREERY: Even before you arrived on the court there was, of course, a great deal of talk about trying to relieve the backlog of death cases. How was that coming along by the time you got there?

ARABIAN: There was a pile, and there's still a pile. There's a bigger pile today than there was back then. You've got an inventory of death cases that's staggering, several hundred of them. I lost track. They don't get to see a lawyer, some of them, for two or three years after the conviction, because they don't have enough bodies to handle it, and the pro bono people don't want to get involved.

So a death penalty is a hollow promise, as far as I'm concerned, in the State of California. You're only executing, what, one a year? It's just pathetic. So you either have it and you work it, and you carry it out, or they die of old age or something else. The public is in a sad spot with that, because overwhelmingly they are in favor of it and they've always been. Maybe it's dropped a little bit in the passage of time, but it's there. When you do something cruel enough and bad enough, the public wants revenge.

MCCREERY: I wonder how you can characterize the views of your colleagues about the death cases and whatever personal aspect they might have brought to it.

ARABIAN: I was the only one of the collection that had sat next to an accused person who was facing death in my practice. Nobody else had that experience. So I took it a little extra special. But from the point of view of, was there some philosophical resistance to it, such as Rose Bird or somebody like that? Nothing like that. The case was there. If it was tried fairly, and good representation, and due process, that was that. If there was a problem with it, you could reverse it, but it had to be one that was shown up on the law, not about how you felt about it.

MCCREERY: During your tenure there, of course, was when executions resumed after a hiatus, shall we say.

ARABIAN: Twenty-five years.

MCCREERY: I just wonder, how did that look from where you sat? How did that play out?

ARABIAN: In Robert Alton Harris's case, he was the one that went in, I think that was '93, it was a heinous killing, cruel in every aspect. About ten

or twelve years along the roadway afterwards, he's still sitting around here breathing air, and we stay up all night long for that to take place. So at the sunrise of the morning when he checked out — and twenty-five years have passed since the last one experienced death like that — I felt that the public had been finally served. What did I feel about it? I was exhausted, but I was happy to have participated in it, because it made up for somebody's life who was not around anymore.

MCCREERY: Can you tell me more about how you actually spent that night? You described going to dinner early in the evening, because you had the cell phone finally.

ARABIAN: Yes, with the cell phone. Justice Baxter and I went down to North Beach and we were eating, and the phone was with us, and that was on-again, off-again night. We finish up. We go back to chambers. Midnight rolls around. Two o'clock rolls around. Judge [Harry] Pregerson along the way gets a phone call from someone. I don't even know if he could ascertain it was a lawyer. It was a phone call to him. He was on the Ninth Circuit. Halts the execution.

With this, this charade had gone through the whole day. I got in my car and I drove to Pacifica. It's now, I don't know, around five o'clock in the morning. I no sooner hit the kitchen than the phone is ringing. It's Justice Baxter. "Come back, it's on again." I said, "You've got to be kidding." He says, "No. Chief Justice Rehnquist has ordered that no one is to touch this case again until you hear from him."

So I get back in the car and return to the city. Some Highway Patrol guy is following me. He sees E plates on my car at this weird hour of the morning, wondering what's that all about? There are no cars on the road. I get back up there, everybody's reassembled, sitting around the conference table. It's now about five minutes to six in the morning. We've been up the whole day, whole night.

We've got the clerk on the phone with the warden at the state prison, "Are there any further delays or stays?" The answer, "No." Plop, plop, fizz, fizz, oh, what a relief it is. About — I'm going to guess ten after six, he checked out. The sun was coming up over the Bay Bridge there, the Oakland Bay Bridge, and everybody went home. That was that. Everybody went

home to take a nap. I think I got back to court at three in the afternoon. So that's how that went down.

MCCREERY: As you sat there assembled, do you recall the mood or the conversation in the room?

ARABIAN: Everybody's alert. They're waiting for something to come to a conclusion that's taken more than a decade to get there, and when the final word was, "Go," to the warden, that was it. That's what happened.

MCCREERY: There were, I guess, a couple of other instances while you remained on the court —

ARABIAN: There were two others along the way. [William] Bonin was, I think, the third, if I recall right, and there was another one [David Mason], who went rather quietly. Both of those went kind of quietly. In Bonin's situation, I remember that one of the boys that he had picked up at a bus stop was so mutilated, the next day his mother could barely identify her son. He was really vicious, and they don't know how many he was responsible for. He was at large for quite a while. You know, you look back at that and you go, how savage could anybody be? Bonin may have set a new standard for savagery, much more than the other two would ever think about. It was pretty bad.

MCCREERY: I wonder if you ever had occasion to talk with your colleagues about the method of execution, which had changed to lethal injection, of course, by that time.

ARABIAN: No, no.

MCCREERY: And as we know, is now under a process of review, shall we say, to determine whether the patient suffers, and so on. Any thoughts about that?

ARABIAN: Never. There was only one style. It was plop, plop, fizz, fizz. That was it when I was there, so that was not a discussion. I had visited the gas chamber. I'd been to it a long time before, so it was no mystery to me.

MCCREERY: What took you there?

ARABIAN: During one of the judges' colleges they had a field trip, and we saw it.

MCCREERY: In reviewing the death cases and voting on them, what is it in your mind that would set those apart from other cases?

ARABIAN: First of all, the record is quite voluminous. It's boxes and boxes that you could fill a room up with, the transcripts and the record. It just grows huge. Then it's come directly to the Supreme Court, so here one of your research people had to spend who knows how long, several months, going through it, analyzing it. Then you analyze what he's done, and every other chamber analyzes it with their staff and their justice.

At the end of the day, you're dealing with the taking away of a life. There's a religious aspect to that. Thou shalt not kill is one of them. There's also another aspect that says something about God put judges at the gates to take care of business. Well, there you are, and this is part of the business. So those were in my head when I was deliberating on these kinds of things.

But beyond that, it had to pass the Arabian test, as I explained, having sat there when the accusatory finger came by looking for the death of somebody sitting next to me. If I was satisfied that everything had happened correctly, as correct as it could be, and the person deserved to die, then that person was going to have my vote to be put away. It's as simple as that. But it's a weighty mental responsibility that I did not take lightly, ever, because it had better be done right, because there's no coming back. So that's it.

MCCREERY: What about the role of the governor in the process of appealing these cases, right prior to the execution?

ARABIAN: They have the power to intercede and commute and pardon and all these other good expressions, but it wasn't being done when I was around, so we were the final word. That was it.

MCCREERY: I just wonder if you had anything to tell about Governor Wilson, in your time, and the part that he played?

ARABIAN: No. No involvement directly to us. Totally separate. They have a weighty responsibility, too. The buck stops finally with them, and they say yes or no. Most of the time it's no, and that's that.

MCCREERY: Since we've mentioned Governor Wilson, maybe you could just say a few words about him and how and when you got to know him.

ARABIAN: I'd met him along the way at political events here and there. I really didn't know him when he was mayor of San Diego way back when. He always struck me as a pretty nice person. He was sociable. I went to his swearing-in, and he was the person I was going to surrender my job to. I went to make an arrangement to see him in Sacramento. He'd pretty well known why I was going in there, and I told him I had full confidence that he would replace me with someone that was an outstanding jurist, and that I was pleased to turn it over to him. He thanked me profusely on behalf of the citizens of the state, both verbally and in writing, and that was it.

MCCREERY: I take it you didn't get to know him very well?

ARABIAN: No, no. I've seen him a few times since.

MCCREERY: Is there anything to mention about how things might have changed once he became governor and took over from your friend Governor Deukmejian?

ARABIAN: I didn't see any big startling events. He just ran a steady ship, like George Deukmejian ran a steady ship. It was a very smooth transition from one to the other. They did basically the same kind of good appointment process. I found no fault with it. He replaced me with Ming Chin, who's an outstanding jurist. I'm so proud that Ming took over my spot.

MCCREERY: Of course, he'd already appointed Justices George and Werdegar before that time, so you had seen a little of his choices.

ARABIAN: Yes, good appointments. Let's just call it what it is, good appointments, great appointments.

MCCREERY: We said that we might talk just a little bit about a couple of cases today, and I realize these were a long time ago, but they were a couple of medically related cases that really kind of stand out as a bit unusual. One was *Thor v. Superior Court of Solano County*,[13] and that was a patient's right to refuse medical —

ARABIAN: Hydration.

MCCREERY: — hydration, thank you.

[13] 5 Cal. 4th 725 (1993).

ARABIAN: He was a quadriplegic. He either jumped or was pushed off one of the tiers in prison and at some point decided he didn't want to live and didn't want any kind of food or water or anything else. Medical people took the view that they were going to force feed him, and so they did. They forced hydration, so he challenged it. It came up to us in the Supreme Court. When he saw that the Supreme Court took his case, he decided to take hydration, to see how the whole thing was going to turn out. I wrote the opinion, giving him self-autonomy so that he could refuse, that he had the right to refuse it. He was competent, and he knew what he was doing. Along the way the good Lord was watching. His catheter got infected and he died.

MCCREERY: And never knew the outcome?

ARABIAN: He died before the outcome. It was quite a bizarre ending. *Arato v. Avedon*,[14] which was sort of a companion — I wrote a law review article about "The Ambivalence of Arato and the Thunder of Thor."[15] That was quite an interesting situation. This person is dying slowly. Body parts keep going out, and he finally expires. The family sues the head of oncology at Cedars Sinai, claiming that there was not enough informed consent, that had he known when he was going to die, he would have sold the shopping center, or whatever he was going to do by way of disposing of assets.

It didn't take a genius to figure out if your spleen goes here, and your kidney goes there, and something else goes, your days are numbered. So that was a unanimous opinion. Both of them were. We said that sufficient information had been given. At the oral argument I inquired of the counsel, I said, "Since when did the Hippocratic oath become equated with a Merrill Lynch advisory?" Everybody laughed. What's a doctor supposed to do? And the doctors really loved that opinion, because it settled quite an area for them.

MCCREERY: Yes, and say a bit more about what it was the patient was —

ARABIAN: They have what they call a chilling effect. They don't want to be asked the question. In other words, the doctor is giving them as much information as is medically available.

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[14] 5 Cal. 4th 1172 (1993).

[15] Armand Arabian, "Informed Consent: From the Ambivalence of Arato to the Thunder of Thor," *Issues in Law & Medicine* 10, no. 3 (Winter 1994): 261–98.

MCCREERY: Yes, "How long am I going to live, doc?"

ARABIAN: When they say, "How long am I going to live?" the doctors don't like to hear that question, because as they have said to me on other occasions, "We're not God. Only God knows how long you're going to live." And there's a chilling effect, because if you say, "I think you've got ninety days," the person goes into some kind of toxic shock and says, "Oh, my God," and has a heart attack or whatever. So they don't like the question.

MCCREERY: It's interesting when the Supreme Court is asked to decide these areas in medical-related issues, because those issues are changing all the time as technologies change and life expectancy changes.

ARABIAN: It's a challenge. I enjoyed these two cases perhaps more than most, because it is that extra challenge. You're into the world of medicine, which is not your forte, and you're listening, and you're learning, and you're reasoning, and your colleagues are doing it with you.

What's fair, what's appropriate, what's reasonable? All these concepts come in there, and it's a gray area, so you've got to do your best. Is this hospital or this physician going to be held liable because they didn't sit down in greater detail with a person whose body parts are going out the door? I don't think so, and that's what that opinion says. There's a fellow laying in there, and he's competent. He thinks his life is over because he can't walk, he can't do much of anything, he's a quad. Okay, you want to check out? We don't need Dr. Death to come in there and do something like that. You don't want to eat? Okay, they shouldn't be able to force you. That's what we said.

MCCREERY: Some of these must be tough, and I wonder to what extent you might ever feel ill-equipped to address these kinds of issues. They're pretty unusual in their detail.

ARABIAN: Yes, but the medical world is subject to the laws of California, so they're on your plate. If you have a case where it says there are electrical wires, high-tension lines running across your property. Are we electricians or experts in electricity? No, but we've got to decide that case. We did one of those. I think Justice Mosk may have written it. There was no tangible evidence that it was giving you cancer down below. It was one of those areas, so you do your best.

MCCREERY: While we're thinking of medical things, I wonder if you happen to remember the so-called spleen case, *Moore v. U.C. Regents*,[16] which was an opinion by Justice Panelli, as it happens.

ARABIAN: Yes. I wrote a concurring opinion in that case dealing with the moral issue. I joined in the result that he had. But I spoke about the morality question, which he hadn't gone into and the court really wasn't involved with. So I said what I had to say about it.

After I retired, I got a phone call from Chicago, De Paul University, and they were having a national symposium on this question of body-part sales, and they credited me with the *Moore* concurrence in starting the debate. So they had doctors and lawyers and I don't know who else assembled in Chicago, a couple of hundred people. I was the keynote speaker, talking about this question. I later wrote an article which was published in the *Daily Journal*, which again had to do with UCLA and UC Irvine, where body parts were being sold, allegedly without the knowledge of the schools.

I wrote that article while their cases were pending. One suspect died. There were arrests but only recently a prosecution of those cases. So to this minute I can't tell you what those reasons were or weren't. But had they been able to prove the sale of body parts against the will of somebody else, or donors who were unaware, so it would be a very serious criminal matter. Anyway, that's how I got into the world of body parts, and it was that opinion that they really herald. I didn't think it would have that kind of an effect, but it did.

MCCREERY: At the risk of duplicating what you said in your article, I wonder if you can just tell me what prompted you to address the moral side of this case.

ARABIAN: You're dealing with a very unusual commodity, the body. It has great value, or no value. If you dump it into a river and it rots away, it has no value as a component. But if you need a spleen, or a liver, or a heart, or whatever, it has tremendous value. So are we into the commodity side of bodies? How do we evaluate the process? Is it legal, is it moral, is it going to be done out the back doors of morgues? There's a lot of morality questions

[16] Moore v. Regents of the University of California, 51 Cal. 3d 120 (1990).

involved here, which no one was thinking about. So I said, "Let's think about it. Let's put that in here." That's why it got in there.

MCCREERY: Then kind of the larger, related question. I wonder in general what would prompt you to write a concurring opinion.

ARABIAN: I didn't write that many of them. This seemed to be an edge-breaking kind of a case, and whenever you have one like that, you want to make sure that everything is discussed that's out there, and if it wasn't done in the majority or a dissent if there was one, then it's my responsibility to put that out on the table. That's it. It helps the public understand the ramifications of what this is.

MCCREERY: And you singled it out as important enough to merit a separate opinion?

ARABIAN: And it turned out exactly that way, to this minute.

MCCREERY: What about writing a dissent? What would bring that on, in your mind?

ARABIAN: The dissent is where you feel so strongly that there's no way you're going to sign on to the majority. It's not something that you can get away with a concurring opinion, because you have to still go with the majority. Now, you're going to stand up and speak to something bigger and greater than what this case is saying on the majority side of it.

So if you say that in a condominium, for example, these are the questions and this is the real issue, and we are better if we tear down walls instead of putting them up between students over at Berkeley on student activities fees, or condominium owners whose cats never go outside, but bring pleasure to someone inside. At the university, freedom of thought is so key that if you take that away in a majority opinion, that's not going to wash by Justice Arabian. So that's when you step up to the plate. I didn't do too many of them, but *Nahrstedt* and *Smith* were two that I really felt very strongly about.

Smith was a difficult situation about students going into the student activities fund to get a certain amount of money to do what they're going to do.[17] They're going to put on a program. We need sixty dollars to rent a projector.

[17] Smith v. Regents of University of California, 4 Cal. 4th 843 (1993).

MCCREERY: This comes out of mandatory fees charged to all students?

ARABIAN: Everybody pays into that fund, okay? Now, the question is, who is entitled to the sixty dollars? If the unwed mothers show up, maybe somebody doesn't want their fraction of funds to go into that projector. If it's a person in Tiananmen Square holding a hand up to the turret of a tank, and the Chinese students want to get the funds to show that film, is that a question that the university can ask? Is it political? Oh, my gosh, that may be a problem. Is it social? Oh, gee, maybe we can't cover that. Is it educational? Oh yes, we could do that. Is it — whatever.

So the majority took the view that that was an improper request, because it was political in nature, whatever the reasons they came up with, which was contrary to academic freedom at Berkeley or any other place. No university should be put in the situation of having to make that determination. Who is going to make that determination, some secretary sitting there with a key to the lockbox? Come on. That's outrageous.

I thought it was a pathetic opinion, to be very blunt about it, and Justice Mosk agreed with me. He was happy to sign on my dissent, and a few years later the United States Supreme Court, citing their awareness of *Smith v. Regents* in its holding, kicked that one over. That strikes at the heart of academia, and that's when you don't sit by. Other colleagues went with it.

MCCREERY: As you say, though, you and Justice Mosk ended up together on this one.

ARABIAN: I wrote it, he joined on my opinion.

MCCREERY: Was that a case of strange bedfellows?

ARABIAN: I didn't think so. I think both of us liked the academic world. We think students have a right to share equally in the process of getting funds. It was a simple request. They weren't going out to get ten million dollars from you. Why should anyone be placed in a denial position, either by the person asking for it or the person who has to say no to you? They're not equipped to do that. The person you're going to to get that money is not equipped to make that kind of a judgment. They shouldn't be having to make that judgment. That's what the United States Supreme Court said later on. We all eat from the same bowl here, folks. In the world of academia, somebody's going to learn something. You're going to tell them it's

not available because this is political by some label? No way. That's what that was all about.

MCCREERY: But it is an interesting case of you and Justice Mosk joining forces, whereas on many cases — I don't mean to generalize too much, but on many kinds of issues you might have been expected to be on opposite sides.

ARABIAN: The death area on occasion would have been one of those. He was the sole dissenter, as I recall, I think it was on term limits or reapportionment, one of them. But on a case like this, I wouldn't expect Justice Mosk and I to be different. I didn't at all. I was so pleased when he wrote a note to me, and he says, "Armand, I wish I had written it. I'm pleased to sign it. Stanley." I've saved it. I love it. But that was one of those little binding moments where push and shove met up. It was one of my happier moments, to have him aboard.

MCCREERY: Yes. But that strikes at the heart of a big issue that you hear about out in the media and the popular arena all the time, which is the idea that judges are going to predictably respond a certain way or another, or they're going to line up a certain way. Tell me how you see that.

ARABIAN: Again, this is a classic example of that. Am I as big a liberal that day as Stanley Mosk? Yes, I was. In fact, I was a bigger liberal. He signed on to my opinion.

Now, *Nahrstedt*,[18] the property-owner lawyers came into those hearings appalled. Here's this Republican conservative law-and-order guy up there fighting for cats and dogs of some woman who's living by herself, or some person who needs a guide dog who couldn't even get into that place. It's against federal law, et cetera. So if the ACLU happened to be sitting in, they'd say, "Oh, my God, we want to give him a membership." Here's the guy standing up by his lonely against all the "conservatives," quote, unquote." Justice Kennard wrote that one, and here he is fighting for those lives out there. Was that not the quintessential liberal? Yes, I'd say, absolutely.

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[18] Nahrstedt v. Lakeside Village Condominium Assn., 8 Cal. 4th 361 (1994), discussed in Armand Arabian, "Condos, cats, and CC&Rs: Invasion of the Castle common," *Pepperdine Law Review* 23, no. 1 (1995): 1–30.

So that's what I tell you about labels. Labels can be applied to anybody on a given day. Don't make book. Over a period of time, oh, well, he voted to affirm ten death penalties, so he's a conservative, or a law-and-order buff, or something like that. It's got very little to do with those decisions, because he either deserves to die or he didn't deserve to die, and if he didn't, he'd have gotten a walk to another day. It's got nothing to do with labels. Labels are pathetic, and I'm reluctant to use them.

MCCREERY: Thank you. As I say, we do hear those all the time, and yet when they're repeated often enough, people start just assuming that there's something to them.

ARABIAN: You have to go through an entire lifetime to see a pattern and then say, "Looking back at a thousand opinions that this person did, unjustifiably he was x." That's a key word. Did you do the right thing?

MCCREERY: To look at this from kind of a different angle, to what extent did you think your colleagues were predictable in how they would respond to certain things?

ARABIAN: When you say predictable, that's tough to put a tag to because, again, I go back to the facts. If the facts are that Robert Alton Harris did what he was accused of doing, I could predict that a majority of my colleagues up there are going to vote to execute him. What is that telling me, or telling you? It's telling whoever looks at that, that if the law and the facts justify a certain conclusion, that's what the conclusion, hopefully, is going to be.

It's got nothing to do with being law-and-order or liberals, or anything else. It has to do with, what does this case demand? End of show. If you have enough cases that demand a certain result, well, that's what you're going to see by way of a vote. If that shows you, oh, my gosh, they're all running loose to hang somebody, I don't think so.

MCCREERY: Another thing we often think about, and for good reason, is, where's the center of a particular court, because that's where the tie break will happen. Where was the center of your court?

ARABIAN: If you had Stanley Mosk and, let's say, Joyce Kennard on one end of it, and you had Malcolm in the middle, which was a good title for the TV show, the rest were basically in the middle. They were with the chief a lot of the time, or the chief was with them a lot of the time.

Janice Brown, who I never served with, has come up with a reputation that she was a hard right when she was on the court. Maybe she was. I don't know, because I wasn't there. I've read some of her opinions. But I think there were a lot of people in the middle. I think I would call myself in the middle. On a given day, I tell you, I'd go whichever way I just explained to you.

MCCREERY: I ask, though, because if there's a regular tie breaker or two, those are considered powerful people.

ARABIAN: I didn't see it that way on our court. I know on the U.S. Supreme Court that that's happened, but I didn't see it that way.

MCCREERY: Justice Lucas, over his ten years or so of being chief justice, he enjoyed a very collegial court, as you've put it, and really a situation where quite a few of the opinions came down, if not unanimous then fairly close to it. Six–one, five–two. Now, is there anything to be said about how much unity is too much?

ARABIAN: No. If the case deserves a unanimous, it's entitled to a unanimous. If somebody wants to dissent, be my guest. Six-to-one. Fine. If he's the one writing it, and he's done it the way it ought to be done, fine. I'm going to sign onto it, which I did a lot, and others with me. So this is no criticism of any of that. He'd call it the way it was supposed to be called.

MCCREERY: I'm just thinking a little bit more about the background and experience that the different judges bring. Of course, that did change a little bit while you were there. I think we even touched earlier on the idea of how useful is it to have a variety of backgrounds on a court, to bring in those bits and pieces that one group of people might not think of, or that sort of thing.

ARABIAN: It's very helpful, I think, to have diversity of background, and minority influence, and majority influence, and all these other things. So the mix is wonderful, as far as I'm concerned. At the end of the day, Stanley Mosk used to say, "All information is useful information," and it is. Wisdom which comes late is still wisdom. No, it's impactful to have somebody step up and say, "Wait a minute. I remember so-and-so," something from their knowledge or background. So all that's pretty valuable.

MCCREERY: Let me ask you, if I might, about oral argument on the Supreme Court. We've talked about it in an earlier context, but I just wonder — that was show time as you put it. What kind of a show was it in

your early years on the court? I'm talking about before Justices Baxter and George and the others came on. But when you were the new guy, what was oral argument like, and how did people approach it?

ARABIAN: Never changed, never changed. You have a question, you ask it. Now, I was quite surprised that Justice Thomas for the whole first term didn't ask a question, because that just couldn't happen in my world. If you didn't ask a question in an entire day, people would be looking at you as if there was something wrong. Everybody asks questions, some more than others. On occasion maybe you don't. On occasion, maybe you're using it to try to tweak someone's attention who may not be on your side of it, and using the lawyer as a pawn out there, in a sense. So there's a different drama to it.

Or sometimes you want to throw one out there to see how well they can handle it. I find oral argument fascinating. That was one of the more enjoyable parts of being a justice. I love oral argument. You see the talent of an attorney on his or her feet, hitting the curve balls and the spitters, and I love a fastball.

So that's it. I look forward to oral argument, and that's why I've lectured on it, the art of oral argument. Some people like to pooh-pooh it and say, "Oh, well, if there's a memo or a draft opinion out there, who cares?" Believe me, you can turn parts of that so-called draft opinion around, in some cases you can change the whole outcome if it's done correctly.

MCCREERY: But is that a legitimate criticism of this particular court, that because of the process and the ninety-day rule and so on, the whole thing's too far along by the time oral argument takes place?

ARABIAN: No. You have the written materials. Everybody knows what the record is telling you, and now, as we used to say, we want to kick the tires to see if the car will still be up there on those four pieces of rubber. If you kick it hard enough and it collapses, somebody's got a problem. So it's our duty to kick it a little bit, and that's it. I just loved the debate out there, just loved it.

MCCREERY: I take it you were a lively participant?

ARABIAN: I was. I enjoyed it. If I had something to ask, I'm going to ask it, and I'd throw you a curve ball quicker than anybody. That was what we were there for.

MCCREERY: How did you treat counsel?

ARABIAN: Very respectfully, very respectfully, because I know how hard that job is.

MCCREERY: I guess you knew it better than practically anyone else there.

ARABIAN: I knew it's a tough road. Some people are not equipped to do it, and they're doing it. Some are absolutely fantastic at it. There's a whole variety of that. But if you've got the guts to stand up there and take the heat, I give you my hello. [Laughter]

MCCREERY: What about your colleagues? Which were the active oral-argument participants?

ARABIAN: Justice Kennard was the most active. She'd get on your tail and hook onto you and wouldn't leave you for a while. Justice Mosk was very circumspect. He'd have a few things to say. The same way with Baxter. I'm just trying to recall. But the person who stands out at the numbers of questions would be, there's nobody in second place with Justice Kennard up there.

MCCREERY: I wonder how she developed that style. Any thoughts?

ARABIAN: I don't know. "Let me ask you this, counsel. Can you help me out?" And it would go on with a long question, and then maybe some follow-ups, three parts to it, and the lawyers would be out there trying to do their best.

MCCREERY: She is rather known for that.

ARABIAN: That's her M.O. She'll explore what's bothering you, and that's what she's there for. If they can answer all those questions, they're probably in pretty good shape.

MCCREERY: How about Chief Justice Lucas in oral argument?

ARABIAN: He wasn't known to really go too far with it. He asked what he wanted to do and was to the point, very scholarly question, and that was it. He wouldn't make a big story out of it.

MCCREERY: You spoke to the isolation on the Court of Appeal. How did that compare on the Supreme Court?

ARABIAN: It's one big law firm with seven partners in it, one head partner. You've got all your subordinates working with you. You see each other in the hallway, you meet on Wednesday, you have oral argument once a month, et cetera. Everybody does their own thing. It's not a hangout special, but just doing the job and getting through the day.

MCCREERY: Were there any occasions where the seven of you, or perhaps with others, could let down your hair and get to know each other on a more personal level?

ARABIAN: We had retreats. We had retreats once in Oakland, another time in Coachella Valley. Those are two that come to mind.

MCCREERY: How long would those events be?

ARABIAN: My memory is one night out.

MCCREERY: A couple of days?

ARABIAN: Yes, it was whoever wants to ask or say something, it was just a collegial time. I don't think we really needed it, but we did it. That was Justice Lucas's idea. So they were fine.

MCCREERY: What about going up to sit in Sacramento? What was that like?

ARABIAN: I loved going up there, because most of us would stay at the Hyatt. Some others stayed at different places. You'd walk across the street, cut through the State Capitol, go by the governor's door, go out the other side, cross the street, and you were in the court. So it was a short couple of blocks' walk.

Then the women lawyers would always take us out, have an evening for the court, which was a lot of fun. We got to know some of them. Usually there was an event or two for the time we were up there. We wouldn't be up there too long, but I loved the ambiance of the Hyatt, and you'd run into people that you know from this place or that, or if you knew the governor or some senator or whatever, you'd have an opportunity to say hello, things like that. I enjoyed especially election night was kind of exciting up there, which happened once.

So it was a lot of fun. I enjoyed going to Sacramento. I'm glad they moved the court out of there to San Francisco as time went by, because I think we'd be really isolated up there. But San Francisco was just perfect.

The pulse of California is right there, and it's a much better atmosphere. So we'd go up there twice a year, and I always enjoyed going to Sacramento.

MCCREERY: Likewise, you'd sit in Los Angeles on occasion.

ARABIAN: Four times.

MCCREERY: Where and how would that happen?

ARABIAN: Again, we have, of course, our court building, and I would stay at the Biltmore Hotel, because I didn't want to drive back and forth. Let's say we were in session for three days or something like that. So they knew when I would come, and there was a lady there in charge of accommodations, and she'd give me a little bit of an extra room and maybe a computer, which is not something I used, but it was a little bigger than a little square room. And then the car would be there, and a five-minute trip to the court, park, and you were in business. So it made it a lot more comfortable, as opposed to driving for an hour each way and getting there wondering what's happening.

MCCREERY: It's an interesting system, to sit in these three places, mostly in San Francisco. How important is that to our court system, do you think, to actually show up in the other parts of the state?

ARABIAN: I think it's very important. On rare occasions they'll have a visit. We did Riverside one time, and another time some other places along the way for some commemorative. I think it's important. First of all, a number of us are located in Long Beach or the valley, or wherever. This is our home. It's just a different flavor in each of these other places, especially Sacramento. You're in the headquarters of everything up there. It's a lot of fun to visit and say hello.

MCCREERY: I wanted to ask you also about some of the administrative aspects of being on the Supreme Court, and other staff involved. These are things behind the scenes that most of us never hear anything about. Was the staff support sufficient for the incredible workload that you had?

ARABIAN: Yes. Five lawyers working for me was fine. The chief had eight, but one was really very much involved with administrative, as opposed to researching.

MCCREERY: I wonder, as you reflect back on your time, what else you might say about Chief Justice Lucas and how he managed to regroup this court over time, after that period of crisis that we talked about before, with the '86 election. How was he doing at putting things back together?

ARABIAN: First of all, he was personally friendly with Justices Arguelles and Eagleson. They go way back. I had a relationship with him because of the JSAB situation. So he wasn't winning friends and making new compacts. These were people that he could rely on, so that was a no-brainer. Once three went out and those three came in, that was a done deal. Then the ones who replaced, same thing, so it was very smooth.

MCCREERY: I'm thinking in terms of the outside public perception and rebuilding the state's confidence in the court system.

ARABIAN: That came to be as a result of the new harmony that was taking place.

MCCREERY: I'd like to talk a little bit more about Chief Justice Lucas as the steward of this organization, and I wonder if you could start us off on that topic by just describing his administrative style.

ARABIAN: Administratively, he had about eight people working for him, five research types, and administrative types and so forth. They were all accomplished people. Some of them had been there for quite a while, and so there was the responsibility of moving back to the original location and how that was going to look, and the changes that would be made and so forth, because we were in temporary quarters. So he had an unusual responsibility of seeing the transition back over there. That didn't take place until after I'd retired, because I went back to the dedication ceremony, and he was there also.

So from the administrative point of view, I thought it was a very smooth-running situation. They had the central staffs that were well organized and saw the work accommodated. Everybody had their own crew which interacted with the other crews, and so forth, so you'd work on getting a majority opinion. So I think he received high marks for his style and level of intelligence in how he handled his responsibility. He got along with everyone, and there was no friction like in the Rose Bird era. Everybody could have a laugh with each other, and we did.

MCCREERY: He accomplished a number of things for the whole state court system while he was chief, trying to increase state funding, and there was the Trial Court Delay Reduction Act, and some specific things that he was working on. What was your sense of his main interests, in terms of running and perhaps reforming the entire state system? Did you get much of a view of that?

ARABIAN: You get some view of it. You read what he has to say, and he gives a State of the Judiciary address, and there are discussions in the meeting as to, "Tomorrow we're doing this," or, "We're having a conference over there." But the rest of us were not that involved with much of that. But every chief justice has those responsibilities, to make the system work better, to get more judicial power on the bench, judges, and courtrooms, and things like that. So that just comes with the territory. It somewhat changes over time, but they're always burdened by it.

MCCREERY: You always hear this line that it's lonely at the top. Do you have much of a sense of Chief Justice Lucas' position in that regard, or who he could talk with?

ARABIAN: I think he was closest to Dave Eagleson, because they had the Long Beach connection from the earlier days. I think if he had a confidante, in my view it would have been Justice Eagleson. After that, everyone was on one level or another level, but I think they were fairly well equally viewed. But I think if I had to pick one off, it would have been Justice Eagleson, because of the background of the two of them and where they came from.

Is it lonely at the top? Yes, it's lonely at the top. His marriage dissolved along the way, and that created extra pressure for him, I'm certain. He remarried and has a happy life ever since, but those are some of the pressures that take place. Unless you're living up there with your family, you're a transient. You're flying up and back every week, in my case for six long years, and without a parrot or a cat to keep you company. I used to hear the ocean waves. Those were my companions at night. And so it is very lonely, if you're a commuter.

MCCREERY: You mentioned a moment ago the fact that Chief Justice Lucas had come from the federal court system, unlike most of you coming from the California Court of Appeal. Did you have much of a sense of

whether that federal experience played into the way he managed as chief justice, being that the two systems are substantially different?

ARABIAN: I didn't see any gear shifting. I think one job was like another job. You're a judge. There's federal law and state law. You always are conscious of federal impact, obviously, the Constitution and things like that, but there was no carryover from his other experience that I ever saw.

MCCREERY: And the rocky parts of the transition from the Bird Court had already passed?

ARABIAN: Three people came in, Arguelles, Kaufman, and Eagleson, and that was a big support group for him. It had to make him feel very comfortable. They were what he could call friends.

MCCREERY: In his own work as a judge, what was his approach, as you think of it?

ARABIAN: Like anybody else. You see the case. He would assign to himself those matters that he felt that he would want to handle, and he did.

MCCREERY: The record shows that he rarely dissented.

ARABIAN: That's probably accurate. I remember one case he dissented separately. I dissented, on a State Bar case, of all things, the famous Rolex opinion, as we later called it. The transgressing lawyer refused to turn a watch over to his client and came all the way up to the Supreme Court to argue with the watch in his pocket. He displayed it to us. I would have disbarred him, and so would Justice Lucas, and we did that in two separate dissents. That's the one that I remember. [Laughter] It was pretty funny. That's the one that comes to mind.

MCCREERY: To look at the flip side, how important was unanimity to his way of thinking?

ARABIAN: You strive for that in every case, if you can get there. Obviously, you speak more strongly if everybody's in on the same side of it. But you can expect disagreement, you can expect concurrence, you can expect sharp-worded dissent on some occasion, and that's just part of the territory. It lends to the growth of the law to have somebody else say, "Hey, I didn't see it that way, and let me tell you why." But you do try to get a unanimous opinion.

MCCREERY: I wonder, though, as leader of the court, would Chief Justice Lucas be trying to get a unanimous decision in certain cases, or were there instances where he would promote the idea of unanimity for the court to speak as one voice?

ARABIAN: Never. No. That's your business. You want to join, you join. You don't want to join, you don't join. They can suggest some things to you through the staff, and so you can buy it or not buy it.

The one case that comes to mind that I'm recalling, I believe was term limits. I think he authored that, if I remember it right, and Justice Mosk was the only dissent. Now, that was a case where I'm sure it was hoped that that would have been one voice, and it was almost one voice and that was the end of the game. But in reapportionment and term limits, cases like that which really strike at the whole system of the political world, you'd like to say, "Gee, I'd like it unanimous." But that's not saying that the author's going to say that to you. It's just more or less understood that this is something powerful.

MCCREERY: We'll return to those subjects. Those are kind of key areas. I was just wondering, just in terms of all of your colleagues, when they were trying to win over others to their point of view. You've said earlier that you were not one to walk the halls in search of votes, but did some of them operate that way?

ARABIAN: On occasion. I didn't believe in that. In the Court of Appeal it's more common, because you're snuggled next to one another. There are only three of you, and so the ability to communicate is easy, and it's almost expected. You go next door to Justice Danielson and say, "George, how about this?" and so forth. In the Supreme Court, I didn't really believe in that.

MCCREERY: Why?

ARABIAN: I respected the individual's right to do what they felt like doing, without me going down there as a ward heeler and talking them into it. I didn't believe that in the Supreme Court. If somebody did that, that was their business. On some occasion, very informally, if you're going to lunch with Justice Baxter, and he says, "Hey, what do you think about that?" That's normal. But to go down into another colleague's office and

say, "Gee, on this one I really need your vote. It'd be good for this or that." I didn't do that. That's my involvement with that subject.

MCCREERY: But is that just a matter of individual style?

ARABIAN: Sure. Sure. If you feel like doing it, it's your privilege. It's not one privilege that I wanted to take advantage of. I didn't believe in it. I said what I've got to say; you can join me, don't join me, that's your business.

MCCREERY: May I ask which members might be more inclined to operate that way?

ARABIAN: No, you may not. [Laughter] Because that's speculation beyond a certain point. I wasn't involved in it.

MCCREERY: Sure. I'm just trying to establish how things were. But fair enough, absolutely. Let's see. Oh, I know. You touched on the State Bar a couple of minutes ago, and, of course, when you arrived at the court you were still hearing the State Bar cases, and then in '92 came the advent of the State Bar Court. Just tell me a little bit about how it was before and after and how good a solution that separate court was.

ARABIAN: It couldn't have been a greater solution than the creation of the State Bar Court. Here you go to the highest court in the State of California, having served municipal, superior, and appellate. And what are we dealing with? We're dealing with direct jurisdiction over the Public Utilities Commission, which on rare occasion would show up. You have direct jurisdiction over death-penalty cases, which is appropriate. It would be nice if someone else could be involved in that before it got to us, but that's not the way it's drawn up.

And then we have bad lawyers. That's the bulk of the work, okay? "I didn't give back a Rolex watch, so the Supreme Court has to resolve whether or not I should be punished for this, or absolved." There was no shortage of State Bar cases, because of fee questions, or failure to communicate. They're up there, and we have nothing better to do than to sit there and listen to this business.

So to take that kind of a load — because the PUC was not a load, the death penalty's a huge load — and then to get rid of this area of the law, subject only to review in rare cases where it was something important, that's the situation. So it was a blessing to have that body of cases taken

away and have somebody else look at that first, and then we could review it at the end of the day. So that was a major improvement. I don't want to use the word, "It established greater dignity of the court," but let me tell you, that job was not one that we should have had the first shot at, and that's what finally took place.

MCCREERY: Of course, it allowed you to increase productivity in a lot of other areas.

ARABIAN: Absolutely. If you get a death-penalty case, somebody's tied up for four months, five months on a room full of documents. Here comes this case up here because somebody didn't do something that somebody didn't like, and the Supreme Court's got to get into the fight. These are street brawls. We're supposed to be doing championship matches. [Laughter]

MCCREERY: I wonder how you viewed the State Bar on the whole, as an institution.

ARABIAN: I thought they were great. I thought they did a fine job. It was new and it was challenging. They had the hearing office, and they had an appellate level, then it would come to us if necessary. But I thought they did a fabulous — they're still doing a good job.

MCCREERY: What about other aspects of the State Bar and how well it served its membership? Did that change much over the years?

ARABIAN: I don't think so. I think that's been pretty consistent. I think we have an outstanding state bar organization, myself. I think they stand up for what they think is right. You may not agree with them all the time, but if a group of lawyers thinks marijuana ought to be legalized, or prostitution ought to be okay, that's their business. I have my own view, but they're entitled to it. But outside of that, they have a huge administrative world to — mandatory continuing instruction and all those things. They have a fairly big job out there, over 200,000 or so lawyers? I mean, come on. That's a big body of work. I wouldn't want the job of president of that outfit, ever.

MCCREERY: Let's go to the topic of the Commission on Judicial Nominees Evaluation, the Jenny Commission. You've gone on record with some strong views of it, developed over the years, and so perhaps you could share those, keeping in mind that this was a body that had once found you

unqualified, because of an unusual circumstance, and had also occasionally found one of your colleagues unqualified.

MCCREERY: Then, of course, Janice Rogers Brown, later on —

ARABIAN: I know. They showed their ugly head more than two times, but that was outrageous.

MCCREERY: Tell me your rap on that.

ARABIAN: Okay. My view of that was, here you are, you haven't done anything wrong, knock on wood, and the governor's out of town. The lieutenant governor wants to get into the political war game and put your name in for elevation. That Jenny Commission was a political tool unlike anything that I can tell you. It was a star chamber set up for the governor's protection. That is all this whole thing was. Most states don't have a Jenny Commission.

The governor is supposed to have authority to appoint, if they feel somebody is qualified for it. Then you go up before the confirmation process and whoever wants to say something — when Chief Justice Lucas was having his hearing, one of these loud-mouthed lawyers got up in an open forum and just tore him upside down and sideways. He wanted to embarrass him in public, he got his day in court, and then Lucas was confirmed. Taking a shot is the American way.

But when you set up an organization, hand picked with what I will call unpaid stooges, which is what that Jenny Commission was in this early formation, then you are disrespecting the entire process. And so when the governor's judicial appointments secretary, who was out to protect the governor, has the ability to walk into the hearing where they are trying to resolve your qualifications, and they are in a position to disregard the mountain of favorable responses with the two inches of unfavorable and find you not qualified, the system pukes.

That's why I wrote about "Time to Jettison Jenny," because they were nothing but unpaid whores. Unpaid whores is all they were. And when the appointments secretary to the governor can go in there, that's like the commanding general, in my experience, going into a court martial hearing to infect the hearing officers, who may be majors and colonels under his jurisdiction, so that they have, quote, unquote, "done the right thing." That's called command influence, and it's prohibited in the military.

Now, that's how pukey it was. So here I am, an alleged champion of women's rights. I've done what I'm supposed to do. I go to work every single day. I show up in front of this pack of coyotes, and they have the nerve to call me unqualified, to simply pander to the whore masters who put them in office, then I have something to say. I hate to get back into that, but you've asked me, and they deserve everything that I've just said to you, and I put it down in writing at the head of this. "Time to Jettison Jenny." I did a review of all the states, and this is one of the few that set this little gimmick up so they could whack somebody.

And much later than me, Janice Brown. "Oh, we don't like her because she's a Black conservative, and she's got a smart mouth on her, and she can put acid into her pen," which is her privilege. I went to that hearing. I was disgusted. To see what the idiots of the State Bar had to say about her; it was pathetic.

Yes. And then, of course, they were famous for leaks, the so-called quiet commission. The minute they got out of that room, the phones were buzzing. "Oh, we just found Arabian unqualified. We just dinged Janice Brown." This is what they were good for.

Now, I will say as time has passed that I haven't seen that bad an odor in recent times, but from Arabian to Brown, that's a pretty good span of time. That's what was going on, and you can calculate the years. Now, to their further discredit, how is it that this unqualified Superior Court judge then gets approved when life has changed and times have evolved and some of the whores are gone, that now he's well qualified? And she goes clear over to the federal system, and she's qualified. There's something wrong, not with the candidates. There's something wrong with the whores in the system, and I have no shyness about calling them what they have been in those instances, because that's the name they deserve.

MCCREERY: In the case of Justice Janice Rogers Brown, she had, of course, been Governor Wilson's legal affairs person.

ARABIAN: Yes.

MCCREERY: Did you know her? I know you didn't serve with her on the court itself, but did you know her at any prior time to all this?

ARABIAN: No. I'm sure I've met her someplace, said, "Hello, how are you doing?" and that was it. I never had a cup of coffee with her; I wouldn't know her from the next person. I just knew of her.

MCCREERY: But your view of this review of her qualifications was that it had no basis?

ARABIAN: It was pathetic. I mean, forget basis. It was a pathetic set up, just like mine was, okay? And to their discredit, knock on wood, we're still standing. She's still sitting. [Laughter]

MCCREERY: Exactly. Governor Wilson chose to ignore this rating and appoint her anyway.

ARABIAN: Absolutely. That rating is worthless, totally done by a pack of fools that have a mission in life, and that's to keep somebody like her off the higher places, and they did the same to me. In my case, it's to protect Jerry Brown, because next time he left town to run against Reagan, maybe Mike Curb would put my name in again. This was their fear. So we're going to cut his throat right here and now, and the governor can say, "Oh, well, he's not qualified. Forget him." That's what this was all about. It was a political game.

MCCREERY: What about the governor's power to appoint judges? To what extent is that getting in the way of this, aside from other matters of this controversy?

ARABIAN: The governor can appoint anyone the governor wants to appoint. They don't have to listen to this stuff. But it's a little insurance policy for them. That's all it is. It's a little guillotine in front, if they want to get rid of somebody. The governor appoints anybody. They have the power to appoint. The Jenny Commission doesn't have power to appoint, and nobody else does. That's it. You want to appoint somebody that everybody said is not qualified? You can still put that person in. That's the governor's power. This is just a political scheme that they created, a number of states, to do what we just said.

MCCREERY: Would you still favor abolishing the Jenny Commission?

ARABIAN: Yes. I think it has absolutely no place in the system. The governor had fifty-eight places to find out who is running and what people

think of them and what the ups and downs are without this little hit squad. Believe me, the State Bar, everybody's got something to say.

MCCREERY: It does, though, kind of lead into this whole question of the independence of the judiciary, in a way, because there's always so much speculation in the popular press, for example, about appointees that are being considered, and what's the latest litmus test, and all of that. What's your view of how this system can work the best, for the good of the judiciary?

ARABIAN: Look at the present governor [Arnold Schwarzenegger], who I have to this day not met. He's appointing from both sides of the aisle. You can be 50 percent Republican, 50 percent whatever. He's picking people based upon not their political persuasion but their qualifications, which is what you're supposed to be doing. Again, I haven't smelled any smoke lately from this inside operation, because maybe they've learned their lesson a little bit. I doubt it, but they may have.

So the idea is, who is this person? There is no litmus test. Do I expect them to perform in an admirable way? If the answer is yes, I can appoint. Simple as that. The governor's duty and responsibility. George Deukmejian when he was governor said, "One of the most important reasons why I ran was to appoint judges." They consider that their legacy. So when you go into a legacy, that's yours. If somebody gets in trouble under your legacy's aegis, you're the one that they're looking at, "How did that ever happen?" Well, they don't want that.

MCCREERY: All right. But now what about retention elections? This is where we differ so much from the federal system, and at times those have been very controversial.

ARABIAN: It's an outstanding attribute to have the retention system, because I have had seminar sessions with judges from other jurisdictions, especially Texas, where in order to keep your office, you've got to go out and raise funds, because there's somebody else out there raising funds against you. So you've got to go to the trial lawyers, the defense lawyers, the insurance companies, and so forth. That lends itself to a problem. When you don't have that problem, by the retention system, it's very difficult, unless somebody's asking for trouble, to get kicked out. Rose Bird and company were an exception to that whole thing. But they were running against themselves.

In a situation where you're in a lower court, and people can run directly on you, that's where the money problem gets to be very bad. It's rotten in some states, to be very frank with you. So we are blessed.

MCCREERY: Another facet of our system that exists in other states, but certainly not all of them, is the provision for ballot measures to be voted on by the citizens of California. Oftentimes the ones that pass make their way up in challenge to the Supreme Court. We'll talk about a couple of those in particular, but I just wonder, what are your views of the initiative process?

ARABIAN: I think it's the American way of life. If you have enough people to sign signatures, and you want to put something on a ballot, be my guest. If it's constitutional and it's challenged and is upheld, wonderful. That's how you change the law. You don't have to sit down and look to an assemblyman or a senator all day long. You can take matters into your own hands. If you want to do property-tax restrictions, well, okay. Thank you, Howard Jarvis. That's the beauty of the system. Now, if you do something real crazy and it passes, and then it goes up and gets challenged, well, there's a protection for that. It's called knocking it out. [Laughter]

MCCREERY: But it makes it fairly easy for the ordinary citizens to change the Constitution, and it happens frequently.

ARABIAN: I don't think so. Unless you can give me statistics on that, I don't think you change the Constitution too quickly around here. Some things — I was surprised recently here in the city. They extended the term-limit provision, which I thought was going to die, because most people hate the forever politician, but they got a few more years added on. When it came up to the statewide situation, you saw what happened. Get Willie Brown out of office is all that was about. But down here, they seem to be happy with their city council, so they let that one slide by. I was personally surprised at that.

MCCREERY: But having constitutional amendments, when they happen, come up by ballot measure. One of the things that does is deprive the Legislature of its traditional role of bringing issues forward to act upon. Of course, a lot of our themes today have to do with this tension between the Legislature and the judiciary, vis-à-vis the will of the people.

ARABIAN: I don't find that a bad idea, to have an initiative process, because the people are the ones who are being served. Whether the Legislature wants to take care of it or not, that's another story. But if on those rare occasions they feel strongly enough about something, the death-penalty this or something that, that's their right. I love it.

MCCREERY: Or if the people feel the Legislature is not acting in an area where it should —

ARABIAN: Then they have an opportunity to go "take the law into their own hands," quote, unquote. That's fine with me.

MCCREERY: Oftentimes we see these measures pass, but then we find that the language itself becomes subject to a lot of scrutiny, because it's poorly drafted, or —

ARABIAN: That's where the problem comes. And if it's violative, then it's going to get knocked out. That's part of the flaws of the process.

MCCREERY: You can appreciate that, because you've made a career of paying careful attention to language, haven't you?

ARABIAN: That's what it is. If you put the wrong word in there and it's going to violate some other provision, it's not going to stand up, and that's that. You have to be smart enough to do it right. [Laughter]

MCCREERY: Let's talk about a couple of those things that originated as ballot measures and eventually came to your Supreme Court. One of them had been passed back in the late eighties, and that was Proposition 103 on auto insurance. It came up to the Supreme Court in a series of cases, and you were not there for the first of those, but you were there to vote on some of the later ones.

Basically we can summarize by saying that the California Supreme Court upheld the will of the voters in that case and really didn't show itself to be a particularly strong supporter of the insurance industry. Was that a surprise in any way?

ARABIAN: No. My memory of all that is you call them like you see them. If it was proper, fair, and for the will or the health of the people, fine. Who it hurts or harms is on the side of it. What is for the best interests, and was

it done properly? If it was, it's going to be — and the following cases would fall into it. So that was not a big deal for me.

MCCREERY: It's often the case, though, that people are trying to look for patterns within the Lucas Court or whichever court it is, and it was often said that this court was pro-business, in general, a so-called friendly climate for business.

ARABIAN: What's wrong with that?

MCCREERY: No, nothing. I'm just saying that the —

ARABIAN: I'm part of that cabal, okay? I think if business is good and they need protection, then they get it, okay?

MCCREERY: I was simply noting that this was a little bit of an exception to that, where the auto insurance cases came up and really the court stood next to the regulators in those instances.

ARABIAN: Again, you call them like you see them, and the chips fall where they fall. That's it, and hopefully, it's for the betterment of the community and society. That's the bottom line. I didn't go up there and say, "Who's going to win, who's going to lose? Good-time Charlie's got the blues." Charlie could be anybody. [Laughter]

MCCREERY: We touched on the subject of terms limits, Proposition 140, passed in 1990. Let's return to that one for a moment, because it's an interesting set of circumstances, isn't it? This came up to you in the form of *Legislature v. Eu*, Secretary of State March Fong Eu,[19] and the court voted 6–1 to uphold it, with Justice Mosk dissenting. Talk a little bit about how you viewed that issue, if you would.

ARABIAN: The words that appeared in the opinion, if my memory serves me right, were "an entrenched dynasty." This was a Chief Justice Lucas opinion. And I have to say, looking back at that later on, I don't remember seeing that expression along the way. I think my eyes would have caught it, because I'm remembering the words as best I can now. But in the final opinion the words "entrenched dynasty," as I recall it, appeared, which was taken as a real personal affront by the Legislature, who, of course, was

[19] 54 Cal. 3d 492 (1991).

hoping that this would never be upheld. There was a lot of bitterness, as you might imagine.

I remember [Senator John] Vasconcellos from up north told people, "You broke my heart. You took me out of my life," and this and that and the other guy. I was at an event where Senator Ken Maddy from Fresno — who passed away — he used to hug and kiss me; he didn't want to shake my hand after that went down. It was really — it was bitter. Until the passage of some time, like the State of the Judiciary address, it was really cold.

There were other scenarios that were floating about as to how deep this whole thing went, because if somebody had a girlfriend up in Sacramento and was leading a separate life and had some wife and family down in the south, that was going to break that whole thing up, unless he got to be a lobbyist. There was a lot of chatter going on about the impact, outside of the legal side of it. But I think it was a fair conclusion that they wanted to stop Willie Brown, "the ayatollah of the Assembly," continuing on for more time.

It only passed by three or four percentage points. A lot of people liked it the way it was. They didn't want to go out and have to start new relationships and raise money for somebody else out there. So it was a major-impact case, obviously. But the words "entrenched dynasty," that was like putting a knife in there and twisting it, later on. And as I say to you, I don't recall them until later on. It's just two words that I think would have jumped up at me, but who knows?

Anyway, it wasn't that it wasn't true. They were an entrenched dynasty. That's why this whole thing came to pass. I mean, how long is long? So if you've been up there for twenty or thirty years, and you're looking for some more, well, maybe it's time to say, "Take a hike." And that's what that whole thing stood for. But the relationship between the judiciary and the Legislature was really sore.

I may have told you the story about seeing Willie Brown at an event after that, and I said, "Willie, don't fret. There's life after the Legislature." He says, "How's that, Armand?" I said, "You can run for mayor of San Francisco." He says, "You really don't like me." [Laughter] A couple of weeks later he was running. As we know, he did a couple of terms. [Laughter]

MCCREERY: Yes, and he sidestepped the act of actually being termed out by getting out and becoming mayor. But he saw the writing on the wall, of course.

ARABIAN: Yes. Well, that was it. But he did another eight years hanging out. Jerry Brown, I notice he's still not termed out. He's still going at it. Some people are addicts. They've got to have the whiff of the voters' election ballot.

MCCREERY: How well has it worked, in your opinion, if people do cycle into other similar jobs, or other jobs in state government?

ARABIAN: I can't say that it's bad, because if they're talented and that's their desire in life — if you're a poet, you want to keep writing poetry. I don't have a problem with that. But I think there is a time when enough is enough is enough. I think that people had a right to say, eight years is enough, or twelve years is enough, whatever that is. So I voted for it, and I was happy to vote for it. It had nothing to do with Willie Brown, it had to do with the system.

MCCREERY: Should there be term limits for judges?

ARABIAN: Well, there are, like in New York State. At, I think it's seventy-six, you're out.

MCCREERY: Oh, an age limit.

ARABIAN: Age limit, yes. That's your term limit, age limit. If you hit seventy-six, the chief justice of New York is going to have to step down in a couple of years, because when you hit seventy-six, you're history. That's the way that they built that thing. They don't leave you up there till you're ninety-six years old on the Supreme Court of the United States. They say, "That's long enough." I think it's a great idea. I like that idea. I have no problem with that idea.

MCCREERY: But nothing like a limit of six years, eight years, twelve years, like the Legislature has?

ARABIAN: We have terms. But in New York they have a year-age term. They don't care where you are in the middle of your period of years. When you hit that seventy-sixth birthday, you're gone. I like that. That gives a person enough running time to do him — the chief judge, there's a wonderful woman in charge, I think Judith Kaye, if I remember right, a terrific chief for the State of New York, where I'm from originally. But I like that

idea. I'm seventy-two now. If somebody tells me, "You've got four years left," I have no problem with that. I don't.

MCCREERY: What about the system of the federal judiciary, where they do all have lifetime appointments. What's your view of that?

ARABIAN: I think generally speaking, it's worked well. I think it can lend itself to abuse. I think the power factor there can be somewhat of a problem in certain cases, but generally speaking, I don't see that as a problem. I think they're dedicated. They go there, and if they want to go to senior status at a certain point, they do that. If they want to return, they still get paid, so it's a lucrative situation, actually, financially. But that's fine with me. I have no problem with that. If they want to change that they can change it, but I think it's working well.

MCCREERY: But you say that a system of lifetime appointments is fine for the federal system, but you like having the retention elections —

ARABIAN: I do. They could make it life here, but I think it lends itself, in a court of this size, to problems, and I think those problems can be alleviated — with the system that we have — better. If somebody gets out of line, they can run on them and say, "This is what this judge did." Okay, well, there's term limits for you. It works out.

MCCREERY: I'd like to touch briefly on the matter of reapportionment and redistricting as it came up to you while you were on the Supreme Court. This is something that comes up every so often in California, and it certainly had before with the same kind of solution. The Legislature in this case had a reapportionment plan, Governor Wilson vetoed, and then the recommendation was for a panel of judges to sit as special masters, and so on, so the California Supreme Court did adopt that.

ARABIAN: We appointed some masters, yes, and they did a wonderful job. They worked real hard at it. There were problems. Whenever the political structure is in charge of taking U-turns around certain areas to get more votes of support and so forth, that's what reapportionment fights are all about. So they're not an easy thing to resolve, because it's out there.

MCCREERY: Yes. I didn't know if you were particularly interested in this issue, but we have a system now with very well-protected, safe seats, and

that's part of what this was trying to address, and that's still a very hot topic today, isn't it?

ARABIAN: Exactly. I think the only solution is not to face the battles that are the ones that we see. I think there's got to be a situation where it's done by boundaries that are established without your involvement. The City of Pacoima has "from this street to that street, and that's involved in District X," okay? You don't carve pieces of Pacoima up because they help you and hurt somebody else. That to me is the fairest system. Do it on a geographical outline, and stop the chicanery, because I think chicanery stinks.

I think it's a disgrace how they carve up little snake tails and things, when you see how these jurisdictions run. I think it's outrageous. The simple answer is, this is Van Nuys, and the votes are in a unified area here. You want to run in there, be my guest. That's it. It makes it simple and fair for everybody, and you take the human element of chicanery out.

MCCREERY: May I ask how you think Pete Wilson did as our governor in the nineties?

ARABIAN: I thought he did a fine job. I thought Deukmejian did a fine job. These are quiet rulers of a government. They do what they think is right, and they have a clear sense of what is right, et cetera.

When you get to Gray Davis, who I like personally, and you say, "Illegals ought to have driver's licenses," that kind of a thing falls out of the mainstream of California thought, and you're looking for trouble. Those two other governors never did anything, to my memory, that was remotely that controversial. And all of a sudden you're [Governor Davis is] out of office. Well, what did you expect? Okay?

This is what I call a turnip-truck situation. You've got to know a little bit more than falling off one of those, and if you're hysterical, you don't deserve to be there. I love him personally. I think he's a wonderful person. But whatever was going on that allowed him to get booted out of office was off the charts, as far as I was concerned, because he's a good person, a fine person.

MCCREERY: It was very tied in with the energy crisis, of course, too.

ARABIAN: Yes, that was in the middle of it, too. But there are certain things the public will not buy into very quickly, and he was working that end. It doesn't work.

MCCREERY: What are your thoughts about electing Arnold Schwarzenegger to take his place? Another unusual move from the citizens of California.

ARABIAN: I thought that Ronald Reagan had set the stage for the actor type to come in and do it, and he was, to me, just the best. I just thought he was great. I think part of that legacy helped Governor Schwarzenegger, because somebody said, "We had Ronald Reagan. Look what a job he did. This guy's got a brain. He's been around business," and so forth. The star power was there, and the non-star power was his opponent in the office, and bango, that's what happened.

To his credit, I think he's taken gutsy stands. He got whacked at the polls on a couple of them, because he alienated a lot of entrenched folks, and he learned from it. Then he admits his mistakes, and he goes on. And judicial appointments, I think he's done a great job, from the ones that I'm familiar with.

MCCREERY: He's had his first appointment to the Supreme Court in Justice Carol Corrigan. Do you know her, by any chance?

ARABIAN: I've met her. She seems like a very nice — I've met her at the Italian lawyers' annual gathering, a very, very nice person. I've never sat with her to speak on anything, but she seems to be very accepted by the colleagues. That says something.

MCCREERY: I wonder, while I'm thinking of it, do you know Governor Davis's appointee, Justice Carlos Moreno?

ARABIAN: I have met him a number of times. He's just a very social, nice person, and we respect each other just on the record, because we really don't know each other personally. I've met him maybe three or four times. He seems to be doing a good job. He speaks his mind, which is what he's supposed to be doing.

MCCREERY: I wanted to spend just a few minutes, if you're willing, on a case that the Supreme Court ruled on while you were there, or actually just right after you left, but you were a return appointee by the Judicial Council. That had to do with upholding California's parental consent law of 1987 — that had never actually gone into effect — but saying that minors needed to have parental consent to obtain an abortion.

ARABIAN: As I recall, that was the one that was flipped over.

MCCREERY: After you and Justice Lucas left.

ARABIAN: Judge Lucas and I were on one side, and then when we both left it went the other way.

MCCREERY: That's part of what makes it so interesting, and it's a very hot topic always, generally speaking.

ARABIAN: I don't remember all the minutiae of it now, but as a parent I think there's a duty of control and an obligation to safeguard a child. If you think that the child ought to be able to run down to somebody to create an abortion on their whim without a parent knowing about it, that's not the way I call that shot.

The hard side of that is, if they don't get the consent, or they don't want to go through the agony of the parental confrontation, they go down to some abortionist butcher shop someplace, and they may lose their life. That's the other side. But it's just a matter of how you look at the parental responsibility in life, and I think that a parent is, by definition, someone in charge of a child until they become emancipated. So that's the way I look at that. Is that conservative? Well, I guess it is.

MCCREERY: This is a topic that any of us can view on a number of levels, and it is always controversial. Clearly, the court was split on it, voting 4–3 both times, first one way and then, as we said, after you and Justice Lucas retired, hearing it again and voting also 4–3 the other way.

ARABIAN: Well, reasonable minds can differ on one of those. If you're a civil libertarian you say, "Oh, no, one's right to control one's body is absolute." If you're an adult, I don't have a problem with that. In fact, I upheld that in another case. But when it's a minor it's another story.

MCCREERY: When the court heard that case again and decided it the other way after you left, this was, of course, based upon a right to privacy, which is a very strong aspect of our constitution in California, stronger than in the federal constitution, as I understand it. That leads me to ask you to reflect on those areas where the two constitutions differ, and as a justice of the Supreme Court, when do you look where?

ARABIAN: I think the general answer is, if the state constitution has more protection than the federal constitution, I think we have a duty to uphold the state constitution. When the feds outdo the state, then that's

a no-brainer. They are the highest in the land, so that's basically where I would draw the line.

MCCREERY: Privacy is one example where California has for a long time had a different standard and perhaps a stronger protection.

ARABIAN: Privacy is privacy, but a minor is a minor, okay?

MCCREERY: Okay. The related larger area of independent and adequate state grounds, when to look to the state constitution versus the federal — that was an idea, as I understand it, that had kind of a resurgence, and I read that Justice Mosk was very interested in this matter. I wonder if you recall him ever talking with your colleagues about that matter.

ARABIAN: No, but he was well known for it, and he'd articulate it on his own terms. He wouldn't have to come — if it was in the conference room, he could certainly say, "I think this overrides that," or whatever, but we didn't get into a debate about that. That was again how you viewed whatever the question was, and he didn't impose his will on anybody. If he didn't like it the way you had it, he'd do it his way, which is what we expected.

MCCREERY: He wrote an essay about state constitutionalism back in '85, I think it was, and took the position that both liberals and conservatives should support stronger devotion to the state constitution, maybe for different reasons, but he felt it was an area where both sides could get together.[20]

ARABIAN: He was strong on this topic, and I was proud of him for having a deeper interest than most people in the topic, and he argued his argument. Not a problem.

MCCREERY: I wonder if I could ask you to talk just a little bit, to whatever extent you wish to, about the U.S. Supreme Court. We've touched on it a little bit, and one or two members that you may have known and so on, but I just wonder how you viewed it while you were sitting on the California Supreme Court, what was going on there, and how much it was a reference point for all of you?

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[20] Stanley Mosk, "Whither Thou Goest — The State Constitution and Election Returns," *Whittier Law Review* 7 (1985): 753–63.

ARABIAN: In what you're doing, they were not on my scope of vision, okay? We have a job to do on the problem in front of us. If it has some federal impact, it's going to work its way up, so be it. Was I comfortable with certain members of the court being at the high court? Yes, I was. Was I uncomfortable with others? Yes, I was.

On the whole, however, the Rehnquist Court was doing things my way, so I didn't have a problem with the [U.S.] Supreme Court at all. I'd met him a couple of times. I have a photograph with him. Justice Scalia, he just turned seventy-one the other day. Justice Scalia and I, I think, have a lot in common, by both of our agreements about that, and, of course, I went to Armenia with him for a week, so I got to know him pretty well. Sandra Day O'Connor I've met. She seemed to be a wonderful lady. I met one or two along the way, just in passing. That's basically it.

MCCREERY: How did Chief Justice Rehnquist do in his leadership, in your opinion?

ARABIAN: I thought once he got the votes that would uphold his side of life, I think he had a wonderful term of office. I understand near the end he had some physical problems, in some recent writing. But I thought he ran a great court, and they did the thing the right way. They weren't going to give the country's rights away just on somebody's whim of an appeal someplace. They would take that appeal and do it right.

MCCREERY: Now we have Chief Justice John Roberts, and Samuel Alito as a new member. What does that change portend?

ARABIAN: I think that those are outstanding appointments, that if this president is known for nothing else he will be known for those appointments. I've met Justice Alito. I've heard Justice Roberts up at Pepperdine Law School. They're my kind of guys. I think they're outstanding choices, and they're going to do a great job.

MCCREERY: How much of a power shift is it, in your opinion?

ARABIAN: It's certainly strengthens the "law-and-order," quote, unquote, side of life, I'll tell you that. And law and order is important to this country and to me.

MCCREERY: Anything else about the U.S. Supreme Court, its trends?

ARABIAN: No. I just wonder how somebody like Justice Souter got to be on that high court, but that was kind of — he was the 105th up there, and I'm the 105th down here, so we have that in common. That's about it.

MCCREERY: But what makes you say that?

ARABIAN: He had no track record known to anyone. He just physically came out of the woods up there. Unusual. Clarence Thomas, Justice, they beat him up real good, and Souter didn't have that kind of a beating. I was surprised.

MCCREERY: The court during your time was noted for overturning some rulings of the earlier Bird Court in areas related to breach of contract and some of these kinds of things. To what extent was that discussed as a goal to be met?

ARABIAN: It was never discussed as a goal to be met. But if in the prior regime — I use that word gently — death-penalty cases were being overturned for the personal whim of the chief justice and a couple of her colleagues who thought that was the way to go, that was not probably going to be tolerated. It wasn't. We were known as a pro-death-penalty court because these cases had been fairly tried, and that was that.

If they had a definition of great bodily injury in a rape case that didn't fit with common standards, well, that was going to get overturned. So it wasn't a conscious goal. For example, they sometimes say the [U.S.] Supreme Court salivates when they see some of the Ninth Circuit cases come up there, written by certain people. We didn't have that.

But if the cases came to us that had a result back a few years before or whenever it was that just was out of tune with reality — if you stab a person fifteen times and you can't find enough evidence in there to have a death penalty, there's probably something wrong with you, not with the case. That's one of those things. But that didn't happen all that often. There was no conscious agenda to say, "Oh, well, this was the Rose Bird Court. Let's take care of business." That was never out there.

MCCREERY: Let's reflect for just a few minutes on managing the workload over the time that you were there. I wonder how you viewed the productivity of this court over the six years you were there.

ARABIAN: I thought it was excellent. It was a steady flow in and a steady flow out. At the end of the year somebody would do a review of the year's work and who did this and who did that. I think I was always rated as

a high producer, not that many dissents. There would obviously be some variance between the high producer and the low producer, but it wasn't really vast. Somebody might have a lot more dissents than others and that sort of thing, but the work was steady and you had to get your share done, and we did. It was not considered an onerous load. It was considered a responsible production, is the way I would term it.

MCCREERY: How about talking about areas where California law was developing? Again, I know all your work is case-driven, but I'm just kind of thinking of the notion that California had historically been a leader in certain legal areas.

ARABIAN: For example, what comes to mind are the informed-consent situation, and the force feeding, personal autonomy. Those were cutting-edge questions, and so if you resolved them — I think they were both unanimous opinions of mine — that would set the standards for other places. They'd say, "Here, California did this. They said you don't have to force feed a prisoner. We don't have a law like that, but it makes sense." And so we would be cutting edge in certain things. Those are the ones that come to mind in my own desk.

MCCREERY: Yes, there are a lot of new areas, genetic research, and stem-cell research.

ARABIAN: Oh, yes. *Moore v. Regents*. What are we doing with body parts, that sort of thing. So I thought we were right there.

MCCREERY: Let me ask you — and this is a good segue into your retirement from the court — but let me ask you about the role of alternative dispute resolution, as it was evolving.

ARABIAN: In '96 when I left, it was, of course, blossoming along. In earlier times I think there was a lot of skepticism about whether this would all work out, and the groups started to form up. I think once it caught on, it was like a snowball going downhill. It just started to really pick up weight and speed, to the point where today I don't think the courthouse could survive without it, honestly. Even with it, they're backed up. Certain courthouses don't have the funds with which to complete the courtroom.

So it was a blessing to society that this whole thing developed, because you have the experience of retired judges and justices. You have the

experience of lawyers who have expertise in certain areas, all helping to resolve conflict. So it was really due, and it came at the right time, let's put it that way. It was a meeting of different forces.

MCCREERY: What did cause it to catch on when it did and have this snowball effect?

ARABIAN: As I said, there was a shortage of judicial resources. If a judge is sitting down there and he's got fifteen lawyers that are on some case, and they're going to be bashing it out, he hasn't got the time or the resources with which to do it. So they say, "Okay. This is going to go out, I'm ordering it out to mediation," and if the mediator can solve that case with fifteen of those lawyers, or a discovery referee is going to take testimony for a year and a half, how else is the court going to survive without that asset? They can't. It's impossible. I've had two discovery fights that went on for a year and a half each, with all these lawyers.

MCCREERY: Here in your private practice?

ARABIAN: Right here in this office, going around the country taking depositions. Without that, the cases can't get resolved. They finally settle out, because all of this went into it. The courthouse can't do it. Then the arbitration is a whole separate judicial system of getting rid of cases, and you've got extra judges all of a sudden, because they're working and not sitting home or going fly fishing. So that's made a huge difference in the ability of the court to stay afloat.

MCCREERY: We had talked earlier, perhaps when you were a trial judge, just about the fact that in reality only a few percent of cases go to trial, and there may be any number of measures taken in between. But I wonder how you saw this developing, given that you had been a trial judge for so long. Where did ADR fit in?

ARABIAN: First of all, you have different sides of the cases. Criminal cases are going to get resolved by a trial or somebody's going to plead out, so that's a whole different side of life. Now, in the civil side a lot of them are going to get resolved without going to trial. Some are obviously going to go. But if you can assist the process of resolution by having a discovery referee taking all these pieces of information so they can get to a point of an agreement, or as a mediator sometimes you settle one and you've settled three cases, so they're

no longer up at the courthouse, okay? You've eliminated the appearance of eighteen lawyers coming in from all over the United States. It's such a blessing to the situation that — some escape hatch had to come up, and they were smart enough to come up with this escape hatch. Otherwise it was going to crumble. You would see court delays that — it would be terrible.

MCCREERY: Is there any downside to this development?

ARABIAN: No, none. There are those who'll say, "It's discriminating against the poor, because they can't afford to do this or that." Well, they can argue all they want. In other words, the private resolution, as opposed to someone who can't afford that, is the only criticism.

MCCREERY: How do you answer that criticism?

ARABIAN: Hey, everybody's wife doesn't wear a fifteen-carat diamond ring. Everyone doesn't drive a Rolls Royce. In life, you afford what you can afford, and if you can't afford it you don't afford it, and you stay in the public system. So if someone has a way to resolve their problem, it's none of your business how they resolve it. That's their business. You resolve yours your way on the public tax dollar; they'll do it privately on theirs. The bottom line is, you get rid of a case. That's the answer to that.

MCCREERY: That's for individual private clients, individuals. What about for business interests?

ARABIAN: It's more so for the business. Those are the ones that are utilizing this. They can afford to utilize it. They're the ones that utilize it. Why shouldn't an insurance company hire an arbitrator or several arbitrators, with the consent of the other party, splitting the cost whatever it is and getting rid of their problem? Is something wrong with that? I don't think so.

MCCREERY: How much did that change things?

ARABIAN: I can't tell you from inside the court, except to tell you the courthouses are still over there, packed up. But I can also tell you the judges are retiring left and right. Lawyers are specializing as arbitrators and mediators, because they see the need for their services outside the traditional role of a lawyer.

So supply and demand. There's plenty of supply, and the demand is there, and if you've got the talent to be fair and administer things just as if you were wearing a robe, so be it. That's what's going to happen, and that's what is happening.

MCCREERY: As you say, these are experienced judges who bring —

ARABIAN: I'll only speak for the judges, but I know the lawyers are branching out into the alternative dispute resolution. It's getting to be a specialty. I made Super Lawyers for Southern California, 2007. They have me under the category, arbitrator–mediator.

MCCREERY: Maybe that is a good segue into your own retirement. We talked in an earlier interview about how you decided the timing of your retirement and what some of those factors were. But let's talk a little bit about your private practice since you left the Supreme Court in 1996.

ARABIAN: I outlined all of this for an issue of *The Bench*, which went to 2,500 judges in the State of California.

MCCREERY: Yes, I have that here. Thank you.

ARABIAN: It's been an exciting decade, to put it mildly, a number of honors, a number of interesting assignments, some major criminal defense cases, including Suge Knight of Death Row Records, and Jesse James Hollywood at the present time, and the LSAT Test Theft, and things like that, which are prominent and they're notorious. So it's been very fun-filled in a way. It's been very rewarding, and going into the eleventh year, if others can match what's happened to me in my last ten, I'd like to know about it.

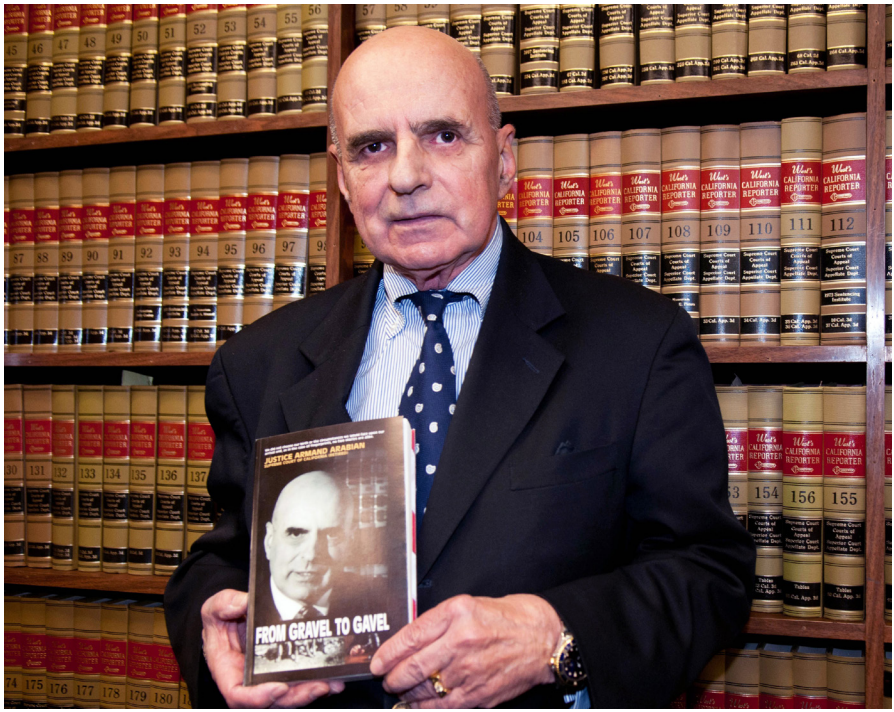
MCCREERY: You told me that when you were getting ready to retire, you thought about it and decided to affiliate with American Arbitration Association.

ARABIAN: They sort of introduced themselves to me. I interviewed with them. They interviewed with me, and it seemed like a pleasant fit. I'm AA, they were AAA. That seemed to be good. [Laughter] So it was pleasant.

MCCREERY: But do you actually get business from them, or how does that work?

ARABIAN: I'm on their roster and I get business from them. Law firms contact me directly. Sometimes judges suggest that I look into the situation for them. So it's from a variety of places. I'm not beholden to one place. Plus, unlike many of the retired judges, I am a practicing lawyer, so there's a whole different side to that, expert witnessing and things like this.

MCCREERY: Tell me about some of your other things that you're doing.



ARMAND ARABIAN HOLDS A COPY OF HIS BOOK IN HIS VAN NUYS OFFICE, JANUARY 10, 2011.

Photo: Thomas Wasper

ARABIAN: I was teaching appellate advocacy at Pepperdine, but that got to be a little strenuous, about fifteen weeks at a time, the preparation, the driving and all that. I loved doing it. The students loved it, but it just got to be real tiring. I enjoy the criminal defense, because it keeps my blood pressure up to a nice level and it's challenging. Criminal law has always been my first love, and most of my time was as a criminal-court judge in Superior Court. So I do enough of that, as much as I feel like doing.

Discovery referee — as I said, two cases took up about three years of my time here, but that's really trickled down. There's not much of that going on at the moment, for me. Expert witnessing — I've done a few of those, sometimes on indemnification, sometimes on whether the lawyer performed, and so on. But that's not that often.

Mediation is the most prevalent conduct or activity, and, of course, you've got to have both sides agree to a resolution; otherwise, you don't

have a completion. So that is a bit of a task. I am writing a book, which I hope to have out one of these days.[21]

MCCREERY: Can you talk about that just a little?

ARABIAN: Basically, it's just, I hope, an inspiration to any immigrant person, or anybody, but especially to the issue of an immigrant family, who will ask, "My family came here, let's say from Mexico, and here I am trying to be somebody." I want that person to be able to look at this book and say, "Here's a kid who was born on the sidewalks of New York, and he went all the way to the California Supreme Court. He did these kinds of things. If he can do that from the ashes of a genocide, why can't I do that?" That's what that's all about.

The honors accumulated and piled up. The Fernando Award, which is for me a major thing. The Ellis Island Award was huge. I want that to be lined up so that reader can say, "Oh, my gosh. Look at the targets and goals I can set for myself. Somebody did this ahead of me, and if he can do it I have a shot at it." I always shoot my arrow up high. It may not hit the star, but it could land on the moon. So that's really the reason I'm putting that scenario together, with basically a pretty good outline of what went on between the beginning and before the end. That's the reason. I'd like it to be a diary outline to inspire someone to say, "Gosh, I can do it. Somebody did that. I can do it, too." That's what — I want it to inspire somebody.

MCCREERY: You've done a lot of writing, but I wonder, how does it compare to work on a memoir?

ARABIAN: The memoir's fun, because I have a lot of resource information. I've kept volumes of scrapbooks on anything that was written or said, lots of photographs, so in this summary that I did for the [California] Judges Association, it forced me to go back through all those things and kind of pick off the highlights, and that's what was kind of fun to do. It took a little time to do it. But that will ease the task of finishing up what's left, from the time of retirement to present time. But as I look back on it, I was fascinated by myself. Holy mackerel, that was a pretty good run! And if God gives you strength, you keep on trucking, but that's for another day. That's why I'm doing it.

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[21] Armand Arabian, *From Gravel to Gavel* (Los Angeles: Flagship Books, 2011).

MCCREERY: What's the timing of your memoir? Do you have a deadline for yourself?

ARABIAN: I'd love to have it done by the end of the year. If I can get enough time set aside, now that I have the outline, I think I can finish it up. I've got a couple of publishers who keep calling and want to know what's going on. But it's basically, from now till the end of the year I'd like to get that finished. I'm going to take a couple of cruises and take a little breathing time off, too, just enjoy life a little bit.

MCCREERY: Yes. You are still working quite a bit. You mentioned all these different things. Do you envision cutting back at this point?

ARABIAN: No. It's at a nice flow right now. It's not like — the discovery referee times were five days a week about eight hours a day. That wore on for three years. But now, it gives you time to breathe. It gives you time to think. It gives you time to create that book. It gives you time to vacation and spend time doing what you want to do. So it takes some of that pressure out of here.

I once asked Governor Deukmejian when he retired, why did he retire when he did. He says, "When the time comes, you'll know." [Laughter] So you've got to pace it that way. I thought that was good advice.

MCCREERY: Are you staying in close touch with him?

ARABIAN: I see him. I saw him about a week ago. I usually run into him about once every four months at one place or another. He looks great.

MCCREERY: You mentioned that in terms of the work you are still doing, mediation takes up quite a bit of that. Is that your favorite of all these forms? What do you like about it?

ARABIAN: It is my favorite, because you get an agreement that is hopefully satisfactory to everybody, as opposed to dropping a gavel at the arbitration table. They know what finality is. They know to the last dotted line what the situation is. When they walk out it's in a signed form. Then they can go up and enforce it at the courthouse, dismiss the case, and so on. But the strain of that is to get warring parties to come to a marriage at the end of the day.

That's a lot different than sitting back and listening to a case such as you would do at the courthouse. Arbitration is a totally different run. So the art

of mediation to me is totally different from the art of arbitration, and that's the difference. The wonderful part of it is if at the end of the day everybody is happy and goes home contented as much as they can be, and you've eliminated some more stress of the courthouse itself. You feel pretty good.

MCCREERY: When they are far apart, just generally speaking, what do you do to bring them together?

ARABIAN: Everybody has their own little way of trying to resolve the difference. One is, you try to keep everybody civil. Another is, you try to take a neutral view but then get forceful when you see that they've slipped from the post, and when they're just totally unreasonable, or there's something wrong with them, or they're so wound up in their emotional situation that no one can talk to them, including their own lawyers.

Show compassion when necessary. There's a whole lot of range to it. If they don't respect you, you're not going to get anything done to start with, so there's just a little of that. They know what your background is, and they usually do, or I'll introduce myself with a little background, and they'll say, "This fellow's been around. I'm going to listen to him. It's better to listen here than across the street at the courthouse." I call that the crap table. I call this one "the granite table of surety."

MCCREERY: It is an actual granite table we're sitting at, I note.

ARABIAN: Very much so. So I tell them, and the other analogy I use is holding the world up on your shoulders, or how long do you want to hold that weight up? Do you want to put the thing down one day? Go up to Fifth Avenue over there by Rockefeller Center, you'll see somebody holding the world up. Put it down. That's enough. So that's sort of a way.

MCCREERY: Do you limit your mediations to certain subject areas?

ARABIAN: No, everything. You name the scenario, I've probably seen it in the last decade.

MCCREERY: We didn't talk about the three strikes law in California and, of course, by the time that was voted on by the court, you had left, if I'm not mistaken. But I wonder, what's been the effect of that on the whole legal arena, and perhaps it's even affected the business that's come to you in private practice?

ARABIAN: The three strikes law had every well and good intention behind it, and if properly exercised it's good, because at some point you've forfeited your right to life as you think you should be running it, by robbing and stealing and raping and plundering from other people. But there is a movement afoot to make some modifications. I think District Attorney Steve Cooley is behind that movement, so that Jean Valjean when he steals a loaf of bread shouldn't have to go to state prison for the rest of his days. I think that that's a salutary movement.

The other thing is, there are so many people in the state prison system it's completely out of control. The governor's thinking about moving inmates out of state, which is a pathetic idea. This is California. You commit your crime, you do your time here, as far as I'm concerned. But you can't build prisons fast enough or big enough to keep up with the inflow, so there have to be some modifications made about the return parole violators, the more aggravated types, and so on. There's a whole world of remedy that has not yet been concocted. I've done about five parole hearings. I know how bad it is. So we have a monstrous situation on our hands as far as the incarceration part of our lives are concerned.

MCCREERY: Any suggestions for things that the state should seriously look at?

ARABIAN: I think that the power that was given to the governor to set aside parole decisions is a pathetic response from the community, because even if they're lawyers, as Gray Davis was, some underling usually writes up the review. If it's anything in a serious range, they don't want it on their conscience that they let Joe Blow out and he went out and committed another robbery or murder. Now you're up for reelection, and they're going to use it against you. There's a whole political measure to this veto power, which I think is out of control.

So that's a rule that should never have been enacted, and it upsets the millions of dollars we spend on parole hearings and on the lawyers that go up there. Now, I'm not saying that you shouldn't do your time for doing a crime, but for those who get a successful review by a parole board, for that to be set aside on the signature of a governor, I think, is contrary to justice as I know it. That's one part of it. The parole violators, that's another whole show. There should be something done about that. There are

different considerations that I've read about recently, but we can't keep piling them in to the same old stone storage house, because there's just no more room there.

MCCREERY: What about building prisons, which was such an emphasis for a while there, when you were still a judge?

ARABIAN: There's nothing wrong with building more prisons. I'm for that if you have a need for them, which we do. The NIMBYs, of course, raise up against any new prisons coming in anywhere, because they don't want that in their backyard or front yard, which is their right to complain. Then they shouldn't complain if there's no resolution for where they go. So there's a whole huge problem out there that's really, in my view, not being seriously addressed. Where do you house that collection?

MCCREERY: You touched a moment ago on serving as an expert witness as one of your activities. That strikes me as a very interesting area of endeavor that's really becoming more and more widely used, is it not?

ARABIAN: The thing is, they have a dispute and they're at a loggerhead over some part of that case. Let's say that it has to do with whether there's a proper indemnification clause. Let's say the attorney charged too much money for what he did. Let's say he didn't do his job. There are all kinds of disputes. They'll come to someone who has served on the court, who has had experience in a particular area, or whose opinion they would respect in the forum, and so that leads you to the expert witness consultation situation. It doesn't happen all that much, but it happens. There are lawyer types who are professional experts in some given area. So there's a whole world out there for that, the scientific people of every stripe.

MCCREERY: It's an interesting development in our system, isn't it, to use that so frequently?

ARABIAN: They figure if Justice Arabian says, "This lawyer competently did all he was supposed to do," and that goes in front of a jury, they're probably going to pay some attention to it. That's where you get called in, and that's an area that's not all that hard to figure out. You either screwed it up or you did the right thing, and that's it, either way.

MCCREERY: Which of your awards and honors, of which there are a great many, shall we talk about? I'd like to just get a little of this. I know that

you've, as you said, summarized these in your article for *The Bench*. But could we just start with the Fernando Award, since that so recently resulted in the wonderful dinner earlier this month?

ARABIAN: For forty-eight years they've been giving this Fernando Award in the name of a mythical Indian early settler of the San Fernando Valley. They put a statue of Fernando over by the courthouse, which is about fifty yards away from where I used to serve on the court at the civic center in Van Nuys. I used to pass by it, because they have a nameplate each year for the recipient, and I knew some of them along the way who were business types and so forth.

A few years ago when Mayor Riordan was around, they put a second one up, not in the form of Fernando, but in a marble form, and it's over at the Warner Center by Woodland Hills. Obviously, you're up against a lot of contenders, and oftentimes your name is submitted and nothing ever happens. So I was quite surprised that my name was put in last year, and on the first pass it was granted.

So to be honored in the valley, the place where I really — the old song, "I'm going to make the San Fernando Valley my home, you can send my mail care of RFD, and you're going to settle down and nevermore roam, make San Fernando Valley my home," I heard that song, I must have been around twelve years old. Anyway, to be honored by the valley for being a valley-ite I considered was quite nice, and we just had a tremendous party. About 250 people came, and they give you the statue of Fernando in small form. It was a very heartwarming event.

The other one that I thought really very impressive was in 2004, the Ellis Island Gold Medal of Honor, to go back to where my parents landed and visit the ground. I had been there before once. That was a very moving ceremony, because that's what America is about, and all the people who came through that place who were the debris, the ashes of somebody else's foreign shore, which I made remarks about in the Fernando acceptance speech, "the wretched refuse," as Emma Lazarus put it. I thought that was a tremendous accolade to somebody's life, because they only give about a hundred or so a year out of the whole nation. It's a major ceremony, with military bands and all kinds of flags flying about. I really hold that one pretty close.

And then Project Sister, which is the anti-rape group, when they put the Healing the Heart Award in my honor, which they now give yearly for someone who's helped victims of a violent crime like rape, I would put that right up near the top.

So there have been lots of other ones, a lifetime achievement award, which has only been given to me since the [San Fernando] Valley Bar [Association] was formed, I think, in 1928. That was quite a beautiful award. The Armenian church, I've gotten about four or five awards from different religious leaders for doing different things. Those are very important to me because, again, it sets forth the standard that I spoke to you about, about someone looking back up and saying, "What happened here?" Things like that.

MCCREERY: When I was here last month you very kindly took me out to the Chatsworth Courthouse. Tell me about the naming of the Arabian Reception Hall there.

ARABIAN: That courthouse was opened in 2002, and I had already retired, but I was busy. I didn't get to the opening of it, but I had driven by it. It's a hundred-million-dollar building. Along the way there were some supporters who said, "We ought to name something after the justice." So they went to the supervisor over here in Van Nuys, and his view was, you have to be dead before we name something for anyone. I said, "That could be arranged. Who do you have in mind?" [Laughter]

And then they went to Supervisor Antonovich, Mike Antonovich, who's a long-time friend, and he has jurisdiction from San Fernando over to the West Valley. The Chatsworth Courthouse fell under his jurisdiction. So under the outline that — actually, he's not a lawyer, and there is a courthouse named after him in the Antelope Valley, the Michael Antonovich Superior Court, the difference obviously being that I was both a lawyer and a retired justice.

They settled for the view that instead of trying to name the building after me, that they would name the entire first floor of about 75,000 feet, as the Justice Armand Arabian Reception Hall. So one day before my birthday in 2004, we had a big ceremony. There is a showcase up at the far end with memorabilia in it, and whoever wants to walk over and see what it contains is welcome to do so.

Then it's like a ballroom entrance, different from every other court I've ever seen, before you get over to the metal detector and go into the main part of the building. It's quite elegant and very difficult to have done while you are still alive and kicking around a little bit. But that was really an unprecedented honor, and I don't think of it in terms of medals, obviously, because it's something way beyond that.

MCCREERY: Thank you for showing it to me, because it is big and open and light and an extraordinary architectural design, isn't it?

ARABIAN: There's no second place for that one. They'd drawn it up, and someone apparently said, "If you're going to build a building, make it beautiful," and they really did. It's just a showplace. I especially like the fact that when you walk in, you don't run right into the metal detector. You can have a cocktail party out there in that first entry area, before you start in with the rest of it, so that's quite different. And they did it in curved glass, marble, everything. Whoever designed that did a real job on it.

MCCREERY: We can include with your oral history manuscript this list that you compiled for *The Bench* that lists the many other things that you've been doing since you left the Supreme Court, I guess eleven years ago as we speak. What else from this list would you like to mention? Anything in particular?

ARABIAN: I like the idea that I donated the funds for the Justice Armand Arabian Attorneys Communication Resource Centers in Van Nuys and San Fernando courthouses, because I felt that with a Bar card you could go in there and Xerox or compute, an office away from an office, so I was happy to do that. Then we have the Advocacy Tournament at Pepperdine, which is an endowed scholarship. That's pretty nice. Then the Law and Media Award by the Valley Bar, Erin Brockovich and Ed Mazry, who passed away, were some of the recipients of that. And the list goes on, different honors and awards.

Outside of all the details that are in that — *Who's Who in the World*, being named to that was quite nice. And that's basically tiptoeing through the tulips of a lot it, a lot of different things. But I'm looking forward to this year, as we spoke about, hopefully finishing up the memoir, which I want to do.

MCCREERY: I wish you very well with that. Let me ask you to return to the Supreme Court just very briefly, and just reflect on your time there. How do you evaluate that whole experience, looking back now, eleven years later?

ARABIAN: First of all, it's a dream come true, because out of the history of the court to that day, I was only the 105th person to serve in that capacity. Secondly, I didn't get there at a real old age. I got there when I was young enough and feisty enough to punch the clock out for six years. I enjoyed my colleagues. They were a dedicated, good group that you could hang out with if you felt like it, so there wasn't animosity on the court amongst the players, which really lends to a creative atmosphere.

I had to spend those years alone, because my family was down south, so I had the experience of living off the coastline of the great Pacific and enjoying the nighttimes when I would sit down and do some of the work of writing, which was a wonderful time for me. I had time for reflection, and it has come out in some of the opinions along the way. The challenge of having to face the problems of an entire state and, in effect, impacting the country, is an unusual experience and one that's weighty.

You've got to take it in your heart and your soul when you do that job. I sat in three executions. Everybody doesn't look forward to doing one of those, but that happened, and you endure what I call the agony of judgment, because someday somebody's going to judge you, and you don't know where that's going to fall. So that's a consideration.

To be able to assist victims of rape, in furtherance of what I had in my heart — I had the opportunity to do that in a couple of situations. To create sexual assault counselor–victim privilege along the way — that was unheard of.

So when you say what are the things you remember about some of the things that happened, it was an adventure, different, of course, from the other levels of public service, magnificent in what it allowed you to do, humbling in the power that you had and the way that you should exercise that power, because you could overdo it in a New York second, and you must not fall prey to that temptation, ever. To be respected by your colleagues and by the bar, after you've done twenty-four years and six up there, speaks volumes without you having to utter a sound, and it makes you feel pretty good.

Sometimes you get a little depressed, and you say I spent all those years of my life, and what's out there? We've got some of the worst trash you could ever imagine wearing the garb of a human being, kidnapping little children, and doing the most horrible things. Was my investment of my life worthwhile?

And the answer always comes out, yes, you're damn right it was worthwhile. Without that it would have been worse, if you hadn't put your imprimatur out there. So as you reflect back you say, there was this calling. The bell rang. I was on the horse at the merry-go-round. I grabbed the ring right at the right moment, and I rode the ride. Was that an Arabian horse? It was. Amen. [Laughter] I couldn't resist that!

MCCREERY: I was going to say. [Laughter] Arabs are beautiful horses, aren't they?

ARABIAN: The best.

MCCREERY: Was there anything about your time on the California Supreme Court that took you by surprise, once you were behind those doors and working on the top of the heap on the most important cases?

ARABIAN: Nothing like that. If you've been that prepared to get to that spot — I wasn't Rose Bird being thrown into the chief justice spot when I didn't know a damn thing about judging. I knew a lot about judging, so as I told you, Justice Mosk said, "You really hit the ground running." And I said, "Thank you." I figured that was a compliment, but I thought it was a correct statement, because I didn't just wander into the place.

I loved it. I loved being there, every moment of it, from one place to the other place, whatever it was. I would have really loved to have stayed on, but I just, as I told you, there's a time that comes and you say, my term limits are self-imposed. I don't need the community to do that to me. Let someone else also contribute.

But when you can look back and smile on yourself and say, I played all nine innings every damn day I was out there. I may not have hit a home run every day, but I sure as hell was out there hitting doubles and singles and stealing bases.

And that's it. That's how I played baseball as a second baseman, and that's how I wrestled when I was on the varsity team at Boston University and high school before that. You just give it all you've got.

As I tell colleagues, "Whatever you do on that bench, at the end of the day if you can go home and put your head on the pillow and say, 'I did the best damn day's work I could do, and I'm going to sleep good tonight, because I didn't do anything knowingly wrong,' you've done your day's work."

MCCREERY: No regrets?

ARABIAN: You have no regrets if you can pass the Arabian test. When I put my head on my pillow, do I fall asleep soundly with a clean heart and soul? You didn't show any favoritism that was undeserved to somebody, you played it fair and square, equal justice and due process? That's all you can do. The rest of it is up to fate and in God's hands, not yours.

MCCREERY: Of course, Chief Justice George took over after you left, but he's been there now eleven years also, almost, and has instituted quite a few changes, continuing the path to unifying the trial courts, and increasing funding, and all kinds of things. How has he fared in that role?

ARABIAN: In my view, he wanted to rise as high up in the state system as one could, and he obviously achieved that by becoming chief justice. He has totally dedicated his life to it. His heart has always been in the right place. His mind has always been sharp and in the right place. His detractors are few and to be disregarded. He's done a fabulous job. He's at the helm every day and has earned high praise from his contemporaries in other courts across the country. So California is lucky that they have somebody of that talent, dedication, and perseverance who wants to do the job right and is doing the job right. He's doing a fabulous job as the chief.

MCCREERY: Is there anything that you've thought about and want to say little more on, perhaps about the most meaningful parts of your career?

ARABIAN: I think that everyone should have in the back of his or her mind the simple statement, "Make a difference." I used to autograph my court photos with that. "Dear so-and-so, always remember to make a difference." As simple as that slogan is, it's a lifetime of challenge.

So if you want to be a judge and, as I call it, the peace-and-payday type, and not make a difference, just make your paycheck and go home after twenty years and retire, you can do that. It doesn't only have to be on the court. You can be one as a lawyer. What are you doing?

So everyone has some appetite for something. It may not show up at the first breakfast, but along the way you're going to develop a taste. In my case it happened to be rape reform. For someone else it could be child molestation. For somebody else it can be DNA evidence improvement, whatever it is. Pick your path with care and make a difference.

Everybody can make a difference to some extent in some project or some process. Without that, you're just a useless wanderer of the desert. Don't go wandering in the desert. Have a goal. If you want to get to Morocco, get to Morocco. So that to me is a direction that I've told on other occasions to people, "Make a difference."

If you put it in your mind that you're going to do something like that, and you create and you put your energy to it — how else would I come up with the Sexual Assault Counselor–Victim Privilege? It's got to be in your heart and soul, and in your head, and then onto a pen and into some legislative program, and the governor's signature, and adoption by other places. If you don't think about it, so what? She went to jail because she didn't turn her records over. Just go home and have a beer. This is the other way to do it.

So there are many challenges out there, and my word is, find one. Do it. If you don't succeed, keep on trucking, because if you lay the groundwork, maybe somebody else will pick up on it if you didn't hit the goal line. But it's out there.

At the end of the day, put your head down on a pillow and rest. The Boy Scout, "Do a good turn a day," is, I swear, one of the sparks of my life. If it means stopping at a crosswalk and letting somebody go across, that's your good deed for the day. It didn't take much effort to do that instead of running them over, or making them wait until you went through.

There's a lot of good turns to be done out there, so do one good turn a day, and then have something in your heart and your soul that you're going to make a difference. When they put you down in Forest Lawn over there, somebody'll say, "Oh, boy, do you remember what they did for such — do you know what this person did for the Red Cross?" Whatever it be. There are so many things out there. So that's the guiding post for me in somebody's life.

MCCREERY: You talked about your memoir, which will recount many of these things that have meant so much to you. Besides writing that, what else do you want to do in your life?

ARABIAN: That's the most immediate target, because to me it's leaving the headstone behind. Before you check out, you want to make sure the engraving is in place. I want that to happen. I want that to be done in a nice way. As far as other awards to come, I just can't conceive of any more. I think I'm awarded out, and let that be in a showcase someplace for someone to look at, because that's what's going to ultimately happen.

So from the point of view of what are my goals, I'd like to continue to do what I'm doing, to settle disputes amongst the players. I'm scheduled for two speeches coming up in the next few months, to get up and share some thoughts with audiences who seem to like to hear it. And then God gives you the next one.

We don't know what happens after that. But try to make life interesting and fun. The days are ticking on everybody, and my colleagues are gone. Justices Kaufman, Eagleson, Broussard, Mosk — they're checking out. Everybody's clock is ticking, so you want to make the most of each day. That's the goal.

MCCREERY: Unless you have anything to add, I've come to the end of what I will ask you. Any second thoughts?

ARABIAN: I'll say amen to your wonderful efforts. I just feel terrible that you missed out on a couple of great colleagues, Justices Eagleson and Kaufman. You would have really enjoyed talking to them as you have with me.

I have left [videotaped] remarks with the Superior Court, which you have a copy of, and I'll give you a few more things along the way for your file. Other than that, I think that I have provided you with all the oral remarks that I can think of giving, and I think you've covered just about everything I had thought about, and about fifty more.

MCCREERY: Thank you for telling me about your career. You've done a marvelous job, and it's been great.

ARABIAN: Thank you for your dedication to your efforts, and to the group behind you.

MCCREERY: I'll pass that on. Thanks again.

ARABIAN: Thank you.

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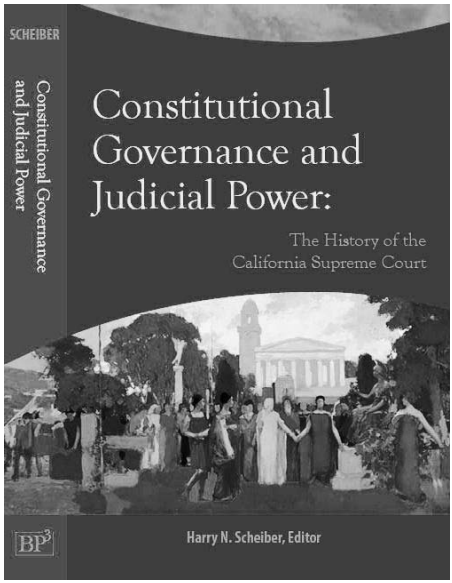

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