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.

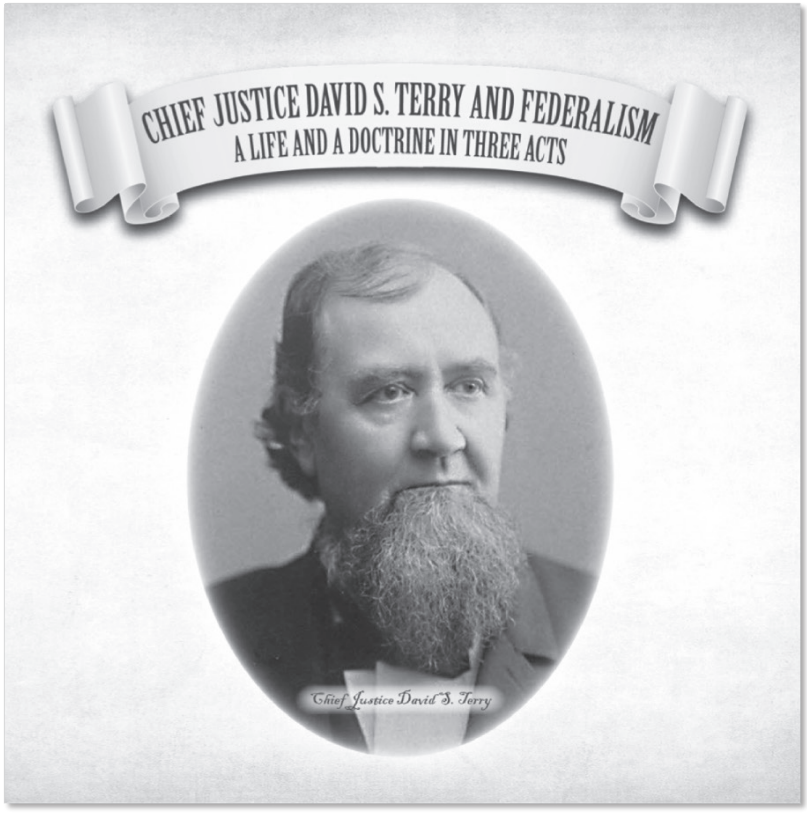
Historical documents used in the script for the characters' speeches were condensed or modernized in various places. Actual citations should be quoted from the original sources.

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

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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

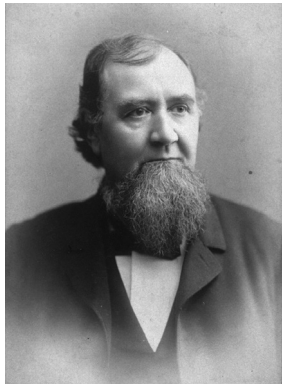
in dispute: whether the U.S. marshal could be tried for murder in California courts if he was acting in the course and scope of his federal duties?

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.

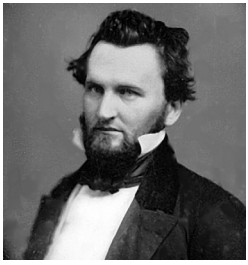
REPORTER: And, of course, by "satisfaction" you mean by participating in a duel?

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

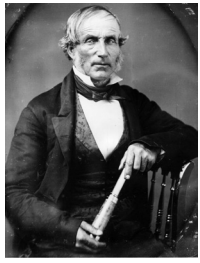
a sense among the general public that city government (now largely in the hands of Senator Broderick's Tammany Hall–style political machine) was corrupt, that the police and courts were incompetent at best, and that many criminals went unpunished. Two murder cases were seen by many as glaring examples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

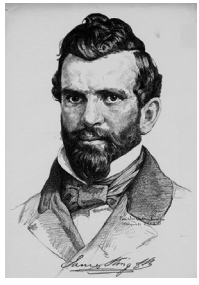
The second murder was of reformist newspaper editor James King of William. As corruption and violent crime continued, King wrote an editorial on May 14, 1856 that attacked San Francisco County Supervisor James Casey. Later that same day, Supervisor Casey shot King as he was leaving his newspaper office. 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.

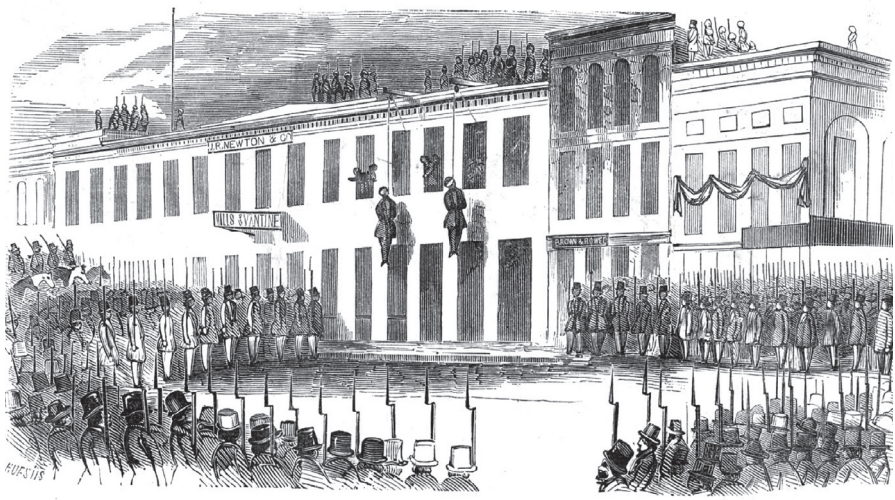
NARRATOR 1: Fort Gunnybags was located on Sacramento Street more or less across the street from what is now Embarcadero Two.

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.

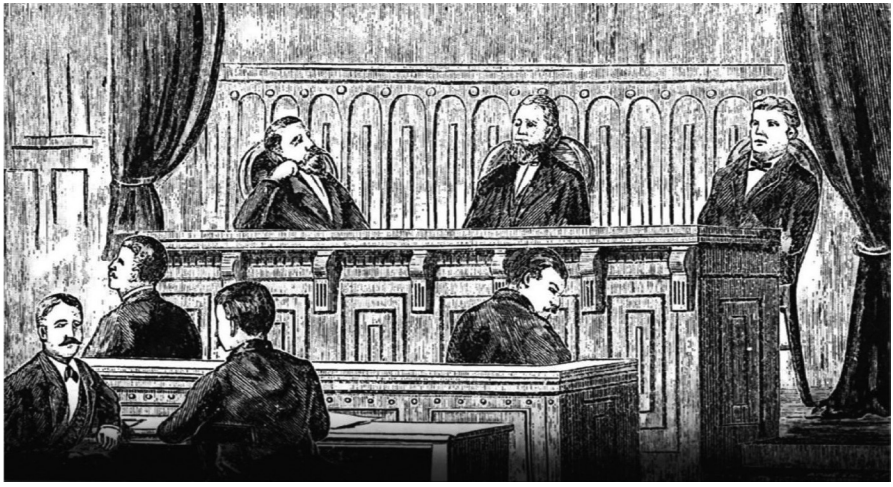
NARRATOR 1: Days later, Governor Johnson wrote directly to President Franklin Pierce to request assistance. (In 1856 — before the Pony Express or transcontinental telegraph — it took three weeks for a letter to go from California to the East Coast, and another three weeks for a return letter to arrive 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.

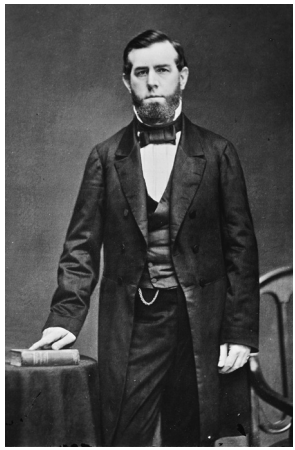


Chief Justice David Terry (center) at the California Supreme Court

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.

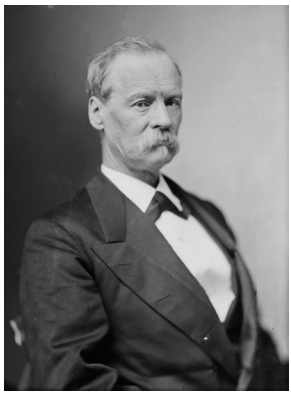
Ostracized, Terry moved to Nevada, and then left that state in 1863 to become a colonel in the Confederate Army. Returning to California in 1870, he began a long climb to respectability and financial security. He rebuilt his law practice, with offices in Fresno, Stockton and San Francisco. He resumed 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

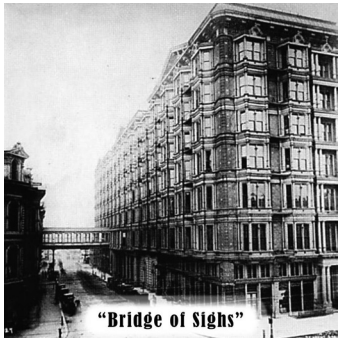
cases, and its violent aftermath, generated ten California Supreme Court decisions, nine Federal Circuit Court decisions, and two U.S. Supreme Court decisions. We will assess the key rulings from these courts. But first we should introduce the principals. Who was William Sharon?



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.

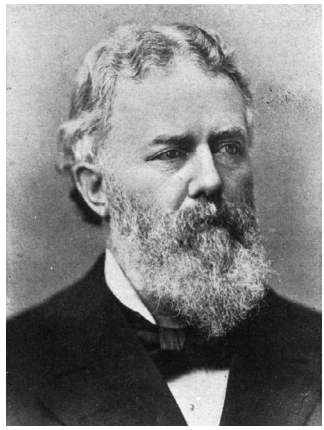
NARRATOR 1: The examiner submitted a transcript of over 1,700 pages to Judges Matthew Deady and Lorenzo Sawyer. There followed a month of selective readings from the transcript and legal argument, at the close of which the judges took the matter under submission for three months.

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

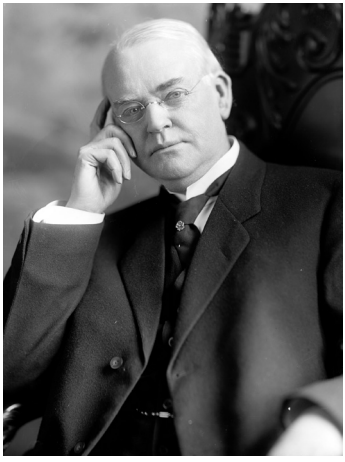
NARRATOR 1: Sharon filed appeals from three of Judge Sullivan's decisions. (Because California had no intermediary appellate courts, all appeals

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.

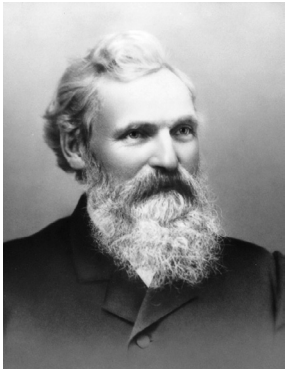
THE THIRD STATE APPEAL

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)

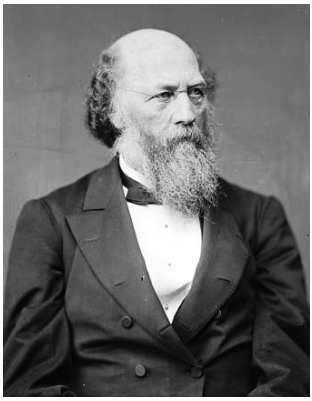
TERRY SENTENCED TO SIX MONTHS BY JUSTICE FIELD FOR CONTEMPT

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?

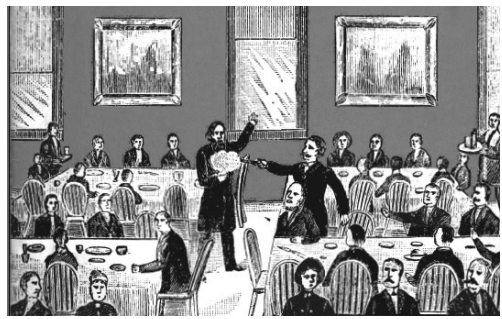
NEAGLE: Yes, sir.

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.

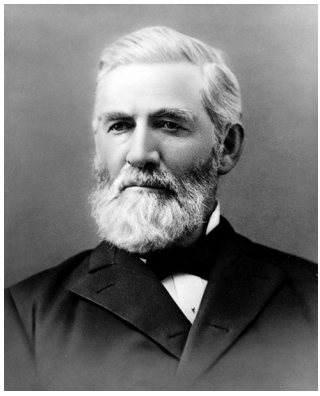
HERRIN: What did the motion that Judge Terry made with his right hand indicate to you?

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*

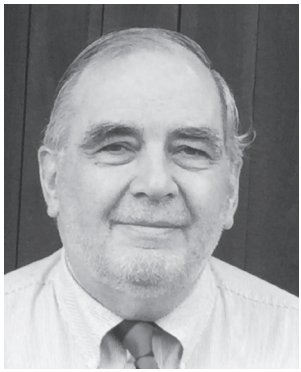
EDITOR'S NOTE:

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."
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> 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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