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What Did We Learn?

California Courts' Response to the 1918 Influenza Epidemic

People waiting in line to get flu masks to avoid the spread of Spanish influenza. Montgomery Street in San Francisco, 1918. Photo: Wikimedia Commons.

What Did We Learn from the California Courts' Response to the Influenza Epidemic of 1918–1919?

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The California judiciary's response to the COVID-19 pandemic was swift and thoughtful. Mindful of the need to balance community health and safety needs with individual civil and constitutional rights and liberties, the Judicial Council of California, chaired by California Chief Justice Tani G. Cantil-Sakauye, issued emergency measures beginning in March 2020.[1] Following the first statewide stay-at-home order, the Judicial Council extended several statutory deadlines, suspended jury trials for 60 days and expanded the use of technology to conduct proceedings remotely.[2]

As the pandemic evolved, so did the Judicial Council's response. Because the coronavirus had manifested itself differently throughout the state, California's six appellate districts and 58 trial courts confronted different impacts. As a result, the Judicial Council moved away from statewide orders and relied on flexible advisories and orders unique to each court to address the pandemic. By December 2020, Chief Justice Cantil-Sakauye had signed 353 emergency orders to assist trial courts in their COVID-19 management efforts.[3] For example, a January 2021 order concerning Los Angeles County provided flexibility for the locations of holding criminal hearings and extended a number of statutory deadlines in criminal and juvenile dependency cases, whereas January 2021 orders in smaller counties such as Lake County and Placer County provided only a 30-day extension for the time periods specified in Penal Code section 1382.[4]

Even now, when we can begin to envision a future where court operations return to some semblance of normality, the Judicial Council remains flexible, modifying its guidance to adapt to an ever-changing situation, a response that has required constant oversight

1. Merrill Balassone, "California Chief Justice: 'No need and no right will be overlooked,'" *California Courts Newsroom*, *https://newsroom.courts.ca.gov/news/california-chief-justice-no-need-and-no-right-will-be-overlooked* (as of Mar. 6, 2021).

2. "Judicial Council of California Statewide Emergency Order by Hon. Tani G. Cantil-Sakauye, Chief Justice of California and Chair of the Judicial Council, March 30, 2020," *California Courts Newsroom, https://newsroom.courts.ca.gov/sites/default/files/newsroom/document/Statewide%2520Order%2520by%2520the%2520Chief%2520Justice-Chair%2520of%2520the%2520Judicial%2520Council%25203-30-2020.pdf* (as of Mar. 6, 2021).

3. Merrill Balassone, "California Chief Justice Issues Advisory to Courts Amid COVID-19 Surge," *California Courts Newsroom*, *https://newsroom.courts.ca.gov/news/california-chief-justice-issues-advisory-courts-amid-covid-19-surge* (as of Mar. 6, 2021).

4. "Court Emergency Orders," *California Courts Newsroom*, *https://newsroom.courts.ca.gov/covid-19-news-center/court-emergency-orders* (as of Mar. 6, 2021).

"I have been inspired by what courts at every level of our justice system have been able to achieve in their unprecedented efforts to serve the public during this time."

Chief Justice Tani Cantil-Sakauye, Mar. 12, 2021.

and vigilance. As Chief Justice Cantil-Sakauye observed early in the pandemic, "We are at this point truly with no guidance in history, law or precedent. To say that there is no playbook is a gross understatement of the situation."[5]

At first blush, the absence of a playbook might seem surprising given that California confronted a world-wide pandemic just over 100 years ago. Between spring 1918 and mid-1919, an influenza pandemic that came to be known as the "Spanish flu" blanketed the globe, killing an estimated 50 million people, including 675,000 in the United States.[6] There are myriad similarities between California's overall response then and now, including that state courts adopted individualized responses based on the needs of their communities. Yet, there is no indication that the judicial system yielded any takeaways from its response to the Spanish flu.

Indeed, the lack of a playbook for the California courts might be because there were no coordinated "plays" executed in response to the 1918 pandemic. The Judicial Council did not yet exist and there is no indication that any other entity stepped in to provide centralized guidance. Instead, courts throughout the state appeared to act independently — and arguably erratically — resulting in a range of responses.[7] At the highest level, there seems to be little evidence that the influenza outbreak caused major disruption to the work of California Supreme Court. On October 18, 1918, one week after Los Angeles had adopted a public closure order, the Court met to hear cases in Los Angeles.[8] By mid-November, however, the Court did implement a two-week continuance for the cases it was scheduled to hear in Sacramento.[9]

At the trial court level, individual judges controlled the response of their courtrooms. They decided what safety measures to implement and/or whether to postpone proceedings. One of the most well-known photographs from the time period depicts Judge John J. Sullivan conducting a trial outside in San Francisco's Portsmouth Square during October 1918. His stated goal was to conduct timely criminal proceedings while striving to protect public safety.[10] Judge Sullivan acknowledged that physicians recommended fresh air and sunshine as preventive measures against influenza, stating, "There seems to be no great reason why several hundred persons should be cooped up together to scatter the germs when we can all go into the open air."[11] During the first day of open air court, Judge Sullivan disposed of 20 criminal cases, including one involving a man who was sentenced to three months in jail for expectorating on the sidewalk and making disloyal remarks. Once court adjourned, the park superintendent informed Judge Sullivan he had broken the law by convening a large gathering without a permit. Undeterred, Judge Sullivan announced he would resume open-air court the next morning.[12] Perhaps the reason why only one such photograph can be found is that Judge Sullivan's open-air court sessions quickly ended when, instead of resuming court, he stayed home the next day with a cold, amidst reports that his son had contracted the Spanish flu.[13]

Open-air police court being held in Portsmouth Square, San Francisco during October 1918. *Photo: Public domain.*

5. Balassone, "California Chief Justice: 'No need and no right will be overlooked,'" *supra* note 1.

6. N. Pieter M. O'Leary, "The 1918–1919 Influenza Epidemic in Los Angeles" (2004) 86 *S. Calif. Qtrly.* 391–403.

7. The lack of centralized authority likewise means there is no central repository of information summarizing the California courts' response to the influenza. The information about those responses outlined in this article has been obtained primarily from contemporaneous newspaper articles, as well as from more recent academic and other articles focusing on California's response more generally.

8. *Id.* 393–94; Minute Order by the California Supreme Court (1918, Oct. 18) [Cal. Judicial Center Library].

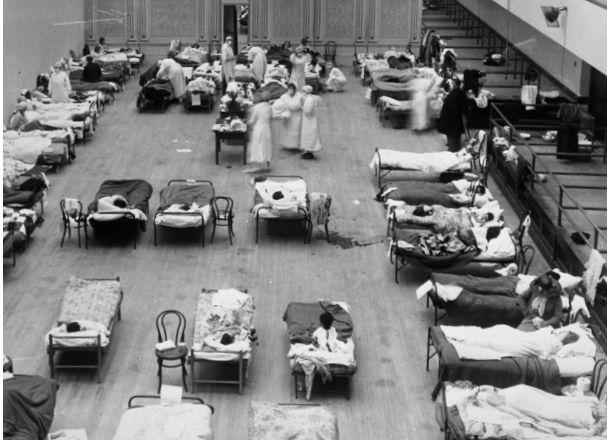
9. Minute Order by the California Supreme Court (1918, Nov. 4) [Cal. Judicial Center Library].

10. S. Villaran, "Reflections on the first post-pandemic jury trial in San Francisco," *The Daily Journal,* Sept. 23, 2020.

11. "Police Court to Hold Sessions in Open Air," *San Francisco Examiner*, Oct. 20, 1918, 6.

12. "Police Court is Held in Park," *San Francisco Examiner*, Oct. 22, 1918, 13.

13. "Open Air Judge Gets Cold; Son Has Influenza," *Santa Ana Register*, Oct. 22, 1918, 1.



Volunteer nurses from the American Red Cross tending influenza sufferers in the Oakland Auditorium, Oakland, California, 1918. *Photo: Wikimedia Commons*.

Sometimes the courts' decisions were last minute. Also in October 1918, Police Judge Ray L. Chesebro established an outdoor courtroom in Los Angeles.[14] Judge Chesebro's regular courtroom was in the old Normal School Building on Normal Hill.[15] When a case was called against a Chinese herbalist alleged to be practicing medicine without a license, the jury panel, attorneys, court personnel and witnesses crowded into the courtroom. Once he saw the packed courtroom, Judge Chesebro ordered the proceedings to be conducted outdoors on the Normal Hill Center lawn and further ordered books, tables and chairs to be carried outside.[16] Although at that point the defense waived a jury, witnesses were examined in the outdoor courtroom.[17]

An alternative to the outdoor courtroom was delay. Many courts did not implement trial continuances systematically but instead based them on the health of the judge, attorneys or parties. On October 22, 1918, the *Los Angeles Times* reported that a condemnation trial had been continued for three weeks because the judge, the deputy county counsel and the defendant's corporate secretary were suffering from influenza.[18] The same report stated that proceedings in a different Los Angeles courtroom had forged ahead with a replacement judge while the assigned judge was out with influenza. Nonetheless, the replacement judge granted some continuances in that courtroom as a result of physicians' certificates confirming that a party or key witness was under quarantine due to influenza.[19]

The duration of court continuances varied. Modesto postponed setting any jury trials initially for two weeks and thereafter for one week at a time for several weeks.[20] Sacramento continued its civil cases "until after the epidemic of influenza is under control" and temporarily continued its criminal cases while the jail was under quarantine.[21] Likewise, the Placer County court halted all court proceedings "until the influenza epidemic has subsided."[22] On his own motion, a Yuba County judge ordered a two-week adjournment of his court.[23] Courts in Los Angeles similarly issued various orders closing for one to two-week periods of time.[24] The Los Angeles federal court calendar was described as "considerably confused" due to the cessation of jury trials.[25] In late October 1918, all San Francisco trial courts continued jury trials and contested cases for four weeks, while a federal judge in San Francisco dismissed his jury panel and continued all jury trials "until the influenza epidemic subsides."[26]

Sometimes in combination with delay and sometimes as an alternative thereto, courts elected to limit access to their courtrooms. Federal courts in Los Angeles started to resume jury trials without spectators after the superior courts had done so in November 1918, but ultimately decided not to resume jury trials until January 1919.[27] Sacramento courts continued all jury trials and "all cases likely to attract a crowd," but otherwise remained open for business.[28] Before turning to postponement, one Modesto judge continued to hold proceedings but cleared spectators from the courtroom.[29]

In some instances, delay was unavailable because the influenza pandemic increased the courts' workloads. For example, Oakland's initial closure list included theaters and other places of amusement, but it omitted the closure of saloons. During the weekend of October 19–20, 1918, with saloons being the only remaining place to gather, police executed a record number of arrests for public drunkenness, which added 77 cases to the police court's

14. "Flu Cases Much Fewer," *Los Angeles Times*, Oct. 26, 1918, 1.

15. Normal Hill was a 70-foot rise that stretched from downtown Los Angeles to Elysian Park that was ultimately shaved down to allow for an extension of Fifth Street and the construction of the Los Angeles Central Library.

16. "Flu Cases Much Fewer," *supra* note 14, 1.

17. *Ibid.*

18. "Must Pay Your Taxes by Mail," *Los Angeles Times*, Oct. 22, 1918, 2.

19. *Ibid.*

20. "Jury Trials Will Be Held Over for Two Week Period," *Modesto Herald*, Nov. 3, 1918, 11; "Setting Jury Cases Postponed A Week," *Modesto Herald*, Nov. 16, 1918, 8.

21. "Criminal Trials Are Delayed By Epidemic," *Sacramento Bee*, Oct. 28, 1918, 4.

22. "No More Court Till Influenza is Over," *Press-Tribune* (Roseville), Oct. 29, 1918, 3.

23. "Court Adjourns; Saloons Close at Marysville," *Sacramento Bee,* Oct. 29, 1918, 8.

24. "May Reopen Schools Soon," *Los Angeles Times*, Oct. 24, 1918, 11.

25. "Flu Cases on Decrease Here," *Los Angeles Times,* Nov. 8. 1918, 13.

26. "Proclamation of Mayor Asks Masks for All," *San Francisco Chronicle*, Oct. 22, 1918, 8; "Dooling Calls Halt On Trials by Jury," *San Francisco Chronicle,* Oct. 26, 1918, 9.

27. "No Federal Court Jury Trials Until January," *Los Angeles Times*, Nov. 23, 1918, 14.

28. "Home Town Items," *Sacramento Bee*, Oct. 28, 1918, 6.

29. "Courtroom Cleared Because of the 'Influ,'" *Modesto Morning Herald*, Oct. 22, 1918, 6.

docket for Monday October 21.[30] Some courts in San Francisco began imposing jail sentences on individuals convicted of violating an ordinance prohibiting spitting on the street, explaining that such stringent measures were necessary to prevent influenza germs from being spread in such a manner.[31]

On occasion, the impact of the influenza pandemic resulted in unusual court proceedings. In a Pasadena case, a large estate owner brought suit against his neighboring estate owner alleging negative effects from an incinerator.[32] Judge John Lewis R. Work ordered an expert "smelling expedition" to personally assess the incinerator's impacts. The problem was that the experts risked violating Pasadena's mask mandate in order to obtain an accurate sense of the odors being emitted. As a result, Judge Work contemplated both postponing the expedition or, in the event a mask violation was alleged, he made an extraordinary offer to represent the experts in court. In the end, Judge Lewis modified his order to require a report only on the impact of cinders and sparks from the incinerator and not its smell.[33]

In at least one instance, the decision to move ahead with court proceedings had dire consequences. In 1918, California resident Harry Smelser reported for jury duty and became infected with the Spanish flu. His wife Dot cared for him, and although Mr. Smelser recovered, unfortunately his wife passed away from influenza.[34]

At the time, these decentralized and varied responses by the judiciary did not lend themselves to creating a playbook designed to guide California in future pandemics. In hindsight, we know that public health measures need to be consistent, their rationale understandable and their enforcement steadfast. But local government officials, including the judiciary, faced enormous pressure from a skeptical and at times hostile public to measures found to be inconvenient, cumbersome or seemingly ineffective. In 1918 as now, scientists, and in turn public officials, faced a steep learning curve with a new, highly contagious, widespread and deadly illness. As a result, officials sometimes waffled and backpedaled, undermining the goals of consistency and steadfastness. These challenges extended far beyond court operations. Indeed, many of the critical issues that arose during the Spanish flu are eerily similar to those California (and other states) faced with COVID-19. Here are just a few examples:

Responses Were Local

In 1918, there was really no mechanism for the federal government to take an active role in responding to the virus. Neither the Centers for Disease Control nor the Food and Drug Administration existed. Moreover, President Woodrow Wilson's single-minded focus on victory in World War I contributed to the disease's massive spread. Wilson failed to acknowledge the escalating civilian loss of life, insisting on continued troop mobilization even as the fighting abroad began to wind down.[35] Thus, the obligation to respond fell to states and largely to local governments.[36] Although local governments in California relied primarily on closing places of public accommodation and on recommending or requiring masks in public, no two jurisdictions responded in identical fashion.

Indeed, many of the critical issues that arose during the Spanish flu are eerily similar to those California (and other states) faced with COVID-19.

For example, San Diego coupled its closure and mask orders with some unique recommendations. On October 13, 1918, after several individuals were hospitalized due to influenza and additional cases were reported among the jail population in San Diego, the city board of health — not the city council — closed public amusements and facilities indefinitely, empowering the police to enforce the order. The board quickly followed with a recommendation to use a quinine bisulphate nasal spray and wear masks.[37] The city health board encouraged residents to spend time outdoors, advising that fresh air served as a protection against the disease. One well-known San Diego physician further opined that the influenza could not survive in certain altitudes, leading San Diegans to flock to the nearby mountains.[38] The city board of health rescinded its closure in mid-November, but tried to reinstate it in late November after a spike in cases. The city council did not endorse the action until December 6, at which point it issued a three-day closure order for all but essential businesses, followed by a mask mandate that lasted through Christmas Eve.[39]

30. "Municipal Buildings to Augment Infirmary Facilities; Red Cross is Enlisted in Work; 'Masks Appearing,'" *Oakland Tribune*, Oct. 21, 1918, 7.

31. "2 Get Jail Terms for Spitting on Sidewalk," *San Francisco Examiner*, Oct. 24, 1918, 13.

32. "Court Sniffers Face Dilemma in Sniffing Minus Masks," *Los Angeles Evening Herald*, Jan. 22, 1919, 13.

33. *Ibid.*

34. David Raybin, "Why has the Tennessee Supreme Court suspended jury trials until Independence Day?" *Tennessean*, May 22, 2020, *https://www.tennessean.com/story/opinion/2020/05/22/tennessee-supreme-court-suspended-jury-trials-until-independence-day/5244078002/* (as of Mar. 21, 2021).

35. John M. Barry, *The Great Influenza: The Story of the Deadliest Plague in History*, New York: Penguin Books, 2004, chs. 9–11.

36. "Lessons Learned From the 1918 Pandemic: Historical and Legal Framework of the Spanish Flu and How It Relates to Today's Crisis," *Hist. Soc. of the NY Courts* (May 11, 2020) *https://history.nycourts.gov/events/lessons-learned-from-the-1918-pandemic-webinar/* (as of Mar. 21, 2021).

37. Richard Peterson, "The Spanish Influenza Epidemic in San Diego, 1918–1919" (1989) 71 *S. Calif. Qtrly.* 89, 92, 95.

38. *Id.* 94.

39. *Id.* 97–98.

This room at Wilson High School in Pasadena was converted into a flu isolation ward during the 1918 Spanish flu pandemic.

The cities of Riverside and Ontario also issued closure orders on October 13, 1918, while neighboring Redlands did not (though it quickly followed suit).[40]

On October 16, 1918, the Oxnard City Council ordered its health officer to close "theaters, motion picture houses, schools, churches, both public and private dances and all public gatherings until further notice," keeping certain "essential" businesses open.[41] Beyond that order, the city council mandated that residences housing an influenza patient be "placarded," meaning that a physical sign would be posted on the home and the address identified in the newspaper so that potential visitors could avoid exposure.[42] The city council also directed Oxnard firefighters to wash the pavement and sidewalks of main thoroughfares daily, and Oxnard officials later pointed to this measure as a reason Oxnard fared better than neighboring Ventura.[43]

San Bernardino similarly had a placard ordinance, together with a quarantine requirement that " 'No persons will be permitted to enter or leave the home until 10 days from the beginning of the attack, and all members of the family will be kept away from the influenza patient.' "[44]

Smaller cities like Napa were slightly slower to respond. On October 29, 1918, after Napa's city clerk died from the Spanish flu, the mayor declared influenza an epidemic and ordered everyone in public to wear masks of at least three thicknesses of material. He further ordered schools, churches and other public gathering places closed.[45]

Although Los Angeles did not impose a mask mandate, Pasadena did and enforced it vigorously. Exhibiting their awareness of the differing local ordinances, teachers who lived in Pasadena but worked in Los Angeles would remove their masks at the city limit on the way to work and don them at the same place on their way home.[46]

The South and North Differed

Los Angeles and San Francisco undertook distinctly different responses to the pandemic, with distinctly different results.

Los Angeles acted quickly, focusing on closing public spaces. Influenza surged among local residents in mid-September 1918, likely spread by infected soldiers on a naval training vessel that was quickly quarantined.[47] The first civilian case was reported on October 1, and, at the urging of Los Angeles Health Commissioner Dr. Luther M. Powers, on October 11 Mayor Frederick Woodman and the city council passed "an 'ordinance to prevent the spread of the epidemic of influenza in the city of Los Angeles' " that required the closure of public spaces including theaters, churches and schools (but not local courts). Los Angeles officials recommended but did not mandate mask wearing, instead focusing on social distancing as the key preventive measure.[48]

San Francisco was slightly slower to act, responding after cases exploded from 169 on October 9, 1918 to more than 2,000 just one week later.[49] Mayor James Rolph, in consultation with City Health Officer William C. Hassler, issued a closure order on October 17, 1918, directed to schools, social gatherings and places of public amusement, excluding churches and leaving the issue to each church leader's discretion.[50] In contrast to Los Angeles,

40. "Closing Order May be Made for City," *San Bernardino Sun*, Oct. 13, 1918, 1–2; Mark Landis, "How the 1918 Spanish flu ravaged Southern California," *San Bernardino Sun*, Apr. 13, 2020, *https://www.sbsun.com/2020/04/13/how-the-1918-spanish-flu-ravaged-southern-california/* (as of Mar. 21, 2021).

41. Andy Ludlum, "Flu Fighters: The 1918 Flu Pandemic in Oxnard," *Museum of Ventura County*, *https://venturamuseum.org/research-library-blog/flu-fighters-the-1918-flu-pandemic-in-oxnard/* (as of Mar. 21, 2021).

42. *Ibid.*

43. *Ibid.*

44. Landis, "How the 1918 Spanish flu ravaged Southern California. *San Bernardino Sun, https://www.sbsun.com/2020/04/13/how-the-1918-spanish-flu-ravaged-southern-california/*, Apr. 13, 2020 (as of Mar. 21, 2021).

45. Barry Eberling, "Napa has known a pandemic before: Looking back at 1918's deadly Spanish flu," *Napa Valley Register*, *https://napavalleyregister.com/news/local/napa-has-known-a-pandemic-before-looking-back-at-1918s-deadly-spanish-flu/article_27cd9587-e63c-5fd8-8831-c9bbbb4f4866.html*, Mar. 14, 2020 (as of Mar. 21, 2021).

46. "Smoke in Flu Mask Leads to Arrest," *Los Angeles Evening Herald*, Jan. 21, 1919, 3.

47. O'Leary, "The 1918–1919 Influenza Epidemic in Los Angeles," *supra* 86 *S. Calif. Qtrly.* 393.

48. "Peak of 'Flu' Is Reached Here Now, Is Hope," *Los Angeles Evening Herald*, Oct. 26, 1918, 3; "To Establish Influenza Hospital for City," *Los Angeles Evening Herald*, Nov. 6, 1918, 3.

49. "The American Influenza Epidemic of 1918–1919: San Francisco, California," *Influenza Encyclopedia, https://www.influenzaarchive.org/cities/city-sanfrancisco.html#* (as of Mar. 21, 2021).

50. *Ibid*; O'Leary, "The 1918–1919 Influenza Epidemic in Los Angeles," *supra* 86 *S. Calif. Qtrly.* 393–94; James Rainey & Ron Gon Lin, "Heed the lessons of 1918," *Los Angeles Times*, April 19, 2020; James Rainey & Ron Gong Lin, "California lessons from the 1918 pandemic: San Francisco dithered; Los

the cornerstone of San Francisco's public safety plan was the face mask. The city mandated masks for those who came into contact with the public — such as barbers, bank tellers and motel clerks — and strongly recommended all persons wear masks while in public.[51]

Officials in both Los Angeles and San Francisco drew on the spirit of patriotism engendered by the ongoing war, maintaining that complying with influenza precautions was one's patriotic duty.[52] Patriotism did not always favor such precautions, however. Timing-wise, the Los Angeles ordinance preceded and thus precluded a scheduled Liberty Fair parade and rally; San Francisco's one-week delay allowed the parade to go forward there, which became what we might now term a super spreader event.[53]

Guided by Dr. Powers, the Los Angeles City Council resisted efforts to lift the closure order in mid-November in light of reports that influenza was waning.[54] Instead, Los Angeles waited until early December to begin re-opening, when Dr. Powers advised it was safe to do so.[55] At the time of repeal, Dr. Powers expressly advised that people should continue to exercise caution and remain away from crowds as much as possible.[56] Even through mid-December 1918, when cases had declined precipitously, Dr. Powers publicly urged those with influenza symptoms to remain isolated.[57]

In San Francisco, influenza cases declined dramatically while the mask ordinance was in effect, leading Dr. Hassler to recommend re-opening the city by mid-November.[58] Over the next two weeks, the city completely re-opened and rescinded the mask ordinance. Residents engaged in a mask-removing celebration on November 21, ripping the masks from their faces and throwing them in the street as a whistle sounded across the city exactly at noon.[59] Thinking they had conquered the influenza, San Franciscans streamed into theaters, movie houses and sports arenas after the one-month closure.[60] As we might now have anticipated, influenza cases again surged. Initially, city officials requested that residents voluntarily resume wearing masks, and ultimately voted to resurrect the mask ordinance in mid-January 1919.[61]

California's average death rate due to influenza and resulting pneumonia during the pandemic was 538 per 100,000.[62] Los Angeles stayed below that average with 494 deaths per 100,000,[63] while San Francisco well exceeded the average with 673 deaths per 100,000 people.[64]

Masks Were Controversial

In the fall of 1918, only seven U.S. cities had mandated mask wearing. Four of those cities were in California: Oakland, Pasadena, Sacramento, and San Francisco.[65]

Any public resistance to mask wearing in San Francisco was met with strict enforcement of the ordinance. One day in mid-November, police arrested 1,000 individuals, called "mask slackers," for refusing to wear masks in public. The city jail and later the police courtrooms quickly filled beyond capacity with maskless individuals who could not afford the $5 bail, and those who indicated a steadfast refusal to mask were sentenced to two to ten days in jail.[66] The court held evening and weekend sessions in order to dispose of all the cases.[67] Oakland likewise relied on strict enforcement. Almost 100 individuals appeared in Oakland Superior Court on a Saturday morning in early November 1918, charged with violating the city's mask ordinance and were sentenced to pay a $10 fine or

San Francisco police officer warning a man to wear a mask.

Angeles acted and saved lives," *Los Angeles Times*, *https://www.latimes.com/california/story/2020-04-19/coronavirus-lessons-from-great-1918-spanish-flu-pandemic* (as of Mar. 21, 2021).

51. "The American Influenza Epidemic of 1918–1919: San Francisco," *supra* note 49.

52. *Ibid*; O'Leary, "The 1918–1919 Influenza Epidemic in Los Angeles," *supra* 86 *S. Calif. Qtrly.* 400–01.

53. *Id*. 395.

54. "Influenza Declining Rapidly Here," *Los Angeles Evening Herald*, Nov. 9, 1918, 3.

55. O'Leary, "The 1918–1919 Influenza Epidemic in Los Angeles," *supra* 86 *S. Calif. Qtrly.* 398–99.

56. "1463 Fewer Cases This Week Than Last," *Los Angeles Evening Herald*, Nov. 30, 1918, 3.

57. "Heavy Decrease Again Shown in Flu Cases," *Los Angeles Evening Herald*, Dec. 19, 1918, 3.

58. "The American Influenza Epidemic of 1918–1919: San Francisco," *supra* note 49; O'Leary, "The 1918–1919 Influenza Epidemic in Los Angeles," *supra* 86 *S. Calif. Qtrly.* 401.

59. "The American Influenza Epidemic of 1918–1919: San Francisco," *supra* note 49.

60. *Ibid.*

61. *Ibid.*

62. Diane North, "California and the 1918–1920 Influenza Pandemic," *Boom California* (June 18, 2020), *https://boomcalifornia.org/2020/06/18/california-and-the-1918-1920-influenza-pandemic/* (as of Mar. 22, 2021).

63. O'Leary, "The 1918–1919 Influenza Epidemic in Los Angeles," *supra* 86 *S. Calif. Qtrly.* 393–94; Rainey & Lin, "Heed the lessons of 1918," *supra* note 50.

64. "The American Influenza Epidemic of 1918–1919: San Francisco," *supra* note 49.

65. Christine Hauser, "The Mask Slackers of 1918," *New York Times,* Aug. 3, 2020, *https://www.nytimes.com/2020/08/03/us/mask-protests-1918.html?searchResultPosition=1* (as of Mar. 22, 2021).

66. "1000 Taken as Mask Slackers," *San Francisco Chronicle*, Nov. 10, 1918, 6.

67. "1000 Alleged Mask Slacker Cases in Jails," *San Francisco Examiner*, Nov. 10, 1918, 13.

spend five days in jail.[68] Among those charged was Congressman J. Arthur Elston, whose mask dropped while he was arguing with his law partner as they emerged from their law offices onto the street. In view of the congressman's clean record and averments that he typically wore his mask in public, his sentence was suspended.[69]

When San Francisco revived its mask ordinance in early 1919, the opposition was more pronounced and led to its demise two weeks later. Several well-known San Franciscans, including some members of the Board of Supervisors, formed "The Anti-Mask League" to condemn the ordinance and advocate its repeal.[70] More than 2,000 individuals attended one of the group's public meetings where they raised objections, maintaining that science did not support the efficacy of masks and mandating them was unconstitutional.[71]

In Los Angeles, Dr. Powers declined to push for mandatory masks, asserting it would be too difficult to educate the public on their proper and effective use. Moreover, Los Angeles was already home to the entertainment industry. Though it is unclear to what extent the city council bowed to pressure from Hollywood, celebrities tended to eschew mask wearing because it was "'so horrid'" to not be recognized in public.[72] Messaging from city officials, coupled with the decline in cases following the implementation of other measures, led a once potentially willing community to become hostile to mask wearing.[73] Even when cases spiked in January 1919 due to a second influenza wave, Dr. Powers considered but declined to support a mask ordinance. By then, the notion that masks were ineffective had become part of Los Angeles' culture.[74] In a recent article, the *Los Angeles Times* conceded its own contribution to that culture. In 1918, the paper criticized physicians who advocated for a mask ordinance and published data showing that cities with mask mandates had fared worse than Los Angeles. The reporting stoked Los Angeles' rivalry with San Francisco by labeling the latter as the "City of Masks" while highlighting that its influenza toll exceeded that of Los Angeles.[75]

In San Diego, an editorial in the local newspaper mocked the wearing of masks: "'Modern civilization has abolished the mask as part of human wearing apparel . . . only highwaymen, burglars, and hold-up men wear masks professionally . . . . We sincerely regret . . . that some of the younger women in public employment are compelled to wear these masks. We miss the pretty faces, and we have not yet learned to interpret the glances of the eyes that flash and sparkle above the concealing gauze.'"[76]

Closure Orders Were Controversial

By way of example, Los Angeles implemented one of the more stringent closure orders in California. Nonetheless, the city council rejected an effort to close all "unessential" businesses for a brief time period in November 1918 when influenza cases spiked.[77] Retailers were uniformly opposed to closure. Speaking to the city council, one retailer asserted that existing precautions — which included proper ventilation, extra sanitation, air space between people and the practice of immediately excusing employees who showed any influenza symptoms — afforded adequate protection.[78] Members of the Motion Picture Theater Owners' Association, whose businesses had been closed since early October, maintained that the city should either be tightly closed or opened entirely. They threatened to sue the city for alleged discriminatory treatment.[79]

Christian Science churches in Southern California notified local police departments that they intended to hold services the first weekend in November 1918, while the closure order was in effect, so as to create a test case allowing them to challenge the constitutionality of the ordinance.[80] One case succeeded on a technicality. In Pasadena, Superior Court Judge Leslie R. Hewitt lifted the ban against church services, not on constitutional grounds but rather because the Pasadena Board of Trustees had issued only a resolution and not an order, and therefore no official ban existed.[81] Another Christian Science test case was continued indefinitely after both the first and second judges assigned to the case contracted influenza.[82] Shortly thereafter, the prosecutor became afflicted with influenza.[83] Other churches

68. "Hundred in Toils for Not Having Mask," *Oakland Tribune*, Nov. 2, 1918, 7.

69. "Congressman Nabbed as He Drops Mask," *Oakland Tribune*, Nov. 2, 1918, 7.

70. "The American Influenza Epidemic of 1918–1919: San Francisco," *supra* note 49.

71. *Ibid.*; Hauser, "The Mask Slackers of 1918," *supra* note 65.

72. Hauser, "The Mask Slackers of 1918," *supra* note 65.

73. Gustavo Arellano, "In 1918, L.A. failed on mask policy. Debates over COVID are eerily reminiscent of arguments during Spanish flu pandemic," *Los Angeles Times*, Dec. 29, 2020, B.1.

74. *Ibid.*

75. *Ibid.*

76. Peterson, "The Spanish Influenza Epidemic in San Diego," *supra* 71 *S. Calif. Qtrly.* 94–95.

77. "Council Rejects Flu Fight Plan to Close City. Hot Clash in Debate Before Action. Merchants Take Stand Against Ordinance Submitted as Emergency Measure," *Los Angeles Evening Herald*, Nov. 27, 1918, 1.

78. *Ibid.*

79. *Ibid.*

80. "Will Enforce Ordinance," *Los Angeles Times*, Nov. 3, 1918, 10.

81. "Scientists of Pasadena Win," *Los Angeles Times*, Dec. 12, 1918, 22.

82. "Judge's Illness Delays Case of 5 Scientists," *Los Angeles Evening Express*, Nov. 29, 1918, 2.

83. "Lyle Pendegast, Victim of Influenza Attack," *Los Angeles Evening Express*, Nov. 30, 1918, 5.

subject to bans, for example those in Berkeley, adapted to local ordinances and held services outdoors.[84]

Moreover, the impact of closure orders was certainly more significant without the benefit of the Internet or any form of video technology. The acting superintendent of schools in Los Angeles instructed parents of elementary school age children to set aside time to read with their children and directed high school students to study four hours each day, threatening examinations as soon as school reopened. Some Los Angeles area teachers also posted their assignments in the local newspapers.[85] Likewise, some Los Angeles religious leaders posted their sermons in the local newspapers.[86]

People Sought Novel Remedies

Some individuals recommended eating lemons, claiming their acidity would combat influenza.[87] Others claimed that milk and milk products such as buttermilk and ice cream were best to strengthen the system and increase resistance to influenza.[88] Some doctors recommended whiskey, including in a glass of hot milk, as both prevention and treatment.[89] Dr. R. F. Tisdale of Oakland opined that onions were an effective cure. He claimed to have relied on onions to treat 78 influenza patients, not losing a single one.[90] Some police courts in San Francisco changed their rules to allow smoking in the courtroom because smoke was thought to be an effective antiseptic against influenza.[91]

Early, Stringent and Compound Efforts Were Effective Against the Pandemic

In one area of California, the response to the pandemic was close to perfect. Not one person at the Naval Training Station on Yerba Buena Island was infected at the height of the Spanish influenza.[92] Navy officials learned of the influenza as early as August 1918. Though no cases had been reported among the more than 6,000 soldiers and military families stationed on the island, the commandant quarantined the base on September 22 as a precautionary measure. The quarantine's protocols were strict: No outsiders were permitted on the island; those delivering supplies maintained a 20-foot distance from anyone else; health inspectors conducted daily temperature checks and enforced hygiene rules; gatherings were moved outdoors; screens were placed in the barracks between beds; and sailors reassigned to the island during the quarantine period were isolated and required to wear gauze masks.[93] Navy officials even thought to address mental health issues, providing a carnival and outdoor circus for the soldiers' entertainment. Yerba Buena's quarantine lasted 62 days. Though the island saw a handful of cases in December 1918 and January 1919 after the quarantine was lifted, Yerba Buena's success was unparalleled in California.

. . . the parallels between California's response to Spanish flu and COVID-19 are inescapable. Fortunately . . . the response by the California courts seems to have evolved over the last 100 years.

In contrast, the Navy commandant at nearby Mare Island declined to impose an absolute quarantine, instead implementing almost all of the Yerba Buena safety measures but allowing civilians to come and go from the base. By the end of November 1918, approximately 20 percent of the more than 7,700 Navy personnel on Mare Island had been treated for Spanish influenza.[94]

It is a cliché to say that history repeats itself, yet the parallels between California's response to Spanish flu and COVID-19 are inescapable. Fortunately, particularly when compared to other measures, the response by the California courts has evolved over the last 100 years. The Judicial Council was able to utilize its centralized management to craft responses that provided a balance of certainty and flexibility that was needed to address the competing interests at stake. One hopes that during the next pandemic the courts will be able to take advantage of the playbook that Chief Justice Cantil-Sakauye is certainly creating. ✯

Jennifer King practiced appellate law for approximately 30 years and is currently an adjunct professor at USC's Gould School of Law. She is a past president of the California Supreme Court Historical Society.

84. "Alameda Flu Cases Are Stationary, Berkeley Keeps Up Restrictions," *Oakland Tribune,* Nov. 9, 1918, 7.

85. Hadley Meares, "How Did LA Cope With The Influenza Pandemic Of 1918?" *LAist, https://laist.com/2020/03/25/how_did_la_cope_with_the_influenza_epidemic_of_1918.php*. Mar. 25, 2020 (as of Mar. 22, 2021).

86. *Ibid.*

87. "Lemons Bound Upward as 'Flu' Remedy," *Santa Barbara Daily News and Independent,* Oct. 23, 1918, 6.

88. Dr. Lee H. Smith, "Health Talk: Spanish Influenza or Grip," *Los Angeles Times*, Nov. 8, 1918, 18.

89. "Poor Old Demon Rum Comes to the Rescue of His Former Assailants in 'Flu' Pandemic," *Sacramento Bee*, Oct. 30, 1918, 5.

90. "Onions Are Latest Influenza Specific," *San Francisco Examiner*, Oct. 30, 1918, 1.

91. "Happenings at the Bay," *Sacramento Bee*, Oct. 24, 1918, 10.

92. Douglas Zimmerman, "How a quarantine saved everyone on Yerba Buena Island during the 1918 flu pandemic, *SFGATE*, Mar. 18, 2020, *https://www.sfgate.com/sfhistory/article/flu-quarantine-saved-everyone-Yerba-Buena-SF-15136501.php* (as of Mar. 22, 2021).

93. *Ibid.*

94. North, "California and the 1918–1920 Influenza Pandemic," *supra* note 62.

Judge Thelton E. Henderson (left) and Martin Jenkins at California Judges Association fireside chat, 2019. *Photo: Trina Thompson.*

"Mentoring" Martin Jenkins:

My 40-Year Friendship with California's New Associate Supreme Court Justice

BY THELTON E. HENDERSON

I first met martin joseph jenkins when he was a 3L at the University of San Francisco School of Law. At the time, I was on the U.S. District Court. Marty dropped by my office to talk to me about what he should do after law school. He didn't have an appointment, nor did he call in advance. He simply appeared on the 19th floor of the Phillip Burton Federal Building and U.S. Courthouse in San Francisco's Civic Center, buzzed my chambers and asked if he could see me. As one of the relatively few African-American judges sitting on the federal bench nationally, and only the second appointed to the Northern District of California, I felt it was important to make myself available to young lawyers of color. Once the word got out, I had a steady stream of visitors. Some came for career advice, some to find out how I got where I was and some, I suspect, just to say they had met me.

None of them had been drop-ins.

I had nothing pressing on my calendar that afternoon, and so I told my secretary to send Marty in. Normally these meetings ran about 15–20 minutes from greeting to goodbye and good luck. My secretary knew this, so after 30 minutes had elapsed, she knocked on the door, stuck her head in and "reminded" me that I had a meeting down the hall. There was, of course, no meeting. This was Erma's way of giving me an opportunity to gracefully end the meeting.

I think she popped her head in a few more times, but I wasn't paying attention to the time. I was totally engaged in the conversation I was having with the engrossing young man who had dropped in that day.

It didn't take long before it became clear that Marty was unlike any law student or even newly minted lawyer that I had ever met. He had a depth and seriousness of purpose that immediately told me he was not merely window shopping. He had a vision of his future and was laying the foundation. I felt an immediate kinship with him. The story he told was not unlike my own, including being an ex-athlete (he much more so than I) who was fortunate enough to be able to look beyond that rather limited career option.

Marty was on track to graduate at the top of his law school class. He had ambitions and a winning personality. Like me, Marty comes from a family of modest means. He easily could secure a position with a handsome salary upon graduation. He had everything a big firm would want, including the panache of having played professional football with the Seattle Seahawks for a year.

But Marty eschewed that life.

He made it very clear to me that he wanted to use his law degree to serve others; and he used the word "serve" in the same way that my grandfather, a Southern minister, used the term.

As I got to know Marty, I found him to be a spiritual person with strong religious underpinnings. He received Jesuit training in college and law school and still is a regular churchgoer. He is a soft touch for anyone in need of help, even once having given his own shoes to a barefoot homeless man he came upon on the street. Public service and working for the public good is simply part of who Marty is.

When I finally did look at the clock that first afternoon, I was shocked to see that more than two hours had passed. The time had flown by. When he left, I knew that I had just met a very special young man, a young man who was going places. I assured him that I would be available in the future to talk with him and help him in any way possible. What neither of us knew at the time was that much of Marty's career would be spent on both sides of Golden Gate Avenue in the state and federal judiciary, including a decade as my judicial next-door neighbor.

After graduating, Marty worked in the Alameda County District Attorney's office. From there he went to Washington, D.C. and worked for the U.S. Department of Justice in the Civil Rights Division. In 1985, he moved back to the Bay Area when his mother became ill and served as in-house counsel for Pacific Bell. Four years later, he began his prodigious ascension up and across the judicial ladder: first the Municipal Court, and then the Alameda County Superior Court. This was followed by 10 years on the U.S. District Court for the Northern District of California.

Those were wonderful years having Marty as a colleague and a neighbor. A neighbor who popped into my office regularly to share with me and my staff delicious food he had brought to the office or simply to talk about our jobs. Marty seems to enjoy calling me his mentor

and I am truly honored that he sees me as such. But the truth is that Marty needs no mentoring. When he would come in for advice, our conversation usually went something like this:

MARTY: I've got this case involving an alleged patent infringement.

He would then tell me about the case in clear and complete detail.

ME: Hum. Sounds complicated.
MARTY: It is. Sort of. Anyway, the defendant has filed a motion for summary judgement.

This would be followed by a discussion of the defendant's motion and the plaintiff's response.

ME: WOW. You've really been working on this, haven't you?
MARTY: As I see it, there is a disputed issue of fact in that . . . .

Here, Marty would explain the disputed issue of fact in detail, and why it required him to deny the motion for summary judgment.

ME: Fantastic.
MARTY: It seems to me I have no choice but to deny the motion for summary judgement.
ME: Sounds right to me.

Marty then leaves my office profusely thanking me for all my help. Marty didn't need a mentor. At most, he needed a sounding board.

Marty's work ethic drove him to be thorough and perhaps even a bit compulsive about studying and learning everything about the cases before him. I often told him he was working too hard and needed to slow down but I don't think he was able to. He was too aware that the lives of real people were going to be affected by his rulings, and he had a compelling need to be absolutely certain he was being fair to all sides.

In time, I began referring to Marty as "James Brown," after the popular musician known worldwide as "the hardest working man in show business." No matter how late I left the office, Marty was still in his chambers working. His law clerks were gone, but Marty would be there at his desk working. Alone. This is not the way things are done at the district court. Law clerks are supposed to arrive before and leave after the judge. Every time this happened, I stuck my head in his doorway as I was leaving and shouted, "Damn it, Marty. It's time to go home."

I believe it was Marty's drive for perfection that ultimately led him to leave the district court. When his father's health began to decline, Marty realized that in order to spend more quality time with him he was either going to have to change his work ethic or leave the court. Although the workload and issues facing an appellate court judge were every bit as difficult as those facing a district court judge, the different scheduling system for the appellate court promised to be much easier for him to manage. It took a lot of courage to leave a position that most attorneys coveted.

After leaving the district court, Marty was appointed to the California Court of Appeal, First Appellate District — right across the street from his former federal chambers. He dove into his cases with his usual fervor, loved the intellectual challenge, and still found time to care for his father and for himself. It was during this time that he spearheaded the founding of Vincent's Academy, a charter school in West Oakland where the poorest of the poor live and the public schools are often substandard.

When Gavin Newsom was elected governor, he tapped Marty to be his judicial appointments secretary. Marty saw this as the apex of a remarkable career that put him on almost every bench possible and the last stop before retirement.

This time Marty was wrong.

One night as I was concentrating on the *New York Times* crossword puzzle, the phone rang. It was Marty. He was excited, and his voice was much more animated than usual. He had been giving the governor a rundown on possible candidates to fill the opening on the California Supreme Court, he told me, when the governor interrupted him.

"I don't need any more information," Governor Newsom told him, "because I'm looking at the next member of the California Supreme Court."

Marty was stunned, genuinely flabbergasted. I can imagine him turning around to see if the governor was talking to someone standing behind him. This was an honor he never expected. He thought his term as judicial appointments secretary would be his swansong. Instead, it had become the next-to-last rung on the judicial ladder Marty had been climbing since 1989.

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Above: Celebrating Martin Jenkins' confirmation. *Below:* Jenkins' swearing-in ceremony was held online. *Photos: Courtesy of the Judicial Council of California.*

Cruz Reynoso, California's First Latino California Supreme Court Justice

BY MARIA LA GANGA, GUSTAVO ARELLANO AND LEILA MILLER

Cruz Reynoso, a son of migrant workers who labored in the fields as a child and went on to become the first Latino state Supreme Court justice in California history, has died.

Reynoso passed away May 7 at an elder care facility in Oroville, according to his son, Len ReidReynoso. The cause of death was unknown. Reynoso was 90.

In a legal career that spanned more than half a century and took him from his first job in El Centro to Sacramento, the soft-spoken family man helped shape and protect the first statewide, federally funded legal aid program in the country and guided young minority students toward the law.

As an early director of California Rural Legal Assistance, Reynoso shepherded the organization's efforts to ensure farmworkers' access to sanitation facilities in the fields and to ban the use of the carcinogenic pesticide DDT.

"Many of the suits CRLA brought during his time fundamentally changed the law of this country," Robert Gnaizda, who worked with Reynoso at CRLA and co-founded the Greenlining Institute, said in an interview he gave to *The Times* before his death in 2020. "If you want to talk about Latino heroes — and there are a number — I'd say Cruz is at the top of the list."

But Reynoso, the son of Mexican immigrants, was probably best known for his career's briefest chapter — his controversial entry to and exit from the California high court.

When then-Gov. Edmund G. Brown Jr. appointed Reynoso to the state Supreme Court in 1981, he said that he did not choose his nominee for the lofty legal position because of Reynoso's Latino heritage.

Brown did acknowledge at the time that he was "not . . . unmindful of the need for government to represent the diversity of our state." But he called Reynoso "the most outstanding candidate I could nominate." Brown described Reynoso, who served on the state appeals court, as "a man of outstanding intellect, superior judicial performance, high integrity and . . . rare personal qualities."

Not everyone agreed. Although liberals and Latino groups lauded Reynoso's selection, law-and-order organizations, conservatives and George Deukmejian, who was then the state attorney general, attacked Brown's nominee.

During Reynoso's confirmation process, retired appellate Justice George E. Paras of Sacramento opposed Reynoso's nomination, calling him "a professional Mexican" who favored minorities and the poor and whose slowness in processing cases "bottlenecked" the court.

But Reynoso was confirmed by the Judicial Appointments Commission, and during his five years on the state Supreme Court, he earned respect for his compassion. He wrote the court's opinion in a case that gave homeowners the precedent-setting right to sue airports for jet noise that constituted a "continuing nuisance."

And he penned the court's opinion in a case that ruled non–English-speaking defendants must be provided with interpreters at every phase of the criminal process. Residents of the Golden State "require that all persons tried in a California court understand what is happening about them," he wrote. "Who would have it otherwise?"

Reynoso had heatedly denied during the confirmation process that he would favor the poor, minorities or criminal defendants. And, during close questioning by Deukmejian, he said that he would enforce the death penalty.

The court was led by Chief Justice Rose Elizabeth Bird and was accused by critics of sidestepping the ultimate punishment. "I will follow the law," Reynoso said at the time. "And if your question is, 'Will I try to avoid the death penalty?' the answer is absolutely not."

But the Bird court reversed 64 of 68 capital cases it reviewed, and angry opponents of Bird launched a campaign to oust her from the court. In 1986, she, Reynoso and Justice Joseph Grodin were rejected by voters; they had been outspent by their opponents nearly 2 to 1 during the heated campaign.

Kevin Johnson, dean of the UC Davis School of Law, said that Reynoso was a "fervent supporter of an independent judiciary" and did not believe that justices should run political campaigns and raise money.

"He could have said, 'I'm different from Rose Bird. Look at my opinions,' and try to prevail by distancing himself," Johnson recalled. "He refused to get involved with the political process. Some people said he made a mistake.

"It was important to him to maintain his integrity and his belief in an independent judiciary," Johnson said. "He sacrificed his career on the California Supreme Court to that overarching principle."

Reynoso had a 30-acre spread in the agricultural Sacramento County town of Herald. ReidReynoso remembers the election night party in the Central Valley outpost as a hallmark of his father's gracious spirit.

"The night he lost, he said, 'Well, I know we lost, but look at the millions of people who voted for me,'" ReidReynoso recalled. "'How grateful I am that I have that many people who care for what we're trying to do, have an ethical court and a free judiciary.'"

Reynoso returned to practicing and teaching law, first at UCLA and then at UC Davis. Civil rights were still his main focus, and he worked hard to diversify his profession.

In a 2010 documentary on his life and work by lawyer and filmmaker Abby Ginzberg, Reynoso talked about why it is important for all perspectives to be represented in the American justice system. And he referred to U.S. Supreme Court Justice Sonia Sotomayor, who was excoriated during her own confirmation hearings for a speech she made at UC Berkeley in 2001. "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life," Sotomayor said at the time.

The man who introduced her to the audience that day was Reynoso. In the documentary, "Cruz Reynoso: Sowing the Seeds of Justice," he said of her comments: "To me, it was perfectly logical that a wise Latina judge who may have had different experiences than other folk would have something to add to the court. That's the way judges learn from one another. I was the only person on the Supreme Court who ever worked as a farmworker."

Born in Brea on May 2, 1931, Reynoso was one of 11 children and spent summers with his family working the fields of the San Joaquin Valley. He told Ginzberg that his mother dreamed he would quit school at 16 and work in the orange groves. "She would say, 'Look how lazy my older boys turned out to be,'" Reynoso recounted. "'Instead of being out there working, they're still reading books.'"

Reynoso earned an associate's degree from Fullerton College in 1951 and a bachelor's degree from Pomona College in 1953. After two years in the Army, he entered UC Berkeley's Boalt Hall School of Law and graduated in 1958.

Reynoso went on to serve as vice chairman of the U.S. Commission on Civil Rights; among the issues the commission broached during his tenure was the disenfranchisement of minority voters in Florida during the 2000 presidential election. He was awarded the Presidential Medal of Freedom that same year.

Although he has been described as "a Latino Thurgood Marshall," Reynoso is most often remembered for his kindness and his common touch.

"If the word 'humility' in the dictionary had a picture next to it," said José R. Padilla, executive director of California Rural Legal Assistance, "it would be Cruz Reynoso." ✯

Mary La Ganga, Gustavo Arellano and Leila Miller are staff writers for the *Los Angeles Times*.

Editor's Note: *The Supreme Court held a public memorial session honoring Justice Cruz Reynoso, on June 2, 2021, immediately following the court's oral argument calendar on that date. Four guest speakers — former Justice Joseph R. Grodin, UC Davis School of Law Dean Kevin R. Johnson, Governor Gavin Newsom's Judicial Appointments Secretary Luis Céspedes, and one of Reynoso's children, Attorney Len ReidReynoso — appeared live by video and gave remarks. A recording of the event will be posted at https://www.courts.ca.gov/35333.htm.*

"MENTORING" MARTIN JENKINS

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At Marty's confirmation hearing on November 10, 2020, I was honored to testify on his behalf, and I told the Commission on Judicial Appointments,

> Marty is, and has always been, a man of purpose; modest, though he has much to be boastful about; quiet and introspective, but that still water runs very, very deep; focused and determined, and never, ever forgets where he came from; spiritual, kind and generous, especially to those in need; a man of strong principle, firmly guided by the teachings of his church, and by the Jesuit training he received in both college and law school. And no one will ever don the robes of this Court with greater humility, greater purpose, and greater commitment to justice than Martin Joseph Jenkins.

Pandemic be damned. For Marty, the past year has been the most dynamic of his life, both professionally and personally. He sold his house in Oakland and moved to Los Angeles to live with his partner Sydney. For a man who has been very quiet about his sexual orientation, this is a huge step, one that he says, finally allows him to be himself.

When we spoke recently, I asked him how he felt about the new job. His answer was direct and simple. "Euphoric!" he said, and then elaborated. "I'm afforded the opportunity to think long and hard about these issues; issues that are illuminated by the insightful perspectives of my outstanding colleagues — whose keen intellects are only surpassed by the collegial manner in which they ply their trade," he said. "I wake each day excited about the prospect of what I will learn that day."

He recalled for me the advice his father once gave him. If he found honest work that he also had a passion for, he would never "work" a day at that job. His father's sage advice has proven true.

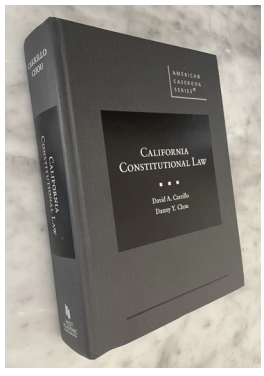
"I have not yet worked a day as an associate justice of the California Supreme Court." ✯

The Hon. Thelton E. Henderson is Chief Judge Emeritus (ret.), United States District Court, Northern District of California, and a Visiting Distinguished Professor at UC Berkeley School of Law.

California Constitutional Law — The Casebook

BY TANI CANTIL-SAKAUYE

EDITOR'S NOTE: *In March 2021, David A. Carrillo,[1] (upper right) of UC Berkeley, and Danny Y. Chou,[2] (lower right) Judge of the San Mateo County Superior Court released their first-of-its-kind casebook addressing the California Constitution. With consent of West Academic Publishing, we are pleased to reprint here[3] the Chief Justice's foreword to that nearly 1,200 page volume.*



THIS INAUGURAL CASEBOOK addressing the California Constitution reflects a welcome and growing awareness on the part of legal education professionals: State constitutions deserve the attention and examination of not just practitioners and judges, but also of law professors and their students.

Thirteen state constitutions predated the federal constitution. They significantly influenced both its drafting and, later, the addition of the first ten amendments to that document — the federal Bill of Rights. Today the constitutions of each of the fifty states continue to set forth declarations of rights and other provisions similar to those found in the federal Bill of Rights. Notably, under what has become known as the "independent state grounds" doctrine — championed by Justices William Brennan of the United States Supreme Court, Hans Linde of the Oregon Supreme Court, and both Stanley Mosk and Joseph Grodin of the California Supreme Court — some state constitutions' declarations of rights, including parts of California's, have been construed to provide protections *beyond* those afforded by the federal constitution, as interpreted by the United States Supreme Court. Yet because these sovereign state constitutions have their own history of development, revision, and amendment, their declared rights have been construed also to afford a different and, in some cases, even *less* expansive meaning than that of the comparable federal provision. In those instances, the federal constitution, with whatever floor it sets, provides the controlling basis for decision.

In other significant ways state constitutions frequently differ from the federal model. First, and most obviously, state constitutions establish and enunciate the structure and powers of *state* and *local* government. A second substantial difference concerns the manner in which the two classes of documents articulate legislative power. The United States Constitution *grants* Congress limited and enumerated governmental authority; hence the federal legislative branch possesses only those specific powers delegated to it by the national constitution. By contrast, California's Legislature, like those of other states, is granted broad plenary legislative authority with respect to *all* potential legislative subjects, *except* as specifically limited by the state constitution. This, in turn, gives state legislatures room to act in many areas in which Congress may not.

A third difference concerns the ease and frequency by which the federal and state documents may be changed. State constitutions can be amended far more readily, and have been altered much more often, than the federal constitution — which, beyond the Bill of Rights, has seen only a handful of substantive rights amendments (most prominently, the Civil War provisions, and those expanding suffrage to women and 18-year-olds). The relatively easy amendability of state constitutions facilitates their expansion, and as a result they generally are, for better or worse, considerably longer and more detailed in comparison with the federal constitution. In California and 17 other states, state constitutional amendments can be submitted to the electorate not only by the state legislature, but alternatively via a citizens' initiative ballot proposition — so-called "direct democracy" — which the framers of the federal constitution had considered and rejected. California, contrasted with other direct democracy states, imposes lower procedural requirements for such ballot measures, further facilitating such changes.

Fourth, in addition to provisions declaring rights that most state constitutions generally share in common with the federal version, and corresponding structural provisions establishing the organs of state and local government, state constitutions contain substantial and important provisions designed to respond to regional or local conditions. The results are substantive passages having no analogue in the federal constitution. Consider, for example, the California Constitution's sections explicitly recognizing an individual's right to privacy, education, and fishing; setting out

Continued on page 19

1. Carrillo, J.S.D., has been a Lecturer in Residence and Executive Director of the California Constitution Center at Berkeley Law since 2012. Previously, Dr. Carrillo practiced law for 16 years, as a Deputy Attorney General with the California Department of Justice, and as a Deputy City Attorney in San Francisco.

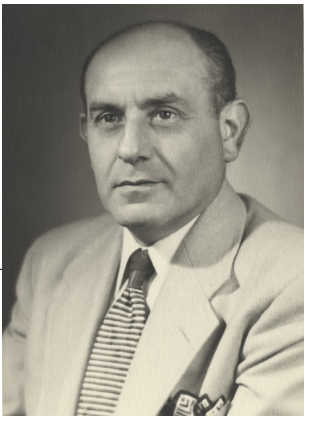
2. Before being appointed to the bench in 2017, Chou was the Chief of Complex and Special Litigation and the Chief of Appellate Litigation for the San Francisco City Attorney's Office, where he litigated some of the cases included in the casebook. Prior to that he was a supervising staff attorney at the California Supreme Court.

3.

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

Conclusion: Preparing for a Public Life

BY JOHN R. WIERZBICKI



Bernard E. Witkin formal portrait, circa 1950s. *Photo: Bernard E. Witkin Papers, MSS 0701; box 8, folder 5; California Judicial Center Library, Special Collections & Archives.*

Introduction

Bernard E. Witkin ("Bernie" to everyone) was never a judge, never held elected office, was never a professor, and except briefly after law school, never practiced law, yet he arguably had the greatest positive influence on law in California of any person. The *Review* is honoring Bernie with a two-part article focusing on his early life and career. Part I,[1] published in the Fall/Winter 2020 issue, explored the unlikely circumstances that led to his appointment in 1930 as California Supreme Court Associate Justice William Langdon's private secretary.[2] This article, the second and last, focuses on Bernie's years working for Langdon, from 1930 to 1939. These were the critical years in which Bernie developed the analytical skills and legal acumen that propelled him to become California's most renowned legal scholar. In this period, he fashioned his great work, the *Summary of California Law*, into the treatise that transformed law in California. But it was also a time when Bernie would receive a personal lesson in the promise, and the perils, of a public life.

"One-Seventh of the Work": Bernie's Time with Justice Langdon

In June 1930, Bernie and Justice Langdon had reached an arrangement concerning his new role as Langdon's law clerk. Bernie would write all of Langdon's opinions and legal memoranda for the court. In return, in addition to his salary, Langdon would permit Bernie to continue to publish and sell his bar review notes (which he entitled the "Summary of California Law") and teach a twice-yearly bar review course. Bernie later described it as being offered "the magnificent sum of $275 a month, and all I had to do was one-seventh of the work of the Supreme Court of California."[3]

It turned out to be a solitary endeavor. According to Bernie, he rarely saw Langdon to discuss the cases or opinions with him. He didn't even see him at oral argument, since law clerks never attended. Instead, when Langdon was assigned an opinion, Bernie would write it by himself from the record and the briefs. He then would himself type the original and seven copies (one for each justice on the court) and place them on Langdon's desk to sign.[4]

In a speech given to the California Supreme Court Historical Society in 1995, Bernie described his experience working for Langdon. The story involved the financing of the Golden Gate Bridge. The California Legislature had passed a statute to allow certain Bay Area counties to create a bridge and highway district. The district adopted plans for a bridge spanning the Golden Gate and sold bonds for its construction. Opponents of the project, led by the Southern Pacific–Golden Gate Ferries, fought so vigorously in court that a group of bankers, as a condition of purchasing the bonds, insisted that the California Supreme Court rule on the bonds' validity. To get the case before the court, the secretary of the bridge district refused to sign the bonds, and the district's directors sought a writ of mandamus, seeking an order compelling him to sign. Argument was held and the public eagerly anticipated a decision.[5]

Bernie recalled what happened next: "Well, one day my boss, Justice Langdon, walked into my office and announced that the court was sore as hell at Chief Justice Waste, because he had assured the reporters that the court was working night and day on the case, and it hadn't even been assigned to any Justice for an opinion."[6] According to Bernie, the Chief asked each justice to prepare a memorandum regarding the matter. Bernie wrote the memo, Langdon submitted it, and because no other justice had done so, the Chief assigned the opinion to Langdon.

"That was a Wednesday; and I collected the 4-foot stack of briefs and records, and took them to my Berkeley home. On Saturday the justices as usual attended the Cal–Stanford football game, and on Monday, I delivered

1. John Wierzbicki, "A Lawyer by Accident, Bernie Witkin's Early Life and Career. Part I: A Suitable Replacement" (Fall/Winter 2020) *CSCHS Review* 27–32.

2. Also called a "law clerk," which will be used throughout the article. Today they are known as judicial staff attorneys.

3. Unpublished interview with Bernard E. Witkin (Sept. 9, 1986), Witkin Archive, California Judicial Center Library, 1986, 7.

4. *Id.* 9.

5. "Golden Gate Bridge Bonds Ruled Valid," *San Francisco Chronicle*, Nov. 26, 1931, 1. The ensuing decision was *Golden Gate Bridge and Highway District v. Felt* (1931) 214 Cal. 308.

6. Speaker's notes, "The Supreme Court of Yesterday and Today," a talk by B. E. Witkin to the California Supreme Court Historical Society, Sept. 29, 1995, Witkin Archive, California Judicial Center Library, 3–4.

Bernie, Alice, and Zara Witkin, circa 1933. *Photo: Bernard E. Witkin Papers, MSS 0701; California Judicial Center Library, Special Collections & Archives.*

the opinion in *Golden Gate Bridge and Highway District v. Felt* upholding the validity of the bonds. Justice Langdon was listed as the author, and others joined him, which was enough."[7]

At the time, no one knew that Bernie wrote not just this opinion, but all of Langdon's opinions. When the newspapers praised Langdon for a well-written decision, Bernie had to learn to be content with that. He was not alone. Bernie later claimed that nearly all of the opinions on the Waste Court were written by the law clerks.[8]

Associate Justice John W. Preston, Langdon's colleague on the court, lends support for Bernie's account. In an article published in October 1931, just a month before the issuance of the Golden Gate Bridge decision, Preston described the court's process of opinion writing. According to Preston, Chief Justice Waste assigned 90 percent of the cases to individual justices, who would prepare the decision without consulting the others. These were "one-man" opinions, simply passed along for other justices to sign. "The court never convenes as a court, nor in chambers, in consultation, to approve opinions so signed previous to their filing. When they bear a sufficient number of signatures and all the Justices have examined the same and have had an opportunity to express their assent or dissent, they are filed, usually at the instance of the author."[9]

Preston saw this process resulting from a court incapable of keeping up with the onslaught of cases. "Because of restrictions placed upon the court by the constitution and by the further reason that the court is two and a half years behind in its duties because of the mass of litigation heaped upon it, one-man decisions were mandatory."[10]

7. *Ibid.*

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

9. "Preston Urges Changes in High Court System," *San Francisco Chronicle*, Oct. 6, 1931, 14.

10. *Ibid.* [Editor's note: for more on Witkin, Langdon and Preston, see pages 26–29, this issue.]

The *Summary of California Law* Becomes a Treatise

With his work at the court receiving no public recognition, Bernie busied himself with his bar review business. He self-published a new edition of the *Summary of California Law* in 1931, and again in 1934, and sold copies to law students and prospective lawyers. He expanded his bar review course by entering into a partnership with Jack W. Chance, a friend from law school practicing with O'Melveny, Tuller & Meyers. Bernie would teach the course in San Francisco and Chance in Los Angeles.[11]

Bernie's approach to preparing these early editions of the *Summary* was straightforward: "I simply took the original material, added the new cases, expanded the outline accordingly, profited by whatever commentary appeared in the law reviews."[12] As his work at the court and his writing of the *Summary* intertwined, he began to envision a much greater publication, one that would encompass his ideas about the law and how the parts of it interconnected.

"I was working for the Supreme Court and I was constantly scanning all the advance sheets and selecting [cases] — it [the *Summary*] began to accumulate content. It was no longer a case of selecting material that was valuable for a student taking an examination. It began to be an updating of current California law. That necessarily meant two things: first an expansion in volume and second, a more sophisticated treatment, abandoning simplicity and going into more detail."[13] He would select only those cases that "I thought from the basis of my experience or from my imagination or from guess work had something to contribute instead of merely a regurgitation of existing law."[14]

Changing his method of selecting material was only one aspect of the *Summary*'s metamorphosis. More importantly, Bernie sought to reformulate the organization of the law. "[W]hen I started putting the subjects in text order instead of just as a summary for law students, I studied the outlines of major treatises, and the major encyclopedias (*Ruling Case Law, Am Jur* and *Corpus Juris*), and the restatements."[15] From there, he developed his own arrangement, to which he would come to apply all new cases, statutes, and legal developments. "[T]he original outline is conceived with a study of the available

11. Letter from B. E. Witkin announcing bar review course in Los Angeles for 1931, undated, Witkin Archive, California Judicial Center Library.

12. Unpublished Interview with Bernard E. Witkin (June 13, 1984), transcript in the possession of the Witkin Legal Institute, 15. Portions of this interview appeared in Charles B. Rosenberg, "Bernard E. Witkin: Interview with an Iconoclast," *Los Angeles Lawyer*, Sept. 1984, 13–21.

13. Witkin Interview, 1984, *supra* note 12, 12.

14. *Id.* 19.

15. "Bernard E. Witkin: Interview with an Iconoclast," *Los Angeles Lawyer*, *supra* note 13, 15.

better works in each of the subjects, but used in my own methods to reflect California law problems and to give them the proper highlighting."[16]

It became his second nature. He later described it this way: "I don't [have the law in my head] — I have the structure in my head. That's the important thing. . . . [I]t's that placement and structure that counts. Not a vast accumulation of memorized ideas."[17]

By 1936, Bernie was ready to reveal his new vision to an audience beyond the law student and test-taker. He would sell his Fifth Edition of the *Summary* widely to judges and practicing lawyers. It would come to change California law and practice. Over the next 85 years, California judges would cite to it, and to new treatises created from it, in more than 14,000 published opinions. In time, experts, judges, and practicing lawyers would acclaim the *Summary of California Law* as the leading authority for understanding California law.[18]

Targeted in the Anti-Communist Hysteria

The growth of the *Summary*'s influence, and the acknowledged brilliance of its author, were not pre-ordained. In December 1937, Bernie's reputation was dealt a blow from which both he and the *Summary* might not have recovered. A lawsuit was filed claiming that many in labor, government, education, and the film industry had conspired to bring about a communist takeover of the West Coast. It alleged that Bernard E. Witkin, private secretary to Justice Langdon, held meetings of communists to further this conspiracy. It made front page news throughout the state.[19]

No evidence existed that Bernie was a member of the Communist Party, had communistic beliefs, or held such meetings. Instead, Bernie found himself caught up in the labor unrest and anti-communist hysteria prevalent at that time on the West Coast, a forerunner of the McCarthyism that would later grip the country in the 1950s.

The suit was brought by Ivan Cox, a former secretary-treasurer of the International Longshoremen's Association local in San Francisco. The union was led by Harry Bridges, who was the central figure in the General Strike that brought San Francisco to a halt for several days in July 1934. Cox had been voted out of office and accused of having unexplained shortages in the union local's accounts. Cox held Bridges responsible for his ouster and sought revenge.

Opponents of the union claimed that communist agitators, foremost among them Bridges, caused the labor unrest, and vowed to remove him.[20] If Bridges were proved to be a member of the Communist Party, he could be prosecuted under California's Criminal Syndicalism Act, which made it a felony to belong to any organization that advocated or promulgated violence as a means of "accomplishing a change in industrial ownership or control or affecting any political changes."[21] Because Bridges was not a U.S. citizen (he was Australian), he could then be deported as an undesirable alien. Bridges consistently denied being a communist.[22]

Cox went to the American Legion to tell his story.[23] The Legion and its partner organization, the Associated Farmers of California, were the principal warriors in the anti-communist crusade in California in the 1930s. While the American Legion supplied the troops, the Farmers provided the strategy, logistics, and financing.[24] Many local sheriffs and police forces supported them, most notably William "Red" Haynes, captain of the notorious anti-communist "Red Squad" of the Los Angeles Police Department. They also had ties to the California Highway Patrol, the state Bureau of Criminal Identification, and Army and Navy Intelligence. The Legion and the Associated Farmers had between them an extensive network of informants and files on more than 1,000 suspected subversives.[25]

Harper Knowles, commander of the American Legion Branch in San Francisco, and later executive secretary of the Associated Farmers of California, seized this opportunity to get Bridges. Cox swore out an affidavit, which Knowles witnessed, and which was then used to draft the lawsuit. Although the suit focused on Bridges, it named many other persons, including Bernie, and thousands of John and Jane Does.[26]

Langdon's dissents in the *Mooney* and *Billings* cases may help explain why Bernie was named a defendant in this suit. Apart from Bridges, the labor issue that most captured the public's attention in California was that of pro-labor activists Tom Mooney and Warren Billings, who were convicted of murder for the Preparedness Day

16. *Ibid.*

17. *Id.* 16.

18. This recognition is even embodied in statute: "The Legislature hereby finds and declares that Bernard E. Witkin's legendary contribution to California law is deserving of a lasting tribute and an expression of gratitude from the state whose legal system, he, more than any other single individual in the twentieth century, helped to shape." Cal. Educ. Code, § 19328.

19. *E.g.*, "Suit Calls Film Stars Communists," *Los Angeles Times*, Dec. 10, 1937, 1; "Deposed ILA Officer Sues for 5 Million," *San Francisco Chronicle*, Dec. 10, 1937, 1; "Vast Red Plot Charged by Ex-I.L.A. Chief," *San Francisco Examiner*, Dec. 10, 1937, 1.

20. Charles Larrowe, *Harry Bridges and the Rise and Fall of Radical Labor in the U.S.*, Brooklyn: Lawrence Hill Books, 1972, 46. *See also*, Henry Weinstein, "Harry Bridges and the *Los Angeles Times*: Unlikely Free Speech Allies" (Fall/Winter 2020) *CSCHS Review* 19–26.

21. Cal. Stats., 1919, ch. 188, p. 281. The Act was repealed in 1991.

22. Larrowe, *Harry Bridges*, *supra* note 20, 59.

23. *Id*. 192.

24. Kevin Starr, *Endangered Dreams: The Great Depression in California*, New York: Oxford U. Press, 1996, 162.

25. Larrowe, *Harry Bridges*, *supra*, note 20, 192; Starr, *Endangered Dreams*, *supra* note 24, 174–75.

26. Larrowe, *Harry Bridges*, *supra* note 20, 191–93.

Bombing in 1916 in San Francisco, in which ten people died.[27] Despite widespread concerns about the fairness of the trial, the court twice denied Mooney and Billings relief during the time that Langdon served on the court. Langdon dissented in both decisions, most recently in October 1937, just two months before the Cox lawsuit was filed.[28] Mooney later praised Langdon, and castigated the other members of the court, when he received his pardon at a ceremony in the state Assembly chamber in 1939.[29] Naming Bernie as a communist, and pointing out his association to Langdon, could have been a way to raise suspicions about Langdon and his motives in these cases without attacking the justice directly.

Bernie's heritage and family ties present another plausible explanation. Bernie and his family, who were of Russian-Jewish heritage, had arrived in San Francisco after the 1906 Earthquake. They were not alone. During this time, so many other Jewish immigrants from Eastern Europe had come to San Francisco that it was likened by some as "an invasion from the East."[30] These new arrivals found acceptance in the city difficult.[31] The Preparedness Day Bombing in 1916 made things worse. Along with Mooney and Billings, two Russian Jews were implicated in the attack.[32] The Soviet Revolution the following year further heightened suspicions against Russian Jews.[33] By the mid-1920s, the Witkin family had moved out of San Francisco, resettling in Oakland.

Autographed portrait of Chief Justice Phil S. Gibson. *Photo: Bernard E. Witkin Papers, MSS 0701; box 43; California Judicial Center Library, Special Collections & Archives.*

Bernie's older brother could also have unwittingly brought unwelcome attention to him. Zara Witkin, a civil engineer, had joined other American business leaders in visiting the Soviet Union in 1932. While there, the Soviet government appointed him "Chief Rationalizer and Consultant" for all building projects of its Second Five Year Plan.[34] The appointment made national news back in the United States.[35] Zara returned two years later and went on a speaking tour about his time in the Soviet Union, highlighted by a speech at the Commonwealth Club in San Francisco.[36] It would be simple enough to link Bernie's Russian-Jewish heritage, and Zara's work in the Soviet Union, to build a plausible story that Bernie had communist ties.

In August 1938, eight months after filing the suit, Cox repudiated his affidavit and the case collapsed. Cox later claimed to have protested that he did not know all the people named as defendants in the suit but was told not to worry, because "[y]ou're helping the government, enabling it to construct its case around what you actually know."[37]

The lawsuit, and ensuing publicity, could have devastated Bernie's career. Fortunately, it did not do so. But Bernie learned that even a relatively obscure role at the court could not shield him against unsubstantiated calumny. When taking on a more public role, Bernie would need to pay careful heed to his reputation.

With Chief Justice Gibson

Justice Langdon died in 1939 and Governor Culbert Olson appointed his finance director, Philip Gibson, in Langdon's place. With the arrangement that Bernie had reached with Langdon now over, Bernie prepared to leave the Court. He had managed to obtain a position at a law firm, but "hated the very idea" of practicing law.[38] Fortunately, he would be interrupted as he finished packing up his office. "There was a knock on the door. A little guy came into my office. He said 'I'm Phil Gibson.' I said, 'I'm Bernie Witkin.' He said, 'I know you. What are you doing?' I said, 'I'm going downtown to practice law.' He said, 'why don't you stay here. I need you.' In a split second I thought this is the right guy, so I said, 'okay, it's a deal.' "[39]

A friendly collaboration quickly developed, contrasting sharply with his former distant relationship with Langdon. "I went to work for Gibson and this time I wrote all the opinions BUT he read them and we discussed them. We disagreed occasionally. They were his opinions. I was a professional, he was not, but they were

27. For the influence of this event on Bernie's appointment, see Part 1 of this article.

28. *See In re Billings* (1930) 210 Cal. 669; *In re Mooney* (1937) 10 Cal.2d 1.

29. Richard H. Frost, *The Mooney Case,* Palo Alto: Stanford U. Press, 1968, 484.

30. Fred Rosenbaum, *Cosmopolitans: A Social and Cultural History of the Jews of the San Francisco Bay Area*, Berkeley: U. of Calif. Press, 2009, 200.

31. *Id.* 202.

32. *Id.* 184–85.

33. Rosenbaum, *Cosmopolitans*, *supra* note 30, 189.

34. "Local Engineer Heads Soviet Building Work," *San Francisco Examiner*, Oct. 6, 1932, 3.

35. "Russia: Balkhazhstrov Conserved," *Time Mag.*, Oct. 17, 1932.

36. "U.C. Engineer, 2 Years in Russia, Finds Soviets Neither Ideal Nor Complete Failure," *Oakland Tribune*, Aug. 24, 1934, 7; "Soviet Suffering but Nearing Industrial Independence," *San Francisco Chronicle*, Aug. 25, 1934, 3; "Ex-Soviet Official Bares Red Secrets," *San Francisco Examiner*, Aug. 25, 1934, 3.

37. Larrowe, *Harry Bridges*, *supra* note 20, 194.

38. Witkin Interview, 1986, *supra* note 3, 10.

39. *Ibid.*

his opinions. That was the first time that I recall anybody on the court having that much participation."[40]

With the death of Chief Justice Waste in 1940, Gibson was elevated to chief justice. That November, he appointed Bernie as the court's Reporter of Decisions. One of Bernie's new duties as reporter was to certify that a court's opinion had accurately cited to an authority before publishing the opinion. Just a few weeks after his appointment, Bernie had the unique experience of certifying the first citation to the *Summary* in a published California Court of Appeal opinion.[41] It must have been for him a heady experience. He had entered the law by accident, through an impulsive response to a university registrar's question. Then, through an unlikely set of circumstances, he became Langdon's law clerk, which instilled in him a burning desire to be "in the middle of where the law was being laid down."[42] Now that an appellate opinion had cited to the *Summary*, he had achieved this in the most literal sense. His time of preparing for a public life was now over. He had arrived. ✯

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40. *Ibid.*

41. *Forman v. Goldberg* (1941) 42 Cal.App.2d 308.

42. Witkin interview, 1986, *supra* note 3, 7.

CALIFORNIA CONSTITUTIONAL LAW

Continued from page 14

reformed electoral and reapportionment procedures; and imposing limitations on property taxation. Likewise, provisions of other state constitutions cover substantial ground not addressed by the federal constitution. They treat and regulate, for example, various privacy protections; gender equality; natural resources and conservation of lands; native peoples and "Indian territory"; flood protection levees; minimum wages; and rights to bilingual education. Provisions like these support the observation that, as a practical matter, the lives of average Americans are affected at least as much, if not more, by state, rather than federal, law.

Recognizing all of this, in 1990 Professor Robert F. Williams published *State Constitutional Law: Cases and Materials* — the first casebook addressing state constitutions, which as of 2015 was in its fifth edition. A casebook dedicated to the Florida Constitution followed in 1992, with a fifth edition published in 2013. In 2010 the national Conference of Chief Justices encouraged law schools to offer courses concerning state constitutional law. That same year an additional casebook regarding state constitutions emerged, and as of 2020 is in its third edition: Sutton, Holland, McAllister & Shaman, *State Constitutional Law: The Modern Experience*.

In the meantime, California, the most populous state and one of the world's largest and most vigorous economies, is fortunate to have seen attention focused on its constitution by both an excellent treatise and law school courses. In the past quarter century our lawyers, judges, professors, and public interested in our constitution's complex history and myriad provisions have benefited from a comprehensive treatise authored by former California Supreme Court Justice Joseph Grodin. First published in 1994, in 2016 it was completely revised in a second edition: Grodin, Shanske, and Salerno, *The California Constitution*. In addition, beginning in 2008, and ahead of the Conference of Chief Justices' call for law schools to focus on state constitutional law, the authors of the present casebook, David A. Carrillo, of University of California's Berkeley Law, and San Mateo Superior Court Judge Danny Chou, have offered courses and seminars at Berkeley Law addressing the California Constitution. Meanwhile, and laudably, other California law schools have offered similar classes. Augmenting these initiatives, Carrillo founded, and continues to oversee as Executive Director, the California Constitution Center at Berkeley Law. The Center has organized and held conferences focusing on the California Supreme Court and our state's constitution — and it has published numerous related useful articles, chapters, books, and reports.

The present casebook, an outgrowth of the courses taught by Carrillo and Chou at Berkeley Law over the past dozen years, is a natural and welcome progression, building upon the earlier and ongoing work of others. This extensive compilation, covering all major (and some minor) articles and sections of the state constitution, formalizes the authors' continuing significant contributions to this area of law and governance. At the same time, it facilitates the education of law students at all law schools of this great, vast, and promising state.

I look forward to a future in which legal training in California and nationwide is enhanced by works such as this. In the meantime, I am hopeful that legal educators in all jurisdictions will augment and expand upon the existing materials mentioned above in order to explore the rich history and important provisions of all state constitutions. The judicial system, in California and nationwide, stands to benefit. ✯

Tani Cantil-Sakauye is Chief Justice of California.

Becoming Chief Justice:

A Personal Memoir of the Confirmation and Transition Processes in the Nomination of Rose Elizabeth Bird

BY ROBERT VANDERET

On february 12, 1977, Governor Jerry Brown announced his intention to nominate Rose Elizabeth Bird, his 40-year-old Agriculture & Services Agency secretary, to be the next Chief Justice of California, replacing the retiring Donald Wright. The news did not come as a surprise to me. A few days earlier, I had received a telephone call from Secretary Bird asking if I would consider taking a leave of absence from my position as an associate at the Los Angeles law firm, O'Melveny & Myers, to help manage her confirmation process. That confirmation was far from a sure thing. Although it was anticipated that she would receive a positive vote from Associate Justice Mathew Tobriner, who would chair the three-member Commission on Judicial Appointments panel that would pass on her nomination, the presiding justice of the Court of Appeal, Parker Wood, had already announced his opposition. That left California Attorney General Evelle Younger, a Republican, as the swing vote. His support was far from certain.

California Supreme Court Chief Justice Rose Bird in San Francisco, May 23, 1979. *AP Photo/Jim Palmer.*

My practice at the time was a source of great satisfaction to me. I had managed to secure a niche specialization in the firm's litigation practice, concentrating my work on First Amendment litigation, primarily defending newspapers, magazines, broadcasters, journalists and book publishers in libel and invasion of privacy suits. The bulk of my work was for media giant Time Inc., but also included clients such as *The Christian Science Monitor*, CBS, NBC and Fox, as well as prominent authors such as Joe McGinniss, Kitty Kelley and Michael Drosnin.

Nonetheless, the exciting opportunity to get involved in a highly publicized political confirmation process was hard to turn down. Plus, my personal friendship with and deep respect for Rose alone would have obligated me to come to her aid whenever she asked.

I had first met Rose Bird in the summer of 1971 when, as a law student who had completed his first year at Stanford Law School, I was a summer law clerk with the Santa Clara County Public Defender's Office. It was an exciting opportunity: I would get to assist in the trials of criminal defendants as a bar-certified law student working under the supervision of a public defender, write motions to suppress evidence and dismiss complaints, and interview clients in jail. A few weeks after my job began, I was assigned to work exclusively with Deputy Public Defender Rose Bird, widely considered to be the most talented advocate in the office. She was a welcoming and supportive supervisor.

Each morning that summer, we would meet at her house in Palo Alto and drive the short distance to the San Jose Civic Center in Rose's car, joined by my co-clerk for the summer, Dick Neuhoff. Before heading off, we would often sit and share a muffin and conversation with Rose's delightful but tough-as-nails mother, Anne, who lived with her.

Gender equality and political correctness were not widely honored norms in the legal world almost 50 years ago, not that they are uniformly respected even today. When we would tail behind Ms. Bird as she entered the courtroom, it was not unusual to hear from the bench condescending comments such as, "Well, here comes Rosie Bird with her little chickens trailing behind her." Swallowing her pride and placing her obligations to her client above her strong desire to deliver a powerful comeback, lawyer Bird would force a smile, greet the judge affably, and we would all take our seats at the counsel table as the client was brought out for the hearing or trial.

The following academic year, I had the great pleasure of enrolling in a very special course, the Criminal Defense Seminar taught by Professors Anthony Amsterdam and Rose Bird. Amsterdam was a legal giant; as a law student, he wrote a law review note postulating a new First Amendment doctrine, "void for vagueness," that was later adopted in whole by the United States Supreme Court.[1] He later became the leading advocate in the country for abolition of the death penalty.

The great thing about the class, one of the first clinical courses in the nation, was that it afforded students hands-on experience in picking juries, interviewing clients, and arguing before a mock panel of volunteer citizens from the community. The bad thing about the class was that, in the small seminar room where we met in the evening,

1. *See* Anthony Amsterdam, "The Void for Vagueness Doctrine in the Supreme Court: A Means to an End" (1960) 109 *U. Pa. L. Rev.* 67.

Amsterdam would chain-smoke cigars. When I returned home to our married-students dorm on campus at night, my wife would make me strip off my clothes in the hallway before entering our apartment and head straight to the shower for a thorough scrubbing and shampoo.

After I had completed the seminar, Professor Bird suggested that I apply for an externship the next semester with Associate Justice Mathew Tobriner. She admired Tobriner greatly and had previously sent other students to extern with him. An extern is basically a temporary law clerk working under the supervision of one of the justice's regular full-time clerks or professional staff attorneys. At the time, they got to review petitions for hearing, write memos to the justice recommending taking or rejecting review and, if fortunate, participate in drafting a "calendar memo" (an oral argument memo shared with the other justices) or a resulting proposed opinion. I had the exciting opportunity to do that once and was pleased when Justice Tobriner adopted the draft opinion with only one minor change: the addition of a single poetic sentence in the middle of the opinion. When the case was reported in the legal press the day following its release, only one sentence from the opinion was quoted: the one added by Tobriner, who was one of the court's finest writers.

I will be eternally grateful to Rose for giving me the opportunity to serve as an extern for Justice Tobriner. Not only did I treasure my time with him both before and after the externship, but it also resulted in one of the longest and most meaningful friendships of my life, with Hal Cohen, one of his two professional staff attorneys.[2] My wife Sharon and I remain close to Hal and to his fabulous lifemate, Inez Shor Cohen. For the rest of Mat's life, we had the pleasure of celebrating the Passover Seder with the Cohens and Justice and Mrs. Tobriner, the dynamic and charming Rosabelle.

In my final year of law school, I vividly remember Rose's disappointment when I informed her that I had accepted an offer from the Los Angeles office of O'Melveny & Myers to join the firm as an associate. She was not a fan of big corporate defense firms and had urged me to become a criminal defense lawyer, either as a public defender or with one of the private criminal defense lawyers she had recommended to me. I never regretted the choice I made, but her disappointment at my decision felt to me like a personal betrayal of her trust and training.

In the years that followed, I remained in close contact with Rose. Sometimes, when legal or personal business took her to Los Angeles, she would stay with us at our oceanfront apartment in Santa Monica and later at our first home in Mandeville Canyon. She was always a delightful house guest.

2. *See* Jake Dear, "Hal Cohen: Tributes to the California Supreme Court's Most Extraordinary and Influential Staff Attorney" (Fall/Winter 2020) *CSCHS Review* 11–18.

Criminal Defense Seminar class at Stanford Law School, 1972, with Professors Rose Bird and Anthony Amsterdam (in the suit behind Bird). The author is to Bird's right. *Photo courtesy of Judge Robert Vanderet.*

So, when I received the summons from Secretary Bird, I informed the firm's management of my intention to take an unpaid leave-of-absence to assist her in preparing for her confirmation hearings. It was easily approved. No law firm would look askance at having a lawyer develop a close relationship with an appellate justice, although if anyone ever thought it would curry favor for the firm with the Chief Justice, they had never met Rose.

I flew to Palo Alto and spent the next few days conferring with Bird and a few other of her close former students, strategizing about how to handle questions, anticipating which adverse witnesses might be called to testify against her — we knew for example that Bishop Roger Mahoney, a foe of hers from the farmworker battle days, would strongly oppose her nomination — and developing our own list of witnesses to testify on her behalf. At Rose's insistence, I was put on the list to offer supporting testimony for her nomination, and I was eager to do so.

As I mentioned, the vote we most needed to secure to achieve confirmation was that of Attorney General Evelle Younger. One of Younger's closest outside advisors was Charles G. Bakaly, Jr., the head of the Labor Department at O'Melveny & Myers, which represented employers in labor negotiations with unions. Bakaly was, and still remains, a giant of the bar in Los Angeles, and also someone with whom I have always had a warm and mutually admiring relationship, or at least I'd like to think so. I can still remember watching Evelle Younger's face as I began my testimony on behalf of Bird's nomination. When I identified myself as a lawyer practicing with the O'Melveny firm, his head visibly snapped up as if he'd been slapped across the face. While I would like to imagine otherwise, I am certain that my testimony played no role in his decision to confirm the nomination, which was based, I am confident, on an honest evaluation of her qualifications for the position. (Bakaly would later play a leading role in the successful campaign to defeat the Chief Justice when her confirmation came to a public vote in 1986.)

Chief Justice Rose Elizabeth Bird *(center)* and *(left to right)* Associate Justices Stanley Mosk, Malcolm M. Lucas, Cruz Reynoso, Joseph Grodin, Edward Panelli and Allen Broussard. *Photo: Courtesy of the Judicial Council of California.*

I joined Rose in celebrating her confirmation and was also pleased to attend her swearing-in on March 26, 1977, at the former Supreme Court hearing room in the B. F. Hastings Building in Old Sacramento. Governor Jerry Brown administered the oath, substituting himself for Acting Chief Justice Mathew Tobriner, for whom he once served as a law clerk.

As the newly-confirmed Chief Justice prepared to assume her new position, she put together what she called a "transition team" and asked me to serve in that role along with several others. She thought that I would be particularly well suited for the role since I had externed for and remained close to Justice Tobriner, who had been the acting chief and had good personal relations with others on the Court, including Justices Mosk and Sullivan as well as their law clerks and professional staff attorneys.

My first task was to prepare her with respect to cases that were pending before the Court and which she would be involved in hearing and deciding. Typical of her concern for others, she also asked me to do the same for Wiley Manuel, who had been nominated to the Court at the same time as she. I knew this would take some time, so I again arranged an unpaid leave of absence from my firm and moved to San Francisco for the transition process. Hal and Inez Cohen kindly offered to have me stay with them in their Noe Valley home in San Francisco. My intrusion on their family life would last for more than a month, an imposition that was duly noted by the Cohens' then four-year-old son, Teddy, who pointedly asked me one day while I was shaving, "Are you ever going to go home?" (Dr. Ted Cohen is today a highly-respected epidemiologist at the Yale School of Public Health in New Haven, with a primary research focus on tuberculosis; he has long since absolved me of my sin of intrusion. If his sister Sara, now a prominent lawyer and noted death penalty opponent in Pennsylvania, harbored similar sentiments, she kept them from me.)

Needless to say, although her practice had exclusively focused on criminal law, Rose Bird proved a quick study in every area of civil law she encountered as Chief. As a First Amendment lawyer, I remember the admiration I later felt for her superb concurring opinion in *Guglielmi v. Spelling-Goldberg Productions*,[3] which addressed the First Amendment implications of right of publicity and defamation actions involving fictionalized biopics:

> No such constitutional dichotomy exists in this area between truthful and fictional accounts. They have equal constitutional stature and each is as likely to fulfill the objectives underlying the constitutional guarantees of free expression. Moreover, in defamation cases, the concern is with defamatory lies masquerading as truth. In contrast, the author who denotes his work as fiction proclaims his literary license and indifference to "the facts." There is no pretense. All fiction, by definition, eschews an obligation to be faithful to historical truth. Every fiction writer knows his creation is in some sense "false." That is the nature of the art.[4]

I was also especially pleased to note that Justices Tobriner and Manuel joined in her concurring opinion in *Guglielmi*.

My second task during the transition period was to get the new Chief Justice physically set up in her chambers. I failed miserably in this task, precipitating an incident that Bird herself said "nearly caused a riot": the moving of the Court's conference table. The incident is recalled the Kathleen Cairn's meticulously researched 2016 book, *The Case of Rose Bird,*[5] but here is the unreported background to the episode: It had always struck me that the positioning of the table where the court met each week unnecessarily infringed on the space available to the Chief Justice for her adjacent chambers. When it is positioned parallel to the wall facing the street, as it always had been, it easily takes up half of the space in the chambers, even though it is used regularly perhaps one-half day each week for conferences.

I was determined to afford the new Chief Justice a little more room for her own chambers. Accordingly, on my own and without her knowledge or approval, I moved the table so that it was positioned perpendicular to the wall of windows, allowing the Chief Justice a bit more personal space within her own office. (When I say I moved it, I mean I physically moved it, which was no easy task; that massive table was built for the ages.) You would have thought that I had evicted the justices from the courthouse: the outrage from the other members of the Court, especially Justice Mosk, was immediate and vociferous. As was typical of her character, Bird did not try to deflect blame from herself by explaining, truthfully, that it was done without her knowledge. Instead, she apologized and had the table returned to its original position. (I'm not sure if she moved it herself, though it wouldn't surprise me to learn that she had done so.)

3. (1979) 25 Cal.3d 871.

4. *Id*. 871.

5. Kathleen A. Cairns, *The Case of Rose Bird*, Lincoln, NE: Univ. of Nebraska Press, 2016, 107.

With the end of the transition period, I returned to my practice in Los Angeles, and her aide and closest personal friend, Steve Buehl, another stellar Stanford Law graduate, took over assisting her in her new job on the Court. For several years, I remained in contact with Chief Justice Bird and our interactions were warm and cordial. I had the honor of introducing her at several prominent bar functions, including an address at the annual Constitutional Rights Foundation dinner, and at a memorial dinner held in tribute to Justice Tobriner following his passing, to raise funds to endow an annual Tobriner Memorial Lecture at Hastings Law School. (Over the years, the annual lecture featured such prominent speakers as Justice William Brennan, Laurence Tribe, Anthony Lewis, John Hope Franklin and J. Skelly Wright.)

At some point, however, and I still have no clear notion of what prompted the break, Rose stopped communicating with me. It is possible that my partner Chuck Bakaly's role in the election campaign against her caused her to doubt my own support for her retention. If that was, in fact, the reason, she was mistaken. I was a vocal and public supporter of her tenure on the bench and penned op/ed pieces in the *Los Angeles Times* supporting her retention.

There are also those who might attribute her actions to what has been characterized in her as a streak of paranoia and vindictiveness. That characterization seems to have first surfaced following a bitter dust-up Bird had with Bishop Roger Mahoney during the contentious farmworker negotiations. The irony is that it was Mahoney himself who relentlessly went after Bird following their clash in that encounter, testifying against her at the confirmation hearings, and publicly trying to undermine her credibility and reputation during her tenure on the Court, including through the election retention campaign and even after her removal.

It would be easy, therefore, to dismiss the charge as a projection of Mahoney's own personality, but it is not that simple. In other instances where Bird felt that she was the target of unfair criticism, whether true or not, or where her authority or control was challenged, these traits clearly manifested themselves by lashing out at others or cutting them out of her life. These were certainly not dominant aspects of her personality, but there is no question that they were there.

Whatever the reason, I had no further contact with Rose up to her untimely death from cancer in December 1999. Along with many other of her former friends and associates, I attended the memorial service for her in Los Angeles.

I will always cherish my memories of Rose Elizabeth Bird. She was a passionate defender of the poor, the disadvantaged and the marginalized. She was a vigorous advocate of the rights of the accused, and a zealous defender of constitutional liberties. Her legal mind was superbly analytic and her opinions well-reasoned and well-written. When I think of her, I still see the twinkle in her eyes, her infectious laugh, and the genuine warmth of her interactions with friends. I miss her greatly. ✯

Robert Vanderet is a Los Angeles Superior Court judge assigned to the Foltz Criminal Justice Center in Los Angeles. He was appointed to the bench by Governor Arnold Schwarzenegger in October 2008.

UCLA SCHOOL OF MUSIC HONORS CSCHS BOARD MEMBER SELMA MOIDEL SMITH

Board Member Selma Moidel Smith's legal accomplishments are familiar to her Society colleagues and readers of this publication. Admitted to the bar in 1943 at the age of 23, Selma practiced law for more than 40 years in Los Angeles and has been honored by the American Bar Association, the Women Lawyers Association of Los Angeles, and many other organizations.

Perhaps less well known, Selma also studied piano and music theory at UCLA and has written over 100 compositions performed in venues nationwide. In recognition of her talent and commitment to young musicians, the UCLA School of Music recently announced creation of a new endowment celebrating its former student while highlighting the work of composition students through an annual Selma Moidel Smith Recital. As part of its announcement, UCLA posted a video about Selma at http://uclamusic.info/SelmaMoidelSmith.

Now 102, Selma continues to edit the Society's *California Legal History* journal, and her extraordinary copy-editing skill has improved every issue of the *Review*.

— Molly Selvin

Photo: Selma dancing to her own music in 2019; *l.-r.* Chief Justice Tani Cantil-Sakauye and Justice Kathryn Mickle Werdegar (Ret.).

Racism, Birthers and the Rule of Law in Early California

BY MICHAEL L. STERN

The year 1863 marked an important turning point in California. After attaining statehood in 1850, the rush of gold-frenzied miners seeking to strike it rich had waned. A new wave of Yankees intent on building an economy based on agriculture and commerce was arriving.

The newcomers' entrepreneurial spirit was not shared by the native Spanish-speaking Californios, proud interrelated families with names like Alvarado, Sepulveda and Pico. Many held vast land grants conferred by the formerly ruling Mexican government. By the early 1860s, the Californios' grasp on their rancheros and well-being were threatened by a disastrous perfect storm of bad weather and changing demographics seemed to conspire against them.

Massive rains and flooding in 1861, followed by devastating droughts in 1862 and 1863, had killed off the vast cattle herds on the Californios' rancheros.[1] Title and boundary disputes, tax burdens, mortgage failures and free-wheeling squatters combined to endanger their legal rights and comfortable hacienda life, especially in Southern California.[2]

Photo of Pablo de la Guerra, Salvador Vallejo and Andres Pico. *Bancroft Portrait Collection, Guerra, Pablo de la--POR:1, The Bancroft Library, University of California, Berkeley.*

As their economic situation became more precarious, the Californios clung for protection to the lofty, but vague, pronouncements of civil and property rights afforded by the Treaty of Guadalupe Hidalgo of 1848 that had ended the war between Mexico and the United States.

The treaty established a general legal framework to resolve land disputes and procedures for Mexicans living in California to opt to become Americans. Mexicans who chose to remain in California could be accorded full dignity, privileges and rights of Untied States citizenship. For Mexicans, this meant the legal protections of the courts. But the treaty deferred until another day whether the property claims of the Californios were truly enforceable or merely words on paper.[3]

After American acquisition of California was decided by the treaty, the rapidly increasing Yankee majority had been anxious to get on with governing. A convention was convened in 1849 in Monterey to enact a constitution and prepare for statehood.

The purpose was to adopt Anglo-American common law and legal institutions to replace the civil legal system with its Spanish and Mexican origins that had governed California before Yankee domination.[4] A new constitution defining the basic functions of three branches of government was drafted, drawing from provisions in existing state constitutions.

The Yankee delegates who dominated the Constitutional Convention (only eight of 48 delegates had Spanish-speaking roots) were superficially amiable to the former Mexicans. But it was clear that the Yankees would have their way and the Californios would be sidelined.[5]

Although the Californios had their backs to the wall as the outlines of a new state government was conceived, they obtained some concessions — such as instituting Mexican law community property laws and allowing the initial constitution and laws to be in Spanish and English. But maintaining voting rights and protections for Californios and other non-Caucasian peoples was problematic.

Fierce convention debates raged regarding voting eligibility, marked by contentious arguments concerning voting rights for males who were not lily-white, "half-breeds," persons of African descent, Asians and Native Americans. Delegate Pablo de la Guerra argued that many Californios were dark-skinned, and that to disenfranchise them would be tantamount to denying citizenship as allowed by the Treaty of Guadalupe Hidalgo.[6] Although his pleas appeared to succeed, the racially based tensions about voting enfranchisement that boiled on the surface of convention debates were left to erupt again on another day.

As the new state government was formed, the Californios adapted to the new American system as best they could through civic participation and winning various statewide and local elected offices. Nonetheless, they were still viewed with derisive prejudice by some of the majority Yankees. For instance, in 1857, Manuel Dominguez, a Los Angeles County supervisor and signer of the California Constitution, was barred from testifying in a court proceeding based on his "Indian blood."[7] In the following year, Pio Pico, the

1. William H. Brewer, *Up and Down California in 1860–1864: The Journal of William H. Brewer*, Francis P. Farquhar, ed., New Haven: Yale U. Press, 1930, 248.

2. Willoughby Rodman, *History of the Bench and Bar of California*, Los Angeles: William J. Porter Pub., 1909, 65–68.

3. Richard Griswold del Castillo, *The Treaty of Guadalupe Hidalgo: A Legacy of Conflict,* Norman, OK: U. of Oklahoma Press, 1990, 72–76.

4. Myra K. Sanders, "California Legal History: The Constitution of 1849" (1998) 90 *Law Lib. J.* 450, 453–54.

5. Hubert Howe Bancroft, *History of California 1846–1859,* v. VI, San Francisco: Bancroft & Co., 1884, 255–58.

6. J. Ross Browne, *Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October 1849,* Washington, DC: John T. Towers, 1850, 79.

7. Paul Bryan Gray, *Forster vs. Pico: The Struggle for the Rancho Santa Margarita*, Spokane, WA: Arthur H. Clark Co., 2002, 68.

last governor of Mexican Alta California, was unjustifiably hauled into court by a sheriff to testify in a civil matter, an indignity that no Yankee would have suffered.[8]

The racial prejudices felt by Californios jeopardizing their legal and personal rights and economic viability were further exacerbated by the outbreak of the Civil War in 1861. Although most Californians favored the Union, there was a strong anti-Mexican sentiment among those advocating secession. This was particularly true in Southern California, home to a substantial number of Confederate sympathizers who held the "mixed blood" Californios in low esteem.[9]

The most outspoken racist Yankees resented virtually every aspect of the Californios. From their prejudiced viewpoint, the Californios should be marginalized because they obstinately refused to adopt proper Yankee customs, had more land than they were entitled to and utilized it poorly, idly celebrated holidays and saints days with too many elaborate fiestas, possessed indolent work habits, dressed in "quaint" Mexican attire and, most obviously, spoke Spanish, not English.

The judicial elections of 1863 brought these racial prejudices against the Californios to a head in Southern California. For many former Mexicans, it was time to take a stand to show their solidarity and protect their precarious rights by electing one of their own to the judiciary.

They rallied their beleaguered forces behind an audacious effort promoting the judicial candidacy of Santa Barbara native Pablo de la Guerra to challenge incumbent Judge Benjamin Hayes, viewed as a racist sympathizer, to become judge of the immense First Judicial District, which covered virtually all Southern California from San Luis Obispo to San Diego.

De la Guerra was highly qualified for a judicial position. Born into a prominent Californio family in 1819, he was fluent in Spanish and English, had been an official and alcalde (mayor with judicial powers) under the Mexican regime, delegate to the Constitutional Convention in 1849, elected four times as a state senator and then as Senate leader, and had served as acting California lieutenant governor and U.S. marshal for the Southern District of California.[10]

Although known as even-tempered, de la Guerra had not cowered to Yankee affronts. In one of his rare Senate speeches, he had expressed his bitter outrage about the invidious insult to Manuel Dominguez when he was not permitted to testify in court because of his race.[11]

Despite the uphill odds, the Californios scoured every town, hamlet and ranchero for votes. It was said that a lot of gold changed hands and whiskey flowed on both sides by election day on Sept. 23, 1863.[12] When the ballots were counted, de la Guerra had won a six-year term of office.[13]

Judge de la Guerra commanded substantial regard on the bench. One Yankee observer commented that he "displayed great ability, judgment and knowledge."[14] Based on his demonstrated fairness, he was rewarded with a second term in 1869.

Regardless of such respect for Judge de la Guerra, some continued to contend that a Californio should not wear a judicial robe. Unable to fault de la Guerra's rulings or demeanor, his detractors concocted a legal pretense to remove him from office. Like the bogus twenty-first century "birther" theory, their racially veiled argument was that de la Guerra was ineligible to serve as a district judge because he remained a Mexican citizen and had never possessed the required U.S. citizenship that qualified him for judicial office.

Soon after de la Guerra's re-election in 1869, a handful of hatefilled men filed a lawsuit in the Santa Barbara court on behalf of the people of the State of California to have him declared ineligible for judicial office and removed. The novel legal contention was that California law required de la Guerra to be a U.S. citizen to be eligible for office; he remained a citizen of Mexico because he had never properly become a U.S. citizen; and he could not claim to have become a U.S. citizen under the Treaty of Guadalupe Hidalgo because Congress had not passed legislation conferring U.S. constitutional rights on Californios.[15] When these convoluted "birther" assertions were rejected by the trial court, they appealed.[16]

In *People v. de la Guerra*,[17] the California Supreme Court affirmed the trial court and upheld Judge de la Guerra's United States citizenship and eligibility for judicial office.

First, the Court discussed the citizenship options available to Mexicans in California under the treaty: They could go to Mexico and remain Mexican citizens; remain in California as Mexican citizens; or remain in California and proclaim themselves as U.S. citizens.[18] De la Guerra had affirmatively chosen to become a U.S. citizen, so he was one.[19]

Continued on page 29

8. Leonard Pitt, *The Decline of the Californios: A Social History of the Spanish-Speaking Californios, 1846–1890,* Berkeley, CA: U. of California Press, 1971, 202.

9. Browne, *Report of the Debates in the Convention of California, supra* note 6, 79.

10. Harris Newmark, *Sixty Years in Southern California, 1853–1913, Containing the Reminiscences of Harris Newmark*, New York: The Knickerbocker Press, 1926, 48.

11. Gray, *Forster vs. Pico, supra* note 7, 68–69.

12. Pitt, *The Decline of the Californios*, *supra* note 8, 237.

13. Jessie D. Mason, *History of Santa Barbara County, California with Illustrations and Biographical Sketches of its Prominent Men and Pioneers*, Oakland, CA: Thompson & West, 1883, 144.

14. *Id*. 145.

15. *People v. de La Guerra* (1870) 40 Cal. 311, 321–22.

16. *Id*. 339.

17. (1870) 40 Cal 311.

18. *Id*. 339–41.

19. *Id*. 344.

The Facts and Law Didn't Seem to Matter — Until They Did

BY GARY L. SIMMS

The late, esteemed California Supreme Court Justice Stanley Mosk, who served on the court for 37 years — longer than any other justice — relished telling colorful tales from the court's history. One was the case of *In re Finkler*.[1] Although it has faded into obscurity, last having been cited in a California appellate decision in 1965, it is worth re-telling. It is a stranger-than-fiction tale of human tragedy with a tapestry of noteworthy characters and relationships.

Henry Finkler was the Supreme Court bailiff for nine years until his suicide in 1878. He was replaced by his then 19-year-old son, Henry C. Finkler. There is no historical record of young Finkler's qualifications, if any, for such an important office. But his teenage talents were impressive in other fields. In his early years, he competed in high-wheel (penny-farthing) bicycle riding and became the state champion in both short and long distances. He also obtained a United States patent for a bicycle roller-brake.

Henry C. Finkler. *Photo: Friends of Edgewood Park.*

Despite his civil servant's salary from the court, Finkler also somehow amassed enough money by 1908 to purchase more than 200 acres of prime ranchland in San Mateo County, now known as Edgewater County Park. He and his wife built a beautiful home there and entertained frequently. Finkler was also active in civic affairs and obtained several public improvements for the area. And he was obsessed with gathering weather statistics. He proclaimed that only three places in the world had a perfect climate: the Canary Islands, northern Africa's Mediterranean coast, and the area within a 20-mile radius of his home in Redwood City. His weather records were used to support the prize-winning slogan, "Climate Best by Government Test," which is still Redwood City's official slogan.

Meanwhile, Finkler continued working for the Supreme Court. He rose to the position of senior secretary, and in 1928, the court held a ceremony in honor of his 50 years of service. At the ceremony, he predicted that he would live to be 100 years old and announced, "I have a secret way of preserving my life, and it is a secret I will not reveal." Apparently, this did not raise any judicial eyebrows because, as the court later acknowledged, Finkler was "a well-known character in court circles." He continued working at the court for two more years. And there would be no tale to tell if Finkler had either retired or had died peacefully at his predicted century mark. But it was not to be.

Finkler's wife had died in 1927. They had no children. He became despondent. Then, in April, 1930, Finkler went to a dentist, who recommended extracting two teeth and injected Finkler with Novocaine and a "calming drug." But Finkler left the dentist's office and went to the store of M. J. Purcell, the husband of one of Finkler's deceased wife's nieces. Finkler said he wanted to make a will before having the dental work because he had none, and did not want to risk dying intestate. Purcell gave Finkler a piece of scrap paper. Finkler handwrote a will on the paper, returned to the dentist, and had the teeth extracted.

Seven months later, Finkler asked John Layng, a friend who was an undertaker, to come to Finkler's home. Apparently, Finkler's mental state had deteriorated so badly that Layng feared Finkler might be deranged and dangerous. Layng was right. Finkler told Layng where he kept his papers and valuables in case of his death. Then, Finkler drew a revolver and fired a bullet into his heart. Death was instantaneous. Yet this was only the beginning of a curious legal saga.

The childless Finkler's only legal heirs were his half-sister Christina Finkler and several nieces and nephews of his deceased wife. But his holographic will named as his sole and equal beneficiaries, M. J. Purcell, who had been with him when he wrote the will on the scrap of paper Purcell provided, and Finkler's co-worker, Grant Taylor, who was the clerk of the Supreme Court. Finkler left nothing to his half-sister Christina or to the nieces and nephews. They and Christina filed will contests.

The trial of the will contests was a matter of great public interest and generated local newspaper headlines such as "'Boss' Charges Hurled in Burlingame"; Crowds at Finkler Will Fight";[2] and "Buck's Court is Packed by Curious Throng."[3] "Boss" and "Buck" were references to Superior Court Judge George H. Buck, whose sternness in his 42 years as a judge had earned him the moniker, "Boss Buck." (Judge Buck was not unfamiliar with Finkler. Buck had ruled years earlier that the public had to pay for a bridge to Finkler's private property.)

The key issue was Finkler's testamentary capacity. As a *San Mateo Times* headline not too gingerly put it, "Aged Attaché Hinted Out of Mind."[4] Many witnesses testified that, in their opinion, Finkler had been of unsound mind for several years. (It was also later noted in the ensuing Supreme Court opinion that, not only had Finkler's father committed suicide, but that Finkler's

1. (1935) 3 Cal.2d 584.

2. *San Mateo Times*, Dec. 15, 1931, 1.

3. *Ibid.*

4. *Ibid.*

mother and one of his half-sisters had been committed to mental institutions.) And the dentist who treated Finkler on the day he handwrote his will testified that Finkler was of unsound mind that day.

Perhaps most remarkably, Supreme Court Clerk Grant Taylor, who presumably worked closely with Finkler and, more importantly, who stood to inherit one-half of his estate under the will, testified that Finkler was of unsound mind during the last few weeks of his life. But Chief Justice William Waste appeared as a defense witness and testified that Finkler was of sound mind until his suicide. That conflict between Justice Waste and Mr. Taylor, the court's clerk, must have been interesting indeed to the jury. And one might wonder how warmly Chief Justice Waste and Taylor got along after they offered conflicting testimony regarding Finkler's mental state. In any event, however great his talents as a chief justice may have been, his testimony was wasted on the jury.

The jury returned a verdict that Finkler was of unsound mind when he executed his will and that he had been subject to undue influence by Purcell, who stood to inherit half of Finkler's estate under the will. "Boss" Buck was not pleased. He did not dispute that Finkler was unusual, but as Buck put it, "Even Henry Ford had been considered strange." Buck granted the will proponents' motion for judgment notwithstanding the verdict, or as the local newspaper put it in a lead headline, "Buck Annuls Finkler Verdict."[5] As subsequent events would show, Judge Buck seemed to have a dislike for will contestants, especially if they were female.

The will contestants appealed to the Supreme Court but it refused to hear the case on the grounds that Chief Justice Waste had testified at the trial and that the other Supreme Court justices were "interested parties." According to newspaper accounts, the Supreme Court transferred the matter to the First District Court of Appeal, which also refused to hear the appeal, as did the Fourth District Court of Appeal. A Bakersfield Superior Court judge was appointed to act as temporary appellate judge. He issued a decision upholding Judge Buck's judgment notwithstanding the verdict.

Finkler's half-sister, Christina, petitioned the Supreme Court to grant hearing.

Oddly, the court did so. The case presented neither any issue of statewide importance nor any conflict of authority. And the justices did not explain why they had changed their minds about being "interested parties." (The court's opinion noted that Chief Justice Waste was disqualified from hearing the appeal but did not acknowledge that he had been a trial witness. That fact was apparently deemed to be better left unsaid for posterity.) And the court affirmed the lower court's decision, so granting review had no practical significance. But obviously, the case was of extreme importance to the court itself. One can reasonably surmise that the court simply could not tolerate any suggestion that its trusted aide of more than 50 years was of unsound mind, and so had to have the last word.

The majority opinion by Justce Preston recounted Finkler's many years of service to the court and noted that he had worked at the court until the day before his suicide. The opinion was for all purposes an encomium to Finkler. The clear and oft-reiterated, but not explicit, premise was that a person of unsound mind could not work for the court. Indeed, the court virtually took judicial notice of this. And the court was loath even to discuss the evidence that suggested Finkler might have been mentally unstable. "To set out at length the testimony of each individual witness would add nothing to the legal literature of this state."[6] Rather, the court offered a brief, general summary; noting that Finkler spoke of a tunnel from his property in Redwood City to Lake Merced in San Francisco; he was cruel to dumb animals; he claimed supernatural powers; he had delusions; and "in many ways he was peculiar and that during many years he was eccentric in some respects."[7]

Mr. and Mrs. Henry C. Finkler. *Photo: Redwood City Public Library.*

That was putting it mildly, too mildly for Justice William Langdon, who dissented. And who was Justice Langdon's law clerk, who presumably had at least a hand in drafting the dissenting opinion? The now-venerated Bernard Witkin.[8] They called the majority to task:

> [T]he brief and inadequate summary of the evidence of the contestants, set forth in the [majority] opinion, does not present the real picture.
>
> Many witnesses, in frequent contact with Finkler, testified that in their opinion he was mentally unsound. They further testified to conduct which can hardly permit of any other inference. He was a persistent collector of refuse and junk of no value. He had a habit of acquiring old-fashioned ladies' hats, which he would offer to his friends. He informed his friends that he was a great inventor, and among his achievements were a perpetual motion machine and a fuel for an internal combustion engine, made of human excreta. He disclosed to another that he had built an airship in the attic of his house, superior to any craft now flying, but that he refused to take the roof off the house and

5. *San Mateo Times*, Dec. 19, 1931, 1.

6. *In re Finkler*, *supra*, 3 Cal.2d 584, 592.

7. *Id*. at 593.

8. [Editor's Note: See pages 15–19 of this issue.]

hence would permit the secret to die with him. He instructed visitors to save their urine, which he used for the purpose of sharpening saws. He suffered from fear of persecution and arrest, and possessed a number of loaded guns, which he carried and kept in his house. He claimed possession of supernatural power to wish evil to other persons. He also believed that there was a secret well on his premises which would supply his airplane with fuel, and was of the opinion that he had control over the water supply of San Mateo County, and could turn it off by means of a valve on his land. He described a cave connecting his home, near Redwood City, with the Golden Gate, through which people habitually passed.

On the day the will was executed, the decedent was suffering from toothache and neuralgia. He visited his dentist, who testified at length concerning Finkler's nervous, irrational condition at the time. In an attempt to extract the tooth, a local anesthetic was injected, and a quieting drug was administered. But the patient was recalcitrant and the dentist recommended a general anesthetic. Finkler thereupon left the office and went directly to Purcell's store, where he executed the will immediately. The dentist testified that in his opinion the decedent was of unsound mind at the time he left the office.

The mere fact that decedent was an employee of this court up to the time of his death is not of particular significance in view of the testimony of respondent Taylor, clerk of the court, that in his opinion Finkler was, during the last few weeks of his life, of unsound mind. The conduct evidencing this mental unsoundness was, as stated above, not of late development, but was manifested over a period of several years, so that the jury might well conclude that the mental unsoundness which respondent Taylor observed at the period just before death was also present at the time the will was executed.

It seems to me that the jury might reasonably determine, as it did, from the recital of these circumstances, that the decedent was not possessed of the requisite testamentary capacity.[9]

We would not have the full story were it not for Justice Langdon and Mr. Witkin. This was not out of character for them. Witkin's outspokenness was legendary. And Justice Langdon was tenacious and perhaps unique in his willingness to dig into the facts of a case. Perhaps the best example was his involvement in *People v. Tedesco*,[10] in which the Court affirmed the first-degree murder conviction of Charles Tedesco, a Redondo Beach man. Langdon dissented, saying only this: "I dissent. The evidence in this case was purely circumstantial, and in my opinion insufficient to justify the verdict of guilty of murder in the first degree."[11] Was that the end of the story? No. Langdon went to Redondo Beach and personally investigated the case. He reported his findings to his Supreme Court colleagues. He persuaded three of them (Chief Justice Waste and Justices Preston and Seawell) that they had wrongly affirmed the conviction. In what at least two newspapers described as a "precedent-shattering appeal," the four justices went to Sacramento and persuaded Governor Frank Merriam to commute Tedesco's death sentence to life imprisonment because his conviction was based solely on suspect circumstantial evidence.[12] (Note to criminal-defense lawyers: Good luck with that in today's Court.)

What about other characters in the Finkler saga? Judge "Boss" Buck's seeming dislike for will contestants, especially female ones, led to his downfall. He was the judge in a highly publicized will contest in 1931 involving the $8.5 million estate (adjusted for inflation: $128 million in today's dollars) of the wealthy banker and investor James Flood. The contestant was Constance May Gavin, who had been reared as an adopted child by Flood and his wife and who claimed to be his child by his first wife. Considerable evidence at the trial supported Gavin's claim, but Judge Buck acted strangely. He told witnesses they did not have to answer questions if they did not want to do so, and he disallowed seemingly relevant evidence. Then, suddenly, he told the jurors that they had to find in favor of the Flood estate and against Gavin. The jurors attempted to rebel, and ten of the twelve said they favored Gavin, but Judge Buck insisted they do as he said, and he directed a verdict for the Flood estate. His ruling was poorly received, to say the least. He was "hissed and booed" by those in the courtroom.[13] When one juror refused to comply, "pandemonium broke loose — cheers, handclapping, shouts — screams of acclaim" for the disobedient juror. And Judge Buck provoked a "storm of criticism,"[14] including newspaper editorials.[15] The following year, after 42 years on the bench, Judge Buck was "decisively beaten" in his reelection bid.[16] And calling to mind the proverb that revenge is a dish best served cold, Buck was replaced by

9. *In re Finkler*, *supra,* 3 Cal.2d at 603–606 (Langdon, J., dissenting).

10. *People v. Tedesco* (1934) 1 Cal.2d 211.

11. *Id*. at 222 (Langdon, J., dissenting).

12. "Highest State Justices Plead to Save Killer," *San Francisco Examiner*, Oct. 18, 1934, 1; "Lack of Evidence Commutes Charles Tedesco's Sentence," *Wilmington Daily Press,* Nov. 16, 1934, 1.

13. "Flood Fortune Claim Thrown Out by Judge," *Pomona Progress Bulletin*, Aug., 7, 1931, 1; "Directed Verdict for Flood Ordered; Some Jurors Are Defiant Over Demand," *Whittier News*, Aug., 7 1931, 1.

14. " 'I'm Right,' Judge Answers to Criticism," *San Francisco Examiner*, Aug. 8, 1931, 6.

15. *See, e.g.*, "A Jury's Rights Are Despotically Denied," *Modesto News-Herald*, Aug. 8, 1931, 14.

16. "Flood Estate Judge Beaten," *Santa Rosa Press Democrat*, Nov. 10, 1932, 1.

Maxwell McNutt, the attorney who had unsuccessfully represented Gavin and — who else? — Finkler's half-sister, who had unsuccessfully contested Finkler's will.[17] Moreover, the Supreme Court unanimously reversed Judge Buck's judgment that directed a verdict for the Flood estate.[18] The court's opinion reversing Judge Buck's directed verdict was written by Justice Langdon, who later dissented in *Finkler* and would have reversed Judge Buck in that case as well.

And what about Chief Justice Waste and Court Clerk Taylor? Waste remained as chief justice until his death in 1940. Taylor was an honorary pallbearer at Justice Waste's funeral and remained at the court until 1942. (Apparently, their conflicting testimony in *Finkler* had not caused any permanent hard feelings between them.) And after the court affirmed the judgment that Taylor was a beneficiary under Finkler's will, Taylor's family occupied Finkler's former home until 1967.

Is there any message for today's lawyers in the Finkler saga? Perhaps not, except that sometimes a case is unwinnable despite the best facts and law. Finkler had worked for the Supreme Court for 50 years. That was all that mattered to every judge connected with the case, from Judge Buck to the Supreme Court, except for Justice Langdon. Or conversely, as Finkler's will beneficiaries learned, sometimes one wins a case for reasons entirely apart from facts, law, or logic. As former football coach Barry Switzer once said, "Some people are born on third base and go through life thinking they hit a triple." ✯

Gary Simms worked from 1987 to 1995 as a judicial staff attorney at the California Supreme Court. After leaving the court for private practice, Simms was a certified appellate specialist (State Bar of California Board of Legal Specialization) for 20 years, handling appeals in California state courts, the U.S. Ninth Circuit Court of Appeals, and appellate courts in Texas and Oregon.

This article was originally published in the August 2012 issue of *Plaintiff Maga*zine and is reprinted here, as edited, with permission.

17. *Ibid*.

18. *In re Estate of Flood* (1933) 217 Cal. 763; "15 to 20 New Witnesses in Flood Case," *Oakland Tribune*, Apr. 19, 1933, 1.

Racism, Birthers and the Rule of Law in California

Continued from page 25

Second, under the treaty, Mexicans who remained in California were to have the rights of citizens of the United States, until legislated by the United States Congress. The Court rejected the "birther" contention that pre-statehood Mexicans who decided to become U.S. citizens, such as de la Guerra, could not hold judicial office until Congress passed on their right to U.S. citizenship. The Court used strong language for this interpretation, calling it "strangely misconstrued."[20]

Moreover, the Court disagreed with the strained argument that de la Guerra's alleged disqualification for office could be based on a conflict between the then-existing California law granting only white males the right to hold office and the U.S. Constitution. As the Court explained, the state could enact its own laws about who could be an elector — and it had done so.[21]

This decision was vindication for Judge de la Guerra personally and for the legal rights of all Californios. By the time that the case was decided in 1870, however, he was unable to celebrate very long. Ill-heath forced him to resign within a year and he died in 1874. The end of Judge de la Guerra's judicial tenure foretold the future for Californios serving in the state's judiciary and those attempting to protect their rights in the courts.

The only other former Mexican serving on the bench in Southern California at that time was Judge Ignacio Sepúlveda, an experienced county judge who was elected as one of the first two Los Angeles Superior Court judges, beginning office in 1880. He did not last very long. By 1883, with increasing Yankee animosity against Californios in Los Angeles, Sepulveda saw the writing on the wall. He resigned before the end of his term and departed for Mexico City.[22] Not a single Mexican-American judge sat on the Los Angeles Superior Court until Judge Carlos Teran was appointed by Gov. Pat Brown in 1958.

The end of bilingual publication of California laws with enactment of the state's updated Second Constitution in 1879 symbolized the Californios' demise. By then, many had lost their rancheros and their economic and social standing was diminishing.[23] They were relics of a bygone era. The romantic ranchero culture was fading into obscurity, never to be seen again.

The California Supreme Court decision in *People v. de la Guerra* remains as an historical tribute to the proud Californios who stood their ground against anti-Mexican racism to defend their rights as American citizens. ✯

Judge Michael L. Stern has presided in civil trial courts of the Los Angeles Superior Court since 2001. A version of this essay first appeared in the *Los Angeles Daily Journal* on Sept. 28, 2020, and is reprinted with permission.

20. *Id*. 341.

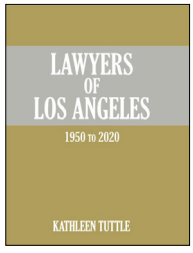
21. *Id*. 343–44.

22. Paul Bryant Gray, "Judge Ignacio Sepúlveda: A Life in Los Angeles and Mexico City: 1842–1916" (2013) 95 *S. Calif. Qtrly* 165–67.

23. Castillo, *The Treaty of Guadalupe*, *supra* note 3, 72–77.

Once Upon a Time in Los Angeles

BY DAN GRUNFELD



Kathleen Tuttle
Lawyers of Los Angeles: 1950–2020
Los Angeles, Angel City Press, 2021

It is hardly a surprise that Los Angeles ranks among the world's most influential twenty-first century cities. Love it or hate it, the city's enormity, outsized impact on the global economy, strategic location as a gateway to Asia, and South and Central America, political power, and leadership in the entertainment and other industries have earned Los Angeles a deserved role as an internationally consequential city.

It wasn't always so. Kathleen Tuttle's marvelous *Lawyers of Los Angeles: 1950 to 2020* sheds insight and light on the city's transformation, which was due, in no small measure, to the efforts of visionary lawyers and innovative law firms.

The practice of law in Los Angeles in the 1950s was, in Tuttle's description, a "provincial Pacific paradise."[1] It was a small and intimate world. There were only ten Federal District Court judges (compared to 49 in 2020), 70 judges on the Superior Court (compared to 501 judges in 2020), and 100 lawyers in the District Attorney's Office (compared to over 1,200 at present).[2] World War II had transformed the city. Military service had brought hundreds of thousands through Southern California during the war, and after their discharge many had decided to make the area their new home. By 1948, Los Angeles had more veterans than any city in America. One UCLA professor noted, "the . . . community draws, as with a magnet, thousands upon thousands each year who beg for a chance to make a living in this natured-favored spot."[3] Among those drawn by the magnet, or soon to be attracted to the area, were such future luminaries as Warren Christopher, William French Smith, Shirley and Seth Hufstedler, Carla A. Hills, Constance ("Connie") Rice, Mary Nichols, and Johnnie Cochran. They and others would go on to profoundly impact not only the practice of law and their own city, but the course of the state, the nation, and the world.

Although the weather may have been worthy of a "Pacific paradise," the issues roiling the country made practice far from idyllic for many. Not until 1951, more than 70 years after its founding, did the Los Angeles Bar Association admit the first lawyer of color — Thomas L. Griffith, Jr., former counsel for the local NAACP chapter. During the anti-communist "red scare" of the 1950s, when public officials combed the country for Communist Party members and sympathizers, "Los Angeles was a particular focus, with its avant-garde Hollywood celebrities and the 'liberal leanings and loose morals.' "[4] In one of the book's most fascinating accounts, Tuttle describes how Los Angeles lawyers were deeply involved on both sides of the issue. Senate candidate Richard Nixon, a lawyer and a member of the LABA, accused Helen Gahagan Douglas, the Democratic front-runner in the race, of harboring communist sympathies. Nixon's Senate campaign was led by a fellow lawyer and LABA member Murray Chotiner. Conversely, prominent Los Angeles lawyers, such as Ben Margolis, Joseph Ball and Herman Selvin, courageously led campaigns to defend the rights of witnesses who were called before the House Un-American Activities Committee.

Tuttle seamlessly chronicles the defining moments of the subsequent decades and the critical role Los Angeles lawyers and legal institutions played, for good or bad, in changing the city from a somewhat provincial entertainment and aerospace-based center to the global powerhouse it is today. For example, in 1960, John F. Kennedy delivered his iconic "New Frontier" speech in Los Angeles because attorney Paul Ziffren had been instrumental in securing the Democratic Convention for the city. In 1970, Judge Alfred Gitelson's order to desegregate the Los Angeles public school system through busing exposed fissures in the legal community and beyond that resonate to this day. The election of President Ronald Reagan in 1980, a defining moment in the rise of the modern conservative movement, was ably facilitated by Los Angeles attorney (and future attorney general) William French Smith, who was Reagan's personal lawyer, business advisor, and political confidant. As a *Los Angeles Times* writer noted: "Smith was a key architect of the Reagan Administration's conservative shift on issues affecting domestic policy, including civil rights."[5]

On the other side of the aisle, in 1992, President Bill Clinton appointed Los Angeles attorney and O'Melveny & Myers leader Warren Christopher as the country's 63rd secretary of state. Christopher was instrumental in bringing about the Oslo Middle East peace accord.

1. Kathleen Tuttle, *Los Angeles Lawyers: 1950–2020*, Los Angeles: Angel City Press, 2021, 45.
2. *Id.* 62.
3. *Id.* 45, quoting William Deverell and Tom Sitton, eds., *Metropolis in the Making: Los Angeles in the 1920s*, 13; quoting Clarence Dykstra, circa 1930.
4. *Id.* 53, quoting "That's Entertainment," *Los Angeles Lawyer,* July–Aug. 1981, 26.
5. *Id.* 257, quoting "William French Smith, 73, Dies; Reagan Advisor and Atty. Gen.," *Los Angeles Times,* Oct. 30, 1990.

During his tenure, the Balkans War broke out, and triggered widespread ethnic cleansing by Bosnian Serbs. A peace accord was reached in 1995. According to an *Atlantic* magazine article: "The talks would not have succeeded without Christopher's tireless patience — and occasional, strategic bursts of anger."[6]

Los Angeles Lawyers artfully explores the critical role that the city played, starting in the 1970s through the present, in the rise of the national, and then international, behemoth law firms. Once New York investment and commercial banks arrived in Los Angeles, beginning in the 1970s, and as the city eclipsed San Francisco as a gateway to the Pacific rim, leading New York law firms "would descend upon the city in a wave of westward expansion."[7] Although the firms' original impulse was to follow their clients, it was soon clear that L.A.'s wealth and economic activity would yield additional unforeseen opportunities.

As the *Los Angeles Times* noted in 1987, "the leading law firms of the Los Angeles legal community, which enjoyed a clubby, well-ordered serenity for decades, are facing the greatest period of crisis and challenge in their 100-year history."[8] Firms began to poach each other's stars. Billing requirements, especially for associates, skyrocketed. Many law firms grew dramatically in size and revenue while aggressive competition resulted in the demise of some highly regarded Los Angeles law firms.

Other leading Los Angeles firms, such as O'Melveny & Myers, Latham & Watkins, Manatt Phelps & Phillips, and Gibson Dunn & Crutcher, decided not only to protect their own talent and clients from eastern invasion but "to head east [themselves] to invade some of their turf."[9] Latham's New York office grew, in time, to be the law firm's largest, prompting Tuttle to observe, "it's debatable which city had more impact on the other's legal community."[10]

Los Angeles lawyers and judges have also played a disproportionate role in the media's fascination with so-called "celebrity trials." These extremely high profile, frequently sensational, trials captivated the national media and public's attention. All too often, they shaped public perceptions and expectations of what constitutes justice.

Every decade produced at least one L.A.-centric "trial of the century." In the late 60s, it was the trial of Robert Kennedy's assassin, Sirhan Sirhan. The 1970–71 trials of Charles Manson and his codefendants for a series of grisly murders dominated public attention. In the early 1980s, it was the Hillside Strangler murder case, presided over by future Chief Justice of the California Supreme Court Ronald George. The 1990s featured both the Rodney King police misconduct trial and the O. J. Simpson murder and civil trials, which generate passionate debate to this day. The new century brought the "cold case" trial of Kathleen Soliah, a key player in the sensational Patty Hearst kidnap and crime spree of the mid 1970s. Tuttle's book brings to light fascinating, little-known aspects about each of these legal proceedings. Moreover, the cases cumulatively reveal that the reason so many of these cases became so celebrated was because of L.A.'s increasing role as a global media center, its ongoing racial and wealth-gap tensions and, on occasion, the city's Hollywood sensibilities.

Los Angeles was also destined to play a critical national role in one of the most positive and widely heralded developments in the practice of law in the past 50 years: the launching and spectacular growth of organized *pro bono* volunteer efforts to assist impoverished and marginalized individuals and communities with their legal needs. At first, the effort to mobilize volunteers in Los Angeles in a coordinated fashion met opposition: "The largest concern was that the new entity would take business away from the established firms, odd in retrospect, given that the indigent likely could not afford the legal fees of those firms."[11] Others felt that while it was appropriate for individuals to undertake volunteer representation, "it was not the function of a bar association . . . to make these kinds of formalized commitments."[12] However, through the efforts of visionary leaders such as Fred Nicholas and Ira Yellin, and the financial support first of the Beverly Hills Bar Association and, subsequently, of the LACBA, the country's first *pro bono* law firm was officially established in Los Angeles in 1970. To this day, Public Counsel remains the country's largest pro bono public interest law firm. (Full disclosure — this reviewer is a former president/CEO of Public Counsel and appears in the book.) Public Counsel became the model for countless other legal *pro bono* organizations throughout California, the country, and in due course, internationally. Collectively, over time, these organizations and their volunteers have assisted, without payment, hundreds of thousands of individuals, if not more, with their most pressing legal needs.

Tuttle's book is crisply written, well organized and meticulously researched. *Lawyers of Los Angeles: 1950 to 2020*, at 320 pages, is greatly enhanced by many photographs, which often help illuminate decades-old events and their leading protagonists. Although the book is co-published by the LACBA and Counsel for

6. *Id.* 255, quoting "Warren Christopher, Mr. Diplomat," *The Atlantic,* Mar. 19, 2011.

7. *Id.* 156.

8. *Ibid.,* quoting "N.Y. Challenge: Legal Boom Ends Calm at L.A. Firms," *Los Angeles Times*, Sept. 27, 1987.

9. *Id.* 158; Toni M. Massaro, *F. Daniel Frost and the Rise of the Modern American Law Firm,* Tucson: U. of Arizona Press, 2011, 90.

10. *Ibid.*

11. *Id.* 149.

12. *Id.* 149, quoting "A Conversation with Ira Yellin," *Los Angeles Lawyer,* January 1990, 10.

Justice, Tuttle, to her credit, does not shy away from exploring some of the bar associations' controversial events and decisions.

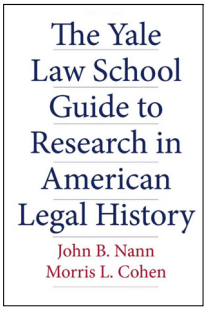
Seeking to explain and bring to life the legal practice in a city as complex as Los Angeles over a span of 70 years is no easy task. Tuttle's book meets this challenge with alacrity, grace, and insight. After reading it, one emerges understanding not only Los Angeles but the world in which we live with new clarity. ✯

Dan Grunfeld served for three years as President of the California Supreme Court Historical Society. He was also, for a decade, the President/CEO of Public Counsel. Subsequently, he was a member of the four-person Executive Team for Los Angeles Mayor Antonio Villaraigosa. He also served as Co-Managing Partner of Kaye Scholer's California offices, and was the Leader, West Coast Litigation, for Morgan Lewis & Bockius.

ON THE BOOKSHELF

An Essential Resource for Researching Legal History

BY LEVIN



John B. Nann & Morris L. Cohen
The Yale Law School Guide to Research in American Legal History
New Haven, Yale Univ. Press, 2018

Why study legal history? How can historical understanding be of any professional value in a world which seems to change by the week?[1]

This excellent guide to legal history research answers Professor J. H. Baker's rhetorical question, at least in part. But *The Yale Law School Guide to Research in American Legal History* has not garnered the attention it merits. Authored by John Nann and the late Morris Cohen, the Guide provides a useful, readable, explanation of both how to access legal history and why that may be useful to a lawyer or jurist trying to understand the current state of the law.

This is not a *Nutshell* guide to legal research (a book Professor Cohen first wrote a half-century ago), but a reference for the experienced legal researcher that largely eschews the arcane and hypertechnical in favor of the practical. If used properly, it will save time and enhance understanding and accuracy in legal reasoning. I heartily recommend it.

Two Major Themes Drive the *Guide*

First, whereas historians may need to understand the applicable law during certain historical events or eras, in turn, lawyers may need to study history to properly interpret how the law being researched once functioned, as a foundation from which to understand what the law is now. Blithely using linguistic usages or assumptions in one discipline concerning material arising in another can be fraught, even given diligence and good faith by the researcher. The *Guide* helps historians and lawyers avoid such missteps.

Some concrete examples may illustrate the problem of cross-discipline confusion. One historian cited "judicial hostility" as an obstacle to road building in early California.[2] But the supporting authority was a California Supreme Court opinion that merely applied our constitutional debt limit to invalidate a road statute.[3] Another scholar misinterpreted the term "death recorded" as used in English criminal court records to mean that defendants had been executed for certain behavior. But that term meant the *opposite*, that the death was merely "recorded" (i.e., put down on paper).[4] Had these scholars understood legal history better, they would have avoided such mistakes.[5]

Second, even in our increasingly web- and AI-driven research world it may be necessary or at least helpful to know *how* legal information was gathered and disseminated in the past to best utilize the most current but often scatter-shot databases that are available. What exists digitally now and for the near future is a collection of databases, each of which has different origins, was organized differently for different purposes, and may be differently accessible. This may present the researcher with so many potential avenues to explore and so many ways to explore them that the most useful material might be missed or simply buried. The *Guide* helps lead legal researchers through the morass to the sets of historic data most helpful in resolving the present-day legal question at hand.

1. J. H. Baker, *Introduction to English Legal History,* New Haven: Oxford U. Press, 4th ed. 2007, v.

2. B. Lamb, "Highways and Waterways: Two Episodes in California's Transportation History" (1996) 75 *Calif. Hist.* 12.

3. *See People v. Johnson* (1856) 6 Cal. 499.

4. *See* discussion at *https://en.wikipedia.org/wiki/Death_recorded* and at *www.bbc.com/news/entertainment-arts-50153743* [as of Feb. 11, 2021].

5. Examples of jurists disagreeing about history abound, particularly in high-profile cases. *See, e.g.*, *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 580 (conc. & dis. opn. of George, C.J. [disagreeing with the majority opinion's "serious distortion of history" of affirmative action]; *District of Columbia v. Heller* (2008) 554 U.S. 570 [majority and dissent present sharply divergent views of the historical background of the Second Amendment]).

The Authors

Morris Cohen (1927–2010) was a prominent modern law librarian. When his law degree proved unfulfilling, he obtained a master's degree in library science, then worked as a librarian and law professor for the rest of his career. His works and lectures inspired law librarians during a time of great change, both through the early years of computerization and through the increasing dominance of proprietary databases. Among many (and remarkably diverse) works, he was the original author (in 1968) of the first-year primer *Legal Research in a Nutshell*, and 30 years later he issued the six-volume *Bibliography of Early American Law*, an invaluable compendium for scholars researching pre–Civil War American legal issues.

John Nann is a senior librarian and lecturer at Yale Law School. He was an early computer services law librarian, and later became Cohen's colleague, co-teaching a seminar on advanced legal research. Nann still conducts similar seminars, now attended by a mixture of law students and social sciences graduates. After Cohen died, Nann continued working on the book the two started. The resulting *Guide* was published in 2018, to scattered reviews, though those were generally favorable.[6]

I hope this review spreads the good word more broadly.

Lawyers as Historians

According to Nann, the *Guide* intentionally sidesteps the "third rail" of originalism. It is described briefly (but neutrally, and with sources for exploring the multifaceted debate). But by now, the more nuanced iteration, "textualism," clearly dominates legal interpretation.[7] That may be why a lawyer or jurist needs or wants to consult legal history.

The outcome of a given case is not dictated by textualist arguments. Reasonable minds may and do disagree about meaning.[8] They may also disagree about what kinds of evidence of meaning are most persuasive, or even relevant.[9] But few would now dispute that the public context of words in a legal text (constitution, statute, or rule) informs as to meaning.

One plausibly could view "the law" as "the rules which were law at the Founding and everything that has been lawfully done under them since."[10] The "law" at the time of Founding was English common law, and in most jurisdictions that law was adopted via "reception" statutes, whereby the common law governs unless displaced or found to be repugnant to a higher law.[11] Thus, knowing the law today may require an understanding of the law of the past. After all: "Part of a fair reading of statutory text is recognizing that 'Congress [or a state legislature] legislates against the backdrop' of certain unexpressed presumptions."[12] History forms a large part of those presumptions, and knowing relevant history enhances understanding of the law.

How the *Guide* Helps

One trap for the unwary is that terminology and underlying assumptions differ between disciplines and differ over time. Another trap may be created by a lack of understanding of how the original written material was organized. This problem persists despite (and in part because of) the digitization that allows the online or text searching on which we now largely depend. As the *Guide* explains, digitization was not done uniformly. Some databases may consist of proof-read text that allows Boolean searching. But some efforts were merely a chop-and-scan of source books that may allow only optical character recognition (OCR) searching, with its attendant problems. The *Guide* gives the example of the "long s" in Colonial writing (ſ) that to modern eyes looks like an "f"; an OCR search for a term with an "s" in it would require great care. Further, consolidation of publishers and the proprietary nature of many databases creates practical and equitable issues. Each database has its own idiosyncrasies, gaps, and algorithms,

6. Kent Olson, who worked with Cohen on prior editions of the legal research *Nutshell*, and is now its lead author, described the *Guide* as "a welcome addition to the literature of legal research and a valuable trove of insights and tips. It goes a long way to bridging the divide between historians and legal scholars." *See* "MoreUs. Blog of the Arthur J. Morris Law Library," *https://library.law.virginia.edu/ajm-blog/2018/07/12/a-new-guide-for-legal-historians* [as of Feb. 9, 2021].

7. *See* D. O'Scannlain, "'We are all Textualists Now': The Legacy of Justice Antonin Scalia" (2017) 91 *St. John's L. Rev.* 303, 304, n. 1 [quoting Justice Kagan]. More recently, this reality was illustrated by *Bostock v. Clayton County* (2020) 140 S.Ct. 1731, in which each of the opinions relied heavily on textual analysis and avoided the lofty rhetoric presented in much of the briefing and expected by many commentators. And although the use of "legislative history" is less controversial in California courts, judges here begin their analysis with the text. *See* Rick Sims, "What Appellate Judges Do" (2005) 7 *J. Appellate Pract. & Process* 193, 196–200.

8. M. Cohen, "Researching Legal History in the Digital Age" (2007) 99 *Law Lib. J.* 377, 388, ¶ 33 ["disagreements over the interpretation of words and phrases are frequently divisive in . . . deliberations and decisions"]; A. C. Barrett, "Assorted Canards of Contemporary Legal Analysis: Redux" (2020) 70 *Case W. L. Rev.* 855, 861 ["even card-carrying originalists don't always wind up at the same spot"].

9. For example, a historian would view a legislator's personal diary entry about a bill as a "primary" source; a lawyer or jurist decidedly would not. But the *Guide* is not focused on the narrower subject of *legislative* history — the materials gathered and (sometimes) disseminated during the statute-making process — but on the much broader subject of *legal* history.

10. W. Baude & S. Sachs, "Originalism and the Law of the Past" (2019) 37 *Law and Hist. Rev.* 809, 812; see O. W. Holmes, *The Common Law: Early Forms of Liability* (1881) ¶ 73 ["The history of what the law has been is necessary to the knowledge of what the law is"].

11. *See* Stats. 1850, ch. 95, p. 219; Civ. Code, § 22.2; W. Morrow, *Historical Intro. to Cal. Jurisprudence*, San Francisco: Bancroft-Whitney Co. 1921, xxxvi–xxxviii.

12. *Bond v. U.S.* (2014) 572 U.S. 844, 857.

and understanding how they were compiled helps the researcher know which to consult and how to extract the information most efficiently therefrom. Not everything is easily findable, and in some cases is not findable at all, or is findable only at a cost.[13]

The "meat" of the *Guide* — its detailed description of what written and electronic material exists and how to use it — is just that, a guide, and does not purport to provide a comprehensive explanation of every source. And of necessity it reflects a snapshot in time, because the databases and technology are in constant flux. But it helps focus the researcher, and does it well. For example, knowing when and why the Code of Federal Regulations Act was adopted (a half-century after the Interstate Commerce Commission began regulating behavior), and understanding how federal regulations were and are compiled, would not come intuitively from browsing online to find when a material change occurred. As another example, trying to understand the structure of the myriad colonial courts by reading cases would be fruitless. The *Guide* explains these and many similar kinds of source-specific problems.

The *Guide* need not be read at one sitting, nor is it designed to be. About 80 pages can be read to acquire a feel for how and why different kinds of legal sources were written and how to find and understand them.

The Introduction and Chapter 1 ("General Bibliographic Sources") explain the overall purpose and contours of the *Guide*. Chapter 6 ("Research Gets Organized") and "The Current Era" part of Chapter 7 describe the rise and fall of structure in the law: *Written* law began with the chronological publication of statutes and cases. The nineteenth century brought organization through codification, West's national reporters, Shepard's, and new topical treatises. Computerization freed researchers from editorially imposed structure, then structure was reënabled via indexes and so forth. Knowing the ebb and flow of structure makes it easier to use and understand both written and scanned materials. Finally, the first seven pages of Chapter 10 discuss dictionaries, their origins, purposes, and usefulness: Not all were created equal.[14]

The subject-specific sections ("English Foundations of American Law," "Colonial Law," "Constitutional Law," "The Early Republic," "The Administrative State," "International and Civil Law in the U.S.") and those on archival, biographical, and non-law sources, can be read when needed.

Four practical and very useful things can be found at the end of almost every chapter: (1) a concrete research problem to illustrate the application of the materials discussed, (2) a detailed bibliography, (3) a list of sources cited, and (4) a good collection of relevant online databases (proprietary and open-source).

Finally, in a telephone conversation, Nann offered me what perhaps may be the *most* useful advice: "Please use your librarian!" They don't just shelve books and insert pocket-parts.[15] ✯

Levin was a Third District Court of Appeal research attorney for over 30 years and now works part-time as of counsel to Colantuono, Highsmith & Whatley. He is a longtime supporter of the CSCHS and its mission of preserving and disseminating California legal and judicial history.

13. *See* M. McAlister, "Missing Decisions" (forthcoming 2021) 169 *U. Pa. L. Rev.* [describing a large body of unpublished federal cases available only via PACER and only if one already knows what to look for]; *see also generally* R. Bering, "Losing the Law: A Call to Arms" (2007) 10 *Green Bag 2d.* 279. Equitable issues about access are in part being addressed by the rise of open-source databases (such as those that disseminate PACER documents). But the proprietary nature of most databases can also cause quality issues: Nann sees a decline in the maintenance of some sources. As an exception, he points to *Moore's Federal Practice*; because it is used nationwide it generates income to support good, continuous, scholarship. More specialized or localized treatises have not all fared as well.

14. *See also* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, Eagan, MN: Thompson/West 2012, 415–24.

15. In this connection, I would like to thank law librarians Holly Lakatos, Linda Wallihan, and Fran Jones for their vital help and many kindnesses to me throughout my career as a court research attorney interested in history.

Do You Remember Bernie Witkin?

Bernie Witkin died 25 years ago last December. To commemorate his passing and celebrate his profound and lasting influence on California law, the California Supreme Court Historical Society will be collecting and preserving remembrances from those who knew Bernie so that they are not lost. We hope you will join in this effort. If you have a personal story about Bernie that you would be willing to include, please contact John Wierzbicki, who is leading this project, at witkinstories@gmail.com.

Bernie's achievements have stood the test of time; now let us preserve his stories, his humor, his humanity.

CSCHS Board Member John Wierzbicki

BY MOLLY SELVIN

John Wierzbicki bemused by a butterfly. *Photo courtesy of John Wierzbicki.*

When John Wierzbicki joined a San Jose law firm in 1987, soon after graduating law school, his new colleagues steered him to the shelf of Bernie Witkin's treatises on California law. This is where you start, they told the young lawyer. They surely meant, this is where you learn how to practice law. But Wierzbicki remembers that those volumes also piqued his interest in Witkin himself, eventually leading to his current position as co-director of the Witkin Legal Institute.

The path between his early practice experience and the Institute wound to graduate studies at the University of Virginia in nineteenth-century English political and religious history, free-lance writing and editing, and a growing expertise advising artists and other creatives on their legal rights, a group that would even include circus performers.

Wierzbicki, who joined the Society's Board of Directors last year, grew up in Saratoga, California — his father worked for IBM — and did his undergraduate studies at UC Berkeley. He left the Bay Area for Georgetown University Law Center thinking "there's no way I'm ever coming back," but now lives in San Francisco. A brief period as an employment and trade-secrets litigator didn't feel right. "I tend to like to bring people together," he said. "Those skills were not always appreciated in litigation."

After regrouping in Portland, Oregon, "where disaffected Californians tend to go," Wierzbicki opted for a master's program at the University of Virginia, writing his thesis on Benjamin Disraeli and the Millenarians. He explains his decision to enroll at UVA with characteristic droll humor: Having finally paid off his law school loans, "I decided that I needed to take on more debt."

Married and a father by then, he began to freelance as a legal writer and editor, and was published by Lawyers Cooperative Publishers Co., now part of Thomson Reuters. Gregarious, and with a hearty laugh, Wierzbicki has been with Thomson Reuters for 25 years in a variety of roles including product management, author relationships, copyright, and contract negotiation. He was also a director of operations, overseeing some of Thomson Reuters' most prestigious U.S. legal publications, including *Black's Law Dictionary*, *American Law Reports*, *American Jurisprudence*, and *Corpus Juris Secundum*.

Wierzbicki's office reflects a man given to whimsy and eclectic tastes. His bookshelves display bobbleheads of the late Justice Ruth Bader Ginsburg and legal writer Bryan Garner perched next to a bust of Theodore Roosevelt, a childhood purchase, and a beloved collection of hard-boiled detective fiction that includes early editions of Raymond Chandler, James Cain, and Cornell Woolrich.

In 2018, he was appointed to co-direct the Witkin Legal Institute. Founded in 1996, the Institute's mission is to "carry forward B. E. Witkin's lifelong commitment to California law." Toward that end, the Institute maintains Witkin's writings and develops educational programs for California's legal community including local law libraries, bar associations, and judicial organizations. Widely regarded as California's pre-eminent legal scholar, Bernie Witkin's relationship with Thomson Reuters began in 1979 when the corporation acquired Bancroft Whitney, which had been Witkin's publisher since the 1950s.

In 1981, Witkin identified and trained the first group of five editors who constituted a "Witkin group," which was responsible for updating his publications. This group became formalized as the Witkin Legal Institute, which was officially launched shortly after Witkin's death in late 1995. Witkin and his wife Alba also founded the separate Bernard E. and Alba Witkin Charitable Foundation, which continues to fund non-profit foundations in the Bay Area that assist children in need. Part of the proceeds from sales of the Witkin Library fund the Foundation's activities.

Wierzbicki regrets he never met Witkin and sees his mission at the Institute to tell Witkin's remarkable story to a wide audience. "Bernie nearly flunked out of law school, never did any of the things you'd think of as being successful as a lawyer, didn't practice except for short period, and wasn't a judge," Wierzbicki noted. "Yet during his life, he was the most influential person in terms of California law and there's a whole story of his life that has never been told." Wierzbicki's plans to write a Witkin biography led him to the California Supreme Court Historical Society once he discovered that Witkin had been a founding member.

He contacted President Richard Rahm, proposing that the Institute and the Society mark the 25th anniversary of Witkin's death, in 2020, by exploring his life and lasting influence on the Court and the practice of law in California. The COVID-19 pandemic has delayed those plans; in the meantime, the *Review* has published Wierzbicki's extensive account of Witkin's early life and career. Part I, which appeared in the Fall/Winter issue, at *https://www.cschs.org/wp-content/uploads/2021/01/2020-CSCHS-Review-Fall-Witkin-Early-Career.pdf* focused on the unlikely circumstances that led to his appointment as "law secretary" (judicial staff attorney) to Associate Justice William Langdon in 1930. Part II, in this issue, explores Witkin's years with Langdon, the published decisions in which he participated, and how his promising young career nearly ended. The goal, Wierzbicki said, is to "help a new generation of Californians to understand why Witkin is so important." ✯

Molly Selvin is the *Review* editor.

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SPRING/SUMMER 2021
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On the Cover: Rail commuters wearing white protective masks during the 1918 influenza pandemic in California, one with the additional message "Wear a mask or go to jail." *Raymond Coyne/Courtesy of Lucretia Little History Room, Mill Valley Public Library. © The Annual Dipsea Race.*