BOOKS

WOMAN LAWYER:
The Trials of Clara Foltz

BARBARA BABCOCK

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392 pp., ills.

REVIEW ESSAY BY MARY JANE MOSSMAN*

> In trying to sort out the reasons for professional women's successes or failures, it is far too facile to say that there were prejudices against women that they had to overcome. The ways in which the prejudice manifested itself were extremely complex and insidious. . . . As determined, aspiring professionals, women were not easily deterred. They found a variety of ways to respond to the discrimination they faced. . . .[1]

Although their study of late nineteenth and early twentieth century women professionals in the United States did not include a review of

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1 Penina Migdal Glazer and Miriam Slater, UNEQUAL COLLEAGUES: THE ENTRANCE OF WOMEN INTO THE PROFESSIONS, 1890–1940 (New Brunswick and London: Rutgers University Press, 1987) at 12.

the first women who gained admission to the legal profession, Glazer and Slater's assessment of the experiences of women professionals (above) is equally appropriate to understanding the lives of "first" women lawyers, such as Clara Shortridge Foltz (1849–1934). Certainly, prejudices about Foltz were manifested in a variety of different ways. But, like other women who chose to become lawyers in the late nineteenth century, Foltz was not easily deterred — indeed, she was both astute and creative in finding ways to respond, and often to overcome, the discrimination she faced.

As Barbara Babcock's new biography reveals, Foltz had great ambitions: to be "an inspiring movement leader, a successful lawyer and legal reformer, a glamorous and socially prominent woman, an influential public thinker, and a good mother"; perhaps not surprisingly in this context, she suffered not a few setbacks in a life that was often "frantic and scattered."[2] Yet, as Babcock's careful scholarship demonstrates, the story of Foltz's life and contributions as one of America's first women lawyers offers important insights about the history of gender and professionalism in law. Moreover, Babcock's biography is particularly important for two reasons. First, it provides both a detailed "story" about Foltz and a sustained assessment of her accomplishments, rounding out many aspects of Babcock's earlier writing about Foltz.[3] Perhaps more significantly, the biography is also augmented by an online supplement with essays and bibliographic notes that extends the documentation in the printed book — part of Babcock's unique Women's Legal History Web site at Stanford Law School, which has become a primary source for scholars interested in the history of women in law, particularly in the United States.[4] This review focuses on the published biography, an authoritative and sensitive biographical interpretation of Foltz's life. Indeed, in answer to Babcock's

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[2] Barbara Babcock, Woman Lawyer: The Trials of Clara Foltz (Stanford: Stanford University Press, 2011) at x [hereinafter Woman Lawyer].

[3] Barbara Babcock, *Reconstructing the Person: The Case of Clara Shortridge Foltz* (1989) Biography 5; reproduced in Susan Groag Bell and Marilyn Yalom, eds., Revealing Lives: Autobiography, Biography and Gender (Albany: State University of New York Press, 1990) 131; and Babcock, *Clara Shortridge Foltz: Constitution-Maker* (1991) 66 Indiana Law Journal 849.

[4] *See* www.law.stanford.edu/library/womenslegalhistory.

professed goal for her biography, it seems clear that Foltz would enthusiastically "approve" this fine effort.[5]

The biography includes four chapters that offer a chronological story of Foltz's life and then three chapters that focus in more detail on significant aspects of her contributions: her role as a "public thinker," her activities in support of political equality, and her "invention" of the idea of a state-funded public defender. Each chapter is carefully written, with supporting references to a wide range of legal and contextual materials, including references to Foltz's own writings and speeches, many of which were vibrant and humorous — and sometimes outrageous, probably intentionally.[6] The book also includes a number of excellent photos of Foltz, especially the portrait that now appears at the entrance to the Clara Shortridge Foltz Criminal Justice Center, the central criminal courts building in Los Angeles.[7]

The four chapters describing Foltz's life have been organized to tell her story chronologically up to 1911,[8] including her early life and elopement at age 15, followed by farm life and motherhood. As Babcock notes, by 1869, when Arabella Mansfield became the first American woman to

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5 WOMAN LAWYER at xi.

6 Like many biographers of women lawyers, Babcock lamented the absence of a significant number of personal papers, although she had access to Foltz's personal Scrapbook and published essays, etc. Babcock also acknowledged assistance from Jill Norgren, the biographer of Belva Lockwood: *see* Norgren, BELVA LOCKWOOD: THE WOMAN WHO WOULD BE PRESIDENT (New York and London: New York University Press, 2007) and a review by Mossman in (2007) 22:1 CANADIAN JOURNAL OF LAW AND SOCIETY 164. Babcock also acknowledged an early assessment of Foltz, published almost one hundred years after Foltz and Laura Gordon had sued Hastings College of the Law for refusing to admit women: *see* Mortimer D. Schwartz, Susan L. Brandt and Patience Milrod, *Clara Shortridge Foltz: Pioneer in the Law* (1976) 27 HASTINGS LAW JOURNAL 545.

7 Installation photo by Susan Schwartzenberg, 2008; and portrait of Foltz at the courthouse entrance, with map detail of Los Angeles where Foltz served as deputy district attorney and witnessed the enactment of the Foltz Defender Bill. Both illustrations precede the Introduction.

8 The chronological chapters focus on Foltz's efforts to become a lawyer (1878–1880); her initial efforts to make a living (1880–1890); her expanding horizons, including participation in the Chicago World's Fair (1890–1895); and her geographical moves to New York, Denver, San Francisco and Los Angeles (1895–1911).

gain admission to the bar in Iowa,[9] Foltz was living in the same state as a farm wife and mother of (eventually) five children. In addition to describing her move west with her extended family, there are details about efforts by Foltz and her supporters (including Laura Gordon) to enact a Women Lawyers' Bill, and Foltz's subsequent admission to the bar of California on September 5, 1878, the first woman lawyer in the West. The stories of the suffrage movement in California, her lawsuit to open Hastings College of the Law to women, and her support for Gordon's work at the constitutional convention that prohibited sex discrimination all reveal an auspicious beginning for Foltz's career.[10]

Yet, although gaining admission to the legal profession represented a significant accomplishment for Foltz, it seems that (as for other early women lawyers), there was another and greater challenge: earning a living in the practice of law.[11] Babcock's description of Foltz's energetic efforts as a political orator, public lecturer, legislative counsel, and newspaper publisher, as well as a practicing lawyer and criminal prosecutor, suggest Foltz's enduring creativity in seeking opportunities to make a living. The detailed descriptions of her legal cases, her involvement with women lawyers elsewhere (including her support for Belva Lockwood's

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9 Woman Lawyer at 5-6. For Mansfield, *see* The First Women Lawyers at 26-27 and 63-64; T. Federer, *Belle A. Mansfield: Opening the Way for Others*, Stanford Women's Legal History online; and L.A. Haselmayer, *Belle A. Mansfield* (1969) 55 Women Lawyers Journal 46.

10 In 1872, Nellie Tator, a suffragist from Santa Cruz, had passed the bar but was refused admission; although she drafted a Woman Lawyer's Bill, it was never passed and Tator did not appeal her rejection. In the process of lobbying for a new bill, Foltz met Laura Gordon, an early suffragist in California, and the two joined forces to promote the Women Lawyers' Bill. When it passed and was signed by the governor to become law, both Foltz and Gordon claimed credit — with somewhat different stories. Foltz, who had studied law in her father's law office, then passed the oral bar exam and was admitted to the bar. Meanwhile, Gordon put aside law studies to engage in extensive lobbying at the Constitutional Convention in the fall of 1878, where her efforts were substantially rewarded. Foltz was also joined by Gordon in the suit against Hastings College of the Law: *see* Woman Lawyer at 24 ff.

11 Although some nineteenth-century women lawyers, particularly in the United States, managed to make a living in the practice of law, many of them struggled to do so and none was as "successful" as male counterparts in the United States at the time: *see* The First Women Lawyers at 37-40 and 54-65.

candidacy for the U.S. presidency in the 1880s),[12] her ongoing suffrage activities, and her significant lobbying efforts (to establish a parole system, and to permit women to become estate executors and to hold marital property) reveal a woman who was energetic, persevering and ambitious. Nonetheless, as Babcock notes, by 1890, Foltz was "largely disappointed by her inability to convert her growing fame into a secure financial situation."[13] As a result, she often engaged in speaking tours, and in the context of the depression of the 1890s, moved often: to New York City and Denver and then back to California. (In addition, her flair for publicity was much enhanced when she survived a shipwreck on a voyage to Europe.)[14] On her return to California, Foltz settled in Los Angeles, where she became the first woman appointed to the State Board of Charities and Corrections in 1910, and shortly after, the first woman deputy district attorney.[15]

In the remaining three chapters of the biography, Babcock provides a more detailed assessment of three aspects of Foltz's accomplishments. Chapter Five, on Foltz as "Public Thinker," details her contribution to the Queen Isabella Society lectures at the time of the Chicago World's Fair in 1893 (an address about the evolution of law and the need for systematic review of legislation and law reform);[16] in addition, Foltz was one of only four women lawyers invited to present a speech to the Congress of Jurisprudence and Law Reform,[17] and it was here that Foltz described her public defender proposal. Both of these presentations were published in the *Albany Law Journal*.[18] In addition, the chapter reviews some highly-debated cases about women murderers, in which Foltz asserted (contrary to others in the suffrage movement) that women and men convicted of murder should both be executed, an early example of

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12 Woman Lawyer at 91 ff. *See also* Norgren, *supra* note 6.

13 Woman Lawyer at 131; and *see* Chapter Two at 64 ff.

14 Woman Lawyer at 174 ff.

15 Woman Lawyer at 215 ff.

16 Woman Lawyer at 221 ff.

17 Woman Lawyer at 305 ff. *See also* The First Women Lawyers at 63-65; and *Reflections*.

18 *See* Foltz, *Evolution of Law* (1893) 48 Albany Law Journal 345; and Foltz, *The Rights of Persons Accused* (1893) 48 Albany Law Journal 248.

the "equal treatment" stance among feminists. There is also an extensive chapter on Foltz and the suffrage movement, including a detailed overview of the shifting alliances within it, and Foltz's part in achieving this major objective in California in 1911. As Babcock suggests, Foltz's goals were intricately connected to the aims of the women's movement, "so that the history of each illuminates the other."[19]

Finally, Babcock turns to Foltz's great "legacy," her invention of the public defender. As Babcock notes, Foltz was a woman with a "reformist attitude to life,"[20] as well as having considerable experience in defending indigent accused in the criminal courts; in addition, Foltz had sometimes witnessed unfairness on the part of prosecutors. Thus, not only did she present a detailed proposal for a public defender during the Chicago World's Fair, but she also later drafted a model statute and presented it to the New York legislature; and she published articles promoting the idea in the late 1890s. Eventually, a public defender system was established in Los Angeles in 1913 (although not exactly the same as that proposed by Foltz).[21] And, according to Babcock, Foltz's proposal was also a forerunner of the Supreme Court's landmark constitutional decision in *Gideon v. Wainwright* in 1963, establishing a requirement for defense lawyers in criminal cases, with state funding provided if necessary.[22]

Babcock's biography of Foltz represents an outstanding accomplishment. With its fine detail and attention to all the disparate aspects of Foltz's life, the biography achieves Babcock's goal of recognizing Foltz's courage and charisma, while also confronting her flaws and mistakes

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19 Woman Lawyer at 246; and *see* Chapter Six.

20 Woman Lawyer at 293.

21 Woman Lawyer at 288-290 and 309-319. Foltz first presented her public defender proposal to the Women's National Liberal Union (a suffrage organization) in 1890; and then at the Chicago World's Fair in 1893. In 1897, she drafted a model statute that was introduced in several states, and Foltz herself presented it to the New York legislature. Although the proposed statute was not enacted anywhere at the time, the progressive movement in the early twentieth century resulted in Foltz's renewing her public defender campaign in California in 1910, and the statute was enacted two years after woman suffrage in California in 1913.

22 Woman Lawyer at 318. *See* Gideon v. Wainwright 372 US 335 (1963), and for an earlier case about public defenders, decided two years before Foltz's death, *see* Powell v. Alabama, 287 US 45 at 71 (1932).

in judgment: "the hag with the hagiography."[23] Although there is some modest repetition, the separation of the chronological life story from the more detailed assessment of Foltz's three most important contributions also generally works well. Poignantly, the biography often reveals Foltz's isolation as an early women lawyer in the West, even though Laura Gordon, the second woman lawyer in California, shared in a number of Foltz's legal and suffrage activities, and Foltz supported Mary Leonard in Oregon and may have met Lelia Robinson in Washington.[24] At the same time, although there is no documented explanation for Foltz's selection as one of only two women lawyers in the United States to take part in the 1893 Congress on Jurisprudence and Law Reform,[25] her status as the first woman lawyer in the West may have worked in her favor on this occasion. In any event, for Foltz and for other women lawyers, the meetings of the Queen Isabella Society during the Chicago World's Fair in 1893 must have been a highlight, as they came together from their isolated legal practices in different parts of the country, not only to engage in presentations about legal developments but also to share their stories as the first women in law.

And, indeed, many of the stories of these early women lawyers reveal how, like Foltz, they often had to respond to "complex and insidious" prejudices. At the same time, their stories confirm similarities in their experiences of support and encouragement: middle class parents who

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23 Woman Lawyer at x.

24 Woman Lawyer at 24 ff. (Laura Gordon); at 100-101 (Mary Leonard); and at 103-104 (Lelia Robinson).

25 The two American women lawyers were Clara Foltz, who was then practicing law in New York, and Mary Greene, a woman admitted to the bar in Massachusetts. There were also two invited women lawyers from outside the U.S., who sent papers to be read by others: one was Eliza Orme, a woman who had been engaged in conveyancing, patents and estates work in London's Chancery Lane since the early 1870s but without formal admission as a barrister or solicitor; the other was Cornelia Sorabji, the first woman to sit for the BCL exams at Oxford in 1892, who had returned home to India and the beginning of her long struggle to engage in legal work there. Mary Greene's description of the Queen Isabella Society meetings and the Congress on Jurisprudence and Law Reform is located in the Papiers Frank in the Bibliothèque Royale, Brussels; for details about the archival records and about Orme and Sorabji, *see* The First Women Lawyers.

encouraged education for their daughters, widespread assistance from the women's movement in the late nineteenth and early twentieth centuries, and timely interventions on the part of a number of prominent men who shared their ideas about equality for women. Yet, unlike most of these early women lawyers, Foltz married, although she later became a single mother, and then (like Belva Lockwood), accepted primary responsibility for supporting her family. Although Babcock's biography does not try to make connections between Foltz's life and the experiences of modern women lawyers today, Foltz's story shows both how much and how little may have changed: as Carol Sanger suggested, "modern women lawyers know that the biographies of women who chose to locate their professional lives in the law are likely to be stories of *piecemeal progress and circumscribed success*."[26]

In this context, Babcock's biography clearly shows how Foltz succeeded in achieving the "limits of the possible."[27] Although she faced private disappointments, she consistently presented steadfast optimism and purposefulness in public. In this context, it seems fitting to give Clara Foltz the last word. In responding to a request for a letter in support of the claim of Jeanne Chauvin for admission to the bar in Paris in 1896,[28]

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26 Carol Sanger, *Curriculum Vitae (Feminae): Biography and Early American Women Lawyers* (1994) 46 Stanford Law Review 1245, at 1257 (emphasis added). Sanger's comments occurred in the context of her review of the biography of Myra Bradwell: *see* Jane M. Friedman, America's First Woman Lawyer: The Biography of Myra Bradwell (Buffalo: Prometheus Books, 1993). For one assessment of connections in the experiences of early women lawyers and their modern counterparts, *see* Fiona Kay, *The Social Significance of the World's First Women Lawyers* (2007) 45:2 Osgoode Hall Law Journal 397.

27 Glazer and Slater, *supra* note 1, at 14. The authors identified four basic strategies for the first women professionals: superperformance, subordination, innovation and separatism; for many women lawyers, the strategy of "innovation" may be most in evidence, as they *created* their opportunities for legal work, evading or overcoming the barriers of formal rules and professional legal cultures: *see* The First Women Lawyers at 282-284.

28 Jeanne Chauvin's claim was denied by the courts, but she then successfully lobbied for the enactment of legislation in France, permitting women to become *avocat(e)s* there in 1900. *See* The First Women Lawyers; and Anne Boigeol, *French Women Lawyers* (Avocates) *and the 'Women's Cause' in the First Half of the Twentieth Century* (2003) 10:2 International Journal of the Legal Profession 193.

Foltz enthusiastically confirmed that there were already a dozen women lawyers in California by then, and confidently asserted the absence of any prejudice against them (or at least that it could be overcome!). Carefully ignoring so many of the challenges she continued to face in the 1890s (clearly documented in Babcock's biography), Foltz described her experiences as a woman lawyer in language that demonstrates a formidable talent for public advocacy:

> I cannot speak for others as [to] the relation between them and their clients, bar and court; for those facts are not much known, but have no hesitancy in speaking as to my own case. I was the first woman admitted to practice in the state of California, and sixth admitted in the United States. I have had a regular court practice ever since. I do not doubt but I have had a longer, broader, and more active experience than any other woman at the bar, for I have had a large clientage and a busy and continuous practice for eighteen years. I was admitted in 1878, and began practice at once. I went into all the courts from the lowest to the highest and tried all manner of causes. With very few exceptions my relations with my clients have been most cordial and satisfactory. I have sometimes lost cases I thought I would win, but so have my opponents, and I have certainly won my share. Losing clients are not always amiable, but their wrath has never been directed toward me, and I think I never lost a client I wanted to retain.
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> Between myself and the members of the bar the most friendly relations have always been maintained. Sometimes one of the rifraf [sic] of the profession made himself obnoxious, but the cases were few and I feel assured that I have received quite as much of a welcome at the bar and been shown quite as much courtesy by its members, as any other member of the profession. Of course there were prejudices, but I feel sure they have been largely dissolved by personal contact. Many indeed have been more than courteous. They have been helpful, rendering voluntarily assistance in tangled cases, and supplying valuable hints as to practice. The Judges have always accorded me a patient hearing, and I have as little fault to find with their decisions as have

> other members of the bar. Among Judges I am persuaded there is little prejudice against women as practitioners at the bar in the west [and in New York City].[29]

Notwithstanding Foltz's advocacy, Babcock's biography clearly shows that Foltz faced prejudices that were "extremely complex and insidious"; at the same time, it seems clear that Foltz, like other women described by Glazer and Slater, was among the "determined, aspiring professionals, not easily deterred [who] found a variety of ways to respond to the discrimination [she] faced."[30] In telling the story of California's first woman lawyer, Babcock has provided a fitting and comprehensive assessment of her life and her "trials." ✯

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[29] Foltz to Louis Frank, September 23, 1896, in PAPIERS FRANK #6031 (file #2), Section des Manuscrits de la Bibliothèque Royale, Brussels; Frank corresponded with a number of women lawyers around the world in preparing his book in support of the application for admission to the bar presented by Chauvin: *see* Frank, LA FEMME-AVOCAT: EXPOSÉ HISTORIQUE ET CRITIQUE DE LA QUESTION (Paris: V. Giard et E. Brière, 1898). Interestingly, Foltz's letter to Frank differs significantly from her assertion in an interview a few years later in 1898, in which she (uncharacteristically) blamed the "ill-concealed, often rude opposition of the legal fraternity [at the New York bar] . . . who regard [women lawyers] as freaks rather than mental equals": *see* WOMAN LAWYER at 203. Significantly perhaps, Foltz's 1898 comment was made to an interviewer in Idaho, to whom she was explaining her intentions to abandon New York and return West.

[30] Glazer and Slater, *supra* note 1.

RESISTING McCARTHYISM:
To Sign or Not to Sign California's Loyalty Oath

BOB BLAUNER

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328 pp.

REVIEW ESSAY BY GLEN GENDZEL*

Imagine the University of California, the nation's top public university system, mired in crisis. Its renowned faculty are demoralized and depleted by waves of layoffs, resignations, and forced retirements. Promising young scholars turn down UC job offers; established academic superstars depart for more hospitable employment elsewhere. So many classes are cancelled that already crowded classrooms get jammed beyond capacity and UC students are unable to finish their degrees on time. Politicians in Sacramento gleefully pander to the public by attacking UC professors as elitist, out of touch, and morally suspect. The university's prestige suffers, the value of a UC degree declines, and a miasma of mistrust poisons campus life. Things get so bad that the UC Academic Senate officially declares the university "a place unfit for scholars to inhabit" because it has embarked on "a tragic course toward bankruptcy" (p. 202).

Imagine this crisis happening to the University of California — not today, but in 1950. The crisis came not from budget cuts but from a self-inflicted wound: the so-called "loyalty oath." Starting in 1949, the UC Board of Regents, on its own initiative, required all UC employees to sign

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an oath declaring that they did not belong to the Communist Party. No UC professors were even accused of being communists, but the penalty for not signing the Regents' oath was automatic dismissal from the university regardless of rank, tenure, or job performance. Actual membership (or non-membership) in the Communist Party had no bearing on whether faculty could keep their jobs; what mattered was whether they signed the oath. UC professors objected to the loyalty oath because it was coercive, it violated academic freedom, it imposed a political test for employment, and perhaps worst of all, it abrogated tenure. Most faculty members eventually signed under extreme duress, but a substantial minority chose to fight the oath. The result was nearly two years of agitation, recrimination, controversy, moral anguish, bureaucratic wrangling, political grandstanding, financial hardship, interrupted careers, several heart attacks, and the firing of over thirty eminent scholars and teachers. Ultimately the issue was resolved by the intervention of the governor, an act of the state Legislature, and a ruling of the state Supreme Court — all of which left no one satisfied but everyone relieved that at least the ordeal was over.

There was nothing new about a mandatory oath of loyalty for UC faculty. Since 1942, all California state employees had been required to swear allegiance to the state and federal constitutions. But in 1949, as the Cold War intensified, as Communism spread across Europe and Asia, and as revelations of Soviet espionage in the United States began to emerge, UC employees were singled out for a special anti-communist oath. Strong opposition arose immediately, though the ranks of non-signing professors dwindled as it became clear that they really would lose their jobs. Non-signers insisted that Communist Party membership alone should not disqualify anyone from university employment. Only demonstrably disloyal professors who advocated violent overthrow of the United States government in their teaching or their scholarship should be subject to dismissal — and even then, they should only be disciplined by the faculty itself through its own self-governing committees after a proper evidentiary hearing, not by the administration. To dismiss a professor merely for presumed membership in the Communist Party, rather than for any actual act of disloyalty, constituted guilt by association and denial of due process. Even worse, the non-signers protested, it violated academic freedom

and foreshadowed a totalitarian-style purge of intellectuals such as had occurred in Soviet Russia, fascist Italy, and Nazi Germany in the 1930s. At UC, the non-signers included no actual communists but many European refugees from fascism who were already familiar with ideological purges and who sensed one in the making.

During the controversy, the faculty offered an olive branch to the Regents: they voted overwhelmingly in favor of the principle of excluding communists from the university, even as they voted just as overwhelmingly against firing faculty who refused to sign the oath. Later the faculty accepted an olive branch that they thought the Regents had offered to them: non-signers got a hearing before duly constituted faculty tenure committees to determine their loyalty. Neither compromise worked, however. The Regents enforced the oath over faculty objections, and they summarily fired non-signers with no regard for the findings of faculty committees. Such strong-arm tactics forced the vast majority of UC professors to sign the oath, but they were deeply embittered by the unpleasant experience of being "brow-beaten into submission," as one of them said (p. 171). Governor Earl Warren, a UC alumnus, opposed the oath; he pointed out that unquestionably loyal faculty members would lose their jobs "not because they are communists, or suspected of being communists, but because they are recalcitrant" (p. 182). Luckily for Governor Warren, and for the non-signing faculty, enough seats on the Board of Regents came open during the protracted controversy that Warren was able to appoint several new regents who shared his point of view. The votes of these replacement regents tipped the balance, just barely, toward rescission of the oath.

At the same time, however, Governor Warren knew that he faced a potentially difficult reelection campaign in 1950, and he could not afford to appear "soft on Communism" over this issue. So even as he orchestrated the repeal of the Regents' loyalty oath, Warren convinced the Legislature to approve an even tougher oath for all state employees. In this way, Warren was able to prove his anti-communist credentials and secure his reelection, while at the same time reassuring UC faculty that at least they were no longer being singled out. In 1952, professors who had been fired for refusing to sign the Regents' oath were reinstated by a ruling of the state Supreme Court, *Tolman* v. *Underhill* (39 Cal.2d 708).

Oral arguments drew record crowds to the Court's chambers in San Francisco, but much to the disappointment of both sides, the ruling was on narrowly technical grounds: the Legislature's mandated oath for all state employees superceded the Regents' special oath for UC employees. The Court did not question the propriety of a political oath for teachers and scholars, nor did it uphold academic freedom or the sanctity of tenure, even though these issues were raised by the plaintiffs. The fired professors got their jobs back, and they even received back pay, but it was a somewhat pyrrhic payoff because the faculty as a whole lost some precious prerogatives in the process.

These insights into the loyalty oath controversy are gleaned from Bob Blauner's fascinating new history, entitled, *Resisting McCarthyism: To Sign or Not to Sign California's Loyalty Oath* (2009). An emeritus professor of sociology, Blauner was a graduate student at UC Berkeley in the 1950s before he began teaching there in 1963. Over the years, Blauner must have heard so many versions of this story from senior colleagues that he apparently felt compelled to seek out the facts for himself. The result is a meticulously detailed account based on formidable research. Previously, the definitive work on this subject was David Gardner's *The California Oath Controversy* (1967), which benefited from Gardner's exclusive access to confidential records of the Board of Regents. Blauner seems not to have been granted similar access, but Gardner deposited his own voluminous research materials at the Bancroft Library in 2004, including copies of many Regents' records that Blauner was able to use. In addition, the most important new sources that Blauner brings to bear are oral histories dictated by dozens of UC professors and administrators. Most of these personal reminiscences were collected, edited, and preserved by UC's Regional Oral History Office in the years since Gardner's book was published. Blauner also tracked down some of the last few surviving oath resisters, their spouses, and their descendants in order to conduct interviews of his own, which incidentally gained him access to unpublished sources in family custody as well. Best of all, Blauner has read deeply in campus newspapers and the local press from this period, opening a rich trove of source material that Gardner omitted from his rather dry, bureaucratic, internal account of UC's administrative

machinations. Gardner was already a UC administrator when he wrote his book, and eventually he rose to become UC president, serving from 1983 to 1992; Blauner, by contrast, writes from a professor's point of view.

That viewpoint gives Blauner a distinct advantage in telling this story. As a longtime faculty member familiar with universities in general and with the UC system in particular, Blauner is able to explore dimensions of the controversy overlooked by less seasoned observers. Standard accounts such as David Caute's *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower* (1978), Ellen Schrecker's *No Ivory Tower: McCarthyism and the Universities* (1986), Richard Fried's *Nightmare in Red: The McCarthy Era in Perspective* (1990), and Kurt Schuparra's *Triumph of the Right: The Rise of the California Conservative Movement, 1945–1966* (1998) place California's loyalty oath controversy in the context of the larger "Red Scare" that swept the nation in the late 1940s and early 1950s. It is tempting to compare UC's Regents, ever-vigilant in their quest to root out communists from the faculty, with national red-baiting politicians such as Joseph McCarthy of Wisconsin, or California's own Richard Nixon and Jack Tenney. The usual assumption is that similarly base political motives were at work in California as in Washington, D.C. Blauner's approach, however, is different: he does entwine his narrative with Cold War events in order to remind readers of the prevailing anti-communist mood, but he does not try to portray the oath controversy strictly as a battle by brave civil libertarians against political repression. He senses that there was more to the story.

Blauner perceives that beneath the surface, the loyalty oath controversy was "a power struggle over the governance of the university" (p. 100). The trouble started not because of any genuine concern over faculty loyalty; rather, the real issues were UC's prestige and autonomy. After embarrassing stories about left-wing speakers at UC campuses appeared in the press, state legislators threatened to investigate communist infiltration of the UC faculty. This threat of outside interference is what goaded the Regents into hastily adopting a loyalty oath in order to protect UC's image and to preserve their own independence from state control. The controversy then escalated when significant numbers of UC faculty members, much to the Regents' surprise, refused to sign the oath.

Blauner shows again and again that as the confrontation unfolded, the only faculty "loyalty" that the Regents seriously expected or cared about was loyalty to their own authority, and the only proof of such loyalty that they would accept was a professor's willingness to obey their orders. A professor's refusal to sign the oath may well have signaled disloyalty, but not disloyalty to the nation; it signaled disloyalty to the Regents, at least by their own self-important reckoning, and such a blatant act of defiance they could never accept.

Gardner's account, written early in his career as a UC administrator, also alluded to the academic power struggle behind the loyalty oath controversy. But it takes a battle-scarred veteran of campus politics such as Blauner, who spent over forty years at UC Berkeley, to convey all the nuances, absurdities, and ironies of professors and administrators locked in bureaucratic combat. Both sides seemed to agree that Communism was not the issue; rather, the issue became who would have the power to decide what UC faculty members must do and who would have the power to dismiss them for not doing it. The Regents, like most administrators, absolutely refused to cede authority over personnel decisions; UC faculty, like most professors, clung fiercely to tenure protection and to their right to choose their own colleagues according to academic merit as determined by the faculty themselves. One side might claim that they were trying to root out dangerous subversives, and the other side might claim that they were defending academic freedom, but both sides understood that they were really fighting over university governance. As one Regent declared at a board meeting that plotted strategy for dealing with faculty resisters: "It is now a matter of demanding obedience to the law of the Regents" (p. 181).

Blauner's familiarity with faculty-administration relations enriches his narrative throughout. He speculates that UC faculty must have resented taking orders from the Regents because the rich and powerful political appointees who ran the university were "not scholars, scientists, or intellectuals" (p. 8). Blauner retells an anecdote popular with faculty at the time: when the Regents learned that Phi Beta Kappa, the national honor society, had condemned the loyalty oath, one Regent replied that he was glad such a "fraternity" had never "rushed" him in his college days. The other Regents applauded; Phi Beta Kappa apparently did not

"rush" any of them, either (p. 267). Nor were the faculty any more inclined to take orders from UC President Robert Sproul, who had "no formal education beyond his undergraduate years, when he had studied business," as Blauner explains. "Thus many professors viewed him as too business-oriented, too much of a 'Rotarian,' to understand the academic mind" (p. 22). Blauner's intuitive feel for academic life alerts him even to subtleties of timing: he points out that some of the Regents' most objectionable initiatives were launched at the beginning of summer or winter vacations, when professors would be dispersed and hence less capable of organizing a concerted response. It is safe to assume that the Regents knew this, but Blauner is not fooled any more than the faculty were.

Endowed with a professor's sensibility, and with great human sympathy as well, Blauner is able to craft moving personal vignettes about his UC predecessors. He chronicles the countless professorial friendships, marriages, careers, psyches, collegialities, and stomach linings that were wrecked by the strain of this struggle. He connects the far-flung research interests of individual faculty members in disparate fields with their joint determination to oppose the oath, which requires impressive intellectual breadth and depth on his part. Blauner knows professorial habits and mindsets so well that he can remark in passing that "the non-signers had forged a solidarity that was unique in an academic culture based on individualism and competition" (p. 172). Blauner also draws upon his familiarity with college teaching to focus attention on non-tenure-track academic employees caught in the oath controversy, such as lecturers, instructors, visiting professors, and teaching assistants. Fives times more of these non-tenure track faculty lost their jobs for not signing the oath than did regular professors, and yet previous historians of the controversy have unjustly neglected their fate. Given that non-tenure-track faculty now do most of the teaching at large public universities, Blauner's attention to their predicament in 1950 is more relevant than ever. Women professors were also rare in 1950, but Blauner reveals that they, too, were disproportionately victimized: women composed less than two percent of UC faculty but almost ten percent of those fired for not signing the loyalty oath. Again, given the much greater academic prominence that women have attained since 1950, Blauner's emphasis here is appropriate and long overdue.

The villain of this piece, as Blauner presents it, is clearly John Francis Neylan. A powerful attorney for the Hearst Corporation with a long career in state government, Neylan was the most domineering Regent behind the loyalty oath. "Neylan was willing to employ any trick, no matter how duplicitous, to gain his objectives," writes Blauner (p. 226). Here again, Blauner's sense of academic politics enables him to explain why Neylan became such a ruthless enforcer of the oath even though he had originally opposed it and seemed to care little about it — until faculty resisted it. Only then were Neylan's hierarchical hackles raised: "Neylan made it clear that he believed it was the Regents, and not the faculty, who ran the university" (p. 102). Imperious by nature, Neylan was a man accustomed to having his way, especially with underlings, and he was not about to tolerate faculty insubordination. Neylan comes across here as a bully, but Blauner also heaps blame on President Sproul, whose bumbling ineptitude was repeatedly demonstrated during the long crisis. It started when Sproul tricked the Regents into approving the loyalty oath by springing it upon them unannounced at the end of a routine meeting, while spouting assurances that the faculty would not object. When the faculty did object, Sproul denied responsibility for the oath and tried to blame the Regents instead. Yet when the Regents seemed ready to rescind the oath, Sproul convinced them to retain it for credibility's sake. At the same time, Sproul tried to reassure the faculty that he was on their side, and that no non-communist professor would ever be dismissed for defying the oath — which turned out to be false. Neylan called Sproul "a vacillating weakling" (p. 119 and p. 170), but both men's behavior, in different ways, was all too typical of university administrators. A much higher standard was set at the time by President Robert Hutchins of the University of Chicago, who successfully defied attempts by the Illinois legislature to terrorize his faculty with anti-communist witch hunts. Hutchins emphatically denounced the red-baiting of academic intellectuals as "the greatest menace to the United States since Hitler" (p. 68).

Participants in the loyalty oath controversy drew a variety of lessons from the ordeal. UC students, through campus newspapers, rallies, petitions, and even cash donations, expressed support for non-signers; they also expressed disappointment that so many faculty caved in to

the oath. The *Daily Californian* considered the outcome an object lesson in "the gap between what professors say and what they do" (Blauner's paraphrase, p. 182). The *Daily Bruin* called UC professors "timid souls, concerned first and foremost with their economic security" (Blauner's paraphrase, p. 228). One faculty member, after signing the oath, told his students: "Today I am ashamed to stand before you and I feel apologetic that I haven't been fired" (p. 186). The chilling effect of the loyalty oath upon teaching was much noted at the time. Some of the more cautious professors decided that it was unsafe to discuss Communism objectively in their classrooms any more, lest their loyalty fall into question. They were reduced to uttering meek echoes of the dominant anti-communist consensus, much to the detriment of UC students, who received an incomplete education about the Cold War. Ironically, however, any criticism of Communism that UC professors did offer became automatically suspect after the oath controversy, because UC students would naturally assume that the faculty were compelled to say such things in order to keep their jobs.

An important lesson of the loyalty oath controversy for Clark Kerr, then a labor economist at UC Berkeley, was the need to protect faculty from administrators. Soon he would have a chance to apply this lesson, for in 1958, Kerr was appointed to succeed Robert Sproul as the next UC president. President Kerr rehired some ex-UC professors who had resigned in protest over the oath, and he prevailed on the Regents to bolster tenure guarantees in order to facilitate recruitment and to rebuild a ravaged faculty. But Kerr's focus on faculty left him unappreciative of student concerns and over-sensitive to red-baiting from politicians, the press, and the community. Kerr was typical of many UC faculty who emerged from the loyalty oath controversy "fearful and rule-bound," according to Blauner, leaving them ill-prepared to handle radical student movements that would trigger Kerr's downfall in 1967 (p. 236). Another UC faculty member during the loyalty oath controversy who later gained prominence was the psychologist Erik Erikson. "The faculty's mistake," Erikson decided afterwards, "was to wage battle on ideological grounds." Instead, he believed that anti-oath professors "should have been organized into a group, such as a labor union, and have used their collective

power to fight the issue" (p. 133). Blauner agrees: "If there was one lesson the faculty learned from the years of the oath," he writes in his conclusion, "it was the need for organization" (p. 222). Yet to this day, University of California professors, unlike their counterparts in the California State University system and in many community colleges, remain unorganized without a faculty union.

Gardner's earlier history of the loyalty oath controversy described it as "a vain and futile episode," but Blauner disagrees. "Resisting McCarthyism," his chosen title, was a necessary and solemn obligation for all Americans of conscience. Blauner openly admires his faculty forebears who made a brave stand on behalf of academic freedom in the face of political intimidation. At the same time, however, Blauner recognizes that academic freedom, though important to those who resisted the loyalty oath, became a side issue in the controversy. His account places the struggle over university governance squarely at the center of the story, with the faculty and the Regents fighting for power more than principle. Hence Blauner's title seems out of place: it makes no more sense to claim that the loyalty oath controversy was about "Resisting McCarthyism" and defending academic freedom than it does to claim that it was about rooting out communist subversives. This is not the book's only flaw: Blauner makes a number of small mistakes. He claims that Anita Whitney, a famous legal client of Neylan's, was convicted of a 1916 bombing, when in fact she was convicted of violating the Criminal Syndicalism Act in 1920, unrelated to any bombing; he refers to the eminent California historian Kevin Starr as "Kenneth Starr"; he improperly cites the case *Vogel v. County of Los Angeles,* 68 Cal.2d 18 (1967), as "*Vogel v. California*" (p. 23, p. 131, p. 219). Blauner also overreaches a bit in tracing Berkeley's reputation as a "center of political resistance" back to this episode (p. 241). One suspects that the 1960s were more important than the 1950s in that regard. Still, Blauner's close attention to the latent issues lurking beneath the manifest ones, and his empathy for the professors' plight, make this book easily the best one ever written on California's loyalty oath controversy. ✯

AFTER THE TAX REVOLT:
California's Proposition 13 Turns 30

JACK CITRIN AND ISAAC WILLIAM MARTIN, EDITORS

Berkeley: Institute of Governmental Studies, 2009
169 pp.

REVIEW ESSAY BY DANIEL H. LOWENSTEIN*

In my more than forty years of living in California, I have never seen the public as exercised as they were during the months leading up to the election on Proposition 13 in the June 1978 primary. I recall a lunch debate on Proposition 13 — I believe it was held by the Commonwealth Club in Sacramento — where I was seated at a table with several farmers. The image persists in my mind of the muscles in the neck of one of these men, strained to the limit by the emotions he was feeling. That image has been my personal emblem of how highly charged were the political passions in that season. I have never again seen their like.

As any reader of this journal must be aware, Proposition 13 was approved by a large majority and has had a major influence on California's subsequent history. To paint with a broad brush, the proposition limited property taxes to one percent of assessed value, rolled assessed values back to the levels of 1975–76 (a significant reduction in those inflationary days), limited subsequent assessment increases to two percent per year even if the market value increased by a much greater amount, and

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made it more difficult to raise taxes by requiring voter approval at the local level and requiring a two-thirds vote for tax increases in the state legislature.

No one doubts that Proposition 13 was one of the major events of the late twentieth century in California. Whether it was for good or bad or both continues to be a lively subject of public debate. In addition, a sophisticated corps of scholars has scrutinized Proposition 13 from almost every angle.

The Institute of Governmental Studies is ideally situated to contribute to the study of Proposition 13. Located at the University of California, Berkeley, it provides to its students and to the public a combination of academic work at the highest level and a close, hands-on association with practical government and politics that includes frequent participation by officials, journalists, activists, and just about anyone else with first-hand knowledge of government and politics, whether international, national, or California-oriented. Thus it is no surprise that the present director of IGS, Jack Citrin, together with sociologist Isaac William Martin, on the thirtieth anniversary of enactment (June 6, 2008), convened some of the best of the scholars who have studied Proposition 13, together with activists and other knowledgeable people, to assess the proposition's legacy. The resulting papers make up the book under review.

According to Martin, the participants' mandate "was a simple one: assess what we have learned about the political, economic, and fiscal consequences of Proposition 13 over the last 30 years." Some of the essays reflect original research and fresh thinking. However, the book's intended audience is not primarily the small group of specialists who are familiar with the scholarly literature on Proposition 13. Instead, the book is directed to a general audience, which can include but should not be limited to students in courses on California government or finance. It can be recommended to anyone seeking either balanced and broad information on Proposition 13 in one short volume or an introduction to the measure with references facilitating future research.

The book contains some annoying though minor flaws. It is short, and most of the contributions are concise, but still a general index would

be helpful. IGS does not seem to have provided fact-checking, copy-editing, or proofreading. Thus, the state senator who led the drive for Proposition 13's unsuccessful alternative, Proposition 8, was Peter Behr, not "Philip Behr" (p. 90), and the former columnist for the *New York Times* and *Newsweek* is Anna Quindlen, not "Anna Quidlen" (p. 162). No uniform style rules were imposed, so "Proposition 13" in some chapters becomes "Prop. 13" in others. Lack of proofreading in some chapters results in garbled sentences that are occasionally not easy to decipher. But such blemishes do not seriously detract from a useful and informative volume. Each chapter contains ideas or information worth reading and each is clearly written.

Three of the authors are included as advocates: John Fund, a *Wall Street Journal* columnist, and Joel Fox, former president of the Howard Jarvis Taxpayers Association, write in defense of Proposition 13. Jean Ross, executive director of the California Budget Project, a liberal group, criticizes it. According to Fox, critics of Proposition 13 believe that "if taxes could be easily raised[,] spending would be increased and problems would be solved" (p. 159). Setting aside the imputation of complacency, Fox's characterization appears to fit Ross, who writes that without the supermajority requirement for state tax increases, "lawmakers could have and probably would have raised state taxes to make up at least some of the shortfall in revenues caused by the measure's 53% reduction in property tax revenues." As Citrin writes in his introduction to the book, the "proper balance between public and private spending is a value judgment" (p. 6). That does not mean the proper balance cannot be debated. Fund, Ross, and Fox all present their cases effectively. Still, a volume like this one is not the place to look for comprehensive consideration of that large question.

Fund writes in his chapter that it is difficult for anyone on either side to consider Proposition 13 objectively. "One of the hardest things in politics is trying to understand voting trends you profoundly disagree with," he writes. "That goes for both sides of the political spectrum" (p. 30). As a general matter, I believe Fund is right. Nevertheless, although the skepticism if not outright hostility by most of the scholarly contributors can be

detected,[1] by and large they manage to present the issues they address fairly. One reason for this is that all the contributors agree on at least one point, namely that Proposition 13 is still popular among California voters. Mark DiCamillo, director of *The Field Poll*, documents that popularity in his chapter and all the contributors accept it. The recognition that there is no practical prospect of repealing Proposition 13 in the foreseeable future no doubt reduces the temptation to attack it indiscriminately.

It remains true that Proposition 13 has some well-known drawbacks, which could hardly be omitted from a book of this sort. The most overtly hostile scholarly contributor is law professor David Gamage, for whom "Proposition 13 is both an important component and a powerful symbol of California's flawed fiscal constitution" (p. 51). His point is that because of Proposition 13's limit on property taxes, California ranks near the top among the states in its reliance on the income tax, which is "among the most volatile of the major state funding sources" (p. 53). Given that neither California's legislature nor those of most other states have had much success in good economic times of saving up surpluses to assist in getting through bad times, Gamage argues that the revenue volatility resulting from disproportionate reliance on income taxation is the primary culprit for California's frequent budget crises.

Although the point is not directly related to Proposition 13, Gamage also observes that California is one of seven states that tax capital gains at the same rate as ordinary income. This further exacerbates revenue volatility. One of the most interesting policy recommendations in the book is Gamage's proposal that revenues from the tax on capital gains should be unavailable for spending and instead should be saved as a rainy day fund. A supermajority would have to certify that a fiscal crisis exists before the rainy day fund could be tapped.

In the absence of any such remedy, Gamage's point that Proposition 13's property tax restraints have required reliance on more volatile revenue sources holds. Fox points out that this difficulty is at least partially offset by a stabilizing effect of Proposition 13. One of the measure's most

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[1] David Doerr, who was a long-time high-level tax consultant for one of the legislature's tax committees and who at the time of the IGS conference was a consultant with the California Taxpayers Association, is an exception.

basic — and most controversial — features is that it bases assessment for property tax purposes on acquisition price, enhanced by a maximum two percent increase each year, rather than on market value. David Doerr points out that the acquisition value assessment system "acts in a counter-cyclical manner to provide stability in the flow of property tax revenues to local government" (p. 81). Fox enjoys quoting a *Los Angeles Times* article to the effect that tax assessors had credited Proposition 13 for its "unexpected role as a tax stabilizer" (p. 164).

Perhaps Proposition 13's greatest drawback is its removal of control over their own major revenue source from local government agencies and the enhancement of the power of state over local government. Of course, the basic removal of control is the limit on property taxes that was placed in the state constitution by the voters. Relying on a legal opinion of the legislative counsel, the Legislature has gone further by assuming control of the allocation of property tax revenues among the various local government agencies within a county (the county, cities, school boards, special districts, etc.). My UCLA Law School colleague Kirk Stark explains the resulting distortion in what he calls "fiscal federalism." Fox does not defend the enhancement of state power but he denies that the legislative counsel's opinion accords with the intent of Proposition 13's authors. According to Fox, the authors intended that each local agency in a county would continue to receive the same percentage of property taxes raised within the county that it was receiving when Proposition 13 was passed. In my judgment, the pertinent language in Proposition 13 is sufficiently obscure that either interpretation is plausible. But Fox's interpretation is hardly ideal as policy. A particular allocation frozen as of 1978 could, over time, become increasingly unworkable.

Another popular argument among Proposition 13 critics is that the acquisition-based assessments benefit commercial and industrial landowners over residential owners, because residential land changes hands more often than commercial and industrial land. Under the acquisition-based system, when the land is sold, the assessment is brought up to the market value, though the new owner subsequently gets the benefit of the two percent limit on annual assessment increases until the land is sold again.

Doerr briefly presents a surprising empirical refutation of this argument:

> Commercial and industrial property assessment averaged 75.1% of market value from 1988–89 to 2006–07.
>
> For owner-occupied property, the average for the same period is 66.3%. . . . Thus, if all properties were assessed on an *ad valorem* basis . . . , homeowners would be paying a much larger percentage of the total property tax burden (p. 83).

None of the other authors addresses the question, though some express the hope that someday, somehow, the voters will authorize split-roll assessments separating residential from commercial and industrial properties. Indeed, though in general this book provides a comprehensive review of issues raised by Proposition 13, relatively little attention is given to the measure's effects on non-residential property.

As was mentioned above, the acquisition-based assessment method has been controversial. It is criticized in this volume as unfair and inefficient. Steven M. Sheffrin says that Proposition 13 is "emblematic . . . in its iconic unfairness," and he claims that even defenders of the measure, "of course, recognize its potential unfairness in terms of horizontal equity — that property owners with identical houses in the very same jurisdiction may have radically differing tax burdens" (p. 117).

If so, I believe the defenders of the measure — and its critics also — ought to reconsider. Interestingly, Sheffrin himself goes a long way toward explaining why. The simple claim, endlessly repeated in debates on Proposition 13, that it is unfair for a homeowner who bought his house thirty years ago to pay a much lower property tax than his neighbor, who bought his identical house last month, depends on "a snapshot of the situation" (p. 121). Sheffrin concedes that under certain highly stylized conditions, including all homeowners owning their homes for equal time periods and home values increasing at a constant rate, homeowners would be treated uniformly over time, though in any given year the homeowner who recently bought his house would pay a higher tax than his neighbor who is approaching the end of the ownership cycle. Nevertheless, the fact that these conditions are never even approximately met "generate[s] intertemporal inequalities" (p. 122).

Sheffrin never explains why he thinks fairness requires *ex post* equality among taxpayers. Many institutions, public and private, are regarded as beneficial because people are treated equally *ex ante*, though it is known that in the result, they will fare differently. The most obvious example is insurance. Sheffrin does not pursue this line of thought. If he did, he might point out that it can sometimes be known *ex ante* that some homeowners are more likely to have short ownership periods than others. But *ex ante* equity does not require complete ignorance of how things are likely to turn out. You, as my neighbor, may know that you are an extremely cautious person while I am a *schlemiel*. You therefore know that as one who is less likely than I to set your house on fire accidentally, you are the better risk for homeowner's insurance. That does not make homeowner's insurance inequitable. The issue is admittedly a tricky one and I do not claim to have thought it through to the bottom. But for the present, the claim that the acquisition method of assessment is inequitable seems to me to be unmade.

In contrast, Terri A. Sexton's chapter makes a strong demonstration that the acquisition method has significantly inefficient properties by penalizing homeowners who move. As she writes:

> A key argument used to garner support for Proposition 13 was that senior citizens were being forced to sell their homes because they could not afford their rapidly rising property taxes. By the mid-1980s this argument had completely reversed; senior citizens could not afford to sell their homes because they could not afford the increased property taxes on new, though smaller homes. (p. 108).

The inefficiency has been only partially mitigated by amendments in 1986 and 1988 that provide a one-time ability to transfer the assessed value of the old house to the new house for homeowners over 55 who move. The disincentive to move may have an external beneficial effect of increasing stabilization in neighborhoods — or so the Supreme Court believed in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), in which the acquisition method was upheld. But Sexton points out a number of likely harmful effects (p. 110).

Still, as a number of the authors point out, the inefficiency is offset by the substantial sense of security that Proposition 13 provides to homeowners and homebuyers. That sense of security is probably Proposition 13's most important benefit. Empirical exploration of its incidence, its depth, and its nature would be a useful subject of study for social scientists interested in Proposition 13.

To summarize, *After the Tax Revolt* leaves little doubt that the adoption of Proposition 13 was a major event whose influence is still very much with us more than thirty years later. Some of the important claims made by both defenders and critics are overblown, but other claims made on both sides have merit and are significant. It is impossible to say exactly what the balance is between the measure's advantages and its drawbacks, but they are probably close enough that one's final judgment will rightly come down to where one stands on the basic question: Would California be better off with higher taxes and higher government expenditures than we have now? That is a question on which liberals and conservatives ought to be able to agree to respectfully disagree. ✯

RACIAL PROPOSITIONS:
Ballot Initiatives and the Making of Postwar California

DANIEL MARTINEZ HoSANG

Berkeley: University of California Press, 2010
372 pp.

REVIEW ESSAY BY ETHAN J. LEIB*

There are obviously many ways to write a history of the American struggle toward racial equality after World War II. Our battle against the Nazis and their most malignant form of racism set the stage for much that followed in the history of race relations in the U.S. Professor HoSang's innovative approach in writing this history in *Racial Propositions* is not to focus on the U.S. experience at large — but to focus on its most populous state: California. More innovative still, HoSang tries to understand political developments about race in the postwar period through the processes of direct democracy in California, where the people of the state get to issue relatively unmediated expressions of their preferences and affinities. What he is able to reveal is that the presumed bastion of progressivism hasn't been especially impressive at addressing racism in its territory; no longer can we only think of the South as racially retrograde in the postwar period. California often gets associated with a certain kind of liberalism (though it isn't nearly as univocally "Blue"

* Professor of Law, UC Hastings College of the Law. Thanks to Kevin Johnson, Aaron Rappaport, Reuel Schiller, Darien Shanske, Rogers Smith, and Frank Wu for their comments and thoughts about this review and its themes.

in the postwar period as some might assume) — but Professor HoSang helpfully reminds us that California's direct democracy is a forum in which that liberalism facilitates racialized ballot measures that often hinder racial integration in the state. The measures and the campaigns surrounding them, HoSang argues, help redefine race and racial equality in the process.

Although his method can have limitations — the story of race in California cannot really be fully isolated from the nation's as a whole, and the politics of race in the state surely cannot be limited to direct democracy when so much else happens in legislatures, courts, and executive offices — HoSang reasonably tries to narrow his scope and pick a lens into this otherwise dauntingly large subject area. His methodological choices are always fully transparent and, ultimately, the historical narrative he tells in his book is a truly engaging, well-written, and provocative account of how certain liberal theories of racial equality produce an arsenal of arguments for the opponents of many efforts at achieving racial justice. Moreover, HoSang charts how reigning theories of racial equality actually can hamstring civil rights activists in how they make their cases in the courts of public opinion and elsewhere. In a way, the consensus commitment to racial equality can serve to limit what the champions of racial justice can realistically say and accomplish. This is a subtle and often underappreciated way to think about racial politics and how they play out before the electorate.

The book is organized as a set of careful case studies about how certain propositions got onto the ballot in California, how certain propositions failed to qualify, how certain propositions were defeated, and how certain propositions succeeded. The aim in each chapter is to focus on the rhetorical campaigns opponents and proponents waged, with the purpose of revealing which accounts of racial equality proved themselves to have swayed the populace. There are chapters on the failed Prop. 11 in 1946, which would have created a Fair Employment Practices Commission (chapter 2); the successful Prop. 14 in 1964, which exempted many real estate transactions from fair housing legislation (chapter 3); the successful Prop. 21 in 1972 and Prop. 1 in 1979, which took aim at mandatory desegregation orders in California school districts (chapter

4); the successful Prop. 38 in 1984 and Prop. 63 in 1986, which reinforced California's commitment to English as an official language (chapter 5); the successful Prop. 187 in 1994, which rendered undocumented immigrants unable to receive social services, public health benefits, and public education (chapter 6); the successful Prop. 209 in 1996 and Prop. 227 in 1998, which ended public affirmative action and ended most public bilingual education, respectively (chapter 7); and the failed Prop. 54 in 2003, which would have banned race data collection and analysis by the government (chapter 8).

In each chapter, HoSang plausibly shows how a certain account of colorblindness as the goal of a progressive society enables opponents of racial progress to wrap themselves comfortably within a rhetoric of antiracism. He refers to the dominant mode of rhetoric as "racial liberalism": he thinks of it as an ideology that supports purging society of direct racial prejudice and that promotes fairness, tolerance, individual rights, and equality before the law. Blatant racism is mostly gone in the campaigns HoSang scrutinizes, save for some of the funders of the campaigns — and when those funders come to light, the relevant campaigns can falter quickly unless the more public advocates distance themselves from racism and extremism. But the campaigns show how one can embrace a story of racial equality that facilitates a covering over of systematic and structural effects of racism, past and ongoing. This is different from the conventional story about how direct democracy gives voters the ability to express their deep-seated prejudice through the private ballot; it highlights how the discourse power of racial equality itself enables certain results that sit in some tension with a more thoroughgoing commitment to system-wide and structural racial justice.

Although each chapter is an exhaustively researched and fair-minded account of the proposition battles under the microscope, there is always room to quibble. In the opening chapter on Prop. 11 (and one might question the strategy of starting with a failed ballot measure, since failed ballot measures are the norm, not exceptional at all), readers will wonder why more attention isn't paid to anti-communism and anti-bureaucratic sentiment as factors that were probably at least as potent in leading California voters to reject bureaucratic oversight over antidiscrimination in

the workplace. The measure was clearly supported by members of the Communist Party, and backlash to administrative overreaching after the New Deal was prevalent in the state. Accordingly, the failure of Prop. 11 is not easily attributable to a discourse of racial equality that was turned in on itself. To be fair, HoSang tries to acknowledge multiple causes and explanations in each of his case studies, sometimes tying the individual campaigns at issue to larger political forces or other ballot battles during the relevant election. But his overarching agenda can sometimes suppress his willingness to pursue how these multiple causes complicate the story he wants to tell.

His account of Prop. 14, which focuses on the rise of the "homeownership" category as a political tool to stymie racial integration is fascinating and important. And it surely makes plain how certain valences of liberalism and colorblindness norms can be marshaled to cover over the link between whiteness and value — literal cash value of property. But the fact that the legislature passed the Rumford Act (which is what Prop. 14 sought to repeal) and that the courts undid Prop. 14 quickly are merely incidental in HoSang's narrative. That is curious if what you really want to tell is the complex story of the battle for racial equality in housing in California. Courts also quickly undid the anti-immigrant Prop. 187 and the anti-busing Prop. 21. Although Prop. 1 was more cleverly drafted to entrench a norm against mandatory desegregation orders (and so passed judicial muster), HoSang has some trouble with the undeniable fact that Chicanos, Blacks, and Asian-Americans had real and deep ambivalence about mandatory desegregation orders and busing. And Props 187, 209, and 227 had minority faces that were saliently attached to their sales pitches to the electorate. One could have reasonably wished for longer meditations on these complexities in the book, which are always acknowledged but also quickly brushed aside as epiphenomenal.

Ultimately, the bookends of the volume — the start and end of the monograph — are absolutely clear that this is history done with a larger purpose: to show how "racial liberalism" is a deeply limiting concept and is responsible in some part (or in large measure) for the success of conservative efforts to disrupt racial progress on many fronts. And the book has to be judged on whether it delivers on its promise there.

The argument is ambitious and sometimes quite persuasive. At its core, it is probably true that some thin versions of racial justice that focus principally on eradicating intentional discrimination and promoting a colorblind society can serve to undermine important policies that can be pursued in racial justice's name. Moreover, these "liberal" theories can have a constraining effect on the kinds of arguments the political vocabulary will deem admissible, tying the hands of progressives who want to explore more nuanced views about how racism ought to be combated. If this is what HoSang is out to prove, he does an admirable job in showing us this dynamic on the stage of direct democracy in California in the postwar period. It is an excellent application of Hartz into the intellectual history of race in America.

But there is every reason to think HoSang wants to say more than this, since this story is relatively familiar — and one most progressives have come to appreciate (even if progressives have had a great deal of trouble destabilizing the rhetorical power of this form of "racial liberalism"). If colorblindness is the mantra, you can easily lose the affirmative action debate. If your theory of racial justice focuses on some versions of individual and atomized equality, then power structures, historical patterns that have disparate impact on minority groups, and class-based subordination lose their pressing relevance. If racism is just psychological pathology as Gunnar Myrdal diagnosed it, the fight to remediate structural inequalities is rarely able to displace concerns about "reverse discrimination" against actually-existing individuals. Historians have been trying for some time to figure out *why* Myrdalian conceptions of racism have had so much staying power — and why more economic and class-based critiques of racial hierarchies have not been especially successful in postwar politics, whether in direct democracy or elsewhere. Some hypotheses include anti-communist sentiment, enthusiasm for localism, a wave of separatism among minority communities, and the failure of political institutions to be able to support and maintain interracial alliances, which might have contributed to unseating the Myrdalian picture. But here is perhaps where we might recruit HoSang to make an intervention: it is his view that the Myrdalian conception of racism

supports and underwrites what he calls "political whiteness," which helps account for its ongoing success and power.

The centrality of "political whiteness" and its rootedness in racial liberalism as the primary explanation for California's racialized proposition battles in the postwar period is HoSang's most controversial claim; and it is one in which he has a substantial investment. Yet it leaves the reader wanting for two main reasons. In the first place, the theory is extremely difficult to falsify. Although "political whiteness" is an organizing principle of the book, its definition remains somewhat vague throughout. Here is how HoSang describes it in the Conclusion: "a formulation of political subjectivity, identity, and community in which whiteness functions as an absent referent within the putatively neutral and abstract terms of liberalism" (p. 266). But this is argument by fiat: it is pretty difficult to identify something that is by definition absent. Worse, it seems to disable one from ever making a good faith judgment that some approaches to racial justice are, in fact, inconsistent with a more basic commitment to liberalism (or some other supervening good). It seems hard to understand how one could have a principled opposition to a civil-rights-community preferred outcome in any policy space without being called "politically white."

For example, the debate about affirmative action can't really be summarized adequately in an intellectually serious way as between the real champions of racial progress on the side of affirmative action and the "politically white" who oppose it. It must be possible to disagree on the merits of what racial justice requires on many questions without having to take on the moniker of "whiteness" for disagreeing with civil rights community orthodoxy. Since "political whiteness" is by definition an "absent referent," it seems very difficult to see how white people could ever cleanse themselves of such a charge. Nonwhites in the book who agree with the "politically white" position are almost always given the benefit of the doubt (as misguided but in good faith), while most whites who oppose the civil rights community are essentially accused of false consciousness of a sort. That doesn't seem quite plausible, even if it is likely that many oppositional whites do engage in false consciousness on a range of issues. Is it really false consciousness (or "whiteness") to care

about colorblindness as an ideal and resist affirmative action accordingly? Sometimes, and sometimes not. Is it really false consciousness to care about your home's property value and to ignore or to subordinate the racially segregating effects of your policy choice to protect your home's value? Sometimes, and sometimes not. Is it false consciousness to want to reserve state resources for legal residents in a time of fiscal austerity, even if such a policy has undeniable racialized and nativist implications? For some, and not others, I suspect. It seems more confounding than clarifying to lump all the complexity in these policy debates into mere vehicles of "political whiteness."

There is a related problem for HoSang in operationalizing "political whiteness" as a frame of analysis. He doesn't embrace a conventional "median voter" or "pivotal voter" theory, which would instruct us to investigate the group of voters at decisional threshold who are actually necessary to a direct democracy result and assess how their decisions get made. By narrowing the inquiry this way, it might at least be possible to disentangle those who have good faith views from those whose views are driven by what HoSang is calling "political whiteness." But HoSang doesn't commit to how many citizens in a given majority (a majority of the majority is another possible contender for operationalizing a falsifiability test) have to embrace the "absent referent" for the theory to be vindicated in any given proposition battle. It is, therefore, very hard to know how formidable a force "political whiteness" is and how we ought to think about how it does its work. Again, we can't really falsify the theory by any metric and that should give us pause.

It could be that this is getting too social sciency: HoSang's method is largely focused on a history of rhetoric — and the book doesn't need formalistic measures or coefficients to make its core point about the discourse power of racial liberalism. Racial liberalism contains the seeds of racial conservatism because its rhetoric is ultimately too anemic to attack very malignant forms of structural racism. To make this point, however, it is not at all clear that the framing of "political whiteness" is especially necessary or productive. This is the second reason that the main thrust of the book might disturb many readers. For a book so attuned to the discourse power of certain modes of argument

and branding associated with approaches to racial justice, *Racial Propositions* veers into a kind of rhetoric that is unlikely to work to destabilize the norms that racial liberalism has been complicit in supporting. To be sure, reifying "whiteness," focusing on "apartheid" in California, attacking narratives of "racial innocence," and elaborating on "Blue State Racism" — all of which are invoked somewhat promiscuously in the volume — all speak to important truths. And racial progressives (whom I suppose we can contrast with HoSang's nomenclature of racial liberals) surely have reasons to doubt that their rhetorical strategies focusing on anti-subordination, structural racism, reparation, and the incidents of economic structure with racialized effects can be successful and convincing in today's political climate.

Yet the book leaves the reader with no doubt that much of racial progressives' failures over the decades in postwar California had as much to do with messaging as message. With cross-cutting interests and internal feuding (and without full support from the Democratic Party), the opposition groups to Props. 187 and 209, for example, played their cards quite badly. One watches the civil rights community bungle proposition battle after proposition battle, leaving those of us sympathetic to progressive politics wondering why progressives can't hire better consultants and design better campaigns that resonate with the populace. HoSang's "political whiteness" argument is one explanation since there may be no argument that can resonate with those in thrall to political whiteness — but something less sinister might be as much to blame: bad organizing, bad branding, bad centralizing, and bad discipline in keeping interest groups focused and united. When the civil rights community runs a competent campaign with a master tactician like David Axelrod at the helm and the deep pockets of the Democratic Party funding the efforts, as it did against Ward Connerly's Racial Privacy Initiative in Prop. 54, it can succeed — "Blue State racism," notwithstanding. True enough, in the Prop. 54 battle, civil rights groups didn't promote a deeper conversation about the dangers of racial liberalism and the need for a more structural approach to combating racism. Yet maybe that choice was not a succumbing to "political whiteness." Rather, it might just have been good pragmatic politics, leaving the larger conversation about race for another day.

In the final analysis, when that larger conversation happens, I suspect that the progressive tradition and its rhetorical arsenal developed over the postwar decades remains the best hope for overcoming the dominant paradigm of racial liberalism in the long term. The rhetorical baggage of "political whiteness" that HoSang prefers, by contrast, will likely remain more alienating and balkanizing to the very large group of liberals he is surely hoping to influence with his rhetorical choices. Ultimately, though, I am no marketing expert. If large groups of people find HoSang's book as stimulating and engaging as this reader did, he might be able to break the stasis of the racial modus vivendi in California.

It is probably the case that after Prop. 8 few people think of California as at the frontier of civil rights in this country. Professor HoSang helpfully reminds us that this is not news but a pattern. Whether he will succeed in changing that pattern in the direct democracy politics of the future is really the ultimate test of his theory's power. And the jury is still out, of course. ✯

THE GREAT DISSENTS OF THE "LONE DISSENTER": Justice Jesse W. Carter's Twenty Tumultuous Years on the California Supreme Court

DAVID B. OPPENHEIMER AND ALLAN BROTSKY, EDITORS

Durham: Carolina Academic Press, 2010
lvi, 225 pp.

REVIEW ESSAY BY MICHAEL TRAYNOR*

"The thing that means more to me than anything else is being able to transmit to posterity through my decisions, both majority and dissenting, something that will be a guide to the future. . . . A decision that stands for all time means something. If a hundred years from now a lawyer gets up in court and says, 'This very lucid and illuminating decision was written by Mr. Justice Carter in 1955,' well, I won't be there to hear it, but it is the thought that a hundred years after I am dead and forgotten, men will be moving to the measure of my thoughts."[1] So spoke Jesse W. Carter, associate justice of the Supreme Court of California for twenty years (1939–1959), in his oral history, conducted by Corinne Lathrop Gilb.[2]

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1 Oral History of Jesse W. Carter, 4 California Legal History 298-299 (2009).

2 *See* Corinne Lathrop Gilb, *Justice Jesse W. Carter, An American Individualist*, 29 Pacific Historical Review 145, 157 (1960). Justice Carter's oral history was conducted in 1955.

In his essay on dissenting opinions,[3] Justice Carter stated, "The right to dissent is the essence of democracy — the will to dissent is an effective safeguard against judicial lethargy — the effect of a dissent is the essence of progress. . . . The majority opinion is, in form and substance, the collective, composed and edited view of the majority. In a dissenting opinion, however, the judge is on his own, and can express his personality, his philosophy and his uncensored convictions."[4]

Justice Carter was understandably proud of his opinions and their treatment in the Supreme Court of the United States, saying in his oral history that "I've had more of mine upheld than any other member of the Supreme Court of California. Not as many as I would like to have had upheld, but more than any of the rest of them."[5] He also furnished for his oral history a "List of Cases in which I Have Dissented Where the Supreme Court of the United States Has Agreed with My Dissent and Reversed the Supreme Court of California."[6]

In their new book, *The Great Dissents of the "Lone Dissenter": Justice Jesse W. Carter's Twenty Tumultuous Years on the California Supreme*

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[3] Jesse W. Carter, *Dissenting Opinions*, 4 Hastings L.J. 118 (1952).

[4] *Id.* at 118-119. His contemporary on the Supreme Court of Pennsylvania, Justice Michael A. Musmanno, also wrote an essay on dissenting opinions, stating, "Once it is proclaimed officially that a majority cannot err, you begin to encourage absolutism. And it has been demonstrated beyond all imagining of contradiction that when criticism is gagged, opposition suppressed, and constructive advice silenced, absolutism sprouts, for power feeds upon power, — and the tree of tyranny will soon bear its poisonous fruit of oppression." Michael A. Musmanno, *Dissenting Opinions*, 6 Kan. L. Rev. 407, 416 (1958). *See also* Abraham E. Freedman, *The Dissenting Opinions of Justice Musmanno*, 30 Temple L. Q. 253 (1957); Melvin M. Belli, *Book Review*, 4 U.C.L.A. L. Rev. 164 (1956) (reviewing *Justice Musmanno Dissents, by Michael A. Musmanno, with introduction by Dean Roscoe Pound*, 1956).

[5] Oral History, *supra* note 1, at 331.

[6] The eight cases listed are Gospel Army v. City of Los Angeles, 331 U.S. 543 (1947); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Rochin v. California, 342 U.S. 165 (1952); Anderson v. Atchison, Topeka & S.F. Ry. Co., 333 U.S. 821 (1948); Garmon v. Building Trades Counsel [sic] [Council] of San Diego, 353 U.S. 26 (1957); California v. Taylor, 353 U.S. 553 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); and Chessman v. Teets, 354 U.S. 156 (1957). He added, "In only one case has the Supreme Court of the United States reversed the Supreme Court of California where I prepared the majority opinion. This was *Richfield Oil Corp. v. St. Bd. Equalization*, 329 U.S. 69 (1946). . . ." Oral History, *supra* note 1, at 332-333.

Court, Professors David Oppenheimer and Allan Brotsky, editors, and their scholarly chapter authors, have made a valuable contribution to legal history as well as to judges, scholars, lawyers, and others interested in the dynamics of judicial decision-making, the relevance to modern law and life of a justice's dissents from over fifty years ago, and, in particular, the life and views of Justice Carter. The book begins with their informative preface, which includes a succinct summary of the material to follow; a foreword by Justice Joseph R. Grodin; a biography of Justice Carter by J. Edward Johnson[7]; an essay by Justice William J. Brennan, Jr., *In Defense of Dissents*[8]; and an essay by Judge William A. Fletcher, *Dissent.*[9] It then continues with thirteen chapters, each by a separate author. Each chapter discusses Justice Carter's dissent in a particular case and reproduces the salient portions or all of the dissent under discussion.[10] The book provides

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[7] Johnson's essay, *Jesse W. Carter: Seventy-Fifth Justice, September 12, 1939–March 15, 1959*, is reprinted in the book from his History of the Supreme Court Justices of California, 1900–1950, vol. II (1966).

[8] Justice Brennan's essay is based on his Mathew O. Tobriner Memorial Lecture at Hastings College of the Law on November 18, 1985 and is also published in 37 Hastings L.J. 427 (1986).

[9] Judge Fletcher's essay is based on his remarks on February 26, 2008, at the Jesse Carter Memorial Lecture Series at Golden Gate University School of Law and is also published in 39 Golden Gate U. L. Rev. 291 (2009).

[10] Susan Rutberg, *Justice Carter's Role in the Caryl Chesssman Cases: Due Process Matters*; Rachel A. Van Cleave, *Justice Carter's Dissent in* People v. Gonzales: *Protecting Against the "Tyranny of Totalitarianism;"* Helen Y. Chang, *Justice Carter's Dissent in* People v. Crooker: *An Early Step Towards Miranda Warnings and the Expansion of the Fifth Amendment to Pre-Trial Confessions*; Mark Stickgold, *"The Hysteria of Our Times": Loyalty Oaths in California*; Frederic White, *Justice Carter's Dissent in* Hughes v. Superior Court of Contra Costa County: *Harbinger of the 60s Civil Rights Movement and Affirmative Action?*; David Zizmor & Clifford Rechtschaffen, Payroll Guarantee Association, Inc. v. The Board of Education of the San Francisco Unified School District: *Denying Hecklers the Right to Veto Unpopular Speech*; Jessica L. Beeler, *Justice Carter's Dissent in* Takahashi v. Fish & Game Commission: *Taking a Stand Against Racial Discrimination;* Marci Seville, *Justice Carter's Passionate Defense of Workers' Rights: Challenging the Majority's "Legal Legerdemain;"* Michael A. Zamperini, *Justice Carter, Contributory Negligence and Wrongful Death: A Call to Get Rid of a "Bad Law with Bad Results;"* Marc H. Greenberg, Kurlan v. CBS: *Justice Carter's Prescient Dissent — A Glimpse into the Future of Copyright Protection in the Entertainment Industry*; Markita D. Cooper, *Justice Carter's Dissent in* Gill v. Hearst Publishing Co.: *Foreshadowing Privacy Concerns for an Age of Digital Cameras, Video Voyeurism, and Internet*

two handy appendices, the first, *Statement of Justice Jesse W. Carter of the Supreme Court of California Relative to His Refusal to Sign the So-Called State Loyalty Oath*, and, the second, an introduction by Janet Fischer, to *The Jesse Carter Collection,* a valuable resource at Golden Gate University School of Law with its own Web site.[11] At the end, the editors provide a detailed fifteen-page index, which also guides the reader to the pages on which the texts of Justice Carter's dissents are noted.

In his foreword, Justice Grodin aptly states: "There is a pattern to his dissents. They reflect a strong willed commitment to a constellation of values that include self reliance, individual liberty, procedural fairness, distrust of the state, respect for juries, protection of the underdog, empathy for working people, and cautious support for unions and collective bargaining. It is a constellation which cannot easily be characterized as 'liberal' or 'conservative,' but against the backdrop of Carter's life experiences, the constellation takes shape as the expression of a fiercely independent spirit."[12]

In his Carter Lecture, *Dissent*, Judge Fletcher identifies and explains the various functions of dissent, including drafting a dissent that "ends up persuading the majority"; making "the majority opinion better"; keeping "the majority honest"; predicting "the legal and practical consequences of the majority opinion"; making "clear to the losing party or parties that their arguments were heard and understood"; calling "for law reform by the legislature"; and appealing to "the judgment of other judges."[13] The final function, and, for purposes of the Oppenheimer and Brotsky book, the most important one, is appealing "to the judgment of a later time. . . . Golden Gate University Law School is justly proud to count among its alumni Justice Carter, a dissenter in this proud tradition."[14]

Excess; Michele Benedetto Neitz, *The Plight of the Derivative Plaintiff: Justice Carter's Dissent in* Hogan v. Ingold; and Janice Kosel, *Carter's Dissent in* Simpson v. City of Los Angeles: *A Precursor to the Animal Rights Movement.*

[11] http://www.ggu.edu/lawlibrary/jessecarter (last visited Dec. 1, 2010).

[12] Joseph R. Grodin, *Foreword,* in The Great Dissents of the "Lone Dissenter": Justice Jesse W. Carter's Twenty Tumultuous Years on the California Supreme Court (David B. Oppenheimer & Allan Brotsky, eds., 2010) xix, xx [hereinafter Oppenheimer & Brotsky].

[13] Fletcher, *supra* note 9, Oppenheimer & Brotsky at li-lv.

[14] *Id.* at lvi.

The Oppenheimer and Brotsky book emphasizes Justice Carter's prescience and the prophetic quality of his "great dissents." This emphasis honors Justice Carter's vision of posterity and contributes to the timeliness of the book and the relevance today of considering Justice Carter's dissenting views.

For nineteen of Justice Carter's twenty years on the Supreme Court of California (1940–1959), he and my father, Justice and later Chief Justice Roger J. Traynor, were colleagues, sometimes in the majority and sometimes in separate concurring or dissenting opinions.[15] In 1948, when the Supreme Court of California, by a 4–3 vote, held California's antimiscegenation law unconstitutional in *Perez v. Sharp,*[16] I was thirteen. I remember generally the controversy over that case and the importance of securing four votes to overturn California's racially discriminatory law. My father wrote the majority opinion in which Chief Justice Gibson and Justice Carter concurred, with Justice Edmonds concurring in the judgment; Justices Carter and Edmonds each wrote separate concurring opinions; and Justices Shenk, Spence, and Schauer joined in a dissenting opinion.[17]

In expressing "his personality, his philosophy and his uncensored convictions,"[18] Justice Carter frequently used strong language. "It caught the eye of the press and he became widely known because of it."[19] It also caught the eye of Dean Roscoe Pound who wrote, "In the last ten volumes

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[15] *See, e.g.,* Frederic White, *Justice Carter's Dissent in* Hughes v. Superior Court of Contra Costa County*: Harbinger of the 60s Civil Rights Movement and Affirmative Action?,*" OPPENHEIMER & BROTSKY at 59, 62 at nn.11, 12, noting that Justice Carter wrote one of the two dissents and that Justice Traynor wrote the other. *See also* note 21, *infra*.

[16] 32 Cal.2d 711 (1948).

[17] I do not have a recollection, however, of any conversations with my father about Justice Carter or his opinions. When I gave the Carter lecture in 2006 on the subject of judicial independence, I referred to Justice Carter's independent spirit being "attended by a love of the outdoors" and said "I have a distant memory of once visiting his ranch in San Anselmo with my family when I was very young and of our friendly, burly, and gracious host." Michael Traynor, *Judicial Independence: A Cornerstone of Liberty*, 37 GOLDEN GATE U. L. REV. 487, 489 (2007) (Jesse Carter Distinguished Lecture Series).

[18] Carter, *supra* note 3, 4 HASTINGS L.J. at 119.

[19] J. Edward Johnson, *Jesse W. Carter, Seventy-Fifth Justice, September 12, 1939–March 15, 1959*, in OPPENHEIMER & BROTSKY at xxi, xxv.

of the California Reports (30-39 Cal.2d) one of the justices writes a dissenting opinion in an average of six cases to a volume and one case in eighteen of the total number of cases reported for six years."[20] He then said, "But this is the least of the matter. We are told that in one of them, 'The people have the right to expect that the members of this court will possess the courage and integrity necessary to declare unconstitutional any legislation which contravenes the rights of the people as set forth in the equal protection clauses of both constitutions. This court should invoke these constitutional guarantees to protect the rights of those who are wronged by such legislation and *should not be servile to* any *interest or influence regardless of the power it wields.*'"[21]

Pound added, "Perhaps the high-water mark of judicial imitation of forensic advocacy is reached by the same judge . . . in twenty-two pages of vigorous dissent [in which] we are told that the majority 'reached a new low in search for a reason to reverse a judgment' (p. 823), that there was 'not a scintilla of reason or common sense in such a holding' (p. 824), that it was 'so lacking in consideration of the realities of the situation that it may be said to be naïve' (p. 824), that 'the reactionary philosophy of the majority opinion is so out of harmony with present day concepts

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20 Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 795 (1953) (italics are Pound's).

21 *Id.* at 795-796 (italics are Pound's), citing Justice Carter's dissenting opinion in Werner v. Southern California Newspapers, 35 Cal.2d 121, 129 (1950). On the majority opinion in *Werner, see* Harry Kalven, Jr., *Torts: The Quest for Appropriate Standards*, 53 Calif. L. Rev. 189, 196-197 (1965): "In *Werner* the issue is the constitutionality of the California retraction statute which limits a plaintiff to special damages in a libel action against radio stations and newspapers unless he has first requested and has failed to receive a retraction or correction. In upholding the constitutionality Chief Justice Traynor reviews with sympathy various criticisms of the law of libel. He concludes that the arbitrariness of the distinction between libel and slander, and consequently between the occasions where general damages are or are not permitted, and the dangers of excessive recoveries under general damages where in fact there has been no injury are sufficient considerations to provide a basis for reasonable legislative judgment restricting the cause of action for libel. Further, the tendency of the law of libel to inhibit the free flow of communication is a factor to which the legislature may properly give weight. . . . [T]he device for limiting the action, employed by the legislature in *Werner* makes some sense; it substitutes, in effect, retraction for general damages. . . ."

of trial procedure that it resembles some of the skeletons of the dead past' (p. 825), and that 'it should be apparent to every unprejudiced mind, as it is to me, that the majority in seizing upon this motion as the sole ground for a reversal of the judgment in this case, is simply creating a mythical error which exists only in hypertechnical illusion' (*Ibid.).* Finally he sums up: 'In essence what these four judges have done here is to blindly announce a court-made rule which not only finds no support in history, precedent, experience, custom, practice, logic, reason, common sense or natural justice but is in utter defiance of all of these standards" (p. 826).[22]

Shortly after Pound published his critique, Justice Carter explained to an audience of lawyers that "I claim the privilege of using language appropriate to the occasion to express my view and I am not disposed to permit even dean emeritus Roscoe Pound of the Harvard Law School to tell me what language I should use when depicting the gross injustices which may result from a majority decision of the Supreme Court of California. . . . A decision which is only a mild departure from settled principles should not be dealt with the same as one which outrages justice and lacks even a semblance of reason or common sense to support it."[23]

In general, the dissents of Justice Carter that are collected in the Oppenheimer and Brotsky book do not seem unduly heated in their language. In one, he went so far as to say, "It is the old story of the will of the people and the Legislature being defeated by reactionary court decisions;" the statute's "nullification by this court is not only a travesty on social justice but an insidious abuse of judicial power."[24] Although the collected dissents are forceful in their reasoning and expression, and

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22 *Id.* at 796, quoting from Justice Carter's dissenting opinion in Sanguinetti v. Moore Dry Dock Co., 34 Cal.2d 812, 823-845 (1951). For further discussion of the Pound critique and ensuing correspondence between Carter and Pound, *see* Johnson, *supra* note 19, OPPENHEIMER & BROTSKY at xxv-xxvii.

23 Jesse Carter, Address at The Lawyers' Club of San Francisco, *Recent Trends in Court Decisions in California* (Mar. 18, 1953), 5 HASTINGS L.J. 133, 143 (1954). *See also* Johnson, *supra* note 19, OPPENHEIMER & BROTSKY at xxvii.

24 Hawaiian Pineapple Co. Ltd. v. Indus, Accident Comm'n, 40 Cal.2d 656, 668 (Carter, J., dissenting), discussed and quoted in Marci Seville, *Justice Jesse Carter's Passionate Defense of Workers' Rights: Challenging the Majority's 'Legal Legerdemain,'* OPPENHEIMER & BROTSKY at 97, 109-110.

readers of them may well have different views, overall, they do not seem extreme to me. Perhaps that helps explain why these particular dissents had lasting power and why Oppenheimer and Brotsky and their colleagues identified them as "great dissents."

A dissenting justice's language may have a current effect on collegiality among fellow justices. Justice Ruth Bader Ginsburg, in her influential essay, *Remarks on Writing Separately*,[25] suggests the exercise of restraint "before writing separately."[26] In her Madison Lecture, *Speaking in a Judicial Voice*,[27] she questioned "resort to expressions in separate opinions that generate more heat than light,"[28] citing Dean Pound.[29]

It is not clear whether — if at all — and, if so, to what extent Justice Carter's language, which Justice Grodin describes as "often vitriolic,"[30] impaired collegiality on his court. In his essay, J. Edward Johnson concludes that "Carter's associates on the Court took his language in good part. It did not lessen cordial personal relations or make for a climate of hostility. The purports of Carter's views were respected on their own merits. His associates were impressed with the lengths to which Carter went in study and research, his phenomenal memory in oral discussions, citing book, page, line of cases he relied upon, and calling to their attention verbatim words they had uttered and written. This, with the fact that the Supreme Court of the United States might well agree with him, inspired respect and esteem, even in the heat of the battles."[31] Indeed, at Justice Carter's memorial service, his colleague, Justice B. Rey Schauer, in his response for the Court, said that although Justice Carter was "[c]austic

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[25] Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133 (1990). *See also* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 131 U. Pa. L. Rev. 1639 (2003); Michael Traynor, *Judge Richard Arnold: His Collegiality and Concurring Opinions*, 58 Ark. L. Rev. 545, 547 (2005) ("Typically, a concurring opinion by Judge Richard Arnold is deferential to his colleagues and makes a single point, briefly and clearly").

[26] Ginsburg, *supra* note 25, 65 Wash. L. Rev. at 134.

[27] Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y. U. L. Rev. 1183 (1992).

[28] *Id.* at 1194.

[29] Pound, *supra* note 20.

[30] Grodin, *supra* note 12, Oppenheimer & Brotsky at xix.

[31] Johnson, *supra* note 19, Oppenheimer & Brotsky at xxvii.

in dissent, he was jovial in companionship. Generous in giving friendship, he cherished his friends."[32]

Apart from any impact it may have on current collegiality, the language of a dissent bears on the public perception of judges. As Judge Patricia Wald has written, "Although judges may indeed develop immunity to internecine barbs over the years, the public perception such barbs produce can only demean courts."[33] Giving numerous examples, she continues: "Regular dissenters such as Justice Scalia are particularly prone to stylish stabs. . . . Lively reading, perhaps; good for the courts, no."[34]

Although they would scarcely agree on substance (if at all), both Justices Carter and Scalia when dissenting reflect their passionate convictions that the majority opinion is wrong. Beyond the expression of uncensored convictions about the law, however, Justice Scalia's robust and frequent displays of sarcasm and scathing remarks about other people, including his colleagues, make Justice Carter's language look tame.

The language of a dissent may also bear on its posterity. In Justice Ginsburg's words, "The most effective dissent, I am convinced, 'stand[s]

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[32] B. Rey. Schauer, *Response for the Court*, at the memorial service for Justice Jesse W. Carter, May 6, 1959, *available at* http://www.ggu.edu/lawlibrary/jessecarter/memorial (last visited Dec. 1, 2010).

[33] Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1382 (1995), citing former Deputy Solicitor General Philip Allen Lacovara, *Un-Courtly Manners: Quarrelsome Justices are no Longer a Model of Civility for Lawyers*, 80 ABA J. 50, 50 (Dec. 1994).

[34] Wald, *supra* note 33, at 1383; *see* Richard Delgado and Jean Stefancic, *Scorn*, 35 Wm. & Mary L. Rev. 1061, 1077 (1994): "In the short time he has been on the bench, Justice Antonin Scalia has distinguished himself for his quick tongue and acerbic wit. In two cases having to do with environmental standing, he appears to have crossed the line between lively language and impermissibly caustic speech," citing and quoting from Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) and Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). For a selection of Justice Scalia's views, *see* Kevin A. Ring (ed.), Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice (2004). For a generally complimentary view, *see* Yury Kapgan, *Of Golf and Ghouls: The Prose Style of Justice Scalia*, 9 Legal Writing J. Legal Writing Inst. 71, 74 (2003): "I argue that dissenting opinions are particularly suited to Scalia's style as well as his message — his sharp wit, biting critiques, elaborate use of metaphors, and preference for bright-line rules find refuge in dissent." The author also compares and contrasts Justice Scalia's style with Justice Musmanno's. *Id.* at 106-108. *See also* note 4 *supra.*

on its own legal footing'; it spells out differences without jeopardizing collegiality or public respect for and confidence in the judiciary."[35] Her forceful and reasoned dissent in *Ledbetter v. Goodyear Tire & Rubber Co.,*[36] which led to the Lilly Ledbetter Fair Pay Act of 2009,[37] is a recent and famous example.[38]

For appellate judges in other cases, whether in California or other jurisdictions, who might be considering a dissenting opinion by Justice Carter as the basis for an advance in the law or the limitation of a precedent, his sometimes heated expression of his uncensored convictions is a warning signal. For example, Justice "Scalia's penchant for writing in his own voice may likewise explain his difficulty at garnering consensus."[39] Justice Carter's similar penchant may also help explain his reputation as the "lone dissenter."

Like appellate judges, lawyers advocating such an advance or limitation, are also apt to be circumspect in quoting from Justice Carter's dissenting opinions in their briefs and arguments. Scholars likewise might be circumspect in their articles and books. One hopes, however, that judges, lawyers, and scholars will heed Justice Grodin's advice, "If one focuses upon substance, rather than style, Jesse Carter's position on the frontier of legal change is clearly discernible, and quite remarkable."[40]

It is puzzling, however, that a justice for whom influence on posterity meant more than anything else, would, by his sometimes heated language, create a potential impediment to the persuasiveness and effectiveness of his dissenting opinions on future courts. Justice Carter of course had a right to express himself vigorously. The question is whether he also expressed himself persuasively to future audiences, even if one might

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[35] Ginsburg, *supra* note 27, 67 N.Y. U. L. Rev. at 1196.

[36] 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting, joined by Justices Stevens, Souter, and Breyer).

[37] Pub. L. No. 111-2, 123 Stat. 5 (2009).

[38] Judge Fletcher discusses her dissent more fully in Fletcher, *supra* note 9, Oppenheimer & Brotsky at lv. Another example of a powerful separate opinion that may persuade a future audience is Justice Carlos Moreno's concurring and dissenting opinion in Strauss v. Horton, 46 Cal.4th 364, 483, 500 (2009) that "Proposition 8 is not a lawful amendment of the California Constitution."

[39] Kapgan, *supra* note 34, 75 Wm. & Mary L. Rev. at 98.

[40] Grodin, *supra* note 12, Oppenheimer & Brotsky at xx.

agree with his conclusions about how the cases in which he dissented should have been decided.

Justice Carter must have understood that posterity necessarily involves an audience that has not grown accustomed to him, as his colleagues were while engaging in the give and take of collegiate decision-making. Such an audience is also selective, searching primarily for precedents and paying little attention to dissents unless they are tellingly on point and persuasive years after they were written. Recognizing that he could not persuade a current majority while seeking to move others in the future to the measure of his thoughts, he might more often have considered language that could persuade not merely a dissenting colleague or two but instead a future majority, including the crucial deciding vote.

Justice Carter also knew how to forge a majority opinion, to do what is necessary to secure the fourth and critical vote, and to persuade current colleagues. His persuasiveness as the author of a majority opinion continues. In a recent securities case, for example, the Supreme Court of the United States cited approvingly his famous opinion for the Supreme Court of California in the tort case of *Summers v. Tice*:[41] "Indeed, an inference at least as likely as competing inferences can, in some cases, warrant recovery. See *Summers v. Tice* . . . (plaintiff wounded by gunshot could recover from two defendants, even though the most he could prove was that each defendant was at least as likely to have injured him as the other)."[42] It bears asking whether Justice Carter's dissenting opinions might have had even more influence on future majorities had he written less heatedly.

No matter how lucid and illuminating a judge's opinions may be, if they come with a heated language discount they are less likely to be influential.

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41 33 Cal.2d 80 (1948).

42 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 324 n.5 (2007) (Ginsburg, J.) (preliminary print). I note in passing that Justice Scalia, who concurred in the judgment, said, "*Summers* is a famous case, however, because it sticks out of the ordinary body of tort law like a sore thumb." Justice Scalia, however, cited no authorities for his opinion. By contrast, and as the majority opinion stated, 551 U.S. at 324 n.5, "Since the publication of the Second Restatement [of Torts] in 1965, courts have generally accepted the alternative-liability principle [of *Summers v. Tice*, adopted in] § 433B(3), while fleshing out its limits" (citing Restatement (Third) of Torts § 28(b), Comment *e*, p. 504 (Proposed Final Draft No. 1, Apr. 6, 2006). Appellate lawyer Sanford Svetcov kindly referred me to the *Tellabs* case.

Randall T. Shepard, Chief Justice of Indiana, has wisely advised that "a carefully thought-out and appropriate dissent can 'salvage for tomorrow the principle that was sacrificed or fotgotten today . . . [and] keep the democratic ideal alive in days of regression, uncertainty, and despair.'"[43]

The model of careful reasoning, craftsmanship, and language, however, does not preclude forceful expression or require mild or sedate words, especially in a dissent. As Judge Wald writes, "It is, of course, possible to write a calm, moderate, restrained dissent, but the question arises: if the difference between the majority and dissent is so mild, why write at all? Logically, a dissent can usefully point out better alternatives to the majority's result or reasoning, or dangers in the development of the law which, while not earthshaking, are nonetheless worth noting. In the main, such workmanlike dissents do not, however, excite or incite changes in judicial thinking. A sense of urgency and of impending doom is almost a *sine qua non* of the dissenting voice."[44]

Justice Carter was an important, indeed, heroic voice for his time and for the future. Professor Leon Green, a prominent torts scholar, described him as "one of the great liberal judges of the century"[45] and suggested, "It may be, as has been true of other great common law judges, that Judge Carter will only gain his full stature after his death."[46] Daniel S. Carlton, in an eloquent tribute to his former law colleague, which reviewed Justice Carter's extraordinary career as a trial and appellate lawyer, district attorney, city attorney, state senator, and justice, concluded, "All of us are

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43 Randall T. Shepard, *Perspectives: Notable Dissents in State Constitutional Cases: What Can Dissents Teach Us?*, 68 Albany L. Rev. 337, 342 (2005), quoting from William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 Judicature 104 (1948).

44 Wald, *supra* note 33, 62 U. Chi. L. Rev. at 1413.

45 Leon Green, *"He Never Declined to Do Battle for His Convictions*, 10 Hastings L.J. 359, 363 (1959).

46 *Id.* at 369. Green also commented, "His advocacy breathes the atmosphere of the trial court, a sense of outrage at the injustice done his client. From no other source could he have acquired the strong words of his dissenting opinions. In the Supreme Court when he had made up his mind as to the justness of the cause, his advocacy for the position he took assumed all the color of his trial experience. Apparently he had no greater joy than springing to the kill of some error he found in the opposing position. He was no mere jabber; he swung with all his might." *Id.* at 364.

a little more secure in our rights and homes by reason of the devotion of Judge Carter to our cause."[47] Professor Susan Rutberg, in her chapter on Justice Carter's role in the Chessman cases, notes that "Carter's reminder to his colleagues that all defendants, regardless of public opinion, are entitled to due process of law seems even more relevant today, when many court watchers believe that result-oriented judges are all too frequently the norm."[48] Dean Frederic White, in his chapter on Justice Carter's dissent in *Hughes v. Superior Court,*[49] concludes: "George Bernard Shaw once wrote, 'all progress depends on the unreasonable man.' Justice Carter's judicial colleagues may often have thought that some of the opinions he expressed in dissents were intractable, stubborn and unreasonable, perhaps all three. Perhaps. But he was right."[50]

With the Oppenheimer and Brotsky book at hand, appellate judges who are considering a dissent will have both an informed and useful reference to the vital role that dissenting opinions play in our jurisprudence and a striking example of a forthright and powerful dissenter. So will lawyers and scholars as well as members of the public who take an interest. Professors Oppenheimer and Brotsky and their fellow authors deserve praise for their timely analysis of Justice Carter's dissenting views and his influence on the law. They also strengthen Justice Carter's welcome place in the pantheon of great state supreme court justices. ★

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[47] Daniel S. Carlton, "*He Died As He Lived — Fighting*", 10 HASTINGS L.J. 353, 359 (1959). Carlton also noted that Justice Carter's "language was strong and perhaps misunderstood. However, he always maintained a great respect and personal affection for his associates on the court; perhaps even to a greater degree than they realized." *Id.* at 357-358. Before Justice Carter joined the Supreme Court of California, he was an extraordinarily able lawyer who contributed to the development of California law. *See, e.g.,* Douglas R. Littlefield, *Jesse W. Carter and California Water Law: Guns, Dynamite, and Farmers, 1918–1939*, 4 CALIF. LEGAL HISTORY 341 (2009).

[48] Susan Rutberg, *Justice Carter's Role in the Caryl Chessman Cases: Due Process Matters*, OPPENHEIMER & BROTSKY at 3, 15. She also refers to recent critiques of the death penalty. For a recent op-ed, *see* Michael Traynor, *The Death Penalty — It's Unworkable*, LOS ANGELES TIMES, Feb. 4, 2010.

[49] 32 Cal.2d 850 (1948), *affirmed*, 339 U.S. 460 (1950); White, *supra* note 15, OPPENHEIMER & BROTSKY at 69.

[50] *Id.* at 69, citing George Bernard Shaw, "Man and Superman: Maxims for Revolutionists" (1903).

A LEGAL HISTORY OF SANTA CRUZ COUNTY:
An Account of the Local Bench and Bar Through the End of the Twentieth Century

ALYCE E. PRUDDEN, EDITOR

Santa Cruz: The Museum of Art & History
@ the McPherson Center, 2006
xiv, 161 pp., ills.

REVIEW ESSAY BY LARRY E. BURGESS*

For those seeking a detailed account of Santa Cruz County's legal history from the Bear Flag Republic through 2006, they have no further to look than to the exhaustive work of eight authors consisting of five attorneys, two librarians, and one judge. Their combined efforts provide insights into the people, cases, court structure, legal environment, and social issues that took place in the county during 160 years.

Reflective of similar themes in California's original counties, the law as practiced before statehood was rooted in Spanish and Mexican tradition. With the onset of the Gold Rush, the legal traditions of Spain and Mexico — adapted over the years by the *Californios* — and the laws of the United States began to conflict. This continued until the time of the Civil War when Santa Cruz County, the authors note, experienced sweeping changes in the procedures and practice of law reflective of the imposition of American legal tradition. "Momentous change" was to follow in the second half of the twentieth century.

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In presenting their research about people, judicial structure, and major trials, the authors set the context of each chapter with a discussion of the social, economic, and political issues confronting America. Such a construct serves well to understand the local events in Santa Cruz County. Their usage of oral history from participants in the legal world provides testimony not otherwise obtainable. The authors began their book in mid-1998. They are quick to add that their effort must also be seen as a challenge to others in the legal community to encourage and create further documentation of the unfolding chapters in the legal history of Santa Cruz County.

A survey of the decades covered reveals a diverse picture of the law. Santa Cruz County harbored many pioneers of distinction who served as *alcalde*, the single most important civil officer in early California before statehood. The *alcalde* played a "critical role in the Mexican system of colonial government, carrying out executive, legislative, and judicial functions." A few qualifications were indispensible — honesty, ability, and literacy. Among those serving as *alcaldes* were Joaquín Castro in the 1830s (a member of the De Anza party in 1776); Walter Colton in 1846 (who introduced the jury system in the county and helped form the California Constitution); and José Antonio Bolcoff in the 1840s (a Russian who married one of Castro's daughters).

Noting the unsettled conditions in California during the aftermath of the war with Mexico, 1846–1848, and especially before statehood in 1850, the authors quote historian Sandy Lydon who wrote, "The Americans rode in on their law books and used their guns in the meantime."

An excellent illustration of justice in those times is that of Judge William Blackburn who found a young man guilty of cutting off a horse's tail. After consulting his law books to no avail, he decided to apply the old biblical law of "an eye for an eye" and ordered the man to have his head shaved, to the delight and cheers of an assembled crowd.

Local history is often personal history, embracing the great events and massive social upheavals of the times. It is in local history where frequently someone may be directly connected to a historical event or person. The authors navigate these waters well, not avoiding discussion of success and failure in the history of law in Santa Cruz County. They

adhere to the concept that local history can be a prism, reflecting its knowledge to provide context for regional, national, and international events. It also provides a sense of place.

A significant portion of the book discusses the intersections between natural and human history. For example, in the story of bankrupted Judge Joseph Ladd Majors (his penury the result of the drought of 1864–65 that destroyed much of California's cattle holdings), we see a man broken by forces beyond his control. His widow, a Castro daughter, near the end of her life in 1913, offers a poignant insight into the culture of her times and of the lawyers she blamed for her plight. To the *Santa Cruz Sentinel*, she declared: "Years ago, thousands of acres of land were mine, and horses and cattle and sheep enough to keep sheep herders busy from rise to set of sun. Then I had fine houses and chests of money and silk dresses and laces and jewelry and friends, ah!, many friends . . . . But the beautiful house on the hill was burned. My husband died, my boys drank the wine and played the cards, and the *Americanos* came like hungry wolves. . . . Today I am old and poor. The young lawyers who were my friends and who made the papers for me are all very rich. . . . They have hundreds of acres of land and much money, while I sit here like an old owl in a dark corner and tell those who ask me that these men have robbed me of all that was mine by their crooked talk and their crooked laws."

An account of California's first jury trial in 1856, a complaint between Santa Cruz County residents over timber rights, occurs when California had been an American territory for but six weeks. A jury of six *Californios* and six Americans was empanelled, demonstrating the tensions in merging two cultures. Another section presents accounts of the creation of the Santa Cruz County judiciary with insight into the evolving judicial system in the form of justice, police, and county courts. Accordingly, the Constitutional Convention of 1879 is better understood as a reaction to the state's growing legal burdens — a result of migration to California — in the creation of a new Superior Court.

The built environment of courthouses is documented by photographs and descriptions, early and current alike. Over the years a great number fell to fire and earthquake, as well as to being razed for improved

facilities. It is easily forgotten that many of those early courthouses also housed treasurers, sheriffs, and even jails.

Historical monographs rarely employ humor. Delightfully, through the use of biographies, humor is often presented and is instructive. For instance, there is John H. Watson, for whom Watsonville is named. He became the first district court judge in 1850. His early background involved a withdrawal from West Point after two years, and a return to his native Georgia. He was reported to have killed a man and then fled to Texas around 1846. He joined the Gold Rush and was a Southern sympathizer. He famously provided advice to a client charged as a horse thief and who had no money. Watson asked the judge for permission to consult in private with his client. When the bailiff went to bring the accused to court, he found only Watson. The judge asked about the prisoner's whereabouts and Watson is said to have replied, "Your Honor suggested that I should advise him to pursue what I considered the best course, and after hearing his statement, I thought the best course he could pursue was a northeast course up the canyon. The last I saw of him he was following my advice."

In addition to humor, human failings among early judges are documented. For example, Judge Theron Rudd Per Lee often consulted a flask under his bench, referring to it as consulting an "authority on this case." Ethnic discrimination is symbolized by Judge Henry Rice who reminisced about the longest sentence he ever handed down (seven years) to Ramón Soto for stabbing a man. "Pretty much altogether it was the Spaniards I sent up. You see they didn't know what law was." The authors acknowledge that the City of Santa Cruz remained a tough place in the second half of the nineteenth century, marred by lawlessness and racial strife, including an infamous 1877 lynching of two *Californios* of Mexican and Indian ancestry.

Many crimes are discussed. The 1920s produced a horrific crime that the authors describe as a combination of "development and disaster." Taking place in a beautiful setting above the beach at Seacliff, a local loner and "giant of a man" named Woodside occupied a ramshackle "hut" where a development company sought to build exclusive residences. When Woodside threatened to shoot anyone crossing his property,

Sheriff Trafton and Under Sheriff Roundtree went to arrest him. On a September day in 1925, a fist fight ensued; somehow Woodside got one of the men's guns and shot both of them. One of the wounded officers managed to shoot Woodside, and all three died of their wounds.

World War II is addressed by the authors and reflects a local reaction to the global conflict. "In 1942 residents of the area were affected heavily and personally when Earl Warren, then California's attorney general, aggressively carried out the President's Executive Order 9066, resulting in the wartime internment of American citizens of Japanese heritage," they write. "Local Italian-Americans and German-Americans also suffered through imposition of curfew, travel, and residence restrictions, but the Japanese were most severely affected. . . . Rancorous disagreements over treatment of the Japanese thus divided the community, adding to the other horrors of World War II." Regrettably, one attorney advocated amending the U.S. Constitution to return all persons of Japanese ancestry to Japan (whether citizens or not) and to prohibit anyone of Japanese ancestry from becoming a U.S. citizen. Opposing such measures were other attorneys who publicly decried such sentiments. Local history, as personal history writ large, indeed exemplified global history.

Complex legal issues surrounding population growth and environmental issues mark the 1960s. Increasingly, decisions by the Supreme Court and by the courts in California created a larger legal bureaucracy. Coastal development issues became particularly complex for Santa Cruz County. These pitched disputes are discussed in cases of beach access, land development, property tax assessments, and dairies.

Noting that "America in the 1970s was a country testing itself and its beliefs," the authors allude to the cultural climate in America that spawned the free speech movement, clothing style changes, the loss of mom and pop stores to mega malls, the fall of Saigon, the Watergate scandal, the oil embargo, and the Iran hostage crisis. A concurrent unprecedented wave of homicides in the county exacerbated fear and uncertainty. There were 36 homicides in 1972 alone.

The Santa Cruz district attorney's words, "If this keeps up, we will become the murder capital of the world," became the victim of a reporter's ellipses. One case cited by the authors discussed a "hippie" who

practiced tarot, back-to-nature, and suffered from severe mental illness. His conviction for the murder of a world-renowned eye surgeon, his wife and two of his children, shocked the Santa Cruz County population. The convicted murderer told authorities that God revealed to him that the Bible was incorrect and that it was his mission to return earth to its natural state. He would do so by requiring persons to join God's army under his lead. If people refused, he would kill them or destroy their homes, cars, and other property.

The authors address a poignant consequence of the Vietnam War in presenting the troubled period of the 1970s: "Many of the crimes charged in the early 1970s involved Vietnam veterans who were suffering from alcohol and drug problems, as well as emotional disorders. The Vietnam War took its toll on a lot of people, and many thereafter went through the court system."

Santa Cruz County residents hoped for a breather from the turmoil and a return to a quieter existence. Nature, however, did not provide the same scenario. Deadly storms, fires, the Loma Prieta earthquake, drought, freezes, and floods came in the 1980s and continued into the 1990s. Lawyers were kept busy representing clients who were victims of these natural disasters. These cases involved judges and juries who rendered verdicts on issues of admission of girls to boys' clubs, voting rights of students at the university in local elections, Latino voting rights in Watsonville, as well as the environment, land use, and utility taxes.

The judiciary found itself in transition during decades of tumult and change. The Superior Court expanded, and the Municipal Court saw its first woman judge, as well as creation of additional judgships to keep up with increasing litigation. The number of attorneys grew from 317 in 1980 to 661 in 2000. The county's burgeoning population of attorneys "brought increased diversity and new ideas; it also brought more litigation." The courts became more clogged, the backlog of civil trials grew, and litigation costs rose beyond the reach of many. One positive outgrowth of those problems was increased interest in alternative dispute resolution.

Additionally, increased numbers of lawyers led to increased competition. "With more competition came the quest for more efficient ways to

practice," the authors conclude. "Specialization became the order of the day; the general practitioner was fast becoming a dinosaur." The number of women attorneys increased, and in 1982 the Santa Cruz County Bar Association elected its first woman president. The authors also discuss the shifting view of the law as a "pure" profession to the realization that "law practice is a business, too."

The information and the volume of material presented are a source of instruction on the importance of the law and its presence in our lives. As an example of local and regional history that transcends borders, but is still rooted firmly in the ground from which the lawyers, clients, judges, and laws come, *A Legal History of Santa Cruz County* is an enjoyable and instructive read. ✯

HISTORY OF THE BENCH AND BAR OF CALIFORNIA:

Being Biographies of Many Remarkable Men, A Store of Humorous and Pathetic Recollections, Accounts of Important Legislation and Extraordinary Cases

OSCAR T. SHUCK, EDITOR

Los Angeles: Commercial Printing House, 1901
Clark, NJ: The Lawbook Exchange, Ltd., 2007
xxiv, 1152 pp., ills.

REVIEW ESSAY BY CHARLES J. McCLAIN*

I. PROLOGUE

Background to the Work

This year marks the hundred and tenth anniversary of the publication of Oscar T. Shuck's mammoth survey of the California legal profession at the dawn of the twentieth century and look back into its pioneer past. His book is once again available in print, and the full text is also available online via Google Books. Consisting of some 620 biographical sketches of California lawyers and judges, living and dead, and of essays on aspects of California legal history, his *History of the Bench and Bar of California*[1] runs to over 1100 pages, most double-columned,

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[1] Hereinafter, *History of the Bench and Bar.*

closely printed. Sprawling in structure, generally uncritical in tone (the sketches are almost all complimentary), the book, nonetheless, offers us abundant and valuable information on the California legal profession in its formative periods and as it moved into modernity.

Shuck was not the originator of the work nor its first editor. M.M. Miller, a San Francisco lawyer, conceived the idea in 1899, found a publisher and was well into the task of collecting material when he was called to Hawaii to, as Shuck puts it, "take part in the transformation of the Hawaiian Islands into a portion of the American Union."[2] Shuck was well suited to take over the project. A little over a decade earlier he had brought out a work entitled, *Bench and Bar of California: History, Anecdotes, Reminiscences,*[3] a compilation of sketches of prominent California lawyers and judges, published in three volumes between 1887 and 1889.

Works similar to Shuck's 1887–89 *Bench and Bar* had appeared before. New York led the way in 1870 with its *Bench and Bar of New York*.[4] Missouri weighed in with its own publication eight years later, followed by Mississippi (1881), Wisconsin (1882) and Texas (1885). The structure of all of these publications, Shuck's included, was similar. They consist of profiles of leading members of the bench and bar, compiled by the author/editor, or possibly with the assistance of the subjects themselves (Shuck's, however, were entirely his own work), recollections of famous cases, humorous anecdotes. The profiles are for the most part adulatory, intended, as the New York volume put it, to hold up the lives of those sketched "as examples to those in the upcoming generation of lawyers."[5] The project that

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[2] *Id.* Preface. Miller is otherwise unidentified, and his profile does not appear in the work, nor for that matter does Shuck's.

[3] Oscar T. Shuck, *Bench and Bar of California: History, Anecdotes, Reminiscences* (San Francisco: The Occident Printing House, 3 vols., 1887–89). Shuck is more accurately characterized as the author of the earlier work, the editor of the latter.

[4] L.B. Proctor, *The Bench and Bar of New York: Containing Biographical Sketches of Famous Men, Incidents of the Important Trials in Which They Were Engaged, and Anecdotes Connected with their Professional, Political and Judicial Careers* (New York: Diossy, 1870). The Mississippi publication dealt almost entirely with deceased lawyers. Tennessee, Michigan, Indiana and Ohio issued their own "Bench and Bar" volumes in the 1890s.

[5] *Id.*, 1.

M.M. Miller conceived in 1899 and that Shuck completed in 1901, while similar in some respects to those earlier works, was different in others. It was more ambitious in scope and cast a wider net, encompassing large numbers of California lawyers, not just its leading lights.

It is impossible to say exactly how much of the final version of the *History of the Bench and Bar of California* should be attributed to the efforts of M.M. Miller, how much to Oscar Shuck's. Shuck tells us that by the time he took over the project from Miller enough work had been done on it to assure its success. But he tells us too that he gave all of his time and effort over the course of a full year to completing the book.[6] Exactly how this time was spent he does not say. Although, again according to Shuck, the idea of a history of the first century of the California profession originated with Miller, it is hard to say how much "history" Miller saw the work including. It seems reasonable to surmise that Miller conceived his volume primarily as a kind of lawyers' *Who's Who*, a vanity publication that would be bought by a goodly proportion of the sizable number of living lawyers whose biographies were to be included. In Shuck's hands it became something more.

Oscar T. Shuck

Oscar Shuck's own biography is of more than passing interest. He was born in Hong Kong in 1843, the son of Baptist missionary parents. He was taken to Virginia as an infant after his mother died, and spent his early years there under the care of family members. His father eventually moved back to the United States, settling in Sacramento. Shuck graduated from high school in that city in 1859 and two years later moved to San Francisco, where he commenced his legal training, reading law in a number of law offices. In 1863 he relocated to Virginia City, Nevada Territory. After a year's clerkship in a law office he was admitted to the Nevada bar. He returned to San Francisco in 1867 and was soon elected a judge of the newly created Justices' Court. When his term expired, he turned briefly to journalism, serving stints as editor of the *Sacramento Reporter* and as a reporter for the *San Francisco Chronicle*. In 1875 he was

6 Shuck, *History of the Bench and Bar,* Preface.

admitted to law practice in California by the state Supreme Court, on the strength, it seems, of his Nevada bar membership.[7]

Shuck practiced law in San Francisco for many years, specializing in probate law. He became well known for his success in locating missing heirs. In one case, described at some length in the 1901 book, he recovered $20,000 for a missing heir, receiving the handsome fee of $3,000 for his efforts.[8] He published several other works during his lifetime, mainly anthologies of the writings or speeches of others, with commentary, and one book of his own verse, a collection of poems inspired by the sermons of the influential San Francisco Unitarian minister, Thomas Starr King.[9] He died in 1905, one obituary remarking that, "while well grounded in the law, he was known primarily for his literary accomplishments."[10]

II. THE BENCH AND BAR IN 1900: TRENDS IN THE PROFESSION

A Caveat on the Sample

The 1900 edition of *Martindale-Hubbell* lists just over 3,000 California lawyers. Shuck's *History of the Bench and Bar* includes profiles of some 548 living attorneys and judges. Since we do not know how Miller and Shuck went about gathering their materials, we cannot say for certain that these biographies represent a cross-section of the California bar. Still, a sample of 548 out of a total population of 3,000 is a significant fraction, and it seems a fair assumption that they do at least open a good-sized window on what was happening to the California legal profession as a whole at the beginning of the twentieth century.

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7 Charles R. Boden, "Oscar T. Shuck, Historian of the California Bar," *San Francisco Bar* 1:3 (April, 1937), 6-8; *Daily Alta California,* April 16, 1871; *Daily Alta California*, June 21, 1874.

8 Shuck, "The Strange Story of an Old Bank Deposit," *History of the Bench and Bar*, 197-206. Shuck's probate exploits occasionally came in for notice in the San Francisco press. See *San Francisco Call,* Jan. 23, Feb. 23, March 25, 1898.

9 Oscar T. Shuck, *Thomas Starr King in Verse* (San Francisco: self-published, 1905). Shuck's other works include *Representative and Leading Men of the Pacific* (San Francisco: Bacon & Co., 1870) and *California Anthology: Striking Thoughts on Many Themes Carefully Selected From California Writers and Speakers* (San Francisco: Barry & Baird, 1880).

10 *San Francisco Call,* May 30, 1905.

Formal Legal Education

The profession on display in Shuck's pages was one in the process of transition. For one thing, formal legal education was becoming more common for California lawyers, as it was for lawyers elsewhere in the country.[11] Shuck divides lawyers then living into several categories, the two largest of which were "Seniors of the Collective Bar," those born in or before 1860, some 257, and the "Junior Rank," those born after that date, some 165. Of those in the first category, some twenty-five per cent had received some formal legal education. Of those in the latter class, the younger group, the figure had risen to forty-three percent. Shuck puts his very oldest contemporaries in a separate category, "Veterans Surviving in 1900." Of these nineteen men, average age seventy-eight, none had had any formal training. The term "formal legal education" is used here broadly to encompass anyone who had spent any significant time at a law school of any sort or in an undergraduate law department of a university, of which there were a fair number at the time. One such law undergraduate was Benjamin Bledsoe, who, according to his biography, entered Stanford in 1892 and graduated "from the departments of history, economics and law" four years later. Another, George E. Crothers, a San Francisco attorney, had an almost identical educational pedigree.[12]

The school most commonly attended, by far, was Hastings College of the Law, which had begun to offer a three-year degree program in 1879, and after that, the University of Michigan, whose law school dated from 1859. (Fifty-seven percent of those in the "Junior Rank" with formal legal training had attended Hastings.) Other schools included Yale, Harvard, Columbia, and the University of Virginia. Graduation from Hastings had a unique advantage. It conferred the so-called "diploma

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11 In 1870 one quarter of bar admittees had attended law schools. By 1910 that figure had risen to two-thirds. Jerrold Auerbach, "Enmity and Amity: Law Teachers and Practitioners, 1900–1922," "Law in American History," in vol. 5, *Perspectives in American History* (1971), 573.

12 Shuck, *History of the Bench and Bar,* 1001, 1017. Stanford at the time had no professional law school but offered an array of law courses for undergraduates. Eighteen of California's ninety-two living state and federal judges had studied law in a school setting. Here, too, the younger the judge, the greater the likelihood that he had received formal training.

privilege," the right, on graduation, to practice law without having to submit to the state's formal admission requirements. These requirements changed somewhat between 1879 and 1900 but always consisted of, at least, the presentation of evidence of moral character and the passing of an oral examination in open court, conducted either by the justices of the Supreme Court or their appointed commissioners.[13]

It is interesting that some lawyers, already admitted to practice, apparently thought it prudent to seek further training in a school. That was true of D.R. Gale, who, after admission, earned a law degree from Columbian University in Washington, D.C. (later George Washington University), then earned a Masters at Yale. That was also the case for Clara Foltz, California's most famous early female lawyer, who after practicing law for some time in San Francisco, sought to enroll in Hastings College of the Law only to be turned away because of her gender. A few, like Alfred Goldner, another San Franciscan, attended law school (Hastings) while simultaneously apprenticing in a law office.[14]

Admission to Law Practice in Nineteenth-Century California

As context for Shuck's references to legal education and admission to practice, it should be noted that the second half of the nineteenth century was a period of evolution in the forms of bar admission in California.

California passed its first statute regulating admission to the practice of law in February, 1851. The law required candidates to undergo a strict examination of their qualifications in open court by "one of the judges of the Supreme Court" and to "present testimonials as to good moral character." Passing the exam entitled the candidate to a license to practice in all the courts of the state, and practicing without this license was made punishable as contempt of court. Lawyers licensed in other states

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[13] Thomas Barnes, *Hastings College of the Law: the First Century* (San Francisco: Hastings College of the Law Press, 1978), 171-72.

[14] Shuck, *History of the Bench and Bar*, 842-45, 828-31, 849-50. Foltz sought admission to Hastings after being admitted to the bar but before commencing her practice. California seems to have lagged behind other states in respect of formal legal education. The editor of *The Bench and Bar of Wisconsin*, published in 1882, commented that few in that state would then think of entering the legal profession without "taking the course of law offered by the state university," 480.

might be admitted without examination. The lower courts (District and County courts) were authorized to admit candidates to practice in those courts upon conduct of a similar examination. Under the law only white male citizens twenty-one or older were eligible for admission.

The law remained essentially in this form until 1872, when it was incorporated in the new Code of Civil Procedure. The codifiers at that time made a significant change. They left out the provision concerning admission to practice in the lower courts, deliberately, according to the code commentators, the intent being to make clear that the Supreme Court alone had the authority to admit attorneys to practice. This change was controversial, however, and proved short-lived. In 1874 the code section was amended to restore the power of the District and County courts to admit attorneys to practice in their respective courts. It wasn't until 1895 that the right to admit attorneys was taken away from the lower courts of record (one did not have to be an attorney to practice in the Justice or Police courts) and the power lodged exclusively in the Supreme Court.[15]

1878 witnessed a major revision in the law. Thanks to the efforts of Clara Foltz and others, references to race and gender were stricken from it so that thereafter any citizen or anyone who had declared an intention to become a citizen was eligible for admission upon proof of qualifications.

Down to the end of the nineteenth century, examinations were always conducted *viva voce*, either by Supreme Court justices or lawyer commissioners appointed by the Court. (In 1900, a bill creating a permanent board of bar examiners, with responsibility for administering a written as well as oral exam, passed both houses of the state legislature, but was not signed by Governor Henry Gage and did not become law.)

We know little about the content or conduct of nineteenth-century bar examinations. The 1892 Rules of the Supreme Court list as subjects of examination such classics of the common law as Sir William Blackstone's *Commentaries*, Simon Greenleaf's *Evidence,* and Theophilus Parsons's *Contracts;* statutory material such as the California Civil Code and Code of Civil Procedure; and the state and national constitutions.

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[15] The standards and procedures for admission to the bar are found in California Code of Civil Procedure (1899), Sec. 276; Rule I, Rules of the Supreme Court of California (1900), included in volume 130 California Reports, Appendix, xxxv-xxxvi.

Anecdotal evidence suggests that, at least in the beginning, the exams were not particularly rigorous. Admission standards in force in the late nineteenth century were certainly not as strict as they are today, but the bar examination was more than pro forma. Shuck informs us that at one testing administered in 1870, six of the fourteen applicants for admission were turned down, and that at the exam conducted in January, 1894, eleven of the forty-five candidates failed.[16]

The Persistence of Apprenticeships

Talk of formal law study notwithstanding, the vast majority of Shuck's contemporaries had received their training in the law through apprenticeships or self-study or, more usually, a combination of both. Most had spent some time "reading law," as the expression went, in the office of a lawyer or a judge. Among the longer apprenticeships served was that of Stephen M. White, former U.S. senator from California and Democratic Party leader. He had spent almost three years, apprenticing in three separate law offices. For many, the apprenticeship was much briefer, amounting occasionally only to a few months. Apprentices were supposed to receive instruction from the lawyers or judges for whom they worked. In some cases, one suspects, they did little more than clerical tasks, picking up such instruction as they could by osmosis, so to speak. Shuck states, perhaps tellingly, that one of his subjects "prepared for the bar while acting as *clerk* [my emphasis]" in the venerable San Francisco firm of Shafter, Park and Shafter.[17]

More than a few of Shuck's lawyers and judges were entirely self-taught, having studied the law while working in non-law jobs. A.J. Buckles, judge of the Solano County Superior Court, had prepared for the law while teaching school and working part-time as a store clerk, "while

[16] Shuck, *History of the Bench and Bar*, 717, 825.

[17] *Id.*, 642, 820. Instruction, even when given, may not have been terribly systematic. Philip Edwards told the young apprentice, George Cadwalader, to read every book in his (Edwards's) law library and to ask any questions the readings might raise. *Id.,* 461-62. Moses Cobb, a graduate of the Harvard Law School, who before coming to California had practiced law in Massachusetts with the likes of Caleb Cushing and Rufus Choate, had as many as six apprentices in his office at one time or another. According to Shuck he took the job of mentoring seriously. *Id.,* 806-07.

keeping his mind on the law and reading its pages as opportunities came." J.R. Ruddock of Ukiah had learned his law on the side while acting as superintendent of schools in Mendocino County.[18]

One occasionally comes upon an example of someone who entered on the practice with the slenderest of backgrounds. H.R. Wiley, while teaching public school and reading law on the side "in accordance with an early formed plan to enter the legal profession," was enlisted by a Redding lawyer to assist him in the conduct of a murder trial. That he did, Shuck tells us, among other things making an address to the jury on the defendant's behalf. Shuck does not tell us what happened to the defendant.[19] Wiley had at least been reading law when he took on his first legal assignment. Not so R.H.F. Variel. "Mr. Variel," Shuck writes, "presents to us . . . the unique instance of a man entering on the practice of law and the study of law at the same time." He had had no legal training whatsoever when he was elected district attorney of Plumas County in 1873. But, Shuck assures us, "He diligently studied law from the time he took the office; . . . and left the place, after his long tenure, a well-informed and experienced lawyer."[20] A little deadpan humor on Shuck's part? It is hard to resist the thought.

That it was possible to become a skilled lawyer or judge, in late nineteenth-century America without having gone to law school, is abundantly clear. Some of the country's most accomplished lawyers and judges fit this description. And examples abound in Shuck's book of California judges and lawyers who attained success and renown in the profession without having had any formal legal education. To take but two examples: Robert E. Bledsoe, who was not only entirely self-educated in the law but who lacked even a "common school education," went on to become one of the leading criminal defense lawyers in Southern California, and William Morrow, a very capable judge of the U.S. Circuit Court in San Francisco, who had studied law during his spare hours while working in government offices.[21]

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18 *Id.*, 672, 921.

19 *Id.*, 968. Wiley later took a law degree at Hastings.

20 *Id.*, 949.

21 *Id.*, 784-85, 655.

Specialization and Stratification

There is a consensus among legal historians that the American legal profession changed in fundamental ways after the Civil War. As Maxwell Bloomfield, perhaps the preeminent historian of the American bar, observes: "With the rise of big business in the decades following the Civil War, specialization and stratification increased within the bar. . . . The prestige that attached to a corporate clientele placed certain metropolitan lawyers at the head of the profession and marked a shift in emphasis from advocacy to counseling."[22] Shuck clearly believed that such changes were afoot in California as the century drew to a close. "Modern conditions have so recreated the profession of the law," he writes, "as, in effect, to give it a new character." The increase of industry and commerce, the rise of the corporation, he went on, had "wrought a truly amazing evolution in the trade of the lawyer." (He meant, no doubt, the big-city lawyer.) His chief function now was that of counselor and guide to practical men of affairs. And Shuck holds up several examples of this new type of lawyer, William F. Herrin of San Francisco and Lewis Andrews, of Los Angeles, to name two. Andrews, he observes, had been successful enough as a trial lawyer but had lately established his reputation by his success in advising his clients how to keep out of court. His business was now primarily handling the affairs of corporations.[23]

Most contemporary lawyers profiled in Shuck's book appear to have been generalists, but Shuck mentions any number who were specializing in one field or another: Henry Hazard of Los Angeles, patent law; E.O. Larkins of Visalia, water rights and land titles; William Craig of Los Angeles, corporate and mercantile law, to take several examples. Others besides Shuck had noticed this trend. In a paper given at San Francisco in 1890, S.F. Leib, a San Jose lawyer, opined: "In this age, pre-eminent

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[22] Maxwell Bloomfield, *American Lawyers in a Changing Society: 1776–1876* (Cambridge: Harvard University Press, 1976), 346. On the rise to prominence of the counselor to business, see also J. Willard Hurst, *The Growth of American Law: The Lawmakers* (Boston: Little Brown, 1950), 297-308 and Wayne K. Hobson, "Symbol of the New Profession: Emergence of the Large Law Firm, *The New High Priests: Lawyers in Post Civil War America*, Gerald W. Gawalt, ed. (Westport, Conn.: Greenwood Press, 1984), 3.

[23] Shuck, *History of the Bench and Bar*, 633, 996.

success in any department of life is rarely ever obtained except by specialists in that department." And the law, he went on to say, was no exception, pointing to such fields as patent law, criminal law and probate.[24] Shuck was, of course, himself a specialist — in probate law, and a narrow niche of probate law at that.

Rise of the Southland

San Francisco, with a population of 342,000, was at the time of publication the largest city in California, twice as big as Los Angeles, and San Francisco lawyers dominate Shuck's pages. But a fair number of important Southern Californians appear in the volume, and one gets a definite sense that southern California lawyers and the southern part of the state generally were looming ever larger in the state's affairs in the closing decades of the century. Shuck notes, for example, that San Francisco Superior Court judge Jeremiah Sullivan, despite having piled up an unprecedented majority in his home city, was defeated in his 1888 bid for a seat on the California Supreme Court by a San Diegan, "for whom the southern part of the State, as a result of a great increase of population, cast a phenomenal vote."[25] One interesting note on Judge Sullivan suggests, perhaps, that then as now private practice may have exerted an at-times irresistible pull on wearers of the robe: the year after his defeat Sullivan resigned his seat and formed a partnership with his brother because, in Shuck's words, "the practice of law was of higher consequence from a financial standpoint." Other Superior and Supreme Court judges had done the same thing for the same reason, Shuck observes.[26]

As is abundantly evident from the book, it was certainly possible to earn a great deal of money in law practice at the time. To take but one

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[24] S.F. Leib, "Needed Reforms in Our Judiciary System," in *California State Bar Association: Proceedings of the First Meeting of the California State Bar Association* (San Francisco: Currey & Co., 1890), 29-30. The title notwithstanding, the California State Bar Association does not seem to have actually gotten off the ground until 1901. See *Report of the First Annual Meeting of the California State Bar Association, Held at San Francisco, December 20–21, 1901* (San Francisco, 1901). Both reports are available through Google Books, http://books.google.com.

[25] Shuck, *History of the Bench and Bar,* 748.

[26] *Id.*

example, Charles F. Hanlon, who besides managing the legal affairs of railroads, litigated large will contests, earning a fee of $125,000 in two such cases. In another protracted case involving creditors' claims on an estate, the court awarded him a fee of $90,000. Translated into today's dollars, these are of course enormous sums of money.[27]

One trend in legal affairs beginning to emerge on the East Coast does not seem to have taken hold in California, namely, law firm consolidation. To judge both from Shuck and *Martindale-Hubbell*, most California lawyers, even urban lawyers, continued to practice in small firms, firms with more than four lawyers being unusual.

Lawyers' Backgrounds: Some Recurring Features

Shuck's lawyers came from a variety of circumstances, but in looking through his profiles one is struck by certain recurring and arresting features. One is the very large number of lawyers who, like A.J. Buckles and J.R. Ruddock (noted above), had been schoolteachers before turning to the law, a fact noticed by the author.[28] Many were involved in Republican or Democratic party politics, some having been elected to local or statewide offices. There was an appreciable number of surviving Civil War veterans still practicing in 1901. Buckles himself, a member of the Indiana infantry, had been wounded four times in that conflict and had had to have a leg amputated. Henry Dibble, a prominent lawyer and Republican politician and another Union veteran, had lost a foot at the Battle of Port Hudson, in Louisiana. John H. Russell had seen considerable action as commander of a company in the 38th United States Colored Troops. One finds a scattering of Confederate veterans as well. Erskine Ross, former California Supreme Court justice and then judge of the United States Circuit Court for Los Angeles, had served in the Southern forces, taking part as a Virginia Military Institute cadet in the bloody Battle of New Market.[29]

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[27] *Id.*, 854-57.

[28] *Id.,* 1036.

[29] *Id.*, 672, 823, 923-24, 657. On the extraordinary career of Henry C. Dibble, see Charles McClain, "California Carpetbagger: the Career of Henry Dibble," 28 *Quinnipiac Law Review* 885 (2010).

The Gold Rush was a half-century old at the time of publication, but veterans of the Gold Rush appear in Shuck's volume with regularity. A.J. Gunnison had left law practice in Massachusetts to dig for gold, working in the placer mines "with the crude implements of the time — the pan, shovel and rocker," but had given up after a year and a half and turned to law practice in his new state. Something similar was true of Isaac Belcher, a Vermont lawyer turned miner turned lawyer again. C.V. Gottschalk, a Calaveras County judge for twenty years, had gone to the mines from New Orleans in 1850, where he worked for several years "with indifferent success."[30]

III. THE BENCH AND BAR IN 1900: SOME NOTABLE LAWYERS AND JUDGES

The "Strong Men of Today"

In one article Shuck focuses on fourteen lawyers whom he dubs, "Some of the Strong Men of Today." What entitled one to inclusion in this list is not clear since many equally impressive careers are profiled elsewhere in the book. John F. Garber, one of the strong men, is described as "holding the first place at the great bar of San Francisco," probably because he placed first in a survey the book's publisher sent out in 1899 to all the state's lawyers, asking them to choose the twelve best San Francisco lawyers. But Shuck acknowledges that the response to the survey was very light.[31] One of the group, William F. Herrin, general counsel of the Southern Pacific Railroad ("thus the foremost man in the professional life of the Pacific coast"), is held up by Shuck as emblematic of the new type of lawyer, the adviser and counselor to "the so-called practical men who are doing the world's work." But Shuck observes that Herrin was also a gifted litigator, a member of the Interstate Commerce Commission, describing him as the ablest attorney who had ever appeared before that body.[32]

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30 *Id.*, 527, 541, 695.

31 *Id.*, 629.

32 *Id.*, 633, 634.

Criminal Defenders, Public-Spirited Attorneys, Clara Foltz

The biographies of living lawyers in Shuck's book are, with a few exceptions, brief and not notably revealing. Most (though not all) read, not surprisingly given the work's likely provenance, as if the text was supplied by the subjects themselves, with some embellishments added by Shuck. Still, arresting facts about individuals do come to light from time to time. Thus we learn of the remarkable careers of two criminal defense lawyers: Samuel F. Geil of Salinas, a former prosecutor, represented thirty-six capital defendants, only five of whom were convicted, none in the first degree. The Los Angeles lawyer, Earl Rogers, a mere thirty-two at the time of publication, had handled more than a hundred felony cases in the previous three years with, according to Shuck, only one conviction. This was a period, it should be noted, when the odds were stacked rather heavily in favor of the prosecution in criminal matters.[33]

From time to time one comes across the public-spirited lawyer and the lawyer willing to act on behalf of society's less privileged members. Frank Stone of San Francisco, not a criminal law specialist, while observing the trial of a Swede convicted of murder and sentenced to death took an interest in the man's case. He had noticed a scar on the man's forehead and by dint of extensive correspondence with officials in the man's home country, determined that he had shot himself in the head while in Sweden and that a bullet was still lodged in his brain. He persuaded the governor to commute the sentence to life imprisonment.[34] Shirley Ward earned his keep or a good part of it representing American Indian tribes. George Monteith, subject of a long sketch, represented labor unions, handling some high-profile cases, including the 1894 case of the American Railway Union strikers. In one capital case he succeeded in saving the life of a union man accused of train wrecking. Shuck comments that "a great deal of his business is among the poorer class of clients."[35]

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[33] *Id.*, 1068, 846.

[34] *Id.*, 938-39.

[35] *Id.,* 1084-85, 1053. In a separate article on contemporary judges, Shuck observes that Waldo York, Los Angeles Superior Court judge spoke up often on behalf of Indian rights, condemning reservations and demanding that Indians be treated as citizens. *Id.,* 760.

Shuck devotes significant space to the career of Clara Foltz, the California lawyer who made history by opening the doors of Hastings law school to women, giving a full account of her struggle. He notes, too, that, prior to this, she had drafted the 1878 amendment to the California Code of Civil Procedure that opened the practice of law to women.[36] He acknowledges that she had had to overcome the skepticism and condescension of male lawyers in the pursuit of her career but states that by virtue of her skills as well as "womanly graces" had eventually won the esteem of the profession. She had also proved that she was perfectly capable of defending herself against sexist insults, which continued even as she became established. Once in the course of a case, opposing counsel said she would be better off spending time at home caring for her children than arguing cases in court. "A woman had better be in almost any business than raising such men as you," she retorted.[37]

IV. CALIFORNIA'S PIONEER LEGAL PAST

Men of the First Era and the Second

Besides opening a window on the state of the California bar and bench circa 1900, Shuck, in another set of biographical sketches, gives us revealing glimpses into the state of the profession in earlier periods of the state's history. These sketches, many reproduced almost verbatim from his 1887–9 volumes, are fewer in number than those of his contemporaries, but, in general, richer in content. Except when Shuck quotes from other sources, they appear to have come completely from his hand. (In preparing them, he seems to have drawn liberally on the wide web of acquaintanceships he had built up over the years.) A few examples will convey the flavor of Shuck's treatment of California's legal pioneers.

Among the earlier lawyers profiled, pride of place must probably go to the man whose photograph graces the frontispiece of the book, Hall McAllister. Shuck declares that McAllister, who died in 1888, combined "more of the essential qualities of the great lawyer than any of his competitors," a principal virtue being his ability to handle cases in

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[36] 22nd Sess., Calif. Legislature, 1877–78, Amendments to the Codes, Ch. 600, p. 99.

[37] Shuck, *History of the Bench and Bar,* 831-32.

an impressively wide range of fields, ranging, as Shuck says, from patent rights to land titles to constitutional law. A judge at the time said he knew of no other who was his equal in this respect. McAllister was first and foremost a trial litigator and, to judge not only from Shuck's but from other accounts, had formidable trial skills. His effectiveness rested on his exhaustive preparation of his cases for trial ("His table," Shuck writes, "was covered with books and papers, and a boy was generally waiting to make fresh drafts upon his well-stocked library"), his competency in eliciting testimony (he got the information he wanted "without trying the patience of the witness"), and his rapport with the jury. He was, too, a skilled appellate lawyer, his name, Shuck notes, dotting the pages of the *California Reports*. He argued several cases before the Supreme Court of the United States, among the most important (though unmentioned by Shuck) the landmark equal protection case of *Yick Wo v. Hopkins*.[38] McAllister there represented Chinese laundrymen in a successful challenge to a discriminatory laundry law. One evidence that McAllister stood as high in the estimation of his peers as he did in Shuck's can be found in the fact that after his death the state bar had a bust of him placed on a pedestal outside San Francisco City Hall.

Shuck's biography of Oscar L. Shafter, a San Francisco lawyer who practiced in San Francisco between 1854 and 1867, offers insights into the conduct of law business in these early years. It is also notable for its frankness. Shafter hailed from Vermont and had practiced law in that state for eighteen years before moving to San Francisco, lured by the annual salary of $10,000 promised him by the leading firm of Halleck, Peachy, and Billings. (It is surprising that Shuck supplies so little information on this important early California firm.)[39] When that firm dissolved, he started his own, which, Shuck reports, was soon able to clear an annual profit of $110,000. His forte seems to have been the organization of his office for the efficient delivery of services and a special responsiveness to clients' needs. At the time many businessmen were

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38 *Id.*, 417-21. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). On the history of the *Yick Wo v. Hopkins* case, see Charles J. McClain, *In Search of Equality: The Chinese Struggle for Civil Rights in Nineteenth-Century America* (Berkeley: University of California Press, 1994), 115-26.

39 The only member of the firm profiled is Frederick Billings. *Id.*, 467-68.

reluctant to leave their offices by day and preferred to handle legal affairs at night. Shafter shone in this regard. He kept his office open well into the late evening hours and was himself usually the last to leave. Shafter was elected to the California Supreme Court in 1864 but, according to Shuck, was a great disappointment as a justice. (Shuck doesn't say why.) He withdrew from the profession in 1867, apparently because of incipient senescence. ("He could no longer grasp the isolated fact, and bind it in eternal fealty to its principle," as a local minister charitably put it.) He died in 1873, after, in Shuck's words, "five years' wandering" through Europe.[40]

The career of Creed Haymond illustrates the fact that even in this early period one career path open to lawyers was that of counselor to the large business enterprise. Haymond came to California in 1852 at the age of seventeen. Like many of Shuck's pioneer lawyers, he dabbled in mining for a while, then spent some years carrying the mails for Wells Fargo, and at length entered on a legal apprenticeship. His reputation grew quickly after he entered practice, He served in the state senate for four years and in 1881 he took a position as general counsel for the Central Pacific Railroad. Within two years he succeeded in settling the vast majority of the hundreds of claims then pending against it and, in the process, according to Shuck at least, "wrought a great change in public sentiment toward the corporation." In Shuck's earlier work, though not in the 1901 volume, he highlights the crucial role Haymond played in the molding of American constitutional law. He was lead counsel for the railroad in the federal case that established the principle that corporations are constitutional persons and as such able to invoke the protections of the Due Process and Equal Protection clauses of the Fourteenth Amendment.[41] Haymond was deeply involved in the founding of Stanford University, drafting the university's organizational act and the Articles of Endowment by which Leland Stanford and his wife transferred their accumulated wealth to that institution.[42]

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40 *Id.*, 573-75. The quote is from Rev. Horatio Stebbins.

41 *Railroad Tax Cases* (Circ. Ct., D., Calif.) 13 F. 722 (1882). The principle was later affirmed by the U.S. Supreme Court in *Santa Clara County v. Southern Pacific R. Co.,* 118 U.S. 394 (1886).

42 Shuck, *History of the Bench and Bar*, 580-82.

Leading Early Judges

Leading judicial lights of the early generations come in for considerable attention, but one would search in vain for significant information on their judicial outlooks. The focus is rather on their careers off the bench or other aspects of their professional (or personal) lives. Some of the details, to be sure, are illuminating. Serranus Hastings, California's first chief justice, we learn from Shuck, left the post because the $10,000 salary that came with it was not enough to meet his needs in Gold Rush California. He ran for and was elected to the office of attorney general because that position allowed him to practice law on the side, which he did very profitably. Solomon Heydenfeldt, justice of the Supreme Court from 1851–57, also left the bench for pecuniary reasons. Originally from South Carolina, Heydenfeldt was one of a handful of California lawyers who refused to take a loyalty oath during the Civil War, making it impossible for him, for a time at least, to try cases in the state's courts. Joseph G. Baldwin, on the Supreme Court from 1857–64, was a lawyer in Alabama before coming to California and was the author of a very popular book of humorous anecdotes about law practice in that state and its next-door neighbor, *Flush Times of Alabama and Mississippi*.[43] Baldwin displayed great logical power on the bench but did not have "an agreeable voice," which Shuck thinks, explains his lack of success as a trial lawyer in California.

Shuck gives most space to Stephen J. Field, "the most distinguished name in the judicial history of the state," as he puts it, but someone, Shuck allows, who had his share of enemies. ("There were always those who did not like the man . . .")[44] Shuck's sketch is devoted almost exclusively to Field's tumultuous quarrels as a young lawyer with a local judge in the delta town of Marysville, to his accomplishments as a state legislator, and to rather stormy episodes in his personal life, including his narrow escape from an attempted assassination by improvised explosive device (if one may use an anachronism). Field served for six years on the California Supreme Court and thirty-four (then a record) on the Supreme Court of the United States, authoring on the latter body some of the most

[43] Joseph G. Baldwin, *The Flush Times of Alabama and Mississippi: A Series of Sketches* (New York: D. Appleton & Co., 1854). The book is still in print.

[44] Shuck, *History of the Bench and Bar*, 421.

influential, and controversial, opinions of the era. Shuck mentions none of them, however.

Admission to the Bar in the Early Era

One final note on the pioneer generation. If the experience of the San Francisco attorney, John R. Jarboe, is at all typical, the bar on admission to the practice of law was not set very high in those days. Jarboe, another schoolteacher who had studied law in his spare time, went to Sacramento in 1858 to present himself for examination for bar admission. Examinations at the time were conducted by three members of the bar, appointed by the justices of the Supreme Court. These men asked Jarboe a series of questions on the common law of England, including a few on obscure points of feudal law, which he answered as best he could. One of the trio who had been silent up to that point then interrupted the questioning, declaring that it seemed to him pointless since the candidate showed that he knew more than his examiners. He turned to Jarboe and asked if he knew how to make a brandy punch. Jarboe replied that he didn't but that he knew of a saloon across the street that made a good one and that he "would be pleased if the learned committee would join me in testing one." The committee did that and returned afterward to the court to report that it had subjected Mr. Jarboe "to a most thorough examination" and was entirely satisfied with his qualifications.[45]

V. ARTICLES ON THE PAST

Essays on Law and Illegalities

Fully a third of Shuck's book is given over to essays on aspects of early California legal history, many written by Shuck himself. They furnish useful details on such important subjects as the organization of the state

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[45] Shuck, *History of the Bench and Bar*, 587. For a similar story, see the account of Abraham Lincoln's examination of Jonathan Birch for admission to the Illinois bar while Lincoln was taking a sponge bath in a hotel room. J. Willard Hurst, *The Growth of American Law: The Lawmakers* (Boston: Little Brown & Co. 1950), 282. It goes without saying that one must be cautious about extrapolating from anecdotal evidence of this sort. Official statistics on bar admissions during this early period seem impossible to find.

judiciary and the decision to reject the civil law as the rule of decision in the state's courts, notwithstanding its entrenched status, and to adopt instead the common law of England. Several essays discuss the development of bodies of California law that were conspicuous in the first years. John F. Davis, a mining and water law specialist, contributed a lengthy piece on "The History of Mining Laws in California,"[46] describing, among other things, how the rules, regulations and customs adopted by the miners concerning claims, often embodied in written codes, eventually came to be recognized by the legislature and the courts as having the force and effect of law. Davis is capable of humor. He records that the Mariposa mining district regulations ended with the statement: "for the full and faithful maintenance of these Rules and Regulations . . . we sacredly pledge our honors and our lives." Noting that these words parrot those in the famous coda of the Declaration of Independence, he comments that "the only reason they did not pledge their *fortunes* is because they did not have any!"[47] John D. Works sheds much light on the vexed, complex and crucially important subject of water and irrigation law in the longest essay in the collection, in the process calling attention to inconsistencies in doctrine and issues that needed to be addressed.[48]

Two articles underscore the fact that, notwithstanding pioneer California's earnest efforts to establish a civilized legal order, this was a frontier society, with a frontier society's sometimes fluid sense of legality and justice.

In an essay entitled, "The Field of Honor: Historic California Duels,"[49] Shuck discusses the subject of dueling and chronicles some of the most famous duels in California history, several involving prominent lawyers or judges. Duels were illegal in California, but, at least in the first years of the state's history, occurred with regularity and were rarely prosecuted. (Stephen Field, it may be noticed, came within a hair's breadth of fighting two duels himself.) The most notorious duel by far was that fought in 1859 between David S. Terry, who resigned his seat as chief justice of California to engage in the affray, and David Broderick, California's

46 *Id.*, 279-331.

47 *Id.*, 297-98.

48 *Id.*, 101-72.

49 *Id.*, 227-64.

senior U.S. senator at the time. Terry killed Broderick and was brought to trial, but it ended in acquittal. After service in the Confederate army during the Civil War, Terry returned to California to resume the practice of law and to re-enter politics. (He was a delegate to the 1878–79 Constitutional Convention.) Among other high-profile duels chronicled by Shuck was that in 1852 between Secretary of State James Denver and Edward Gilbert, editor of the *Daily Alta California*, the state's leading newspaper. Gilbert died, but Denver was never prosecuted. Indeed, he went on to become a member of Congress and governor of Kansas Territory.[50] Flaunting the law against dueling, it seems, was no barrier to the pursuit of a successful political career.

An article on "Lynch Law in California"[51] by the leading San Jose attorney, John Jury, constitutes something of a companion piece and reminds us that Californians regularly took the law into their own hands in the state's early years. Jury, on the one hand, condemns the practice of vigilantism, recognizing that haste and lack of deliberation often "militated against justice and provoked the infliction of cruel and unusual punishments" but, on the other, offers an apology for it, attributing it to the pioneers' "hatred of crime" and desire to get things done quickly and efficiently. He makes great allowance for the San Francisco Vigilance Committees of 1851 and 1856, completely extralegal bodies whose actions led to the hanging of several men. They were organized, he argues, because of a breakdown in the justice system and did in fact put a stop to lawlessness and corruption.[52]

Quite apart from unofficial, vigilante justice, Shuck's article on "The Death Penalty for Larceny"[53] points up some of the harsh features of the standing criminal law. A statute set the penalty for grand larceny as death or imprisonment, the choice being left up to the jury. In *People v. Tanner,*[54] an 1852 case, the California Supreme Court upheld a death sentence for a defendant convicted of the theft of food provisions from a warehouse, rejecting an appeal based on the exclusion from the jury

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[50] *Id.,* 245-64, 227-31. On the Broderick-Terry duel, see A. Russell Buchanan, *David S. Terry: Dueling Judge* (San Marino, Calif.: Huntington Library, 1956).

[51] *Id.,* 267-78.

[52] *Id.,* 274-76.

[53] *Id.,* 75-80.

[54] 2 Cal. 257 (1852).

of a man who expressed opposition to executing someone for stealing. Chief Justice Murray did scold the legislature for having chosen such a disproportionate punishment, but, as Shuck observes, the Court never addressed the question of the law's constitutionality.[55]

Some Causes Célèbres

Articles on bodies of law are complemented by accounts, often colorful, of famous early California cases. Foremost among these, without doubt, is Shuck's narrative of the Sharon-Hill marriage litigation, possibly the most lurid case in the annals of California jurisprudence.[56] William Sharon, a U. S. senator from Nevada and a man who had made a fortune in the Comstock Lode, while on a visit to San Francisco fell under the influence of Sarah Althea Hill, a woman, in the words of one author, "of fair education, strong passions, and infinite resources, in the pursuit of whatever fancy took possession of her mind." Hill claimed to be Sharon's wife and produced a declaration of marriage, but Sharon brought a diversity action in federal court to have the document declared a forgery. Hill, in turn, sued in state court to have it declared genuine and for divorce. The two courts reached diverging results, the federal court ruling for Sharon, the state court for Hill. Sharon soon passed away, and Hill married and retained as counsel none other than David Terry. A second action in federal court produced a second decision, this by Justice Stephen Field, that the marriage document was a fraud. While Field was reading his decision, Hill rose to accuse him of being paid off, whereupon Field ordered the marshal to remove her from the courtroom. She and Terry then proceeded to assault the marshal, and both were committed to jail for contempt. The following year, Mr. and Mrs. Terry encountered Field and a bodyguard at a train station restaurant in Lathrop, California. Terry struck Field in the face and was promptly shot and killed by the bodyguard.[57]

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55 Shuck, *History of the Bench and Bar*, 76. The death penalty for larceny was eliminated by the legislature in 1856. One of Shuck's correspondents informed him that he had witnessed the hanging of three men for larceny near Stockton before a crowd of thousands in 1852.

56 *Id.,* 173-90.

57 Mrs. Terry was eventually committed to an insane asylum.

Less sensational but thoroughly engaging, is John T. Doyle's narrative of the so-called "Pious Fund" case,[58] a matter that stretched over two decades and whose handling by Doyle shows how competent and resourceful early California lawyers could be. The "Pious Fund" was the name given to an endowment established originally in the seventeenth century for the propagation of the Catholic faith in Spanish California. It was managed first by the Jesuit religious order, later by the Spanish government, and then by the independent Mexican government, which eventually took control of the fund and sold its assets. In 1853, after the end of the Mexican-American war and the conclusion of the 1848 Treaty of Guadalupe Hidalgo, Doyle was asked by the archbishop of San Francisco to determine whether he might have any claim against the Mexican government. He concluded that would have to wait until a commission of some sort was established for the adjudication of such claims. He then put the matter aside, but in 1870 happened to see that a mixed Mexican and American commission had been established. Its jurisdiction, however, was limited to claims arising since the 1848 treaty. Doyle relates in fascinating detail how he found a way around this limitation and how, after exhaustive historical research and the able marshaling of legal precedents, he was in the end able to vindicate a claim before the commission (more precisely, before a British umpire, asked to break a tie in the body) and recover a substantial sum of money for the archdiocese.

VI. A CONCLUDING NOTE: POLITICS AND THE BAR

Though concern with political issues is far from a central theme of Oscar Shuck's *History of the Bench and Bar,* they do occasionally peer out at one from his pages. Chinese immigration had, by this time, faded in importance as a topic of public discussion, but some of Shuck's biographies highlight what a burning issue it once was and to what a low level the public discourse surrounding it could sink. John Boalt, prominent San Francisco lawyer and namesake of Boalt Hall, we are reminded, was a staunch opponent of Chinese immigration, arguing that the "Caucasian and Mongolian races" were incapable of living together

58 Shuck, *History of the Bench and Bar*, 81-94.

harmoniously. He was also, Shuck notes, the man chiefly responsible for the 1878 statewide plebiscite on the continuation of Chinese immigration. (The vote was overwhelmingly negative.) Samuel Shortridge, another die-hard exclusionist, delivered a fiery speech against Chinese immigration in 1887, in which he compared Californians facing Chinese immigrants to the Athenians, "threatened by the advancing hosts of Syria," or the Romans, menaced by the barbarian tribes. Lyman Mowry, on the other hand, gets brief acknowledgment as an attorney who represented Chinese litigants in several Exclusion Act cases.[59] And the volume includes a thoughtful essay by Marshall Woodworth, a leading member of the federal bar, analyzing and praising the then recent U.S. Supreme Court decision holding that persons of Chinese ancestry born in the United States were, by virtue of the Fourteenth Amendment, citizens of the United States.[60]

The Spanish-American War had concluded three years earlier, giving the United States possession of the former Spanish colonies of Puerto Rico, Guam and the Philippines, and some Americans, including some Californians, a taste for expansion overseas. Thus we learn that George T. Rolley was a firm supporter of expansion, retention of the Philippines, in particular, and believed the United States "should have the finest navy afloat." And J. Wade McDonald, characterized by Shuck as "the original 'Prophet of Expansion,'" thundered in an 1898 Memorial Day speech that not one foot of Spanish territory should be yielded up. "That which we take with the strong hand of war we will retain; and we shall not ask permission from czar, kaiser or potentate to do so." On the other hand, J.C. Ruddock, a Ukiah attorney, was a strong opponent of the war, believed that America's mission in the Philippines ended with Spain's defeat, and was, Shuck observes, "opposed to anything that savors of militarism and imperialism."[61]

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[59] *Id.,* 786, 1080, 911.

[60] *Id.*, "Citizenship for Chinamen," 1099-1103. The article originally appeared in the July-August, 1898 issue of the *American Law Review.* The case is *Wong Kim Ark v. United States,* 169 U.S. 649 (1898).

[61] *Id.,* 1064, 810, 922. Shuck himself had been involved in the pro-Cuban independence movement and, one presumes, must have supported the war with Spain. See *San Francisco Call*, Feb. 18, March 13, 1897.