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Not Without a Fight:

*How California Women Won the Right
to Serve as Jurors*





Above, and on front cover: In November 1911, less than a month after the California suffrage amendment, Los Angeles County seated the first all-woman jury in the state. (Courtesy George Grantham Bain Collection and the Library of Congress.)

Woman Jurors in California: Recognizing a Right of Citizenship

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ADOPTION OF THE NINETEENTH AMENDMENT to the United States Constitution in August 1920, extending the franchise to women, has been celebrated this year with exhibits, marches and films. Less celebrated, but equally compelling, is the history of equal rights for women as jurors in civil and criminal cases.

A constitutional amendment was necessary to guarantee voting equality for women because, in 1874, the U.S. Supreme Court had held that the Constitution did not guarantee a *citizen* the right to vote.¹ Therefore, although women were recognized to be citizens, voting could be restricted to men. Prior to 1920, women had already won the right to vote in a number of states, including California, which amended its Constitution in 1911 to extend the right to women. But it took adoption of the Nineteenth Amendment to enfranchise women nationally.

Like early struggles for the right to vote prior to adoption of the Nineteenth Amendment, acceptance of women as jurors arrived on a state-by-state basis. Some states automatically coupled jury service with the voting franchise, but most, including California, treated voting rights and jury participation as separate issues, requiring women to wage separate battles to serve as jurors.²

2. In eight states (Nevada, Michigan, Delaware, Indiana, Iowa, Kentucky, Ohio and Pennsylvania), “as soon as women were accorded the right to vote in such states, their right to serve on juries, as a general rule, was automatically established.” Burnita Shelton Matthews, “The Woman Juror” (1927) 15 *Women Lawyer’s J.* 15, 15. Matthews was an attorney and judge, and had the distinction of being the first woman to be appointed a United States district judge. She served on the U.S. District Court for the District of Columbia in active status from 1949 to 1968, and in senior status until 1988. See also Ken Hooper, “History: The day of the woman juror is at hand . . .,” https://www.bakersfield.com/bakersfield_lifelhistory-the-day-of-the-woman-juror-is-atp-hand/article_3eca508d-c739-51ad-88a4-9812f4b0a7da.html, Apr. 25, 2014 [as of Sept. 22, 2020].

1. *Minor v. Happersett* (1874) 88 U.S. 162.

California, in 1917, was one of the earliest states to permit women jurors.³ By 1927, nineteen states had women serving on juries. But it was not until the late 1960s that every state authorized women as jurors.⁴ And nearly another decade passed before the United States Supreme Court invalidated discrimination in jury selection based on sex.⁵

Why did it take so long for one of the fundamental attributes of a free society to be fully available to women? Part of the answer relates to traditional cultural ideas about the role of women in society, which gradually loosened over the course of the last century. Another part is wound up with common law dictates about jury trials. As we shall see, both the California Legislature and courts contributed to the evolving national discussion about whether and how women would be authorized, permitted or compelled to serve as jurors.

Whose Right Is It, Anyway?

The right to trial by a jury of one's peers is an ancient concept, predating even the Magna Carta.⁶ Entitlement to a trial by jury is found both in the U.S. Bill of Rights and in California's Constitution, and has been lauded as one of the fundamental rights ensuring freedom and preventing tyranny. John Adams famously wrote: "Representative government and trial by jury are the heart and lungs of liberty."⁷ If jury trials are the "lungs of liberty," it is literally breathtaking to recognize that the right to

3. In 1898, Utah became the first state to authorize female jurors by statute. Joanna L. Grossman, "Women's Jury Service: Right of Citizenship or Privilege of Difference" (1994) 46 *Stan. L. Rev.* 1115, 1135. Washington followed in 1911, Kansas in 1912, Nevada in 1914, California in 1917, and Michigan in 1918. See Matthews, "The Woman Juror," *supra* 15 *Women Lawyer's J.* 15.

4. Meredith Clark-Wiltz, "Women Jurors on Trial: Popular Depictions of the American Woman Juror in Twentieth Century Newspaper Coverage" (2011) 2 *J. of Res. on Women and Gender*, available at <https://gato-docs.its.txstate.edu/jcr:97e87b0f-addb-4c9e-a3b7-40ab4ff96d17/Clark-Wiltz,%20Women%20Jurors%20on%20Trial%20FINAL.pdf> [as of Sept. 29, 2020].

5. *Taylor v. Louisiana* (1975) 419 U.S. 522.

6. See Hon. Robert von Moschzisker, "The Historic Origin of Trial by Jury" (1921) 70 *U. Penn. L.R.* 1.

7. Adams, of course, meant that white men in a society had the rights to a representative government of white men and trial by juries constituted of white men. In a 1776 exchange of letters, Abigail, wife of John Adams, urged him, when creating a code of laws for the soon to be declared independent republic, to:

Remember the Ladies, and be more generous and favorable to them than your ancestors. . . . Remember all Men would be tyrants if they could. If perticular care and attention is not paid to the Laidies we are determined to foment a Rebelion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation. [Original spelling.]

Letter from Abigail Adams to John Adams, 31 March–5 April 1776 [electronic edition]. *Adams Family Papers: An Electronic Archive*. Massachusetts Historical Society. <http://www.masshist.org/digitaladams/> [as of Sept. 22, 2020].

John responded:

participate as jurors was denied to women for so long and, until recent decades, women were still not fully integrated into the process.

Currently, in California, one is qualified to be a juror if the person is a U.S. citizen, at least 18 years of age, has sufficient command of English to understand and discuss the case, resides in the jurisdiction's county, and has not served on a jury in the prior 12 months. Nobody is exempt because of the person's job, race, color, religion, sex, national origin, sexual orientation or economic status.⁸

The issue of who is eligible, and ultimately selected, for jury service has been viewed both as an inherent right of citizenship (in which sense the "right" or "privilege" belongs to the prospective juror), as well as being ancillary to the right to a fair trial (in which sense the "right" belongs to the criminal defendant or parties to a civil matter to have cases heard by a representative cross-section of the community). The role of women as jurors has been argued — both for and against — under both views of jury service; that is, as an inherent part of each woman's citizenship, or as being related to the right of the parties to receive an fair hearing by a representative group of fellow citizens, including women. Further, the issue of whether and how women can serve as jurors has been examined with respect to both state laws and the United States Constitution.

Throughout the twentieth century, discussions of women jurors — in court opinions and press reports — tended to crop up as women became eligible to serve in a particular location, and are peppered with facts and common assumptions about the traditional roles of women, particularly when the focus was on whether women were competent to serve as jurors. The stories reflected the cultural norms of their times, characterizing women, variously, as tending to act on instincts and impressions rather than evidence, being emotional, moralizing, indecisive, disruptive, unduly harsh to male defendants and unduly sympathetic to women defendants, having an innate sense of justice, and too sensitive or embarrassed to hear the sordid details of some cases. In other words, impressions were both positive and negative. However, many of the articles emphasized the novelty of women

As to your extraordinary Code of Laws, I cannot but laugh Depend upon it, We know better than to repeal our Masculine systems. Altho they are in full Force, you know they are little more than Theory. We dare not exert our Power in its full Latitude. We are obliged to go fair, and softly, and in Practice you know We are the subjects.

Letter from John Adams to Abigail Adams, 14 April 1776 [electronic edition]. *Adams Family Papers: An Electronic Archive*. Massachusetts Historical Society. <http://www.masshist.org/digitaladams/> [as of Sept. 22, 2020].

8. Judicial Council of California, *Jurors: Serving Justice, Serving the Community. Information and Instructions for Responding to your Juror Summons*, <https://www.courts.ca.gov/documents/jury-court-and-community-brochure.pdf> [as of Sept. 22, 2020].



“Women are too sentimental for jury duty.” (*Anti-suffrage cartoon by Kenneth Russell Chamberlain, 1915. Library of Congress.*) Chamberlain’s cartoon echoed arguments of the day by those opposed to permitting women to serve on juries, namely, that women were temperamentally unsuited for the serious deliberation required of jurors in civil and criminal cases.

acting as jurors, focused on their clothing or appearance, discussed seemingly frivolous concerns of some women jurors (such as whether knitting would be permitted in the jury box, or seeking a trial adjournment so that they could shop at a nylon hosiery sale), and commented on how the demands of home and motherhood conflicted with jury duty (e.g., causing women to be absent or late more often than men).⁹

Notwithstanding the prevailing cultural assumptions, for most of the legal history of the issue, courts have generally treated jury selection as a question of the litigating parties’ right to a fair trial, rather than as a right of the juror’s citizenship. Accordingly, the legal focus was on whether the presence of women on juries was either necessary or, conversely, might create an impediment to the parties’ receiving a fair trial. Not until 1994 did the U.S. Supreme Court acknowledge a connection between citizenship and jury service for women.¹⁰ By contrast, jury participation as a right of citizenship under the equal protection clause had been recognized for Black men as early as 1880 — yet all but denied in practice through much of the twentieth century.¹¹

Early Recognition of Women Jurors: An “Awful Bugbear” of Woman’s Rights”

One of the first jurisdictions to permit women to serve as jurors was the Washington Territory.¹² For four years,

from 1883 to 1887, women served as jurors. The territorial law was challenged by Millie Rosencrantz, a Tacoma woman who was charged with running a bordello. The grand jury that indicted her had included married women. Rosencrantz claimed her indictment was invalid because, under the applicable statute, grand jurors were required to be “electors and householders.” Although Washington Territory women had the right to vote, and were thus “electors,” Rosencrantz argued they were not “householders” because, by definition, the head of a household of a married woman must be the husband.¹³ The three judge panel that considered the case held that, pursuant to governing community property legislation, married women and men were both “householders” — and thus upheld the indictment.

The Washington experiment with female jurors was controversial. It generated far-flung interest, and was the subject of commentary by several reporters who traveled to the Territory to see for themselves trials heard by mixed juries. A female observer from Massachusetts “noted as a pleasant side-effect that the male jurors were less likely to smoke in court when ladies were present.”¹⁴ A reporter from Chicago, whose column was reprinted in the *Sacramento Daily Union* in 1896, recounted his memories of having observed women jurors years earlier in the Washington Territory. He had “talked a good deal to the lawyers as to how the women jurors were performing their duties. All agreed that they were conscientious, that they listened carefully to the evidence, and that they gave closer attention to the arguments of the lawyers than the average man juror did.” That said, the reporter was told that none of the lawyers wanted women on the jury because there was a “lack of the logical faculty in the female mind. The women didn’t seem able to weigh conflicting evidence or to follow closely a line of dry argument, or to give the proper weight to the statutes explained to them. . . . Their tendency was to take everything in a personal way.”¹⁵

There was also concern regarding the physical inconveniences of having women on juries. It was “necessary to provide some sort of retiring-rooms for them,” and female bailiffs were needed. “When the jury was locked up to force a verdict the men whose wives were thus incarcerated with a miscellaneous lot of masculine jurors were naturally furious. . . . Out of courtesy to the women members the men came to an agreement sooner than is usually the case, and didn’t resort to the general and

9. Clark-Wiltz, “Women Jurors on Trial,” *supra* 2 *J. of Res. on Women and Gender*, pdf 14–18.

10. *J.E.B. v. Alabama ex rel T.B.* (1994) 511 U.S. 127. See Grossman, “Women’s Jury Service,” *supra* 46 *Stan. L. Rev.* 1115, 1116.

11. *Strauder v. West Virginia* (1880) 100 U.S. 303.

12. Washington Territory allowed women jurors before Utah became the first state (in 1898) to enact a woman jurors statute.

Previously, in 1870–71, the Wyoming Territory had also briefly permitted women to sit as jurors. <https://www.wyohistory.org/encyclopedia/women-jury-wyoming-makes-history-again> [as of Sept. 22, 2020].

13. Aaron H. Caplan, “The History of Women’s Jury Service in Washington” (Mar. 2005) *Washington State Bar News* 13.

14. *Ibid.*

15. “Women on Juries. How the Experiment Failed in Washington,” *Sacramento Daily Union*, Sept. 5, 1896.

venerable custom of tiring out the minority by all-night sessions with cigars and pipes.”¹⁶

One of the people who ventured to see these early female jurors in action was California attorney Clara Shortridge Foltz. Foltz was well known as the first woman admitted to the bar in California, and had also lent her considerable talents to the woman suffrage movement. In 1885, she traveled to Western Washington and observed a mixed jury trial. A contemporary article, entitled “Testimony of an Eye-Witness,” stated:

Mrs. Foltz . . . says that it has seldom been her lot to see as careful, earnest note taken of evidence as that taken by the women who she saw in the jury-box. As regards their disinclination for this service, she says that after careful inquiry she found that most women are not only willing, but many of them are anxious, to perform this service. The exception is found among women of fashion and frivolity, whose uselessness in all active channels is their only passport to “womanliness,” as they have been trained to view it. Said she: “I thought I had been fully prepared to see women acting in the capacity of jurors, but when I entered the court-room and saw that awful bugbear of ‘woman’s rights’ — women among men in the jury-box — I was so overcome with this grand evidence of progress that I felt for a moment quite hysterical, and in my desire to laugh and cry, and my determination to do neither, I had hard work to maintain my self control. One of the ‘ladies of the jury,’ whom counsel with polite, deferential and earnest manner was addressing, was a motherly-looking, intelligent woman who, with hands encased in cotton gloves and bonnet strings tied snugly under her chin, listened with conscientious intent to the argument, her face written all over with earnest determination to discharge her sworn duty in the premises, according to the light furnished by the evidence.”¹⁷

A backlash followed. Critics viewed the Washington Territory’s use of women as jurors to be an abomination. One of the justices of the Territorial Supreme Court objected to jury duty for women primarily because “the labor and responsibility which it imposes [is] so onerous and burdensome, and so utterly unsuited to the physical condition of females.”¹⁸ An 1887 decision of the Supreme Court of the Territory held that women were not really

electors, and thus were not qualified to serve as jurors.¹⁹ Women on juries in Washington thus disappeared until their eligibility for service was restored by statute in 1911.²⁰

California Seats Women Jurors

After the California Constitution was amended on October 10, 1911 to permit women to vote, many assumed that inclusion of women in jury service would not be far behind. Indeed, an editorial in *The Bakersfield Californian* from October 26, 1911, stated: “The day of the woman juror is at hand in this state . . . and it may be predicted that in the next six months members of the gentler sex will be found in the jury box and when they are they will determine the questions submitted to them quite as sensibly as do the men that now make up the juries.”²¹

In fact, in Los Angeles County, women constituted a jury much sooner than the Bakersfield newspaper had forecast. In November 1911, less than a month after the California voting amendment, Los Angeles County seated the first all-woman jury in the state. The question in the case was whether A.A. King, editor of *The Watts News*, should be convicted for printing assertedly obscene and indecent language after he repeated, verbatim, the intemperate words of a Watts city councilman.²² The jurors deliberated only 20 minutes before finding King “not guilty.” The youngest member of the jury, Nellie Moomau, age 22, later said, “Our verdict did not mean that we approved of such language. It meant that we believed the defendant was honest in his endeavor to aid the public when he printed the article. . . . It isn’t half so shocking to read such language in the privacy of our homes as it is to hear it on the streets.”²³

Despite the prompt and apparently reasonable verdict, the female jury was attacked by a Los Angeles Police Court judge and George Cryer, an assistant U.S. attorney for the City of Los Angeles. At the time, Code of Civil Procedure section 192 stated that a grand jury was “made up of men,” while Section 7 of the Civil Code stated that “[w]ords used in the masculine gender include the female and the neuter.” Ignoring the Civil Code’s clarification, L.A. Police Judge Frederickson maintained that “a man is a man, not a woman” and held that if a code was meant to include women, it would have specifically said so.²⁴ Assistant U.S. Attorney Cryer stated that, in his opinion, “women are not qualified to

16. *Ibid.*

17. Sally Roesch Wagner, *The Women’s Suffrage Movement*, New York: Penguin Random House, 2019, 325–26 (quoting Clara Foltz, “Testimony of an Eye-Witness,” *New Northwest*, Dec. 12, 1885).

18. Caplan, *supra* “Women’s Jury Service,” *Washington State Bar News* 13, 15.

19. *Harland v. Territory of Washington* (Wash. Terr. 1887) 13 P. 453.

20. Caplan, *supra* “Women’s Jury Service,” *Washington State Bar News* 13, 19.

21. See Hooper, ULR *supra* “History: The day of the woman juror is at hand”

22. Los Angeles Almanac, <http://www.laalmanac.com/crime/cr54b.php> [as of Sept. 22, 2020].

23. *Ibid.*

24. Hooper, *History*, URL *supra* “History: The day of the woman juror is at hand”

serve as jurors in this state . . . unless the constitution is specifically amended to so provide.”²⁵

Opinions of attorneys and judges around California continued to differ concerning whether women were eligible to be empaneled as jurors. Prohibition politics also appears to have played a role in juror eligibility discussions.²⁶ Prohibition had been a hot political topic for decades, and the women’s suffrage movement had long been linked to efforts to improve the state’s moral climate.²⁷ In 1896, the state Liquor Dealers League had actively worked to defeat a referendum on women’s suffrage, believing that, if able to vote, women would try to limit alcohol sales and consumption.²⁸ Although the liquor interests had defeated women’s suffrage in 1896, they had not succeeded in stopping the 1911 constitutional amendment giving women the vote. Now that women voters were at hand, they were still keenly interested in whether women would also be permitted to act as jurors.



Supporters of California’s Amendment 8 which granted women the right to vote. (Photo: FoundSF.)

In San Diego County, a 1914 committee of three women from the Women’s Christian Temperance Union (W.C.T.U.) sought a determination from the county supervisors that the list of eligible persons to serve as jurors for the coming year would include women. The supervisors refused the request, stating that at common law, only men could be jurors. Plus, said the men,

25. *Ibid.*

26. The Prohibition Era in the United States, during which the production and sale of alcohol was banned nationally by the Eighteenth Amendment to the federal Constitution (proposed 1917 and ratified in 1919), ran from 1920 to 1933 when it was repealed by the Twenty-first Amendment.

27. For example, in 1912, the California Civic League had sponsored a measure to eradicate red light districts in the state.

28. Mae Silver, “Women Claim the Vote in California” (1995) Found SF (digital archive), http://www.foundsf.org/index.php?title=WOMEN_CLAIM_THE_VOTE_IN_CALIFORNIA [as of Sept. 22, 2020].

deliberating jurors were frequently locked up overnight, and they were concerned that “domestic complications” were foreseeable if men and women served on juries together. As reported in the *San Diego Union* under the headline “Supervisors Disappoint Women With Decision Ruling Fair Sex Off Juries in Criminal Courts”:

Three disappointed women left the chambers of the Board of Supervisors yesterday when they were told that the members of the fair sex could not sit upon criminal juries in the Superior Court. They are not satisfied, however, and intend looking up the law and procedure in other cities, and if necessary they will appeal to the legislature. The women were Mrs. Cora G. Carlton, Mrs. E.F. Lynch, and Mrs. Emma G. Kinne of the public welfare committee of the W.C.T.U.

In a speech to the supervisors, Mrs. Carlton said it was the opinion of members of her club that women should be allowed to sit upon juries in cases in which women were involved, especially in assault cases, where the word of a girl, unsupported, might send a man to the penitentiary.

Supervisor Thomas Fisher explained that the names of prospective jurors are picked indiscriminately and that a jury might turn out to be half men and half women. He also explained that, when jurors are not able to agree, they were frequently locked up together for the night and not allowed to separate; all of which, he said, might lead to domestic complications in the families of men and women on a mixed jury. The three advocates of the woman juror admitted that such an arrangement would have drawbacks, and they are going to have an attorney seek some method of eliminating the objectionable features.²⁹

At the time that the San Diego W.C.T.U. delegation was told that women would not be included in the jury pool, the supervisors were receiving legal advice from San Diego District Attorney Harry S. Utley. Utley, a naturalized Englishman, was known to enjoy his Guinness, and was presumably anti-temperance. At the beginning of 1915, Utley was replaced by a new district attorney, H.W. Mahoney. The supervisors asked for a formal opinion regarding whether women were eligible to serve as jurors. Mahoney provided that in January 1915, through his deputy Spencer M. Marsh (later a San Diego County Superior Court judge). Both Marsh and Mahoney were known to be on the “dry” side of prohibition.

Perhaps not surprisingly, the Mahoney/Marsh duo supported the Temperance Union women. Their opinion stated: “[T]he fact that (one) is a woman does not

29. *San Diego Union*, Sept. 9, 1914, 3 (as quoted in L. G. Stanford, “Early Women Jurors in San Diego” (Mar. 1965) 11 *San Diego Hist. Soc. Qtrly.*, sandiegohistory.org/journal/1965/March/women-2/) [as of Sept. 22, 2020].

disqualify her to be selected and to serve as a juror.”³⁰ Thus, in the annual jury panel for San Diego County, drawn in January 1915, eighty persons were listed, of whom six were women. However, no women were actually chosen for jury service until September of that year.

Not everyone agreed with the Mahoney/Marsh view of women’s juror qualifications, and among the dissenters was California Attorney General Ulysses S. Webb. In December 1916, Webb sent a letter to Marsh (who had succeeded Mahoney as D.A.), enclosing an opinion that Webb had sent, in 1912, to the Sacramento County district attorney. The opinion³¹ pointed out that the California code in several different places defined a jury as “a body of men” and that at common law, those words meant men *only*; that the constitutional guarantee of a trial by jury was universally recognized to mean the right as it existed at common law, and that if women were to be eligible for jury duty, the legislature would have to change the law.³²

California’s Legislative Action

A push in the state legislature began. The California Civic League, a precursor to the California League of Women Voters, focused on the argument that a fair jury trial must include a fair cross-section of the community, including women. It drafted a bill stating that women must be permitted to serve on a jury when one of the parties, plaintiff or defendant, was a woman. That suggestion generated disagreement. A new bill was prepared for the 1915 California Legislature, but was “met with ridicule from state senators who defeated [it] . . . in that session, leading several advocates to press for electing progressive women to the state legislature.”³³ Ironically, as a result of the 1911 amendment to the California Constitution, women could not be prohibited from holding office, but they could still be excluded from juries.

Not having heard an outcry from their female constituents, male legislators believed that women did not want to serve on juries. Proponents of women’s rights thought that women’s apparent indifference to the issue

30. *San Diego Union*, *supra* 3.

31. Webb’s 1912 opinion was actually authored by Deputy Attorney General J.T. Nourse, who later became a San Francisco County Superior Court judge — and thereafter justice and presiding justice from 1919 to 1957 on the District Court of Appeal. See Stanford, “Early Women Jurors,” *supra* 11 *San Diego Hist. Soc. Qtrly*.

32. Stanford, “Early Women Jurors,” *supra* 11 *San Diego Hist. Soc. Qtrly*. The rule that constitutional provisions guaranteeing the right to a trial by jury established the right to a trial by jury as known at common law was well established, and remains the guiding rule today.

33. Cynthia Harrison, *Shoehorning American Women onto American Juries*, H-Law (Nov. 2013) <https://networks.h-net.org/node/16794/reviews/17304/harrison-mccammon-us-womens-jury-movements-and-strategic-adaptation>, reviewing Holly J. McCammon, *The U.S. Women’s Jury Movements and Strategic Adaptation: A More Just Verdict*, New York: Cambridge U. Press 2012.

was attributable to an absence of education concerning the ramifications for women litigants if they continued to be excluded from juries. The Civic League launched a campaign to persuade women voters to call on their elected representatives to vote in favor of jury service for women. Finally, in 1917, “the state legislators, now convinced that their women constituents did support the women juror bill, passed the bill that year.”³⁴ Women in California now had statutory authority to be eligible for jury service.

Response in the California Courts

It did not take long for a challenge to the new statute to make its way to the California Supreme Court. In 1918, a prisoner named Eban Mana filed a habeas corpus petition seeking his release from custody.³⁵ He had been convicted of rape by a jury that included seven women.³⁶ In his petition, Mana repeated the familiar argument that California’s authorization of women to sit as jurors violated the California Constitution³⁷ because, under the common law, juries were composed only of men. Mana’s argument rested on several sources, “including the Webster’s dictionary definition of a jury as a ‘body of men,’ historical description of the common law jury, and the Magna Carta, which did not allow women to serve.”³⁸

In a unanimous opinion authored by Justice Curtis D. Wilbur, the California Supreme Court rejected this challenge. The opinion acknowledged that constitutional provisions guaranteeing a right to trial by jury refer to trial as known at common law. However, the Court approached the question of constitutionality by asking whether the state legislature had the authority to prescribe qualifications for jurors that are different from those established by the common law. The *Mana* court noted that the U.S. Supreme Court, in *Strauder v. West Virginia*,³⁹ construing the Fourteenth Amendment, had declared unconstitutional a West Virginia law that excluded Blacks as jurors because the state law “deprived [the litigant] of a trial by jury composed of his ‘neighbors, fellows, associates, persons having the same legal

34. Harrison, *Shoehorning American Women onto American Juries*, URL *supra* H-Law.

35. *In re Mana* (1918) 178 Cal. 213.

36. Grossman, “Women’s Jury Service,” *supra* 46 *Stan. L. Rev.* 1115, 1141. Interestingly, the same U.S. Webb who had concluded in 1912 that, if women were to be eligible as jurors, the legislature would have the change the law, was still California’s attorney general — and he defended the State of California against Mana’s petition.

37. California’s Constitution provided, in article I, section 7: “The right of trial of jury shall be secured to all, and remain inviolate; . . .” Although subsequently amended, the provision remains substantively similar. See present art. I, § 16.

38. Grossman, “Women’s Jury Service,” *supra* 46 *Stan. L. Rev.* at 1142, n. 157.

39. (1880) 100 U.S. 303.

status in society as that which he holds.”⁴⁰ The *Strauder* Court had gone on to note that the Fourteenth Amendment did not prohibit states from establishing qualifications for its jurors, including age, gender and educational conditions.

Justice Wilber recognized in this dicta from *Strauder* the key to resolving the *Mana* case: state legislatures may, within the limits of the Fourteenth Amendment, establish juror qualifications that differ from the common law. Under the California Constitution, women could not, on account of their sex, be disqualified from entering into any lawful business, vocation or profession. Also, as of 1911, women could not be prevented from voting and holding office. Accordingly, the *Mana* opinion concluded:

If the contention of the petitioner is well grounded, we would then have a situation where a woman on trial for a crime might be brought to trial before a woman judge, prosecuted by a woman district attorney, defended by a woman lawyer, brought in court by a woman bailiff, and yet forced to a trial before a jury of men, because men only were considered as eligible for jury duty at common law.

The legislature of the state in providing that a woman might act as a juror evidently believed that there was no longer any necessity of discriminating against her as a citizen of the United States because she was disqualified. The constitution having recognized her as in all respects the equal of man, the legislature was justified in doing away with the discrimination which had theretofore existed against her in the matter of jury service.⁴¹

Thus, the rationale of the *Mana* decision reflected an important hybrid view of participation in the jury process. *Mana* was based both on the idea of fairness in the representative composition of the jury (it would be as unfair to exclude women from jury panels as it was to exclude Black men), and on the idea of jury service as one of the rights of citizenship, in which the woman is “in all respects the equal of man.”⁴²

The U.S. Supreme Court Invalidates a California District Court Procedure

Meanwhile, in federal courts, different rules prevailed. Congress had provided that jurors in federal courts would have the same qualifications as those imposed by the highest court of the state in which they sat, but the method of determining who would be selected for jury service was subject to federal court procedures.

In 1946, a case that arose in a federal district court in California made its way to the U.S. Supreme Court.

40. *In re Mana*, *supra* 178 Cal. 213, 215.

41. *Id.* at 216.

42. *Ibid.*

Edna Ballard and her son had been convicted in the district court for the Southern District of California of mail fraud in connection with promoting an allegedly fraudulent religious program. On both the grand jury (which indicted the defendants) and on the trial jury (which had convicted the defendants), women had been intentionally and systematically excluded from the panel, by order of the trial judge. The defendants moved to quash the indictment and challenged the jury array because of the intentional exclusion of women. On appeal, the Ninth Circuit summarily held that, “in the circumstances of this case,” there was no error in excluding women.⁴³

When that determination reached the U.S. Supreme Court on review, Justice William O. Douglas authored the 6–3 opinion. The Court recognized that federal courts were, by mandate of Congress, to follow the state rules concerning qualification of jurors, but held that, in addition, “[w]hether the method of selecting a jury in the federal court from those qualified is or is not proper is a question of federal law.”⁴⁴ Prior Court decisions had established that the aim of Congress in enacting statutes concerning the qualification of jurors was to make the jury a representative “cross-section of the community.”⁴⁵ Congress had explicitly prohibited disqualification of jurors on the bases of race, color, previous condition of servitude, and party affiliation. But Congress had not prohibited disqualification on the basis of sex.

A recent Supreme Court decision, *Thiel v. Southern Pacific Co.*,⁴⁶ had held that it was an error to exclude from a jury panel in a common carrier liability case all persons who worked for a daily wage. The *Thiel* decision had focused on the imperative that a fair trial requires an impartial jury drawn from a cross-section of the community. The opinion stated:

This does not mean, of course, that every jury must contain representatives of all the economic,

43. *Ballard v. United States* (9th Cir. 1945) 152 F.2d 941, 944; see also *id.* at 950–53 (Denman, J., dissenting, asserting the exclusion of women jurors constituted reversible error).

44. *Ballard v. United States* (1946) 329 U.S. 187, 192.

45. See, e.g., *Glasser v. United States* (1942) 315 U.S. 60, 85–86. The *Glasser* case also presented the question of whether the district court jury had been properly constituted when it included both men and women, but when the women permitted to serve as jurors were limited to members of the Illinois League of Women Voters, which had trained women concerning how to be jurors. Relying on an article published in the *ABA Journal*, the defendants claimed that the training was prejudicial to them because it was biased toward the prosecution, and they were consequently deprived of a fair jury panel. At the time of trial, Illinois had recently amended its jury rules to permit all women to serve, but the jury rolls were still being updated. The Supreme Court held that although limiting jury participation to members of certain groups (i.e., the League) was not consistent with the ideal of a fair jury trial, the defendants had failed to present sufficient evidence to prove the hearsay allegations contained in the *ABA Journal* article.

46. (1946) 328 U.S. 217.

social, religious, racial, political and geographical groups of the community; . . . [b]ut it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.⁴⁷

In *Ballard*, the Court expanded on the rationale of *Thiel*, and concluded that the “purposeful and systematic exclusion of women from the panel . . . was a departure from the scheme of jury selection which Congress adopted.”⁴⁸ In response to the suggestion that an all-male panel drawn from the various sociological groups mentioned above would be as truly representative as if women were included, Justice Douglas asked: “But if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel?” The systematic and intentional exclusion of women, like the exclusion of a racial group, or social or economic class, “deprives the jury system of the broad base it was designed by Congress to have in our democratic society.”⁴⁹

The *Ballard* Court viewed the injustice of excluding classes of people as jurors to be an “injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.”⁵⁰ The error of the California federal district judge in excluding women from the jury panels was irremediable. The trial verdict was nullified, the indictment by the improperly constituted grand jury was invalidated, and all charges against Ballard and her son were dismissed.

Who Really Serves?

Women were now recognized to be qualified to sit as jurors, but this did not translate to many women actually serving on juries, even in “early adoption” states such as California. In some states, such as Washington, women had a right to “opt out” of jury service simply by requesting in writing to be excused. This exemption upon request was not changed in Washington until 1967.⁵¹ In other states, such as Florida, women who

wanted to serve as jurors had to affirmatively “opt in” to be included. The U.S. Supreme Court upheld Florida’s statute in 1961.⁵² In 1975, the Court finally held that opt-in jury rules for women violated a defendant’s Sixth Amendment right to a fairly representative jury,⁵³ and state opt-out provisions were struck down under the same authority in 1979.⁵⁴ It was not until 1994 that the use of peremptory challenges to constitute a jury of only one gender was prohibited by the U.S. Supreme Court as a violation of the equal protection clause of the Fourteenth Amendment.⁵⁵ Against this background, it is hardly surprising that a popular and acclaimed mid-1950s jury room drama, which was produced both as a stage play and movie, was entitled *Twelve Angry Men*. Featuring only white men, the composition of the jury was, at the time, unremarkable.

Conclusion

More than one hundred years have passed since California first recognized women’s eligibility to be seated on juries. The road to full inclusion of women in jury pools has been a long one, mirroring the radical changes in our society over the same period. The social justice movement of 2020, especially the calls for police and other reforms following the custodial suffocation of George Floyd, reminds us that many citizens of the United States have long had to struggle for equal treatment in society and under the law. We are reminded that to be preserved, even fundamental civil rights — such as voting, demonstrating publicly, and free speech — must be guarded and exercised. Neither relief from oppression nor from exclusion from the organs of democracy can be taken for granted.

The California Supreme Court, in 1918, held that jury service for women is a right inherent in their citizenship. The “lungs of liberty” are not fully expanded unless they also include the oxygen delivered by women’s voices. The body politic, addressing questions of justice, is animated by that air. Long may it breathe. ★

COLLEEN REGAN practiced civil litigation and employment law in Los Angeles for 34 years, until 2019. Currently, she devotes time to reading, writing and historical research.

52. *Hoyt v. Florida* (1961) 368 U.S. 57.

53. *Taylor v. Louisiana* (1975) 419 U.S. 522 (53 percent of the venire were women, but fewer than 1 percent served).

54. *Duren v. Missouri* (1979) 439 U.S. 357 (53 percent of the venire were women, but only 14.5 percent served).

55. *J.E.B. v. Alabama* (1994) 511 U.S. 127. The opinion in *J.E.B.* relied on *Batson v. Kentucky* (1986) 476 U.S. 79, which held that peremptory strikes based on race violated a defendant’s equal protection rights. Yet the use of peremptory challenges continues to this day.

47. *Id.* 220.

48. *Ballard*, *supra* 329 U.S. 187, 193.

49. *Id.* 195.

50. *Ibid.*

51. Caplan, “Women’s Jury Service,” *supra* *Washington State Bar News* 19–20.

Hal Cohen:

Tributes to the California Supreme Court's Most Extraordinary and Influential Staff Attorney

BY JAKE DEAR



Hal Cohen in the Supreme Court's fifth floor hallway outside the Chief's chambers, circa 2006. (*Daily Journal photo.*)

HAROLD COHEN — Hal, as the justices and staff of the California Supreme Court have known him for more than five decades — drove with his wife, Inez, from New York City to San Francisco right after their marriage. It was June 1969, and he was to start a clerkship with Justice Mathew Tobriner. A Brooklyn native who was raised in Queens and had attended college and law school on the East Coast, Hal had no inkling that his one year Tobriner clerkship would turn into a lifetime career with the Court in San Francisco.

Hal was following in the footsteps of other young law school graduates who had served the Court — including then-recent Tobriner clerks Jerry Brown and Lawrence Tribe. In the ensuing decades, Brown would shape state, national, and worldwide policy — as well as the state judiciary, and the California Supreme Court especially. Tribe would become a leading constitutional law professor at Harvard Law School, influencing important judicial decisions and the development of the law through his writings and mentorship of lawyers and future public servants — including President Barack Obama. Hal would eschew the limelight, and quietly (well, sometimes not so quietly) influence both California and indeed

national law from *within* the state Supreme Court. Only the comparatively few justices and small cadre of appellate lawyers privileged to work here with him over those years know, understand, and appreciate the magnitude of his contributions and dedication.

“Only the comparatively few justices and small cadre of appellate lawyers privileged to work here with him over those years know, understand, and appreciate the magnitude of his contributions and dedication.”

In July 2020, as the pandemic persisted, Hal broke the news to Chief Justice Tani Cantil-Sakauye, her staff, and then the Court: He would retire. Although, like the Court's justices and most of its staff, he had transitioned to working remotely, and indeed completed a final draft calendar memo in a significant case, he decided that the time had come. A consummate behind-the-scenes professional who adheres to the strictest code of decorum and confidentiality, Hal would never acknowledge, much less admit, what the rest of us know: He's irreplaceable, and his departure will leave a void. Yet what he's given to the institution and to the law will live on — not only in the

127 volumes of *California Reports* published while he worked for eight justices (and with 28 other justices of the Court during that same period) — but also in the example he has set for all of us, and the standards to which those of us who remain, and those who will join the Court staff in the future, aspire.

I asked approximately 25 current and former justices and Court staff to share with me their observations of and thoughts about Hal. I'll set out a sampling of those comments below. But first, I'll briefly sketch Hal's tenure at the Court, and highlight some personal observations about Hal and his work.

Hal's tenure at the Court

When Hal's one-year clerkship ended Justice Tobriner asked him to stay on and Hal did so until Tobriner retired in early 1982. Because prior to that date (and anticipating Justice Tobriner's retirement) Hal had been hired by Justice Otto Kaus, who had joined the Court in mid-1981, Hal worked for both in the overlapping months. Hal stayed with Kaus until he retired in the fall of 1985, and then worked for Justice Joseph Grodin until early 1987, when Grodin left office after the voters unwisely terminated his lease at the prior general election. Hal then was hired and worked for Justice John Arguelles from his confirmation in March 1987 to his retirement two years later. Hal next worked six months for Justice Joyce Kennard as she was beginning her service on the Court, until September 1989, and then, pursuant to a prior arrangement, Hal worked for Justice Broussard until he retired in the summer of 1991. Hal became head of chambers for Justice Ronald M. George when he joined the Court as an associate justice in September 1991. After George was appointed and confirmed as Chief Justice in mid-1996, Hal remained head of the George chambers, and also became chief supervising attorney of the Court. Hal continued with George until he (George) retired in early 2011, even though Hal had, himself, formally retired at the end of 2005 and then continued at the Court as a retired annuitant. When Chief Justice Cantil-Sakauye took office in January 2011, she asked Hal to continue his work, first as a retired annuitant and then in a voluntary emeritus

position. Hal worked on the present Chief's staff until he fully retired in the summer of 2020.

Some personal observations

I've known Hal since 1983, when I served as an annual law clerk to Justice Stanley Mosk, and Hal was on the Kaus staff. I realized then, and with time grew to appreciate even more, his extraordinary capacity to approach legal problems by seeing both the big picture — and diverse implications — as well as the most intricate and complex points and problems. And once I began working with Hal more directly within the George chambers beginning in 1996, I came to recognize his refined realpolitik sense about what may, and may not, gain a majority within the Court at a given time — and how to best structure and organize a draft calendar memo and eventual opinion.

I, like many others who have benefited from Hal's direct critiques and editing, learned that when he returned a draft of my work that I had submitted to him for review, it would be accompanied by a cover memo setting out his gentle and yet forceful comments. Typically, that memo said, in essence: "Great work! How about if we (substantially) revise and reorganize along these lines . . . ?" Like many others, I learned to take a deep breath, absorb his comments and suggestions — and usually concluded, after some debate (often rather energized) that . . . yup, Hal's suggested approach, or at least a version of it, was an improvement.

These types of experiences with Hal and others taught all of us, and reinforced, the need for, and value of, being open to constructive critique. The Court's justices and staff operate in a world of constantly giving and receiving criticism. Under the Court's internal procedures, our work within each chamber, and the calendar memos and draft opinions that circulate from each chamber to all of the other six chambers, are subject to a veritable gauntlet of legal slings and arrows. If one's skin is too thin, it can be painful. Yet we generally realize that it's healthy, and refreshing, to be part of an institution and branch that carries off robust criticism in stride — without, for the most part, taking it too personally. If only other branches of government performed nearly as well . . .

Hal has also been a friend and trusted confidant. Soon after he stepped away from his roles as chief supervising attorney and head of the Chief's chambers in 2005, and I was forced to try to wear those shoes, we began taking daily morning "constitutional" around San Francisco's Civic Center Plaza. During these four laps just outside the state building we talked out our respective research — testing hypotheses and tentative analysis. More than a few passersby must have thought these two fellows were having quite an argument. We also discussed the Court's administrative and policy challenges; the state of our society and government; and the joys and challenges of families. Finishing each walk and returning down the

long interior hallway to the door of my office, we'd typically thank each other for the time and the chat. On reflection, those 30 minutes were often the most productive and inspiring of my day — and oh how I miss that, and Hal's regular influence, now.

But all that's merely a snapshot of my own experience. What of others? I'll set out below comments of former justices and staff attorneys who have worked with and/or known Hal over the years.

Observations and comments by former justices and Court staff attorneys

Let's start with BERNIE WITKIN, who served as a staff attorney for Justice William Langdon from 1930–39, and then for Justice Phil Gibson, 1939–1940 — as a prelude to launching what became his famous and indispensable multivolume treatises on major aspects of California law. In a 1991 oral history Witkin spoke approvingly of the practices of justices — starting with Roger Traynor in the early 1940s — hiring bright recent law school graduates as "law clerk . . . collaborators" who "developed a symbiotic relationship" with their justice and "participat[ed] in the thinking processes that led to the decision as well as in the articulation by the opinion."¹ This led Witkin to reflect on the Court's then current staff, and he focused specifically on one who exemplified his ideal: "Hal Cohen, almost an unknown figure, [but] one of the greatest appellate lawyers that ever hit these parts, Harvard cum laude and all that."² As we will see, Witkin was not alone in that assessment.

OLGA MURRAY came to the Court 14 years before Hal, working as a staff attorney for Chief Justice Phil Gibson, and then for Justice Stanley Mosk.³ She nicely previews themes we will see emphasized and elaborated upon by others: "I worked with Hal at the Supreme Court for decades. He is the most brilliant and dedicated lawyer and had a great influence on the direction of California law during his many years working for various justices of the Court. And he was a pleasure to work with. Though

"Under the Court's internal procedures, our work within each chamber, and the calendar memos and draft opinions that circulate from each chamber to all of the other six chambers, are subject to a veritable gauntlet of legal slings and arrows."

1. Gordon Morris Bakken, "Conversations with Bernard Witkin" (1998–99) 4 *Cal. Supreme Ct. Hist. Society Yearbook* 109, 111–13.

2. *Id.* 115.

3. Olga deserves her own tribute for her amazing work after her service at the Court. See generally Olga Murray & Mary Sutro Callender, *Olga's Promise: One Woman's Commitment to the Children of Nepal*, Olga Murray Publications, 2015 [describing Olga's founding of the Nepal Youth Foundation, a nonprofit organization that has served more than 45,000 children by providing them with vital healthcare, education and a safe environment].



Foreground: Justice Tobriner. Left to right: Ray and Mary McDevitt, Robert Vanderet, and Rosabelle Tobriner at Passover Seder, early 1970s. (Cohen family photo.)



Left to right: Robert Vanderet, Justice Tobriner, and Hal Cohen circa 1972. (Courtesy of Robert Vanderet.)

we sometimes had disagreements about cases before the Court, and I often shed more heat than light in our discussions, he was always gentle, concise, yet forceful and direct — and almost always won the argument. I retired from my work as a staff attorney at the Supreme Court 28 years ago; during my time at the Court I met many exceptional lawyers, but none more passionate about the law and more dedicated to justice and fairness than Hal.”

RAY McDEVITT began a one-year law clerk position with Justice Ray Sullivan in the fall of 1969 and met Hal at the Court then. Ray recalls: “Hal had just begun a clerkship for Justice Mat Tobriner, which was to evolve into a distinguished career of service to a succession of eminent judges on that Court. Although we worked together for only that one year, we have been friends for just over 50 years now.”⁴

Ray elaborates: “Four of Hal’s many attributes deserve particular mention. First, he is super-smart; even three years at Harvard Law School couldn’t diminish his natural intelligence. Second, he writes like an angel, with an

4. Ray, who went on to be a highly regarded civil practitioner, honored the judicial branch by researching and writing *Courthouses of California: An Illustrated History*, Berkeley, CA: Heyday, 2001 — and by serving as president of the California Supreme Court Historical Society.



This framed charcoal drawing, used in a KQED news program commemorating the outcome in Justice Tobriner’s opinion in *In re Lifschutz* (1970) 2 Cal.3d 420, hung in Hal’s office for more than 50 years. (Photo by Jake Dear.)

elegant but simple style that emphasizes clarity. Third, he has a wonderful sense of humor, appreciating both puns and paradox. Finally, he is a kind person: congenial, considerate, and compassionate. I consider it a blessing that my wife, Mary, and I have been able to share good times, and hard times, together with Hal and his wife Inez for five decades.”

JUDGE ROBERT VANDERET, of the Los Angeles Superior Court, writes: “I first met Hal in 1972 when I had the privilege of serving as a law student extern for Justice Mathew Tobriner. Hal was my supervisor and soon became my close friend. That friendship deepened over the decades that followed, and we shared the joys of watching each other’s family grow, sharing family vacations and annual seders, and staying in touch even after we moved to Los Angeles, while Inez and Hal remained in Hal’s beloved San Francisco. As a result of knowing Hal so well for nearly half a century, I can confidently make two observations about him:

“First, Harold Cohen is truly a mensch, in the full sense of the Yiddish meaning of that word: a person of integrity and honor, someone to admire and emulate. No one could ever doubt his integrity or his character. He is an exemplary father and husband, a trustworthy and loyal friend, and the most empathetic and decent human being I have ever known.

“Second, Hal has the finest legal mind I have ever encountered: brilliant, insightful and creative. I used to fantasize that I was in a position of power for the sole purpose of nominating Harold Cohen to the Supreme Court of California or the United States. (I’m not making this up.) But even without holding such high position, many of us know of the profound, positive

“Hal has the finest legal mind I have ever encountered: brilliant, insightful and creative. I used to fantasize that I was in a position of power for the sole purpose of nominating Harold Cohen to the Supreme Court of California or the United States.”

and progressive influence he has had on the law. We are all better for his service on the Court.”

RICK SEITZ, who joined the Court staff in 1975 for Justice Frank Richardson — and stayed nearly 40 years, working also for Justices Frank Newman, Joseph Grodin, David Eagleson, and Marvin Baxter, remarks: “After five decades of sterling service, Hal richly deserves his retirement, but it will be mourned by all who love the Court. His work has been marked by extraordinary wisdom, intellect, scholarship, and integrity. These qualities, plus his humility and his unfailing regard for his colleagues, have earned him their universal respect and affection. He is unique and irreplaceable.”

JUSTICE WILLIAM DATO (Fourth District, Div. One), who met Hal when he was a law student extern at the Supreme Court in 1979, and then an annual law clerk for Justice Tobriner, speaks for many staff, and well captures Hal’s approach to the work and the Court: “While our relationship has grown and evolved over the years as I

went on to do a variety of other things, Hal has remained for me — as for so many other attorneys who have worked at the Court — a mentor and inspiration.”

He explains: “After a half century of service to the citizens of this state, there are few individuals who have had a greater impact on the development of California law. You’d never know that from talking with Hal — he is self-effacing to a fault. Yet for those who

have worked with him, his humble nature could never hide the power of his intellect or the grace of the written product he created. A conversation with Hal about a difficult legal issue was always enlightening — nearly every time you ended with a clearer understanding of the problem than when you started. Equally important, you came away reinvigorated because Hal’s enthusiasm for his work and commitment to quality was contagious. His sage counsel subtly but compellingly reminded that what we are doing *is* important, and we are privileged to be part of the process.”

Justice Dato concludes: “Perhaps that helps explain how and why over the course of 50 years Hal was able to work so well with eight different justices who had widely varying temperaments and philosophies. Most often Hal has a strong sense about the right result in a particular case, but for him it’s never *just* about the result. It’s also about how we get there, because a robust and rigorous process both informs and supports the correct result. No one understands that process, or better exemplifies how to properly utilize it, than Hal Cohen.”

PAUL FOGEL, a staff attorney for Chief Justice Rose E. Bird 1983–1987 (and subsequently a highly respected



Left to right: Hal Cohen, Justice Tobriner, and his annual clerk Steve Yeazell (now a law professor at UCLA), circa 1975. (Cohen family photo.)



Tobriner staff in summer of 1981 — Justice Tobriner (seated, center). Standing: far left, secretary Connie Del Carlo; third from left, Hal Cohen; second from right, long time staff attorney Mike Willemsen (who remained at the Court until the mid 2000s); far right, annual law clerk Bill Dato; the remaining five are law student externs. (Courtesy of William Dato.)

appellate practitioner), puts into perspective the institutional importance of staff attorneys in general — and of Hal in particular:

“Most people who interact with appellate justices and courts do not appreciate the extent to which staff attorneys are the ‘backbone’ and ‘circulatory system’ of a well-functioning judicial ‘body.’

They help keep the Court strong and healthy by working to ensure that its rulings are fair, well-reasoned, and grounded in the law and the facts. This enables the judicial branch to retain respect, resolve disputes fairly, and keep the other branches in check. Appellate staff attorneys in particular do an enormous amount of ‘heavy lifting,’ providing the scholarship,

“Most people who interact with appellate justices and courts do not appreciate the extent to which staff attorneys are the ‘backbone’ and ‘circulatory system’ of a well-functioning judicial ‘body.’”

reasoning, and helpful counsel about the direction the law should move in, consistent with the Constitution and other governing documents.”

Paul concludes: “Hal’s 50 years at the Supreme Court epitomize the absolute best contribution a staff attorney can make to ensure the strength and health of an important institution like the California Supreme Court. Brilliant, kind, polite, funny, caring, eloquent, creative, diligent, productive, dedicated, inquisitive, and selfless are only some of the adjectives that describe him. He has had an extraordinary influence on the law and on those fortunate to be his colleagues. All Californians should be grateful that he chose to use his talents to ensure that our Supreme Court has retained the stature it has. Thank you, Hal!”

BETH JAY, who worked at the Court for more than 40 years — with Justice Richardson, Justice (and Chief Justice) Malcolm Lucas, Chief Justice Ronald George, and the present Chief, Tani Cantil-Sakauye — writes: “Losing Hal Cohen will create a huge hole in the Court’s fabric. His knowledge, memory, curiosity, intelligence, analytical skills, and generosity as a lawyer are unmatched. He

has been a crucial contributor to the work of the Court in every way. I have known and admired him for four decades, and had the great pleasure of working with him on the staffs of the most recent two Chiefs. An exacting writer and superb editor, he improved every draft he touched. He is, quite simply, a lovely person. And who will be left to remember the Brooklyn Dodgers?” (Indeed, as Beth reminds us, Hal kept a photograph of fellow Brooklyn native and Dodgers pitcher Sandy Koufax in his office.)



This framed image hung in Hal’s office for the last few decades. (*National Baseball Hall of Fame Library.*)

low Brooklyn native and Dodgers pitcher Sandy Koufax in his office.)

GRAHAM CAMPBELL worked at the Court more than 38 years, first as an annual law clerk for Justice Maurice Dooling in 1961. He returned to the Court the same year as Hal, 1969, as a staff attorney for Justice Louis Burke, then worked for Justices Frank Richardson, Malcolm Lucas (as associate justice and as Chief — during which time Graham was head of Lucas’ chambers), and finally for Justice Ming Chin, until 2006. Graham recalls inviting Hal as a “guest” to some of our semi-regular Lucas staff alumni lunches, where he could not resist roasting the vaunted Hal. Graham — who worked for judges who were not philosophically or jurisprudentially aligned with most for whom Hal worked — recalled some strong disagreements



Hal, Janet Grodin, and Justice Grodin at the 1985 bat mitzvah of Hal and Inez’s daughter, Sara. (*Cohen family photo.*)

over analysis and outcomes, and reminds us that Hal is not perfect: “I have always loved and admired Hal. Surely, he was one of our more productive, endearing and certainly enduring staff attorneys. But when it came to thrashing out the Court’s decisions, Hal and I usually worked at the opposite ends of the liberal/conservative spectrum. We seldom huddled together on anything but the Supreme Court softball team, where, as player/manager, I consistently pitched losing games, and Hal fumbled relatively easy ground balls to him at second base.”

RETIRED JUSTICE JOSEPH GRODIN knew Hal through his former law partner and their mutual friend (and later Justice) Mat Tobriner, and hired Hal when Justice Kaus retired in 1985. When he recently learned of Hal’s decision to formally retire, Grodin lamented: “First the coronavirus, then the economy, and now Hal Cohen leaves the Supreme Court, where his quiet, unassuming brilliance, and articulate insight have contributed to the Court’s greatness, and his personal qualities have enhanced the lives of all of us who were privileged to work with him.”

“... his quiet, unassuming brilliance, and articulate insight have contributed to the Court’s greatness, and his personal qualities have enhanced the lives of all of us who were privileged to work with him.”

ALICE COLLINS joined the Court’s criminal central staff in 1983, moved to Justice Broussard’s staff in 1984, and worked on the staffs of Chiefs Lucas, George, and finally Cantil-Sakauye, until retiring in 2017. She writes: “Hal’s work has been central to the Court’s jurisprudence for so long — his products were so thorough, insightful, and beautifully written. He remembers everything — it’s quicker to ask Hal than to go to Westlaw or Lexis — and he’s been the institutional memory of the Court. He is

also as honest as the day is long, and somehow manages never to say a discourteous word about others.”

RETIRED JUSTICE KATHRYN MICKLE WERDEGAR recalls: “I first met Hal when I joined the Court as a judicial staff attorney for Justice Edward Panelli in 1985, some 35 years ago. At that time Hal already was an experienced and valued member of the Court staff, relied on by both fellow attorneys and justices for his even temperament, depth of knowledge and excellent judgment. Characteristically, he extended me a warm welcome and offered to assist in whatever way needed as I settled in to my new responsibilities.”

She observes: “During his tenure with the Court Hal served under 36 justices, including six chief justices. He worked as a chambers attorney for eight justices. This is a striking accomplishment. It’s a telling one as well. Along with his legal acumen, one of Hal’s most notable characteristics

“With Hal’s retirement, the California Supreme Court bids farewell to an individual who has borne witness to and helped shape the Court’s history for over half a century.”

is his ability to respectfully and capably serve justices of markedly different temperaments, backgrounds, and judicial philosophies. Hal has been the consummate professional, dedicated first and foremost to the well-being of the California Supreme Court as an institution. From this loyalty to the

Court flowed naturally his willingness to assist its members — individually and as a whole — graciously and to the best of his ability. In his capacity of chief supervising attorney of the Court many of us have had occasion to seek his assistance and plumb his wisdom about matters both legal and institutional. One always came away enriched and enlightened.”

Justice Werdegar focuses on Hal’s strict adherence to confidentiality and decorum: “Hal’s institutional knowledge is unmatched. He has served through times tumultuous and calm, fractured and collegial. He doubtless has stories to tell. But don’t expect to hear them. Along with his intellect, skill and accomplishment, Hal is modest, discreet, and self-effacing.” (Indeed. Although I and others have encouraged Hal to write about his experiences at the Court or give an oral history, that’s not going to happen.⁵)

Justice Werdegar concludes: “The California Supreme Court as an institution and its members individually have been fortunate to have this young



Hal with Justice Werdegar at the Court holiday party, circa 2015. (Photo: Sherry Glassman.)

attorney from Brooklyn, by way of Harvard, decide to dedicate his career to the Court he intended to serve for one year only. With Hal’s retirement, the California Supreme Court bids farewell to an individual who has borne witness to and helped shape the Court’s history for over half a century. His service is unprecedented. The vacuum created by his departure will be deeply felt. Hal, we have been enriched by your presence.”

NORM VANCE, currently and for the past 28 years, director of the Court’s criminal central staff, came to the Court in 1987 and worked with Hal in the Arguelles chambers. He highlights Hal’s tenacity and ability to sense not only the proper development of the law as a theoretical matter, but also the limits of change within the confines of an inherently incremental institution: “Hal was the best supervisor I ever had in my life — and an invaluable mentor when I came to the Court from the Ninth Circuit. We had some knock-down, drag-out arguments over cases (his office was between Justices Broussard and Panelli, as I recall, and both of them had to come over on occasion to ask us to keep it down), and he was always right — by which I mean, I could be right on the law but Hal knew what would work with other chambers. He was as skilled a ‘politician’ in our world as they come. He’s also one of the smartest and one of the nicest people I have ever known in my life — and that’s a rather rare combination.”

“He’s also one of the smartest and one of the nicest people I have ever known in my life — and that’s a rather rare combination.”

RETIRED JUSTICE JOYCE KENNARD speaks to the depth of Hal’s relationship with the institution. “When I joined the California Supreme Court in April 1989, I was lucky in having Hal Cohen, a superb attorney with many years of experience on the Court, assigned to me for my first months. Anyone who has worked with Hal knows of his intellectual brilliance, his integrity, his humility, and his kindness. Hal loved the Court. In turn, the Court loved him.”

5. Much to Hal’s chagrin, he — along with all then-serving justices, and some other key Court attorney staff — was forced to answer deposition questions and testify before the Commission on Judicial Performance during the so-called *Tanner* hearings in 1978–79. See, e.g., Kathleen A. Cairns, *The Case of Rose Bird*, Lincoln, NE: Univ. of Nebraska Press, 2016, ch. 6; Preble Stoltz, *Judging Judges*, N.Y.: Free Press, 1981. I suspect that painful experience reinforced Hal’s existing constitutional proclivity toward circumspection about the Court’s work.

GARY SIMMS, who served nearly nine years at the Court for Justices David Eagleson and Marvin Baxter in the late 1980s through the early 1990s, writes: “In 40 years of law practice, mostly appellate law in various state and federal courts, and including . . . at the California Supreme Court, I have been privileged to work with several judges and attorneys with keen legal minds. But I have never known anyone with Hal Cohen’s combination of passion for the law and whip smart legal analysis.”

RETIRED CHIEF JUSTICE RONALD M. GEORGE, who hired Hal to head his legal staff — and also to be the Court’s chief supervising attorney once George became

Chief Justice — described Hal in his published oral history as “one of the most brilliant minds that I’ve had the privilege of encountering in any venue, and not just limited to the California Supreme Court.”⁶ Chief George went on to reveal what no staff attorney (especially Hal) ever would — specifically describing how Hal worked with him to research and craft some of the leading George opinions, such

“His qualities as an especially caring and thoughtful person inspired gratitude and admiration in me and in every individual — judge, staff attorney, or clerical personnel — who was privileged to know him and work with him.”

as the “marriage trilogy” decisions.⁷ More recently, on hearing of Hal’s recent decision to formally retire, Chief George writes:

“There are very few individuals who can be considered institutions in their own right, but Hal Cohen’s unique role and contributions to the work of the California Supreme Court over more than half a century qualify him for such a designation. He has an extraordinary knowledge of the law, with particular insight into its application in the setting of judicial decision-making. Despite possessing these skills, he has remained a very

modest person. His qualities as an especially caring and thoughtful person inspired gratitude and admiration in me and in every individual — judge, staff attorney, or clerical personnel — who was privileged to know him and work with him. Hal is irreplaceable and will be deeply missed.”

BLAIR HOFFMAN, who worked 28 years at the Court for Justices Arabian and Chin, stresses that Hal could be both gentle and persistent. In the process, Blair shines some light on the inner workings of the Court:

“As everyone who knew him was aware, Hal is very much the gentleman and very collegial. But he could also be a strong advocate for his judge’s position. Not that well known was his ability to lobby privately for his judge’s position. Many times during my years working with him for the Court, he would enter my office to lobby on his judge’s behalf, perhaps arguing against a calendar memo that he was concerned my judge might support, or in favor of his judge’s PR. [A “PR,” preliminary response, is a justice’s written reaction to a circulating “calendar memo,” which is in turn akin to a preliminary draft opinion.] He was always respectful and did not pressure me, but he could also be quietly convincing. Often (not always) he persuaded me to his position, and I would recommend my judge adopt that view or, perhaps, make appropriate changes in a forthcoming opinion. It was always a pleasure to have him come to me to try to persuade me, even on those occasions (not so often) when he did not succeed. That was the Court working at its best.”

STACEY STOKES came to the Court in 1992 as an annual law clerk for Chief Justice Lucas — and eventually served the current Chief, until 2018. She writes: “Many people who have worked at the Court really love the law. The job practically demands it. When it comes to Hal, however, his was a love supreme. The law nourished and enthralled Hal. At times, it also confounded and exasperated him. But his passion for the law never wavered, and it informed all of his memoranda and advice to the various justices for whom he worked. It was also the driving force behind his often-animated interactions (including heated debates) with colleagues.”

Stacey nicely summarizes Hal’s approach to the cases: “Hal went about his work at the Court with the same enthusiasm and resolve in every case, whether it was destined for watershed status or concerned only a narrow, arcane question of law that was of interest to but a few. His process was this: Guided initially by the parties’ briefing, Hal would then tirelessly locate and comb through every relevant case and secondary source, using a stubby sharpened pencil to cram his observations and thoughts onto index cards in handwriting so small the average reader could not make out without the help of a magnifier. He would start writing his drafts when he was satisfied that he had reviewed and chewed on everything he possibly needed in order to find what was, in his view, the better rule, or the most natural progression of the



Hal, left, with Chief Justice George after the petition conference, circa 2005. (Photo: California Supreme Court staff.)

6. Ronald M. George, *Chief—The Quest for Justice in California*, Berkeley: Pub. Policy Press, 2013, 635–36.

7. *Id.* 636–37.



The Chief's attorney staff members in her chambers, December 2019. Left to right: Neil Gupta; Hal Cohen, Michael Rhoads, Erin Rosenberg, Matthew Scarola, Jake Dear, Vyoung Nguyen, Todd Thompson (not pictured, Kyle Graham). (Photo: California Supreme Court staff.)

“The law nourished and enthralled Hal. At times, it also confounded and exasperated him. But his passion for the law never wavered, and it informed all of his memoranda and advice to the various justices for whom he worked.”

law — and the just result. His memoranda were beautifully crafted, always complete and concise in their reasoning. His signature writing style also typically included single sentences that spanned eight or nine lines of text. He had much to say in just one breath!

Finally, Stacey observes: “Hal’s recommendations did not carry the day in every case. But they were always well respected.

His passion for the law and his pursuit of justice was steadfast, even when his own views met with resistance. He was an inspiration to those of us who worked with him, who learned from him, and who called him a good friend.”

Comments by Hal’s most recent colleagues in the Chief’s chambers

Hal’s most recent colleagues on the Chief’s staff echo and expand on these observations. Here’s a sampling from some of them — VUONG NGUYEN, ERIN ROSENBERG, MICHAEL RHOADS, MATTHEW SCAROLA, AND SUNIL (NEIL) GUPTA, respectively: “It always gave me peace of mind to know that Hal was looking over every formal piece of writing I did before it circulated to the Court. There’s something deeply comforting in knowing that Hal agrees with you (or at least didn’t disagree enough to march into your office and tell you exactly what he thought). I miss Hal already.” “Hal is a brilliant and thoughtful attorney. His institutional knowledge of the Court is invaluable. He was quick to offer an insightful comment about a case. I looked forward to seeing his smiling face in the office!” “Hal’s knowledge about the Court’s history and its precedents is unmatched. But what I will remember most is his patience, his humility, and his ready willingness to listen and to share his experiences and perspectives.” “The easiest way to predict the outcome of a new case was to get Hal’s gut reaction. His knowledge was so deep, and his insight so immediate,

that he could solve the toughest legal problems off the top of his head. Hal reviewed all the calendar memos and work by others — and volunteered feedback. A compliment from Hal was one of the Court’s highest honors.” “Hal’s approach to cases was entirely free from ego or any personal agenda. His respect for the law is so great that I can truly attest that it is his sole guiding force in deciding how to approach and analyze a case.”

I’ll quote more extensively from two additional current members of the Chief’s staff. TODD THOMPSON, who joined her staff after decades as a big firm partner, and then as a staff attorney at the First District Court of Appeal, gives a personal account:

“Hal Cohen has manifestly a brilliant legal mind, but what struck me most about Hal was his passion for the work of the California Supreme Court. It was not just the law, but also the institution, that inspired Hal. He cared deeply about the evolution of the Court’s jurisprudence and the quality and content of its decisions. My best times in the office over the last three years were those spent yelling at and with Hal about prospective decisions. Hal yelled not because he was angry or distressed but because he *cared*, because the principles we were debating were supremely important to him. Talking about them excited him.

Hal’s was not an abstract passion for the law, but a passion for the law *as pronounced by this Court*.

Todd illustrates his observations by describing the inner workings of the Chief’s staff: “Within the first year of my beginning work at the Court, I was assigned primary responsibility for a high-profile civil case before the Court. In the Chief Justice’s chambers, we have a practice of requiring the responsible attorney for each case to select a ‘buddy’ from among the Chief’s other attorneys. The buddy serves as a sounding board and reviews our work before it is submitted to the Chief. Hal, whose office was next to mine, had occasion to hear me discuss this case

“It was not just the law, but also the institution, that inspired Hal. He cared deeply about the evolution of the Court’s jurisprudence and the quality and content of its decisions.”



Chief Justice Tani Cantil-Sakauye with Hal at the Court holiday party, 2016. (Photo: Sherry Glassman.)

with other persons, and we had many discussions about civil law when I served as the buddy on one of his cases. Based on this exposure, I am now certain Hal concluded that placing the high-profile case in the hands of a person as rash as myself was a potentially grave mistake. In an unprecedented move, Hal did not wait for me to select a buddy. Perhaps a year before I would begin actual work on the case, Hal asked me whether he could serve as my buddy. Hal pitched his request as based on the interesting nature of the case, but I have no doubt that, in Hal's mind, he was attempting to head off disaster. Although Hal is a sensitive and considerate person, and would sew his mouth shut before causing insult to anyone, in his mind the case was just too important to let propriety stand in the way. At the time, I was just flattered that Hal Cohen wanted to act as my buddy, and I accepted on the spot. It was, of course, the best decision I could have made. Hal and I worked out a successful approach to the case, and his continuing comments and guidance resulted in a far better draft than I could have prepared on my own. We disagreed at times, and we yelled — and the experience will be the highlight of my work for this Court, regardless of what the future might bring.”

“... if you were to name an important opinion produced by the Court from the [late] Traynor years to the present, odds are that Hal made some significant contribution to it.”

KYLE GRAHAM, who served as a two-year law clerk to Justice Moreno, became a law professor, and then joined the Chief's staff four years ago, posted on the day Hal announced his decision: “One of the very best lawyers I've ever come across formally retired today, after 51 years at the California Supreme Court. Hal Cohen joined the Court as chambers staff one month before Neil Armstrong set foot on the moon, at a time when Woodstock was still just some concert that was going to happen later that summer. Although not one of the hundreds of judicial opinions he worked on bears his name, he is probably one of the five most important

attorneys — including justices — to ever have served at the Court. Without delving into specifics, if you were to name an important opinion produced by the Court from the [late] Traynor years to the present, odds are that Hal made some significant contribution to it.”

Kyle concludes: “Hal will never be known to the millions whose lives have been affected in one way or another by his work. He prefers it that way. But to me and others at the Court, he is the textbook definition of a lawyer's lawyer. We were very lucky to have him for as long as we did.”

Finally, CHIEF JUSTICE TANI CANTIL-SAKAUYE comments: “During Hal's tenure at the Court, he served 36 justices, including six who were, at one time or another, chief justices. Viewed another way: Hal served under 30 percent of the Court's 117 justices, and for 30 percent of the Court's 170-year history. Like my colleagues before and presently, I have been exceptionally fortunate to benefit from his extraordinary legal talents and his gracious disposition, as so well recognized and described by many others.”

The Chief continues: “Every superlative in this article describing Hal Cohen is an understatement. Full stop. He is truly a human marvel who possesses unparalleled intellect, poetry of the pen and what seems like infinite exacting knowledge of the law, chapter and verse. And yet, for all his extraordinary and awesome gifts, as recognized by some of the most critical analytical thinkers in the law, Hal is patient with and kind to us mere mortals. When I first met Hal in 2011, I recognized immediately that he is a legal giant among giants and I thank the universe that I had almost ten years to learn from him.”

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Postscript

Working remotely, and using primarily electronic documents, was very challenging — and not at all natural for Hal. He thrives on face-to-face discussions, and is far more at ease using hardbound versions of case law, law reviews, and treatises that, in his office, would usually lie opened in stacks completely covering his old walnut desk, inherited from Justice Broussard. But we can imagine what his home office might look like soon, when he begins working on a project that's been percolating in his fertile mind for many years: A book about the U.S. Supreme Court's recent applications of the federal Constitution's First Amendment, under the working title, *Too Much of a Good Thing*. Hal, we look forward to reading it — hearing your voice, while continuing to be enlightened by your wisdom and inspired by your passion. ★

JAKE DEAR is head of the Chief Justice's legal staff and the chief supervising attorney of the California Supreme Court. A shorter version of this article was published, under a similar title, in the November 12, 2020 edition of the *Daily Journal*.



Harry Bridges (holding book), being met at the San Francisco Airport by labor leaders when he returned from New York, Oct. 2, 1941. In *Bridges v. California*, 314 U.S. 252 (1941), the Court cited the First and Fourteenth Amendment guarantees of freedom of speech and press to overturn contempt convictions against a newspaper and against Bridges, who had criticized judicial proceedings in pending cases. (AP Photo/Jack Rice, used with permission from *The Associated Press*.)

Harry Bridges and the *Los Angeles Times*: Unlikely Free Speech Allies

BY HENRY WEINSTEIN

ON MONDAY DECEMBER 8, 1941, as millions of Americans were reeling from the Japanese military's attack on Pearl Harbor a day earlier, the United States Supreme Court overturned contempt convictions imposed on one of the nation's most outspoken and contentious labor leaders and California's largest newspaper. The Court's controversial 5–4 decision significantly expanded the right of individuals and news organizations to comment on ongoing legal proceedings and criticize judges. Because the Court issued *Bridges v. California*¹ at a time when Americans, understandably, were preoccupied with the nation's entry into World War II, it is not nearly as well known as many free speech cases but for nearly eight decades the decision has had

an important role in enhancing the power of the First Amendment.

The impact of *Bridges* “has been great and wide ranging, setting America on the path of providing far more legal protection for free expression than exists or ever has existed elsewhere,” wrote noted First Amendment lawyer Floyd Abrams in his 2017 book, *The Soul of the First Amendment*.² Since 1941, *Bridges* has been cited in more than 625 First Amendment cases,³ including *New York Times v. Sullivan*, the 1964 decision that provided dramatically enhanced protection for news organizations in libel suits.⁴

The *Bridges* decision marked the culmination of a six-year battle pitting the California judiciary against two of the most unlikely allies in U.S. legal history — leftist labor leader Harry R. Bridges and the aggressively anti-union *Los Angeles Times*. In separate proceedings, Los Angeles trial judges had held both Bridges and the *Times* in contempt for allegedly attempting, through out-of-court actions — a telegram Bridges sent to the secretary of labor and blistering editorials in the *Times* — to improperly pressure judges in ongoing cases,

2. Floyd Abrams, *The Soul of the First Amendment*. New Haven: Yale U. Press 2017, xx.

3. Confirmed on Lexis and Westlaw as of Aug. 29, 2020.

4. (1964) 376 U.S. 254.

1. (1941) 314 U.S. 252.

rulings that the California Supreme Court upheld by lopsided votes.⁵

Harry Bridges and the *Times* became short-term allies when, on appeal, the U.S. Supreme Court consolidated the two cases, concluding that they raised the same primary issue. Ultimately, the Court reversed both contempt convictions as violations of the First Amendment. “It is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions,” Justice Hugo Black wrote for the majority, a forceful statement supporting the right of individuals and institutions to criticize judges, as well as elected officials. “The First Amendment does not speak equivocally,” Black emphasized. It prohibits any law “abridging the freedom of speech or of the press.”⁶

Black also scoffed at the notion that intemperate comments about judges would harm the legal system. He wrote that “an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect.”⁷

The *Bridges* decision not only expanded free speech rights in the U.S., it also sharply delineated the differences between the legal systems in the U.S. and Britain, which has considerably more restrictive policies regarding news coverage of judicial proceedings. Justice Felix Frankfurter, an Anglophile who supported the British stance, issued a sharp dissent, contending that “the atmosphere of” Black’s decision gave license to “trial by newspaper”⁸ and could erode the tradition of administration of justice by an impartial judiciary “that has been basic to our conception of freedom ever since Magna Carta.”⁹

Historically, American judges had used the contempt power to jail or fine people for three reasons, as Anthony Lewis observed in his book, *Make No Law: The Sullivan Case and the First Amendment*: (1) violation of a court order; (2) creating a disturbance in the courtroom; or (3) making comments outside the court that “threatened the integrity” of a pending case.¹⁰ The accusations against both Bridges and the *Times* were in the third category.

Black’s majority opinion relegated to the dustbin of history a line of cases going back to the early twentieth century under which courts had used the summary power of contempt to curb out-of-court criticism of the judiciary and other public officials — in other words, category 3 cases, sometimes called “constructive contempt.” Prime among them was a 1907 Supreme Court

decision, *Patterson v. Colorado*,¹¹ upholding the contempt conviction of a Colorado newspaper publisher who favored municipally owned and operated power. In editorials and cartoons, Thomas Patterson blasted the Colorado Supreme Court for its decision overturning the election of a new governor who favored home rule, a prerequisite for changing the utility system as the voters wanted.

Justice Oliver Wendell Holmes, Jr. grounded his *Patterson* majority opinion in long-established English legal practices, sharply restricting what a lawyer could say about an ongoing case. “If a court believes that comments about a pending case have a tendency to interfere with the proper administration of justice, the court may punish that conduct by using the court’s power to hold the publisher in contempt,” Holmes wrote. Quite simply, Holmes declared, “the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied.”¹²

Black’s opinion in *Bridges* took a diametrically different approach, saying that such an assumption about the potential negative impact of media coverage of a pending case was unwarranted. He rejected the idea that a distinction should be drawn between what could be said about a court case while it was in process and when the case had concluded: “No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.”¹³

“Legal trials are not like elections, to be won through the use of the meeting hall, the radio and the newspaper,” Black acknowledged.¹⁴ “But we cannot start with the assumption that publications . . . actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases.”¹⁵

Although the contempt charges against Bridges and the *Times* emerged from different circumstances and concerned different parties, “both relate to the scope of our national constitutional policy safeguarding free speech and free press,” Black wrote, explaining why the Court considered the cases simultaneously.¹⁶

The improbable judicial shotgun wedding of Bridges and the *Times* that the Court orchestrated stemmed from the labor battles of the 1930s, one involving longshoremen, the other involving Teamsters.

5. *Bridges v. Superior Court* (1939) 14 Cal.2d 464; *Times Mirror Co. v. Superior Court* (1940) 15 Cal.2d 99.

6. *Bridges v. California*, *supra*, 314 U.S. at 263.

7. *Id.* at 270–71.

8. *Id.* at 279.

9. *Id.* at 282.

10. Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment*. New York: Random House, 1991, 97.

11. (1907) 205 U.S. 454.

12. *Id.* at 463.

13. *Bridges v. California*, *supra*, 314 U.S. at 269.

14. *Id.* at 271.

15. *Id.* at 270–71.

16. *Id.* at 258.

Harry Bridges, the central figure in the first case, was Australian by birth. He came to San Francisco in 1922 and soon became the leader of longshoremen in that city. He played an instrumental role in a 1934 general strike there that led to improved wages and working conditions. Two years later, Bridges and others broke away from the New York-based International Longshoremen's Association (ILA) and formed a new, more militant organization, the International Longshoreman's & Warehouseman's Union (ILWU).¹⁷

In 1937, the ILWU, affiliated with the Congress of Industrial Organizations, was engaged in a battle with the American Federation of Labor-affiliated ILA over the right to represent workers on the docks in San Pedro. Los Angeles Superior Court Judge Ruben Schmidt appointed a receiver to take charge of the contested dockworker hiring hall under ILA authority. Bridges angrily sent a telegram to Frances Perkins, FDR's secretary of labor, branding Schmidt's decision "outrageous," considering that the ILA had only 15 members on the San Pedro docks and the ILWU had 3,000. "Attempted enforcement of Schmidt decision will tie-up port of Los Angeles and involve entire Pacific Coast," Bridges wrote, noting that the ILWU had 11,000 members on the West Coast, dwarfing the ILA, which had only 1,000. He said the ILWU did "not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."¹⁸ Bridges' secretary, as was the union's custom, gave the telegram to the CIO's West Coast public relations director, who, in turn, gave a copy of the telegram to a reporter. The telegram generated widespread news coverage.¹⁹

Soon thereafter, the Los Angeles Bar Association sued in Superior Court. The bar's attorneys alleged that Bridges should be held in contempt because the statements in his telegram and the ensuing publicity were "calculated and had inherent tendency to interfere with the orderly and due administration of justice" in the case over which Judge Schmidt was presiding. The judge added that the telegram was designed "to interfere with, influence, sway and control the proceedings" and "to embarrass and influence" Judge Schmidt's actions and decisions.²⁰ Bridges, represented by the American Civil Liberties Union's first full-time attorney A.L. Wirin and several labor lawyers, unsuccessfully attempted to get the case dismissed. They maintained that private lawyers, acting on behalf of the bar association, could not



Harry Bridges at a meeting in Washington, D.C., July 7, 1937, with CIO Head John L. Lewis to plan for a coordinated unionization drive in the marine labor industry. (*Library of Congress.*)

prosecute a criminal case, noting that criminal proceedings are virtually always launched by government attorneys.²¹

Another Los Angeles judge rejected that argument and moved the case forward. He denied Bridges' request for a jury trial. He concluded that Bridges might as well have sent the telegram "direct to the newspapers," found him guilty of contempt of court, and ordered the labor leader to pay a \$250 fine.²² The *Times* published an editorial supporting the contempt decision.

In October, 1939, the California Supreme Court upheld all those decisions. On the key contempt issue, the Court said that Bridges' telegram "was not only a criticism" of Schmidt's decision in a pending case "but was a threat that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up."²³ The telegram "contained a direct challenge to the court that 11,000 longshoremen on the West Coast would not abide by its decision," Justice Jesse W. Curtis, wrote in his majority opinion.²⁴ Chief Justice William H. Waste, Associate Justices John Shenk and Frederick

17. Charles Larowe, *Harry Bridges and the Rise and Fall of Radical Labor in the U.S.* Brooklyn: Lawrence Hill Books, 1972; *The ILWU Story*, <http://www.ilwu.org/history/the-ilwu-story/>.

18. *Bridges v. Superior Court*, *supra*, 14 Cal.2d 464, 470-71.

19. *Id.* at 471.

20. *Id.* at 471.

21. *Id.* at 472.

22. *Id.* at 468.

23. *Id.* at 489.

24. *Ibid.*



A crowd of workers on strike from the Douglas Aircraft Corporation plant in court, Santa Monica, 1937. A bitter struggle ensued between union labor leaders concerning whether or not to support the strike. (Photo: Los Angeles Daily News Negatives, Collection 1387, Library Special Collections, Charles E. Young Research Library, UCLA.)

W. Houser, and California Court of Appeal Justice John T. Nourse, pro tempore, concurred.

Curtis' opinion said nothing about any actions Judge Schmidt took in the case after Bridges' telegram was widely publicized. Curtis emphasized that the issue was "not the influence upon the mind of the particular judge" but "the reasonable tendency of the acts done to influence or bring about the baleful result."²⁵ Curtis rejected Bridges' contention that he had a First Amendment right to make the statements he did, quoting *Stromberg v. California*, a 1931 U.S. Supreme Court decision holding that "the right [of free speech] is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom."²⁶

Justice Douglas L. Edmonds dissented. He said the California Legislature had enacted a law in 1891 prohibiting any punishment for contempt for comments on a pending case "unless made in the immediate presence of such court while in session and in such manner as to actually interfere with its proceedings."²⁷ However, an earlier California Supreme Court decision had ruled that statute unconstitutional, thus permitting punishment for such "constructive contempt."²⁸ Edmonds' lengthy dissent said that numerous court decisions had erroneously described the history of contempt law. He also wrote, "the experience of Pennsylvania and other jurisdictions where immunity of the press has long been maintained conclusively proves" that the power of summary contempt was "not necessary to maintain either the existence of courts or the respect for them. It is not necessary to the wholesome administration of justice in this

state that judicial officers have uncontrolled discretion in passing upon alleged constructive contempts of court. The opportunity for arbitrary punishment often provides the occasion for it."²⁹

Edmonds drew a sharp contrast between direct and indirect contempt. "Noise, interruptions, violence of any kind in the course of judicial proceedings must be repressed; obedience to all lawful orders must be enforced. To uphold its authority when challenged by such affronts to the judicial procedure, a court may and should summarily punish the offender. But indirect contempts, particularly publications in a newspaper, are entirely different in their nature and consequences."³⁰ In summary, Edmonds wrote, "no claims of judicial necessity can outweigh" the

free speech guarantees in the California Constitution.³¹ But, at that point, in October, 1939, his was a lone voice on the state's highest court.

The contempt case against the *Times* stemmed from three blistering editorials about pending court cases, one involving political corruption. The two involving labor disputes drew the most attention. The first, entitled "Sit-Strikers Convicted," applauded the convictions of 22 members of the United Auto Workers who had been found guilty of conspiring to enter Douglas Aircraft by force and to vandalize the property during an organizing campaign. "The verdict means that Los Angeles is still Los Angeles," a reference to the city's reputation as bastion of "the open shop," a workplace where an individual does not have to join a union.³² The editorial blasted "union terrorism."

The third editorial, headlined "Probation for Gorillas?" turned out to be the most important.³³ A jury convicted two members of the Teamsters Union for conspiracy and assault with a deadly weapon after they attacked non-union truck drivers with "steel missiles" fired from slingshots. About two weeks after the verdict and five weeks before the sentencing hearing, the *Times* implored Los Angeles judge A.A. Scott not to grant probation to the duo. The *Times* declared that the judge should make an example of the Teamster "sluggers for pay" by sentencing them to state prison. If Teamster leader Dave Beck's "thugs realize that they face San Quentin when they are caught, it will tend to make their

25. *Id.* at 490.

26. *Id.* at 492.

27. *Id.* at 494.

28. *Id.* at 506, citing *In re Shortridge* (1893) 99 Cal. 526, 532.

29. *Id.* at 509.

30. *Ibid.*

31. *Id.* at 510.

32. *Los Angeles Times* editorial, Dec. 21, 1937, quoted in *Times Mirror Co. v. Superior Court* (1940) 15 Cal.2d 99, 104.

33. *Los Angeles Times* editorial, May 5, 1938, quoted in *Times Mirror Co., supra*, 15 Cal.2d at 112.

disreputable occupation unpopular. Judge A.A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes.”³⁴

The Los Angeles Bar Association swung into action again and a local trial judge held the *Times* in contempt for undertaking actions that tended to improperly pressure a judge. In both of the labor cases, the judges noted that the editorials were published after the convictions but before sentencing, meaning that the decision was not final.³⁵

When the *Times* appealed, it acquired an unlikely ally, the American Civil Liberties Union of Southern California, which filed a highly unusual friend-of-the-court brief on behalf of the paper. Co-authored by ACLU attorney A.L. Wirin, the brief described the ACLU as a liberal organization whose members are “concerned with the preservation and extension to all, of constitutional liberties as guaranteed by the Bill of Rights” and acknowledged that a reader might be surprised to see the ACLU supporting the *Times*.³⁶

The ACLU said its Southern California branch had a particular interest in the case because the *Times* had “for over half a century, been a vigorous and active mouthpiece of the anti-labor and open shop interests in Southern California. For 50 years it has had much to say in its editorial columns upon many public issues. Not once, however, has it ever raised its voice in defense of freedom of speech for anyone other than itself and for those in its, and its publisher’s economic class.”³⁷ The brief noted several instances in which individuals had been denied their free speech rights and the *Times* had “maintained a studied silence.”³⁸ The brief added that it was joining the protest over the suppression of the *Times*’ free speech rights, but “we want it clearly understood . . . that our appearance is as a ‘friend of the Court,’ and *not* as a friend of the *Times*.”³⁹

The ACLU’s act of political magnanimity apparently had no impact on the California Supreme Court, which upheld the *Times*’ contempt conviction 5–2, three months after it upheld Bridges’ conviction. Justice Curtis reiterated most of the points he made in *Bridges*. He rejected the *Times*’ contention that a test U.S. courts had used since at least 1918 was the incorrect standard to assess whether the newspaper had been in contempt. That standard, known as the “reasonable tendency” test, was fully articulated in *Toledo Newspaper Co. v. United*

34. *Los Angeles Times* editorial, May 5, 1938, quoted in *Times Mirror Co.*, *supra*, 15 Cal.2d at 113.

35. *Times Mirror Co.*, *supra*, 15 Cal.2d at 114.

36. Amicus Curiae brief filed in the California Supreme Court by the American Civil Liberties Union’s Southern California branch in support of *Times Mirror Co.*’s appeal of its conviction for contempt, pp. 2–3.

37. *Id.* at 4.

38. *Id.*

39. *Id.* at 5.

States.⁴⁰ That case involved a contempt conviction imposed by a federal district court judge on the *Toledo News-Bee* for editorials and cartoons it published during a six-month, high-profile dispute over the legality of a Toledo city ordinance limiting fares on local streetcars to three cents a ride. The Toledo Railway Co. sued in federal court, contending that the fare limitation was confiscatory. U.S. District Judge John M. Killits, who presided over the case, was the subject of the critical editorials and cartoons in the *News-Bee*. Several months into the dispute, Killits found the newspaper guilty of contempt in a trial held without a jury. Eventually, the dispute that began in 1914 got to the United States Supreme Court. Killits had relied primarily on Section 268 of the Judicial Code of 1911, which stated that U.S. courts “shall have power . . . to punish, by fine, or imprisonment at the discretion of the court, contempts of their authority: Provided, that such power to punish for contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice”⁴¹ Killits’ decision suggested that he considered Section 268 broad enough to include local newspaper coverage.

The Supreme Court, in a 7–2 ruling, rejected all the major arguments of the newspaper’s lawyers, including the fact that the contempt had not occurred in the courthouse or even close to it. More significantly, Chief Justice Edward D. White’s majority opinion upholding the contempt ruling said it did not matter that there was no proof that the *News-Bee*’s editorials had any impact on the administration of justice in the case.

“Our power, in disposing of [the *News-Bee*’s] objection, is not to test divergent contentions as to the weight of the evidence, but simply to consider the legal question whether the evidentiary facts found had any reasonable tendency to sustain the general conclusions of fact based upon them by the courts below,” White wrote.⁴² He continued, “we are constrained to say that the contention on the face of the record is too plainly devoid of merit to require any detailed review.” White added that the determining factor was “not the influence upon the mind of the particular judge.” Rather, he said the test is “the reasonable tendency of the acts done to influence or bring about the baleful result” of obstructing the fair administration of justice.

Justice Oliver Wendell Holmes, Jr., dissented. He said the words of the Judicial Code “point only to the present protection of the court from actual interference, and not to postponed retribution for lack of respect of its dignity — not to moving to vindicate its independence after enduring the newspaper’s attacks for nearly six months, as the court did in this case.” Holmes added,

40. (1918) 247 U.S. 402.

41. Public Law 61-475, enacted March 3, 2011.

42. *Toledo Newspaper Co.*, *supra*, 247 U.S. at 421.

“misbehavior means something more than adverse or disrespect.”⁴³ Although Holmes had a towering reputation as a jurist, his was the minority view until 1941.

Indeed, Justice Curtis’ majority opinion for the California Supreme Court in the *Times* case adopted, without reservation, the “reasonable tendency” test. He rebuffed the argument of the *Times*’ lawyers that the Court needed to examine the effect of the allegedly contumacious editorial on the judge in question.

Curtis emphasized that although verdicts had been rendered in the three cases, none was final because the judges had not yet imposed sentences. He said the editorial blasting the sit-down strikes “could not help having an effect upon the trial judge” when sentencing the culprits.⁴⁴ Curtis cited the *Patterson* decision, periodically, in particular describing the “Probation for Gorillas” editorial as a “striking example of a ‘premature statement, argument and intimidation.’”⁴⁵

Edmonds dissented again, briefly reiterating key parts of his *Bridges* analysis. The Court’s then-newest member, Phil Gibson, also dissented, criticizing the “reasonable tendency” test because it did not examine what actually happened but “what might have happened.” Gibson said “this test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press.”⁴⁶ He cautioned his colleagues not to ignore “the growing suspicion that courts are prone to place their own security above all other considerations. We should recognize the importance, indeed the vital necessity of the fullest comment and criticism in matters of public interest, and not seek to exempt the courts from such criticism.”⁴⁷ Gibson added, “the editorial page cannot be confined to abstract academic discussion of non-controversial matters or of issues long dead.”⁴⁸

Gibson conceded that the language of the “Gorillas” editorial “was ill advised and unfortunate, but it does not necessarily follow that it was contemptuous.” Nonetheless, he said the editorial was consistent with views the *Times* had expressed for many years and that “a judge who felt that it was obstructive or embarrassing would have to confess ignorance of one of the most familiar facts of daily life in his community.”⁴⁹

Both Harry Bridges and the *Times* — the latter with the support of the American Newspaper Publishers Association — asked the U.S. Supreme Court to review the case. The Court granted certiorari early in 1940. The justices decided to consolidate the two cases, concluding

that they raised, in essence, the same issue, even though the appellants could not have been more different.

At that point, the *Times*’ lawyers had to decide if they would make common cause with Bridges’ lawyers. The relationship got off to a rocky start because the *Times*’ attorneys were opposed to relying on a 1937 Supreme Court decision in their brief that had vindicated Angelo Herndon, a Black Communist organizer in the South. But eventually they agreed to cite the case in their brief.⁵⁰

The clash at the Supreme Court centered on the dramatically different views of justices Hugo Black and Felix Frankfurter over what sort of out-of-court comments deserved constitutional protection. As noted, Frankfurter was an Anglophile. He had taken a year’s leave from his position on the Harvard Law School faculty to study in England in 1935, four years before President Roosevelt appointed him to the high court. Then and now, English courts are very restrictive concerning what a lawyer or a party can say outside of court while a case is pending. In contrast, Black, appointed to the Court by FDR in 1937, was a virtual absolutist on the First Amendment, frequently saying that the First Amendment’s words “Congress shall make no law” abridging freedom of speech were to be taken as close to literally as possible.

The Supreme Court first heard the cases in October, 1940. The justices voted 6 to 3 to uphold both contempt citations.⁵¹ Chief Justice Charles Evans Hughes and Associate Justices Harlan Fisk Stone, James McReynolds, Owen Roberts and two Roosevelt appointees, Frankfurter and Frank Murphy, were in the majority. Black and two other Roosevelt appointees, Stanley Reed and William O. Douglas, dissented. Chief Justice Hughes, according to Court records, asked Frankfurter to write the majority opinion. Frankfurter’s lengthy draft opinion relied on both English and American history, saying the contempt power was “deeply rooted” and “part and parcel of the Anglo-American system of administering justice.”⁵²

Black’s draft dissent, which like Frankfurter’s, can be found in the Library of Congress, sharply disagreed with the basic underpinnings of Frankfurter’s opinion. “The first and perhaps basic fallacy of the [majority] opinion is that the vitalizing liberties of the First Amendment can be abridged in whole or in part by reference to English judicial practices,” Black wrote.⁵³ He added, “Perhaps no

43. *Id.* at 423.

44. *Times Mirror Co.*, *supra*, 15 Cal.2d at 109.

45. *Id.* at 113.

46. *Id.* at 124.

47. *Id.* at 126.

48. *Id.*

49. *Id.* at 128.

50. Brief filed by attorneys for the Los Angeles at the U.S. Supreme Court, viewed in the Library of Congress and photocopied by the author. See Robert Gottlieb and Irene Wolt, *Thinking Big: The Story of the Los Angeles Times, Its Publishers and Their Influence on Southern California*. New York: G.P. Putnam’s Sons, 1977.

51. Documents viewed by the author at the Library of Congress; Lewis, *Make No Law*, 98. Roger K. Newman, *Hugo Black: A Biography*. New York: Pantheon Books, 1994, 290.

52. Documents viewed by the author at the Library of Congress; Lewis, *Make No Law*, 98.

53. Documents viewed by the author at the Library of Congress; Lewis, *Make No Law*, 99; Newman, *Hugo Black*, 290.

single purpose emerges more clearly from the history of our Constitution and Bill of Rights than that of giving far more security to the people of the United States with respect to freedom of religion, conscience, expression, assembly, petition and press than the people of Great Britain ever enjoyed.⁵⁴

Before Frankfurter's opinion became final, developments at the Court led to a dramatic change in the case's outcome. Early in 1941, McReynolds, probably the most right-wing justice, retired. Soon thereafter, Justice Murphy, the former pro-labor Governor of Michigan, changed his vote. That meant the Court was split 4–4.⁵⁵ The justices set the case for re-argument during the next term. Then, after Hughes announced his retirement, those favoring reversal comprised a narrow majority. Roosevelt elevated Stone, an appointee of President Calvin Coolidge, to succeed Hughes as chief justice and appointed two new associate justices, Attorney General Robert Jackson and South Carolina Senator James F. Byrnes. Ultimately, Jackson voted to reverse the contempt citations and Byrnes to uphold them; the final vote was 5–4 for the defendants, Bridges and the *Times*.⁵⁶

Before announcing the decision on December 8, 1941, the justices attended a joint session of Congress where Roosevelt asked Congress to declare war on Japan.

Black's majority opinion was not as truculent as the dissent he had planned to issue a year earlier, but it still reflected his fundamental disagreement with Frankfurter's view that the First Amendment was simply a logical progression of Anglo-American jurisprudence.

Black emphasized the importance of "the environment in which the First Amendment was ratified." He quoted James Madison, whom Black described as "the leader in the preparation of the First Amendment." Madison had said that whatever its virtues the British Magna Carta "does not contain any one provision for the security of those rights respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution."⁵⁷

Though he did not use the same language, Black's decision reflected the themes expressed in the dissents written by California Supreme Court Justices Edmonds and Gibson.

Black rejected the "reasonable tendency" test that had governed for many years.⁵⁸ He embraced the positions taken by attorneys for the *Times* and Bridges, adopting a more stringent standard that justices Holmes and Louis Brandeis had earlier formulated when considering cases

54. Documents Viewed by the author at the Library of Congress: Lewis, *Make No Law*, 99; Newman, *Hugo Black*, 290.

55. Newman, *Hugo Black*, 291.

56. *Ibid.*

57. *Bridges v. California*, *supra*, 314 U.S. at 264.

58. *Id.* at 273.



Article in *News-Pilot*, San Pedro, California, Monday evening, December 8, 1941.

alleging that speech was subversive. To sustain a contempt allegation, Black said, a complainant would have to demonstrate that the out-of-court speech constituted a "clear and present danger" of producing an "unfair administration of justice."⁵⁹

After describing the earlier key subversion rulings, Black said what emerged "from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."⁶⁰ He added that the First Amendment prohibition against laws abridging the freedom of speech or of the press "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society will allow."⁶¹

In essence, Black said, no "clear and present danger" had been demonstrated in either the *Times* case or the *Bridges* case. Given the *Times*' "long continued militancy" regarding unions, Black wrote, "it is inconceivable that any judge in Los Angeles would expect anything but adverse criticism from it in the event probation were granted" to the two Teamsters.⁶² Consequently, Black added, to regard the "Gorillas" editorial "as, in itself, of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom and honor — which we cannot accept as a major premise."⁶³ Similarly, he said that under the First Amendment Bridges was entitled to threaten a strike, to inform the

59. *Id.* at 261–63.

60. *Id.* at 263.

61. *Ibid.*

62. *Id.* at 273.

63. *Ibid.*

secretary of labor about the possibility of a strike, and to make his remarks when “the particular labor controversy was at its height.”⁶⁴

Then, Black brought the two cases together, manifesting both his firm belief in the breadth of the First Amendment and his background as an advocate for working people. “The observations we have previously made here upon the timeliness and importance of utterances as emphasizing, rather than diminishing, the value of constitutional protection, and upon the breadth and seriousness of the censorial effect of punishing publications in the manner followed below, are certainly no less applicable to a leading spokesman for labor than to a powerful newspaper taking another point of view.”⁶⁵

In the nearly 80 years since the *Bridges* decision, it has been widely, if quietly, praised, unlike the acclaim for another First Amendment opinion, authored by Black, *New York Times v. United States*.⁶⁶ That 1971 ruling permitted newspapers to write about a secret history of the Vietnam War known as “The Pentagon Papers” — a case of such notoriety and prominence that it became the subject of a movie starring Tom Hanks and Meryl Streep. There has been no movie about the *Bridges* case, but Benno C. Schmidt, Jr., a First Amendment scholar who served as dean of Columbia Law School in the mid-1980s, described Black’s opinion in that matter as a “Judicial Declaration of Independence for the First Amendment, freeing it from English law.”

In addition to its monumental impact on free speech, the *Bridges* decision marked the first step toward changing

the reputation of the *Los Angeles Times*. Although it was the largest newspaper in California, the *Times* was considered a laughingstock by serious journalists because it was so partisan. Its reputation in that era was perhaps best characterized by a story told by humorist S.J. Perelman, who had been traveling west by train and asked a porter to bring him a newspaper. “Unfortunately,” Perelman said, “the poor man, hard of hearing, brought me a *Los Angeles Times*.”⁶⁷

Five months after the Supreme Court decision, Columbia University awarded the *Times* its first Pulitzer Prize: the gold medal in the Public Service category “for the most . . . meritorious service of any American newspaper in 1941 for its successful fight” in a freedom of the press case that went all the way to the Supreme Court. The Pulitzer judges said the *Times*’ campaign “resulted in the clarification and confirmation for all American newspapers of the right of free press as guaranteed under the Constitution.”⁶⁸ ★

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67. The Perelman anecdote has been cited in at least three books about the *Los Angeles Times* (Gottlieb and Wolt, *Thinking Big*; David Halberstam, *The Powers That Be*. New York: Alfred A. Knopf, 1979; and Dennis McDougal, *Privileged Son: Otis Chandler and the Rise and Fall of the Los Angeles Times Dynasty*. New York: Hachette, 2001.

68. Pulitzer Prize citation available at www.pulitzer.org/prize-winners-by-year/1942.

64. *Id.* at 277.

65. *Id.* at 278.

66. 403 U.S. 713.

THE CALIFORNIA SUPREME COURT’S NEWEST JUSTICE: MARTIN JENKINS

On Nov. 10, Martin Jenkins won unanimous confirmation to the California Supreme Court. Appointed by Governor Gavin Newsom, Jenkins becomes the first openly gay member and the fifth Black justice in the Court’s history. Jenkins fills the seat vacated with Justice Ming Chin’s retirement in August. The *Review* will include a profile of Justice Jenkins in the Spring/Summer 2021 issue.

Jenkins, considered a moderate, has extensive judicial experience. Republican governors appointed him to the Alameda County Municipal Court and later, to the 1st District San Francisco-based state Court of Appeal. He also served on the federal trial bench in San Francisco, appointed by President Bill Clinton.

He retired from the Court of Appeal in 2019 to serve as Newsom’s judicial appointments secretary, vetting candidates for the state’s judiciary, including for the position the governor ultimately asked him to fill. ★



A Lawyer by Accident: Bernie Witkin's Early Life and Career

Part I: A Suitable Replacement

BY JOHN R. WIERZBICKI

Introduction

BERNARD E. WITKIN (“Bernie” to everyone), was never a judge, never held elected office, was never a professor, and except for a short time after graduation, never practiced law. Yet he arguably had the greatest positive influence on law in California of any person. Beginning with *The Summary of California Law*, which he first published at age 24, Bernie’s treatises on California law (now maintained by the institute he created), have been cited by California courts in more than 14,000 published decisions. An untiring advocate for legal reform, he championed judicial education and new methods of legal education for both law students and practitioners. He was also personally engaging, and would speak about the law to any group that would invite him. Bernie died 25 years ago this December. After his death, the California Supreme Court held a memorial for him — the first time ever for someone who was neither a justice nor a staff member of the Court. The *Review* is honoring Bernie over the next two issues with a two-part article focusing on his early life and career. This article, part I, explores the unlikely circumstances that led to his appointment as law secretary to Associate Justice William Langdon in 1930. The next article, part II, will focus on Bernie’s years with Langdon, the published decisions in which he participated, and how both tragedy and the law itself nearly ended his promising young career.

The 1930 Gubernatorial Campaign

To understand how Bernie Witkin became William Langdon’s law secretary, you have to start with why California Governor Clement Calhoun “C.C.” Young’s quest for a second term was in so much trouble. The progressive Republican governor had been elected in 1926 with over 70 percent of the vote in a state as solidly Republican as any in the country. At that time, the Republican Party in California contained a substantial progressive element, dedicated to governmental and political reform. But by 1930, many of these Young supporters had grown disenchanted, particularly with his failure to pardon Tom Mooney.¹ Mooney and Warren Billings, pro-labor activists, had been convicted of murder in the San Fran-



Bernard Witkin, undated image, ca. 1920s. (Photo: Bernard E. Witkin Papers, MSS 0701, California Judicial Center Library, with the permission of the Bernard E. & Alba Witkin Charitable Foundation.)

cisco Preparedness Day bombing in 1916, which killed ten people. Their trial was tainted by allegedly perjured testimony, and Mooney’s imprisonment in particular had become a world-wide cause célèbre, with intellectuals, civil libertarians, and many progressives demanding his release. But a pardon would also infuriate those who were convinced that the men were justly convicted. Young delayed deciding on the matter throughout his term, and then announced that he would wait for the California Supreme Court to declare itself on Billings’ request for a pardon before he would act on Mooney’s application.² Unlike Mooney, Billings had a prior felony conviction, and under the California Constitution, a pardon by the governor required the Court’s recommendation. Despite the campaign’s denial, it appeared that Young was trying to push off the decision until after the primary.³

Young’s toughest opponent in the August 1930 primary was James “Sunny Jim” Rolph, Jr., five-time mayor of San Francisco, who had the unique ability to



C.C. Young. (Bain News Service, Public domain, via Wikimedia Commons.)

1. Richard H. Frost, *The Mooney Case*, Palo Alto: Stanford U. Press, 1968, 401. Young himself later complained that Mooney supporters helped bring about his defeat. *Ibid.*

2. Frost, *The Mooney Case*, 384–85.

3. Herbert L. Phillips, “Mooney Case Lags as Vote Campaign Near,” *San Francisco Examiner*, April 5, 1930, 3.

bridge the different wings of the Republican party. His cheerful disposition was a salve to those who were just now experiencing an economic depression that would result in 28 percent unemployment in the state by 1932. Rolph, an early adopter of air travel for campaigning, was running a statewide campaign, visiting every county.⁴ But geographical bases of support within the state remained critical.⁵ Young and Rolph shared the base of San Francisco and its eastern environs. The third major Republican candidate, District Attorney Buron Fitts of Los Angeles, was less of a concern outside Southern California. The battle for the Republican gubernatorial primary between Rolph and Young was going to take place in the Bay Area, and Young needed to appeal to progressives there. Fortunately, he had just the thing — a gift from the voters of San Francisco that he was just waiting to unwrap.

A Municipal Court in San Francisco

The state Constitution was amended in 1924 to permit certain large charter cities to establish municipal courts to replace the justice, police, and small claims courts.⁶ Enabling legislation provided that the new courts could be created by city charter or by election. Los Angeles and Long Beach acted swiftly, creating their municipal courts in 1925, while San Francisco dawdled. Four years later, voters approved a measure to create a municipal court in San Francisco. It was to begin operation on July 1, 1930, and be composed of twelve judges. Nine would come from the existing justices of the peace and police

court judges, and the governor would appoint the other three.⁷

Of the forty applicants for the vacant positions, three were women.⁸ Here was Young's opportunity. Women's rights had long held a prominent role in progressive politics.⁹ For him to appoint the first woman judge in San Francisco, right before the August primary, could be just what he needed to reinvigorate his support.

Theresa Meikle was the best known of the three female applicants. She had been the first woman to serve as a deputy district attorney in San Francisco. In 1925, she would make national headlines for successfully prosecuting a 16-year-old girl who, "in a fit of jazzmania," shot her mother dead for refusing to allow her to go dancing at jazz clubs. Young had already appointed Meikle once before, as lead prosecutor for the state narcotics division, so the municipal court would seem a natural next step.¹⁰

But instead Young chose Mary Wetmore, private secretary (essentially a legal research attorney) to California Supreme Court Justice William Langdon. She was also married to Deputy State Attorney General Charles A. Wetmore, Jr. The wines from the Wetmore family's Cresta Blanca winery in Livermore had won two gold medals at the 1889 Paris Exposition, gaining California vintners international recognition. The Wetmores had also been extensively involved in real estate, at one time owning and developing Coronado Island in San Diego.¹¹ Young was himself a real estate developer, and vice-president of Mason-McDuffie, a prominent real estate firm in Berkeley.¹² Young's administration had finally resolved a growing public controversy over its failure to renew the license of a leading East Bay realtor.¹³ By appointing a member of the Wetmore family, Young could hope to tamp down any lingering ill will in the real estate business community that incident caused. Young made his decision, and Wetmore arranged for a suitable replacement for her position at the Court.

On July 1, Wetmore was sworn in. She served one week, suffered an appendicitis attack, and died.¹⁴ Young appointed Meikle in her place. On July 2, the Court issued its decision on Billings: it would not recommend a



From left: Julia M. Easley, Mary A. Wetmore and Theresa Meikle. (*San Francisco Chronicle*, June 25, 1930.)

4. Loren B. Chan, "California During the Early 1930s: The Administration of Governor James Rolph, Jr., 1931–1934" (1981) 63 *Southern Calif. Qtrly* 262.

5. Stanley D. Hopper, "Fragmentation of the California Republican Party in the One-Party Era, 1893–1932" (1975) 28 *West. Pol. Qtrly* 375–76.

6. William W. Blume, "California Courts in Historical Perspective" (1970) 22 *Hastings L.J.* 121, 175–76.

7. Earl C. Behrens, "Bench Posts Desired by Large Group," *San Francisco Chronicle*, June 17, 1930, 11.

8. "Three Seeking Woman Judge Appointment," *San Francisco Chronicle*, June 25, 1930, 3.

9. Kevin Starr, *Inventing the Dream, California Through the Progressive Era*, New York: Oxford U. Press, 1985, 258.

10. Mark Hull, "San Francisco's Judge Theresa Meikle" (Spring 2018) *San Francisco Attorney* 52–56.

11. "Charles A. Wetmore Dies in S.F. at 80," *Oakland Tribune*, June 10, 1927, 52.

12. Marc A. Weiss, "Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley" (1986) 3 *Berkeley Planning J.*, 12–13. Young appointed Duncan McDuffie, president of the firm, to be chairman of the State Park Commission.

13. Discussed *infra*.

14. "First Woman Municipal Judge is Dead," *San Francisco Chronicle*, August 9, 1930, 1.

pardon.¹⁵ Following its lead, Young also denied Mooney's pardon request. Fitts charged Young with "political cowardice" while Rolph remained quiet.¹⁶ Just a few weeks later, Rolph narrowly defeated Young in the primary and would go on to become governor. And the "suitable replacement" as Justice Langdon's private secretary? That was Bernie.

News of Bernie's appointment must have befuddled his law professors at the University of California. True, he had shown great skill as a debater, but how would that help him in this position, which involved writing legal opinions and memoranda for the justice? His lack of focus on his coursework must surely indicate a deficiency of aptitude for the job. In other words, he was no Zara Witkin. Now there, in the minds of many, was a Witkin destined for greatness.

Zara Witkin's Younger Brother

Bernard "Bernie" Witkin was born in 1904 in Holyoke, Massachusetts to Jewish emigrants from Russia. He was the third of four children, born four years after his brother Zara. The family soon moved west, arriving in San Francisco in 1909. Like his brother, Bernie attended Polytechnic High, graduating in 1921. But his senior yearbook trumpeted Zara's accomplishments: "Zara Witkin, an honor graduate of four years ago, has been elected to numerous scientific honor societies at U.C.; and he is one of four students selected to speak at Commencement this year."¹⁷

Zara was brilliant, driven and idealistic. *Time* magazine later described him as "smooth" and "upstanding."¹⁸ When still in high school, he designed calculating machines for a local company to manufacture. At age 16, he enrolled in U.C. Berkeley's civil engineering program. By the time he graduated with honors in 1921, he had worked as an engineer for the state, the Southern Pacific Railroad, and the San Francisco Bureau of Governmental Research.¹⁹

Civil engineering was more than a calling for Zara. He believed that through it could come the creation of a new, more just society. "I came to know the brutal injustices and waste, as well as the wonderful productive capacity, of American capitalism. No academic idea, this knowledge was the result of my continuous work in

15. *In re Billings* (1930) 210 Cal. 669. The vote was 6–1, with Justice Langdon dissenting.

16. William H. Jordan, "Legislative Board of Labor Endorses Young," *San Francisco Examiner*, July 13, 1930, 15.

17. *Polytechnic High School Yearbook 1921*, http://www.maxie24.com/hailpoly/HailPoly/1920s/1921_Spring.htm [as of Sept. 5, 2020].

18. "Russia: Balkhazhstrov Conserved" (Oct. 17, 1932) *Time Magazine*.

19. Michael Gelb, ed., *An American Engineer in Stalin's Russia: The Memoirs of Zara Witkin, 1932–1934*, Berkeley: U. of Calif. Press, 1991, 1–2.

civil engineering, begun at the age of 14." His upbringing reinforced his activism: "Our home was one in which social conditions were constantly discussed."²⁰ In his commencement address in May, 1921, Zara postulated that the engineering profession, by nature of the training it provided, is "pre-eminently fitted" to lead the nation out of the economic paralysis and blight resulting from the Great War, under which "half the globe goes famished, unclothed, without the necessities of life."²¹ After graduation, Zara moved to Los Angeles, where he would garner praise for his design of the Hollywood Bowl.

Bernie followed in his brother's path, enrolling at Berkeley in the fall of 1921. But compare Bernie's recollection of how he came to his profession with Zara's. "I got into the law by accident," Bernie recounted. "[S]ome bored upper-class woman taking registration asked me what my major was. Nobody ever told me there was such a thing as a major and I didn't know. A friend of my brother was standing there and he said, 'why don't you say law.' So I said 'law.'"²²

Witkin v. Tobriner

Bernie's opportunity to distinguish himself came during his sophomore year. In November 1922, California voters were being asked to vote on Proposition 19, a constitutional amendment to create a state board responsible for managing the distribution of water and electricity. The *San Francisco Chronicle* reported that no other measure "has aroused the interest and antagonism that have been called for by the proposed . . . act."²³ On election eve, Stanford's varsity team met Berkeley's team to debate the initiative at the Scottish Rite Temple in San Francisco. Each team had two members, representing the best debaters at the school. For Stanford, Mathew O. Tobriner, a future California Supreme Court justice, spoke first against the measure.



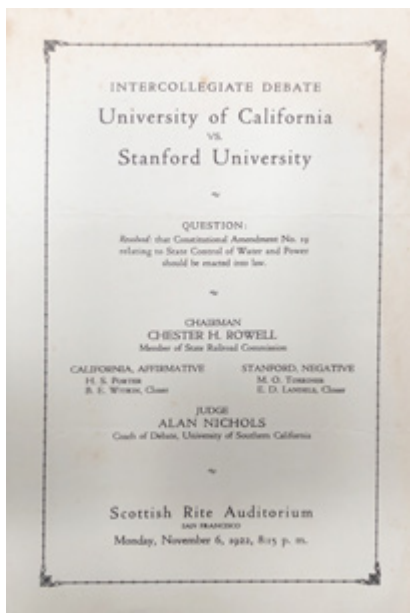
Zara Witkin, undated image, ca. 1920s. (Photo: Bernard E. Witkin Papers, MSS 0701, California Judicial Center Library, with the permission of the Bernard E. & Alba Witkin Charitable Foundation.)

20. *Id.* 29.

21. "Barrows Tells Graduates to Guard Freedom," *San Francisco Chronicle*, May 12, 1921, 8.

22. Unpublished interview with Bernard E. Witkin (Sept. 9, 1986), Witkin Archive, California Judicial Center Library, 2.

23. "Students Will Debate Water Power Issue," *San Francisco Chronicle*, Nov. 5, 1922, 72.



Program, Intercollegiate Debate, University of California vs. Stanford University, Nov. 6, 1922, and accompanying news story. (Photo: Bernard E. Witkin Papers, MSS 0701, California Judicial Center Library, with the permission of the Bernard E. & Alba Witkin Charitable Foundation.)

Bernie was one of the two Berkeley debaters chosen to argue for the measure, and the first sophomore to close a debate for Berkeley. Although Proposition 19 would be decisively defeated at the polls the next day, that evening it was Berkeley's team that won the debate. For Bernie, this was a personal triumph. He had debated in high school, but this was his first intercollegiate debate, and to even be selected for the team he had beaten several more experienced debaters.

From that time on, debate became the focus of Bernie's years at Berkeley. He also dabbled in politics, speaking on behalf of Progressive Party candidate Robert M. LaFollette, who challenged incumbent President Calvin Coolidge in the 1924 election. The Stanford paper noted approvingly (or perhaps ironically): "Bernard Witkin of California upheld LaFollette in a speech pleading for liberal ideals in the finest sense and entirely lacking in the bombast and demagoguery usually associated with oratory for a radical cause."²⁴

"Dreadful"

After graduating in 1925, Bernie entered U.C. Berkeley's law school, an experience he would later sum up with one word: "dreadful." He continued, "I always remember with amusement how hard the law school teachers tried to destroy any possible interest in or understanding of the law (laugh)." It was so bad, according to Bernie, that he "made no attempt to attend classes."²⁵ He would later turn his disdain into a talk entitled "The Law

Curriculum: How Now, Sacred Cow" which became a regular part of his speaking repertoire.

Roger Traynor, the future California Supreme Court justice, was a classmate of Bernie's at law school. "You could see Roger," Bernie recalled, "but you'd have to look at him through his pipe, and he would keep writing or reading at the same time you talked to him." Bernie also met Madeleine Lackmann, who later married Roger, while he served as the freshman debating coach. Bernie's friendship with the Traynors would last over the next half century.²⁶

When not attending classes, what was Bernie doing? Debating, of course. He became a member of Berkeley's first graduate student debate team, and in 1926, was sent on a cross-country tour.²⁷ He made money tutoring undergraduate philosophy students, and giving seminars to fraternities and sororities on exam preparation.²⁸ Bernie also made the finals of the moot court competition in 1926, competing in front of Chief Justice Waste.²⁹

While still in law school, Bernie enrolled in a bar review class offered by a practicing lawyer ("not a gifted teacher," according to Bernie) who cobbled together past bar examination questions, portions of the encyclopedia, *California Jurisprudence*, and recent court opinion advance sheets. But for Bernie, it was "spectacular because for the first time . . . here was somebody trying to tell us what the law was instead of trying to conceal it from us." Having passed the bar,³⁰ and thinking that "there may be something in this," Bernie typed up his bar examination notes and sold eight carbon copies to classmates for \$15 a copy (about \$220 in today's currency).³¹

Law Practice

Graduating nowhere near the top of his law school class, Bernie found no work. He nearly chucked law altogether to become a professor of public speaking. Instead, he was hired by Marcel Cerf, a family friend and former judge³² whose practice, according to Bernie, was moribund. "I managed to land in a dying office where there was nothing being done and no money being paid." With an "inadequate" knowledge of the law, no reference works on which to rely ("existing materials were preposterous"), and so much idle time, Bernie turned again to his bar

26. Witkin interview, 1986, *supra* n. 22, 6, 23.

27. "Graduate Debaters Leave on Tour," *San Francisco Chronicle*, Jan. 8, 1926, 21.

28. Witkin interview, 1986, *supra* n. 22, 4.

29. "Three Jurists to Aid Annual U.C. 'Trial,'" *San Francisco Chronicle*, Nov. 23, 1926, 32.

30. Although many accounts have Bernie passing the bar after graduation in 1928, he actually passed the bar in 1927. "Sixty-Three East Bay Folk Win in Bar Examination," *San Francisco Chronicle*, Oct. 6, 1927, 31.

31. Witkin interview, 1986, *supra* n. 22, 3.

32. "In Memoriam, Marcel E. Cerf" (1935) 14 *Calif. Hist. Soc. Qtrly* 286.

examination notes. He revised them, and with the help of family and contacts at law schools throughout the state, sold his first *Summary of California Law* (1928). Having achieved some success with that, he started a bar review course.³³

The bar review course is where he would come to know Mary Wetmore. In addition to her work at the Court, Wetmore taught night law classes at Lincoln University in San Francisco, and made a special point of promoting the careers of promising young lawyers. A mutual friend invited her to one of Bernie's bar review lectures. Impressed with what she heard, she invited Bernie to visit her at the Court. According to Bernie, they quickly became good friends.³⁴

Bernie's Account

In Bernie's account of his appointment, soon after he became acquainted with Wetmore, there was a movement to have a woman judge on the courts of San Francisco. "At that time the municipal court judge was appointed by the mayor. The mayor was about to appoint a very political woman³⁵ to the great anguish of the bar and a number of important lawyers asked Mary Wetmore if she would take the job. She called me up and she told me she would like to do it. I remember that talk. She said 'I can't leave Justice Langdon. He would have to resign.'"³⁶

According to Bernie, at that time the law clerks wrote most of the opinions for the justices.³⁷ "Mary asked me if I would take over her job. She said, 'I will arrange it so that he will not interfere with your Bar Review course or the writing of the Summary. All you have to do is write the opinions and the memoranda.'"³⁸ Bernie agreed, and was appointed Langdon's private secretary.

In addition to the misstatement about Mayor Rolph (instead of the governor) making the appointment, this account leaves unanswered why Langdon would agree to appoint Bernie to replace Wetmore — on Bernie's conditions no less. Bernie was just 26, and had practiced law in a "dying" firm for fewer than two years after an undistinguished law school career. He may have had Wetmore's support, but what other evidence did Langdon have that Bernie could be trusted in this position?

Langdon's Choice

Langdon had won election as associate justice with progressive votes in 1926, the same election that ushered in

33. Witkin interview, 1986, *supra* n. 22, 4.

34. *Id.* at 6–7.

35. Possibly Julia Easley, who was secretary to the former head of the bar association. "Three Seeking Woman Judge Appointment," *supra San Francisco Chronicle*, June 25, 1930, n. 7.

36. Witkin interview, 1986, *supra* n. 22, 6.

37. Gordon Morris Bakken, "Conversations With Bernie Witkin" (1998–99) *Cal. Supreme Ct. Hist. Soc. Yearbook* 109, 111.

38. Witkin interview, 1986, *supra* n. 22, 6–7.

C.C. Young as governor.³⁹ He was noteworthy as the San Francisco district attorney who brought corruption charges against the mayor and others following the 1906 earthquake and fire. Kemper Campbell, who helped form the California State Bar in 1927, recalled that it was Langdon on whom C.C. Young relied to vet candidates for the newly expanded superior court in 1928: "Young had a great deal of confidence in Langdon. If Bill Langdon told him this lawyer was a fine lawyer and would make a good judge, that was enough for him."⁴⁰ In light of this, it would be remarkable if Langdon was uninvolved in Young's appointment of Wetmore to the Court, and the selection of his own private secretary.

Other than Wetmore's endorsement, what about Bernie would appeal to Langdon? Bernie's backing for the progressive LaFollette in 1924 may have reassured Langdon that he and Bernie would be compatible on the issues. Bernie's employment by Marcel Cerf may also have helped in that regard. Although Cerf was a Democrat, he had been appointed to the superior court in 1913 by a progressive Republican governor, Hiram Johnson.⁴¹ Langdon, too, had been appointed by Johnson to the superior court just a few years later.

Bernie also had shown himself to be an advocate of legal reform, by being active in the campaign to establish a municipal court in San Francisco. He, along with Tobriner and future California Governor Edmund G. Brown, were members of the campaign's speakers bureau.⁴² The measure passed in November 1929, opening up the spot to which Young would appoint Wetmore.

Finally, just a few months before Langdon selected him, Bernie helped C.C. Young resolve the real estate licensing fiasco that may have contributed to Wetmore's appointment. Martinez realtor C.A. "Cappy" Ricks had been denied a renewal of his realtor's license by Young's appointed state real estate commissioner, Stephen Barnson. Ricks, a former officer of the California Real Estate Association, demanded a hearing to clear himself of Barnson's charges that Ricks had acted unethically in



William H. Langdon, Associate Justice, January 1927–August 1939. (Photo: California Supreme Court.)

39. Frost, *The Mooney Case*, 392.

40. Corinne L. Gilb, "Reminiscences of Kemper Campbell," *University of California Regional Cultural History Project*, interview conducted April 13, 1954.

41. "In Memoriam, Marcel E. Cerf," *supra* 14 *Calif. Hist. Soc. Qtrly* 286, 286.

42. "Campaign Committees For Municipal Courts," *San Francisco Chronicle*, Oct. 12, 1929, 4.



Governor James Rolph circa 1932 speaking at rostrum with large microphones. Mayor Angelo Rossi in background. (Photo: Open SFHistory, courtesy of a private collector, photographer unknown.)

real estate deals. Barnson at first refused, but after a “wild scene” at the association’s annual convention, agreed so long as Barnson could choose the judge. Ricks rejected Barnson’s proposal, and in January 1930 hired Bernie to talk to “the powers that be” on his behalf.⁴³

Young was in a difficult spot. Were he to back Barnson, he would anger his fellow East Bay realtors in an election year (Martinez is only 25 miles from Berkeley) — yet he desperately needed their support to fend off Rolph. To intervene on Ricks’ behalf would open Young to charges of favoritism and violate progressive principles. Bernie’s involvement provided him a possible third way — to act only after an “independent” hearing on the matter. It was the same strategy that he was using with Mooney’s pardon. Young decided to bypass Barnson and appoint Corporations Commissioner Fred Athearn as special hearing officer. The published account by the United Press Syndicate admired Bernie’s advocacy. “Speculation is rife as to just what Witkin said to certain officials that convinced them a new hearing was essential. It must have been a good argument, for the reopening means a virtual repudiation by the administration of

43. “Real Estate Commissioner Offers Young Resignation,” *Oxnard Daily Courier*, Jan. 17, 1930, 6.

Barnson’s policies.”⁴⁴ Bernie and Henry Robinson, who also worked for Cerf, represented Ricks at the hearing. Ricks was exonerated.⁴⁵

How Bernie, with no apparent connection to any of the principals, nor experience in state government or real estate, got involved in this matter is unknown. But Young must have been relieved that the issue was finally resolved, just in time for his campaign for re-nomination to begin in earnest. To anyone who may have been following the matter, such as Langdon, Bernie’s talents were favorably displayed.

Revelation

Becoming Langdon’s private secretary was a revelation to Bernie. Unlike his brother Zara, Bernie had no clear career path in mind. As Bernie himself admitted, pursuing the law was “an accident.” But now Bernie understood, for the first time, what inspired him. “I realized that my interests were in the law. All aspects of it. In the improvement of the law.” He was now where he wanted to be, “getting into the middle of where the law was being laid down.”⁴⁶ ★

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44. Elwood Squires, “California Real Estate Chief to Quit Post Soon,” *Bakersfield Californian*, Jan. 17, 1930, 18.

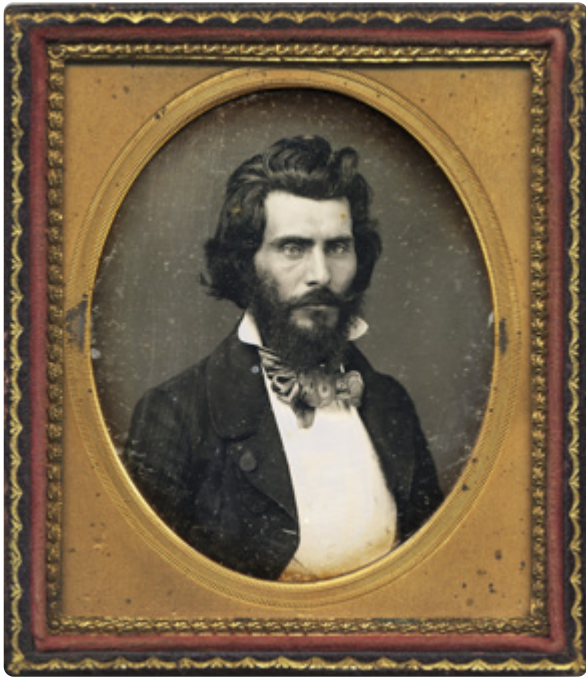
45. “Real Estate Man Freed on State Charge,” *Santa Rosa Press Democrat*, Jan. 22, 1930, 7.

46. Witkin interview, 1986, *supra* n. 22, 7.

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John Rollin Ridge, ca 1850. (Photo, daguerreotype, California State Library.)

Stranger in a Strange Land:

The Story of Yellow Bird, California's First Native American Attorney

BY JOHN G. BROWNING

IN A LETTER written in October 1854, California's first Native American attorney, John Rollin Ridge — better known by his Cherokee name, Chees-quata-law-ny, or Yellow Bird — shared his impressions concerning how he felt after moving to the state at the height of the Gold Rush:

I was a stranger in a strange land. I knew no one, and looking at the multitude that thronged the streets, and passed each other without a friendly sign, or look of recognition even, I began to think I was in a new world where all were strangers, and none cared to know.¹

As we shall see, Ridge was indeed an outsider in many ways. He was a Native American who had fled the violence roiling the Cherokee Nation after its displacement during the tragic Trail of Tears, and a man of letters who used his education to enter professions that were otherwise closed to him, becoming not just a lawyer but a journalist and America's first Native American novelist as well. And in his best-known work, *The Life and Adventures of Joaquín Murieta, the Celebrated California*

Bandit,² the trained lawyer provided insights into how rejection of the rule of law and the legally sanctioned treatment of minorities as inferior can give rise to vigilante violence.

Our Dark History

Dreams of Gold Rush fortune-making aside, there were few states that would have been worse for a Native American like John Rollin Ridge to move to in 1850. As Governor Gavin Newsom acknowledged in his executive order apology last year, California's Native Americans endured "violence, exploitation, dispossession and the attempted destruction of tribal communities" during more than a century of state-sanctioned "depredations and prejudicial policies against California Native Americans."³ Yet even this historic apology doesn't convey the enormity of the genocidal campaign waged against Native Americans in California. Between 1846 and 1870, California's Native American population plummeted from approximately 154,000 to roughly 30,000.⁴ Although disease and starvation accounted for much of this total, approximately 16,000 were slaughtered — not just in conflicts with white settlers or the U.S. Army, but in the 24 state militia expeditions called out or authorized by California governors between 1850 and 1861.⁵

One of those governors was the state's first, Peter Burnett (also later a justice of the California Supreme Court), who in his 1851 State of the State Address declared that "a war of extermination will continue to be waged between the races until the Indian race becomes extinct."⁶ Reflecting the prejudices of the day, the *Daily Alta California* newspaper had issued its own genocidal call in 1849, writing: "Whites are becoming impressed with the belief that it will be absolutely necessary to

2. John Rollin Ridge, *The Life and Adventures of Joaquín Murieta, the Celebrated California Bandit*, San Francisco: William Cooke & Co., 1854; Norman, Okla.: U. of Oklahoma Press, rev. ed. 1977.

3. Hon. Gavin Newsom, Executive Order N-15-19 (June 18, 2019), <https://www.courts.ca.gov/documents/BTB25-PreConTrauma-02.pdf> [as of Sept. 21, 2020].

4. Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe*, New Haven, Conn.: Yale U. Press, 2016, 354.

5. Benjamin Madley, "It's Time to Acknowledge the Genocide of California's Indians," *Los Angeles Times*, May 22, 2016, <https://www.latimes.com/opinion/op-ed/la-oe-madley-california-genocide-20160522-snap-story.html> [as of Sept. 19, 2020].

6. Gov. Peter Burnett "State of the State Address" (Jan. 6, 1851) *Governor's Gallery*, https://governors.library.ca.gov/addresses/_01-Burnett2.html [as of Sept. 18, 2020]. See also Gregory Nokes, "Peter Hardeman Burnett's Short but Notorious Judicial Legacy" (Spring/Summer 2020) *CSCHS Review* 16.

1. Rennard Strickland, "Yellow Bird's Song: The Message of America's First Native American Attorney" (1993) 29 *Tulsa L. Rev.* 252.

exterminate the savages before they can labor much longer in the mines with security.”⁷

Overt violence was just one tool. Over the coming years, state lawmakers, law enforcement officials, and judges would also strip Native Americans of legal power and rights, land, and protection under the law. The ironically-titled “Act for the Government and Protection of Indians,” passed in 1850, banned Native Americans from voting; legalized the corporal punishment of Native Americans; made them presumed guilty until proved innocent in the event of criminal charges; legalized de jure custodianship of Native American minors as well as convict leasing; and stipulated that no white man could be convicted of a crime based on the testimony of a Native American.⁸ After that Act, California legislators moved swiftly to restrict Native American access to the courts, barring them from giving evidence against a white person in criminal cases, from serving as jurors, or from serving as witnesses in civil cases involving whites. On February 19, 1851, legislators decreed that only “white male” citizens could become attorneys.⁹

Enter Yellow Bird

One might think that with such an overwhelmingly hostile climate toward indigenous people, California in 1850 would be among the least likely destinations for a Native American seeking to make his fortune. However, John Rollin Ridge was no ordinary individual. Born in 1827 in the Cherokee Nation (present day Georgia) to a wealthy, prominent Cherokee leader named John Ridge and his wife Sarah (the daughter of white missionaries from Connecticut), John Rollin Ridge was raised in comfortable surroundings.¹⁰ He was educated by missionaries in New Echota, the Cherokee capital. But there was trouble brewing over the policy of “Indian removal” being pushed by the Georgia Legislature and at the national level by President Andrew Jackson. Ridge’s father and grandfather led a Cherokee faction that was resigned to the inevitability of being removed from their ancestral homeland; they signed the Treaty of New Echota in 1835, and voluntarily relocated to lands provided to them in what is now Arkansas and Missouri. Another faction led by John Ross resisted relocation, and was forcibly removed as part of the horrific “Trail of Tears.”

Once the Ross faction arrived, bad blood persisted between the starving newcomers and the “Treaty” Cherokees who had already settled in the new territory.

Resentment boiled over into violence, and on June 22, 1839, John Ridge was dragged out of his home and stabbed to death in front of his wife and 12-year-old son (other “Treaty” faction leaders, including John Rollin Ridge’s grandfather, were also assassinated the same day).¹¹ After the murders, and fearing for her family’s safety, Ridge’s mother Sarah moved them to Fayetteville, Arkansas. There young John continued his education, even as the family’s finances became more precarious. In 1843, Sarah sent John back East for further schooling at Great Barrington Academy in Great Barrington, Massachusetts, where he remained until 1845.¹²

In 1845, Ridge returned to Fayetteville to study law. In keeping with the custom of the time, this meant “reading the law” under the tutelage of an older lawyer. In a letter to his uncle, Cherokee leader Stand Watie, Ridge says, “I have been in town here ever since you left pursuing the study of Law and will remain for a considerable while.”¹³ In May 1847, Ridge married a white woman, Elizabeth Wilson, and they settled down on a farm on Cherokee land. With the arrival of a daughter, Alice, in 1848, Ridge began to supplement his income as a writer, publishing poetry as well as articles about Cherokee politics and history in Arkansas and Texas newspapers under his Cherokee name, Yellow Bird. But in 1849, Ridge killed a member of the Ross faction in a confrontation over Ridge’s missing stallion.¹⁴ Fearing that he would not receive a fair trial, Ridge fled — initially to Missouri, and then, on April 18, 1850, for the gold fields of California, leaving his wife and daughter to follow later. He would never return to Arkansas or the Cherokee Nation.

California Dreaming

Initially, Ridge headed to California accompanied by his brother Andrew and an African American slave (the Cherokee, for all their sufferings, saw no hypocrisy in their own slaveholding tradition). The trip was arduous and depleted virtually all of Ridge’s resources. Upon arriving in Placerville, a bustling mining town at the foot of the Sierra Nevada mountains, Ridge’s party tried to set up a mining operation. But Ridge quickly learned that few of the fortune-seekers ever actually struck it rich. There was a shortage of available claims; digging or prospecting for gold was backbreaking work; and the costs of supplies and equipment was exorbitant. Compounding the harsh living conditions in mining camps was a lawless environment characterized by vigilante violence against immigrant miners.¹⁵ Interestingly enough,

7. Quoted in Erin Blakemore, “California’s Little-Known Genocide” (Nov. 10, 2017) *History.com*, <https://www.history.com/news/californias-little-known-genocide> [as of Sept. 18, 2020].

8. Madley, *An American Genocide*, 158–59.

9. *Id.* 160. See also, e.g., Michael Traynor, “The Infamous Case of *People v. Hall* (1854) — An Odious Symbol of Its Time” (Spring/Summer 2017) *CSCHS Newsletter* 2.

10. See generally James W. Parins, *John Rollin Ridge: His Life and Words*, Lincoln, Neb.: U. of Neb. Press, 2004, 10.

11. *Id.* 29–31.

12. *Id.* 36.

13. *Id.* 45 [referencing letter of John Rollin Ridge to Stand Watie, Apr. 14, 1846].

14. *Id.* 55.

15. See, e.g., Martin Ridge, Disorder, “Crime, and Punishment in the California Gold Rush” (Autumn 1999) *Montana, The Magazine of Western History* 12–27, 22–23.

Ridge was far from the only person with a legal background seeking his fortune during the Gold Rush. Many lawyers flocked to gold mining camps.¹⁶ One of these was Stephen J. Field, who went from alcalde and justice of the peace in the mining community of Marysville, California in 1850 to the California Supreme Court, and finally to the U.S. Supreme Court as an associate justice, appointed by President Lincoln in 1863.¹⁷

Ridge himself had little but disgust for the lawyers he encountered in mining camps and towns, and felt there were too many of them. He observed:

This part of the country abounds with lawyers . . . (whose name in every country is Legion), some good and some bad; some lawyers who understand the point of lucre, and others who deal more in monies than they do in eloquence, although the latter is not always dishonored at their hands . . . A few are certainly such men as we can trust . . . , but the majority of them, I might almost call them a mass, belong to that abominable class of knaves, idiots, and scoundrels.¹⁸

Ridge would be among those who decided that using his legal training would be more lucrative and less physically taxing than mining for gold. Still, he saw law as a last resort to provide a stable source of income beyond his writing endeavors, his post as Yuba County deputy clerk, and “side hustles” as a notary public and a part-time special policeman. Writing to his mother in 1855, Ridge said:

I will not practice law unless I am driven to it. The general science of law I admire — its every day practice I dislike. But for the sake of having something upon which to rely in case of necessity, I have patiently burned the midnight oil since I have been in Marysville. I was determined that if untoward circumstances gathered around me, and I was thrown out of employment, I would have some sure thing to depend upon, so that I might stand boldly up and say to the world, “I ask you no favors.” I prefer a literary career, but if I cannot place myself in a position as a writer, I will even go into the drudgery of law.¹⁹

16. Gordon Morris Bakken, *Practicing Law in Frontier California*, Lincoln, Neb.: U. of Neb. Press, 1991, 14.

17. Stephen J. Field, *The Personal Reminiscences of Early Days in California* (1880, 1893), reprint New York: [privately published], 1969. See also James Marchiano, “Justice Stephen J. Field’s Personal Reminiscences, Remembered” (Spring/Summer 2011) *CSCHS Newsletter* 10 [recounting the story of how the book came into existence, leading to the original 1893 publication].

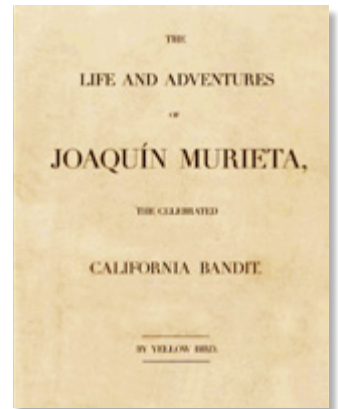
18. Strickland, *supra* 29 *Tulsa L. Rev.* 252, 253.

19. Letter of John Rollin Ridge to Sarah Ridge, Aug. 19, 1856, located in the Stand Watie Miscellaneous File, Western History Collections, University of Oklahoma Library.

Little is known of John Rollin Ridge’s law practice, but it was likely as mundane as he described, probably drafting of mortgages and deeds, and resolving disputes between merchants and miners. And while the State Bar of California archives have no record of a “John Rollin Ridge” being admitted to the bar,²⁰ in all fairness, Ridge died long before the earliest admission dates of practicing attorneys who were brought into and assigned bar numbers by the State Bar. As Gordon Bakken pointed out, the Roll of Attorneys in the California State Archives in Sacramento reflects a total of 619 people admitted to practice in the 1850s, “but in that era it was not unusual for men to practice law in local justice courts without being admitted to the bar.”²¹ Admission to practice in California then, as in most states, was fairly easy. Bar admission, as Bakken noted, required being “twenty-one years of age, good moral character, and the necessary qualifications of learning and ability.”²² Having “read the law” in Arkansas, and with his intellectual gifts and writing skills, it is not surprising that Ridge could meet and exceed the low bar for admission.

A more intriguing question is how Ridge achieved this despite his Native American ancestry, which should have barred him under California law from entering the legal profession. Certainly, Ridge made no secret of his lineage, writing under his Cherokee name and sometimes tackling topics related to Native American issues and white atrocities committed against indigenous peoples in California.²³ It is possible that in daily life, the biracial Ridge “passed” as white; surviving photographs depict Ridge as lighter-skinned, with more Anglo features than Native American.

Regardless, John Rollin Ridge’s most important legacy remains not in his work as a lawyer, but as a writer. He wrote for the *Sacramento Bee*, was editor of the *California Express* until 1858, and then became the editor of the



Title page of *The Life and Adventures of Joaquín Murieta: The Celebrated California Bandit* by John Rollin Ridge, writing as “Yellow Bird.” (Public domain, via Wikimedia Commons.)

20. Email to the author from Louise Turner, Program Supervisor, Attorney Regulation, The State Bar of California (Aug. 12, 2020).

21. Bakken, *Practicing Law in Frontier California* 2.

22. *Ibid.*

23. See, e.g., David Farmer and Rennard Strickland, *A Trumpet of Our Own: Yellow Bird’s Essays on the North American Indian*, San Francisco: Book Club of California, 1981, 54–64.

Daily National Democrat.²⁴ He achieved great renown (if not riches) for his only novel, *The Life and Adventures of Joaquín Murieta, the Celebrated California Bandit*, published in 1854.²⁵ Widely regarded as the first novel by a Native American author, the book recounts the tale of a Robin Hood-like figure, a Mexican American driven to banditry after he and his wife were wronged by white men. Ridge's tale of a bandit turned folk hero echoed the xenophobia and ethnic violence of California in its early days of statehood. But although his work captured the public imagination, Ridge never realized the profits he deserved²⁶ — and so law and journalism remained his more reliable sources of income.

After the end of the Civil War in 1865, Ridge was part of a Cherokee delegation that traveled to Washington, D.C. to negotiate with the federal government (a faction of the Cherokee Nation had sided with the Confederacy

during the war, and Ridge's uncle Stand Watie had served as a general). But that delegation ended in failure, and Ridge returned to California. By 1867, John Rollin Ridge would be dead of a "brain fever," or encephalitis lethargia.²⁷

Conclusion

John Rollin Ridge is best known today as one of the first modern Native American writers, and an important figure in early California journalism. But he was also California's first Native American attorney, an often overlooked and stunning accomplishment given the barriers that have existed throughout U.S. and California history restricting Native Americans from entering the legal profession. Yet at the same time, John Rollin Ridge — who remained a "stranger in a strange land" long after his arrival in California — reflects the dichotomy and inner conflict experienced by all Native American lawyers and perhaps all minority attorneys. Ridge was driven into white society, a so-called "civilized Indian" educated in white schools, yet his sense of Native American pride and identity remained at odds with the demands of surviving in the white man's world. ★

24. Parins, *John Rollin Ridge*, 139.

25. See, e.g., Cheryl Walker, "John Rollin Ridge and the Law" in *Indian Nation: Native American Literature and 19th-Century Nationalisms*, Durham, N.C.: Duke U. Press, 1997, 111–38; Hsuan L. Hsu, "The Legend of Joaquín Murieta: A History of Racialized Violence" (July 9, 2018) *The Paris Review*, <https://www.theparisreview.org/blog/2018/07/09/the-legend-of-joaquin-murieta-a-history-of-racialized-violence/> [as of Sept. 18, 2020].

26. Copyright infringement was not uncommon during this period, nor were unscrupulous publishers. In his correspondence to family, Ridge expresses frustration and money problems, saying he "expected to have made a great deal of money off of my book," and describes publishers as "putting the money in their pockets" while leaving him and other authors "to whistle for our money." See Parins, *John Rollin Ridge*, 105–8.

JUSTICE JOHN G. BROWNING serves on Texas' Fifth District Court of Appeals in Dallas. He is a trustee of the Texas Supreme Court Historical Society, serves as editor-in-chief of the Society's *Journal*, and frequently writes on legal history topics.

27. Parins, *John Rollin Ridge*, 220.

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2020 WRITING COMPETITION VIRTUAL ROUNDTABLE

Virtual Roundtable Participants —

Top, left to right: Chief Justice Tani Cantil-Sakauye, recently retired Justice Kathryn Mickle Werdegar, Competition Chair Selma Moidel Smith, and Society President Richard H. Rahm. Bottom, left to right: Winning authors Taylor Cozzens, Gus Tupper, and Brittney M. Welch. (*Published in the San Francisco and Los Angeles editions of the Daily Journal on September 24, 2020.*)

FOR THE FIRST time, the California Supreme Court Historical Society met by video conference to congratulate the 2020 winners of its annual Selma Moidel Smith Student Writing Competition in California Legal History. The three award-winning students introduced themselves and presented summaries of their papers. Chief Justice Tani Cantil-Sakauye responded, “All of us will benefit because of this inspired writing. I’m greatly excited and inspired by your minds.”

First place was won by Taylor Cozzens of the University of Oklahoma History Department for “Ronald Reagan v. CRLA: Politics, Power, and Poverty Law.” He receives a prize of \$2,500.

Second place was awarded to Gus Tupper, 2020 graduate of the UC Berkeley School of Law for “Breaking California’s Cycle of Juvenile Transfer.” He receives a prize of \$500.

The third-place winner is Brittney M. Welch of The Ohio State University Moritz College of Law for “Stop! Turn the Car Around Right Now for Federalism’s Sake! The One National Program Rule and How Courts Can Stop Its Impact,” which discusses federal preemption of California’s clean air standards. She receives a prize of \$250.

Praising the high quality of the winning entries, Selma Moidel Smith, competition founder and editor-in-chief of the society’s annual journal, announced that all three papers will appear in this year’s volume of *California Legal History*.

The chief justice concluded by saying, “All of these issues come to us at the Supreme Court, and this is what moves policy forward, so thank you for this opportunity. I’m excited and impressed.”

This year’s judges, all of whom are legal historians and professors of law, were: Stuart Banner, UCLA School of Law; Christian Fritz, University of New Mexico School of Law (Emeritus); and Sara Mayeux, Vanderbilt University School of Law, who was the first-place winner of the competition in 2010.

The annual competition is open to students enrolled in a school of law or graduate program in history. Papers are required to be original, unpublished scholarly writing on any aspect of legal history that deals significantly with California, in any time period from 1846 to the present.

The complete video of the virtual roundtable is available at: <https://youtu.be/ToP6rkZpaxU>. ★

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CALIFORNIA LEGAL HISTORY



TABLE OF CONTENTS

INTRODUCTION

FIFTEEN YEARS OF CALIFORNIA LEGAL HISTORY: THE ROLE OF A JOURNAL IN AN EMERGING FIELD
Selma Moidel Smith

SOCIETY PROGRAMS

Each introduced with an editor's note by Selma Moidel Smith

JUSTICE DAVID S. TERRY AND FEDERALISM: A LIFE AND A DOCTRINE IN THREE ACTS
Richard H. Rahm

THE JOADS GO TO COURT: A TRUE-LIFE MELODRAMA WITH IMPLICATIONS FOR TODAY
John S. Caragozian

CELEBRATING THE CALIFORNIA SUPREME COURT AND ITS HISTORY

INSIDE THE COURT AND OUT: CALIFORNIA SUPREME COURT JUSTICE KATHRYN MICKLE WERDEGAR

ARTICLES

CALIFORNIA'S FIRST JUDICIAL STAFF ATTORNEYS: THE SURPRISING ROLE THAT COMMISSIONERS PLAYED, 1885-1905, IN CREATING THE COURTS OF APPEAL
Jake Dear

2020 WRITING COMPETITION VIRTUAL ROUNDTABLE

RONALD REAGAN V. CRLA: POLITICS, POWER, AND POVERTY LAW
Taylor Cozzens

BREAKING CALIFORNIA'S CYCLE OF JUVENILE TRANSFER
Gus Tupper

STOP! TURN THE CAR AROUND RIGHT NOW FOR FEDERALISM'S SAKE! THE ONE NATIONAL PROGRAM RULE AND HOW COURTS CAN STOP ITS IMPACT
Brittney M. Welch

SPECIAL BOOK SECTION

A SOCIAL HISTORY OF FARM LABOR IN CALIFORNIA WITH SPECIAL EMPHASIS ON THE UNITED FARM WORKERS UNION AND CALIFORNIA RURAL LEGAL ASSISTANCE
Ellen Casper Flood

TABLE OF CONTENTS

FOREWORD
Kevin R. Johnson

PREFACE

CH. 1: INTRODUCTION

CH. 2: FARM LABOR IN CALIFORNIA: THE SETTING

CH. 3: FARM LABOR ORGANIZING: THE BACKGROUND

CH. 4: FARM WORKERS AND THE UFW: GAINING ADMISSION

CH. 5: CONTAINMENT OF THE UFW

CH. 6: CRLA: BROADENING THE CONFLICT

CH. 7: CONTAINING CRLA

CH. 8: INSTITUTIONALIZATION THROUGH THE ALRA

CH. 9: CONCLUSION

CODA

BIBLIOGRAPHY

ORAL HISTORY

ORAL HISTORY OF JUSTICE ARMAND ARABIAN

TABLE OF CONTENTS

PREFACE
Laura McCreery

INTRODUCTION
Ellis J. Horvitz

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Selma Moidel Smith

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FALL / WINTER 2020
TABLE OF CONTENTS

**Woman Jurors in California:
Recognizing a Right of Citizenship**
 COLLEEN REGAN 2

**Hal Cohen: Tributes to the California
Supreme Court’s Most Extraordinary
and Influential Staff Attorney**
 JAKE DEAR 10

**Harry Bridges and the *Los Angeles Times*:
Unlikely Free Speech Allies**
 HENRY WEINSTEIN 19

**The California Supreme Court’s
Newest Justice: Martin Jenkins. 26**

**A Lawyer by Accident: Bernie Witkin’s
Early Life and Career, Part I: A Suitable
Replacement**
 JOHN R. WIERZBICKI 27

**Stranger in a Strange Land:
The Story of Yellow Bird, California’s
First Native American Attorney**
 JOHN G. BROWNING 33

**2020 Writing Competition
Virtual Roundtable 37**

California Legal History
 VOLUME 15, 2020 38

Membership Donors 2019–2020. 39