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CALIFORNIA LEGAL HISTORY



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CALIFORNIA SUPREME COURT
HISTORICAL SOCIETY

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ORAL HISTORY I
PHIL S. GIBSON

CHIEF JUSTICE OF CALIFORNIA
(1940-1964)

Oral History of
CHIEF JUSTICE PHIL S. GIBSON

INTRODUCTION

JOSEPH R. GRODIN*

When I first saw the chief justice's chambers at the California Supreme Court, someone — it may have been Chief Justice Bird — pointed to an indentation in the ceiling tile and said it was caused by the cork from a champagne bottle opened by Chief Justice Phil Gibson, then age 70, in celebration of the birth of his son Blaine. Somehow that image captured for me the spirit of a man whom I had come to admire and respect — a spirit that combined enormous dedication and *gravitas* with a perennial youthfulness and ebullience and (the consumption of alcoholic beverages inside the State Building being a bit questionable) just a touch of irreverence.

Phil Gibson was appointed to the Supreme Court by Governor Olson in 1939. I think it is fair to say that his appointment, along with that of Jesse Carter earlier in the year and of Roger Traynor the year following, marked the transformation of the California Supreme Court from mediocrity to excellence, and its emergence as one of the preeminent courts in the nation. In large part this was the product of what turned out to be Gibson's genius for judicial administration, and his extraordinary accomplishments

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PHIL S. GIBSON,
CHIEF JUSTICE OF CALIFORNIA, 1940-1964.

Courtesy California Judicial Center Library

in that arena, from structural reform to procedures for judicial accountability, are understandably the primary focus of the oral history that follows.

Such attention as is typically paid to Gibson's contributions as a judicial administrator, however, tends to obscure his contributions to the substance of legal development as a legal scholar, and that tendency is enhanced by the shadow of legal giants like Roger Traynor, Mathew Tobriner and Stanley Mosk who came to serve with him on the Court, and to whom, through the assignment of cases, he often deferred. And so it is that in the oral history which follows, the opinions that Gibson wrote are relegated to a single footnote, whereas in fact, the opinions of the Gibson court — in the forefront of judicial response to changing conditions in the nation and in the world — are of at least equal significance to judicial reform in the Court's emerging preeminence. Gibson's own contributions to those developments, especially in the area of civil rights, deserve greater recognition than they have received.

In his oral history, Gibson is quoted as saying that he considered an opinion holding that unions could not discriminate against blacks to be the most important case he wrote. The case, *James v. Marinship Corp.*,¹ was brought by black boilermakers against their union and their employer, a shipbuilding company in Marin County. World War II was underway, and, skilled workers being scarce, the black boilermakers, imported from the South, were badly needed. Their presence, however, created a problem for the boilermakers' union. The union had a closed shop agreement with Marinship, requiring that all workers be union members, but at the same time it was the union's policy not to admit blacks as members. And yet the union did not want to be seen as obstructing the war effort, nor was it anxious to forego additional dues revenue. The union solved this dilemma by establishing an "auxiliary" union that blacks could (and were forced to) join, and pay dues, but without any voice in policy formulation or selection of officers who, as a matter of federal law, were supposed to represent all the members of the boilermakers' bargaining unit.

The response of the black boilermakers, represented by the NAACP and its lead counsel, Thurgood Marshall, along with local lawyers, was to sue both the union and Marinship. For the Court it must have seemed a

¹ 25 Cal.2d 721 (1944).

politically sensitive case, since labor unions had been among the strongest supporters of the Olson administration, but as Justice Stanley Mosk put it in his memorial tribute at the Supreme Court, for Gibson there were no “sacred cows.”² In terms of his own values, and the emerging values of society, the answer must have been clear. But what about the law? This was 1944. The federal Civil Rights Act was still twenty years away. The union’s duty of fair representation under federal law had yet to be firmly established. Neither the federal nor state constitutions applied to conduct by private actors. And, as the union argued vehemently in its brief, labor unions were private associations, free to establish their own qualifications for membership without judicial interference.

The easy answer, the course of least resistance, would have been for the Court to deny relief, invoking principles of judicial constraint. Any other answer would require judicial activism, would it not?

Gibson’s answer — one that went beyond the theories advanced in the briefs — was solidly grounded in the common law. A union, he observed, is like a public utility, exercising a sort of monopoly, *de facto* if not *de jure*, in the representation of workers. In that respect it was like the keeper of a remote inn, or the provider of a scarce service, who at common law had the duty to serve all without arbitrary discrimination. A union might maintain a closed shop, requiring union membership as a condition of employment, and it might maintain a closed union, excluding those whom it did not care to admit to membership, but to maintain a closed shop and an arbitrarily closed union at the same time violated the union’s common law obligations.

The idea that a union may not exclude persons on the basis of race, or relegate them to a separate (and decidedly unequal) membership status, no longer strikes us as remarkable, but at the time it represented a huge advance in legal doctrine. As applied to unions, Gibson’s reasoning came soon to be accepted as part of federal labor law, but the implications of the reasoning were broader, and reverberated throughout the common law. What is now known as the doctrine of “common law due process” — the doctrine that an organization or entity that controls access to a business or occupation must exercise that control through fair procedures

² Stanley Mosk, *Phil Gibson — A Remembrance*, 72 CAL. L. REV. 506, 508 (1984).

and non-arbitrary standards — has been applied not only to unions but to professional societies and insurance companies as well.³ Gibson's pride in *Marinship* is understandable, and justified.

Equally significant was Gibson's opposition to California's sad history of discrimination against persons of Japanese descent, reflected in laws prohibiting the issuance of commercial fishing licenses, and the ownership of property, by aliens ineligible for citizenship under federal law. These laws came to be challenged before the California Supreme Court in the years following the end of World War II. In *Takahashi v. California Fish & Game Commission*,⁴ a majority of the Court, in an opinion by Justice Edmonds (who was Governor Olson's fourth appointee) upheld the fishing prohibition against equal protection challenge. Gibson joined Carter and Traynor in a strong dissent, and their position was vindicated when the U.S. Supreme Court reversed.⁵

When the alien land law came before the California Court a few years later, in *Sei Fujii v. State of California*,⁶ Edmonds switched to join the prior dissenters in an opinion by Gibson holding the law unconstitutional. The plaintiff was about to lose ownership of land which he had purchased after World War II, pursuant to the decision of the trial court based on the provisions of the Alien Land Law which provided for escheat to the state. But Gibson's court reversed. The opinion began by rejecting plaintiff's argument that the Alien Land Law offended the United Nations Charter, reasoning that while the Charter was a treaty, its terms were not self-executing, and so the opinion went on to consider plaintiff's argument that the law violated the Equal Protection Clause of the Fourteenth Amendment. Gibson had no difficulty concluding that the Alien Land Law, by incorporating the federal standards for citizenship eligibility, had both the purpose and effect of discriminating on the basis of race, but there was a problem: the U.S. Supreme Court which had sustained similar land ownership restrictions against equal protection challenge on the basis that such restrictions were "reasonable" in light of a state interest in confining land ownership to

³ See Matthew [sic] O. Tobriner and Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CAL. L. REV. 1247 (1967).

⁴ 30 Cal.2d 719 (1947).

⁵ *Takahashi v. California Fish & Game Commission*, 334 U.S. 416 (1948).

⁶ 38 Cal.2d 718 (1952).

persons who had a stake in the national polity. Gibson and his liberal colleagues found the law unconstitutional notwithstanding those opinions, on the ground that the principles on which those cases were decided had been undercut by subsequent decisions, including *Takahashi*. The three dissenters attacked the majority's reasoning on the familiar ground that it represented personal preference rather than the law, but the U.S. Supreme Court denied *certiorari*, implying under the circumstances, that Gibson and his colleagues were right, as indeed they were.

It is worth recalling, in light of the currently fashionable emphasis on prior judicial experience as a qualification for appointment, that Phil Gibson had never served as a judge when Governor Olson put him on the high court. He had served as director of Finance in the Olson government, and before that as a successful corporate lawyer representing entities in the movie industry. Underlying those experiences were a creative intellect, a keen appreciation of human nature, a personality which projected warmth and integrity, and an unwavering commitment to social justice. Governors looking for criteria to guide judicial appointments could do a lot worse.

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Oral History of
CHIEF JUSTICE PHIL S. GIBSON

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INTERVIEW HISTORY¹

The Regional Oral History Office sought to interview the Honorable Phil S. Gibson for the Knight-Brown Era Oral History Project with some trepidation, due to a layman's hesitation about imposing on the dignity of the state Supreme Court and because we had heard that he preferred not to be disturbed in his retirement. Although he pleaded ignorance of politics due to his years on the bench, Chief Justice Gibson was cordial in inviting the interviewer to his home to discuss general observations on his years in state service (1939–1964).

Age 88 at the time of the interview (May 12, 1977), Gibson was of medium height and build, white-haired, and well-tailored. Seated in his pleasant living room overlooking the Carmel Valley, he chatted a while to test the interviewer's questions and intent and then agreed to record some of his personal recollections of California governors from Frank Merriam to Jerry Brown.

What emerges is an informal portrait of a man who was appointed to what many feel is the number two spot in state government, director of Finance, after brief and almost casual acquaintance with Governor Culbert Olson, who shortly thereafter appointed him an associate justice and then chief justice of the state Supreme Court. With remarkable objectivity, Gibson skips over highly political events, mentioning instead lasting administrative reforms he introduced, based on his business and legal experience.

During the 1950s and '60s, Gibson's insistence on improvements in procedures for judicial qualifications review, assignment of judges, and getting cases through the courts are credited by knowledgeable observers with setting standards for the nation. They may, indeed, have provided guidelines later followed by fellow Californian Earl Warren as chief justice for the U.S. Supreme Court.

¹ Editor's Note: The oral history is printed by permission of The Bancroft Library at UC Berkeley. It is presented here in its entirety, and it has been reedited for publication. The original transcript is a portion of "Governmental History Documentation Project : Goodwin Knight / Edmund Brown, Sr. Era : California Constitutional Officers : Phil S. Gibson, 'Recollections of a Chief Justice of the California Supreme Court,' an Interview Conducted by Gabrielle Morris in 1977: oral history transcript and related material, 1977–1980" and may be viewed at the Library or online at <http://www.archive.org/details/caliconstitutoff00morrrich>.

In the interview Gibson also refers briefly to the close working relationship between attorneys general and chief justices and acknowledges that upon occasion governors confer with a chief justice about judicial appointments. There must be many occasions on which those seeking to govern well would seek the benefit of the experience and wisdom of the state's highest court.

The interview concludes with useful brief summaries of governors Gibson has known. Although the fullest comments are on Culbert Olson and Pat Brown, there are also useful insights on Earl Warren and Goodwin Knight. It is hoped that at a later date Chief Justice Gibson will discuss some cases of importance that came before the Supreme Court in his day.

— GABRIELLE MORRIS, INTERVIEWER

Regional Oral History Office, July 15, 1977

The Bancroft Library

University of California, Berkeley

FROM MISSOURI TO LOS ANGELES

MORRIS: I was asking why you decided to come to California and how you got interested in government and public service.

GIBSON: Do you want a little background?

MORRIS: Yes, please.

GIBSON: I was born in Grant City, Missouri, a small town, 1,400 people in the northwestern part of the state near St. Joe. My father was a lawyer. He was born in Indiana, served in the Union army in the Civil War, came to Missouri from Indiana, had a small newspaper. He had a good education. He was educated in Indiana. He had six daughters by his first wife. She died. He married my mother while some of those girls in his first family were still in the house. My mother brought up some of them and then she had five children, three boys and two girls.

MORRIS: Was your mother also a Missouri girl born and raised?

GIBSON: Well, she was born in Missouri, but her childhood after the Civil War was spent in Mississippi. She came back to Missouri. She had little education, very little. She educated herself. My father was supposed to be a rather prominent man in that area; I think she was smarter than he was.

MORRIS: How did she go about educating herself?

GIBSON: Reading.

MORRIS: Would she help him with the newspaper at all?

GIBSON: No, he didn't have the newspaper then. I think he owned part of it, but he never had anything to do with it. He had a farm, and the law office — quite successful. His three boys all graduated from the University of Missouri, myself and my two brothers.

MORRIS: Were you the oldest?

GIBSON: No. The oldest became a lawyer and a very successful one. My younger brother, Blaine, studied journalism, became a newspaperman. He was the editor of the Pasadena paper when he died. He died quite young of Hodgkin's disease. He died in his early 30s. Our son, Blaine, now 20, who is a student at the University of Bordeaux, is named after my brother.

MORRIS: He accomplished a lot in that short time.

GIBSON: Yes, he did, a great deal. I graduated from the University of Missouri in 1914. I went to my home town and ran for prosecuting attorney, and was elected.

MORRIS: Before you'd been to law school?

GIBSON: No, just after I graduated from law school. Then the war came. I went to the first officer's training camp and was kicked out because I couldn't pass the physical examination. I enlisted in the National Guard in Kansas City, the same outfit as Harry Truman.

MORRIS: I was thinking about that driving down. It really was the same unit?

GIBSON: Yes.

MORRIS: That's marvelous.

GIBSON: Except he was in the artillery and I was in the infantry. I saw very little of him. Of course, I was soon commissioned and sent to France. I served for a time with the British, and then was returned to my old outfit.

It was the old 35th Division that Truman was in; but I didn't see much of him. Saw him a time or two. One of my schoolmates at the University of Missouri was Bennett Clark, the son of Champ Clark who had a great deal to do with Harry Truman's political career. Another one was Tuck Milligan, Jacob Milligan nicknamed Tuck, who also had a great deal to do with Truman's political career. Both of them served in France in the 35th Division; Milligan was a congressman and ran against Truman in the Democratic primary nomination for senator. Truman beat him. Clark was then a senator.

MORRIS: Yes, and early in the century hadn't he been a candidate for the Democratic presidential nomination?

GIBSON: His father had, Champ.

MORRIS: Champ was who I was thinking of.

GIBSON: Champ Clark ran against Wilson. Bryan helped Wilson at a critical point or Champ Clark would have probably been nominated. Charles Evans Hughes won the Republican nomination, but he was defeated because he didn't carry California. He didn't carry California because Hiram Johnson didn't give him the support that he should have. Wilson was elected.

You were asking me about how I got to California. After the war I went to school in England. I hadn't been discharged. I went to the Inns of Court, which is a great law school; I was still in uniform. When I was discharged I came back to this country. I was physically not able to practice law so I got a homestead in Wyoming. I lived for two years on the Wyoming homestead.

MORRIS: That must have been pretty rugged.

GIBSON: Well, not too much so. There were lots of us, mostly soldiers with tuberculosis. It wasn't rugged, no. Not too much so.

MORRIS: Had you picked up tuberculosis serving overseas?

GIBSON: Probably. When I was sufficiently recovered to work again, my brother who was editor of a paper in Los Angeles County, my younger brother, urged me to come to Los Angeles and that's how I got to California. I was admitted to practice in California and started practicing in February 1923, as I remember it.

MORRIS: How complicated was it to be admitted to the bar in California?

GIBSON: Not then. Not with my background.

MORRIS: I would think that was pretty distinguished.

GIBSON: With the army service and everything, we got a break, of formal examination. It didn't amount to much. I passed a sort . . .

MORRIS: Was there a set time of year at which everybody who wanted to be admitted took the exam?

GIBSON: I don't think so for a person who had been admitted to practice in another state. I started practicing in Los Angeles. Those were boom days in Los Angeles.

MORRIS: Was there a shortage of lawyers?

GIBSON: Well, Los Angeles was booming. I don't know if there was a shortage of lawyers, but the city was growing very fast, the moving pictures were in their prime, and very soon I was representing people in the moving picture business.

MORRIS: That must have been interesting.

GIBSON: I lived in Beverly Hills and knew many of those interesting people. My wife and I didn't go out socially. She wasn't real well and I didn't

want too many social contacts. Of course, it doesn't always help to know all your business contacts socially.

MORRIS: It does not help?

GIBSON: Sometimes it's better not to. I did not represent many of the actors. I represented the companies.

MORRIS: In corporate law?

GIBSON: Yes, mostly.

MORRIS: The business end of things.

GIBSON: Yes.

GOVERNOR CULBERT OLSON'S ELECTION AND ADMINISTRATION

GIBSON: I met Olson in the early '30s and I liked him. I found him a very fine person to work with, a very able man. I liked his record in the Senate, the state Senate.

When he decided to run for governor, for the nomination, there were several very important men seeking the nomination: O'Connor, who afterwards became a federal judge, a great friend of Roosevelt's, wanted the nomination, and two or three other prominent men. I thought Olson was the best candidate. At that time I was not a registered Democrat. I think at that time I probably was registered declined to state. I had run on the Republican ticket when I was elected prosecuting attorney in Missouri, but I hadn't taken any active part in politics in California.

I made a contribution to Olson's campaign. He found out about my contribution and he called me and asked me to meet with some people in his office. I told him, "They promised me that I wouldn't be bothered if I made this contribution," and he said, "Well, just this once." So I went over. The question was whether he should address a group in Pasadena that was pretty far to the left. I said, "Hell, they're your friends, aren't they?" He said, "Yes." I said, "Well, stay with them." Some of the people there were advising against it.

But anyhow he asked me if he could walk back to the office with me. He said, "I'm looking for a headquarters, and I know you represent several of the buildings downtown. Would you find me a place for a headquarters?"

I said, "It will cost you too much money. You can't afford the rents downtown." I went back up to my office and I thought about the basement of the Loew's State Building. It had been occupied by a cafeteria, a very successful one. These were pretty hard times and it had gone broke and the place was empty. A lovely place at the corner of Seventh and Broadway. I called Loew's real estate man in New York.

He said, "Hell, yes. Rent it to him. Louis Mayer will have fits." Louis Mayer was then president of Metro-Goldwyn-Mayer and a great Republican and very active in support of the Republican candidates.

MORRIS: Did you work out a rental that the Olson campaign could afford to pay?

GIBSON: Sure, sure. The cafeteria room had been empty for quite some time. Olson's headquarters attracted a lot of people there and that was business for the building.

MORRIS: So did you continue to sit in on these discussions?

GIBSON: No. I had very little connection with the campaign after that. Then after Olson was nominated, I attended a couple of meetings with just a few people from the moving picture industry that were supporting Olson.

MORRIS: Who would that have been?

GIBSON: Well, Joe Schenck was one of his leading supporters.

MORRIS: On your recommendation?

GIBSON: No, I think Joe always acted on his own; a pretty able fellow, you know.

MORRIS: Yes, to start a motion picture business and keep it going.

GIBSON: Joe's brother, Nicholas M. Schenck, was one of the most powerful men in the moving picture business.

MORRIS: Did you and Mr. Olson talk about his ideas about government at all?

GIBSON: No. I didn't discuss those things with him. He had ideas of his own and frankly I wasn't in politics. He asked me to dinner at his house just a few days after he was elected. He asked me if I would go to Sacramento with him to help him with his budget. In those days, and it's still

to a certain extent true, a governor has to find out something about what he's going to do when he gets into office as far as his first year's budget is concerned.

MORRIS: Because the budget is presented right after he's sworn in?

GIBSON: That's right. So I went to Sacramento with him. Went with him and helped him with his budget. When that was done, I went back to my office in Los Angeles. Nothing was said about any political appointment at all. I wasn't looking for one.

DIRECTOR OF THE STATE DEPARTMENT OF FINANCE, 1938–1939

GIBSON: A few days after I got back, he called me and asked me if I would like to be director of Finance. I said, "I don't know that I'm qualified. I don't know anything about state politics." At that time I thought he was going to appoint Dewey Anderson. Did you ever hear of Dewey?

MORRIS: Read his book?

GIBSON: Burke's book. I haven't read Anderson's book, but a man named Burke has written a book called "Olson's New Deal in California" — doctoral thesis. It was a . . .

MORRIS: He mentions that Dewey Anderson was the person that was expected to be director of Finance. Dewey Anderson also wrote a book? I have . . .

GIBSON: Oh, yes. He died just a short time ago.

MORRIS: Just a year or so ago, yes.

GIBSON: Dewey had a lot of ability but he did not always have good judgment in political matters.

MORRIS: I understand that he did help Governor Olson develop position papers on social issues and that kind of stuff.

GIBSON: Oh, I'm sure of that, yes. He wanted to be director of Finance. Olson may have let him think he'd get it. So when I was appointed, Dewey was very upset. The governor gave Dewey the job of handling all of the relief set-up in the state; what did they call it then?

MORRIS: They called it the State Relief Administration.

GIBSON: SRA?

MORRIS: Right.

GIBSON: While working at that Dewey got in trouble with the communists, who were trying to run the Olson administration and were not succeeding.

MORRIS: Was it that communists got to Mr. Anderson or that there were just some who got hired?

GIBSON: There were some that were hired in that relief set-up that caused Anderson and the governor a lot of trouble. I don't know exactly the basis of the Anderson-Olson split. I don't know what was at the bottom of their differences. I got along with Dewey very well when I was director of Finance, even though he thought he should have had the job instead of me. I expect he was right.

MORRIS: The Relief Administration was a knottier problem than the Department of Finance at that time, am I right?

GIBSON: From a public standpoint. Of course, at that time the director of Finance next to the governor was the most powerful position in the state. At that time it had responsibilities that are now encompassed in a half a dozen departments. It was a very powerful position.

MORRIS: Were those things that later became separate departments already too unwieldy?

GIBSON: Oh, I think some of them were.

MORRIS: So what you're saying is that your appointment as director of Finance was announced before Dewey Anderson's job as head of the SRA? You were the first appointment announced?

GIBSON: I expect that I was. I don't remember, but I think that my appointment was announced before Dewey's. I know Dewey thought he was going to get it. He was rather upset about it, but I told him that I wasn't going to be around there very long and that he would probably step into my shoes when I left. I had told the governor I could not stay in the job more than six months.

MORRIS: I see. How come?

GIBSON: I wanted to get back to my law practice. I didn't like being away from my wife, who stayed in Beverly Hills, and I didn't really want the job.

MORRIS: Then why did you say yes?

GIBSON: Well, I was weak, I guess. Olson had a way of convincing his friends. I thought I might learn something, too. Some people said that I took the job because I wanted a judicial appointment. That's not true. Dewey Anderson has that in his book. I was not looking for a judicial appointment. If there hadn't been a couple of deaths on the Supreme Court right at that time, I probably never would have gotten one.

MORRIS: What kinds of things did you think as a practicing attorney that you might learn in running the Department of Finance?

GIBSON: Business experience on a large scale.

MORRIS: How much is there that the director has to know of actual financial things ?

GIBSON: Of course, I'd had quite a bit of experience with the business side of law practice. After all, I couldn't work with the people high in the motion picture business at that time without knowing something about business. I quit trial work entirely in my last years of practice. I refused to take any trial cases. Business law occupied all my time.

MORRIS: How much of the actual detail work of the Department of Finance was handled by the career civil servants?

GIBSON: We had splendid people there. I could not have done the job without their help. They were able and loyal.

The director of Finance handled certain investments, and when I first went in as director of Finance, half the people outside waiting to see me were bond salesmen. I called up the University of California and I asked for the man in charge of their investments, if I could get a man to take over this work. They gave me the name of a fellow, and so, working with the Personnel Board, the governor, and the Legislature, I set up the job.

MORRIS: A separate person to handle the investments?

GIBSON: Yes.

MORRIS: That's interesting. And you got him from the university?

GIBSON: I've forgotten his name. He was recommended by the people handling the investments for the university and we got that job out of politics entirely.

MORRIS: That sounds like you'd need a real professional in that job.

GIBSON: Yes, I wasn't qualified to do it and probably none of my predecessors were qualified to do it.

MORRIS: The business of investment of state funds, this is always a tricky one, isn't it?

GIBSON: Well, you have to know something about the business. I didn't and I didn't want to be bothered with the horde of people pressing all the time. There were millions of dollars there to be invested. Those were pretty lean years. They were all hungry for business.

MORRIS: When you were working with Mr. Olson on that first budget after he was elected governor, was it a surprise that there was more of a deficit than was expected?

GIBSON: Oh, I don't know. I really don't remember much about it.

MORRIS: I was thinking of your comment about "Those were lean years."

GIBSON: Yes, they were.

MORRIS: You were saying, "Those were lean years" in the economy when you and Olson went to Sacramento.

GIBSON: Sure. You had the Great Depression in the '30s. In the last years of the '30s and early '40s things were pretty tough. The war came in the early '40s and it changed the whole picture.

MORRIS: One of the things that Mr. Olson had the most trouble with was getting the Legislature to approve money for that State Relief Administration, wasn't it?

GIBSON: Yes, he had trouble with the legislature on nearly everything because they didn't like Olson and the things that Olson was proposing in California. All of them have since become part of our government, but Olson was far ahead of his time, way ahead of his time.

MORRIS: But they had liked him when he was a state senator, hadn't they?

GIBSON: Not all of them. [Chuckles.] Just one group liked him; the liberals liked him. I don't think the big oil companies or big business liked Olson much. For that matter, they didn't like Warren towards the end of his administration.

About a month before he left, Governor Warren told me that he was sick of them. He said they interfered with almost everything that he was trying to do for the people. Warren was getting more liberal; he was changing before he left as governor.

MORRIS: Do you think that being governor has that effect on a person?

GIBSON: I think most governors want to do a good job for the people. Warren gradually became more liberal during his administration, very much so in the last two years of his administration. Of course, he carried it on as chief justice. Eisenhower told me once that the biggest mistake he ever made was his appointment of Warren as chief justice, and I understand he told other people that same thing. I think Warren was a good governor. He made very good judicial appointments. He did a good job in administration. But I thought you wanted to talk to me about Goody Knight.

MORRIS: We do, but since we don't often get a chance to talk to somebody who's worked with so many governors, we thought we would pick up on the earlier ones, too.

GIBSON: I worked very closely with Olson and with Warren. I never worked so closely with Knight, although I knew Knight very well. We never were very close after he became governor.

MORRIS: Why would you think that is?

GIBSON: I don't know why.

CALIFORNIA SUPREME COURT: APPOINTMENT AND FELLOW JUSTICES

MORRIS: Would you say that you generally were considered liberal in your outlook on life and the tone of your decisions?

GIBSON: Oh, I think so, yes. I suppose so. I became an associate justice on the court in '39. I became chief justice in '40. Roger Traynor took my place as the associate justice. Three of us at that time were Olson's appointments:

Carter, Traynor, and Gibson. Carter had been a state senator and was an exceptionally able lawyer, one of the best trial lawyers in the state. He had had no judicial experience. Neither had Traynor, nor I. When I went on the Court, Waste was chief justice. I succeeded him within a year, seven months I think I had been on the Court. Justice John Shenk was the senior associate justice. He was conservative but he thought he was a liberal.

MORRIS: He thought he was a liberal?

GIBSON: In his own mind, and I expect he was at one time a liberal Republican. [Jesse] Carter, who had been a superior court judge and on the court of appeals [sic], came from a very conservative area. He was a very fine looking man; he looked like a judge. [Fred] Houser was one of the ablest lawyers I think that ever sat on our court. Nobody gives him much credit, but he was an exceptionally able man. He suffered terribly from migraine headaches. It was a big handicap. I could sympathize with him because that was my first wife's big problem. [Douglas] Edmonds was very ambitious, but very intelligent. Sometimes he went with Carter, Traynor, and Gibson in labor cases. It was a good court. Warren only had one appointment on the Supreme Court, Justice Homer Spence. Olson had four, let's see, Gibson, Traynor, Carter, and Schauer. He had four appointments on the Supreme Court and he was governor for only four years. Warren was governor over eight years and only had one appointment and that was Spence.

MORRIS: Schauer was appointed by Olson before he finished his term?

GIBSON: Yes.

MORRIS: That's interesting. Goodwin Knight had only one appointment, too, I believe: Marshall McComb.

GIBSON: Yes. Goody had promised that place to Tom White. Afterwards he gave the appointment to McComb. He called me — my wife had died and I had left Piedmont and was living in San Francisco when Knight called me. He said, "You're a friend of Marshall McComb's, aren't you?" I said, "Yes, I've known Marshall since 1926 or '27."

He said, "I would like to appoint him justice of the Supreme Court." And I said, "Well, Goody, you told me you promised it to Tom White." He

said, "Well, Tom will wait." Goody was *very* political, McComb, of course, as you know from recent publicity, is very rich.

MORRIS: I knew there was a debate about who was going to control his assets. I thought that probably meant they were sizable.

GIBSON: Well, Marshall McComb is a wealthy man. He and Schauer went on the superior court at the same time in Los Angeles. At the same time [1927] Spence was put on the superior court in Oakland, Alameda County, by Governor Young. At the same time he appointed a judge who afterwards became quite famous, [Leon R.] Yankwich.

Yankwich served on the United States District Court in Los Angeles. I knew all these people. We were all about of the same age and all, except Spence, all of us Los Angeles people. They were appointed by Governor Young; he was one of the best governors this state ever had. He never gets much credit, but he was a fine governor.

MORRIS : He was from Berkeley, wasn't he?

GIBSON: Yes.

MORRIS: A high school teacher. He taught civics and government; I've always thought he sounded like a very interesting man.

GIBSON: He was a good governor, excellent.

MORRIS: You think he was ahead of his time?

GIBSON: Yes, but he lacked the ability to communicate, to tell his story to people. But he did a fine job as governor.

MORRIS: Young seems to have had some fairly advanced ideas on administration and efficiency and accounting.

GIBSON: He did, he did. Any man in the office of director of Finance who looks back over prior administrations can immediately see the fine job that was done when Young was governor.

MORRIS: Was Fred Links already in that office when you were?

GIBSON: Is he still in there?

MORRIS: No, I'm sorry to say he died a couple years ago. But I talked to him a year or so before that.

GIBSON: He certainly helped me. I'm sorry to hear he has died. I hadn't got a Christmas card from him for a couple of years and I wondered about Fred. He was a great help to me when I was director of Finance. He was my right-hand man. He was one of the ablest men who ever served in the civil service in this state, one of the most knowledgeable. We were very close, remained very close for a number of years. Then I sort of lost track of him. I wondered because I hadn't heard from him.

I asked Paul Peek about him not long ago, and he said, "I think he died." He wasn't very strong physically towards the end.

MORRIS: He seemed to continue to enjoy life tremendously. In working with Governor Olson on setting up the budget, would you also have given him a hand finding other people to take appointments in the other departments?

GIBSON: No. I never had much to do with the governor's selection of people in the administration outside the judiciary. Olson conferred with me on almost all his judicial appointments. He didn't always follow my suggestions, but he always conferred with me.

MORRIS: You said you were surprised that two people died on the Supreme Court so soon after Olson became governor?

GIBSON: Yes, that was unusual.

MORRIS: When did you get an idea that Governor Olson was considering appointing you?

GIBSON: To the Court?

MORRIS: To the Court, yes.

GIBSON: Well, I also ran the finances of the exposition on Treasure Island, representing the state. I was there on one occasion with Governor Olson and I rode back to San Francisco with him. In the car, he turned to me and said, "I'm going to put you on the Supreme Court."

MORRIS: And what was your reaction?

GIBSON: I was very much surprised. I knew there was a vacancy, of course. He had talked to me when he appointed Carter just a few months before, a short time six weeks before, following the death of another member of the Supreme Court. But this came as a complete surprise to me. A lot of people

think it was all set. It wasn't at all. I told him just about ten days before that that I had to get back to my office in Los Angeles. He was looking around for somebody to succeed me as director of Finance. I had recommended George Killion. You know George.

MORRIS: Yes, I do know George.

GIBSON: He didn't appoint George first. He appointed him afterwards. George was not my immediate successor . . . a fellow from Pasadena whose name I've forgotten.

MORRIS: There was a man named [John R.] Richards in there for a while.

GIBSON: Yes, Richards, from Pasadena. I didn't know Richards. I was surprised that he was appointed. That was how Olson broke the news to me when he appointed me.

GIBSON: Then when Waste died, the Court was in Los Angeles holding a session. I can't be certain about dates, but I think we got word of his death on Thursday while the Court was sitting in Los Angeles. Waste was, we knew, quite sick and did not attend the session in Los Angeles. He was in his home in Berkeley. We adjourned the session when he died. All of the judges immediately went back to San Francisco. The funeral, as I remember it, was set for Saturday. My wife was with me in Los Angeles. She wasn't very well, so I stayed with her.

We were living at the old Biltmore Hotel downtown in Los Angeles. On Friday the governor was in Petaluma. He had gone up there to make a speech. He called me at the hotel. I was paged by a little fellow who had worked at the old Biltmore for years. He found me at the bar. I was having a drink. He told me the governor wanted to speak to me.

The governor said, "I'm going to appoint you chief justice." He said, "There's a crowd of newspapermen here and they are going to press me to tell them who the new chief justice will be." He said, "I am going to announce it."

I said, "Oh, please don't, Governor, not until after the funeral. The funeral will be on Saturday." He said, "All right."

MORRIS: Did he like to make a big splashy announcement?

GIBSON: No, he liked to get things behind him, make appointments quick.

MORRIS: Get things done.

GIBSON: No, he was not flashy. Olson was anything but flashy. Not nearly as flashy as Warren or Knight or Brown. Not at all as flashy. When I got on the Lark that night, Friday night, to come back to San Francisco for the funeral, which was to be held in Oakland, I was sitting in the club car of the old Lark.

MORRIS: Yes, the only way to travel.

GIBSON: That was great in those days. They had a radio on in the corner of the car. A blast came over the radio, governor's announcement that he'd appointed Gibson chief justice. An elderly-looking gentleman sitting in the corner of the car reading his newspaper wrinkled it up and threw it on the floor in absolute disgust. The fellow sitting next to me said — I didn't know that he had recognized me; I didn't recognize him — he said, "That fellow didn't like it, did he? Mr. Chief Justice, I'm going to buy you a drink." It was a little embarrassing.

MORRIS: Had you ever thought about possibly becoming a judge?

GIBSON: Oh, yes, I'd thought about it. I don't think that I would have been interested in becoming at that time a trial judge. I was doing very well in the law practice right at that time.

MORRIS: And you liked the business law?

GIBSON: And I liked it, yes. I was doing very well. But almost any lawyer would like to be on the state Supreme Court. There are very few lawyers that wouldn't like that. And to be chief justice is, of course, a very powerful position; more powerful than it is now; it was a very powerful position.

JUDICIAL REFORMS

GIBSON: The chief justice at that time appointed all the members of the Judicial Council. Now the chief justice appoints only the judicial members. I was partly responsible for that. I began to work to broaden the base of the Judicial Council to include members of the State Bar and members of the Legislature, because the Judicial Council should be the advocate of judicial reform.

While I was chief justice we reorganized courts in the state, which is probably the most important reform in that field that had ever been

accomplished. We also created the Commission on Judicial Qualifications, which is now called the Commission on Judicial Performance. I made my first speech advocating that in Los Angeles.

Then the same year or the next year I talked to the State Bar here in Monterey, the State Bar and the Conference of California Judges. The proposal was well received by the State Bar, but not by some of the judges. We'd had some tragic situations in the state. Judges that were not doing their job, because of illness, incapacity, and some because of laziness.

It proved to be a very important reform. People don't know much about it. Until this McComb case, they didn't know hardly anything about it. Most of its effect is never known by the public; a judge gets in trouble and he is notified of the complaint.

MORRIS: Something's done about it before there's an issue?

GIBSON: Yes, before any action is taken.

MORRIS: If there is a commission that's looking into the qualifications of judges, what does that do to the governor's role in making appointments?

GIBSON: Well, there isn't any commission looking into the qualifications of superior or municipal judges before appointment. The Commission on Judicial Performance looks into the conduct of a judge, complaints that are made against judges. I'll give you an example that occurred before this commission was created, just one of a hundred examples that I could tell you about.

A very able young superior court judge in the northern part of the state was mixed up and he would go off on sprees and we wouldn't know where he was for a couple of weeks. There was a murder committed in the county and he could not be found. I assigned a judge from an adjoining county to take over. (This was during the Warren administration, the last years, as I remember, of his administration.) I asked the judge to meet me in Sacramento. We went in to see Governor Warren, and following the meeting he resigned. He died a few years after he resigned.

We had many such situations where judges, by reason of illness, could not perform their duties. We got better retirement laws. Part of this happened in the Warren administration, some of it in the Knight administration, and some of the best of it in Brown's administration. That's the thing that the Judicial Council should do, under the leadership of the chief

justice. I think the present chief justice, Rose Bird, is going to do an outstanding job in that field because she has the administrative ability.

LATER APPOINTMENTS TO THE SUPREME COURT

MORRIS: In that case, there were people commenting about her qualifications before she was appointed. Is the commission just for the Supreme Court?

GIBSON: No. The commission also passes on all appointments by the governor to the courts of appeal. The commission consists of the chief justice, the attorney general, and, if the appointment is to the Supreme Court, then the senior justice of the court of appeals [sic]. If the appointment is to the district court of appeals [sic], the third member is the senior justice from the district. In Bird's case, it was the attorney general and the senior court of appeals justice, Parker Wood. I testified for her.

MORRIS: I noticed that. What was it particularly about that appointment that made you decide to speak up?

GIBSON: Well, I thought she had the ability, a fine record in school, a fine record as the deputy in defending people charged with criminal offenses. She'd had a fine record and she is very intelligent. The fact that she'd had no judicial experience I didn't think disqualified her. After all, I had had none when I went on the Court. Carter had none; Traynor, who I think one of the ablest men that ever sat on the Court, had none.

MORRIS: That question is raised quite frequently. They said the same thing about Earl Warren when he was appointed to the U.S. Supreme Court.

GIBSON: This was also true of others, including Douglas and Frankfurter.

MORRIS: Was there anything in your testimony for Bird . . . were you concerned that there should be more women on the court?

GIBSON: No. I was testifying as to her qualifications. I had assigned Annette Adams to sit on the Supreme Court and later I assigned Mildred Lillie to sit on the Supreme Court.

MORRIS: Because you thought it was a good thing for more women to have judicial experience?

GIBSON: Well, no, because I thought they were qualified. They were judges on the courts of appeal and we needed help on the Supreme Court. I thought they were well qualified to do the job. I didn't want to discriminate against them because they were women. I think my wife is qualified to sit on any court in the state.

MORRIS: Your present wife is an attorney?

GIBSON: And a damn smart one.

MORRIS: Good. That's very advanced thinking.

GIBSON: Oh, I don't think so. I think my mother was smarter than my father and she'd never gone to college, never gone to high school.

MORRIS: While raising all those children.

GIBSON: Yes, one family and part of another.

MORRIS: How about your own appointment . . . did you feel there'd be a controversy over whether or not you should be appointed?

GIBSON: I never thought of it. I don't think there was any opposition to my appointment.

MORRIS: Aside from the guy at the other end of the club car?

GIBSON: [Laughter.] He didn't like it. He may have thought that the appointment should have gone to Justice Shenk. I had recommended to the governor that he appoint Shenk chief justice.

MORRIS: When you knew Mr. Waste was dying?

GIBSON: Well, we knew for two months that he'd never come back to the court. At that time the retirement laws were not nearly as good as they are today. Waste had heavy financial responsibilities and he'd been sick a long time. We knew that he wouldn't last too long. Shenk was the senior member of the Court. He was able. He was popular among the lawyers and judges. He and the governor had attended the University of Michigan and they were good friends. I thought the governor would appoint Shenk chief justice. He may have thought Shenk was too old.

MORRIS: So he was thinking that people on the Court should stay there a long time when he appointed them?

GIBSON: Well, he hoped they would, I suppose.

MORRIS: Do governors generally look for somebody who shares their philosophies?

GIBSON: Yes, I think so. But they make some mistakes.

MORRIS: That's in the nature of human events, isn't it?

GIBSON: I suppose. That's what Eisenhower claims he did. He said the biggest mistake he ever made was to appoint Warren.

MORRIS: Do governors in general consult with the present members of the Supreme Court when they're considering an appointment?

GIBSON: Well, I don't think that our present governor [Edmund G. (Jerry) Brown, Jr.] consulted with anybody on the Court except probably one member. He probably consulted with Justice [Mathew] Tobriner. The governor was Tobriner's research assistant. Tobriner is one of the ablest men ever to sit on a Court. I thought he should appoint Tobriner and, when he retired, appoint [Stanley] Mosk.

Mosk has the experience. After all, he had four years in Governor Olson's office, served with distinction as a superior court judge, sitting frequently by assignment on the court of appeals [sic], and was elected attorney general by the largest majority any man had ever received for that office. Mosk is doing an outstanding job on the Supreme Court. He was a natural. Mosk is a top administrator as well as a good lawyer. Tobriner, of course, has written some of the finest opinions on the Court. He was very close to young Brown, since the governor had worked for him as a research attorney.

MORRIS: When he was just out of law school?

GIBSON: Yes.

MORRIS: I had forgotten that.

GIBSON: So that's what I expected. I didn't know Rose Bird. I think she's going to make a great chief justice.

MORRIS: Were you asked to go and speak for her at her confirmation hearings?

GIBSON: Yes.

1958 ELECTION SPECULATIONS

MORRIS: I'm interested in Mosk and the other people like Goodwin Knight who leave the bench to run for office.

GIBSON: Well, I don't remember whether Knight ran for lieutenant governor while he was still a superior court judge. He may have finished his term as superior court judge when he ran for lieutenant governor. Mosk was still a judge when he ran for attorney general. But he took a leave of absence as I remember it.

MORRIS: I understand that Mr. Knight liked being on the bench. Normally a judge is pretty sure of being confirmed for another term.

GIBSON: Knight was very ambitious politically, I think one of the most ambitious men I've ever known politically. There's nothing wrong with that. But you know he wanted to run against Warren for the Republican nomination, for Warren's third term.

MORRIS: In 1950?

GIBSON: He tried to get support.

MORRIS: By 1950 there was a fair amount of opposition building up to Governor Warren.

GIBSON: Yes, there was.

MORRIS: But not enough to deny him the nomination?

GIBSON: Oh, no. Knight would have been elected governor easily if he had run for governor again. It is possible that Pat Brown wouldn't have run against him. You know what happened then?

MORRIS: That's the 1958 race when Knight ran for the Senate and Knowland ran for governor?

GIBSON: You know what happened.

MORRIS: I always wondered *why* it happened.

GIBSON: Oh, you live around Berkeley and Alameda County. You must know the picture.

MORRIS: Well, one of the theories is that Mr. Knowland wanted to run for president eventually.

GIBSON: That's not a theory; it's *fact*.

MORRIS: And why would it be easier to run for president as a governor than as a senator?

GIBSON: Well, he had been a senator, very successful. He felt if he could be governor of California he would have recognition as a chief executive of a large state and that would help him to get the Republican nomination for president. Many important Democrats didn't think Brown should run against Knight for governor.

MORRIS: Because Knight had such control?

GIBSON: Knight was popular. You might ask Pat. He is still around.

MORRIS: We plan to ask him. But what we wanted to ask you was if he'd asked your advice on the merits of this campaign.

GIBSON: No. He was attorney general then. I was chief justice. It wouldn't be likely that he'd ask me. I had breakfast with Knight, I think either the day after or two days after he'd gotten the word that he wouldn't get the financial support to run for governor. Knight was brokenhearted. He didn't want to run for the Senate. It was rumored that three newspapers, the *Chronicle*, *Los Angeles Times*, and the *Oakland Tribune*, wanted Knowland. I had breakfast with Knight either the next morning or two mornings after they told him that they wouldn't give him the finances. You know Ed Pauley?

MORRIS: He's on our list of people we hope to interview.

GIBSON: He could tell you the whole story if he would.

MORRIS: Well, if he won't tell us maybe he'll write a memoir.

GIBSON: I doubt if you could get Ed to write anything. He might tell you. I haven't talked to him for a long time. We're old friends, but I don't know whether Ed would talk. I haven't seen him for several years.

MORRIS: Yes, he was right in the middle of things at that point. Do you think Mr. Pauley would tell us about the 1958 election?

GIBSON: He might; I think Pat Brown would tell you. Pat's a pretty frank fellow, but he would not want to say anything that would hurt his son.

MORRIS: That's almost unique, isn't it, to have a father and a son be in the same kind of a job at the political level?

GIBSON: Well, I think I've told you about everything I know to tell you.

OBSERVATIONS ON PAT BROWN AND OTHER GOVERNORS

MORRIS: Let me take a quick look at my list. Yes, I have another question. Pat Brown feels that you were a great help to him in advice and example.

GIBSON: Pat's always given me a hell of a lot more credit than I'm entitled to.

MORRIS: Why?

GIBSON: I don't know why.

MORRIS: You don't like being a mentor for the next generation and sharing your advice and experience?

GIBSON: Oh, no. I wrote several opinions that he liked very much,² but that was just the law as I saw it. Pat advised with me on judicial appointments, on most judicial appointments he made. He didn't always agree

² [The following note appears in the original transcript.] In a phone conversation on 5 October 1977, Chief Justice Gibson recalled a few of the cases on which he wrote opinions that Pat Brown liked.

One concerned Japanese-American land ownership, an uncomfortable issue during and after World War II. At the time, ownership of land by aliens was prohibited under the California Constitution. Gibson wrote the opinion saying that this position was unconstitutional. The United States Supreme Court declined to take the case on two occasions, and the state Constitution was later changed to comply with his decision. Several cases concerning discrimination against Japanese-American fishermen also came to the Gibson court. Traynor, Carter, and Gibson wrote the dissenting opinion that discrimination was being practiced against the fishermen; their minority opinion was supported by the U.S. Supreme Court.

Asked about the Chessman case, one of the more controversial during the Pat Brown administration, Gibson commented that the state Supreme Court passed on it three times. He joined with the majority in holding Chessman guilty as charged. When the governor sought to commute Chessman's sentence from execution to life imprisonment, Gibson was among the minority voting to uphold the governor. Citing a recent

with me. He didn't always accept my recommendations, but he always asked me about the people he was appointing. I talked to him quite frankly and honestly. Of course, I'd worked with Pat when he was attorney general. I was chief justice when he was attorney general. We sat together on the Commission on Judicial Appointments.

The chief justice has a lot to do with the work of an attorney general. Or I did. You see, this is one thing I think I said in my testimony for Rose Bird: our Constitution states specifically that the attorney general is the attorney for the people of California. He has all the civil and criminal cases on appeal and many of the civil cases in the trial courts.

Say there is a case involving the people of California in a trial court and it is difficult to get an early hearing because the calendar is congested. It's important to get that case finally decided so the government can function. When I was chief justice, I assigned judges to assist courts in which those cases were pending so they could be heard promptly. The chief justice can do that. He can assign judges from one court to another all over the state. One of the principal powers of the chief justice is the assignment of judges. He assigns them from the municipal court to the superior court or to some other municipal court. California is one of the few states in the country where the courts are in session the year round. The Supreme Court of California takes no extended leave like the Supreme Court of the United States. There are four men there all the time. And if they need help the chief justice, or acting chief justice, can assign judges to help them.

I worked very closely with Pat Brown when he was attorney general and when he was governor in legislation affecting the courts and in judicial

opinion by Justice Stanley Mosk, Gibson noted that under present law Chessman would not be guilty of a first degree crime and thus not subject to execution.

The most important case he wrote, he feels, held that unions could not discriminate against black people. During World War II, shipbuilding companies needing more help recruited black people, but the AFL union in the case in question would not give these new workers full membership. The case received national publicity at the time and Justice Gibson's opinion holding the union discriminatory was a first in the country. He indicated that the issues involved had similarities to those in the 1977 Bakke case concerning "reverse discrimination."

Other civil rights cases of interest were those from the University of California concerning faculty fired from their positions for non-signing of a loyalty oath required in 1949. Gibson wrote the opinions holding this oath unconstitutional.

appointments. So I know he says very complimentary things. His son called me not long ago and said, "My father says you were the strong man in his administration."

And I said, "Well, your father had many strong men in his administration. He just likes me personally." He has always said nice things about me. I know they come back to me; but I don't know that I was any more important in state government during his administration than I was during the administrations of Olson, Warren, and Knight, although I got along better with Olson, Warren, and Brown than I did with Knight.

MORRIS: That's interesting. Why do you suppose?

GIBSON: We were good, personal friends. But Knight didn't consult with me as much as Olson and Warren and Brown. He opposed me several times in judicial reforms because he thought he was on the popular side. Knight was a very ambitious man politically.

MORRIS: In terms of staying in office in California, or did he have any thought of going on?

GIBSON: Oh, he wanted to be president. You know that if you followed his career.

MORRIS: No, I didn't know that.

GIBSON: Oh, yes.

MORRIS: He wanted to be president, too.

GIBSON: Yes. If he had been re-elected governor, he would have had a chance. They pushed him off to run for the Senate so Bill Knowland could run for governor, and then Knowland came out for the right-to-work law. That's one of the things that defeated him.

MORRIS: Did the right-to-work law ever go to your Court?

GIBSON: No, because it was not the law in this state. It is in a number of states.

MORRIS: That's interesting. The right-to-work bill was defeated and so was Knowland who was plugging it.

GIBSON: Sponsoring it, yes.

MORRIS: How could you explain that?

GIBSON: Of course, the unions fought it very strenuously, you know.

MORRIS: To defeat both of them?

GIBSON: Oh, yes. They fought Knowland and they fought, of course, his advocacy of right-to-work. There may be a growing spirit in the country now in favor of right-to-work laws. I think part of it comes from the fact that unions have become somewhat unpopular because of strikes of public service employees: police, firemen, and teachers.

MORRIS: Would the fact that there are large numbers of people out of work have an effect, too? If people really need a job, they aren't so concerned about whether or not there's a union shop?

GIBSON: Oh, sure. Olson always said (and, of course, he'd done a lot for the unions) that unions would not support social legislation if it affected their union organization. For instance, when I was director of Finance we were building the Cow Palace in San Francisco.

MORRIS: That was built by the state?

GIBSON: Yes. In part for agriculture exhibits.

MORRIS: I have a dim recollection that the reason it's called the Cow Palace is that it was built for agricultural stock shows and the like.

GIBSON: There were a lot of people out of work. I met with the union leaders in the governor's office, asking them to let us hire a lot of people out of work for ordinary labor to help us finish the Cow Palace. They said they would not work if we had non-union labor in there.

MORRIS: The unions?

GIBSON: The unions. We went ahead and did it anyhow, That was one of the things the unions had against Olson.

MORRIS: So he had his troubles with unions, too.

GIBSON: Oh, plenty. He was always fighting for social reforms. Sometimes the unions didn't agree with him. The leadership at that time was very conservative.

MORRIS: Of the unions?

GIBSON: Yes. And some opposed him in his election when he ran against Merriam. AFL didn't oppose him, but the Teamsters did.

MORRIS: In '38?

GIBSON: Yes.

MORRIS: It's curious about California politics. Why did it take twenty years between Democratic governors when registration has been heavily Democratic all the way through?

GIBSON: It took them more than half the century before Olson's election. It was more than fifty years, wasn't it?

MORRIS: It was like 1879 or something like that. Was it the same Democratic party in the 1800s as it was in 1938?

GIBSON: You mean were their philosophy and ideals the same? I don't know. I never had much to do with partisan politics. I ran for prosecuting attorney in my home county the year I was admitted to the bar, the year I graduated from college, on the Republican ticket in a Democratic county, and was elected. I had nothing whatever to do with politics after that — partisan politics or public office — until the governor asked me to become director of Finance. I took no part in any political activities in the Los Angeles area or in the state. I knew Governor Young pretty well. He was a friend of my brother, who was editor of the paper in Pasadena. I had a very high opinion of Young. I never knew Merriam very well. He offered me appointment to the bench and I turned it down.

MORRIS: Why?

GIBSON: I had a very successful law business and I wasn't interested in becoming a municipal court judge.

MORRIS: With all the fascinating things going on in the motion picture industry, did you ever regret leaving all that to go on the state Supreme Court?

GIBSON: No. I was very pleased with my position on the Court and very proud of it and still am.

MORRIS: Do you feel that the greatest successes were in the administrative kinds of things that you've been talking about?

GIBSON: I don't think they were more important than our opinions. But we did things that had never been done before, in any state in the country. This was the first state to establish a Commission on Judicial Qualifications,

which is now called the Commission on Judicial Performance. I think it is the single most important judicial reform that has occurred in the last fifty years. Some people said the reorganization of the courts in the state was the greatest reform that had taken place. Although it has received much more publicity and is more easy to visualize, I don't think it was more important than the creation of the Commission on Judicial Qualifications.

MORRIS: Thank you for sharing your experiences on the Court with us and for your insights into the governors you've worked with.

GIBSON: Brown probably accomplished more for the state than Warren or Knight. It must be remembered, however, that Warren was governor during the trying years of the World War. Knight was a good governor but he was more politically ambitious. ★

PHIL GIBSON:

Conversation with Edward L. Lascher

EDITOR'S NOTE

Phil S. Gibson (1888–1984) was appointed to the California Supreme Court in 1939 by Governor Culbert Olson and served as chief justice from 1940 until his retirement in 1964. He was interviewed in 1973 by the well-known attorney and legal columnist Edward L. Lascher. The interview was intended for publication in the *California State Bar Journal*, but it did not appear. This was explained by Lascher at the time of Gibson's death in 1984:

The legal world, as well it should, mourned the passing of Chief Justice Phil Gibson last month. The encomiums regarding his matchless impact on the California judicial scene were less than adequate for such an incandescent life and person. Despite enormous respect for his achievements, however, my favorite picture is not of a judge in a robe, but of a host in an easy chair in a gracious Carmel home, plying my secretary, Hilda, and me with better champagne than our palates deserved and discoursing on how the juice of the grape was obtained during Prohibition, not to mention the merits of the various cheeses and caviars we were downing.

We had gone to do an interview for a special issue of the late, lamented *State Bar Journal*. We got a witty, candid, wide ranging commentary on four decades of California legal history and personalities, from the perspective of someone who not only had the best of all views, but also applied the “Show Me” mindset of his native state. Everything was gentle, kind, modest — and incredibly perceptive and penetrating.

The two hours were more than enough to add enormous fondness to my preexisting admiration — and to make Hilda an unabashed cheerleader for that gentleman. They also produced a priceless text which would have been the most informative, original and avidly read thing regarding courts, judges and lawyers to appear in a month of blue-mooned Sundays — because of what he had to say, obviously, not any contribution by the interviewer.

How come you never read it? As agreed in advance, I sent a draft and, a few days later, got a call. “I don’t want you to print it at all, Ed.”

Why? “Those are just the ramblings of an old man. Nobody wants to hear about that stuff nowadays. You should be writing about today, not bothering with reminiscences.” That was tantamount to Einstein’s telling an interviewer nobody would be interested in hearing about some penny ante theories. But he was adamant, and I had made a deal, so it never saw light of day, anywhere, and I was even more in awe.¹

The interview did finally see the light of day in 2006, when it appeared for the first time in the Newsletter of the California Supreme Court Historical Society.²

As prepared for publication by Lascher, the interview opens with a brief introduction, followed by questions and answers. It will be noted that the first “answer” by Gibson continues an ongoing conversation. The

¹ Edward L. Lascher, “Lascher at Large — The Untold Story: A Priceless Interview with the Chief; Jurist Phil Gibson, in Two-Hour Session, Left a Lasting Impression,” *Los Angeles Daily Journal* (June 6, 1984).

² Edward L. Lascher, “An Interview with Phil Gibson,” *California Supreme Court Historical Society Newsletter* (Autumn/Winter 2006), 1, 8-14 (by permission of Wendy C. Lascher). The year of the interview was stated there incorrectly as 1963.

interview appears to have begun with a discussion of Lascher's work in the field of appellate practice, in which he was an early specialist. The published portion of the interview then turns to Gibson's observations about appellate practice in general and to his career on the Court. The interview is reprinted here in full.

— SELMA MOIDEL SMITH

PHIL GIBSON:

Conversation with Edward L. Lascher

INTRODUCTION

EDWARD L. LASCHER

During his introduction to the second edition of his much-noted *California Courts and Judges Handbook*, lawyer-author Kenneth James Arnolds observed:

Among the giants who loom large in recent history is a remarkable man who spent a quarter of a century on the California Supreme Court — 24 years as chief justice. Judicial reform was his personal crusade. He was the driving force of the court reorganization program. He fathered pre-trial procedure and non-publication of judicial opinions. He regenerated the Judicial Council and improved the administration of justice in countless ways. His long and fervent advocacy of penal reform is hopefully nearing fruition. Judged by his accomplishments, he must be 208 years old; judged by his vigor, Phil S. Gibson may outlive us all.³

³ Kenneth James Arnolds, *California Courts and Judges Handbook* (San Francisco: Law Book Service Co., 2nd ed., 1973), xxxiv.

True words, indeed, about the man who personified the title: “The Chief.” In view of current interest in judicial reform, particularly at the level where Chief Justice Gibson’s impact was most immediately felt, the *State Bar Journal* sought his views on some aspects of the contemporary appellate scene.

The Chief’s response to our request for an interview was negative, for a characteristic reason: “Nobody wants to hear what I’ve got to say; talk to those who are on the scene.” Perhaps the *Journal* never convinced him, but we did wear down his resistance, and our interviewer spent as delightful a mid-day as one is likely to encounter, chatting with The Chief and the vivacious Mrs. Gibson (herself a lawyer) in their lovely Carmel home. It provided a heady brew of good company, good conversation, pointed insight, vintage anecdote and fine Champagne — all of it too much for the recollective and reportorial capacities of an awed lawyer. The *Journal* must, therefore, apologize for the shortcomings of its recounting of the provocative and evocative conversation.

CONVERSATION

GIBSON: Well, it certainly is an important subject you’re working on, something I’m glad to see people thinking about. It takes real talent and effort to do a good job of handling an appeal.

LASCHER: I think there are a lot of us who think that if you’re a good trial lawyer, you’re automatically going to be a good appellate lawyer.

GIBSON: No, that’s not true. You take Jerry Giesler, for example. He was one of the best trial lawyers I ever knew, specialized in criminal practice and studied the whole law, but he wasn’t an outstanding appellate lawyer. He didn’t present his points on appeal nearly as well as he did in trial practice.

One of the best appellate lawyers in my experience, in the criminal field, was a deputy attorney general in Los Angeles some years ago. He was particularly good in oral argument. He never tried to kid the court; he laid it right on the line. If the case was against him, he said so; if he thought it could be distinguished, he tried to distinguish it, and if he didn’t do that, he said it should be overruled because it was wrong — and he told us why.

He never tried to fool the court by presenting a tricky argument and the court appreciated it. Time after time, I remember the members of the court leaving the bench after an argument and complimenting that man.

LASCHER: That reminds me of one of the things I wanted to ask you about. There's been a lot of talk and writing lately about whether we should even have oral argument on appeals. I wanted to ask you about it — the usefulness of argument.

GIBSON: I think it's important; with some judges it's very important. Of course, it may not be quite as much so as it was at one time because the judges are better prepared at the time of oral argument now than they used to be. The fellow that I think is entitled to as much credit for that as any other man in California is Ray Peters. When he went on the District Court of Appeal, about the same time I went on the Supreme Court, he had two older men for associates, who were both good judges, but after all they had been on the court for some time while Peters had hardly any trial experience at all — he had been working for the Supreme Court as a research attorney. He was well known among lawyers, of course, as being able, but he was completely new to the District Court of Appeal.

Still, he immediately set up what he called a “conference system” which was something entirely new. It required the judges to hold a conference among themselves before oral argument. Before then, sometimes judges went out on the bench without knowing a damn thing about what was in the briefs.

In fact, when I went on the Supreme Court, the situation was much the same on that court. I was shocked at how little some of the members of the court knew about cases before they heard oral argument. So I set up a policy that's still practiced on the Supreme Court. Immediately on acquiring a case, we'd set up a conference and when we were in the conference I would assign the case to a member of the court to prepare what we called the Conference Memorandum on every case that came before our court on petition. So, when we were passing out petitions, we'd have this memorandum prepared by a judge and his staff setting up both sides of the argument in the petition for hearing.

Then, if it was decided at the conference to take the case over, I would assign the case to a judge. They follow a practice on the Supreme Court

now which is much better in the long run, of assigning it in rotation, but I assigned it going around the table for a man to prepare the memorandum who had voted to hear the case. Anyway, the judge who was assigned would prepare it and have a memorandum which had to be circulated two weeks before our calendar. That way, every judge, when he went on the bench for oral argument, would have had an opportunity to study this calendar memorandum setting forth the arguments on both sides and sometimes with some original research of his own, or by his staff — quite frequently so, in fact.

When we went on the bench we knew pretty much what the case was about or at least most of us did. Some judges are just more industrious than others, as you know. But, we were pretty well informed, so we could ask questions of attorneys. By and large, we all thought oral arguments were very important. I know I did. I do like for attorneys to disclose all the facts, so I think I had a reputation of making it a little tough at times and, as I look back on it now, I think I was too tough on lawyers — probably scared some of them. If I had it to do over again — and I've told some members of the court this — I think I'd be a little more considerate of the fellow out in front.

At any rate, after the argument we'd go into conference and sometimes the oral arguments would have changed our views, some of us, at least. I don't think it did that very often, but it helped us, some members of the court. I always thought oral argument was useful — valuable — but only when it was well presented.

LASCHER: There is a view we hear a lot about nowadays, to the effect that the court should only hear oral argument on certain, selected cases. What do you think of that idea?

GIBSON: Well, the problem is that you never know; you never know. I would say that lawyers would be surprised at the number of times judges change their views on the merits of the case before argument, and after for that matter. I've certainly changed my view on important cases, at least sometimes.

I remember times that I had a majority of the court with me — only one or two members raising any questions about the decision — then, the more I started working on the case, the more I became concerned and

worried about it. So I'd circulate the memorandum to the members of the court, saying I was doubtful about my position. Then, I remember at least one rather important case where that happened and I got a unanimous opinion exactly opposite from what I started on.

So it happens, and I would say there is no reason why they shouldn't have oral argument. How are you going to tell? You can't tell whether — what case is it going to be useful in? It may not affect many cases, but you can't always tell beforehand what your views are going to be or what's going to happen to them.

LASCHER: Of course, from a lawyer's standpoint, I think most of us feel shortchanged if we don't have oral argument.

GIBSON: Well, I think your clients do, too.

LASCHER: They certainly do.

GIBSON: So I think that's important, too. One thing I always argued with our court was that the public had to be taken into consideration — what their rights were and what they thought about the court. It's important that the people you're deciding cases for feel that they've had the proper amount of attention and work. That's all got to be taken into consideration. The record is for the people and they are entitled to a shot. I think it's rather important in the administration of justice, for everyone to at least feel he had a fair hearing.

LASCHER: You mentioned lawyers fudging on the facts and misrepresenting them . . .

GIBSON: Well, not so much misrepresenting them as this: the facts have been determined already when they get to the appellate court, as you well know, but instead of accepting the facts found by the trial court — rightly or wrongly — we're bound by them unless they are just shocking — lawyers (and young lawyers, particularly) want to reargue the facts. One experience I regret was jumping all over a young lawyer who was trying to argue the facts to us. I should have been a little more considerate with him and explained the thing that some inexperienced lawyers don't realize — and that disturbs the court — that the lawyer can't reargue the facts. Unless, of course, he has a case where he says that you have no evidence at all to support the findings or the findings of the court are shocking in view of

the evidence. There's nothing wrong with saying that, if it's really there in the case.

LASCHER: What did you find — as opposed to ignoring the facts or trying to relitigate them — what did you find about the level of preparation of lawyers for oral argument? Was it satisfactory?

GIBSON: Oh, there's some difference. Some of them come in well prepared, are helpful, and impress the court. Time after time, I've heard judges say, as we've left the bench, "That was an argument; that was a job well done." Well now, that judge is influenced by that good argument; he's going to think some more. He may have been a little on the other side of the fence, but after a good argument he may want to have some second thought he didn't have before.

You know, most judges in all my experience on our court — and I've served with a lot of them (every judge that held a seat on that court when I became a member was dead when I left, so there was a turnover) — while they differed, all of them I served with tried to do a good job, tried to be objective.

You take a fellow like Jesse Carter, who was an excellent lawyer. Carter had his mind made up on so many damn things, it was awfully hard for him to change, but Carter certainly just wanted to be objective — he just was such a man of beliefs. I once told a meeting of chief justices from all over the country who were there in San Francisco that I sat with Jesse Carter, who was probably one of the most distinguished advocates on any bench anywhere in the United States. He was an advocate all the time he was on the bench, but he was able. You know, a lot of the things he advocated then are the law today, including things he wrote in his dissenting opinions. We were good friends; we went on the court at the same time.

He used to say that he was the only member of the court who had been judicially determined to be qualified. Once before that they had an argument over a very able lawyer from Marysville, a state senator, who almost got an appointment to the court, but then somebody raised the question whether he was qualified because he couldn't hold another elective office — while he was a senator, he couldn't be a justice of the Supreme Court since that was an elected position. The old gentleman, Chief Justice Waste, didn't think he could, so that man didn't get the appointment. And they

raised the same question with Carter, because he was a state senator, but the court held he was qualified for appointment. So he used to say he had a judgment saying he was fit for the court and the rest of us didn't.

LASCHER: That brings up another area of considerable concern or controversy around the appellate world, I guess: the selection or, in particular, the confirmation of judges of the Supreme Court and the courts of appeal.

GIBSON: Well, I guess I happen to know more about that than any other man in California. A lot of the information that's going around isn't authentic. They say that Radin was the only man ever turned down for a court appointment; it isn't true. The others they just never knew about. Governors withdrew appointments, or learned in advance that the appointment might not be confirmed, so they never even made the appointment.

For example, I remember one judge who was appointed to the superior court in Los Angeles County and did fine, but when there was talk about raising him to the District Court of Appeal, the attorney general and another member of the commission came to see me and they said that they didn't want to hurt the young man, but he had been connected with somebody who was in danger of winding up making license plates in the penitentiary, so it looked like there might be two votes against him if the appointment were made. So the governor withdrew the name and somebody else was appointed at the time. The judge went on to a long, fine career where he was.

There were two or three other occasions when men were proposed but not actually presented to the commission and the commission was doubtful, and there were a number of challenges and votes against appointments after they were made public. I know of one man who got a vote against him for the District Court of Appeal and he later went on the Supreme Court and had an outstanding record. Then there were several bad appointments, too. There's a lot of talk now about the qualifications commission, the part of the old commission they named the Commission on Judicial Appointments.

There's talk about enlarging that commission. Well, very soon after I became chief justice, I talked to members of the Board of Governors of the State Bar about getting the State Bar into the Constitution, getting it statutory status. I thought it should be in the Constitution and I appeared

in a meeting in San Francisco and urged them to get behind that, but they were afraid that if the State Bar presented that issue to the people and got turned down, the bar would lose prestige. I didn't think so, but they waited and eventually it was tied in with other constitutional provisions and got passed without any problems.

But what I proposed was a broadening of the membership of the qualifications commission. One fellow I talked to was O. D. Hamlin, who was president of the State Bar. You know Hamlin?

LASCHER: The judge of the 9th Circuit now?

GIBSON: Yes, Hamlin was then bar president. He was from Oakland and I arranged a lunch with Homer Spence, who was very close to him, and urged his help in broadening of the base of the Commission on Judicial Appointments. I think I talked about it to him and other bar governors and people in state government for 10 to 12 years, urging that idea until finally we divided the old commission into two: the one on judicial appointments and a Commission on Judicial Qualifications. The one on judicial qualifications had the broadened bases that I recommended and they're doing some fine things now.

They should do a lot the same with the Commission on Judicial Appointments and it should be divided into regional bases. That is, not all of the appointments should come before the same commission with all the same members. If the court of appeal appointments are for the Los Angeles district, you should have a different commission than for a court of appeal appointment for San Francisco, for example. After all, they've got the interest and the information. I think the same fellow should be at the top all the time, the chief justice, and maybe certain other members should be on all the commissions.

We made that kind of proposal to the Legislature so long ago I've forgotten and they turned us down. One problem was we never got a hell of a lot of support out of the State Bar. Two fellows who always supported it were Herman Selvin and the other was, he was president of the State Bar when Selvin was on the board, Joe Ball from Long Beach. They were for it. I made a speech here in Monterey during the meeting of California bar executives and they were both present and really helped a lot on it, but still nothing came out of it.

I suppose some of the problem goes back to around the time when we got the State Bar into the Constitution. There was a lot of opposition then, probably because, you see, when I became chief justice, the chief justice absolutely ran the Judicial Council. He appointed all the members and he was it. And I didn't like that. I thought there should be changes. Of course, I thought the council should have more authority; I wanted to make rules. As you know, the courts had lost the rule-making power before that — had given it back to the legislature — and I wanted to get back into the rule-making business. As a matter of fact, that was the first speech I made after I became chief justice.

Broadening the base of the Judicial Council and getting members of the legislature and lawyers into it was one of the healthiest things that we ever had, and it was important to making the Judicial Council into what it's become. It couldn't do the things it does without the membership. The same thing should happen when it comes to judicial appointments. You could stop all of the agitation that's going on now — that happened over some of these appointments — if you had a broader base and more representation on the Commission on Judicial Appointments, give it the power to get some things done, too.

You shouldn't have to depend on pleasant surprises — although I've had a lot of them in my lifetime — with appointments. Maybe I gave a few surprises, too. I remember one time, just after I was appointed as an associate justice, two fellows in San Francisco took me out to dinner because my family was still packing up in Beverly Hills and I was living in a hotel. Two San Francisco judges that I had tried cases before wanted to make me feel a little comfortable in the city and they took me out to dinner in a place called John's Rendezvous. John had been in my outfit in France; he was a cook when I was a second lieutenant, both of us at the front, and by this time he had a good restaurant there in San Francisco. He put on quite a dinner for us. I guess he was proud that one of his old comrades had made good, or something of the sort, and so he really treated us. Anyway, after that we walked into the Bohemian Club and in the lobby we ran into a lawyer who had a great reputation around San Francisco, quite a guy. He said to one of the judges I was with: "I see where the governor has just appointed a damn communist onto the Supreme Court." And Dick Allen said: "Yes, I'll introduce you to him; here he is." That's OK, the lawyer and

I got to be pretty good friends later on; he was an Irishman and he found out I was a little Irish. Anyway, people get surprised on appointments that aren't always so popular.

LASCHER: I don't know that I'd want this printed, but I think there were some lawyers who were a little uneasy about the present chief justice, but they all think he's turning out to be a great surprise.

GIBSON: Wright? Well, he was popular with me! When he was on the municipal court in Pasadena I assigned him to the superior court because of the recommendation of some of the judges in the area. I put him in a spot that he didn't like very much, too; not in Pasadena, but he had to travel clear across the county to San Fernando. He did a good job. And I know what kind of a job he did on the superior court, later. He wasn't the kind that always was popular with all of his fellows, but he was a good man who got things done, and after people got to know him he had plenty of friends among his associates, from what I hear. He's a good chief justice, doing a good job, an excellent job.

LASCHER: He's become a great favorite among the lawyers of the state in very short order.

GIBSON: Well he's doing a good job. I thought he would when he was appointed, and I was very happy — I've been enthusiastic about him. Now, the fellow I was concerned about was probably my closest associate, Roger Traynor, because Traynor didn't like that kind of work. He was bored to death with a lot of the jobs the chief justice has to do which are not very much fun, not very exciting, and there's hours and hours of labor that don't get you anywhere much. Traynor would rather spend that time writing opinions — and there's never been anybody better than Traynor at that. What an able man! There certainly were able men on the court when I sat on it.

All the difference is, is that they're different jobs. In the first place, a chief justice has to run his court; he's got to have them happy. He's got to sit down around a conference table and be able to discuss the case objectively. The chief justice is the fellow who's got to walk up and down the hall and get the fellows to work together. You take this: There never were two men farther apart on any court in their personalities and attitudes than Traynor and Carter. They were just as far apart as night from day, and yet

I had to get them to work together. The funny thing is, they were both so-called “liberals”, and they were both real friends of mine, but they worked so differently. That’s the kind of thing the chief has to work on. Of course, it helps to have men like those two and the others; they really gave me 100 percent support. Even when they’re individualists.

I think it’s become real clear to a lot of people, even the chief justice of the United States — very clear — there’s so much else you have to do. The chief justice may not be as able as some of the other members of the court, but that doesn’t really make any difference. He’s got to give leadership and be able to get the most out of his court — whether he is all that able himself or not. That’s absolutely essential. And it’s a lot different job.

LASCHER: To change the subject a bit, something just reminded me. What do you think about publishing opinions?

GIBSON: Well, I think they should be cutting down on the length on the opinions. A lot of the opinions are way too long, but I think the Supreme Court should publish an opinion in each case. A cut-down on all that length would be helpful, but that’s a personal thing for the judge.

LASCHER: You know, they’re still writing opinions at the Court of Appeal level on every case, but they’re only publishing 30 percent of them.

GIBSON: Well, they shouldn’t have to publish them. Thirty percent of them published is all right, but five percent would be better. Actually, they shouldn’t have to write so many opinions.

LASCHER: Would you like to see them go to memorandum opinions?

GIBSON: Yes, in some cases. You know, there’s an awful lot of those criminal cases, particularly, where it isn’t necessary; there’s nothing to them. A lawyer appeals them because he feels he has to go as far as he can for his client, but a memorandum of opinion should take care of it. Of course, I think we all approve of having opinions, in publishing them, when they are true law.

LASCHER: Coming back to the subject of selection and so on, and some of the things you said a few years ago about the merit plan that was around then. You remember that stir?

GIBSON: Yes, they got pretty upset with me when I said I thought they should stay with the California system.

LASCHER: There's some talk about it right now — talk about just adopting it for the court of appeal.

GIBSON: Oh, I think they should go all up and down the line, but using the California system. I've advocated it for years, at least 35 or 40 years. The selection of judges under the California system is much better than the one proposed by the State Bar, which I didn't think would work. I thought that proposal of the State Bar was taking the responsibility away from the governor and putting it nowhere. Under the traditional system in this country, there should be an executive appointment with a check on it and the check should be the Commission on Judicial Appointments — broadened and properly prepared. I argued that for years.

When they had that proposal to change the system a few years ago, I was advocating a broader base on the Commission and the fellow who was the president of the State Bar — who was it?

LASCHER: John Finger?

GIBSON: Yes. He thought I had changed my mind and was kind of unhappy with me. I just told them off the cuff, but really it was what I always advocated, and that is: Let's stay with the California system and make it work.

LASCHER: To put a blunt question, do you think it works with the commission the way it is now?

GIBSON: Well, it works fairly well, but not nearly as well as it should, without broadening the basis of the qualifications commission.

LASCHER: What do you think of the idea of Senate confirmation as an alternative?

GIBSON: I'm absolutely opposed to it. I've had too much experience with it, and it is not good. Senate confirmation is throwing it right into the political heap. That's just not good. The best thing to do would be to stay with the California system, but improve it, broaden the base of the commission, give it a chance to do the job. That's the best thing they can do on judicial selection in California. That's been my opinion for over 40 years now — and it still is.

LASCHER: Well, that's a pretty solid answer.

GIBSON: What you've got to do, besides changing the membership of the commission and having different commissions for appointments in the different areas, is give the commission a budget and a staff. The way it's been done, with some phone calls and private talks, doesn't work — and it isn't right, it isn't what the public is entitled to. There should be a staff that works, something like the staff of the Commission on Judicial Qualifications which deals with complaints against judges. The staff should get information on people who might be up for confirmation, or the chief justice or the commission should be able to ask them to go out and gather information. The State Bar helps a lot when it's asked, but it doesn't really have the skill or time or ability to do that, or to keep consistent records or all the things you need if you're going to investigate something decently and make a sensible decision. You need, first, a commission with more people on it and the legislature and the lawyers represented, and, second, a place that can get its information and somebody it can send out to gather information. Then you get an intelligent decision on confirmation.

LASCHER: May I switch to a different subject? I mentioned to you on the phone that I wanted to ask you for your view on the proposal to restructure the appellate levels — like the Court of Review.

GIBSON: You mean putting something in between the Supreme Court and the court of appeal? Like that national court they're talking about in Washington? Well, Professor Freund's a good friend of mine; a good personal friend, and a great lawyer, has been for a great many years, one of the ablest fellows in the country. But I think he's all wrong. I don't think you need it.

No, what you need — we've got part of it — what you need is a good intermediate appellate court, good courts of appeal. Work more on confirming their appointments, get rid of having to write an opinion for publication on every case (like we said) just to take a lot of room on the shelf, and that kind of thing. Give them the help they need, and we've got the courts we need to get the job done.

LASCHER: One idea along that line I wanted to ask about was this: Many people are talking about the idea of eliminating divisions in the California Court of Appeal — go more to the federal system of one court with a lot of judges and rotating panels.

GIBSON: Well, that idea's got a lot to recommend it — if you have a good presiding justice! Everything depends on that. Just like one of the big superior courts, Los Angeles, San Francisco, those; everything depends on a good presiding justice.

I remember one of the bitterest personal attacks I ever had on me was over the proposal that the presiding judges of the superior court should be appointed by the chief justice. Any man that sat in that job as chief justice knows that the only way a superior court can operate efficiently is with a good administrator as presiding judge. And the chief justice, because of his assignment powers — and his assignment responsibilities — knows how a court operates, how every court in the state operates. He knows that, when there's a good man in the position of presiding judge, he can make his court operate, function more efficiently and more justly, too.

Take for example Burke, when he was on the superior court, presiding judge in Los Angeles; he did an outstanding job, because he knew how to run a court. A lot of fellows thought he was stepping on toes, but there wasn't a court run like that one at the time. Where you have bad examples in the superior court is where the judges elect a presiding judge on a popularity basis or, worse, where they make the senior one presiding judge in turn, the way they do it in so many counties. It just doesn't work. You need someone who's good at that kind of thing, has a knack for it, and that's got nothing to do with how good a judge he is — it's just something different.

So if you have a Court of Appeal with all of the judges lumped together, you'd have to have a fellow at the head who is not just presiding justice by seniority or that kind of thing, but by his administrative ability. What happens otherwise is that the court can get so far behind that it's just not justice. There was one time that one of the divisions of one of the courts was three and a half years behind and another division of that court only one year behind. If a lawyer won a case in superior court and it went up to the District Court of Appeal, as it was then called, if he hit one division he could have the case over within a year, but if he hit another one he'd be stuck for three years before he had his judgment, and he had no choice about it — and no chance. And the difference was largely because of the men who happened to be presiding in those two divisions. Of course, we moved in on the picture with superior court judges pro tem and cleaned it up within about two years or less. We even transferred cases from one

district to another. They'd have to consent to it on both sides, but if lawyers wanted to get their cases over with, that was the only way they could get it done.

There was one time, after we'd gotten so far behind, I wound up with six or seven judges on each three-judge division, and we were knocking the backlog down fast — had them up to date in less than two years. So when you talk about throwing the court of appeal judges all together, instead of in a division, it would be a good idea if you let the chief justice designate the presiding justice of that whole court. He'd do it on the basis of which one could be the best administrator.

LASCHER: The one thing we've heard against the whole idea — and I understand it's actually something that this Judicial Council has hinted it might be in favor of — is the idea that the presiding justice, by hand-picking the panel, could pretty well predetermine the outcome of the case.

GIBSON: Oh, I suppose it's possible that you might get a bad chief justice someday, and that he'd put in a bad presiding justice, but I just don't think that's a real danger. The chief has a staff of his own and they know what's going on, and they all want to make their courts work. I think very few of them would play any kind of personal politics, none that I've ever known. I never did, and Traynor never did, and I can't imagine Wright ever doing that.

The crucial thing is picking the presiding justice, but I don't think stacking a panel to decide a case is very likely; I don't think it would work. My father, who was a lawyer, told me you could never be sure who a woman would marry or what a judge would decide — and now, I guess there's something to that. Even just trying to figure out in advance people like Carter who had a slant, a really strong philosophy, but in many cases he surprised me.

They're all men of strong opinions, of course, or they wouldn't be there, but when judges get on the appellate court they surprise you with their independence and they surely try to be objective.

You take the United States Supreme Court; of course you know something about the attitudes of Brennan and Douglas and Marshall, because of the cases they participated in over the past, but there are two or three others you never can tell about. And you can never tell about any of them all of the time. When you've got a good court — like our present Supreme

Court in San Francisco, we've got a good court there — nobody can tell in advance what any one judge is going to do on any one case. It depends on the record, the issues, the precedents, too many things, No, you can't worry too much about that.

One thing people don't realize is what hard work it is. Being on the appellate court, especially the Supreme Court, that's a full time job. This is one of the few courts in this country, you know, that is in session all the year round. I took one vacation, myself, and I was on the court 25 years or a little over. Most of the others were the same way. For instance, Shenk; he'd take a couple of weeks up in the country most years, but he always took his briefcase and cases right along with him. He used to call me up at home at night about the cases, too. Mentioning Shenk reminds me, sometimes we'd call him "the greatest distinguisher" because he hated to overrule a case; he'd distinguish it and distinguish it. Of course, a lot of the time we'd all go along with him if he came up with the right result in the end.

Another man you didn't hear much about but while I served with him was one of the ablest men on the Court, was Houser. A very able man, and the amazing thing is that he was sick — he had migraine headaches. How he suffered! He told me that he'd walk for miles and miles just trying to get hold of himself when he'd have that kind of headache, and yet the work he did, he was an able judge. We sure did have a lot of able judges that I served with, and a lot of able lawyers that I saw trying cases — that I tried cases with and against, too, for that matter.

I remember one fellow who used to try a lot of cases in Los Angeles, and he had this one against Bill Gilbert, the great trial man, a jury case. Anyway, all through the trial he kept referring to Gilbert as "Uncle Will;" every time he'd have some reason to mention him or turn to him, he'd call him "Uncle Will." And when Gilbert got up to make his argument to the jury he said: "You know, I had a brother who came up to this country many years ago," and he said, "He never married, but the rumor was that he had a son — and, by God, I finally found out who he is!"

Say, how about a glass of wine or something now?

LASCHER: It would be a pleasure.

And it was. A pleasure and an honor.

REMEMBERING CHIEF JUSTICE GIBSON

ELLIS HORVITZ*

It is nearly 60 years since I was a law clerk for Chief Justice Gibson, but my memories of the Chief remain as strong as if it had been yesterday. In this brief note, I would like to recall some memories of the Chief as teacher and friend.

I still remember our first working conference. I was quite unprepared for the Chief's robust critique. As I left the meeting with Vicki Glennon, the senior staff attorney who mentored my first effort (later Mrs. Gibson), she said cheerfully, "That was a wonderful meeting. He likes you." I don't recall if I said it or only thought it, but I wondered what it would have been like if he hadn't liked me. I soon learned this was the Chief's teaching style. It was my good fortune to experience it.

From the first day, he set the bar high. Praise was measured. There was no room for complacency. In short, he provided a master class in judicial analysis and clear writing. I didn't know it then, but the relatively short time I worked for the Chief, less than two years, would determine the course of my career as an appellate lawyer.

* The author was one of Chief Justice Gibson's law clerks from 1951 to 1953. This article is an expanded version of his "A Personal Note," *California Law Review* 72:4 (1984), 503-505.

Looking back, I think the Chief achieved three goals.

First, he provided us a bridge from the academic world to the practical world of law practice. More than once he told us, “My job is to undo the way you learned to think in law school and to train you to think like lawyers.” Of course, watching the law being made and being allowed to participate in the process provided a superior learning experience to reading and discussing case book opinions in law school.

Second, by his comments and by his example he taught us respect for the judicial system and for the people who administer it. Watching him conduct court and listening to his comments in chambers taught us a great deal about what he expected of attorneys in terms of competence, integrity and decorum.

Third, and perhaps most important, he wanted us to learn to produce our best effort as a way of life.

We took our first steps in the transition from law student to lawyer by observing how judges decide cases. I learned that case names belong to real people and that a fair disposition of the case at hand exercised a strong pull on the court even while it was formulating judicial doctrine. In *Zentz v. Coca Cola Bottling Co.*,¹ as I labored through the mysteries of the doctrine of *res ipsa loquitur*, I was never allowed to forget that Mary Zentz really was injured when a Coca Cola bottle exploded in her hand and that she hadn't the remotest idea why it happened. Legal doctrine was held accountable to the litigants it affected.

The Chief always described the decision-making process as hard work. Fair and reasoned answers to difficult questions did not come easily. If we submitted a memorandum which took a simplistic or one-sided view of an issue, he sent us back to reconsider the other side even if he agreed with our proposed conclusion. He insisted we understand and respect the point of view with which we disagreed. His own prior opinions were open to reexamination. Shortly after I came to work, he asked me to research a point which he had decided several years earlier. I found a Cardozo opinion which went the other way. It did not dawn on me immediately that I was not the first to discover it. Without expressing an explicit preference, I submitted a memorandum in which the Cardozo opinion was prominently

¹ 39 Cal.2d 436, 247 P.2d 344 (1952).

displayed. At our next conference, the Chief asked: “Do you think I was wrong?” Then, noting my hesitation, he smiled and said: “That’s a tough question. I’ll rephrase it. Do you think Cardozo was right?” The Chief’s openness and willingness to hear and genuinely consider all sides was more than a matter of tolerance. It was a high duty, which he made clear we were obligated to share with him.

But if an attorney attempted to deceive or mislead the court, particularly a public attorney, the Chief’s disapproval was withering. I recall one occasion when an attorney misstated a crucial rule during oral argument. Another member of the court proceeded to take him to task with a series of questions which left the attorney’s position in a shambles. At lunch, the Chief expressed his disapproval and then commented as an afterthought: “I don’t know why a lawyer would ever attempt to mislead this court. There is always one judge who knows the law and usually seven.”

The Chief was a stickler for clear and precise writing. When we over-worked our thesaurus and used stilted or uncommon language, he struck the offending passages and cautioned us: “If you don’t talk that way, you can’t write that way.” I also learned early to quote rather than paraphrase key holdings from cited cases. “Some judge worked hard to write that opinion,” he said, “and you’re not yet ready to improve on it.” And we drafted, redrafted, and redrafted again until all the fat was trimmed and the written words carried the precise message intended. In short, we were given a graduate course in logic, composition, and style.

It is impossible to explain what it was like working for the Chief without attempting to describe the richness, warmth, and force of his personality. A working conference with the Chief was an event, never routine. He had an extraordinary ability to generate excitement and rivet our attention on the work at hand. He was relentless in demanding our best and resourceful in getting it. At times he was gently cajoling, at other times stern and scolding, sometimes both within moments. His scoldings, colorful, salty, often laced with humor and warmth, were legendary. I remember more than one occasion, however, when a stern lecture fell victim to his own sense of humor, and he would dissolve into a warm smile and laughter. On the other hand, a well-written memorandum or draft elated him, and we shared the enjoyment with him. A compliment from the Chief, however, was measured, genuine, and not intended to

induce complacency. I often left conferences feeling good, never feeling complacent.

Throughout, the Chief delivered two powerful underlying messages. First, he transmitted to us his own deep dedication and devotion to the judicial process in its broadest sense. Second, he was interested in us individually, he wanted to contribute as much to our legal training as he could within the short time we were with him, and he enjoyed having us there.

His law clerks were not the only beneficiaries of the Chief's caring and generous nature. These qualities found constant expression in his relations with his entire staff. He was interested in our lives and families; he concerned himself with our well-being; when trouble or misfortune beset any of us, he somehow found out about it and came forward to express his concern and to help; when tragedy struck, he wept. Despite the demands of his office, he found time for everyone.

The Chief will be remembered as a great jurist and as a giant in judicial administration and court reform. Those of us who worked for him and knew him will also remember him as a wise, generous, and loving man. His great heart embraced us all.

The last time I saw the Chief he was approaching his 90th birthday. My wife, Angela, and I visited him in Carmel. Angela had never met him. She and I were seated on a love seat. He squeezed in between us, turned to Angela, "Now darlin', tell me about . . ." and they proceeded to charm each other. ★

ORAL HISTORY II

JUSTICE
MILDRED L. LILLIE

CALIFORNIA COURT OF APPEAL
(1958-2002)

Oral History of
JUSTICE MILDRED L. LILLIE

INTRODUCTION

EARL JOHNSON, JR.*

When Justice Lillie completed the oral history below, she still had another dozen years of life and service to the California legal community ahead of her. As someone who worked closely with her for that dozen years (as well as a half dozen years before that), the most useful thing I probably can do is cover some of the highlights of her life after the interview and also convey what it was like to be a member of the appellate division she headed.

But before I move on to the years after those Justice Lillie spoke of in her interview, I will begin with an event that happened years earlier that had a profound influence on her life, but which she had no way of knowing and hence wasn't mentioned in her oral history. It happened in 1984 when Division Seven was just in its second year of operation. The first presiding justice, Richard Schauer, had announced he was retiring from the judiciary. This meant Justice Leon Thompson and I, both of us selected by Governor Jerry Brown, were facing the prospect of working under a new P.J., one selected by Republican governor George Deukmejian. It didn't take us

* Associate Justice (ret.), California Court of Appeal, Second Appellate District, Division Seven.



MILDRED L. LILLIE,
CALIFORNIA COURT OF APPEAL, 1958–2002
Courtesy California Court of Appeal, Second District

long to figure out the one we wanted and hoped had a chance the governor might pick was Mildred Lillie. But we also knew she was nearing 70 and also was a Democrat — both likely strikes against her. Nor had she put her name in for the position, so Governor Deukmejian might not even have thought of her as a possible candidate.

The opportunity to place Justice Lillie's name in contention, at least, arose when Justice Schauer was scheduled for an "exit interview" with the governor. The three of us met and quickly reached the consensus that we would like to see Justice Lillie as Division Seven's second presiding justice. So it was decided that Justice Schauer should make a strong case for that selection when he met with Governor Deukmejian. When he returned from the exit interview, Schauer could report that the governor seemed intrigued with the possibility. As Justice Lillie describes in her oral history, she was surprised when she received the call from the governor asking if she would be interested in becoming Division Seven's presiding justice, and she was especially surprised about the offer considering her age. Little did either the governor or Justice Lillie suspect she would occupy that position for some eighteen years, thus becoming one of the longest serving presiding justices in the history of the Second Appellate District.

Justice Lillie was already an institution when she arrived in Division Seven as its second presiding justice in 1984. So it was always Justice Lillie's court. But for most of her tenure it remained a three justice division and, with the untimely death of Justice Leon Thompson and his replacement by Justice Fred Woods in 1988, it became her division in another and very important sense. In the close cases, maybe five percent of those we considered, Justice Woods and I often disagreed. So it was Justice Lillie who occupied the middle ground and her decision became the decision of the court, no matter who wrote the opinion.

With rare exceptions, Justice Lillie presented a stern face to the outside world, especially when presiding in the courtroom. I have spoken to lawyers who expressed fear at the thought of appearing before her and witnessed a few who visibly trembled when arguing to her in our court. But behind the scenes and especially in her interactions with her fellow judges in the division, she was a warm, kind, caring colleague with a wonderful sense of humor. Every writ conference began with Justice Lillie telling her latest, favorite joke — often more than one.

Justice Lillie also was a great cook, especially of sinfully lavish desserts. She often baked them and brought them to court to celebrate a colleague's birthday. This was part of her commitment to making Division Seven a collegial court. After her early experiences in Division One, some of which she mentions in the oral history, where her colleagues wouldn't speak to each other or even travel in the same automobile, she was determined to make her new division a place of harmony and good feelings.

Justice Lillie's commitment to a collegial court also extended to her relationships with the division's staff, not just her fellow judges. Pablo Drobny, the writ attorney for the entire eighteen years of Justice Lillie's service heading Division Seven, was typical. When speaking about his daily interactions with her: "From the first day I entered Justice Lillie's chambers I realized I was meeting with a legend. And we carried on our discussions that way. But it wasn't long before there was a twinkle in her eye, and frequently a joke to be shared. And from then on I felt I was a friend and not just a writ attorney. Over the years that friendship just grew stronger and stronger."

Justice Lillie was not only an exemplary presiding justice, but during the years after completing her oral history she continued producing influential opinions. One that received national attention in the press and on several television shows was *Hecht v. Superior Court*. In that case, her opinion held that it was not against public policy to allow an unmarried woman to attempt in vitro fertilization using frozen sperm her deceased long-time live-in boy friend had expressly stored for this purpose before committing suicide, despite opposition from the man's ex-wife and her adult children.

For several years during the 1990s, Justice Lillie took on an additional, time-consuming challenge when Chief Justice Malcolm Lucas appointed her administrative presiding justice of the entire Second Appellate District. Although in her late seventies and early eighties at the time, she performed that demanding role with seeming effortlessness. She skillfully guided the court through one of California's periodic economic downturns, with predictable consequences for the court's budget, at the same time that caseloads swelled to unprecedented levels.

In the midst of her tenure as administrative presiding justice, Justice Lillie suffered a devastating personal loss, the death of her second husband, A.V. Falcone, in 1996. They had been a devoted, nearly inseparable couple for the thirty years of their marriage. Many people, including those

of us on Division Seven, the family of her stepson Judge Dewey Falcone, and several old friends tried to compensate for the loss, but Justice Lillie's life away from the court was never the same.

Mildred Lillie was an appellate judge for forty-four years and a judge in the California Court system for fifty-five years, both of them records for this state. In addition to records for longevity, she had a number of "firsts." Among them, she was the first woman to preside over major criminal trials in Los Angeles and the first woman to be appointed a justice of the Second Appellate District. But it was years after her oral history that Justice Lillie learned why she didn't achieve the ultimate "first" — to be the first woman on the United States Supreme Court. In his book, *The Rehnquist Choice*, published in 2001, John Dean revealed what his research uncovered about President Nixon's decision to nominate William Rehnquist rather than Mildred Lillie to the high court. In an example of the sexist attitudes that still permeated American society in 1971, Chief Justice Warren Burger objected to the appointment of a woman to his court, a view also expressed by several members of the American Bar Association committee that found her "unqualified," fearing the disruptive effect a woman justice would have on the collegiality and deliberations of the Supreme Court. It would require the revolution the legal profession experienced during the rest of the 1970s — when law school classes moved year by year from less than five percent to nearly fifty percent female, and women were appointed to lesser courts with far greater frequency — to set the stage for the 1981 appointment of Sandra Day O'Connor as the first woman on the nation's highest court.

Justice Lillie received many honors and awards for her service as an appellate judge during the last years of her life. Among them, she was named "Appellate Justice of the Year" by the Los Angeles Association of Consumer Attorneys and later received the same recognition from the Criminal Courts Bar Association. Demonstrating the appellate bar's reverence for Justice Lillie, the Appellate Courts Committee of the Los Angeles County Bar Association held a luncheon in her honor, with speaker after speaker praising her and her many contributions to California jurisprudence.

When the Southern California legal community finally lost this judicial giant on October 27, 2002, it mounted a funeral worthy of a head of state. An overflow audience including hundreds of judges and lawyers

attended the ceremony, Cardinal Roger Mahoney conducted the mass, and the California Highway Patrol closed down not only several streets but two freeways in order to clear the way for the funeral procession.

This was followed a year later by a unique and permanent recognition of Justice Lillie's unparalleled stature in the California judiciary. On November 6, 2003, at a reception attended by many of her fellow justices and trial judges, along with other leaders of the Southern California legal community, the Los Angeles County Law Library named its main facility in downtown Los Angeles the "Mildred Lillie Building." During the ceremony, former Attorney General John Van de Kamp narrated a video of Justice Lillie's life and Chief Justice Ronald George extolled her remarkable career and personal qualities. Altogether a fitting reminder for future generations of this legendary figure in California legal history.

* * *

Oral History of

JUSTICE MILDRED L. LILLIE

CALIFORNIA COURT OF APPEAL

EDITOR'S NOTE

The oral history of Justice Lillie was recorded by attorney Mary Louise Blackstone of the former State Bar Committee on History of Law in California, in two sessions: November 20, 1989, and July 26, 1990, in which she taped and later transcribed the narrative presented by Justice Lillie.

The provenance of the oral history is provided by Carol Hicke of the Regional Oral History Office (ROHO) at The Bancroft Library, UC Berkeley, in a prefatory note dated December 5, 1997: "In 1991, the interviewer gave a copy of the transcript and tapes to The Bancroft Library. . . . The Bancroft Library sent the transcript and tapes to the Regional Oral History Office. I sent a copy to Justice Lillie and asked her to review it, which she did, making a few minor corrections."

The oral history is presented here in its entirety, incorporating Justice Lillie's corrections, and reedited for publication. It is printed by permission of the State Bar of California. The original transcript may be viewed at the Library or online at http://digitalassets.lib.berkeley.edu/roho/ucb/text/lillie_mildred.pdf (last visited Dec. 1, 2010).

— SELMA MOIDEL SMITH

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HUSBAND: A.V. FALCONE

My immediate family consists of my husband, A.V. Falcone, who is a lawyer. We were married in 1966. My husband has two adult children who have families of their own; I have no children.

My husband is a fine lawyer. He is by far the best lawyer I know. Prior to our marriage, he appeared before me on numerous occasions when I was on the municipal and superior courts, so I know his ability. I also know his knowledge, experience, intellect and dedication to the law and to justice. He is one of the few lawyers who, in his case is adequately prepared on the facts and on the law. There is no question you could ever ask him about his case to which he would not know the answer. He has a running knowledge of civil and criminal law, which is due primarily to his phenomenal memory, the fact that he reads constantly, his long experience and his active practice. He presently [November 20, 1989] is involved in filing a petition for certiorari in the United States Supreme Court. He is very tenacious and fights for the rights of his client. He is also a person who projects well and speaks well. He participated in a great many landmark cases. One case involved a boundary dispute, *Daluiso v. Boone*, and the California Supreme Court established that there was no self-help in California. He represented a man who had been approached by four men on horseback who had shotguns at their, sides. They claimed his fence went over the boundary line; and when the client refused to move it, they tore down the fence. My husband sued on his behalf and prevailed. Another case was *Los Angeles v. Frew* wherein, through the Supreme Court, he established that an owner of property had a right to testify to the value of that property. *Aetna v. West*, was a case wherein an employee had quit his job and the customers followed the employee; the plaintiff ran a janitorial service. My husband was able to establish for his client, the employee, that as long as it's fair, the employee can accept former customers of the employer — that is, if it's done fairly and the employee doesn't go out and solicit. He established the doctrine that it is unfair competition that is illegal, not fair competition. And there are a variety of others. I am very proud of him.

I like to talk to him about the law, but we have an agreement: he doesn't tell me anything about his cases and I don't tell him anything about mine. So unless it's a general rule of law or issue or a publicized matter, we do not

discuss the law. I remember one time he was in superior court and between the time the court took his case under submission and he returned for the court's decision, I had filed an opinion that was not in his favor. The attorney on the other side could hardly wait to advise the court, "Your Honor, his wife just wrote an opinion . . ." and when I got home, I heard about that. He didn't lose the case, however, because he was able, after a short recess, to distinguish his case.

He is a well-adjusted person who is very, very supportive of me. He is loyal, considerate and understanding and, am I lucky! He says I can do anything, and he has given me a tremendous feeling of self-confidence. He has convinced me I can do whatever I want to do, and has encouraged and helped me. For example, when we were married in 1966, I continued to sign my name "Mildred L. Lillie." It was before the days when a woman retained her maiden name. He said, "You know, I think that I should change your name to 'Mildred L. Lillie' and, further, legally. Because you have to run for retention, and the public knows you as Mildred Lillie, I think to avoid any question about whether it is your legal name on the ballot, we should change it." So, he filed a petition in superior court for change of name. And the judge who heard it was Jackie Weiss. Notices were published in the *Daily Journal*. There was no objection. It was interesting because just prior to that time, Ivy Baker Priest had remarried and was running for State Treasurer. She wanted to change her name to Ivy Baker Priest for the ballot. So she did the same thing, but I think there was some objection voiced to her change of name. But, I had no problem, and so my name was changed legally to Mildred L. Lillie.

BIRTH, CHILDHOOD, AND FAMILY, 1915-31

My maiden name was Kluckhohn; my father's family came from Germany. The family originally was named von Kluckhohn, but there was a schism in the family and one branch stayed where they were and my father's branch came to America and dropped the "von" and became known as Kluckhohn. The other branch of the family changed its name to von Kluck and produced the General von Kluck of World War I fame.

I have only been to Germany once, but I was there in such a hurry that I was unable to try to go back and see who my antecedents were. I hope

that before I die, I can return for the purpose of finding out from where my family came and what they did.

When my paternal grandmother and grandfather came to the United States, they settled in Iowa. They were people of means and they bought property there. They became farmers; they were people of the soil. When they retired, they came to Los Angeles where they lived until they both passed away. My father's name was Ottmar August Kluckhohn. "Ottmar" is a typical German name, so is "August" for that matter.

My mother's family came from Scotland and from Alsace-Lorraine. My grandmother was of the Borah family, and one ancestor married Martin Luther. Another eventually produced Senator William Borah of Idaho; he was my mother's second or third cousin. I have no memory of having met him, although I might have when I was a young child.

My mother was born Florence Elizabeth Martin in Wisconsin. The family settled in Wisconsin, and they too were farmers. My mother was well educated for her time, and she received her diploma from Normal School. She had three siblings, two brothers and a sister. One brother became a mathematics teacher at what we would know now as a high school. He decided later on that he wanted to work with his hands, so he came to California and settled. My aunt, who was then unmarried, came with him. They settled in the Coachella Valley where my aunt later married. Years later she lost her husband to an accident when he was trying to install an artesian well. My uncle and aunt eventually moved to the town of Oakdale, which is in Stanislaus County, and the San Joaquin Valley.

In the meantime, mother married my father in Riverside; she was married by Billy Sunday, and they honeymooned at the Palace Hotel in San Francisco. They finally settled in Iowa. My father was a farmer and owned several farms in Iowa, raising mostly corn and soy beans. I was born in Ida County in Ida Grove, Iowa, on January 25, 1915. I was the first baby born of caesarean section in the state of Iowa. Andy Warhol said, every person should have 15 minutes of fame in his life; I guess that was mine. I was told by my mother that they didn't expect either one of us to survive; we both did.

During that period, during World War I, there were a number of Germans in Wisconsin and in Iowa. There was a great deal of prejudice and violence against German families. They had a rough time for a couple of years before anti-German feelings eased off.

My mother separated from my father when I was three years old. She left Iowa and brought me to California when I was three, having filed suit for divorce from my father in Iowa. It was an interesting separation in that my father was crazy about my mother, and when he would come ostensibly to visit me, he really came to visit my mother. He never paid a great deal of attention to me, and he never supported me. He told my mother that if she would come home, he would support her and he would support me, but he wasn't going to support me and he wasn't going to support her as long as she refused to come home. And she said, "No thank you, I'll stay where I am." Well, eventually he didn't come to visit any longer and I lost track of him when I was in high school and when I started college. My mother was rendered practically penniless because she had no money of her own. She had been raised as the favorite child and been catered to as the youngest in the family. She was taught to sew and to do all of the things that young ladies did in those days. When she lived with my father, who was fairly well off, she did not have to work then either. But when we came to California, she was reduced to having to work in any way she could to earn a living for herself and for me, mostly in the fields picking fruit.

In the meantime, my uncle and my aunt had established themselves on a six-acre ranch just outside of the city limits of Oakdale, and we lived with them. This town, incidentally, was a fairly small one of about 5,000 people, and it was primarily an agricultural community. My uncle developed special varieties of peaches and nectarines for the luxury market in San Francisco. We did all of our own work — irrigating, cultivating, planting, thinning fruit, pruning trees, spraying, and picking fruit, sorting, packing and shipping. Of course, every member of the family worked; we all worked. When I wasn't going to school, I worked too. So I learned at an early age about hard work and doing common labor.

I was educated in the public schools in Oakdale. We were not people of means; in fact, we were poor, but we were respectably poor. We weren't poverty stricken because even throughout the Depression we were able to eat fairly well because we raised most of our own food. And we were properly clothed, but we had no luxuries. In those days, because our home was just outside the city limits, we had no electricity and I studied by kerosene lamp. We had no hot water in the house, and while we had running cold water, we had no bathroom facilities or plumbing. While I was

not in need, I had none of the luxuries that most of the kids that I went to school with had.

There were very few children in our particular area. Those that were there, were from a Japanese family named Adachi that lived on an adjoining farm, and an Italian family by the name of Bianchi that owned a dairy on the other side of the railroad tracks not far from our little fruit ranch. They were both large families and we kids played together. The Japanese family had six or seven children and were wonderful neighbors. I lost track of them; I think they settled in and around Modesto. I was raised with that family as I was raised with the Italian family.

At that time our economic status was not such that I was particularly popular at school because most of the kids were from affluent families and lived at the other end of town. I didn't have very much time to socialize or play anyway because when I was not in school, I was either working in the garden, picking or packing fruit or cooking the meals.

I cooked for my family. When I was about 11 years old my mother taught me how to cook, and she also taught me how to sew. While I've never been any great seamstress, I have been able to turn a fair seam. I did the cooking; I have a little talent in that direction and I enjoyed it. My summers were spent cooking for the family, sorting and packing of fruit. My pay for each day's work was an ice cream cone. Finally it dawned on me that I couldn't go to college on ice cream cones, so I got a job at the local cannery. I was about 12 years old and I misrepresented my age, but I'm sure they knew that I was not 16 because there were other kids who did the same thing. As long as we could cut fruit, that's all they really cared about. We worked on a conveyor belt and cut fruit, and were paid by the box. I saved my money and when the job at the cannery closed, it was seasonal of course, I worked at the cutting sheds. Those sheds were for drying fruit. Some of the fruits — peaches, apricots, pears — were dried naturally by the sun and others were cured by sulfur process. And I saved my money from that. Between all the work I did and school, I really had very little time to get into any trouble.

I was an excellent student, and when I graduated from high school I won a \$100 scholarship, which would probably amount to \$1000 to \$1500 today. It was a lifesaver and it encouraged me more than ever to work that summer, and enroll in the fall at the University of California at Berkeley.

I was raised by my mother and by my uncle, her brother, and sometimes by my aunt who later on remarried and moved away.

My uncle was the nicest, kindest man I had ever known; I just adored him.

My mother had to work out in the fields and picked fruit for other orchards in order to support me; her sacrifice is something I have always been grateful for. She never complained; she was a stoic. She never complained about the work she had done, and I can't remember that she ever complained about anything — not her lot in life or anything else. When she was 90 and was ill, I was unaware of her condition because she would not tell me. Finally I realized that she was really not getting along as well as she should, had her examined and took her to the hospital. She taught me never to complain and was a strict disciplinarian. She was very liberal with the hair brush, and she operated under the theory that if you spared the rod, you spoiled the child.

She taught me a great many things that have served me well throughout my life. One of them is that there is no free lunch, that you have to work for everything you get: There was no compromise about that and she instilled in me a work ethic I still have — sometimes much to my great sorrow because I find myself to be almost a workaholic. My husband says I am never quiet for a moment — that if I have no work from my office to do at home, I am constantly working around the house. It's difficult for me to sit down and read anything frivolous, and I seldom watch television — mainly because I don't have the patience or time for either.

Above all, my mother instilled in me a strong sense of duty. If I have a job to do, an obligation, a duty, I can't rest until I do it. My husband calls me a child of duty. If I'm to be some place on time, I'm there, and if I give my word about something, that's it. It's a good thing to be that way, but it's a burden, too.

She also taught me that I had to follow the rules in everything I did, and obey the law. Once I took an orange from a tree without permission, and I had to return it. I was greatly humiliated, but my mother forced me to go back by myself, knock on the door, and tell the lady that I had taken the orange. My mother instructed me that if she said to me, "You may have the orange." that I was not to take it, which just about broke my heart. In any case, she gave me a great foundation for future living.

The hardest thing for me to do was to follow her admonition that if I couldn't say something nice about someone, not to say anything, but it has kept me in good stead all of my life. I am not a gossip and I do not listen to gossip. I used to think that if I didn't talk about anybody, no one would talk about me, but that isn't the way it works, unfortunately. I could have said a lot of things about a lot of people and done a lot of things but didn't do them because of my early training. I can still hear, "You'll win in the long run." And it's always been true.

I learned manners the hard way. When I was very young, my mother would take me visiting and instruct me at the outset that I was to sit in a chair and say nothing and not move, and that is exactly what I did. And I had no participation in anything; I only sat there! I was to be seen and not heard. She taught me good manners. I am reminded of Oscar Wilde who said a gentleman is one who never unintentionally insults a lady.

My mother was very loving and she sacrificed a great deal for me. She did not remarry. She did have suitors, and I remember when they would come to the house for dinner. I think that she did not remarry because of me. She never told me so, but when I would ask her if she liked someone, she would say, "Oh, no, Honey; I'm happy here." But I had a feeling that I was probably the one who prevented her from getting married. However, there was no conscious effort on my part to keep her for myself.

In those days, divorce was not common, and Oakdale was a small, fairly tight community. I was not the most popular student in the school mainly because of our economic situation; I had to work and I was the product of a divorced family. That was something that was not well accepted at that time. But I studied and I had some friends and I was happy. I never felt I was underprivileged or restricted or deprived. I always felt that I was very lucky that I had all the things I did have. I have wonderful memories of Christmas — of a tree with real candles, it's a wonder we didn't burn down the house, my mother rocking me to sleep when I was about five years old, on rainy days the smell of baking bread. She baked bread in an old wood stove. It had an oven you couldn't calibrate, so you wouldn't know if it was "on" or not. I learned to cook on that stove, and so I can cook on any stove that you've got — gas or electric, or wood or coal or barbecue — whatever it is, I can cook on it. I also have a memory of my mother teaching me to read when I was about five or five and a half. She insisted I be able to read before

I entered first grade. I know I got a lot of spankings because I was pretty bored with reading, but finally learned, and when I went to first grade, I knew how to read — which may or may not have been a great boon because eventually everybody caught up to me.

When I entered first grade I had trouble finding my way home. We lived about a mile away. The town had a general store from where I knew how to walk home. What I didn't understand at the time was that after going to the general store I always passed the school on my way home. My mother kept telling me that I was passing that school house on my way home, but I had to work this out my own way. It took several weeks.

During grammar school my activities were fairly limited, but during high school I was a member of glee club and various other organizations, and sang in the church choir. Mostly I spent my time at home and very little time playing with the kids on the school grounds. I had no real encouragement from my teachers relative to going to college. I rather suspect they thought that I couldn't afford to go. But I got good grades and I was determined to go to the university.

COLLEGE YEARS, BERKELEY, 1931-35

In 1931 I graduated from high school and enrolled at the University of California. I'd never been more than 30 miles from Oakdale, and had never spent any time overnight away from home. We went to Modesto now and then, and sometimes to Stockton, and once or twice to Yosemite Valley; but aside from that, my travels were very limited. I didn't even know how to board a streetcar, and I had great difficulty the first time I tried. I had no idea on which side of the street to stand or how to pay my fare.

I went to college alone by Greyhound Bus from Modesto and arrived at the station in Oakland rather early in the morning. I took the streetcar to the university and went directly to the employment office, at which time I got a job working for a private family in exchange for my room and board.

I was 16 years old. This family was an interesting one in that they had a very active social life and really needed someone to care for the children because they were seldom at home.

The lady of the house was very kind. I had previously learned how to comport myself, and my mother had sent me to dancing school. I had

learned some ballet but had never learned to ballroom dance. The girl across the street, who was also working her way through college, and the lady of the house where I was working taught me to dance. I didn't have an opportunity to try it out for a year or two thereafter, but I have a sense of rhythm and did well.

My cooking skills came in handy, and they improved during the time I was working for this family. In fact later, I successfully passed myself off as a cook. I spent about an hour and a half working in the morning before school, cooking breakfast and taking care of the children, and then I returned at about 5 o'clock in the afternoon, at which time I prepared the evening meal and put the children to bed if the parents were not home.

I learned firsthand about the consumption of alcohol. There never was any liquor in my own home and I was unaware of the drinking habits of other people. It rather surprised me and I was appalled at the effect it could have on a human being. I just did not know about drinking and did not know how to deal with someone who had imbibed too much.

In any case, I grew up very fast. I had a succession of jobs. I left the first one because the lady of the house invited her mother to spend a couple of weeks, and she decided to stay on — much to the dismay of her husband. Since there was only one extra bedroom, which I was occupying, I had to find another job.

The next position I held was a similar one, in the home of a certified public accountant and his wife and their two children. The daughter, who I would say was then about 12 years old, is now married to a superior court judge. This was during Prohibition, and the man of the family made some beer in a washtub, storing it under the kitchen stove. It got very warm and the whole tub of beer blew up, over the ceiling, the stove, the floor and all of the cupboards. We were never able to eradicate the smell, and to this day I have never tasted beer because I could never get close enough to it to try it. I am nauseated by even the thought of beer.

I took the regular courses an undergraduate would take at college the first year, but then my mother was determined I should be an artist. I did have some talent in that I had done some oil and watercolor painting at home. I had designed Christmas cards and things of that nature. I, too, thought I had artistic talent. But when I took some art classes at Cal, I discovered much to my surprise that if I had to rely upon my artistic talents

to earn a living, I would probably spend the rest of my life on welfare. I decided I would have to look for something which would make it possible for me to support myself and my mother, which I knew eventually I would do. When I decided to go to law school my mother was heartbroken; she thought the family was losing an artistic genius. Incidentally, I have done some respectable oils and watercolors as a hobby, some of which have won awards in various shows.

BOALT HALL SCHOOL OF LAW, 1935-38

At that time I had taken some pre-legal courses — one in international law and one in business law. I was very interested in the business law course and enjoyed the international law course. Edwin Dickinson, who was the dean of Boalt Hall at that time taught the international law course. He had come from Michigan law school where he had been a professor. His specialty was international law. He apparently saw some promise in my studies. I inquired about the possibilities of going to law school, and he encouraged me to do so. I told him that I had no money and that I would have to work during law school. He said there were very few students who worked while going through law school and it would be difficult, but that he thought I could do it and that he would give me a job, which he did. I corrected bluebooks for him for a couple of semesters.

In order to enter Boalt Hall, I took some summer session courses. During that summer I also went to intersession, and worked. I did a variety of jobs, from coaching undergraduates and correcting bluebooks to working in Sears Roebuck as what was then called a floor walker but was really a store detective. Later on I was asked by Sears & Roebuck to do some investigating because it had been sued by a woman who claimed she had been injured because a hot water bottle she had purchased there had burst and scalded her neck and back. I was sent out to investigate and to come back with whatever information I could find concerning her injuries. I was told that the best place to start was her neighbors. Well, I learned very quickly that snooping around was not my favorite thing, so I had to go back with a partial failure. I did some interviewing, with negative results, and finally I just went back to the office and told them that I would prefer to do some other kind of work. Well, someone else had taken my job as floor detective,

so I was put in the mail order department, which was kind of interesting and not difficult. I worked there summers and weekends.

I had no communication with my father up to that time, but decided to write and tell him what I was going to do. Well, he wrote to me — I think it was about the third letter I ever received from him — and told me what a ridiculous idea it was, that I was on my own, that it was a waste of money, that all I would do would be to get married and have a batch of kids, that I would never use my law, even if I got through law school, and that I was wasting my time and I ought to get smart and get a job. I decided that since I had been living all this time without any help from him, that I could continue to do so. So, I entered law school.

At that time there was no LSAT, and I was admitted on my grade average. One hundred thirty-seven of us were in the starting class. We were told the old saw about, look to your right and look to your left because next semester one of you won't be there. And, sure enough it was true because only sixty of us finally finished.

There were two other women in my class who started with me and finished with me. One was Nan Mountjoy Boie who was married to an engineer who worked in the Interior Department. She was very bright. Later she worked for Legal Aid, then practiced on her own. She was older than either I or Selma Michaels, who was the other woman student.

Selma also graduated with me; she later practiced law in the San Fernando Valley. She married, had several children, divorced and now she is married to a physicist at the University of California. She practiced in Berkeley also, and I don't know if she is doing any legal work now. I saw her at the 50th reunion of the Class of 1938 in 1988. That event brought out maybe 15 or 20 of our classmates, none of whom I could easily recognize, and I guess they couldn't recognize me either.

We had a number of professors who were famous in their field: Professor Langdon, who taught contracts; William Ferrier, who lectured in wills and property; Henry Ballantine, who taught torts and corporate law; Roger Traynor, who lectured in taxation and trusts; Max Radin who taught legal ethics; Professor McMurray who taught civil procedure; and Professor Alexander Kidd who taught criminal law.

Professor Kidd was called Captain Kidd. He ran a tight ship, and ran roughshod over everyone in the class. He was insulting to anyone

who wasn't paying attention or who gave an incorrect answer. He would become so irate he would throw books and papers at us. He would jump up and down and scream and yell and throw papers on the floor and really carry on. But we got used to him, almost fond of him. All the time I was in his class, he never called me "Miss," he always called me "Mister," and he always mispronounced my name. I told him a number of times the proper pronunciation but, no way. He did this intentionally because he really had no tolerance for women in his classes. He ignored us until he called on us. and if we did not answer correctly, he became insulting and threw tantrums.

I remember an incident that occurred during one of his classes that we students thought was very funny. Boalt Hall was kind of a salt-box-shaped, square building and there was a little incline of lawn up to the street. We were sitting in class one afternoon looking out the window, which we were forbidden to do. We were watching two dogs having a romantic interlude on the lawn. We were absolutely fascinated and were all watching. When Captain Kidd finally discovered he was getting no attention at all, he turned around, looked at this display of amorous activity and then looked at all of us. He closed the windows, pulled down the shades, left us in total darkness and walked out.

My classmates were an interesting lot. I had a conversation one time with Joe Grodin, former associate justice of the Supreme Court, about the university. He had gone to Cal and had a professor he raved about whose name was Jacobus tenBroek. TenBroek taught a speech class. It really consisted of cases and concepts that related to the First Amendment and the Equal Protection Clause, but he didn't teach in the law school; this was in the regular college curriculum. Jacobus tenBroek was blind and had been in my class at Boalt. He was a very, very bright man and most helpful to me. I sort of gravitated to him. He was a great big bear of a guy, was a fine gentleman and my good friend. I think he is now deceased.

My law school class dwindled little by little through the first, the second, and the third year, and finally, sixty of us graduated.

In 1940, Roger Traynor, by a historic accident, was appointed an associate justice of the California Supreme Court. Governor Olson, a Democrat, had named Professor Max Radin to the Supreme Court but, as it became obvious that because he was considered to be a liberal he would

not be confirmed by the Commission on Judicial Qualifications, he went to Governor Olson, offered to withdraw his name and asked him to appoint his friend and colleague Professor Traynor. Traynor was appointed. He served 24 years, then became the chief justice of California.

The first year of law school, I did not do too well. At the end of the term just before final examinations, my uncle passed away. He had been very ill. I went home. It just broke my heart because he had raised me. I had to make arrangements to bring my mother back with me, and I had no place to take her and no money. I was really in dire circumstances. I finally worked it out, but during that time I took my examination in criminal law from Captain Kidd and did poorly. He asked me what the trouble was, and I told him. He said he would let me take it over again. He did, the next semester when he gave the first semester examination, and I passed with flying colors. He was not heartless, and he really was a fine man, he just had a violent temper.

I finally got my mother located, and I got another job that paid a little bit more. I continued my law school, and I did fairly well thereafter. I had no real concern about how I was treated in law school because I was so busy trying to make a living and support my mother and pass my courses that I really had no time to worry about whether I was being treated properly as a woman. The fact of the matter was, that we three women were largely ignored. No one paid much attention to us or took us seriously. Our classmates and professors were affable to us as individuals but could not believe any one of us would ever really practice law. We all did, and under the most difficult of circumstances not the least of which was the Depression.

I received my degree in 1938, took the bar examination in 1938, and passed. The year before, I made my application to the State Bar for permission to take the bar examination — I don't know what it costs today, but I paid \$1 as the fee and still have my receipt.

ALAMEDA CITY ATTORNEY'S OFFICE, 1938-39

Also in 1937, we were all looking for jobs. I went to Oakland to talk to the district attorney because I thought I would like to join that office. I went there without an appointment. He very kindly showed me into his office and talked with me. He asked me why I wanted to be a lawyer, and I said

it was a little late to be asking me that because I was almost through law school. He said, "Well, I don't like to discourage you but I would never appoint a woman." He said, "I've had a couple of women in this office, one of whom worked out fairly well, but the other one created nothing but problems, and I want no part of women in the law." So he said, "Good luck to you. I don't encourage you very much because I think that women probably don't belong in the law." I thanked him and went my way.

After I graduated I, for the first time, in looking for a job met with rank prejudice and bias. But first I had to concentrate on taking the bar, and I took a bar review course in San Francisco. I took it from a man who says we are the two oldest people in California who remember the "good old" days, and he is Bernie Witkin, that's who. He personally taught the class. He must have taught it well because I passed the bar. But during that period of time and thereafter, I was really desperate because we had no money at all. I had just enough to go back and forth across the Bay.

I went to the offices of law firms in San Francisco but made no appointments because there was no reason to — I would not have gotten in the front door. In fact, very seldom did I ever get past the receptionist's desk. Once in a while a member of the firm would come out into the office of the receptionist and tell me how useless it was for me to continue to look for a job. You have to remember, number one, the year was 1938, in the Depression, and no one was hiring. Number two, no one had any time for a 23-year-old woman who had no experience at all and who had not even yet passed the bar. And, number three, prejudice against women in this field was rife. One of the few times I ever entered the inner sanctum of one of the big law offices, I was lectured about the folly of ever having studied law, the futility of looking for a job in a law office because of my sex and no one would hire a woman, no one would trust a woman, a woman would probably get married and leave, and what use was it? It was a waste of time, it was a waste of money, and my education was for naught. So, I was pretty discouraged.

One day I found myself in the Federal Reserve Bank Building at the office of a firm by the name of Agnew and Boekel. I asked the receptionist if I might speak to some member of the firm; she called Mr. Boekel. He came out and invited me into his office. He too gave me a little lecture, but he was very kind about it. He said, "You look like a very intelligent young lady.

Give me your telephone number; perhaps I can help you.” We couldn’t afford a telephone, so I had to give him my landlord’s number. I thought well, that’s the end of that, and left.

Within a couple of days, my landlord came in and told me that a Mr. Boekel was on the phone. He said, “I have a friend who is the city attorney of Alameda, and he is looking for someone to do some research. I think you can get the job and I’ll put in a good word for you.”

So, I took the streetcar and went to Alameda and talked to Mr. George, the city attorney. He said after a long discussion, “All right, I’ll hire you but, I can’t put you on Civil Service because you haven’t passed the bar, and I can’t give you any legal work to do, so you will have to do research only and you will have to do your own typing.” Well, I couldn’t type, but I decided to make a stab at it with the hunt-and-peck system. I went to work at the magnificent sum of \$175 a month. That was more money than I had ever seen at one time in my life. I was just ecstatic about the whole thing.

After I had worked for about a month, I came to the realization that if I remained there, I would forget all the legal knowledge I had ever accumulated, because all I did was to write and do research on public nuisances. That’s all he had me do because he had to learn something about public nuisances; I did the research and he practiced law someplace else. He only came in occasionally to perform his duties as the city attorney. Well, I wasn’t terribly happy, but I had to have a job, so I remained there.

I had to room in Alameda because it took too long for me to ride the streetcar back and forth from Berkeley. My mother was in Berkeley and I was in Alameda, but it worked out fairly well because I roomed with a little old lady who had a house full of antiques. It was like sleeping in a museum. That room was furnished with just one antique after another. But she was a dear little old lady, and I loved her company and her cooking, but believe me, it was a nightmare to go to bed in that house.

One day I was sitting in my office and I received a call from a reporter from Oakland. Now during this period, I was so busy trying to get a job I had forgotten completely about the bar examination. She told me she had learned I had passed the bar and wanted to take my picture and interview me. It gave me a tremendous shot of ego and encouraged me to look elsewhere for a job.

I had taken the bar examination in the Opera House in San Francisco. It was a three-day examination. None of us had any money, and we took our lunch and ate outside by the fountain across from the State Building. We fed the pigeons and fooled around outside until it was time to continue the examination. Well, we discovered that there was a strike going on at the Emporium, a general department store on Market Street. We walked down there and found people picketing. So we joined in, and they had the benefit of a bunch of aspiring lawyers. For three days we picketed during the noon hour. But that was the extent of my labor activities.

After I had passed the bar, Mr. George offered me a permanent position, but I was not satisfied because all I was doing was research, and he promised me nothing more. So, I communicated with the dean of the law school and told him I would like to make a change. Later he called me and asked if I would be interested in going to Fresno. I had never been in Fresno. I said, well, I would take a crack at it.

In the meantime, I was sworn in at admission ceremonies in Sacramento at the Supreme Court in the State Building. I don't know if you have ever been there, but it is a beautiful courtroom — wood paneled, and what you would conceive as the perfect courtroom. It has all the dignity, the grace, and the warmth that you think a courtroom should have. I was sworn in by Chief Justice William H. Waste.

I had gone to Sacramento with four of my classmates, and we drove. We didn't even think about taking our families, and no one was married. Now when there is an admission ceremony, the court is packed with children, and wives, and mothers, and friends, and aunts, and uncles, and cousins. We drove there, took the oath, and drove home — far different than it is now.

I am presiding over admission ceremonies in the Chandler Pavilion at the Music Center in a few weeks. We have often had the ceremonies in the Chandler Pavilion and it is always jammed with admittees, relatives and friends. It is very difficult for me to make the transition from the small, dignified courtroom of the Supreme Court in Sacramento, to this big affair in the Music Center or the Shrine Auditorium.

After I was admitted to practice, I returned to the City Attorney's Office, and I stayed there until I took the job in Fresno.

ATTORNEY: OFFICE OF JAMES ROYLE, FRESNO, 1939-42

I took the bus to Fresno for the interview. The attorney, James Royle, was interested in having someone do probate, divorce, small cases, draw wills, etc. Royle was a sole practitioner. He was very active in the dairymen's associations around Fresno County. There were a great many Portuguese dairymen there, and they had organized two or three dairymen's associations around Los Banos, Coalinga, and other areas. Mr. Royle was the attorney for these associations which he had organized, and I frequently attended board meetings with him. At that time, he was in the appellate court on a variety of matters related to the testing of cows which the State Department of Agriculture ordered to be done. The associations were fighting this, and Mr. Royle needed someone to take care of the routine cases. I didn't realize at the time that he also needed a legal secretary. Well, he rattled the wrong cage; I told him I couldn't type. He said maybe I could learn; I, in my ignorance, said I would try. My secretarial efforts were a failure; my law practice was a success.

I returned to Berkeley. At that time I had an old car that my uncle had left me. It was a Whippet and it barely made it to Fresno. I put my mother in the car and what little luggage we had, and we started out for Fresno.

I meant to tell you that I was offered \$100 a month, and whatever business I could bring in would be my own. In accepting the job, I figured I would probably do a lot better than staying in the City Attorney's Office in Alameda. My mother agreed; she was very, very supportive and had great faith and confidence in me that helped.

So, in the Whippet we are rolling into the first street from the highway into Fresno, and it turned out to be Divisadero Avenue. I spied an apartment house with a for rent sign on it. So, I stopped the car and went in and rented an apartment. It was a one-room apartment with a kitchen, bath and a large living room with a fold-down bed. I think the rent was \$35 a month. We set up housekeeping, and I started my work with Mr. Royle.

Mr. Royle was very kind to me and very tolerant, although when he found out I really couldn't type, he was very discouraged, and I thought I might lose my job, but he hired a secretary instead.

In his office was a man by the name of Bert Green. He was a fine man who kept encouraging me and telling me that he knew sooner or later I

would be practicing on my own. Some of my experiences were devastating but I learned a lot about man's inhumanity to woman and many other things. The superior court was a learning ground for me. I took the bulk of Mr. Royle's routine cases and tried them, and I learned about prejudice, and I learned about bias, and I learned about what the judges and lawyers thought of women in the law. I was the only woman who was practicing in Fresno at that time. There had been another lady there, but I don't know what happened to her; she disappeared from the scene. Her difficulties with the State Bar didn't help matters any. The first case I had was a personal injury case, and Mr. Royle went in with me and he took the laboring oar because it was my first case. Unknown to me, Mr. Royle had denied that he had a certain document. When the attorney for the defendant in open court made a demand for the document, I instinctively reached for the file, which was a dead giveaway. I might add that there was a distinct coolness between Mr. Royle and me for some weeks thereafter. We lost the case, but I remained on the job.

I then got a workers' compensation case on my own. A man had been working in the sewer, and he had injured his right arm. At the hearing, they pulled the old saw on me. "How high can you raise your arm now?" And he did like so, raising it only a few inches. The counsel said, "How high could you raise your arm before the accident?" My client raised it a few inches, and suddenly you could see the wheels turning, and he put his arm down on the table and raised his left arm as high as he could. We got a nice award.

I tried a divorce case before Judge Murray, an explosive type of individual, who sat on the Superior Court of Madera County. He had red hair and a temper to match. The wife had come to me through a classmate in Madera. The woman complained that her husband had been very abusive, verbally and physically. I put on my case, which I thought was a very good case. Then the defendant testified that his wife, my client, had called him obscene names and had incited him to beat her up. He said he had struck her, but that she had called him the vilest, most obscene names, nagged him constantly and was verbally abusive to him. During recess, she insisted he was a liar, she had never used such language and wouldn't even think of using that kind of language. The judge held in my favor and ordered the residence sold and that the husband turn over to my client one-half

the proceeds within two weeks of the sale. Well, the house was sold, but after two weeks, no money. So, the wife came into my office in Fresno. She walked in the door and said, "You want to know what that no-good, dirty so-and-so . . . did?" I never heard such language in my life. So, I learned a thing or two about what to believe and what not to believe of clients.

I tried all the run-of-the-mill cases in the office. There were a number of judges in Fresno, two of whom became federal judges. I practiced before Ernest Klette, Campbell Beaumont, who later became a federal judge, H. Z. Austin and T. R. Thompson, who subsequently joined the court of appeal. All of these gentlemen treated me like a lady, but not like a lawyer. It was very difficult for me to be taken seriously no matter how hard I worked. The judges and lawyers treated me as though this was just an incident in my life and it was nothing that I was going to continue to pursue. They were very tolerant, but they largely ignored me. I just could not impress upon them that I was serious about what I was doing, that this was not just a fill-in, and that I wasn't just waiting around to get married. But I lived through it, and I learned an awful lot from it.

I had a case involving a promissory note in which I represented the defendant. It came before Judge Campbell Beaumont. An elderly gentleman by the name of Lindsey South represented the plaintiff. Lindsey South came from the South and he was an elegant gentleman with a sonorous voice. In putting on his case, he tried to put the promissory note in evidence. There were several novel twists to the case, and I objected. He tried a variety of ways, and I interposed an objection each time, which was sustained. Finally, Lindsey South walked up to the bench and said to Judge Campbell Beaumont, "Judge, if you want this promissory note in evidence, you will have to put it in yourself." I can just imagine what would have happened had I done the same thing. Finally, Judge Beaumont explained to him why the objections were good. We took a recess, and when we returned to court, Lindsey South was able to put his promissory note in evidence.

I went with Mr. Royle on his rounds to his dairymen's association meetings. There were three associations. Their board of directors, of which he was a member and for which he was counsel, would meet once a month. After several years, James Royle decided he wanted to be the postmaster of Fresno; he was appointed and quit practicing law. I fell heir to the dairymen's associations. I was pretty well versed in their problems, and their

appellate work had been disposed of, so it was no great burden. I became employed in a strictly advisory capacity as their lawyer; I was not a member of their board.

I would go one day to the Los Banos Association, and another day to the East-West Association up near Coalinga. I was always asked for lunch, or dinner, by the members of the association, and it was always in someone's home. All of the homes were dairy homes. If you're not used to the smell of manure and fresh hay, it takes some getting used to; these people were born and lived in this aura and didn't bother them at all.

They were the greatest cooks of all time. They kept on the back of wood stoves a big pot of stew and put everything — wine and everything else they could find — in that stew. It was very, very flavorful; I really appreciated their cooking.

Eventually, the associations hired a male lawyer to represent them. They were all very apologetic. It took them about a year and a half or two years to get up the courage to tell me they did not want to be represented by a woman.

In the meantime, Mr. Royle moved his office to the Federal Building as postmaster of Fresno, and I went into the office of Mansel Gallaher.

Mansel Gallaher had been chief assistant to the United States attorney here in Los Angeles and then retired to his practice in Fresno. He was an elderly gentleman and not in good health, and I handled some of his work. We were in the office of David Peckinpah.

David Peckinpah was part Indian and probably the best attorney in the valley. He had two sons whom I remember. One, named David, became a lawyer, the other, Sam Peckinpah, the director and producer who is now deceased.

I had a personal injury case I was going to try in Merced County. Dave Peckinpah told me I was foolish if I did not get some help, but I was young and ambitious, and I said, no, I could handle it myself. So I went to Merced County. My opponent was Ray Robinson. Ray Robinson was well known throughout California, an excellent lawyer, very active in the State Bar, and related to every person in Merced County. The jury was composed mostly of his relatives, and it was a combination of this, the fact I was a woman, and that I did not live in Merced County that spelled doom for my client. But the experience taught me a great lesson: first, that you don't believe

what jurors tell you about being objective, and second, that whenever you go to another county to try a case, you must have a local lawyer with you whether he does anything or not.

Mansel Gallaher became very ill and closed his office, and I had an opportunity to go into the office of Charles Hill. Charles Hill had been a fine lawyer; at one time he had represented Standard Oil Company. He was getting along in years and asked me to come into his office to handle a lot of the routine work.

In the building in which Hill's office was located was a medical doctor named George Sciaroni. Dr. Sciaroni became our family doctor. He was an excellent doctor, had a fine family and owned a beautiful home overlooking the river. He felt kindly toward me and would send me accident, divorce and small cases, for which I was very grateful.

One day Dr. Sciaroni asked if, as a favor to him, I would take a case without the payment of a fee. Without asking what kind of case it was, I answered yes. Well, this was around the beginning of the war. Dinuba was a small town between Bakersfield and Fresno, and before the war was strictly a farming community. A military installation was established on its outskirts and generated a great deal of activity. Cafes, dance halls, and bars sprung up, and with them, a house of prostitution. Among Dr. Sciaroni's patients were a couple of the girls, and the client he had for me to represent was their pimp, who had been charged with a violation of the Mann Act — bringing three women over from Las Vegas to Dinuba for immoral purposes. I was just crestfallen. I said, "Doctor, I can't represent someone like that." But then I thought of all the business he had sent me and said, "All right, I'll do it." He said, "If you want to be paid, I'll pay you out of my own pocket." I said, "That isn't it. I just don't want that kind of business." He said, "Well, would you do it for me?" And I said I would.

I went to see this man in jail. He was a little weasel-like, sleazy, tacky-looking character. He was being held by the United States marshal in the county jail as a federal prisoner. The deputy United States marshal later became a good friend of mine. He said, "What are you doing? A nice looking girl like you defending a fellow like that!" I said, "The story is too long to tell you, just let me talk to him." So, he brought the man into the interview room, and when he saw me, he gave up. He said, "You are going to represent me?" I said, "Yes, it's better than nothing! And for you, the price

is right.” He said, “I don’t have any money, but I’ll tell you one thing. If you get me off, I’ll give you all of my business. I’ll make you the richest woman in California.” I said, “Don’t do me any favors. Further, I doubt I can get you off on this but I’ll try.” So, I had a long talk with him, and he lied to me, and I knew he was lying. He said he did not bring these three girls to Dinuba, they were crazy about him and followed him from Las Vegas.

Well, one of the women was being held as a material witness and I finally got permission to go talk to her. She said, “You know, I’m just crazy about him. He’s taken care of me all these years and I was in love with him,” and so forth. And I said, “Well, did he bring you across the border?” And she said, “Well, no, I followed him.” I said, “As a matter of fact, he drove you across, didn’t he?” “Well,” she said. I repeated, “He drove you across, didn’t he?” And she said, “Yes.” It was a real loser.

It came time for trial and we picked a jury. Judge Beaumont was then on the federal bench and assigned to Fresno. The prosecutor was a man named Silverstein, who later became United States attorney here in Los Angeles. He put on his case, and I moved to dismiss the case on the ground no one had seen the defendant bring anyone across the state line and because the girl’s testimony had not stood up on cross examination. Although Judge Beaumont was straight-laced and from Tennessee and scowled all through our argument, he reluctantly granted my motion.

I walked back to that sleazy little client and told him, “You’re free to go.” And he said, “What do you mean, I’m free to go?” I said, “You can leave.” And he said, “Sure, and get shot at the front door.” And I said, “You can go. As soon as you check out with the United States marshal, you are free to go back home.” So, he looked at me and said, “Are you kidding me?” “No, I’m not.” The jury in the meantime was discharged and we were sitting in the courtroom arguing about whether he was or was not free. Finally, the marshal came up to him and said, “Come on and I’ll check you out.” And he said, “I’m really free?” The marshal said, “Yes, this lady did a wonderful thing for you and you don’t deserve it.” And he said, “She didn’t do anything for me, she’s just a woman.” And the marshal said, “Didn’t you hear what she said to the judge?” The defendant then said to me, “You know, I’ll give you all the business you can handle.” And I said, “Forget it.” He said, “I’ll pay the fee.” Well, he didn’t pay the fee and I never saw him again, and I couldn’t have cared less; it was all right with me.

ASSISTANT U.S. ATTORNEY, LOS ANGELES, 1942-46

About this time James Royle suggested that I make an application for a job in the United States Attorney's Office in Los Angeles. I had been very active in the Democratic Party and had been a member of the Young Democrats. Through this connection I had met James Carter, who was the director of Motor Vehicles, having been appointed by Governor Olson. Carter would later become the United States attorney and then a federal judge here. I also met Stanley Mosk, who at that time was a secretary to Governor Olson, later a judge, then attorney general of California, and then an associate justice of the Supreme Court. Royle suggested I talk to Senator Sheridan Downey. I did not know the senator but finally was able to make an appointment to see him. He said, "Well you have had pretty good experience and we'll see what we can do." I said, "Don't let the fact that I'm a woman make any difference." And he said, "It's going to." So, I countered, "It shouldn't because there is a war on and they're going to need women to help out whether in the legal area or somewhere else."

Very soon thereafter I received a call from William Fleet Palmer who was the interim United States attorney in Los Angeles in 1941 and 1942. He was 90 years old and a very dignified man who still had a razor sharp mind. Subsequently, he died in office.

Mr. Palmer interviewed me; he thought he could find a place for me. He did, but told me I had to be approved by the attorney general of the United States. I was approved, and I came to Los Angeles alone.

Tom Clark was the attorney general at that time. This was in May of 1942 and the war was on. When I presented myself the first day, I found a stack of files on my desk you wouldn't believe; they were piled up about as far as my chin and solid across the entire length of the desk. They were cases that had to be tried one after the other starting the next week.

Well, I had no place to stay in Los Angeles, so I registered at the Rosalyn Hotel. Little did I know that the Rosalyn Hotel at that time was a favored place for girls on the street to pick up the soldiers and sailors on skid row. Nevertheless, I was comfortable there, no one bothered, and I stayed for three months. Where I lived became a joke around the office. In those days, you could walk at night up and down Main Street without any trouble.

I had a room that faced Main Street. Night and day the jukeboxes blared in the bars below; the street was alive all night. All the big bands were playing at that time, and I learned all of the current dance music by listening to the jukeboxes — second hand. At night I spent my time in my hotel room working on the cases I had to try.

I had a pretty good reception in the U.S. Attorney's Office; there was one other woman attorney by the name of Betty Graydon, then about 60 years old.

I buckled down and went to work. I handled all kinds of cases. I was assigned to spend three months of the year in Fresno to handle the entire calendar in the federal court. I was assigned to the court of Leon Yankwich here in Los Angeles, and assigned to whatever judge sat in Fresno for the three months.

The cases on the Fresno calendar emanated out of that section of the Southern District of California. Now it is divided into districts and Fresno is in the Central District of California.

My sojourn in Fresno was great experience for me. Sometimes Judge Beaumont presided, sometimes Judge Pierson M. Hall, who at one time had been in city or county government, a superior court judge, U.S. attorney, then a federal judge. I learned a great deal from him. He had a wonderful speaking voice and I learned how to speak in public from him and how to project my voice. He was so definite in everything he said, so clear, and he projected power and authority when he spoke. I admired him greatly, and he helped me a great deal, but he also gave me a hard time. He told me he would make a good lawyer out of me if it was the last thing he ever did; in the process it was painful at times. Many years later we became good friends and one of his marriage ceremonies I performed in my home.

The first murder case I ever tried emanated from an Indian reservation over in Inyo County. One of the Indians had killed the Chief, and I prosecuted him. The Indian had been drinking, and an argument resulted in a stabbing on the reservation. It was not a capital case.

Indians came down to attend the trial. Some of them were for him and others were against him, and each group sat on different sides of the courtroom. There was great animosity among members of the tribe and the courtroom bristled with accusations.

It was an interesting case in that it involved a lot of perjury on both sides. As I was waiting for the defense to start, the defense counsel called a

woman, who was breastfeeding her baby, to testify. This was a very ample lady and was seated in the front row. As defense counsel called her as a witness, she held the baby out. Judge Hall said to me, "Miss Kluckhohn, do you think you could take this lady's place and hold the baby while she testifies?" I said, "Your Honor, I don't think I can do that baby justice, but, in any event, I am a federal prosecutor and I am trying this case. I am not a baby-sitter, and I decline." He said, "Very well." and she gave the baby to somebody else, rearranged herself, and got up on the stand and testified. The defendant was convicted and he was sentenced to the federal prison for life. That was my first murder case as a prosecutor and, I think, it was my last one. I had one that arose out of an automobile collision, but it was of another type.

In Los Angeles I tried 50 to 100 Selective Service cases. I heard every excuse in the world for not going into the Army, from shooting off a toe to hiding in the attic. I also got a number of cases involving conscientious objectors — all kinds of religious sects. Even though the defendants were given probation most of the time, they were difficult cases for me. Most were very sincere. Finally, I had had enough of Selective Service violations, and I was transferred to the civil division.

The federal judges then were Leon Yankwich, Campbell Beaumont, Pierson Hall, Ben Harrison, and William Mathes.

Judge Cosgrove was a very elderly gentleman; he had come from Fresno and had been on the federal court in Los Angeles for a number of years. I tried a personal injury case that arose out of a collision that occurred between a woman driving her car and my client, a mailman driving a mail truck. It was a two-bit case, really, and it did not amount to very much; it should have taken a couple of hours to try and it took a week. I was always inclined to over-prepare, to be repetitive and to argue at great length. Finally the judge called a halt to the whole thing and said, "I have now learned more about mail truck drivers than I ever cared to know. I'm going to bring this case to a close, and I'm going to hold in favor of the government." I thought I had won a big victory. However, he said to me, "I would like to see you in my chambers." There he lectured me: "I would like to tell you that you cannot impose upon the court the way you do, little girl." I was irate. I said, "Number one, I'm not a little girl, I'm 27 years old, and furthermore, I'm a lawyer and an assistant United States attorney, and I am entitled to the same respect as any other lawyer; number two, thank you

for the criticism — I will never impose upon this or any other court again.” He glared at me and said, “Very well. I’ll have no more to say.” So that was the end of the conversation. Thereafter, when I appeared in his court, he was very respectful.

Finally, I was assigned to the appellate department of the U.S. Attorney’s Office and I was sent to San Francisco to argue before the Ninth Circuit Court of Appeals on matters that had been tried in Los Angeles. The Ninth Circuit did not sit in Los Angeles very often, and I went up to San Francisco two or three times a month. I would fly up, and in those days it was a little different than flying up there now. Travel was difficult during the war, and it was very difficult getting any kind of hotel room, so generally I would fly up in the morning and return the same night.

At this point, let me tell you about another case I tried in Fresno. It involved the contamination of dried figs; I had never tried a federal Food and Drug case before. Around this time, a new lawyer had come into the U.S. Attorney’s Office whose name was Cameron Lillie.

HUSBAND: CAMERON L. LILLIE, 1947-59

Cameron Lillie had a most interesting background. He was born and raised in New York. His father was born in Scotland and had been the attorney for the Canadian Pacific Railway Company; his mother, also of Scotch descent and born in Canada, was a successful corsetiere in New York. When Cameron Lillie was 18 years old, his mother and father divorced; he and his mother came to Los Angeles and he got a job with a construction company. This construction company was owned by a man by the name of Lewis. Four or five years later Mr. Lewis acquired the Palomar Ballroom, located on Vermont Avenue between about Third and Fourth, in some kind of a trade. The Palomar was a losing proposition and Mr. Lewis didn’t know what to do with it. He looked around and said to Mr. Lillie, “How about managing the ballroom?” Mr. Lillie liked music but knew nothing about managing a ballroom. So he went into the entertainment business. He booked orchestras for dancing and began to build up the attendance.

He heard there was a band in New York playing for society balls, conducted by a man named Goodman, and he booked it. At that time, Benny Goodman was unknown, and the first time he played at the Palomar, he

bombed. The crowd did not like the society dance music and started to leave; those who stayed talked and laughed and did not listen to the music. It was a disaster. After a couple of hours, Benny Goodman said to Lillie, “We are losing customers; can I play the kind of music the band plays when it is alone?” And Lillie said, “Well, we’re nowhere now, go ahead.” Benny Goodman’s group had been privately playing a lot of jazz. Goodman then told the band, “Come on, let’s jazz it up.” People began to surge upon the bandstand swinging and swaying, and Benny Goodman’s Orchestra, as well as Big Band music, was born. The next evening, you couldn’t get into the place, and from then on, the Palomar was a huge success. Goodman always said that Lillie gave him his big chance — had discovered him.

Lillie then learned of a young orchestra leader by name of Tommy Dorsey, and he brought him to the Palomar. He let Dorsey play the same kind of music as Goodman. Lillie also gave him his big chance.

At about the same time, there was a young violinist who wanted to be a doctor but also liked the entertainment business. He said to Lillie, “How about you and me going into the entertainment business booking these bands” Lillie said, “No, I want to go to law school. I’m not interested.” So the violinist went his own way and founded MCA, and became an ophthalmologist — Jules Stein.

Although Lillie had made the Palomar a great success, he wanted to be a lawyer. He quit and got a job as a deputy clerk in the municipal court, and went to law school. He practiced law for a while, then went into the U.S. Attorney’s Office.

Now, back to the fig contamination case. The U.S. attorney said to me, “Since you have never tried a Food and Drug case, I am going to send another lawyer with you.” And Mr. Lillie and I tried the case. In picking a jury, he said to me, “The man in the corner will hang up your jury. Get rid of him.” I said, “No, I like his looks.” So, after a big argument, we kept him on, and he hung up the jury. Lillie never forgot it. He said, “I told you that he was a farmer, that while he didn’t grow figs, he grew raisin grapes and he was not about to condemn any fruit, contaminated or not.” He was right, of course.

Lillie asked me out to dinner. We went a couple of times, and we started to keep company.

On the Ninth Circuit Court of Appeals there were three judges, Albert Lee Stephens, the father of Justice Clarke Stephens of Division Five, and

Albert Lee Stephens, Jr., who is a federal judge, and brother of another Judge Stephens, a judge of the superior court, and Judges Curtis and Denman. Denman was a miserable man who abused the lawyers. The judges had the habit of getting up in unison and walking off the bench if a lawyer argued past his allotted time, leaving the lawyer talking to himself. I learned about this from sitting in the courtroom awaiting the call of my cases. Denman was very cross, had few friends, and about ten years later, committed suicide. Judge Stephens was a very kind man, but strict; Judge Denman was very rough on lawyers; Judge Wilbur was a stickler for the record. Wilbur enjoyed asking obtuse questions about the record that lawyers would never think of looking up or even remember if they had read the record.

I would go to San Francisco two or three times a month and would sit there in the courtroom awaiting my turn. I learned a good deal observing other lawyers and the court. They all but ignored me. I would get up and make my argument without incident. I would win some, lose some. I really never had any big problem with them.

One day I was late in getting out of court. There was a thick fog across the Bay and I could not fly out that night. We passengers waited around until about 11:00 p.m., and then the airline told us they would reserve rooms for us at the St. Francis Hotel. This was during the war, and by the time our bus got there, there were no rooms available. So, here I was alone, with some money but without luggage, and it was midnight. I walked down O'Farrell Street and saw a "Hotel" sign, so, I went in. In the lobby some men were seated talking, and a woman was at the desk. I asked for a room. She looked me up and down, and, finally, after a great deal of, what appeared to be indecision, she said all right, asked me to pay in advance, and told me the room was at the top of the stairs. I went up and tried to lock the door. No lock on the door. I was scared to death. So, I called Mr. Lillie. I said, "There's no lock on my hotel room door!" He said, "Well, where are you?" "I'm on O'Farrell Street." He said, "Describe the place for me." I did. He said, "Well, I hate to tell you this, but you are in a house of assignation! Can you move the dresser?" I said, "I don't know!" He said, "Move all the furniture you can up against the door." There was a telephone and a bed in the room, but that was about all. I moved what furniture there was against the door. Then I discovered I had an open window facing the alley which

I couldn't close, and that frightened me more. I called Mr. Lillie again and told him about the open window, but he only told me to go to bed. I stayed up practically all night and at the crack of dawn I got out of there, took a cab to the airport and went home.

Charles Carr was the U.S. attorney in 1945–1946, and my boss. Somewhere along the line, Charles Carr had gotten himself mixed up in some kind of political situation in which he felt he had to present a case to the Grand Jury, and that case was against Charles Chaplin. Chaplin was indicted for a violation of the Mann Act. In the office, we all thought it was very funny. Then Carr tried to get somebody to help him try the case, and no one would touch it. Finally, he came to me, and I was the last attorney he talked to. He wanted me to help him try it. I said, "Charlie, we're going to lose it because Chaplin doesn't have to bring her across the line to sleep with her. He's been living with her in New York. He's been living with her in Los Angeles. He didn't bring her here for any commercial purpose; he brought her here for himself."

He said, "Well, I can't help it. I'm stuck with the case and I have to try it." I said he would just have to get someone else, and when he asked if I liked my job, I knew I was doomed. I said, "All right, I'll help you try your case, but it's a loser." So, we tried it. Charles Chaplin was represented by Jerry Giesler.

Giesler had a wonderful reputation for being a fine lawyer. I suspect that a lot of that reputation was made by the media because he had a voice that didn't project, and he did not sound like or comport himself in the fashion I thought a lawyer should. He was very soft-spoken and very low-key. I was terribly disappointed.

The trial took place in the courtroom of Leon Yankwich. We picked a jury, and at recess I said to Carr, "You know, I think I'll stay in the office and take care of my work," and he said, "No, you don't, you're going to go back down with me." So, we tried the case — a very miserable one. When the case was submitted to the jury, it took them no longer than it took to open the door of the jury room, pick a foreman, take a vote, turn around, and walk back into the courtroom. So, he was acquitted. And as we sat, there before we were excused by the judge, all of the jurors jumped up from the jury box and ran over to Charlie Chaplin, and shook his hand, hugged him and kissed him, and told him how wonderful he was.

In those days, even though we worked in the U.S. Attorney's Office, we could have a little law practice. Mr. Lillie had a client involved in a partnership breakup and wanted me to be co-counsel in the case. I went to what then passed for the law and motion department of the superior court. An old-time superior court judge presided, and learned about "contributory nelegence" and "erevelant" evidence, and all kinds of things I never heard of before. I returned to my office and said to Mr. Lillie, "I never heard a more ignorant old man!" And he said, "Well, that's the judge before whom you are going to try the case." Well, by the time we got to Department One, that judge had retired and we had to be assigned out to another court.

We were waiting in Department One, and the parties decided to settle the case. We sat down in an empty courtroom and dickered around awhile for a reasonable settlement and finally arrived at one, but with the understanding that the defendant would pay attorney's fees — my attorney's fees. He negotiated awhile and came within \$500. Finally, the other lawyer said to Mr. Lillie, "Well, we'll decide it on the toss of a coin," so they went into the men's restroom, and it was my fee that was being decided by the coin toss, but I couldn't go in to witness it. Mr. Lillie won the toss of the coin, and I got my \$500 extra.

Charles Carr retired as U.S. attorney and went into private practice in the Subway Terminal Building. I was still in the U.S. Attorney's Office. In about six months he asked if I would come to his office and join him in starting a firm.

I was one of the few lawyers who could really get along with Charles Carr. He was a perfectionist. He was a fine lawyer and had no patience with incompetence. He later became a federal judge, and the big complaint lawyers had against him was that he took their cases away from them and tried them himself. After a lot of soul-searching, I decided to join him. We got on well and I enjoyed the association very much.

APPOINTED TO LOS ANGELES MUNICIPAL COURT, 1947

In the meantime, Mr. Lillie kept after me to make an application for a municipal court vacancy created when Judge May Lahey took disability retirement because of a heart condition. She had been born in Australia, went to

USC law school, and had been on the municipal court for many years. She was well loved and very popular. She was the first woman presiding judge of the Municipal Court of Los Angeles County. She was a good lawyer and a good judge. Mr. Lillie insisted I apply but somehow I never got around to it. Finally, one day when Mr. Lillie came to dinner, my mother said, "Will you kindly make an application for the Municipal Court and shut him up!" So I did, and sent it to the governor, and that was the end of that.

I had a friend by the name of Frank Belcher who was a fine lawyer, had been active in the State Bar and Los Angeles County Bar Association, and was well respected in the community. He was my mentor and active in Republican politics. In about six months my application bore fruit. I learned that an investigation was being made in Fresno, and the State Bar was in the process of making a report to the governor. It was a lengthy investigation and took considerable time.

One day I was serving as a member of an interview board for the Civil Service, Commission for Los Angeles County, interviewing for the job of deputy district attorney. I received a note from the girl in the office that the governor had called me and wanted to see me immediately. I told her to call him and tell him that I am engaged in interviews of applicants for a job in the District Attorney's Office and could not leave without imposing on the others. She did so, called me again and told me the governor was very put out about the situation. In the meantime, Mr. Belcher had called Mr. Lillie and said, "Will you get that woman over to the governor's office or she's going to miss her opportunity." Eventually, I made arrangements to go over to his office in the State Building at 3:00 in the afternoon. The governor said to me, "Did you finally decide that you would like to talk to me about an appointment? Well, I am thinking about appointing you to the Municipal Court." This was Governor Earl Warren. He had been raised in Bakersfield and we both had gone to Boalt Hall; so after we talked about the San Joaquin Valley and law school and my legal experience, he told me he would appoint me. So the man who, when he was district attorney of Alameda County, told me he wanted nothing to do with women lawyers, appointed me to the municipal court and later elevated me to the superior court.

I was appointed as judge of the municipal court in February, 1947 and married Cameron L. Lillie on March 17, 1947. We were married in the Flyers' Chapel at the Old Mission Inn in Riverside, and honeymooned in

Palm Springs. We returned in two weeks, I was sworn in and immediately went to work. I took Judge Lahey's place; there was then one other woman on the municipal court and she was Ida May Adams.

Ida May Adams came from Kentucky and had been elected to the municipal court in 1941 in a race against an incumbent judge. I am told she was backed by a supporter by the name of Dr. Schuller, a minister. She had tremendous backing and she was elected. Every morning before court, she would lead a salute to the flag and a little prayer. Ida May Adams retired after a long tenure as a municipal judge, and long after I was appointed to the superior court. She was not particularly friendly to me, I might add. While we had a nodding acquaintanceship, that's about all.

Two other women preceded me on the municipal court bench. Oda Faulconer was appointed by Governor Rolph in 1931; she died in 1943. Judge Orfa Jean Shontz had been appointed by Governor Merriam in 1939; she served until 1947.

Incidentally, after I joined the superior court, May Lahey recovered to the point where she could work. The chief justice then appointed her to serve pro tem on the municipal court, and she worked until she was able to retire. Having taken disability retirement, May forfeited her right to a pension. However, one of the women very active in the Women Lawyers' Association (known at that time as the Women Lawyers' Club), Ariel Hilton, single-handedly worked to put a special bill through the Legislature enabling May Lahey to retire on a regular pension. It was a bill only for May Lahey. Ariel felt it would be a great injustice to a fine judge if she could not receive regular retirement after all the work she had done. It was a fine thing for Ariel to do.

Incidentally, Ariel was a deputy in the Attorney General's Office here in Los Angeles for a long time. She was English, and her mother had been one of the original suffragettes in England, and for her marching, speaking out and picketing, she spent some time in a London jail. Like her mother, Ariel was very active in women's groups for equality for women.

My first day on the bench was in Van Nuys. My husband, who had worked as a clerk while going to law school, gave me some advice that has stood me in good stead for all my years on the trial bench — make your decision without explanation.

I arrived at the Municipal Court on a Monday morning. It was jam-packed with traffic violators and a scattering of other minor charges. There was no afternoon calendar, but at noon I had to drive to West Los Angeles to preside in the afternoon. I presented myself to the clerk, but I did not tell the clerk who I was. I asked, "Could you tell me where the judge's chambers are?" He said, "I have no time for that and the judge isn't here and you'll have to wait." Finally I said, "I'm the judge." He looked me all over and said, "You're kidding." After a short verbal hassle, he showed me the chambers, then told me pretty generally what I had to do; he was very thoughtful about everything. I think he didn't want me to embarrass him so he really extended himself. The afternoon calendar in West Los Angeles proved to be less burdensome. Most of it consisted of public drunkenness and drunk driving.

Judge Ray Brockman was the presiding judge at the time. Although I had already taken the oath, he suggested that I have a ceremony for a formal oath taking. So, in April, we had the ceremony, and it was a very lively affair. The federal judges came en masse. They made a complete shambles of the program because they all wanted to say something and they all did. We started at 2:00 p.m. and around 4:30 we finally finished. Everyone was exhausted except for the federal judges who were having the time of their lives. It was a rousing send off, it was a lot of fun, and I'll never forget it. They were very complimentary, and I've often thought how much happier I would have been during my federal service had I known they felt that way toward me.

At that time the municipal court held sessions every Sunday morning in Lincoln Heights Jail. Each judge was to take a turn, and there were about twenty of us. It should have come around about once in twenty Sundays, but I soon discovered that every three or four week I was being called upon — a situation I quickly straightened out. Thereafter, no judge skipped his turn.

The first morning I opened court in Lincoln Heights was not only a new experience but a learning one. It was during the early spring and it was very warm. On my way to chambers, the court personnel took me through where there were some cells, and the smell was overpowering. The Sunday calendar consisted mainly of drunk arrests and minor sex offenses. The arrest reports were far different from the FBI reports I had been reading in the federal court. I came across words I had never heard before. I took

the drunk cases first, the prostitution cases and then some of the other sex cases. As I read the arrest reports, I felt like I was in a foreign land. I took a short recess.

My husband had come with me that morning and was seated in the audience, and it was a good thing he was. He came back to chambers and I told him, "I need some advice. Would you kindly tell me what this means, and this means, and what this means?" So, after about ten minutes of sex instruction, I took the bench and did fairly well once I found out what it was all about.

Eventually, I was assigned to a civil division, which operated out of an old hotel known as the Municipal Courts' Building, located on Broadway, situated near the entrance of the Broadway tunnel. I also sat in the plea and arraignment court which was in the Hall of Justice. I moved around considerably, and I enjoyed the variety.

I discovered after being there six months that I was the only one working on Friday afternoons, which was very disconcerting. I continued to work on Friday afternoons because I just couldn't understand how anybody could cheat like that and not do the job he was paid to do. I created a minor ruckus about it, but eventually others began to come back, and finally there was a full complement on Friday afternoons. I was credited with having encouraged others to return to the court and stay there on Fridays.

I spent a week in the traffic division, then located in the basement of City Hall, which was an education. There were hundreds of people there. I finally finished about 1:00 p.m. and said to the clerk and bailiff, "I'll see you in the morning." And the clerk said, "The morning? You have a calendar at 1:30." So I had a quick sandwich and spent the rest of the day and part of the night there. I knew I would have to work faster than that. The traffic court was a real "fast-track" court; it took me some time to learn the ropes, but when I did, we finished the calendar in record time. In fact, later I was offered the court, an assignment I did well to forego.

I sat in criminal for a while, and then I was assigned pro tem in the superior court. They didn't have any courtrooms available, and one time I think I sat in what had been the anteroom of the men's restroom in the Hall of Records.

ELEVATION TO LOS ANGELES SUPERIOR COURT, 1949

During the war, little Quonset huts had been built on the site of what is now the Criminal Courts Building on the corner of Broadway and Temple. There were about half a dozen of these makeshift buildings. Finally, I was assigned to one of the Quonset huts and took the overflow of domestic relations cases from the domestic relations court, then known as Department 8. While I was sitting pro tem, Governor Warren called me. I had not made an application for elevation to the superior court, nor had I even thought about it, so it came as a complete surprise. He told me he was going to appoint me to the superior court. Well, very close to this time, Governor Warren was interested in the nomination for the Presidency. The fact that at the same time he also appointed a Jew, David Coleman, a Mason, Ellsworth Myers, and a Catholic, Francis Maroney, might give you an idea of why he appointed a woman. I was elevated to the Superior Court of Los Angeles County in October of 1949. I was delighted because I liked the work on the superior court — I liked the judges, the type of cases tried and the caliber of lawyers who appeared.

There was one other woman on the court, Georgia Bullock. She was the first woman judge of a court of record in California — a police court judge. She was responsible for creating the women's court which handled cases involving prostitutes and minor cases involving women. She felt that women should have a judge who understands them better, and that she could do a better job with them than male judges. And I think she might have been right. From what I have heard, the court was successful, but for some reason it didn't last very long. In 1926 she was appointed to the municipal court and in 1931 to the superior court by Governor Rolph. On the superior court she was instrumental in establishing the Conciliation Court, to be used in conjunction with the disposition of marital cases. Toward the end of her career she handled adoptions. I'm not certain, but I think that somewhere along the line she also handled civil cases. She retired in 1955 and died not long thereafter.

Georgia was a most difficult person to know. She never quite accepted me and considered me a poacher on her turf. She just did not know how to deal with me. When I had been on the superior court for a couple of months, she called me and asked me to lunch and asked me to meet her at

a certain place in town. I arrived at the appointed time and waited, but she didn't appear. That afternoon I received a bouquet of roses from her with a little card of apology that she had been otherwise engaged and just couldn't make the appointment.

Well, I should have learned my lesson, but a month later she called me again and invited me to lunch and said she would meet; the same thing occurred. It finally dawned on me that she really had no intention of ever meeting me. Later on we became friends to a certain extent, but she was always very aloof and very wary.

I continued to sit in overflow of Domestic Relations until February 1950. Charles Haas was a native Californian, had been on the bench a long time, and was a very good presiding judge and very fair. He was presiding judge when I joined the court, but in 1950, Clarence Kincaid took his place as presiding judge, and he assigned me to Long Beach. Now, I was not low-man on the totem pole at that time; there were three other judges, all males, below me. I asked him if it was because I was a woman that he was giving me the assignment, which was a long way from my home. He became very indignant, but he did not deny it, then countered with the comment that one of the judges had complained a year ago that he did not want to go to Long Beach, and he told him that he had better rethink whether or not he wanted to be a judge. That ended the matter as far as I was concerned. So I went to Long Beach for three months.

Edwin Jefferson had just finished his assignment in Long Beach; and he was the first black man to be appointed to the superior court west of the Mississippi. He told me it had been difficult for him but that finally he was accepted in Long Beach and enjoyed it. He warned me not to expect too much.

Every morning I rode the Red Car to Long Beach; it was the forerunner of the Blue Line. The first month was very quiet. I was friendly to the lawyers, but I minded my own business, did my work, got there on time, and started court on time, and no one bothered me. In fact, no one paid any attention to me. In about a month, Joe Ball, the leading lawyer in Long Beach, asked me to be his guest at a luncheon of the Long Beach Bar Association. Having been taken under Joe's wing, it was not long before I was accepted by the lawyers of Long Beach. I will always remember Joe Ball with great affection for his thoughtfulness. My stay in Long Beach was

very enjoyable. I sat with judges Fred Miller of Long Beach, and George Francis who sat on pro tem assignment from Mono County and later was appointed to the Superior Court of Los Angeles County.

George Francis was a superior court judge in Mono County up Bishop way. The population was so small that at every election he knew within one or two votes whether he was going to make it. He figured that if ever there was a high profile case he would have to hear, he would be in real trouble, so he asked Governor Earl Warren to appoint him to the Superior Court of Los Angeles, and he did so. He was a delightful man. As a very young man, he rode “shotgun” for Wells Fargo. Judge Francis was then permanently assigned to Long Beach and served there for many years. Now retired, he still is active at 90.

I was happy in Long Beach, and the local bar wanted to ask the presiding judge to reassign me for another three months. However, I told them not to do me any favors because there was a serious problem in my household: I hadn't been married too long and we were trying to build a house; my husband, who was a lawyer, had to get up at all hours to get me to the station on Main Street to catch the Red Car. Having served my term in Long Beach, I was relieved of what finally became a very pleasant assignment.

PRESIDING JUDGE, DOMESTIC RELATIONS COURT — CELEBRITY CASES

I was then assigned as presiding judge of the Domestic Relations Court. At that time the new boy on the block was Louis Burke, who took my old courtroom for overflow domestic relations cases. It was the same Louis Burke who later was elevated to the court of appeal and then to the California Supreme Court. He was a devout Catholic and spent most of his time trying to reconcile irreconcilable couples, and we couldn't move our calendar. Finally, I had a talk with Lou about the “church and state thing” and asked that he try to speed up a little. But Judge Burke was a joy to work with. The Conciliation Court at that time had fallen into disuse. Georgia Bullock had moved on to something else, and while it was still in operation, it did not work effectively.

I followed Judge Thomas Cunningham on the Domestic Relations Court, then known as Department 8. It was located in one of the bungalows

or Quonset huts on the grounds on which is now located the Criminal Courts Building, next to the old Hall of Records. In any case, Tom Cunningham had started the practice of asking the parties at the call of the calendar if there was any chance of reconciliation; there were always couples who said they would like to talk about it. All reconciliation discussions took place in my chambers upon conclusion of the calendar. I think that because I was a woman, new interest in conciliation was generated. I was successful in some instances in which the reconciliation became permanent; in others, it was short lived. For a while, there was a bunch of girl babies and children running around with the first name of Mildred or Lillie, whose parents I had brought back together, unfortunately, for only a night or two. I finally realized that both parties had to be serious about reconciling or reconciliation could not succeed, and in the short time I could give them, I was not solving any problems for them. Judge Burke also recognized this and later, when he followed me as presiding judge of the Domestic Relations Court, he reestablished the Conciliation Court, calling it the Court of Reconciliation. It was a very successful operation.

There were many celebrities who passed through the Domestic Relations Court, and that is where I first met Kay Spreckles. She and her husband, Adolph Spreckles, were engaged in divorce proceedings; they appeared on various orders to show cause. Later she married Clark Gable, who was a long time friend of my husband.

The Domestic Relations Court was a court to which school teachers used to bring their young students in human relations classes for maybe an hour or two. Once, a teacher brought all her girl students, who were in the last year of high school, to watch court proceedings in the morning. After the calendar had been called and disposed of, I talked to them and learned that those girls were interested in home, marriage, how to keep a marriage together, what kinds of problems would arise, how early they should get married, and so on. All of their questions were directed to family unity.

In the afternoon, the same teacher brought the boys in the same class — 16, 17, 18 years old. They listened to the afternoon calendar, then I talked to them. It was interesting that they were not at all interested in family affairs. They weren't interested in anything that related to family unity or marriage or commitment of any kind. Their interest was reflected in questions such as — is a Tijuana marriage legal; if one got a girl in trouble,

would he have to marry her; if she had a baby, would he have to support her and/or the baby; how long did he have to support the baby; were divorces obtained in Las Vegas legal. The questions were all directed to their relations with young girls at that stage of their lives, and they were not particularly interested in anything that related to commitment.

Toward the end of 1950 I campaigned to move out of domestic relations. When approached with this request, the presiding judge, [W.] Turney Fox, who later became the presiding justice of the Court of Appeal, Division Two, said, "Well, you have a choice. You either stay there or you go to psycho court." That wasn't much of a choice, so I stayed in Domestic Relations Court for another year.

During that last period, I heard the custody case of Pia Lindstrom, the daughter of Ingrid Bergman and Dr. Lindstrom. It related to a visitation by Pia to her mother in Rome. It was a rather difficult situation because neither Ingrid Bergman nor Rosselini, to whom she was then married, were in the United States. However, they were represented by Greg Bautzer. Lindstrom was represented by the Pacht firm, which had been started years before by Isaac Pacht, one time a judge of the superior court.

It was a very lively lawsuit. Ingrid Bergman at that time was in the hospital giving birth to twin girls. The problem was that Rosselini, a hot-headed Italian, at one time had told the press that if Pia came to Italy, he and Ingrid would keep her. That, of course, was the problem because there was no way Dr. Lindstrom could retrieve her if they decided that they did not want to send her back to her father. Even posting a bond would not have been all that helpful. It was a difficult case with an 11 year old as a pawn. My holding allowed Ingrid visitation but only in the United States.

Pia was brought to my home for an interview at the request of both lawyers. Mrs. George Stevens, wife of the director, brought her. Pia was a nice, well-mannered child who grew into a very bright, good looking, capable young woman. I think she is doing television work at this time.

Judge Stanley Barnes became presiding judge, and he listened to my impassioned plea to transfer to another court. I wanted other experience, but my main concern was that women judges at that time were typecast as family court judges or juvenile court judges. When you read about any woman judge in the United States, she was always in the domestic relations court, always handling family matters or juveniles. I didn't want that

kind of reputation. I wanted to be known as an all-round good judge. I told Judge Barnes my problem, and, bless him, he assigned me to a criminal department. I was the first woman judge to be regularly assigned to a felony court in Los Angeles.

At that time there were only three criminal departments, and only two other judges. One was Judge Charles Fricke who wrote the books on criminal law, which at that time were the bible for criminal lawyers and judges. The other judge was Judge Thomas Ambrose. We three heard everything from petty theft with a prior to murder and it was very interesting.

Meanwhile, my husband had gone into private practice, entered a firm as a name partner and was doing very well. He took me to Europe for a vacation that spring. We stayed at the Savoy Hotel in London and were booked for about a week. After we had been there two or three days, the manager came to us and asked us if we would move to another floor. We were willing to, until he told us why — “Well, Charles Chaplin has arrived from the United States with his family and is taking the entire floor.” And incidentally, that was the last time he lived in the United States, although he returned to visit a couple of times. I decided then and there I would not move for Charlie Chaplin, so we declined. The manager said, “All right, you can remain where you are.” And we did. And we were sorry that we did because Charles and Oona had a batch of kids who ran up and down the hallway night and day, making all kinds of racket, and music blared at all hours. Unfortunately, we had placed ourselves in a position in which we were not about to ask the management to move us. We were delighted when our stay ended.

When my husband and I arrived in Rome, the hotel management sent me a message that Ingrid Bergman would like to speak to me. I declined because I could think of nothing that could be accomplished by any discussion. But every time we walked out of the hotel, my husband would say, “I wonder if Rossellini is looking around the corner.”

I stayed in the criminal department for two years, and we heard every conceivable kind of felony case. I enjoyed it, but I really wanted to go into a civil department because I was interested in civil law. I asked the presiding judge to assign me to a civil court because I had seniority; he assigned me to a civil department in City Hall. This was before the courthouse had been built at First and Grand and Hill Streets.

I was happy there. I heard annulment cases every morning before my regular court session. I guess I have heard about every kind of marriage. After the annulment calendar, I heard jury and non-jury trials.

A case I think to be of special interest involved L. Ewing Scott. Mrs. Scott, an heiress, had been missing for some time, and under circumstances that would suggest foul play. L. Ewing Scott had filed an action seeking appointment as conservator of his wife's estate and thereby control her money. He claimed she was still with us and could have gone into seclusion or maybe just wandered off. He was represented by Charles Beardsley and Seth Hufstedler. Meanwhile, Mrs. Scott's brother entered the lawsuit, objected and asked to be appointed conservator. He made all kinds of claims that his sister was missing and Scott should explain why; that he should know what happened to her. Well, L. Ewing Scott never appeared in the courtroom. I learned later that he had been stashed away in an empty courtroom one floor above. The brother was never able to serve him with a subpoena, and, of course, he was not required to appear in his own law suit. He lost the case and appealed. In the meantime, murder charges were filed against him in connection with Mrs. Scott's disappearance, and he became a fugitive from justice. He fled to Canada and his appeal was dismissed because he was a fugitive. Mrs. Scott was never found. Eventually, he was tried for her murder and convicted.

Near the end of my service on the superior court I heard a condemnation case involving an old mansion located on Main Street directly across the street from City Hall. This was about 1957, and all of the other buildings had been demolished. The old mansion stood by itself and in the way of street improvements and the police building that was eventually built in that area. The mansion was owned by a number of people who were from old families in Los Angeles, among them, the Amestoyes and the Dockweillers. There was not a satisfactory offer made; thus, the eminent domain proceeding went to trial. There was a request by both sides to view the premises, so we took the jury across the street to view the premises, and the two bailiffs served as showers. The reporter, the clerk, the lawyers and I went over as well. We stood on the sidewalk while the bailiffs opened the old building which had been boarded up to keep out transients who well might pose a fire danger. The building was in such a state of disrepair that the jurors could only go onto the first floor of the building; the rest of us

were outside. I was standing on the curb and a drunk came along and said to me, “Lady, would you please get out of the way so I can see what is going on?” And he pushed me into the gutter.

Well, during the showing we acquired a lot of bystanders who were curious to find out what was going on. In those days there were a lot of open bars in that area along Main Street. So we accumulated quite a crowd, and when the jurors finally finished viewing the premises, we walked back across the street. In the lobby of City Hall, the crowd looked pretty big and I decided I had better count the jurors; instead of 12, I had about 8 extras — all hangers on.

During this period of time, Georgia Bullock was handling adoptions three floors above me. She was becoming more and more infirm, and when she was unable to come in, the presiding judge would ask me to go to her courtroom and handle the adoptions along with my annulments and my regular calendar. It didn’t take that long, and it wasn’t difficult, but it was kind of a nuisance at first. Later on it became a real joy for me because I signed adoption orders for a number of people who later in my life approached me and told me I had “given” them a child so many years ago and how happy they had been. One of those was Willie Shoemaker. I don’t know how long he had been married, but he and his wife adopted a little boy. Later, they were divorced, and he remarried. There is a waiter at the Jonathan Club who always regales me about his boy, who by now is maybe forty years old. He is very proud of that boy and he and his wife did a good job raising him. So, it was a very rewarding assignment.

During this time I handled a lot of jury trials. One day in the midst of a jury trial, Dolores Hope walked into the courtroom. I had known Dolores a long time and she had come to take me to lunch. I asked her what she had been doing, and she said she had been serving for some time on the jury and had been permanently excused that morning. After lunch, before the jury was called to the box, one of the lawyers, a plaintiff’s lawyer, asked to speak to me. He asked me if I was a friend of Mrs. Hope, and when I said yes, he said she had convinced the jurors in a case of his to cut the amount of the verdict considerably, and he thought she was cheap and maybe her husband didn’t make much money, although he seemed to have a pretty good job. I said, “Oh? What did she tell you he did?” “Well, she said he worked in TV. We assumed from what she said he was in the

repair business.” I said, “Do you know who Mrs. Hope is? She’s Mrs. Bob Hope.” Well, he almost had a fit. I said, “I think maybe you didn’t do your job very well.”

I had known Loretta Young for some years. When she was cast as a woman judge in a TV show or movie, she came to my courtroom to audit the court session; she was there for two or three days. She wanted to learn how to act like a judge. I saw the movie later, and I saw all of my own mannerisms on the screen. I was delighted, but at the same time I saw how I must appear to other people. I corrected some of them.

One of the last cases I heard on the superior court was one involving an accident between a truck and a train — the caboose. This happened out in the Antelope Valley area. The man who was driving the truck had been killed; Melvin Belli represented his heirs. It was a very interesting case because Melvin Belli was a very colorful, flamboyant trial lawyer. He came into the case late and found himself on the losing side. All of his ingenuity and brilliant trial strategy could not save it. Later, he sent me one of his latest books and inscribed it, “From Melvin Belli, the caboose lawyer.”

By 1957 the ranks of superior court judges had thinned out. Judges Allen Ashburn and Roy Herndon had been elevated to Division Two of the Second District Court of Appeal; Stanley Barnes had been appointed by President Eisenhower to the Court of Appeals for the Ninth Circuit; Thurmond Clark had been appointed a United States District Court judge; Thomas Cunningham retired and became general counsel for the University of California; W. Turney Fox had been elevated to presiding justice of Division Two of the Second District Court of Appeal; William B. McKesson was elected district attorney of Los Angeles; Stanley Mosk ran for attorney general of California and was elected, and later became an associate justice of the California Supreme Court; and Paul Valle was elevated to Division Three of the Second District Court of Appeal, as was Parker Wood. So, I had acquired some seniority at that time.

I wanted an assignment to the Law and Motion Department, and Presiding Judge Philip Richards said that the next year he would assign me. Of course, at that time it was not the same kind of law and motion department that they have now. We had no long pre-trial procedure or discovery in those days and the trial was more of an adversarial proceeding. I was looking forward to the move.

Around about that time, Presiding Judge Richards asked me if I would talk to Georgia Bullock and ask her if she planned to retire — really if she would retire. She was becoming more and more infirm. I declined, and told him I did not feel comfortable asking anybody to retire, and he would have to do the job himself. I was reminded of Stephen J. Field, the chief justice of California, who had been appointed by Abraham Lincoln to the U.S. Supreme Court. The low man was always given the message by the chief justice to deliver to whoever he thought should retire. So Field, the newest member, was given a letter to deliver to one of the justices who, according to the chief justice, had passed his prime; and Justice Field said, “A more dastardly piece of business I had never done.” So I was reminded of that when the presiding judge asked me to talk to Georgia Bullock. Apparently, he did the job himself, for within a matter of a couple of months she did retire from the court.

APPOINTED TO COURT OF APPEAL, 1958

Again my husband insisted that I make an application to the governor, then Goodwin Knight — this time to sit on the court of appeal, and so I did. Speculation ran rife, but my name was never mentioned. It was unthinkable that he would appoint a woman. Then one day about 5:30 p.m. I received a call in my chambers from Governor Knight offering me the appointment. He asked me to keep it confidential for a couple of weeks and, believe me, it was the hardest two weeks I ever spent. However, he did give me permission to tell my husband.

The last case I heard on the superior court was the most difficult. It was brought by a lawyer who had separated from and was suing his law firm — *Anderson v. Grady*. It was difficult from the standpoint that the parties were tax lawyers. They were not familiar with the trial of a lawsuit and knew little of the rules of evidence. All of their work was done in their law offices. Each of the parties insisted that he tell his story the way he wanted to tell it — in narrative form. No witness wanted to be restricted by questions on direct or cross examination. I had a very difficult time keeping those lawyer witnesses in line. But they were represented by very fine counsel — Ed Youngblood represented Anderson; the law firm was represented by Frank Dougherty, an old-time lawyer. Both of them had great

difficulty controlling their clients, and I had great difficulty in getting the witnesses to follow the rules of evidence. It was a fascinating case and I thoroughly enjoyed it. The judgment was affirmed on appeal.

The new courthouse between Hill Street and Grand Avenue on First was just being completed, and everyone was moving. I moved to the State Building, then across from the Los Angeles Times on First Street between Spring and Broadway. It had been built in the Depression and it was a beautiful building. I was appointed to fill the unexpired term of William Doran in Division One of the Second District Court of Appeal. The only other woman ever appointed



MILDRED L. LILLIE ON
HER APPOINTMENT TO THE
CALIFORNIA COURT OF
APPEAL, 1958.

*Courtesy California Court of Appeal,
Second District*

to the court of appeal in California was Annette Abbott Adams. She had distinguished herself as the United States attorney in Sacramento and had been appointed presiding justice of the Court of Appeal of the Third Appellate District by Governor Olson in 1943. She served only a few years and retired thereafter, I believe, for health reasons. So, I was the second woman court of appeal justice.

By the way, most of the furniture the court of appeal had at the time I was appointed had been made by the prisoners during the period from about 1905 on about twenty years. It was beautiful oak furniture, some hand carved. But about ten or twelve years ago, the State Historical Commission appropriated most of it, and it reposes in the leadership offices in Sacramento.

The court of appeal was created by constitutional amendment in 1904 to alleviate the burgeoning caseload of the California Supreme Court. Before this, a judicial commission had been created to dispose of the overflow from the Supreme Court, but it did not prove to be too successful. In 1905 three appellate districts were created with three justices in each district:

District One in San Francisco, District Two in Los Angeles, and District Three in Sacramento. Thus, the intermediate court of appeal was born.

About 1918 the Legislature created two divisions within each district and so, the Second District's Division One (the original court) and Division Two were born. In 1941 Division Three was created. When I joined the Second District, there were just these three divisions.

In Division One, Thomas P. White was the presiding justice; he later became an associate justice of the California Supreme Court; with him in Division One sat Walter J. Fourt, associate justice, who had come from the superior court in Ventura. In Division Two, W. Turney Fox was the presiding justice, and Allen W. Ashburn and Roy Herndon were associate justices, all of whom had come from the superior court. In Division Three, the presiding justice was Clement L. Shinn and the associate justices were Parker Wood and Paul Vallee. There were twenty-one justices of the court of appeal in the State of California at that time.

In 1964, Division Four was created, and in 1968, Division Five. Then the Legislature increased the number of justices in each division to four, but retained three-judge panels.

In 1974, we moved from the State Building to 3580 Wilshire Boulevard because of earthquake damage to that beautiful old building. It was demolished shortly thereafter. Office buildings in downtown Los Angeles were not enthusiastic to have us because not long before, the Office of the Attorney General, which had to move with us, had been bombed. We expected our move to be only temporary, but Governor Jerry Brown did not see fit to start a new State Building. It was not until the later part of 1990 we were able to move into permanent quarters. We are now in the Ronald Reagan State Office Building located on Spring Street between Third and Fourth, in downtown Los Angeles.

In 1981, Divisions Six and Seven were created — each division had only three justices. Division Six is located in Ventura and was created to handle cases in Ventura, Santa Barbara and San Luis Obispo counties. Division Seven was created for Los Angeles. Today we have a total of eighty-eight court of appeal justices in California. The Second Appellate District has contributed its share of justices to the Supreme Court and two chief justices, Donald Wright and Malcolm M. Lucas. And one justice via the California Supreme Court became a deputy secretary of state,

national security advisor, then secretary of the interior in the Reagan Administration.

I took the oath of office on March 6, 1958, in the courtroom in the State Building; Governor Knight administered the oath of office. I invited twelve friends besides my husband and my mother, and about 750 people showed up. The courtroom was jammed and people were standing up in the back, lined up in the hallways and down the stairs. It was shocking to me as it was so unexpected.

My husband and I were good friends with Clark Gable and his wife. I had wanted them to come, and they had accepted. They arrived a bit late, so during the time people were being seated in the courtroom, which was packed, Clay Robbins, then the Division One clerk, went in and asked Judge Edwin Jefferson if he would move over so Clark Gable and his wife could sit with him. Having no idea that it was really Clark Gable, Ed said, "Oh, sure, sure! Let Clark Gable sit on the floor where those others are sitting." So Clay brought in Clark and Kay Gable, and Ed, nearly expired from embarrassment. Ed loved to tell that story and how he and Mattie, his wife, moved over so Clark and Kay could sit down.

After the swearing-in, I went to my chambers and found my desk completely covered with records of cases that had been left for me by my predecessor, Justice Doran. He had a lot of interests, but disposing of his assigned cases wasn't one of them, and no one — neither Justice Fournor nor Justice White — offered to help me. So I started out with twenty-five cases in addition to my regular two-week draw. It was very difficult for me because my husband had become very ill. I worked at home at night and finally was able to catch up with the other justices. It took me three or four months.

My first research attorney was Cuthbert Scott, a son of Joe Scott. I knew his brother, Al Scott, who was a judge of the superior court. Al called and asked if I would talk to his brother. I said I would; and I did and I hired him. He had a very fine background. He had practiced law with his father and worked in the Attorney General's Office. He worked with me for a number of years; then, to my sorrow, he reached retirement age and retired. He was an excellent lawyer and I was very fortunate to have him.

While Pat Brown, who later became governor, was attorney general, he appointed me to his Crime Commission. On the commission was Robert

Kingsley, then dean of USC Law School and who later became an associate justice in Division Four of the Second District Court of Appeal. At that time the prosecutors were having difficulty, without an informer, convicting defendants of sale of narcotics. As a result, a lot of cases had to be dismissed or reduced to mere possession. So Dean Kingsley and I, after some research and study, recommended to the commission that the Penal Code be amended to add the crime of possession for sale of narcotics; it subsequently was recommended to the Legislature and the Legislature adopted it.

My husband became very ill and entered the hospital in early April 1959, and passed away on April 13, 1959. His death was caused by a faulty heart valve that had accumulated scar tissue through rheumatic fever when he was a child. This occurred in the days before open-heart surgery. Had he been able to live a little longer, open-heart surgery, then only in the experimental state, could have saved his life. His heart damage was too extensive and he succumbed at age 52. I was simply devastated, and the only thing that saved me was hard work.

In the meantime, Governor Pat Brown appointed Thomas P. White, our presiding justice in Division One, to the California Supreme Court and appointed Justice Parker Wood of Division Three to replace him as presiding justice. Justice Fourt felt that because he was in Division One, he should have been appointed to the position. Animosity developed and for a couple of years, a great deal of tension existed. At that time we were on a circuit and also heard oral argument in Santa Barbara. On these occasions, the little feud was alive and well. It was very difficult to have a collegial atmosphere, but eventually the feud wore itself out and our division returned to normal. As intermediary and peacemaker I was constantly on the alert to remain impartial.

In 1968, the Legislature increased the number of justices in the division to four. Justice Robert Thompson, who had been a judge of the superior court, was appointed to Division One by Governor Pat Brown. Upon the retirement of Walter Fourt, Roy Gustafson, who had been the district attorney in Ventura County, was appointed to take his place. Gustafson stayed only two years. He had prosecuted Mrs. Duncan, who was accused and convicted of murdering her daughter-in-law, and was executed.

Governor Reagan appointed William P. Clark to the vacancy left by Gustafson. Judge Clark had been a superior court judge in San Luis

Obispo; before that, he had practiced law and then served on the staff of Governor Reagan. He came from an old-time family in Ventura County, and his grandfather was the first United States marshal in the Southern District of California. When I was in federal court as an assistant United States attorney in 1942, the marshal brought his little grandson in to meet me; that little boy was Justice Clark.

In 1973, Justice Clark was appointed to the California Supreme Court. He had opposition from Donald Wright who was then chief justice. I testified on behalf of Justice Clark. He and I had worked together in Division One and I had high regard for him. He was confirmed by a vote of two-to-one, and Chief Justice Wright cast the vote against him.

I went to San Francisco to testify on behalf of Justice Clark before the Judicial Qualifications Commission, and I think that was just about the beginning of the commission hearings as we know them today. When I was confirmed in 1958, it was done by telephone. So, this may have been one of the first times that the commission met in formal hearing to hear testimony. Later on, Justice Clark retired from the Supreme Court and became deputy secretary of state, then national security advisor to President Reagan, and later, secretary of the interior. He presently is practicing law.

Judge L. Thaxton Hanson took Justice Clark's place. Justice Hanson had been a superior court judge in Los Angeles County assigned to Van Nuys.

In 1977, Parker Wood, our presiding justice, became ill and passed away the next year. Governor Jerry Brown delayed filling the vacancy, so I was the acting presiding justice for a period of two years, during which we had a series of pro tem justices. In the meantime, Justice Robert Thompson, who is a fine lawyer, retired to teach law; he became a full-fledged law professor at USC, and only recently retired. We were left with only a skeleton bench of Justice Hanson and me. Eventually, Justice Bernard Jefferson, who was then an associate justice in Division Four, was appointed by Governor Jerry Brown to Division One as the presiding justice. He retired after a very short time when he reached retirement age. Another delay occurred and I was again the acting presiding justice. Then Governor Jerry Brown appointed as presiding justice, Judge Vaino Spencer, who had been a judge of the superior court in Los Angeles. But Jerry Brown continued to drag his feet, and the vacancy created by Robert Thompson's retirement

remained unfilled. Finally, in 1981 he appointed Vincent Dalcimer, a judge of the superior court in Los Angeles.

Jerry Brown appointed three women to the Second Appellate District: Arleigh Woods, the presiding justice of Division Four; Joan Dempsey Klein, the presiding justice of Division Three; and Vaino Spencer, the presiding justice of Division One. Three other women were appointed to the court by Governor George Deukmejian — Joyce Kennard, who had been a judge of the superior court, as an associate justice in Division Five, and later an associate justice of the California Supreme Court; Miriam Vogel, a superior Court judge, as an associate justice in Division One; and Margaret Grignon, a superior court judge, as an associate justice in Division Five.

During this period, I was very active in the California Judges Association and the California Center for Judicial Education and Research. I chaired committees, worked in seminars, and gave a lecture on contempt at the Judges College in Berkeley. I was the chairman of the Appellate Courts Seminar in San Diego and have actively participated yearly in its program. In 1975, I was elected a member of the board of directors of the Los Angeles Chamber of Commerce, which always had an all-male membership. Caroline Ahmanson (Mrs. Howard Ahmanson) and I were the first women ever to be voted regular members of the board. I held this directorship until 1982. It was a very confining commitment and I attended a meeting every Thursday noon; but it was one of the most interesting experiences I have ever had and I enjoyed it immensely. It really was one of the highlights of my career. Thereafter, I served as presiding co-chairman of the National Conference of Christians and Jews, Southern California, a most rewarding experience.

I held the office of associate justice of Division One of the Court of Appeal until 1982. I had just run successfully for retention for a twelve-year term, and I was happy in my work there. In 1981, the Legislature had created Division Six and Division Seven. Jerry Brown appointed Richard Schauer, the presiding judge of the Los Angeles County Superior Court, as the presiding justice of Division Seven. As associate justices, he appointed Leon Thompson, of the Los Angeles County Superior Court, and Earl Johnson, a professor of law at USC. In early 1982, Justice Schauer retired to go with Sidley and Austin, a large and prestigious law firm, which has

its main office in Chicago. I was hardly aware of the vacancy and certainly had no particular interest in it.

APPOINTED PRESIDING JUSTICE, COURT OF APPEAL, 1984

One day, out of the blue, Governor Deukmejian called me and offered me the post of presiding justice of Division Seven. Inasmuch as I had not applied for the position, I asked him if he knew I was 69 years old, soon to be 70, and he said, yes, he did. And I replied that, in light of the fact the offer had come as a surprise, I wanted to discuss it with my husband before I gave him an answer. He said to think it over and to call him the next day. I told my husband that if I took the post, I felt obligated to remain past my retirement date, because my birthday was coming up in January and already it was June or July; he said he saw no reason I could not continue on as long as I felt well. To make sure I was in good health, I underwent a stringent physical examination and found I was in excellent health. Even though I had just been re-elected to a twelve-year term, I told Governor Deukmejian it was an offer I couldn't refuse. My name was sent to the State Bar for rating by the commission. At that time, the commission had been under fire because of various things that had occurred, so, I was about the first one to go through it after it had been overhauled. I was rated "exceptionally well qualified." I told the attorney general, a member of the Judicial Qualifications Commission, that the woman who headed the team that interviewed me, who was a deputy attorney general, had done an excellent job. I said I was very proud of her as a woman and that he should be very proud of her for the job she had been doing for the State Bar.

About two years after my late husband passed away, I received a call from A.V. Falcone, who asked me if I would testify on his behalf at a hearing in which he was to prove up for fees in a probate matter. On the superior court I had heard several cases in which he had represented civil litigants and thought he was one of the very best lawyers in the city, and I readily agreed. "Well," he said, "to save you time, I will take your deposition." He arranged for the deposition in his office, and I went there at 4:00 p.m. After the deposition, which was brief, he asked me to dinner. I said, "Mr. Falcone, I thought you were married." And he replied, "I've been a

widower for five years.” I said, “Well, okay, but not this evening,” and we set another time. When he called for me, who should be with him but his son, a grown man who practiced law in his office, and who is now a judge of the superior court. His son was very embarrassed in his role as chaperon, but it didn’t seem to embarrass Mr. Falcone any. At any rate, that was the beginning of a romance, and in 1966 we were married. I would say that he is the most supportive husband that any professional woman could possibly have.

On Friday, July 27, 1984, the Commission on Judicial Qualifications met in the courtroom. Chief Justice Rose Elizabeth Bird, Attorney General John Van de Kamp, and Presiding Justice Lester Roth were then its members. I had a wonderful time, probably because only my friends were present. I took the oath the same day from Chief Justice Bird, and went to work the next Monday. Well, I’ve never been so busy in my life. As you probably know, the presiding justice has very little authority; he or she is only the titular head of a division. The work of the presiding justice is primarily administrative work — signing orders and pushing papers around — a continuous shuffling — that’s pretty time-consuming. It takes only an hour each day, but it cuts into our regular judicial work. The only other thing the presiding justice does is preside over oral argument in open court.

I found two very collegial persons in Division Seven, and I was very happy to come into the division. Of course, one of the most sensitive issues in the internal administration of any division is collegiality — the ability to work together in peace and harmony with cooperation and with open communication. We work with two or three separate individuals. If it is a three-justice division, of course we work with two others; if it is a four-justice division, we work with three others. We are independent and intolerant of any infringement on our independence, have egos as big as all outdoors, and we are all of different backgrounds, experience and education. We all have different religions and philosophical views. As a result, it takes pretty special people to work in close contact with each other and get along. And whether we work successfully together depends primarily on the willingness of each justice to cooperate, to communicate and listen, and to respect the views of others. Whether we can all successfully work

together also depends, in part, on the personality and the skill and the tact of the presiding justice.

In 1987, I was appointed a member of the Judicial Council by Chief Justice Malcolm M. Lucas for a period of two years. I had served a previous two-year term, having been appointed by Chief Justice Gibson in 1960. In 1988, I was appointed the administrative presiding justice of the Second District Court of Appeal. With a break of about a year, I am again serving as administrative presiding justice. It is very time-consuming work, especially since our move to the Ronald Reagan State Building.

In 1988 we suffered a tragedy in Division Seven. Justice Leon Thompson passed away in September of that year after only a very brief illness. It completely devastated our division because he had not been ill, and he had taken only a little time off for some physical examinations.

Subsequently, we were very busy, Justice Johnson and I, doing the work of three people. Fortunately, we had the assistance of Justice Thompson's two research attorneys, until they went to other positions. Finally, we were able to catch up. By the time Justice Fred Woods joined Division Seven, we were current in our work.

Justice Norvel Fred Woods, who hails from Long Beach, was a superior court judge, but he had served as a justice pro tem in Division One. We were pleased to have him. He was fresh from the appellate department of the superior court, and also had served in law and motion. He is very knowledgeable about law and motion, and court and jury trials, in both civil and criminal cases, and we are lucky to have him.

At the present time, I am engaged in work for CJER and have served on a variety of committees for the California Judges Association, as a member or as a chairman. Whenever we have an appellate justices seminar, I always seem to find myself involved in one way or another, probably because I've been on the court so long. I am the senior justice in the State of California, probably the senior judge. I have been on the court of appeal thirty-three years and on the bench forty-four years — since 1947. For some years I have pretty regularly sat pro tem on the California Supreme Court when a justice is disqualified. On the Court of Appeal, I have authored close to 4,000 opinions, starting with 158 Cal.App.2d through 268 Cal.App.2d and 1 Cal.App.3d through 220 Cal.App.3d, or about 330 volumes of reports. Now we are up to 49 Cal.App.4th.

THOUGHTS ON WOMEN LAWYERS

I have always been interested in the advancement of women in the legal profession. On an individual basis, I have encouraged women lawyers to advance in the profession and those who are about to enter law school or who are already studying law. My contact with them, of course, is limited, but I have had a number of young women serve with me as externs, and I have done everything I could to encourage them to branch out and use their legal education to their fullest advantage. I am proud that some of these young women are now successful practitioners and some are serving in judicial capacities.

The first woman to be admitted to practice in the United States was Margaret Brent, who was admitted in 1648, with certain restrictions. Her practice, by edict, was limited to the administration of the estates of the Lord Proprietor of Maryland, who was Cecelius Calvert, the Second Lord of Baltimore. After that there is, in history, a big stretch of time during which there appears to be no record of any woman having been admitted to practice.

Arabella Mansfield of Iowa was the first woman admitted as a professional law student. St. Louis Law School was the first law school to admit a woman in 1868.

Also, in 1868, Myra Bradwell in Chicago applied for a license to practice law; her application was denied by the Illinois Supreme Court by reason of her “disability” as a married woman. The United States Supreme Court upheld the decision in 1872. Meanwhile, Bradwell became occupied with editing the *Chicago Legal News*, which she founded, and she did not renew her application. In 1890, the Illinois Supreme Court *sua sponte* granted her application.

In 1870 a member of the Board of Trustees of Columbia University Law School, in denying a woman’s application to study law, said, “No woman shall degrade herself by practicing the law in New York, especially if I can save her.”

In 1870, an unmarried lady, Alta M. Hulett, made a similar application in Chicago, and this time the Supreme Court did not even bother about the excuse of coverture. She took her cause to the legislature, formulated an enabling act and was admitted to the practice of law.

In 1870, Harvard Law School refused to admit women because it believed it was not practical to admit men and women to the law library at the same time; therefore it would not be fair to admit women to the law school without giving them library privileges.

In 1876, Belva Ann Lockwood of Washington, D. C., made an application to practice before the United States Supreme Court, and it was denied. She drafted a bill and lobbied for three years; finally Congress passed an enabling act to admit her in 1879. She was the first woman to be admitted by the United States Supreme Court.

In the 1870s there were three young women born in different parts of the United States, who lived in different places in California, were not known to each other and who wanted to study law. But no law school would admit them. Laura DeForce Gordon had been born in Pennsylvania and was married to an officer of the Union Army; they moved to California. She was a journalist by profession, and in 1873 she founded the *Daily Leader*, a newspaper in Stockton. Mary Josephine Young had been born in Santa Clara and was married to a lawyer and lived in Sacramento. Clara Shortridge, who had been born in Indiana, was the sister of Senator Samuel Shortridge and a descendent of Daniel Boone. She married a man by the name of Foltz, and they moved to California. About this time, all three of the women were trying to enter law school, and eventually met and joined forces to compel Hastings Law School to admit them. They filed a petition for writ of mandate in the Supreme Court; the Court granted the petition and issued the writ; and they enrolled.

From this point on, historically there is a kind of gray area as to what happened to these ladies. As they advanced in age, through faded recollection and the claims of relatives, friends, and enthusiastic supporters, they challenged each other's claims as to who was first admitted to practice in California. However, it is fairly established that in 1878, Clara Shortridge Foltz was the first woman admitted to practice in California, but her admission was by the county court in San Francisco. In 1879, one year later, Mary Josephine Young and Laura DeForce Gordon were the first women admitted to practice by the California Supreme Court. Later that year, Clara took her examination and became the third woman to be admitted by the Supreme Court.

Mary Josephine Young practiced in her husband's law office in Sacramento and died in 1946. When she was admitted, the *Sacramento Bee*, as if in defense of the California Supreme Court, said of her admission, "She pursued her studies with the full consent and concurrence of her husband."

Laura DeForce Gordon was active in the criminal law field and was the second woman to be admitted to practice before the United States Supreme Court, in 1885.

Clara Shortridge Foltz became known as the Portia of the Pacific. She was very militant and aggressive and traveled up and down the state on behalf of women's suffrage, served two terms as deputy district attorney and then practiced law in Los Angeles. She drafted various pieces of legislation and article 18, section 20, California Constitution, prohibiting disqualification on account of sex of one seeking to enter into and pursue any lawful business or profession. She twice ran for governor of California. She died in 1934. I never met Clara but always considered her as my kind of woman.

Very slowly, women began taking their place in the legal profession in California.

There was no great impetus for the advancement of women lawyers, especially in public offices. I have already mentioned that in 1942 I became an assistant United States attorney; probably the onset of the war and scarcity of men in the office was the reason public offices were more willing to look favorably upon women applicants. It has been a long struggle, but while now women are studying law in substantial numbers in our law schools — in excess of fifty percent of the enrollment — there is still widespread discrimination against women in the law — by law firms, public offices, the courts and the public. And there is no question about it. The Women Lawyers' Association [of Los Angeles] over the last twenty-five years has taken a more active role in the advancement of women, and has done extensive work and an outstanding job in helping women advance in the legal profession.

The Women Lawyers' Club was a pioneer organization of women lawyers in Los Angeles and a forerunner of the Women Lawyers' Association as it exists now. It was organized in September of 1918 in the office of Mabel Walker Willebrandt, in Oakland [sic: Los Angeles], California. The first officers were chosen on January 19, 1919; it was organized "for the purpose of promoting and advancing the interests of the[ir] profession." The first

president was Caroline Kellogg, and the charter members were Elizabeth Kenney, prominent in the Political Equality League and a tireless worker for women's rights, Georgia Bullock, the first woman judge of a court of record in California, Oda Faulconer, an early judge of the Los Angeles Municipal Court, Mae Carvell, a private practitioner in Los Angeles who specialized in probate law, Litta Belle Campbell, who was the wife of Kemper Campbell, a well known lawyer, and Ariel Hilton, whose mother had been a suffragette in London. Ariel was deputy attorney general when I first joined the court of appeal in 1958. Ariel was very active in the Women Lawyers' Club. Clara Shortridge Foltz was also a member, as was Edna Covert Plummer.

Edna Covert Plummer had a remarkable background; for me she was a role model. She had been elected the first woman district attorney in the United States, in a county in Nevada. Edna met her husband in Nevada; he was a stagecoach driver. Eventually she and her husband came to California and she established an office in Los Angeles. She was a fine lawyer and was well regarded in the profession; she was the first woman member of the Board of Trustees of the Los Angeles County Bar Association.

May Lahey was also a charter member of the Women Lawyers' Club. Anita Robbins graduated from USC Law School at the same time as Georgia Bullock. She was married to attorney Clay Robbins, and was the mother of our clerk, Clay Robbins. She was a deputy district attorney for some years before she married. Another member was Sarah Patton Doherty. She was married to Frank Doherty who was one of our top lawyers in Los Angeles for many, many years. She retired to raise a family.

The Women Lawyers' Club was incorporated in 1928. Many prominent women were officers and/or members — Shirley Hufstedler, who later became a superior court judge, a court of appeal justice, and then a judge of the Court of Appeals for the Ninth Circuit, and went on to become a member of President Carter's cabinet. A few others are Carla Hills, who presently is our trade ambassador in the Bush Administration, Elisabeth Zeigler, a judge of the municipal court and then a judge of the superior court, May Lahey, and Mabel Walker Willebrandt, who served in the Attorney General's Office in Washington, and who later came to Los Angeles and practiced law with a firm of which McIntyre Faries, who later became a judge of the superior court, was a member. She also was a role model.

With respect to the characteristics in my role models which were important to me, I was very much impressed, for example, with what Edna Covert Plummer had done with her life. She was aggressive just to the point where she was still able to get along well with the male lawyers, and she was a good lawyer. Proof of the respect they had for her was their acceptance of her on the Los Angeles County Bar Association Board of Trustees.

Mabel Walker Willebrandt was a very sharp lady. She tried several cases in my court when I was a superior court judge and I was most impressed with her ability. Both of those women had really distinguished themselves at a time when they had precious little help from anyone. At that time, although women tried to help other women, they really could do little because they were in no position to do so. The most help I received was from the attorneys I had worked with in the United States Attorney's Office, the attorneys with whom I had associated in Fresno, the federal judges to whom I had been assigned as an assistant U.S. attorney, and the male judges with whom I had worked on the municipal and superior courts. Also, Edna Covert Plummer and Mabel Walker Willebrandt had helped me considerably. Both had been very willing to do anything they could to be of assistance to me, but they were limited in what they could do. For a long while, I, too, was limited in what I could do for other women. The war, then the 1960s produced a more aggressive woman lawyer, one that more easily moved in the profession.

About 1953 or 1954, I drew the logo for the Women Lawyers' Club, which is still used. I was a founding member of the Lawyers' Wives Club, now known as the Los Angeles Lawyers' Auxiliary.

Gladys Towles Root graduated from USC about the same time as May Lahey, Georgia Bullock, Anita Robbins and others. She had specialized in domestic relations and criminal sex cases. She was very good in the limited area of her practice; she was also very colorful. She dressed flamboyantly and always wore big hats, low-cut gowns to court and lots of jewelry. She was an interesting woman and very knowledgeable and proficient in her field. She had tried a number of cases when I was in both the domestic relations court and criminal department. She presented herself well, was very articulate and very demanding in a dignified manner. She well represented her clients and gave them a good run for their money. She was very successful.

Prior to the 1960s, we, as women lawyers, tried as best we could to gain public acceptance. We used the Women Lawyers' Association as a medium of information for its members relative to current changes — new developments in the law, legislative changes, court reform, problems relating to women, and so on. We became as active as we could in bar activities. We weren't too welcome, but we did what we could, although we did not have much clout.

In the 1960s, we had more opportunity to help advance women in the profession, and in the 1970s and 1980s the Women Lawyers' Association became very active in the legislative field. Today it is active in many areas affecting women and has been a potent force in the professional life of the woman lawyer and has attained a proud status among bar associations and the State Bar.

THOUGHTS ON THE COURTS AND LEGAL PROFESSION

Over the years, I have noted many changes that have affected the judicial process and one of them is the relation of attorneys to each other and to the court. When I first started to practice, we all knew each other. Of course, I was in the smaller community of Fresno, but we all knew each other's ability, integrity, personality and strong and weak points. If we had a case against another lawyer, we knew who he was. We knew from where he came, his reputation in the community and how he practiced law; we knew that when he gave his word, we could rely on it. Because of the great increase in population, in litigation and in the number of lawyers, this is almost impossible now. In 1938, there were only 11,958 lawyers in California, and it was a fairly small professional community. Today there are over 150,000 lawyers in the state. Now the practice of law is impersonal. Other lawyers and the courts now are unable to rely on counsel in the way they once did. We know some of the lawyers who appear before us; we also know those who do sloppy work, lack preparation, are dilatory and lack decorum in the courtroom. But the majority of lawyers who appear before us are lawyers we've never seen before. So, we really have no way to judge them except by their briefs and their performance in oral argument.

Also, we have an immense judiciary now. There are in excess of 1,467 judges in the State of California. So our courts are really big business. At the time I was practicing law, there were small courts and not too many of them, and in 1938 when I was admitted, there were only 160 superior court judges in California; today we have burgeoning caseloads and many judges. The Superior Court of Los Angeles County has branches all over the county.

The Second Appellate District has kept up very well with the caseload. It is pretty current, and our judges work very, very hard, and our caseload continues to increase.

The 1960s saw a change in dress, in attitude, in manners, in mores, and in courtroom conduct; and a change in conduct and ethics among lawyers and between lawyers and the court — even the quality of work changed. The pace is faster; litigation has increased. The attention lawyers once paid to the quality of an appellate brief is no longer the prime consideration. They must move fast, go on to the next case. And in the mix is the important factor of billable hours — what all lawyers work toward. Sad to say, we find many appellate lawyers who have no familiarity at all with the rules on appeal. We see this particularly in petitions for writs. Most petitions are put together very quickly and very haphazardly. We cannot too strongly emphasize the importance of reading the California Rules of Court.

I have also noticed a drop in the quality of appellate briefs. Time is of the essence and often quality suffers. Some lawyers argue a case in which someone else in the firm or a paralegal has written the briefs; and unfortunately those lawyers are not prepared and often cannot answer questions that bother the court. Often we get a brief in a civil case that is a near copy of the trial memorandum; that is no way to practice appellate law.

We now are in such a fast pace and lawyers are so worried about billable hours that I think sometimes they lose sight of the purpose of the law, the majesty of the law, the idealism of the law, and what is fair and what is just.

Today, the lawyers and the courts are simply inundated with rules, and it is almost out of control. When I was practicing and later was in the trial court, there was limited discovery and we didn't have the extended pretrial motions we have today. We had time in which to try our lawsuits. They were real adversarial proceedings. Today, with the discovery rules, pretrial

motions and the fast track rules and pretrial provisions for sanctions, there are numerous traps for the unwary. The pitfalls for the lawyer who does not keep up to date are many. Petitions for writs filed in the court of appeal tell us of the numerous sanctions imposed because of slovenly practice, much of which generally is the result of failure to read and follow the rules.

Another thing that bothers me is the growing tendency to reduce personal contact between the lawyer and the court. I realize that the almost unmanageable caseload that made the fast-track program necessary can no longer be disposed of in a leisurely manner and I heartily approve of the results of the program, but in the process we have lost personal contact. Some law and motion matters in the trial court are handled by telephone; some appellate arguments are held by telephone and pleadings can be faxed to the clerk; and that's a great way to do it. It saves a lot of time. But it also removes the element of personal relationship between the lawyers and the court.

Another change is the development of the electronic media. A television camera in court at one time was a no-no. At first we believed that they detracted from the dignity of the court and interrupted the proceedings, but today if they are unobtrusive, and they generally are, and there is no disruption to the proceedings, and there seldom is, there is no reason they should not be in the courtroom. As long as news reporters can be present, I see no reason the television camera should not be there also. Today there are far more restrictions on the use of and presence of the media in the courtroom.

The judicial process is due for some major changes. For example, extensive pretrial motions are time consuming and unduly extend the process. This is true in both civil and criminal cases. I would like to see the lawyers get on with the lawsuit after it has been filed. I would like to see a criminal defendant, particularly in the felony courts, tried within a reasonable time. Pretrial motions and extended voir dire examination often delay the administration of justice. I am not for a moment suggesting that the rights of a defendant in a criminal case be curtailed, but procedures can be consolidated and shortened.

We have become a litigious society, and we seem to be doing everything that we can to encourage lawsuits. We publish how-to books to instruct the layperson from how to draw his will, dissolve his marriage, and file his lawsuit, to how to probate a will. We have sanctioned the use of

paralegals in the legal field which has invaded those areas that have heretofore been reserved solely for the lawyer.

Of course, the indigent defendant in our criminal justice system is entitled to a court-appointed lawyer — either a private lawyer or a public defender — paid for by the state; and the same applies to the convicted indigent defendant on appeal. In a certain type of civil case, the defendant, and also in some instances, a plaintiff, is also entitled to a court-appointed lawyer.

More and more litigants, some in criminal cases, but more in the civil field, are appearing in *propria persona*, which for us in the appellate court, most often results in very poor briefs that sometimes are almost unintelligible. It places on the justices the obligation of searching the record for error and of doing legal research for the *pro per* litigant. We often find ourselves researching a case from scratch, especially when there are two litigants who are in *pro per* in the same case. It's unfortunate for them, and it's unfortunate for the court, but more and more litigants are filing their own appeals, are writing their own briefs and arguing their own cases. This, no doubt, is due primarily to the increased cost of litigation; it is very expensive to hire a lawyer these days. Of course, there are other reasons — a litigant may think he can do a better job than a lawyer, or perhaps he can find no lawyer willing to take his case.

All this activity, together with a steady increase in population, new legislation, an extension of liability in various fields, an increase in lawyers and many other factors has placed a tremendous burden on our court system. The caseload has made necessary reforms designed to bring cases to trial within a reasonable time. Several years ago the Trial Delay Reduction Act was passed by our Legislature, which resulted in the fast-track project of the trial courts. It has done wonders to cut down the backlog — by weeding out stale cases and requiring cases to be tried within specific periods of time; but it has also spawned a multitude of problems for the bar and for the appellate court. We have an increase in filings of petitions for extraordinary writs relating to dismissals and impositions of sanctions, mainly because the bar has not yet gotten used to the idea that when a lawyer files a lawsuit, he is obliged to proceed with dispatch to trial. Lawyers are unfamiliar with the new rules and they find themselves in trouble; dilatory lawyers used to a leisurely pace haven't yet adjusted to the diligence required to make the fast-track system work.

We have a modified version of fast-track in our appellate system. Appellate litigants are entitled to have their appeals disposed of within a reasonable time. Most of the delay in the appellate court is caused by the inability of the court reporters to timely file their transcripts. This has created a great deal of up-front delay in processing appeals. Lawyers and litigants become very upset about it, and I don't blame them. In an effort to alleviate the situation, we have created an order-to-show-cause court for the purpose of bringing those court reporters who are in default into court to determine the reason for delay in filing their transcripts. Some delinquent reporters are fined, some are taken off of their daily work in the superior court until they finish the transcript for filing in the appellate court, others are admonished and, in a very serious case of lack of diligence and unwillingness to cooperate, a few days in confinement until the transcript is completed. A lot of this may be alleviated by an audio-video system, but to date, we are still plagued with dilatory court reporters. This has been our main source of delay.

It is the obligation of the presiding justice in the appellate court to move cases along for hearing because it is he or she who passes on motions for extensions of time, requests for continuance of oral argument, and all kinds of applications and requests that create delay. One of the favorite methods of lawyers in criminal appeals to gain more time after no further extensions of time to file their briefs will be granted is to request an augmentation of the record and thirty days after it is completed to file their briefs. True, the majority of requests to augment do not fall into this category, but there are enough of them used for that purpose, and that is wrong. This has resulted in the establishment of a local rule placing a time limit on how much augmentation can be requested.

I couldn't have lived for going on to 76 years, with my background and all the things that I have done, and my exposure to the critical comments, prejudices, and biases of others, without being aware of the inequalities suffered by females from the beginning of recorded history. And considering my background and my past experience, I simply could not be insensitive to women's issues! No way! I have a long, long memory of my experiences in the early days of my practice and the indignation and humiliation I suffered. Until you know the treatment of women lawyers, especially in the 1930s and 1940s, by male members of the bar and the courts, or the

experience of seeking a job or of practice in a large firm, you'll never come face-to-face with man's inhumanity to woman, or really have an insight into the problems women faced in the legal field, or comprehend the extent of the prejudice and gender bias which, sad to say, are still alive and well in the law firms, public offices and the courts today. Some time ago, the chief justice, as chair of the Judicial Council, appointed a high-powered committee of prominent men and women to look into the subject of gender bias. It conducted days and days of hearings and rendered a very interesting and comprehensive report. It is my hope it will produce some very constructive results.

One of the serious problems judges have to face is the election process. Elections tend to politicize the court, which is wrong. An example is the 1986 election. We are the only real security the people have for their constitutional rights, and the courts must be kept free of politics. It is well nigh impossible for a judge who is challenged to defend himself. It is fair to question a judge's qualifications or his ability or his professional conduct, but it is unfair to challenge him on the basis of sheer disagreement with decisions he has made. Inherent in any judicial decision is the inevitability of disapproval of those who disagree.

The judge has no friends. Certainly, the litigant and the lawyer who lost the case will not be his friends; the litigant and his lawyer who won the case feel that they should have won the case anyway. No judge is infallible; that is why we have a three-tiered court system to correct errors. If the superior court is wrong, the appellate court is there to correct it; if the appellate court is wrong, there is always the California Supreme Court and the United States Supreme Court.

No judge should have to explain a decision. If there is an opinion, oral or written, that opinion speaks for itself. If the decision is wrong, the Supreme Court will eventually correct it. It is in this area the voluntary bar associations could be especially helpful, in contested or retention elections. A rating system of judges is not the best assistance they could give for it is not always all that impartial and, in any case, it gets very little media coverage. Of greater service would be for voluntary bar associations to rise to the defense of a judge unfairly attacked or to embark upon a continuing educational program to make the public more aware of what judges do, the function of our courts and the importance of our legal

system. I dare say there are few voters who know what the administration of justice is all about.

The problem of fundraising is almost insurmountable for judges. It is embarrassing and humiliating — and very questionable — for the judge to have to go out and raise election campaign funds. With respect to judges of the superior court, who are those who often must face direct opposition, no one, except relatives or close friends, is really interested in contributing to their campaign unless he has a stake in the process. It is only human nature for someone who contributes money, whether it be an individual or an organization, with a special interest, to expect something for his efforts. And it is only natural that certain segments of our profession have interests they wish to advance. There is not a lawyer who is worth his salt who does not want to achieve the very best result he can for his client. In civil litigation, defense lawyers are interested in limiting liability; plaintiffs' lawyers seek to expand causes of action. In criminal cases, the public defenders and defense bar seek reversal of convictions, and the public prosecutors want affirmances of judgments. And it is the same with organized groups. There is really no one other than a relative or a close friend who makes a contribution to a judge's campaign who doesn't expect something for it. There is no easy way for a judge to raise campaign funds, even when others do it for him and he does not know the identity of his contributors.

Unfortunately, the public is generally unaware of the function of our judicial system and if it even knows of the existence of the intermediate appellate court, has no idea what it does. The public does not know that it does not make the law, that it does not hear witnesses or take testimony, that all it does is review what has been done in the superior court.

Few voters know a judge or a justice, and the public has great difficulty in evaluating a judge's qualifications or performance. The education of voters in this area comes mostly from special interest groups that urge a "yes" or "no" vote to advance their own interests. I remember Judge Gittleson of the Los Angeles Superior Court, who was defeated because of one case — the school busing case. It is unfortunate that the public does not know more about a judge — who he is, what he does, and his qualifications. Generally, it is voting out of sheer ignorance.

A judge should be accountable to the public, but I think only in the area of qualifications, his ability, and his conduct. Because it is far more

difficult for appellate justices to be perceived fairly and to defend themselves, than it is for superior court judges, a lifetime judicial tenure following the first election after appointment might be the solution.

Rule 976 of our Rules of Court provides the standard or the criteria for publication of opinions, and it became effective January 1, 1964. Up to that time, all court of appeal opinions were published. Thereafter, it was for the court of appeal panel to determine whether a case was to be certified for publication. I do not publish many opinions unless they really fall into one of the criteria. I have the normal pride of authorship but not enough arrogance to foist on the profession a deluge of opinions that really do not meet the criteria and have no place in the California Appellate Reports. I have no agenda and no coterie of supporters to impress. However, whether or not we publish depends upon the vote of the panel participating in the opinion; it isn't just one justice making a determination. Paragraph (c)(2) of rule 976 authorizes the Supreme Court to depublish any published opinion of the court of appeal. This section also authorizes the Supreme Court to publish those opinions not certified for publication.

The practice of depublishing is controversial. It was first utilized by Chief Justice Wright in 1970. I remember that in the old days when the Supreme Court depublished a case of mine, the chief would call me and tell me the reason. Of course, now we never know why a case has been depublished. Chief Justice Bird was critical of the practice of depublishing, and she often dissented when there was a vote to depublish an opinion. Her view was that all opinions should be published. Depublication has gained momentum with the present Supreme Court, and whether or not you approve of the practice, it should be considered in the light of the very heavy caseload carried by the California Supreme Court. It started out as a way for the Supreme Court to avoid granting a petition for hearing and further burdening its calendar, and burying a bad or a questionable opinion by removing it from the books to prevent its use as precedent and future citation by the bench and bar. In depublishing a court of appeal opinion, the Supreme Court may disagree with the disposition of the case, or, it may not disagree with the final disposition, but it finds the opinion advances a minority view, or, it feels there is too much dicta in the opinion, or, it disapproves of the reasoning, or, it finds the opinion contains a minor misstatement of a point of law, or, it determines the opinion creates a conflict

with other court .of appeal decisions, or, it concludes that it runs against public policy of which the appellate court was not aware, or, the Supreme Court wants to take over the issue but for some reason wants to wait for a better case, a more appropriate time or different circumstances.

While I might not always agree that a particular case should be taken out of circulation, I do agree generally with those lawyers who defend the practice who see it as a legitimate tool for the Supreme Court to manage the development of the law and its own caseload. I note that here in Division Seven, we are getting more and more requests for either publication or nonpublication by lawyers and organizations not involved in the case. It is becoming an increasingly popular technique of molding the law in California. It may be used, for instance, by groups who fear that if a certain opinion is published, it will eventually affect their own interests. Of course, we receive a lot fewer requests than the Supreme Court, but the practice is prevalent among public defenders, prosecutors, plaintiffs' lawyers, defense lawyers and special interest groups.

Once in a while, a lawyer not involved in a particular case will make a request for publication because he has a similar case and wants a precedent. Or, a lawyer who has a similar case will seek depublication or ask us to modify our opinion so that there will not be precedent against him in the books. We in Division Seven are pretty careful in determining in the first instance whether the case meets the criteria for publication. Then if there is a subsequent request for publication, depublication, or modification, we look at it again. However, we seldom change our minds because we have been very careful about the decision in the first instance. Most of the time we make a recommendation to the Supreme Court that we thought we were right in the first place and that nothing has happened to change our minds. I understand that in the last year, 142 opinions were decertified for publication.¹

THOUGHTS ON "IMPORTANT CASES"

People are prone to ask, "What were some of your most important cases?" My reply is that every case I have ever had was important — important to the litigants — and the smallest case brought by a *pro per* litigant is just as important to him as is a big, complex case to a corporate litigant. I just

¹ At this point in the transcript a note appears in brackets: "reference to year and number must be checked before publication."

don't think there is any case more important than any other unless it is a case that has made a significant impact on the development of the law. Pretty generally cases fall in the category of being either interesting or not interesting. And while I'm fascinated by every case I've ever had, and I love the variety that I'm faced with every day, some cases hold more interest than others. One of them was *Jones v. Calder*.

Entertainer Shirley Jones and her husband Marty Ingels sued for damages for libel, invasion of privacy, and intentional infliction of emotional distress arising from an allegedly untrue article published by the *National Enquirer*, which is a weekly periodical of nationwide circulation. It is one of those newspapers one sees when waiting to check out of a supermarket. It is pretty generally a conveyor of gossip. The defendants were the National Enquirer, Inc., a Florida corporation which published the periodical; Calder, who lived in Florida and who was the editor of the periodical; and South, writer of the article. Calder and South were both residents of Florida, and process was served on them in Florida by mail. They appeared specially here in Los Angeles County Superior Court to quash service of process on the ground that California lacked personal jurisdiction over them. The trial court granted the motion to quash, and the plaintiffs appealed from the granting of the order. We reversed. In the opinion that I authored, we held that Calder and South had no special First Amendment privilege deriving from their status as employees of the publisher and, accordingly, the right of the California court to assert personal jurisdiction over them must be determined on traditional principles unaffected by First Amendment considerations.

Now, Calder did not enter California or even make telephone calls into the state in the preparation of the article, but jurisdiction over him was warranted because his acts performed in the State of Florida resulted in tortious injury to the plaintiffs in California, where they resided and pursued their occupations as professional entertainers and where the allegedly defamatory article was circulated.

Jurisdiction over South, who wrote the article, was warranted because, in addition to the tortious effect that his Florida activities produced in California, he had other contacts with this state sufficient to permit the courts to exercise jurisdiction over him. Those kinds of acts included gathering

information for the article, and one visit to California, and a number of telephone calls, and so on.

I was in Division One at the time, and we held that the California court had jurisdiction over Calder and South and sent the case back for hearing. A petition for hearing in the California Supreme Court was denied. Subsequently the United States Supreme Court took over the case and issued an opinion very similar to mine, which was most flattering.

The case of *Rogoff v. Grabowski* came to us on the pleadings, so we knew as facts only those alleged in the complaint. Plaintiffs were husband and wife and they decided they wanted to have a night on the town. They rented a limousine from the Starlight Limousine Service, which was owned by defendant Grabowski. The husband alleged that he had rented the limousine so that he and his wife could go to a pool party a distance away and wouldn't have to worry about driving home when they left the place. The limousine had a bar, and the plaintiffs had a few drinks on the way to the pool party. When they got there, they were dressed in bathing suits. They gave the driver a bag containing their clothes and toiletries; in addition, the husband gave him his wallet and some important papers in a briefcase for safekeeping. They spent the evening at the pool party, had been drinking, and very late came out to change into their clothes. No limousine!

They spent a frustrating hour or two trying to get transportation back to their home. It was further alleged that when they eventually returned home, the husband drove his own car to the limousine office and found his belongings, including his credit cards, scattered all over the office. Not only did he have to sign and pay to get his credit cards back, but included in the bill was a huge tip for the limousine driver.

One might think that he would sue for breach of contract. He sued for breach of the implied covenant of good faith and fair dealing and among other things, asked for recovery for emotional distress. Well, a tort remedy is not available for breach of the implied covenant of good faith and fair dealing in a contract for rental of a limousine, so we couldn't help him there. However, the plaintiff was left stranded without his clothes and his wallet. We held that he had stated a breach of contract cause of action against the limousine company and that he could recover emotional distress damages under this theory. Our holding was consistent with the recent trend of the California Supreme Court to limit the scope of tort remedies for breach

of commercial and employment contracts. This case suggests that in the proper case, emotional distress damages may be recoverable under contract theory if such damages are in the reasonable contemplation of the contracting parties. That is, the injured party in the commercial context can be made whole without injecting tort remedies and punitive damages.² ★

² The following note appears at this point in the transcript: “End of interview. Note: Justice Lillie’s typewritten notes on additional cases for inclusion in the formal interview are attached.” However, they do not appear in the oral history transcript provided by the Bancroft Library.

ORAL HISTORY
REVISITED

JUSTICE JESSE W. CARTER:

Grandfather and Role Model

J. SCOTT CARTER

EDITOR'S NOTE

As an epilogue to the oral history of Associate Justice Jesse W. Carter of the California Supreme Court, which appeared in the previous issue of *California Legal History* (vol. 4, 2009), we present the following reminiscence by Justice Carter's grandson, J. Scott Carter. These remarks were delivered orally and in printed form on November 10, 2010, at Golden Gate University School of Law, from which Justice Carter graduated in 1913 when it was the YMCA School of Law. The occasion was the annual induction of new members of the school's legal honor society, the Jesse W. Carter Society.

The Jesse Carter Collection at the Golden Gate University law library includes copies of Justice Carter's speeches, photographs, newspaper clippings, case files, and a painted portrait, received primarily from J. Scott Carter. Mr. Carter is a retired instructor of history at Shasta College and a former mayor of Redding, California. He kindly provided photographs to illustrate the publication of Justice Carter's oral history, and he has provided the photographs that appear here.

Golden Gate University is also the birthplace of the new book on Justice Carter, *The Great Dissents of the "Lone Dissenter": Justice Jesse W. Carter's*

Twenty Tumultuous Years on the California Supreme Court (2010). Co-editor David B. Oppenheimer (now professor at Berkeley Law) served until 2009 as professor of law and associate dean at Golden Gate University; co-editor Allan Brotsky is emeritus professor of law at the university; and the authors of substantive chapters include thirteen current and former faculty members, as well as two lawyer graduates. The book is the subject of a review essay by Michael Traynor in this volume of *California Legal History*.

— SELMA MOIDEL SMITH

My grandfather, Jesse Washington Carter, was born in a log cabin. He was raised in rural Trinity County, California, and his strong work ethic was forged as a young man who was required to contribute for many years to the hard labor and responsibility of living apart from the conveniences and conventions that most of us enjoy today.

I was born in 1939, the year he was appointed to the California Supreme Court. I understood, even as a child, that he was a highly unusual and gifted man. To amuse family members, he often recited lengthy passages of poetry around the table at Thanksgiving. His colorful stories, some centered on his experiences as a young lawyer in Redding, were told to us in the long evenings around campfires at our summer retreats in the Trinity Alps. In his later years, even despite his busy schedule, he managed to keep in touch with us through letters — a forgotten art, it seems.

His life as an attorney has been well documented and you may be quite familiar with the more prominent cases he has tried, particularly the



JULY 1946 (LEFT TO RIGHT): J. SCOTT CARTER AT THE AGE OF SIX, JUSTICE CARTER WITH AN AXE OVER HIS SHOULDER, AND SCOTT'S LATE BROTHER KENT CARTER, AS THE FOUNDATION LOGS WERE BEING SET FOR JUSTICE CARTER'S CABIN IN THE TRINITY ALPS OF CALIFORNIA.

Courtesy J. Scott Carter

dissenting opinions he submitted as a member of the California Supreme Court. Yet you may not be as well informed about his personal philosophy about his life's work.

He opened his first law practice on February 5, 1914, at age 24. In the beginning, he had very few clients — primarily those the older attorneys didn't want. But, as he stated in his oral history:

I followed the advice of my friend Edward Hohfeld, a very able lawyer, to outwork the other fellow, put in more time, prepare cases better. So I would get down to my office at seven o'clock in the morning and I would make a very thorough study of every case that I had, even though it was of very minor importance. I would go into court well prepared and I took a lot of the older lawyers by surprise who were resting on their laurels of long experience and recognized legal ability and who expected to win their cases on their ability to speak without preparation. It wasn't very long before I won some cases that surprised not only the lawyers, but a lot of people in the county.¹

As a result of his hard work, he was elected as the Shasta County District Attorney in 1918 and reelected in 1922. He tried a multitude of cases, ranging from prohibition to prostitution and was regarded as a very "vigorous" prosecutor. He chose to return to private practice in 1928 because of the poor pay (he made only \$175 or so a month). He estimated that he lost \$15,000 to \$20,000 per year working for the county.

By 1931, his private practice had grown to seven lawyers, and they were quite busy, mostly with cases involving water rights and numerous lawsuits against one of California's private utilities. In 1938, they tried 52 cases and won 50 of them. The remaining two were won on appeal. His reputation, by that time, had spread throughout the state.

He entered the arena of politics in 1939 and was elected to the California State Senate. In that same year, a vacancy occurred on the California Supreme Court, a position that he enthusiastically sought. His appointment by then Governor Olson was confirmed, and so began his "twenty tumultuous years" as a member of this judicial body.

¹ "Oral History of Justice Jesse W. Carter," 4 *California Legal History* (2009), 213.

If there was a consistent theme while he was on the Court, it embraced the concept of due process of law and the protection of individual liberty for all citizens. Underlying this theme was his view that restraints should be placed on government officials who overreach their powers and authority, and that large corporations who pursue abusive policies should also be restrained.

I can recall one special case where my grandfather's principles and character were tested by a very controversial and sensational event that took place in the 1950s dealing with a notorious criminal, Caryl Chessman. It is difficult to describe the tension and negative atmosphere caused by press reports of Chessman's scheduled execution date on July 30, 1954. The case was mired in controversy and my grandfather believed that both the trial court and California Supreme Court had erred in not upholding Chessman's due process claims. Certain appeals had failed and the die was cast for Chessman's execution on that date.

Jesse and I were working at his cabin in the Trinity Alps wilderness when, on July 29, 1954, two exhausted men appeared at the outskirts of his property. They had driven over eight hours from the Bay Area and walked four miles through the wilderness to plead Chessman's case before Justice Carter. One of the two strangers was Ben Rice, Chessman's chief attorney. Mr. Rice was seeking a stay of execution so that the Supreme Court of the United States could review Chessman's due process claims.

I was only 14 years old but quickly understood the gravity of the claim and, since time was of the essence, it was a life or death issue. I remember my grandfather sitting down on a tree stump and, in longhand, writing out the details of the stay of execution. I learned many years later that he was quite concerned about criticism from his six fellow justices on the Court but felt he had no choice in the matter but to follow the Constitution and do the right thing.

Even more dramatic for me was my presence with Jesse in mid-June of 1957 when he was visiting Redding to give a commencement speech at the local college. On the following day, I believe it was on a Saturday, he asked me to drive down to the local newspaper office as he was expecting a teletype report. To this day I can remember the news item as it appeared from Washington, D.C., stating that the Supreme Court of the United States had essentially vindicated his position on the due process issue. I know,



J. SCOTT CARTER WITH DEAN DRUCILLA RAMEY OF
GOLDEN GATE UNIVERSITY SCHOOL OF LAW, NOVEMBER 10, 2010.

Courtesy J. Scott Carter

and this is an understatement, that he was elated by the Supreme Court's decision.

Jesse never backed away from critical public opinion or doubts about his actions. Throughout the several years of the Chessman controversy, it became apparent to me that he had gone through some emotionally difficult times. In his later public statements, he indicated that he had been roundly criticized by those in the press, not to mention those members of the Court who disagreed with his position.

I can remember many other examples of Jesse's rock solid character and fortitude. I was always inspired by his word, his actions on the bench and his focus on promoting and protecting the concepts outlined in the Bill of Rights.

For my part, Jesse's actions have profoundly influenced my life, my day-to-day conduct and my teaching. On some occasions, when answers to current events and controversies have not been clear, I've sometimes re-read his oral history to gain perspective and direction, as well as his letters and the mimeographed copies of his speeches that he had sent to me over the years. Toward the end of this history is one of my favorite passages summarizing his judicial philosophy:

The soundness of a decision must be tested by the reasons given as its basis. The thing that means more to me than anything else is being able to transmit to posterity through my decisions, both majority and dissent, something that will be a guide to the future. If I depart from logic and reason and common sense in writing my decisions, either majority or dissents, those decisions are not going to be accepted; they are going to be repudiated. If I get any satisfaction out of doing this work, it is in the thought that what I say is going to receive not only contemporary approval but what it will mean in 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.²

[The printed text of J. Scott Carter's remarks ends with the note: "If you are interested in learning more about Justice Carter, please refer to the following excellent texts that can be found in the Golden Gate University School of Law Library," and he cites Justice Carter's oral history in *California Legal History* and Oppenheimer and Brotsky's *Great Dissents*.] ★

² Ibid., 298-299.

A Retrospective of

THE COMMITTEE ON HISTORY OF LAW IN CALIFORNIA

EDITOR'S NOTE

The oral history of Justice Mildred Lillie was the final oral history of a California Supreme Court or Court of Appeal justice to be undertaken by the former State Bar Committee on History of Law in California, and it is the only one that remained unpublished when the committee was retired by the State Bar in 1992. Its publication now provides the occasion for a review of the committee's work.

The Early Years

The committee was first appointed on November 18, 1948 by the State Bar Board of Governors.¹ This occurred during the presidency of F. M. McAuliffe of San Francisco, who was appointed to chair the new committee.² The committee's original charge — as reflected in its initial name, the "Committee on the History of the Bench and Bar in California" — was to plan and organize the "publication of a history of the accomplishments and contributions of the profession to the progress of California."³ Such

¹ *Journal of the State Bar of California* 34:4 (July–Aug. 1959), 452.

² Florence M. McAuliffe became a partner of Heller, Ehrman, White & McAuliffe in 1921.

³ *Journal of the State Bar of California* 23:6 (Nov.–Dec. 1948), 383.

a charge would have placed the committee's output within the long line of "bench and bar" biographical works published throughout the United States since the late nineteenth century.

By the mid-twentieth century, however, a new direction had also begun to emerge in the United States, namely, the organized study of American legal history in all its aspects. For both practical and theoretical reasons, the committee chose to align itself with this new movement. They recognized that the funding required for a project of statewide scope could more easily be attracted if their topic was not limited to biographies of leading lawyers and judges. In addition, they were attracted to the broader concept of California legal history envisioned by committee member Lawrence A. Harper, who was also a professor of history at UC Berkeley.

In May of 1953, the committee submitted to the Board of Governors an outline prepared by Harper for a comprehensive "Introduction to the History of Law in California."⁴ Of its sixteen proposed chapters, only the last deals with personalities in the legal profession. The preceding chapters are grouped into four broad topics: the history of law and administration in "Earlier Eras"; the "Modern Institutional Structure" created by the Constitution and codes — as seen in the functioning of courts, the organized bar, and administrative agencies; the "Development of Modern Legal Concepts" reflected by the history and theory of the law itself; and "Today's Achievements and Tomorrow's Challenges," in which California's position as a national trendsetter is given early recognition.

As both a historian and attorney, the author emphasized the importance of "Introducing the Historian to Legal Data and Sources" commonly used by lawyers but unfamiliar to the academic historian. The outline also provided a wide-reaching guide to published and unpublished materials likely to be useful in researching the proposed work.

The formal transformation of the committee's charge occurred the following year. In August 1954, Chair McAuliffe requested Board of Governors' approval of a change in name to either the "Committee on the History of Law in California" or "Committee on California Legal History."⁵ The former name was adopted (with the word "the" before "History" variously

⁴ The complete outline is available in *Journal of the State Bar of California* 29:6 (Nov.–Dec. 1954), 486-495.

⁵ *Ibid.*, 486.

present or absent throughout the committee's existence). In his request, he informed the Board that, having previously undertaken the "necessary but tedious work of amassing historical data and bibliographical references," the committee had devoted the current year to "preparing an introduction to the legal history of California." He further explained that the work was necessary because "the need for paying greater attention to legal history has become more apparent," but attorneys "are too busy practicing and scholars shy away because they believe the subject too difficult."⁶

Three years later, McAuliffe announced that the committee's *Introduction and Guide to the History of Law in California* was available in mimeographed form at the State Bar office in San Francisco.⁷ The guide itself indicates that its more than 200 pages were being duplicated as quickly as possible for distribution to attendees of the 1956 State Bar Convention.

McAuliffe's 1957 report to the Board of Governors places the work of the committee in national context. He notes the founding of the American Society for Legal History in 1955 and the creation of the *American Journal of Legal History* at Temple University School of Law in January of 1957. He says that this new society and new journal "offer an outlet for the initiated," but that "California seeks to lure others into the field." He then asks assistance from California lawyers in distributing the *Guide*, and offers a brief overview to stimulate interest.⁸

McAuliffe's successor, Presiding Justice A. Frank Bray of the First District Court of Appeal,⁹ stated in 1958 that the *Guide's* purpose was "to introduce the scholar to legal data and the lawyer to the standard sources of the social scientist and historian." Like McAuliffe, he noted the growth nationally of interest in legal history, and he proposed a five-year plan for promoting interest in the legal history of California — "not so much to

⁶ *Ibid.*, 485.

⁷ This consists of two separate works, the *Introduction* and the *Guide to Material on the History of Law in California* by Lawrence A. Harper, 1956. McAuliffe indicates that "Dr. W. N. Davis, Jr." (State Historian William Newell Davis, Jr.) was coauthor of the *Guide*. Copies are at present available in at least three California libraries: UC Berkeley Law Library, UCLA Law Library, and Stanford University Crown Library.

⁸ *Journal of the State Bar of California* 32:4 (July–Aug. 1957), 394.

⁹ Bray served from 1951 to 1981 as founding president of the Contra Costa Historical Society.

prepare legal histories as to stimulate others to work in the field.”¹⁰ Thereafter, the committee undertook a single major project of its own.

The final publishing project of the committee’s early years was the preparation of the two-volume *History of the Supreme Court Justices of California*, edited by J. Edward Johnson. Volume I, covering 1850–1900, appeared in 1963, and Volume II, covering 1900–1950, appeared in 1966.¹¹ Both are large-format, illustrated books with biographies of the Court’s justices from those periods. Most were written by Johnson and had appeared during prior years in the *State Bar Journal*.

The publisher’s introduction to the first volume states that the committee’s manuscript “made it clearly apparent to the publisher that this work was an important literary contribution,” and that it was not a work of fleeting importance, “but one that will endure for generations as an honest appraisal of a group of men who exerted major influence on the development of California jurisprudence.” The introduction to the second volume states that the work resulted from Johnson’s lifelong interest in judicial biographies: “For more than 35 years he has collected clippings, sought family papers and interviewed those who could add to our knowledge of California’s Supreme Court Justices.” A note indicates that the materials collected by Johnson remained in his own possession at that time, but that he had willed them to the Bancroft Library at UC Berkeley (where they are now located).¹²

During the late 1960s and early 1970s, the committee published a series of approximately fifty articles in the *Los Angeles Daily Journal* on historic California courthouses and jails.

The Later Years

The committee’s most recent period of productivity extended from the early to late 1980s. During this period, the committee described its charge

¹⁰ *Journal of the State Bar of California* 33:4 (July–Aug. 1958), 456–458.

¹¹ J. Edward Johnson, *History of Supreme Court Justices of California*, vol. I, 1850–1900, San Francisco: Bender-Moss, 1963; vol. II, 1900–1950, San Francisco: Bancroft-Whitney, 1966.

¹² At present, the Bancroft Library catalogue states that its collection of “J. Edward Johnson Papers” consist of 14 cartons of material, not yet arranged for use, and that inquiries “should be directed, in writing, to the Head of the Manuscripts Division.” It also indicates that Johnson’s album of photographs of 53 early Supreme Court justices has been transferred to the Bancroft Pictorial Collections.

as follows: “Works with the State Bar and its members to promote the study and preservation of legal history; conducts oral history interviews and programs; makes public presentations; and prepares publications in the field.”¹³ The notable addition to its earlier charge is in the area of oral history. Here, again, the committee’s evolution parallels that of society at large, in which the collecting of oral histories received increasing emphasis during the second half of the twentieth century.

The committee’s most ambitious project was the creation of a guide to the California legal history manuscripts held by the Huntington Library in San Marino. The project was initiated in 1983 under the chairmanship of Eric Chiappinelli and was pursued to completion by five succeeding chairs. Legal historian Gordon Morris Bakken was engaged to prepare the work, and the committee secured funding from foundations and law firms. The completed book was published in 1989,¹⁴ during the term of committee chair Rosalyn Zakheim. The occasion was marked by the appearance of an illustrated feature article in the *Los Angeles Daily Journal*, subtitled “A Scrappy State Bar Committee Chronicles the Development of California Law.”¹⁵

One outgrowth of the book project was a bibliographic essay by Fritz and Bakken on materials in the field of California legal history, published in 1988.¹⁶ Another — and the most recent — is the article by Peter L. Reich in the present volume of *California Legal History* that surveys additions to the Huntington collection in the years following publication of the committee’s book.¹⁷

In the area of oral history, the committee pursued three separate projects. The first was the recording of audiotaped oral interviews of leading lawyers and judges in 1987. Four such interviews were conducted, of which

¹³ “State Bar Report,” *California Lawyer* 8:11 (Dec. 1988),

¹⁴ Henry E. Huntington Library and Art Gallery. *California Legal History Manuscripts in the Huntington Library: a guide / by the Committee on History of Law in California of the State Bar of California*. San Marino, Calif.: The Library, 1989.

¹⁵ Arlene Silberman, “Our Story, Her Story, History,” *Los Angeles Daily Journal*, May 11, 1989.

¹⁶ Christian Fritz and Gordon Bakken, “California Legal History: A Bibliographic Essay,” *Southern California Quarterly* 70 (1988), 203-222.

¹⁷ Peter L. Reich, “California Legal History in the Huntington Library: An Update,” 5 *California Legal History* (2010), 323-336.

audiotapes and transcripts were deposited in research institutions for public use.¹⁸ The interviews were as follows:

Sharp Whitmore,¹⁹ interviewed by Ray Roberts,²⁰ January 9, 1987.

Leon T. David,²¹ interviewed by Ray Roberts, January 16, 1987.

George Yonehiro,²² interviewed by Ray Roberts, January 21, 1987.

Ruth Church Gupta,²³ interviewed by Rosalyn Zakheim,²⁴ Sept. 28, 1987.

A second project in the area of oral history was the creation of a booklet titled, “The Story of the State Bar of California” (1989) which consisted primarily of excerpts of audiotaped recollections by past State Bar presidents solicited by the committee. It included statements from twenty-three past presidents, ranging in years of service from 1937 to 1988, on the history of the State Bar and their terms in office.

The committee’s third, and best known, oral history project was the recording of videotaped interviews of leading California Supreme Court and Court of Appeal justices. Four such interviews were conducted. Transcripts of the first three were published in the *Hastings Constitutional Law Quarterly* in 1987 and 1988, and the fourth — of Justice Mildred Lillie — remained unpublished until its inclusion in the present volume of *California Legal History*. The first three were published as follows:

¹⁸ These were deposited in the State Bar Archives in San Francisco, the Bancroft Library at UC Berkeley, and the Department of Special Collections at the UCLA Research Library.

¹⁹ Whitmore served as president of the Los Angeles County Bar Association and was a member of the Board of Governors of both the American Bar Association and the California State Bar.

²⁰ Roberts was a retired judge of the Los Angeles Superior Court.

²¹ The interview of David commences with his playing an audiotaped self-interview recorded on July 31, 1977, in which he says he was serving at that time as chair of the Committee on History of Law in California. He was a retired judge of the Municipal and Superior Courts in Los Angeles County.

²² Yonehiro was then serving as a Superior Court judge in Placer County.

²³ Gupta was the first woman president of the Lawyers Club of San Francisco (1975–1976).

²⁴ Zakheim conducted the interview on behalf of the committee and also the Women Lawyers’ Association of Los Angeles (of which she was president, 1983–1984.)

“Oral History: Justice Bernard S. Jefferson,” *Hastings Constitutional Law Quarterly* 14 (Winter 1987), 225-287.

“Oral History: Justice Otto Kaus,” *Hastings Constitutional Law Quarterly* 15 (Winter 1988), 193-268.

“Oral History: Justice Joseph R. Grodin,” *Hastings Constitutional Law Quarterly* 16 (Fall 1988), 7-68.

Personal Accounts

The theme of oral history also provides the concluding section of this review of the committee’s work. By good fortune, four of the later chairs of the committee agreed to share recollections of their periods of service on the committee. Personal accounts by past chairs Kenneth Crews (1985–1986), Laurene Wu McClain (1986–87), John Hanft (1987–1988), and Rosalyn Zakheim (1988–1989) are presented below.

Following these four accounts, further good fortune provides a final narrative by David C. Long, formerly director of research for the State Bar, who agreed to describe the creation in 1989 of the California Supreme Court Historical Society. As early as 1954, Chair McAuliffe had proposed seeking a foundation grant for the committee’s activities, and thereafter to “establish a legal history society which can continue the activities after the foundation grant has expired.”²⁵ A grant does not appear to have been secured, and formation of the society was not pursued. In the late 1980s, when societies for legal history had become well established in other jurisdictions, the State Bar proposed such a society for California. The realization of this proposal is the subject of the concluding narrative by David Long.

— SELMA MOIDEL SMITH

²⁵ *Journal of the State Bar of California* 29:6 (Nov.–Dec. 1954), 486.

BUSY YEARS FOR THE HISTORY COMMITTEE

KENNETH D. CREWS,²⁶ CHAIR, 1985–1986

Without question I was privileged and challenged to have been surrounded by an extraordinarily fine and productive run of leaders. As chair during the year 1985–1986, I was in a mix with Eric Chiappinelli, Christian Fritz, and Laurene Wu McClain. We were active lawyers, but each with a strong and serious penchant for academia. Indeed, all four of us ultimately pursued careers in research and law teaching. With our studious inclinations and our scholarly zeal, we tended to seek out exciting projects — never satisfied with tasks that were handed to us.

We did attend to the committee's central mission to preserve the history of law in California. We addressed multiple concerns in that spirit. Professor Lawrence Friedman of Stanford Law School brought to our attention that the records of the Alameda County courts were at risk of destruction. We learned that the Federal Archives in San Bruno offered little realistic place for researchers to use the collections. We reached out to administrators, managers, and archivist to foster an open flow of historical resources.

Our committee, however, was too restless to be merely responsive. We wanted to shape our own projects. We wanted to create and capture resources that would facilitate new insights into California law. The first major self-imposed undertaking of our era was the oral history interview of Justice Bernard Jefferson. One member of the committee deserves most of the credit for getting the project underway. David Doyle, an attorney from Fresno, had come to know and admire Justice Jefferson and insisted that an oral history interview would be a valuable resource for future scholars. At first we did not realize how right he was.

We academics on the committee hesitated and analyzed. We pondered the proper methodology for oral history and enlisted support from professionals at the Regional Oral History Office of the Bancroft Library at UC Berkeley. We tried to nurture a clear vision of where this project might take us. At one meeting we pursued questions about the ownership of rights in

²⁶ Director, Copyright Advisory Office and faculty member, Columbia Law School.

the finished interviews and what we might do with any funds that the work could generate. Silly us. While we investigated, David Doyle would be neither deterred nor delayed. He pressed ahead with logistics and scheduling. Fortunately, he prevailed.

We booked a committee meeting at McGeorge School of Law in December 1984, invited the justice, and David conducted the interview. McGeorge kindly provided the rooms and the videorecording staff and equipment. We came away with an original product of the committee. David had done his work well, and he handed the finished recording to the committee. We were determined to get it into the hands of anyone interested in the subject. Justice Jefferson helped us prepare a clean transcript. I wrote an introduction and fired a roster of letters to law reviews in quest of a publication outlet. We found strong interest with the *Hastings Constitutional Law Quarterly*, which began a constructive friendship. The *Law Quarterly* published the Jefferson project as well as subsequent interviews.

The projects were also a means to connect with the wider legal community. Donald Wright, former chief justice of California, joined the committee. Loyola Law School in Los Angeles hosted an interview with Justice Otto Kaus, supplying the essential talent and equipment for videorecording. No accomplishment is without detractors. Even interviews of prominent jurists could not escape some controversy. Before we had barely started in 1984, our chair Chris Fritz reported that some officials of the bar had conveyed their concerns “with regard to the project’s political ramifications,” although Chris added that “the project’s historical and educational origins would appear to safeguard it from any such criticism.” The committee moved ahead with its plans, and the political concerns never materialized.

As we learned more about the needs of researchers, we found a wealth of relatively undiscovered materials in archives, libraries, and other repositories throughout the state. We were eager to expand awareness of these resources and invested the better part of a year in exploring possibilities for one more even more ambitious undertaking. A few committee members made the rounds of different archival collections, looking with an open mind for the right project for the committee to sponsor. We spent many days visiting repositories of court records and libraries of archival collections.

One prospect clearly captured our attention as early as 1983. The Huntington Library in San Marino was interested in developing an innovative inventory of its legal history collections. A meeting with Martin Ridge, the Huntington's director, allowed us to see that the Huntington was the right project. The collection was rich and little used by legal historians. A few scholars, such as John Phillip Reid of New York University, helped reveal the strength of the materials, but many more possibilities for historical discovery remained. The Huntington was ready to lend its support in many ways, from providing a work space for the researchers to publishing the finished study.

We knew that the project was enormous and it would require inventing a new form of guide through historical collections. We also knew that no one on the committee was prepared to actually complete the book-length study. We embarked on a diligent quest for funding to retain a professional historian. With contributions from foundations, firms, and individual attorneys, we were able to retain the skilled services of Professor Gordon Morris Bakken of California State University, Fullerton. Professor Bakken approached the Huntington collection with determination and élan. He knew that our committee project was groundbreaking. He also knew that perusing the collections would likely yield fodder for years of his own historical writings.

I always suspect that I was Bakken's least favorite collaborator. I was chair of the committee as the project came to completion. I wanted to see the effort at or near publication before I handed the committee to Laurie McClain. I spent many days and weeks scrutinizing drafts and making substantial suggestions for changes and rewrites. I typed letters of several pages and proposed restructured layouts. Gordon probably wisely picked what he liked from all of my words — and he brought a complex project to completion.

The resulting book — which demanded steady attention until finally published in 1989 — was warmly received by the Huntington and by scholars throughout the country. It offered detailed glimpses of the many different materials in one library that are certainly of interest to legal historians — documents ranging from property claims to litigation papers and criminal records. We also earned good press coverage, especially in the legal newspapers throughout the state. The Huntington set the stage. Gordon Bakken did the work. The committee used its good offices to conceive and support the project and prod it along the path to completion.

Service on the history committee in those years was an outlet for ambitious members who took seriously the study of legal history and who wanted to make a difference for other scholars who could benefit from our efforts. We also simply liked our work. We were ready to invest our time and skills. We gave heartily, but we also gained delightfully.

PRESERVING AND PROMOTING CALIFORNIA'S LEGAL HISTORY

LAURENE WU McCLAIN,²⁷ CHAIR, 1986–1987

I entered Boalt Hall School of Law in 1979 after having pursued an academic career at several colleges in Virginia and California. While taking courses at Boalt, I continued to teach college-level American and Chinese history. I graduated with a law degree in 1982 and began to pursue legal practice with a well-known San Francisco law firm. I left teaching. However, I found that the daily responsibilities of being a litigator required total focus on pragmatics with the goal of winning or at least settling cases for clients. While I worked with some of the best attorneys in San Francisco, the firm was so involved in doing its best job for clients that there was little time for reflective thinking about law as an intellectual discipline. I felt a need to join a group which could devote more time to the large questions of how our law had evolved, who were the major players in shaping that law, what were the myriad ramifications of decisions made by our courts, and how could the development of California law be best preserved and promoted. By 1983, the State Bar of California appointed me as a member of the Committee on History of Law in California. I had found a niche with colleagues who shared many of the same intellectual interests that I had.

Practicing attorney Eric A. Chiappinelli chaired the committee in 1983–1984. Christian G. Fritz who already had a law degree but was pursuing a Ph.D. at the University of California, Berkeley, succeeded Eric in 1984–1985, and lawyer Kenny Crews became chair in 1985–1986. I then

²⁷ Attorney and professor of history, City College of San Francisco.

served as head of the committee in 1986–1987, followed by law book editor John K. Hanft in 1987–1988.

The committee delved into several projects which fulfilled our goal of preserving and promoting California legal history. We were never paid for our work. We volunteered our time. We met in San Francisco, Sacramento, or Los Angeles, for meetings that lasted several hours, and in between those meetings, we conferred by telephone or by memos. Of course, we had no access to e-mail.

The committee launched “The California Bar Oral History Series,” which received the endorsement of several California law schools and firms. We received valuable advice from career oral historians Carol Hicke and Sarah L. Sharpe of the Regional Oral History Office at the University of California, regarding how to prepare for oral histories and how to edit transcripts for publication. We chose Justice Bernard S. Jefferson of the California Court of Appeal as our first oral history subject, and Otto Kaus, an associate justice of the California Supreme Court from 1981 to 1985 as our next interviewee. Both men gave generously of their time, and in turn, individual committee members did copious research on the justices and their opinions so that questions addressed to the justices at their interviews would be cogent, accurate, and thorough. To give the interviewer and each justice an environment that would be conducive to contemplation and an accurate account of experiences on the bench, only the questioner, the justice, and a cameraman were allowed in the interview room. The *Hastings Constitutional Law Quarterly* published both oral histories. Videotapes of the interviews were then lodged with law schools and the archives of the State Bar of California.

Since the Huntington Library in San Marino, California, had an extensive and valuable legal collection, but lacked a subject access guide, the committee decided to publish a legal manuscript resource guide for the library. This volume would provide easier access to Huntington’s materials, publicize the depth of Huntington’s collection, and further understanding of the development of California’s legal history. Dr. Martin Ridge, head of research at the Huntington, immediately endorsed the project and guaranteed partial funding from the Huntington. The committee solicited the remainder of the funds necessary to complete the project from attorneys, foundations, and law firms. The State Bar of California paid only for administrative expenses. The committee then hired legal historian Gordon

Bakken to prepare the guide. This volume entitled, *California Legal History Manuscripts in the Huntington Library: A Guide*, was published in 1989 by the Henry E. Huntington Library and Art Gallery, San Marino, California.

The committee was concerned about the loss of original documents in California courts, as many of those courts had limited storage space for case files, and had decided to preserve them only through microfilm or microfiche. Scholars complained to the committee that this trend left them with spotty research documents, as microfilm and microfiche often did not duplicate the originals completely or were full of extraneous spots and other markings. The committee did contact several county courts about this issue, but the trend of putting documents on microfiche or microfilm still remains a major problem for researchers today.

My term on the committee ended around 1988. I returned to college teaching but continued to practice law on a part-time basis. In the meantime, my colleagues Chris Fritz and Kenny Crews decided to pursue academic careers. Chris became a prominent legal historian and professor at the law school at the University of New Mexico, and Kenny decided to move from practicing law to pursuing advanced degrees at the Graduate School of Library and Information Science at the University of California in Los Angeles. Today, Kenny is the director of the Copyright Advisory Office at Columbia University in New York City.

RECOLLECTIONS OF THE COMMITTEE ON HISTORY OF LAW IN CALIFORNIA

JOHN HANFT,²⁸ CHAIR, 1987-1988

I served a three-year term with the Committee on History of Law in California and was fortunate to stay on for an additional year after my regular term ended. Serving on the committee was exceptionally rewarding, both because of the good work we were able to accomplish and the long friendships I established with some of my colleagues. The highlights of my time with the committee were (1) taking and publishing the oral histories

²⁸ Director, Witkin Legal Institute, West Group, San Francisco.

of Justices Otto Kaus and Joseph Grodin, and (2) a fascinating behind the scenes tour of the conservation facilities at the Huntington Library (in conjunction with the 1989 publication of *California Legal History Manuscripts in the Huntington Library: A Guide*, compiled by the committee).

At the request of David Long, the director of research at the State Bar, the committee investigated and drafted a proposal for the formation of a California Supreme Court Historical Society, similar to existing societies in the federal court system.

In my last year on the committee, we spent a considerable amount of time editing and compiling *The Story of the State Bar in California*, which was distributed at a dinner in January 1989 honoring past presidents of the State Bar. The publication included a brief history of the struggle to create a unified bar in California, excerpts from the published annual reports of past presidents, and personal reminiscences from living past presidents. Twenty-three past presidents prepared oral or written statements discussing the events, issues, activities, and personalities that were most significant during their respective terms as president. This project gave us the opportunity to collect and preserve information and insights, especially about the early days of the State Bar, which assuredly would have been lost otherwise. I feel very lucky to have been part of that endeavor.

REFLECTIONS ON THE HISTORY OF LAW IN CALIFORNIA COMMITTEE

ROSALYN ZAKHEIM,²⁹ CHAIR, 1988–1989

Serving on the History of Law in California Committee and chairing the committee in 1988–1989 was one of the most fulfilling volunteer activities of my thirty-five-year legal career, both at the time and in retrospect. My undergraduate degree at Smith College was in American Studies, and my interest in the subject did not wane over the years. Before my tenure on the committee, I had helped begin the Oral History Project for the Women Lawyers Association of Los Angeles (WLALA). Serving on

²⁹ Senior Judicial Attorney (ret.), California Court of Appeal, Los Angeles.

the committee allowed me to further my interest in history and to utilize lessons learned from the WLALA project. Special thanks to John Hanft, my predecessor, for his support and encouragement as well as for his many contributions to the committee.

The committee worked with other groups to accomplish mutual goals. We tried to have an impact on the preservation of court records, a project passed to the 1989–1990 committee. Reaching out to other groups, the committee continued to provide assistance and encouragement to local and minority bar associations to encourage initiation of their own oral history projects.

We held our first annual meeting with the Ninth Judicial Circuit Historical Society. The society's executive director, Chet Orloff, arranged for us to meet and tour the Ninth Circuit courthouse in Pasadena. We discussed possible joint projects, including a legal history award to be given for an essay of interest to western legal historians.

For the first time, the committee presented a program at the State Bar Annual Meeting, a short play written by GeriAnne Johnson and Rick Walden, based on a lawsuit involving Jack London and the right to intellectual property. The room was packed, and the feedback was very favorable.

In addition to new projects, we continued the work of our predecessors. Under John Hanft's leadership, the committee had compiled and edited tapes from the State Bar's past presidents. John and Leigh Shields continued with that work in 1988–1989 and conducted further research that resulted in the informative manuscript, "The Story of the State Bar of California," which was distributed to those attending the State Bar's past presidents' dinner on January 21, 1989, in San Francisco.

The committee also accomplished final editing and publication of *California Legal History Manuscripts in the Huntington Library: A Guide*, a project begun in the term of Eric A. Chiappinelli (1983–1984) and continued through chairs Christian G. Fritz, Kenneth D. Crews, Laurene Wu McClain, and John K. Hanft. Professor Gordon Bakken compiled information for the *Guide* and provided its introduction. The Huntington celebrated publication of the *Guide* with a reception on the afternoon of our visit to the Ninth Circuit and included an insiders' tour of the preservation facilities at the Huntington Library. *The Daily Journal* and other publications wrote articles about the event and the committee's accomplishments.

The committee's program of video oral histories added a transcript of the interview of Justice Joseph Grodin to those of Justice Bernard Jefferson, published in 1987, and Justice Otto Kaus, published in February 1988, all in the *Hastings Constitutional Law Quarterly*. We conducted an excellent entire day session with Hon. Shirley Hufstедler in July 1988, but the audio reception on the videotapes forced us to reschedule the session. Justice Mildred Lillie agreed to an oral history to be commenced during the 1989–1990 committee year.

The committee's audio oral history interviews also continued. Thanks to committee members Ray Roberts and John Hanft, the transcriptions of interviews with George Yonehiro and Sharp Whitmore were completed.

Finally, past work by the committee and current efforts by Frank Winston [Board of Governors liaison to the committee] produced the incorporation of a California Supreme Court Historical Society in 1989. I am grateful that the Society's journal is interested in a committee that has not existed for two decades. For those of us involved, the committee was very productive and made significant contributions to legal history in California.

THE CREATION OF THE CALIFORNIA SUPREME COURT HISTORICAL SOCIETY

DAVID C. LONG³⁰

In the late 1980s, when I was Director of Research for the State Bar of California, Herbert Rosenthal, the State Bar's Executive Director, suggested that California was giving short shrift to its legal history because, unlike many states, it lacked an organization devoted to the history of the state's judicial branch.

The State Bar itself had a Committee on History of Law in California, which was focused primarily on preserving oral histories of prominent members of the bench and bar. However, in contrast to supreme court historical societies in other states and jurisdictions, that committee lacked a

³⁰ California attorney, now in private practice.

nexus to the state courts and had less ability to involve both judges and lawyers in preserving judicial branch history.

Herb asked that I take on the project of laying the foundation for a supreme court historical society in California. We asked the State Bar's Committee on History of Law in California to consider recommending the creation of a California Supreme Court Historical Society, which the committee did. My office conducted research on the structure and functions of judicial branch historical societies in other states and jurisdictions; for example, both the United States Supreme Court and the Ninth Circuit Court of Appeals have active historical societies. We found that Chief Justice Malcolm Lucas and other members of the California Supreme Court were enthusiastic about the possibility of an historical society, and we offered to prepare draft articles of incorporation and initial bylaws for a new California Supreme Court Historical Society. This led to the formation of the Society in 1989.

Since the functions of the new California Supreme Court Historical Society included all those which the State Bar's Committee on the History of Law in California had performed, the State Bar discontinued that committee and encouraged committee members to become involved in the CSCHS. ★

ARTICLES

THE CALIFORNIA PUBLIC DEFENDER:

Its Origins, Evolution and Decline

LAURENCE A. BENNER*

“It is still the duty of the State and of the court, its instrument, quite as much to protect the innocent as to punish the guilty. Honest administration of justice is the end sought . . .”¹

— Clara Shortridge Foltz, 1897

INTRODUCTION

As California approaches the centennial of the birth of the first Public Defender office in the state and the nation, it is perhaps appropriate to reflect upon the reasons for establishing an institutional Public Defender as part of government and make an appraisal of the institution’s current

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¹ Clara Shortridge Foltz, *Public Defenders*, 31 AM. L. REV. 393, 395 (1897) [Foltz, *Public Defenders*].

health in California today. The concept of the Public Defender, considered radical at the time of its inception, was initially the brainchild of Clara Shortridge Foltz. A champion of women's rights and the first woman admitted to practice law in California, she spearheaded a national movement to create an elected office known as the Public Defender. The County of Los Angeles became the first government to establish a Public Defender office, which began providing representation in both criminal and certain civil cases in 1914. What would Clara Foltz think of the Public Defender system as it has evolved in California today? How does our present system differ from what she envisioned?

Sadly, while the road has been marked with many successes, and fortified by U.S. Supreme Court decisions establishing the right to the effective assistance of counsel under the Sixth Amendment, if Clara Foltz were to return today she would find a criminal justice system that has broken faith with one of its fundamental underlying premises: the presumption of innocence. Instead, as a consequence of local funding and control over indigent defense services, many counties have chosen to operate under a presumption of guilt, resulting in a system where processing the "presumed guilty" as cheaply as possible has been made a higher priority than investigating the possibility of their innocence.

This should not be surprising. Members of a county board of supervisors, many of whom are not lawyers, can easily be persuaded by political pressures arising from the competition for scarce tax dollars to provide only minimal resources for the defense of those who are accused of crime. That translates into just enough funding to facilitate the plea bargaining regime upon which the entire system relies, as no county has the resources to have trials in all cases. This may seem logical because many defendants are in fact guilty. But the system is based upon a false premise. It is assumed that those who are providing defense representation will somehow be able to distinguish between the many who are guilty and the few who are innocent. It also further assumes that the indigent defense system will be able to provide an effective defense for the innocent by managing to triage the limited resources available. This cannot be done, however, if the system does not ensure adequate defense investigation into the possibility of innocence in the first place. Yet recent empirical research conducted for the California Commission on the Fair Administration of Justice has

shown that the current structure within which indigent defense services are provided in many counties fails to ensure this important safeguard.

This is not to say that all of California's counties across the board are providing indigent defense services that are inadequate. What Clara Foltz would immediately recognize, however, are the glaring disparities that exist between counties in the adequacy of indigent defense services they provide. She would also be struck, although not surprised, by the tremendous disparity in funding that exists between the defense and the prosecution functions. Finally, she would no doubt be alarmed at the growing trend toward unregulated privatization of indigent defense services that threatens the very existence of competent and efficient institutional Public Defender offices. This is because in an ever expanding number of counties justice is now up for sale to the lowest bidder.

ORIGINS OF THE PUBLIC DEFENDER CONCEPT

Clara Foltz first introduced her proposal for an elected Public Defender in a speech at the Chicago World's Fair in 1893, given before the Congress of Jurisprudence and Law Reform.² She envisioned the Public Defender as a counterweight to even the scales of justice and correct the "grave evils" that plagued the administration of criminal justice in her day.³ As she later explained in a law review article, "judicial crimes"⁴ were repeatedly being committed because of 1) the abuses of unchecked and overzealous prosecutors,⁵ 2) the incompetence of untrained, inexperienced and unpaid appointed counsel for the indigent accused,⁶ and 3) the buzzard mentality

² The speech was reprinted in the *ALBANY LAW JOURNAL: Public Defenders — Rights of Persons Accused of Crime — Abuses Now Existing*, 48 *ALB. L.J.* 248 (1893) [WORLD'S FAIR SPEECH]. Other notable presenters at the Congress included John Henry Wigmore, David Dudley Field and James Bradley Thayer. See generally Barbara Babcock, *Inventing the Public Defender*, 43 *AM. CRIM. L. REV.* 1267 (2006) [Babcock] for an excellent account of the life and times of Clara Shortridge Foltz and the influences that led her to originate the idea of a publicly funded attorney for all defendants accused of crime.

³ See Foltz, *Public Defenders*, *supra* note 1.

⁴ *Id.* at 393.

⁵ *Id.* at 395-97.

⁶ *Id.* at 399.

and dishonesty of a “shyster” element among the private bar who preyed upon those defendants with meager resources.⁷

Called the “Portia of the Pacific,”⁸ Foltz was at the time of her World’s Fair speech an able and experienced criminal defense practitioner, who shortly afterwards would win a notable victory in the California Supreme Court. In *People v. Wells*⁹ — a case involving prosecutorial misconduct — she represented a successful business agent who had been charged as an accomplice to a client’s forgery involving a promissory note and mortgage. Wells testified he had been deceived by the client who falsely represented herself as the owner of property which was mortgaged to secure the loan. The California Supreme Court reversed Wells’s conviction because of “utterly inexcusable and reprehensible” conduct by the prosecutor who repeatedly employed improper questions on both direct and cross examination to interject inadmissible and unsubstantiated accusations for the sole purpose of prejudicing the jury against the defendant. In granting a new trial, Justice McFarland declared in a revealing statement:

It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent.¹⁰

Foltz identified the causes of such prosecutorial abuse as naturally arising from human nature — the prosecutor’s “vanity of winning,” and “the fear of newspaper criticism” coupled with the ability to rationalize such

⁷ *Id.* at 397-98.

⁸ See LOS ANGELES TIMES, Nov. 12, 1888 at 2, and Nicholas C. Polos, *San Diego’s ‘Portia of the Pacific’ — California’s First Woman Lawyer*, 26 JOURNAL OF SAN DIEGO HISTORY, No. 3, Summer 1980, San Diego Historical Society. Clara Foltz was an eloquent advocate. For an excerpt from one of her closing arguments, see MICHAEL S. LIEF, ET AL., LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW, Chapter 6, *A Man’s World No More*, 211 (1998).

⁹ 100 Cal. 459 (1893). *Wells* was subsequently referenced by the U.S. Supreme Court in *Berger v. United States*, 295 U.S. 78 (1935), a seminal case on prosecutorial misconduct.

¹⁰ *Id.* at 465.

behavior through the jaded “assumption that the defendant is always guilty.”¹¹ Prosecutors were allowed to go unchecked, Foltz argued, because with rare exception they had no equal adversary. She pointed out that counsel appointed for the poor “have no money to spend in an investigation of the case, and come to trial wholly unequipped either in ability, skill or preparation to cope with the man hired by the State.”¹² Those of modest means, moreover, had neither the knowledge nor the ability from within the walls of their jail cell to secure competent counsel. They were thus easy marks for the “runners” of unscrupulous “shyster” lawyers who, after having obtained a defendant’s money, would “botch or neglect” their case.¹³

¹¹ Foltz, *Public Defenders*, *supra* note 1, at 396.

¹² WORLD’S FAIR SPEECH, *supra* note 2, at 249.

¹³ Foltz, *Public Defenders*, *supra* note 1, at 397. A vivid account of how such shyster lawyers operated in the lower criminal courts of New York is described in ARTHUR TRAIN, *THE PRISONER AT THE BAR* (1915) 76-77:

A young girl who had fallen from virtue, but who had never been arrested before, was brought into the Jefferson Market prison. She had saved five hundred dollars with which she intended the following week to return to her native town in New Hampshire and start life anew. The [jailer] led her to believe that she would be imprisoned in the penitentiary for nearly a year unless she could “beat the case.” One of these buzzards [i.e. a shyster lawyer] learned of her distress and offered to procure bail for her for the sum of fifty dollars. A straw bondsman was produced, and she paid him the money and was liberated. Meanwhile the lawyer had learned of the existence of her five hundred dollars. By terrifying her with all sorts of stories as to what would possibly happen to her, he succeeded in inducing her to pay him three hundred as a retainer to appear for her at the hearing in the magistrate’s court. He had guaranteed to get her off then and there, but when her case was called he happened to be engaged in reading a newspaper and, looking up from where he was sitting, merely remarked, “Waives examination, your Honor.” The girl had only one hundred and fifty dollars left, and as yet had had no defense, but the shyster now demanded and received one hundred dollars more for representing her in the Special Sessions. She now had but fifty dollars. Immediately after the hearing in the police court the bondsman “surrendered” her and she was locked up in the Tombs pending her trial, for she had not money enough to secure another bail bond. Here she languished three or four days. When at last her case appeared upon the calendar the shyster did not even take the trouble to come to court himself, but telephoned to another buzzard that she still had fifty dollars, telling him to “take her on.” Abandoned by her counsel, alone and in prison, she gave up the last cent she had, hoping thus still to escape the dreadful fate predicted for her. When she was called to the bar the second

Indeed, at the time of the *Wells* decision California did not even have an integrated State Bar that could control the admission to practice law.¹⁴ The reputation of the legal profession also hardly inspired confidence. As one of Foltz's contemporaries observed, the bar in general was considered "a pool of mediocrity."¹⁵

THE PUBLIC DEFENDER ENVISIONED BY CLARA FOLTZ

To remedy the evils afflicting the administration of criminal justice, Clara Foltz proposed that an office of the Public Defender be created in each county. The Public Defender was to be elected and hold office for a three-year term. Only an attorney who had been a resident of the county for at least one year was eligible to stand for election. The duties of the Public Defender were "to attend all criminal courts, and to appear for and defend all persons charged with violation of the law who are without counsel and who desire an attorney to appear for them."¹⁶ The Public Defender's duties also included "appearing for and in behalf of all persons charged with being insane or lunatic."¹⁷ The Public Defender was empowered to hire assistant Public Defenders and employees when such positions were authorized by the county.¹⁸ When a capital or "other important criminal action" was

lawyer informed her she had no defense and the best thing she could do was to plead guilty. This she did and was fined twenty-five dollars, but, having no money, was compelled to serve out her time, a day for each dollar, in the City Prison, at the end of which time she was cast penniless upon the streets.

¹⁴ The California State Bar was not created until 1927.

¹⁵ MICHAL R. BELKNAP, *TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY* (1992) at 12. As Professor Belknap points out, the movement to organize state bar associations and regularize admissions to the bar through bar examinations did not begin until the late 1800s. *Id.* The American Bar Association and the Los Angeles Bar Association were both formed in 1878. *Id.* See also Patricia Phillips, *Meeting Challenges: The Association's History of Accomplishment*, *LOS ANGELES LAWYER*, March 2003, 33.

¹⁶ *An Act to Create the Office of Public Defender, Provide for His Election, Define His Duties, and Fix His Compensation in the Several Counties, and Cities and Counties of New York*, reprinted in 55 ALB. L.J. 65 (1897) [Foltz's *Defender Bill*]. The bill is also available in the appendix to Babcock, *supra* note 2.

¹⁷ *Id.*

¹⁸ *Id.*

to be tried, the Public Defender could hire special co-counsel with judicial approval.¹⁹

It is noteworthy that Foltz's bill entitled *all* criminal defendants to representation by the Public Defender regardless of whether they were indigent or not. In her view the person of average means should not be "ruined by payment of counsel fees in order to be protected from a malicious prosecution."²⁰ She reasoned that because the right to the assistance of counsel was a constitutional right, it should be free like other constitutional rights such as the right to a jury.²¹ There was also a practical reason. As Babcock has observed, Foltz correctly foresaw that if the Public Defender was only for "the friendless and destitute" the office "would not command the respect or resources necessary to do the job."²² The bill nevertheless provided that a defendant with means still retained the option to hire his or her own counsel who could defend either alone or jointly with the Public Defender.²³

Although Foltz lobbied tirelessly for the Public Defender concept and introduced bills in state legislatures across the country, it was not until 1913 that the County of Los Angeles amended its charter to create the first Public Defender office, which opened its doors on January 7, 1914.²⁴ In contrast to Foltz's Public Defender who would be available to all, the Los Angeles office represented only those who were financially unable to afford counsel.²⁵ The Los Angeles Defender was tasked with representing

¹⁹ *Id.*

²⁰ Foltz, *Public Defenders*, *supra* note 1, at 393.

²¹ *Id.* at 398.

²² Babcock, *supra* note 2, at 1272.

²³ Foltz's *Defender Bill*, *supra* note 16.

²⁴ REGINALD HEBER SMITH, *JUSTICE AND THE POOR* (1919) at 117 [SMITH].

²⁵ Section 23, charter of Los Angeles County, which provides:

Upon request by the defendant or upon order of the court, the Public Defender shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged, in the Superior Court, with the commission of any contempt, misdemeanor, felony or other offense. He shall also, upon request, give counsel and advice to such person in and about any charge against them upon which he is conducting the defense, and he shall prosecute all appeals to a higher court or courts, of any person who has been convicted upon any such charge, where, in his opinion, such appeal will, or might reasonably be expected to, result in a reversal or modification of the judgment of conviction.

indigent defendants “charged in the Superior Court, with the commission of any contempt, misdemeanor, felony or other offense.”²⁶

Surprisingly, the Los Angeles charter also authorized the Public Defender to bring civil actions to collect unpaid wages (where the amount did not exceed \$100) and to defend any person unable to employ counsel who was sued in civil court where in the opinion of the Public Defender the defendant was being “persecuted or unjustly harassed.”²⁷ The reasons for providing civil legal aid appear to have their origins in the reform movement during the Progressive Era to improve the administration of justice generally. In *Justice and the Poor*, published in 1919, Reginald Heber Smith described in detail the defects in the administration of justice in America which had given rise to the widely held belief during that era that there was “one law for the rich and another for the poor.”²⁸ Because the poor could not afford legal advice and representation, they were easily taken advantage of and exploited. In response to this need for legal assistance, legal aid societies sprang up in many of the larger cities.²⁹ Some, such as the Voluntary Defenders Committee of New York provided criminal defense representation.³⁰ While most legal aid offices were funded by private donations, there were also a handful that operated as public bureaus of city governments.³¹ The Los Angeles County charter’s provision of counsel in certain limited civil cases reflects a similar attempt to give the poor access to the courts, denied them due to the inability to afford counsel.

Although Smith devoted much of his analysis in *Justice and the Poor* to the need for legal aid in civil cases, he also asserted that nowhere was the injustice arising from the lack of adequate counsel more apparent than in the criminal justice system.³² Smith examined the assumption that the rights and procedural protections given to a defendant were adequate safeguards against unjust conviction and concluded that standing alone they

²⁶ *Id.*

²⁷ Section 23, charter of Los Angeles County, *supra* note 25. This same provision was also enacted in state legislation establishing Public Defender offices. See CAL. GOVT. CODE § 27706.

²⁸ SMITH, *supra* note 24, at 105.

²⁹ *Id.* at 176 and 187-191.

³⁰ *Id.* at 117.

³¹ *Id.* at 173.

³² *Id.* at 105.

were ineffective because “[a]dequate protection, in the last analysis, depends on adequate representation.”³³ Most defendants then, as now, could not afford to hire counsel. The fairness of the criminal justice system thus depended upon defense representation provided through a system of assigning counsel for the indigent accused.

Examining the assigned counsel system, Smith echoed many of Foltz’s arguments. Although counsel assigned in capital cases were generally paid and given an allowance for expenses, in routine felonies, counsel was either not provided at all, or went unpaid and without funds to conduct any investigation.³⁴ Thus even a competent criminal defense lawyer appointed to a case was forced not only to provide representation for free, but also to pay for investigation expenses and expert witnesses out of his own pocket. The lawyers who could afford to provide such pro bono representation, however, were generally members of civil law firms and were largely exempt from assignment because they had no experience in criminal work.³⁵

Smith moreover found that the “shyster” lawyers Foltz had complained about had taken over the assigned counsel system and corrupted it.³⁶ Smith observed:

These men have learned how to make a living out of assigned cases. . . . They are willing to take assignments because they . . . know how to strip a prisoner and his relatives of every last cent . . . [by] magnify[ing] the crime . . . and the horrors of prison . . .

If well paid, the professional assigned counsel undertakes a defence [sic] that knows no bounds of honesty or propriety. . . . If not paid, he is perfectly willing to betray his client by neglecting the case, or forcing him to plead guilty, or deserting him altogether.³⁷

Thus except for murder cases, where reputable lawyers would step forward because of a sense of duty and the potential to enhance their reputation, the assigned counsel system deserved, in Smith’s judgment “unqualified

³³ *Id.* at 111.

³⁴ *Id.* at 112.

³⁵ *Id.* at 112-113.

³⁶ *Id.* at 111.

³⁷ *Id.* at 114. Smith maintained that it was because of the dishonest tactics of these shyster lawyers that prosecutors had become “aggressive” and “partisan.” *Id.* at 111 and 114.

condemnation.”³⁸ The salaried professional Public Defender envisioned by Smith, would, by contrast, be honest, ethical, and provide uniformly competent representation.

For Smith there was also an additional ideological reason for providing adequate defense services for the poor. This was necessary in his view to prevent a loss of confidence in the judicial system that might further encourage the anarchist movement. The turn of the century witnessed economic changes that gave rise to conflict as a result of the pressure from two growing influences — the escalating unrest between the laboring class and their employers and the great wave of immigration from eastern and southern European countries. It was a turbulent time in American history — from the Haymarket Square bombing in Chicago in 1886, and Panic of 1893 when the stock market crashed, to the assassination of President McKinley in 1901 by an anarchist and the bombing of the *Los Angeles Times* building in 1910.³⁹ The fear of “sedition and disorder” created by these and other similar events clearly emanated from Smith’s writings.⁴⁰

Smith was especially concerned about the masses of recently arrived unskilled immigrant workers.⁴¹ The International Workers of the World (known as the Wobblies), actively recruited such unskilled workers to join

³⁸ *Id.*

³⁹ See generally ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* (1960), ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877–1920* (1967) and RAY GINGER, EUGENE V. DEBS: *THE MAKING OF AN AMERICAN RADICAL* (1970). See also PBS, *THE AMERICAN EXPERIENCE, TIMELINE: ANARCHISM AND EMMA GOLDMAN*, [PBS TIMELINE] available at http://www.pbs.org/wgbh/amex/goldman/peoplevents/e_freespeech.html (All online sources cited in this article were last visited Dec. 1, 2010).

⁴⁰ SMITH, *supra* note 24, at 11.

⁴¹ Due to political and religious persecution, famine and the lack of economic opportunity, immigration jumped to almost 9,000,000 during the decade from 1900 to 1910. See Table No. HS-8. Immigration — Number and Rate: 1900 to 2001, available at <http://www.census.gov/statab/hist/HS-08.pdf>. See generally ALAN M. KRAUT, *THE HUD-LED MASSES: THE IMMIGRANT IN AMERICAN SOCIETY, 1880–1921*. Smith observed in *JUSTICE FOR THE POOR* that the immigrant

comes to this country . . . with high hopes, expecting to receive fair play and square dealing. It is essential that he be assimilated and taught respect for our institutions. . . . When he finds himself wronged or betrayed, keen disappointment is added to the sense of injustice. Through bitter disillusionment he becomes easily subject to the influence of sedition and disorder. *Id.*

its radical agenda, which was based upon Marxist principles.⁴² During one such effort in 1912, for example, San Diego passed an ordinance banning union activity in its business district. This sparked protest demonstrations which were brutally suppressed by both law enforcement and vigilantes.⁴³ It was against this backdrop of violence and unrest that Smith warned in the *Journal of the American Judicature Society* that

the revolutionary proponents of a new world order . . . may undermine public confidence in our justice if they attack its results, and demonstrate its inequality in case after case. Such an attack might come perilously near to succeeding because it has truth on its side. The present drive for Americanization furnishes an illustration. The plan is to educate the immigrant . . . so that he will understand and respect our institutions. But suppose after his education he finds in America institutions which, in part at least, do not deserve the respect of intelligent men. And if his contact with justice has been in the lower criminal courts where he has been preyed upon by runners, shysters and straw bondsmen,⁴⁴ may he not mistake

⁴² The I.W.W.'s constitution, drafted in 1908, called for class warfare, proclaiming: The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people, and the few, who make up the employing class, have all the good things of life. Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

PBS TIMELINE, *supra* note 39.

⁴³ Rosalie Shanks, *The I.W.W. Free Speech Movement: San Diego, 1912*, 19 THE JOURNAL OF SAN DIEGO HISTORY, SAN DIEGO HISTORICAL SOCIETY QUARTERLY, No. 1, Winter 1973.

⁴⁴ Straw bondsmen were individuals secured by shyster lawyers to swear false affidavits pledging non-existent property to secure the amount of the bond. If the prosecutor discovered the fraud, the bond was revoked, the defendant returned to jail, and of course the amount the defendant paid to the straw bondsman was lost. Even if the fraud went undiscovered, the bondsman would “surrender” his client at the first court appearance and the defendant would be returned to jail. News reports suggest that this practice was prevalent in California. A column reporting on court cases in a San Francisco paper in 1887, for example, noted two straw bondsmen were sentenced to significant prison terms (six and seven years, respectively) and described the trial judge’s lengthy speech that “reviewed the evils of the straw bond business and severely cored lawyers who would desecrate their oaths by offering to procure such bonds.” *The Straw*

the part which he knows for the whole and conclude that our judicial institutions ought to be overthrown?⁴⁵

Smith found a solution in the concept of the institutional Public Defender where counsel are paid for their services, resources are provided to cover needed expenses such as investigation and expert witnesses, and where “centralization of work makes for economy, efficiency, and responsibility.”⁴⁶ Smith praised the results of the Los Angeles Public Defender experiment and cited its work as empirical proof that the concept of an institutional defender office was not “visionary” or “subversive of fundamental rights” as a prelude to socialism.⁴⁷

In its first year of operation in 1914 the Los Angeles Public County Defender handled 260 felony cases.⁴⁸ Favorably comparing the results obtained by the Public Defender with that of privately retained counsel, Smith found that the Public Defender took approximately the same percentage of cases to trial as private counsel (22% vs. 26% for private counsel), had roughly the same success rate at trial (34% not guilty or hung jury vs. 36% for private counsel) and obtained probation for a slightly greater percentage of his convicted clients than private counsel (33% vs. 30%).⁴⁹ Smith also argued that the Public Defender had improved the efficiency of the court by filing fewer frivolous motions “for purposes of delay” and spending on average fewer days per trial than retained counsel.⁵⁰ For example, Smith cited statistics showing private counsel filed motions in 17% of their cases but were successful only 6% of the time, while the Public Defender filed motions in only 3% of its cases and was successful 25% of the time.⁵¹

One striking fact revealed by Smith’s statistics was that 70% of the clients represented by the Public Defender pleaded guilty, while retained

Bondsmen Sentenced, DAILY ALTA CALIFORNIA, August 25, 1887, available at <http://www.newspaperabstracts.com/link.php?id=25776>.

⁴⁵ R. H. Smith, *Denial of Justice*, 3 J. AM. JUD. SOC. 112, 113 (1919–1920).

⁴⁶ SMITH, *supra* note 24, at 115–16.

⁴⁷ *Id.* at 115 and 122–24.

⁴⁸ *Id.* at 122. After civil service examinations, Walton J. Wood was chosen as the first Public Defender. *Id.* at 117.

⁴⁹ *Id.* at 123.

⁵⁰ *Id.* at 122.

⁵¹ *Id.*

counsel entered guilty pleas in only 48% of their cases. Foltz had detested plea bargaining. In her view reducing a defendant's sentence because his guilty plea saved the county the time and expense of a trial was akin to bribery. She wrote: "Think of the spectacle of a *court* remitting part of a criminal's legal punishment for a money consideration!! And yet who has not witnessed it."⁵²

Foltz was a strong proponent of the adversary system and believed the truth emerged from the contest at trial fought by ethical advocates on both sides. Smith and the reformers of the Progressive Era, on the other hand, while not rejecting the adversary system, believed in a more collaborative system of justice.⁵³ Reacting to the dishonest tactics in which the shyster lawyers had engaged with impunity, the Public Defender they envisioned was not just an ethical trial lawyer, but also an officer of the court who, while ensuring that the innocent were protected, would not stand in the way of the guilty being fairly punished. This vision of the Public Defender of course begs both the larger philosophical question of whether such "truth" is indeed knowable and the more practical question of whether a busy staff attorney at a Public Defender office with a heavy caseload and limited resources for investigation has the ability to know the truth regarding guilt or innocence. Smith's statistics, however, point to the Achilles' heel of the Public Defender concept: the high volume of cases handled.

As Smith chronicled in *Justice and the Poor*, the Los Angeles experiment was successful in eliminating the abuses of the shyster lawyers, and the California state legislature subsequently passed legislation in 1921 authorizing county governments to create an office of the Public Defender.⁵⁴ That legislation, however, left it up to county governments to determine whether or not to have a Public Defender and also whether the chief Public

⁵² Foltz, *Public Defenders*, *supra* note 1, at 399 n.2.

⁵³ Smith, for example, praised the Los Angeles Defender's handling of insanity cases because, instead of engaging in a battle of experts, the defender and prosecutor agreed to have the court appoint three physicians to examine the accused and stipulated that no other experts would be called at trial on that issue. Smith observed that "[i]nstead of working at odds, it has been possible for the two attorneys to work in harmony to a common end." SMITH, *supra* note 24, at 121-22.

⁵⁴ CAL. GOVT. CODE § 27700. The current statute is derived from legislation enacted in 1921.

Defender would be elected or appointed.⁵⁵ Thus in contrast to Foltz's bill which mandated an elected Public Defender in each county, California has evolved into a hodgepodge of arrangements for providing indigent defense services. Only the Public Defender of the City and County of San Francisco is an elected official.⁵⁶

In the 1960s and 1970s U.S. Supreme Court decisions in *Gideon v. Wainwright*⁵⁷ and *Argersinger v. Hamlin*,⁵⁸ vindicated Clara Foltz's belief that defense counsel was constitutionally required in felony and misdemeanor cases. This spurred the growth of Public Defender offices to handle the constitutional mandate to provide counsel. The U.S. Department of Justice sponsored the National Advisory Commission on Criminal Justice Standards and Goals (1973)⁵⁹ and the National Study Commission on Defense Services (1979) which promulgated maximum attorney caseload standards and other guidelines for establishing such offices. In 1973, *The Other Face of Justice*, reporting the findings of a nationwide study of indigent defense delivery systems, found that California had 31 Public Defender offices and 16 assigned counsel systems.⁶⁰ In 11 counties defense services were provided through contractual arrangements with law firms or individuals.

THE PUBLIC DEFENDER TODAY

Clara Foltz envisioned that a professional Public Defender would represent virtually all criminal defendants. While this concept was never accepted in theory, as a practical matter today more than eight out of ten defendants accused of serious crimes in California are provided with counsel.⁶¹ Foltz

⁵⁵ CAL. GOVT. CODE § 27701.

⁵⁶ Web site of the San Francisco Public Defender's Office available at <http://www.sfpublicdefender.org>.

⁵⁷ 372 U.S. 335 (1963).

⁵⁸ 407 U.S. 25 (1972).

⁵⁹ NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, 276 (1973). See *infra* note 97.

⁶⁰ THE OTHER FACE OF JUSTICE, Appendix 1A, 90-91, and Appendix 1D, 112-13.

⁶¹ See L. Benner, *Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California* 45 CALIFORNIA WESTERN LAW REVIEW 263, 311 n.111 [*Systemic Factors*], reporting results from a survey of presiding Superior Court judges indicating a state-wide indigence rate in excess of 85%.

would be dismayed, however, at what has happened to the Public Defender concept and the current crisis confronting the delivery of indigent defense services. She, along with Reginald Heber Smith, would also find that like the themes from Greek tragedies, the problems they identified still persist.

In 2008, the California Commission on the Fair Administration of Justice (“Fair Commission”) reported that 33 of California’s 58 counties now have an institutional Public Defender office which serves as the primary provider of indigent defense services.⁶² While the number of counties employing an institutional Public Defender office grew by only two since 1973, the number of counties using contract defenders more than doubled. In 24 counties (most having a population of less than 100,000) defense services are now provided by contractual arrangements with either a law firm or solo practitioners.⁶³ Only one county, San Mateo, uses a bar association administered assigned counsel system as the primary provider. The San Mateo system, known as the Private Defender Program, actually functions, however, much like an institutional defender office. It has an investigative staff and employs supervising attorneys who provide training and monitor the performance of assigned counsel panel members.⁶⁴

While the San Mateo assigned counsel system has been a success, it appears that the assigned counsel systems in other counties were replaced by contract defenders. Unfortunately, California has had a disturbing history with respect to contract defenders. Contracts for indigent defense services are not regulated by any state standards nor is there even any requirement

⁶² FINAL REPORT, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE 92 (2008) [CCFAJ FINAL REPORT] *available at* <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>. An institutional Public Defender is defined as a county department where attorneys are employed on a salaried basis as public employees. While the primary institutional defender office handles the lion’s share of indigent cases, other arrangements must be made to represent co-defendants and other cases where the primary defender has a conflict of interest. This is done through the creation of one or more alternate defender offices, or through an assigned counsel panel or by contractual arrangement with a law firm or individual.

⁶³ *Id.* There is a variety of contractual arrangements. One law firm, for example, provides representation in eight different counties, while one county has seven separate contracts with solo practitioners.

⁶⁴ See SAN MATEO COUNTY BAR ASSOCIATION PRIVATE DEFENDER PROGRAM ANNUAL REPORT, FISCAL YEAR 2009–2010, *Administration and Structure*, 6-7; *Attorney Training*, 35-37; and *Attorney Evaluation*, 40-44.

that performance of the contractor be monitored for quality control. A monograph published by the U.S. Justice Department's Bureau of Justice Assistance revealed the dangers of such unregulated low bid contracts in the following report of a disastrous experience with a California contract defender:

In 1997 and 1998, a rural county in California agreed to pay a low bid contractor slightly more than \$400,000 a year to represent half of the county's indigent defendants. The contractor was a private practitioner who employed two associates and two secretaries, but no paralegal or investigator. The contract required the contractor to handle more than 5,000 cases each year. All of the contractor's expenses came out of the contract. To make a profit, the contractor had to spend as little time as possible on each case. In 1998, the contractor took fewer than 20 cases — less than 0.5 percent of the combined felony and misdemeanor caseload — to trial.

One of the contractor's associates was assigned only cases involving misdemeanors. She carried a caseload of between 250 and 300 cases per month.⁶⁵ The associate had never tried a case before a jury. She was expected to plead cases at the defendant's first appearance in court so she could move on to the next case.

One afternoon, however, the associate was given a felony case scheduled for trial the following week. The case involved multiple felony and misdemeanor charges. When she looked at the case file, the associate discovered that no pretrial motions had been filed, no witness list had been compiled, no expert witnesses had been endorsed, and no one had been subpoenaed. In short, there had been no investigation of any kind into the case, and she had no one to help her with the basics of her first jury trial.

The only material in the case file was five pages of police reports. In these reports she found evidence of a warrantless search, which indicated strong grounds for suppression. She told the judge she was not ready to proceed and that a continuance was necessary to preserve the defendant's Sixth Amendment right to counsel. The continuance was denied. The associate refused to move forward with the case. The contractor's other associate took over

⁶⁵ The national standard is only 400 misdemeanor cases per attorney *per year*.

the case and pled the client guilty to all charges. The associate who had asked for a continuance was fired.⁶⁶

The Justice Department report concluded: “In this California county, critics’ worst fears about indigent defense contract systems came true. When contract systems are created for the sole purpose of containing costs, they pose significant risks to the quality of representation and the integrity of the criminal justice system.”⁶⁷

In a deposition arising out of a lawsuit brought by the associate who had been summarily dismissed, the contract defender stated that he was able to handle such a high volume of cases because he pleaded 70% of his clients guilty at the first court appearance after spending thirty seconds explaining the prosecutor’s offer.⁶⁸ The county of Shasta, where this occurred, subsequently established an institutional Public Defender office.⁶⁹

The Fair Commission observed that despite the notoriety of this disturbing example of abuse, nothing has been done to prevent its recurrence and reported that “flat fee contracts are still being negotiated for defense services with no separate funding for investigators and ancillary services.”⁷⁰ Indeed, testimony before the Fair Commission revealed that some counties employing contract defenders have solicited bidding wars in an attempt to further cut the cost of indigent defense services. The Commission reported the story of one contract defender of long standing who had repeatedly fought off low bidders in the past with the support of the judiciary. His budget, which had been 41% of the District Attorney’s budget in 2000, declined to only 27% in 2005. Yet in 2006, he was undercut by a bid from a competitor that was almost 50% less than his submission. He lost the contract he had repeatedly held since 1990. According to the Commission:

He was undercut by a bid from John A. Barker & Associates, now operating as Richard A. Ciummo & Associates. Ciummo now contracts

⁶⁶ U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 1-2 (2000).

⁶⁷ *Id.*

⁶⁸ CCFAJ FINAL REPORT, *supra* note 62, at 95 (citing deposition of Jack Suter in *Fitzmaurice-Kendrick v. Suter*, Civ. S-98-0925 (E.D. Cal. 1999)). The lawsuit reportedly resulted in a substantial settlement for the plaintiff. *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

with eight California counties to provide defense services. . . . Ciummo's operation has been described as the "Wal-Mart Business Model" for providing defense services, "generating volume and cutting costs in ways his government-based counterparts can't and many private-sector competitors won't." Mr. Ciummo responds that he operates on a single-digit profit margin, and substantial savings result from hiring attorneys on a contract basis that does not include expensive benefit and retirement packages. While his contracts with counties provide separate reimbursement for interpreters and expert witness fees, there is no separate reimbursement for investigative services.⁷¹

The Commission noted that the successful bidder's Web site contains an advertisement stating: "What Would Your County Do With Hundreds of Thousands of Dollars?" The advertisement suggests the answer ("Better schools? Better fire protection? More police? Improved roads? More parks?") and boasts: "Every county we have contracted with has saved substantial funds over their previous method of providing these services. Additionally, our firm has an excellent record of containing cost increases."⁷²

In hard economic times, competitive bidding can obviously lead to a dangerous downward spiral of cost-cutting that can result in bids that provide an inadequate number of attorneys who have little or no experience, and who are given little or no training, supervision, or support services.

Unfortunately, no action has been taken to regulate indigent defense contracting and evidence of abuse continues to be reported. For example, Fresno County awarded a flat fee contract for \$80,000 to an attorney in a death penalty case where the Public Defender was unable to provide representation because of a conflict of interest. On appeal, after the defendant was sentenced to death, it was revealed that the contract attorney spent less than \$9,000 for investigation and expert witnesses, although in justifying his bid he had budgeted \$60,000 for such expenses. The attorney instead pocketed \$71,000 of the \$80,000 fee.⁷³ It was conceded that even

⁷¹ *Id.* at 95 (quoting Cheryl Miller, *Calif. Defense Firm Borrows Wal-Mart Business Model*, THE RECORDER, Dec. 26, 2007).

⁷² CCFJA FINAL REPORT, *supra* note 62, at 94-95 n.4.

⁷³ *People v. Doolin*, 45 Cal.4th 390, 457-58 (2009) (opinion of Kennard, J. concurring and dissenting). The California Supreme Court assumed without deciding that

though counsel was aware that the defendant had a learning disability and had been abused as a child, the contract attorney failed to conduct a background investigation and social study of defendant as required by ABA standards governing the duties of defense counsel in capital cases.⁷⁴ In *Sears v. Upton*,⁷⁵ the U.S. Supreme Court recently held that the failure to conduct an adequate investigation into the defendant's background before deciding on a mitigation strategy constituted deficient performance, even where counsel employed a plausible mitigation strategy.

Another example that reveals the contrast in the quality of representation between flat fee contractors and institutional Public Defenders was seen in the case of two juveniles who were both charged with the same crime: assault with a deadly weapon. The older of the two was represented by the Public Defender, but the younger, aged 15, was assigned a contract attorney who took juvenile cases for a flat fee of \$345 regardless of complexity. The Public Defender's client was adjudicated in juvenile court, but the younger boy, represented by the contract attorney, was charged as an adult. Upon transfer to Superior Court he was represented by the alternate Public Defender who immediately recognized that the child had serious mental deficits and should not have been transferred to adult court. It was later determined that the contract attorney had "failed to provide even a minimal level of representation" and the case was transferred back to juvenile court.⁷⁶

The Fair Commission, noting that state laws impose standards for county contracts involving public works, has recommended that the state legislature adopt at least minimal standards to protect against such demonstrated abuses where the liberty of a citizen is at stake.⁷⁷

counsel's performance was deficient, but on the record produced on direct appeal found no prejudice was shown as required by *Strickland v. Washington*, 466 U.S. 668 (1984). Two Justices (Kennard and Werdegar) dissented arguing that prejudice should be presumed because of the inherent conflict of interest created by the flat fee contract. Post conviction proceedings are still pending.

⁷⁴ AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989).

⁷⁵ 130 S. Ct. 3259 (2010).

⁷⁶ Molly Hennessy-Fiske, *Juvenile Justice Diverges in Court*, LOS ANGELES TIMES, June 14, 2010.

⁷⁷ CCFAJ FINAL REPORT, *supra* note 62, at 97.

THE IMBALANCE BETWEEN DEFENSE AND PROSECUTION

Clara Foltz saw the institutional Public Defender as a means of correcting the imbalance between counsel for the accused, who was often either inept or dishonest, and the strong district attorney, who was often overzealous because the “pride of contest” overcame the “spirit of justice.”⁷⁸ The institutional Public Defender office has, when properly implemented, eradicated this gross imbalance. By providing an organization where properly trained and supervised attorneys can embark upon a professional career as a Public Defender, defense counsel can be on a par with their counterpart in the district attorney’s office and provide excellent and cost-effective defense representation. The San Francisco Public Defender, for example, represented over 28,000 clients during 2009, obtained an acquittal rate at trial of 46.5% (which would be the envy of many private practitioners who get to choose their clients) and saved an estimated “\$5 million in incarceration costs [through placement of clients] in vocational, educational, substance abuse and mental health programs.”⁷⁹

There can be no doubt, therefore, that the scales of justice have tipped toward a more even balance as thousands of dedicated career Public Defenders and their support personnel strive daily throughout California to provide the best representation possible. As a former client of the Los Angeles County Public Defender’s Office stated in tribute after being acquitted of murder on the grounds of self defense:

Even if I had \$10,000 I couldn’t buy that kind of defense. . . . And here I am a nobody, just a 52-year-old bartender in a jam. When a plain nobody gets a defense only a rich somebody could buy, you got a real great country.⁸⁰

⁷⁸ C. Foltz, *Duties of District Attorneys in Criminal Prosecutions*, 18 CRIM. L. MAG. & REP. 415 (1896).

⁷⁹ Web site of the San Francisco Public Defender’s Office, available at <http://sfpublicdefender.org/media/2010/01/year-report-demand-public-defenders-remains-high-economic-crisis/>.

⁸⁰ Web site of the Los Angeles County Public Defender, available at <http://pd.co.la.ca.us/History.html>.

Despite such successes, however, serious imbalances still remain. Foltz could not have envisioned the tremendous volume of cases our criminal justice system handles today. As a nation we imprison more citizens per capita than any other country in the world.⁸¹ Starting with only 260 felony cases in 1914, the Los Angeles County Public Defender (LACPD), for example, now handles an “estimated 420,000 misdemeanor cases, 100,000+ felony cases, 41,000 juvenile cases and 11,000 mental health cases, for a total of over 571,000 cases annually.”⁸²

Funding Disparities

The financial burden of providing counsel falls primarily upon county governments. Recent empirical research conducted in 2007 for the Fair Commission reveals, however, that tremendous disparities exist from county to county regarding the resources allocated to indigent defense services. For example, while the average spent per capita on indigent defense for all counties is \$19.62, Sutter County with a population of 91,000 spends only \$5.85 per capita.⁸³ Significant disparities in expenditure also exist between counties within the same population class. Butte County, for example, with a population of 217,000 spends less than \$10.00 per capita on indigent defense while Yolo County, with a population of 190,000 spends almost \$31.00 per capita.⁸⁴

Still more glaring is the disparity between funding for the prosecution and funding for indigent defense. As a consequence of local budgetary decisions, the Yolo County Public Defender Office, for example, has been forced to provide representation (including representation in a death penalty case) with less than half of the resources of the prosecution.⁸⁵ Looked at from the viewpoint of resources per attorney, the district attorney has the advantage of over \$100,000 more per staff attorney than the Public

⁸¹ The United States imprisons over 700 persons per 100,000 population. R. WALMSLEY, *WORLD PRISON POPULATION LIST* (7th ed.) King's College, London, International Centre for Prison Studies, available at <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf>.

⁸² COUNTY OF LOS ANGELES, ANNUAL REPORT 2009–10, 24.

⁸³ *Systemic Factors*, *supra* note 61, at 309.

⁸⁴ *Id.* at 310.

⁸⁵ *Id.*

Defender.⁸⁶ An even more extreme example is Sutter County, which spends five times more on prosecution than it does on indigent defense.⁸⁷

In *Argersinger v. Hamlin*, Chief Justice Burger declared that “the system for providing counsel and facilities for the defense should be as good as the system which society provides for the prosecution.”⁸⁸ Yet statewide, for every dollar spent on prosecution, California counties spend only fifty-three cents on indigent defense.⁸⁹ At least 85% or more of the criminal docket in the Superior Courts of California, however, must be handled by the indigent defense system.⁹⁰ In some counties the indigence rate is as high as 95%.

Prosecutors have argued that they need greater resources because they have to screen arrests made by police that do not result in charges. This argument has been refuted, however, by a statistical analysis which shows that the additional prosecution workload to screen such arrests is more than offset by the additional workload imposed on indigent defense systems to handle non-traffic misdemeanor cases that occur within cities.⁹¹ Because these cases are prosecuted by the city attorney rather than the district attorney, they are not part of the prosecution’s workload. In addition, the indigent defense system has other added workloads not shared by the district attorney. It must also provide representation for clients involved in involuntary mental health commitments and conservatorships. Thus, even if privately retained counsel handle between 5% to 15% of the criminal caseload, one would not expect to see such gross disparities in funding between the prosecution and defense functions.

The disparity in funding between prosecution and defense is also not limited to less populated counties that might be expected to have less

⁸⁶ *Id.* This comparison actually overstates the resources per Public Defender staff attorney because it is based upon the indigent defense budget for the county as a whole and not all those funds go to Public Defender office. It also does not include additional investigative resources available to the prosecutor from the city police, county sheriff’s department and state highway patrol.

⁸⁷ *Id.* at 310.

⁸⁸ *Argersinger v. Hamlin*, 407 U.S. 25, 43 (1972).

⁸⁹ *Systemic Factors*, *supra* note 61, at 311.

⁹⁰ *Id.* at 311 n.111.

⁹¹ *Id.* at 314 n.117. The comparison showed that indigent defenders handled over 60,000 more cases statewide than did county prosecutors.

adequate financial resources. The Fair Commission study conducted an in-depth examination of funding for the district attorney's office and the indigent defense system in Santa Clara County, one of the richest counties in the nation. In terms of per capita income, Santa Clara ranked 17th out of 3,000 counties in 2008.⁹² Yet in terms of parity with the prosecution, funding for Santa Clara County's indigent defense system was below the state average. For fiscal year 2007 the Santa Clara prosecutor's budget was more than twice that of all the indigent defense components combined.⁹³ This translates into a dramatic disparity in staffing resources. The Santa Clara County District Attorney's Office, which has its own crime lab (funded out of a separate budget financed in part by fines from convicted drug offenders pursuant to Health and Safety Code section 11372.5) had a staff of over 500 in 2007.⁹⁴ The primary and alternate Public Defender offices combined had a budgeted staff of only 206.

This type of disparity in resources has consequences, as the indigent defense system simply cannot keep up with the volume of cases generated by the more generously resourced law enforcement and prosecution components of the criminal justice system. Once held to be an exemplary office, the primary Santa Clara County Public Defender was forced after budget cuts to ration representation and had to take the drastic step of no longer providing counsel at misdemeanor arraignments. After newspaper articles revealed that uncounseled defendants were pleading guilty at arraignment without being aware of the consequences, some funding was

⁹² *Id.* at 318 n.122.

⁹³ In addition to county funding, the Santa Clara District Attorney received \$1.4 million from the State of California's Department of Insurance and \$1.9 million from the federal government's Office of Emergency Services. Other grants included an Anti-Drug-Abuse Enforcement Program Fund, Child Abuse Vertical Prosecution Fund, D.A. Worker's Compensation Fraud Grant Fund, Hi-Tech Identity Theft Program Fund, and Welfare Fraud Investigation Fund. Combined with county funds and money from the Public Safety Sales Tax (known as Proposition 172 funds) the prosecutor's budget for 2007 totaled over \$86 million. The total funding for the Santa Clara County Public Defender Office, Alternate Public Defender Office, and Legal Aid Society of Santa Clara County, which administers an assigned counsel panel to handle conflict of interest cases the Alternate Public Defender cannot represent, totaled only \$42.7 million. *Id.* at 318 n.123.

⁹⁴ *Id.* at 319.

finally restored to the office.⁹⁵ If a prosperous county like Santa Clara can only grudgingly muster the will to provide even basic defense services, the picture appears bleak for the future of indigent defense in counties across the state that are less financially well-endowed.

Excessive Caseloads

The disparity in funding might be less disturbing if Public Defender offices were given adequate staffing to handle the caseloads generated by the prosecution. However, as U.S. Attorney General Eric Holder candidly acknowledged in his keynote address at the 2010 National Symposium on Indigent Defense, Public Defender offices across the country are overloaded with too many cases. California is a prime example. When asked to rate the health of the institutional Public Defender in the county in which they practiced, 73% of private practitioners certified as criminal defense specialists indicated that excessive caseloads were a significant problem for the institutional Public Defender in their jurisdiction.⁹⁶ The majority of Public Defender offices in California carry caseloads that exceed the national standards promulgated by the National Advisory Commission on Criminal Justice Standards and Goals (NAC).⁹⁷ In Santa Clara County, for example, the Primary Public Defender office staff attorneys were attempting to handle more than 300 felonies annually, which is twice the national standard.

A recent examination of the Los Angeles County Public Defender (LACPD) shows the impact that the excessive caseload crisis has had on

⁹⁵ Aram James, *Public Defender Must Staff Misdemeanor Courts*, SAN JOSE MERCURY NEWS, January 7, 2010; *Public Defender Access Expanded*, SAN JOSE MERCURY NEWS, June, 26, 2010.

⁹⁶ *Systemic Factors*, *supra* note 61, at 286.

⁹⁷ *Id.* at 286 citing NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, 276 (1973). Standard 13.12 specifies maximum caseload standards per attorney per year as follows: for felonies (150), misdemeanors (400), juvenile (200), mental health (200), and appeals (25). As the National Study Commission on Defense Services later observed, however, these standards should only be used as a starting point because only an actual workload study can determine the maximum number of cases an attorney can effectively handle given the unique practice environment in a particular jurisdiction, including logistical considerations and other operational characteristics that impact defense representation such as prosecutorial charging and plea bargaining practices and judicial sentencing practices.

misdemeanor defendants. Observing the arraignment of misdemeanor defendants, the author reported:

The processing of L.A. citizens in misdemeanor arraignment court is nothing short of Orwellian. Detainees are brought into the courtroom in groups, shackled together in pairs at the wrist, and held in a cage-like enclosure [the 'box'] off to one side of the courtroom during the proceedings . . . and must communicate with the judge through slats.

LACPD misdemeanor attorneys dispose of 1,200 cases per attorney per year, about three times the recommended national maximum. In-court observation supports the conclusion that LACPD's misdemeanor caseload is grossly excessive. . . . Only after their arrival at misdemeanor arraignment court do detainees have the opportunity to speak with counsel for the first time. Police reports are transported along with detainees, so that Public Defenders must await the arrival of their prospective clients before viewing the evidence [against them]. . . . The majority of misdemeanor cases are disposed of by guilty pleas at arraignment. Since detainees generally meet their Public Defenders only a few moments before appearing before the judge, many guilty pleas take place without any investigation into the facts or the opportunity for a full-scale interview. Terms of the plea agreement generally include a fee representing recoupment of a portion of the cost of providing Public Defender services.

The author witnessed a group of African American women paraded into the box in groups of six, each shackled to a partner. In order to rise and approach the slats when her case was called, each woman was dependent upon the willingness, or unwillingness, of her partner to rise and take a few steps. Each woman signed a plea agreement, clumsily juggling papers between her free hand and her shackled hand. . . .

The confusion apparent in the L.A. misdemeanor arraignment court is illustrative of an assembly-line type of justice. On one occasion, a male defendant stood in the box, straining to hear the judge, who spoke in a soft voice. The defendant called out, "I can't hear you. I don't know what's going on!" A second defendant, a

female, was informed that her bail would be \$10,000, whereupon she changed her plea to guilty so that she could be released. In the latter case, California's bail bond system⁹⁸ and the defendant's poverty determined the outcome.⁹⁹

Recent news reports reveal that excessive caseloads in several counties have become markedly worse. In June of 2010, for example, it was reported in a "Gideon Alert," published by the National Legal Aid and Defender Association, that both the Sacramento County and San Joaquin County Public Defender offices were operating with caseloads that were two to four times the maximum allowed by national standards.¹⁰⁰

Lack of Investigative Assistance

The maximum attorney caseload standards, moreover, are predicated upon having adequate investigative assistance. Yet over two-thirds (69%) of the presiding Superior Court judges surveyed in the study conducted for the Fair Commission stated that the lack of resources to investigate indigent cases thoroughly was a problem in their jurisdiction.¹⁰¹ Two rural Public Defender offices had no investigator on staff at all and one of those offices reported having significant difficulty in obtaining court approval for funds to obtain investigative assistance.¹⁰²

Public Defender offices employing staff investigators reported that their investigators were also laboring under excessive workloads.¹⁰³ The

⁹⁸ To obtain bail the defendant would have had to pay the bondsman 10% (\$1,000) which was apparently more than the fine. L. BENNER, BAIL PROJECT MANUAL, 25, California Western School of Law (2010).

⁹⁹ Nancy Albert Goldberg, *Los Angeles County Public Defender in Perspective*, 45 CAL. W. L. REV. 445, 466-67 (2009).

¹⁰⁰ See David Carroll, GIDEON ALERT: CALIFORNIA COUNTIES EXHIBIT WIDE DISPARITY OF SERVICES, National Legal Aid & Defender Association, available at <http://www.nlada.net/jseri/blog/gideon-alert-california-counties-exhibit-wide-disparity-services>.

¹⁰¹ *Systemic Factors*, *supra* note 61, at 278.

¹⁰² *Id.* at 288 and Figure 6 at 282. Also revealing was the fact that 100% of the institutional Public Defender offices reported that they had difficulty interviewing prosecution witnesses. More than one quarter (27%) classified this problem as "serious." *Id.* at 289.

¹⁰³ *Id.* at 288.

recommended standard is one investigator for every three attorneys.¹⁰⁴ In several counties, however, the ratio was discovered to be as high as eight attorneys to just one investigator. One of these offices handled ten death penalty cases during the year.

As the U.S. Supreme Court has explained, the “core” of the Sixth Amendment right to counsel “has historically been and remains today, the opportunity for a defendant to consult with an attorney, and to have him investigate the case and prepare a defense for trial.”¹⁰⁵ In *Powell v. Alabama* the Court recognized that the period between arraignment and trial is “perhaps the most critical period” of the proceedings against an accused.¹⁰⁶ Because the majority of felony cases in California are disposed of by guilty pleas that are entered less than 45 days after the filing of charges,¹⁰⁷ the inability of defense counsel to conduct a prompt investigation into guilt or innocence thus amounts to nonrepresentation at this critical investigative stage. Not surprisingly, an analysis of over 2,500 California appellate court decisions involving claims of ineffective assistance of counsel revealed that the failure to conduct an adequate investigation has been a major cause of ineffective representation.¹⁰⁸ By continuing to tolerate excessive attorney and investigator workloads, we continue to run an unnecessary and unacceptable risk that an innocent accused will be wrongfully imprisoned or executed.

It should be noted that the difficulty created by the lack of adequate investigative resources is aggravated by several additional factors. First, virtually all of the Public Defender offices have no contact with an indigent defendant until they are appointed at the arraignment, several days after arrest.¹⁰⁹ This delay jeopardizes the ability to preserve evidence and makes it more difficult to locate witnesses who may be favorable to the defense.

¹⁰⁴ NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS, STANDARD 4.1 (1976).

¹⁰⁵ *Kansas v. Ventris*, 129 S. Ct. 1841 (2009) at 1844-55.

¹⁰⁶ *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

¹⁰⁷ See CALIFORNIA JUDICIAL COUNCIL, 2010 COURT STATISTICS REPORT (covering fiscal year 2008–09) Tables 8a and 10a disclosing that the disposition of 71% of all felony filings in California occurs in less than 90 days, while over half (56%) are disposed of in less than 45 days.

¹⁰⁸ *Systemic Factors*, *supra* note 61, at 277-78, Figure 3.

¹⁰⁹ *Id.* at 290.

Second, as a result of the loss of California's traditional preliminary hearing, occasioned by the passage of Proposition 115, defense counsel no longer have the right to confront prosecution witnesses at a preliminary hearing.¹¹⁰ The statements of witnesses, untested by cross-examination, can simply be presented by a police officer, who may not even have been the interviewing officer.¹¹¹ As a result, the preliminary hearing has become an empty ritual that deprives defense counsel of the ability to make an informed assessment of the prosecutor's witnesses' credibility and, given the limited investigative resources otherwise available to the defense, effectively precludes an intelligent evaluation of the merits of the case against an accused.¹¹² To make matters worse, almost half of the Public Defender offices surveyed by the Fair Commission study reported that felony cases are routinely disposed of at a disposition conference held approximately a week after the arraignment, prior to the time set for preliminary examination.¹¹³ Where the prosecutor presents a "take it or leave it" offer at this early stage, pressure is thus placed upon the defendant to accept the plea bargain before there has been time to conduct any meaningful investigation.

Perhaps only a defense attorney who has advised a defendant to plead guilty to reap the benefits of a "good deal" — and later discovers that the client was innocent — can truly appreciate the wisdom of the law's command that a defendant should be presumed innocent until proven guilty. When defense counsel, without adequate investigation, recommends that a client pleaded guilty, the weight of that advice can tip the scales and cause an innocent defendant to rationally forego a trial, the outcome of which he believes is a foregone conclusion. Numerous cases have documented that innocent defendants have pleaded guilty to avoid a more severe prison sentence even though the evidence against them was later discovered to be perjured testimony and planted evidence.¹¹⁴ Recognizing the vital role defense

¹¹⁰ *Id.* at 335-339.

¹¹¹ *Id.*

¹¹² While the prosecutor retains the right to call key witnesses, both indigent defense providers and certified criminal defense specialists reported that key witnesses, such as victims and eyewitnesses, were rarely or only occasionally called at a preliminary hearing. *Id.* at 337.

¹¹³ *Id.* at 294.

¹¹⁴ See Ted Rohrlich, *Scandal Shows Why Innocent Plead Guilty*, LOS ANGELES TIMES, Dec. 31, 1999, reporting on the Rampart Division police scandal in Los Angeles

investigation serves in our adversarial criminal justice system, the ABA Standards on Criminal Justice state that counsel has a duty to investigate “the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case . . . regardless of the accused’s admissions or statements to defense counsel.”¹¹⁵ An example demonstrating the necessity for fulfilling this duty is found in the reported case of an innocent juvenile who was charged with armed robbery of a cab driver and tried as a adult:

Footprints in the snow led from the crime scene to the defendant’s family home, where he was arrested and identified by the victim as the robber. Although the youthful defendant expressed his willingness to plead guilty, investigation disclosed that his older brother, who would have faced life imprisonment as a habitual offender, was the actual assailant. The family, believing the younger brother would only be sentenced as a juvenile, had kept silent about the misidentification in order to protect the older brother.¹¹⁶

Prosecutorial Misconduct

“When a prosecutor plays by Machiavelli’s rules and neither judge nor counsel for defense resists, our system and all hope for justice is destroyed.”¹¹⁷

In a thoughtful and revealing book, Arthur Campbell, tells of convicting an innocent man as a young prosecutor. Defense counsel had failed to conduct an adequate investigation, the police had been inept, and Campbell candidly confessed that he perhaps had been overzealous in his prosecution of the hapless defendant because of “my warrior’s will to win.” The story corroborates Foltz’s view that prosecutors, in the heat of an adversarial contest, can become caught up in, as Campbell puts it, “the fighter’s lust

where corrupt officers committed perjury and planted evidence causing numerous guilty pleas to be overturned. *See also* WHEN THE INNOCENT PLEAD GUILTY, The Innocence Project, available at http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php.

¹¹⁵ ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 126, Standard 4-1.3(3) (3d ed. 1992).

¹¹⁶ *Systemic Factors*, *supra* note 61, at 289 n.49.

¹¹⁷ Arthur W. Campbell, TRIAL & ERROR: THE EDUCATION OF A FREEDOM LAWYER, VOLUME TWO: FOR THE PROSECUTION, 123 (2010).

for victory” and lose sight of the “spirit of justice” which should properly guide their conduct.¹¹⁸

While intended to be a counterweight to correct this condition, under-resourced and overburdened Public Defenders have not proven to be very successful in preventing the type of prosecutorial abuses Foltz sought to eliminate. Among the litany of unfair prosecutorial practices described by Foltz, many would not be unfamiliar to readers of California appellate court opinions today. A recent study of California appellate cases from 1997 to 2009 documented over 700 instances in which the court found that a prosecutor had committed misconduct.¹¹⁹ In addition to the misconduct found in *People v. Wells*¹²⁰ (interjecting inadmissible evidence for the purpose of prejudicing the defendant), the types of misconduct found by the Misconduct Report ranged from intimidating witnesses to presenting false evidence.¹²¹

Also documented were constitutional violations that would not yet have been established as such in Foltz’s time, including discriminatory jury selection, violating the defendant’s Fifth Amendment right to remain silent and, perhaps most important of all, the failure to disclose exculpatory evidence.¹²² The Fair Commission likewise found substantial evidence that prosecutors were not complying with their statutory and constitutional obligations to provide essential information to the defense through discovery procedures. An overwhelming majority (over 90%) of both defenders and experienced private criminal defense attorneys reported that prosecutors failed to turn over evidence favorable to the defendant (*Brady*

¹¹⁸ *Id.* at 122. Campbell, after discovering evidence post-trial that exonerated the defendant, corrected the error. *Id.* at 105.

¹¹⁹ K. RIDOLFI AND M. POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 [MISCONDUCT REPORT], Northern California Innocence Project, Santa Clara University School of Law at 3.

¹²⁰ Discussed *Id.* at 3.

¹²¹ See also *Genzler v. Longanbach*, 410 F.3d 630 (2005) detailing allegations in a civil rights case against a San Diego prosecutor for suborning perjury in a murder case. The lawsuit later settled out of court. Confirmed by conversation with Patrick L. Hosey, attorney for Genzler.

¹²² MISCONDUCT REPORT, *supra* note 119, at 25. Prosecutors have a constitutional duty to disclose evidence favorable to the accused, including evidence that could be used to impeach a prosecution witness. *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Bagley*, 473 U.S. 667 (1985).

evidence) and delayed providing even routine information the defense is statutorily entitled to receive in discovery.¹²³

The Misconduct Report concluded:

[P]rosecutors continue to engage in misconduct, sometimes multiple times, almost always without consequence. And the courts' reluctance to report prosecutorial misconduct and the State Bar's failure to discipline it empowers prosecutors to continue to commit misconduct. While the majority of California prosecutors do their jobs with integrity, the findings of the Misconduct Study demonstrate that the scope and persistence of the problem is alarming. Reform is critical.¹²⁴

Professional Independence

Gideon v. Wainwright established the right of state criminal defendants to the “guiding hand of counsel at every step in the proceedings against [them].” . . . Implicit in the concept of a “guiding hand” is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.¹²⁵

Clara Foltz thought the Public Defender should be elected to ensure the professional independence necessary to carry out the defense function in an adversary system and guarantee equal stature with the District Attorney. However, with the exception of San Francisco, today all Public Defenders are chosen by county government, sometimes with judicial approval required, and serve at the will of either the county board of supervisors or the county's chief executive officer.¹²⁶

Reginald Heber Smith had been wary of local government control over the provision of civil legal aid and indigent defense services. In *Justice and the Poor*, he wrote: “It is commonplace that many American municipalities possess improper and inefficient governments in which politics play

¹²³ *Systemic Factors*, *supra* note 61, at 279-80.

¹²⁴ MISCONDUCT REPORT, *supra* note 117, at 5.

¹²⁵ *Polk County v. Dodson*, 454 U.S. 312, 322 (1981).

¹²⁶ *Systemic Factors*, *supra* note 61, at 299-300, CAL. GOVT. CODE § 27702 (West 2009).

an undue part. It is always a question whether it is safe to entrust an essential service such as legal aid to such a government.”¹²⁷ Smith was here referring to the unfortunate experience he had witnessed with respect to publicly funded legal aid bureaus that were controlled by municipal governments. Initially there had been adequate funding and little political interference.¹²⁸ However, in 1917 several incidents made the dangers of politically controlled legal services manifest. After an election in Dallas, Texas, the new mayor dismissed the department head responsible for overseeing the Legal Aid Bureau and attempted to appoint his personal friend to the bureau. When this prompted a “storm of protest” the mayor abolished the Legal Aid Bureau.¹²⁹ Similarly, in Portland, Oregon, that same year, the attorney who headed the combined legal aid and defender office (established in 1915) had not supported the newly elected mayor. Because the attorney held a permanent civil service appointment and could not be fired, the new mayor simply had the city council abolish the legal aid and defender office.¹³⁰ Smith therefore concluded in 1919 that although the “ultimate goal” was for legal services for the poor to “become part of the state’s administration of justice,” whether they should be publicly or privately funded in the short term was a matter that depended upon local conditions.¹³¹

Smith’s insight that funding and control at the local level makes the delivery of legal services for the poor vulnerable to political interference unfortunately still resonates today almost a century later.¹³² California has

¹²⁷ SMITH, *supra* note 24, at 184.

¹²⁸ *Id.* at 185.

¹²⁹ *Id.* at 185-86.

¹³⁰ *Id.* at 186.

¹³¹ *Id.*

¹³² Although direct interference in the operation of a Public Defender office by county officials would seem unthinkable today, it does occur. Recently, Chief Public Defender Edwin Burnette of Cook County, Illinois, successfully sued the president of the Cook County Board of Commissioners to prevent such interference with management of the Public Defender Office in Chicago. The county board president had unilaterally selected thirty-four assistant public defenders for termination (called lay-offs) and had ordered other staff to take unpaid furlough days. In a unanimous decision, the Illinois Appellate Court ruled that the county board president “lacked the authority to select whom to hire, fire or retain among the public defender’s staff.” *Burnette v. Stroger*, No. 1-08-2908, slip op. at 32 (Ill. App. Ct. Mar. 30, 2009). Unfortunately the

had a sad history of harassment and termination of chief Public Defenders who have had the courage to fight against excessive caseloads. Chief Public Defender Sheldon Portman of the Santa Clara County Public Defender Office, for example, was first reprimanded, then denied a pay raise and finally fired after persistently challenging excessive caseloads. His offense was stating at a public budget hearing that his staff attorneys would be violating their ethical duty to provide competent representation and could face professional disciplinary action if the board did not provide funding for additional lawyers. Although Portman was later vindicated by an ABA Ethics Opinion regarding the duties of defense counsel when faced with an excessive caseload,¹³³ he lost the legal battle over his vindictive firing.¹³⁴

Unfortunately the Portman example is not an isolated incident. A chief Public Defender, who was a member of the Fair Commission, related that at the time they were offered the position, it was made very clear to them that they would be expected to do the job with the limited resources given to them and if they could not, then the board would find somebody else who would.¹³⁵ In research conducted for the Fair Commission, three fourths (73.1%) of the responding institutional Public Defenders reported that county board pressure to keep costs down was a significant problem

courageous Chief Defender paid the ultimate price for this victory. While he was not an “at will” employee, having secured the protection of a contract for a term of years, he was nevertheless at the end of his contract, which was not renewed. See Hal Dardick, *Public Defender Wins Last Case Over Stroger; County Board Chief has Limited Control of Appointee’s Office*, CHICAGO TRIBUNE, Apr. 1, 2009, at C6. Clara Foltz, who believed in the democratic process, would perhaps not have been surprised to learn that county board President Stroger subsequently lost his bid for reelection. Patrick Boylan, *Stroger era ends in Cook County*, NWI.COM, Dec 1, 2010, available at http://www.nwitimes.com/news/local/illinois/article_def 7c4be-8d14-502b-87e3-ee4366014780.html.

¹³³ ABA FORMAL OPINION 06-441: ETHICAL OBLIGATIONS OF LAWYERS WHO REPRESENT INDIGENT CRIMINAL DEFENDANTS WHEN EXCESSIVE CASELOADS INTERFERE WITH COMPETENT AND DILIGENT REPRESENTATION, May 13, 2006.

¹³⁴ See *Portman v. County of Santa Clara*, 995 F.2d 898, 901 (9th Cir. 1993) holding that Portman had no standing to challenge the constitutionality of the “at will” statute on Sixth Amendment grounds, and had no due process rights concerning his termination because as an “at will” employee he had no property interest in his job. See also *Wilson v. Superior Court*, 240 Cal. Rptr. 131 (Cal. Ct. App. 1987) and Gail Diane Cox, *Public Defenders Find Independence Can Be Precarious*, L.A. DAILY J., Feb. 21, 1986 (both describing other similar incidents).

¹³⁵ *Systemic Factors*, *supra* note 61, at 300 n.82.

in their jurisdiction.¹³⁶ The American Bar Association has recommended that to safeguard professional independence, the oversight of a Public Defender system should be in the hands of a nonpartisan board of trustees.¹³⁷ However, none of the institutional Public Defenders in California appear to have the protection of such a board.¹³⁸

WHAT WOULD CLARA FOLTZ THINK OF TODAY'S PUBLIC DEFENDER?

If Clara Foltz could return today to see how her concept for a Public Defender has evolved, she would no doubt be gratified to see how popular and widespread it has become. The majority of California's counties have adopted her basic idea, and for good reason. The institutional Public Defender office is, in theory, the most effective delivery system for providing quality representation in a cost-effective manner. Its capacity to develop and maintain skilled expertise, provide comprehensive training and supervision, and furnish the support services and supportive environment necessary for effective representation is without equal.

At the same time, however, she would undoubtedly be disappointed to find that California's Public Defenders have been denied the independence she sought to ensure. Imagine a district attorney or a judiciary that served at the will of the county board of supervisors. Why should an equally important component of the criminal justice system be treated differently? The lack of independence has been due in part to the failure to make the position of chief Public Defender an elected office as Foltz envisioned, or in the alternative, to insulate it from political pressure by having a governing board of trustees, as the ABA has recommended. The lack of independence has also been a result of the refusal to make the Public Defender available to all

¹³⁶ *Id.* at 299-300.

¹³⁷ ABA STANDING COMM'N ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>. These standards, approved by the ABA House of Delegates in February 2002, were created to assist governmental officials and "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." *Id.*

¹³⁸ *Systemic Factors*, *supra* note 61, at 299.

criminal defendants, as Foltz planned. These omissions have made it difficult for the Public Defender to marshal political support for the institution.

The failure to have a broad base of political support for the Public Defender has of course, as Foltz foresaw, made it more difficult to secure adequate resources. Yet the Public Defender today represents more than 85% of the defendants accused of serious crimes. While the average citizen probably never thinks about whether he or she could afford competent criminal defense representation, a staff attorney from the Public Defender's office is in fact the attorney upon whom innocent middle class citizens must rely for their defense if wrongfully accused of a crime.

Funding decisions for the indigent defense system, moreover, have been left in the hands of local officials who, chafing under an unfunded mandated imposed by the federal Constitution, understandably desire to spend only the bare minimum necessary to keep the system functioning. Most defendants plead guilty because of the pressures created by a system of plea bargaining in which no penalty is imposed upon a prosecutor who overcharges to increase the incentive to plead. Thus, only enough funding to process the "presumed guilty" is deemed necessary.

While Foltz would have been appalled at our current system of plea bargaining, she would have been equally disturbed at the tremendous imbalance between the resources allocated to the prosecution and the system for providing defense services. The fact that on average a Public Defender office receives only about half the resources granted to the District Attorney makes it exceedingly difficult, even given heroic efforts, for the Public Defender to serve as the counterweight that she envisioned would balance the scales of justice. Equally troubling is the glaring disparity *between* counties in their ability and in some cases their willingness to adequately fund indigent defense services.

Nevertheless, the Public Defender has been able to achieve one goal of both Clara Foltz and Reginald Heber Smith: the elimination of the incompetent assigned attorney and the unethical and greedy "shyster" lawyer who preyed upon criminal defendants with limited resources and corrupted the unregulated assigned counsel system. Institutional Public Defender offices have been successful in building a cadre of competent, professional, well-trained career defense attorneys in many jurisdictions across the state. But even here it would appear that the Public Defender has become

a victim of its own success. Making the Public Defender a career office at relative parity with the district attorney in terms of salary, health care and retirement benefits, has caused it to become increasingly expensive.

Efforts by county administrators to curb expenditures on indigent defense have thus taken two approaches. The first option has been to make budget cuts which reduce staff levels and increase the caseloads handled by the Public Defender office. Because Chief Defenders are “at will” employees they risk their jobs (and their healthcare and retirement benefits) if they resist. When courageous chief Public Defenders stand up to this pressure they can either be replaced or the county can move to the second option.

The second approach has been to contract indigent defense representation out to the lowest bidder. While properly regulated contract defenders can provide competent and cost effective services, this system is also open to abuses. The primary contractor winning the bid, can in turn subcontract indigent cases out in lots to individual private attorneys. In this way the entrepreneurial primary contractor can eliminate the overhead expenses necessarily incurred in having a career office. No healthcare or retirement benefits need be provided to subcontracting attorneys who may be just starting out and need the work to help pay their office overhead while they develop their practices. Because such contracts are unregulated, there are no minimum requirements regarding the training or experience levels of such subcontractors. Even where the primary contractor is qualified, at least in terms of experience, that is no guarantee a qualified attorney will actually perform the representation if there is no requirement that the county monitor who is providing the services.

Likewise, in the absence of any regulation, there is no requirement that the attorney providing the representation be currently trained, or supervised or provided with adequate investigative services. Where flat fee contracts are employed, there are built-in incentives to pocket the money that should be used to conduct an adequate investigation and obtain competent experts to assess forensic evidence that has increasingly been shown to be unreliable.¹³⁹ Our criminal justice system should not be reduced to

¹³⁹ See COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCE COMMUNITY, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES OF SCIENCE, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009). See also Harry T. Edwards, *The National Academy of Sciences Report on Forensic*

the status of a bargain basement where unregulated contracting of constitutionally mandated legal services makes possible the return of the inept and the shyster lawyer whom Clara Foltz sought to eliminate by creating a public office that would attract career professionals.

As a result of making funding decisions based upon the presumption of guilt, many Public Defender offices operate under crushing caseloads while an increasing number of counties are cutting costs by providing indigent defense services through unregulated low bid contracts. The dangers existing under both approaches are clear. So are the consequences. During a 15-year period examined by a recent study, courts released more than 200 inmates from California prisons because they had been wrongfully convicted.¹⁴⁰ While this is an astonishing figure, it does not mean that the concept of the Public Defender has been a failure. Nor does it mean that contract defenders cannot provide competent representation. It does, however, mean that reforms are necessary to fulfill the potential of either system to provide the effective assistance of counsel guaranteed by the Constitution.

SOLUTIONS

“I have been a public defender for over thirty years in three different counties. There is a great disparity in the quality of defender services throughout the state.”¹⁴¹

What can be done? The fact that the members of the Fair Commission in 2008 were unable to agree on any recommendation to solve California’s admitted funding crisis in indigent defense services speaks volumes about

Sciences: What it Means for the Bench and Bar, paper presented at the Conference on The Role of the Court in an Age of Developing Science & Technology, Superior Court of the District of Columbia, May 6, 2010, available at [http://www.cadc.uscourts.gov/internet/home.nsf/AttachmentsByTitle/NAS+Report+on+Forensic+Science/\\$FILE/Edwards,+The+NAS+Report+on+Forensic+Science.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/AttachmentsByTitle/NAS+Report+on+Forensic+Science/$FILE/Edwards,+The+NAS+Report+on+Forensic+Science.pdf).

¹⁴⁰ Nina Martin, *Innocence Lost*, SAN FRANCISCO MAGAZINE, November 2004, available at <http://www.deathpenalty.org/downloads/SFMag.pdf>.

¹⁴¹ Comment made by a chief Public Defender from an urban Public Defender office. *Systemic Factors*, *supra* note 61, at 351.

how politically difficult the problem is to solve.¹⁴² It was estimated in 2007 that to bring indigent defense services up to 85% of parity with the prosecution, funding would have to be increased by approximately \$300 million.¹⁴³ The gap between prosecution and defense was widening then and has likely increased substantially since that estimate.¹⁴⁴

A significant portion of the funds needed to improve California's indigent defense system could be found by simply rethinking how we spend our criminal justice dollars and redirecting the cost savings from some of California's current poor choices. There are a number of areas where cost savings could be achieved. These include: (1) abolishing the death penalty, (2) abolishing mandatory minimum sentences, and (3) decriminalizing some non-violent misdemeanor offenses by making them infractions. In addition, fines currently given exclusively to law enforcement should be shared so that an appropriate portion is given to the defense component of the criminal justice system. Finally, the bail system could be reformed so that defendants would pay 10% of the amount of bail to the state rather than a private bail bondsman.¹⁴⁵

While some of these solutions can only be addressed by state legislation, local prosecutors can also exercise their discretion to reduce the number of cases in which the death penalty is sought, and to make appropriate charging decisions. It is clear, for example, that more than a third of the funding needed to improve indigent defense systems in California could be found by simply eliminating the death penalty. The Fair Commission estimated that it costs \$137.7 million annually to maintain the present death penalty system in California. By contrast, only \$11.5 million would be required to handle these same cases if a sentence of life without parole were imposed. Thus, \$126.2 million in current expenditures could be employed to improve indigent defense in California.¹⁴⁶

¹⁴² The Fair Commission essentially punted on this issue by recommending that the California State Bar reconsider the issue by convening yet another commission. CCFAJ FINAL REPORT, *supra* note 62, at 99.

¹⁴³ *Systemic Factors*, *supra* note 61, at 313.

¹⁴⁴ The gap widened from fiscal year 2003–2004 to fiscal year 2007–2007 by 20 per cent. *Id.* at 317.

¹⁴⁵ Illinois, for example, operates such a system. See 38 ILL. COMP. STAT. 110-7 (2009).

¹⁴⁶ CCFAJ FINAL REPORT, *supra* note 62, at 156.

The Fair Commission also considered a proposal to establish at the state level an Indigent Defense Commission similar to those that exist in Texas, Virginia, Massachusetts and Indiana.¹⁴⁷ Such commissions are empowered to set minimum performance and caseload standards and provide reimbursement to counties for meeting those standards. This proposal has been objected to, however, by those who believe that California counties currently funding above such “minimum” standards would cut their funding in a “race to the bottom.”¹⁴⁸ In any event, given the state’s current economic condition (the current 2010 budget deficit is approximately \$20 billion and is projected to rise to \$25 billion by 2012¹⁴⁹) it seems unrealistic to expect that funding for indigent defense services can be shifted to the state. A recent study by the federal Bureau of Justice Statistics of state funded and organized public defender systems, revealed that state funding was no guarantee that adequate resources would be provided. In 15 of the 22 statewide systems, felony and misdemeanor caseloads still exceeded national standards.¹⁵⁰

For over thirty years there has also been a call for federal assistance and the creation of a national Center for Defense Services. In 1977 the ABA Standing Committee on Legal Aid and Indigent Defendants, together with the National Legal Aid & Defender Association (NLADA) and the National Clients Council, prepared a “Discussion Proposal” for such a Center.¹⁵¹ The basic concept underlying this proposal was an

¹⁴⁷ *Id.* at 99.

¹⁴⁸ *Id.*

¹⁴⁹ Anthony York, *Brown calls Sacramento budget meeting for Wednesday*, LOS ANGELES TIMES, December 2, 2010.

¹⁵⁰ L. LANGTON, D. J. FAROLE, JR., BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CENSUS OF PUBLIC DEFENDER OFFICES, 2007: STATE PUBLIC DEFENDER PROGRAMS, 2007, September, 2010, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf>.

¹⁵¹ THE CENTER FOR DEFENSE SERVICES: A DRAFT DISCUSSION PROPOSAL FOR THE ESTABLISHMENT OF A NONPROFIT CORPORATION TO STRENGTHEN INDIGENT DEFENSE SERVICES, ABA Standing Committee on Legal Aid and Indigent Defendants, October, 1977. Copy #37 of the Discussion Draft is on file with the author, who as National Director of Defender Services of NLADA participated in drafting the proposal. In 1979, Senator Edward Kennedy became involved in sponsoring a bill to create a center for defense services. *Defense Services Bill Still in the Works*, 65 ABA JOURNAL 1629, November 1979.

independent federally-funded granting entity constructed upon the following four principles:

- (1) federal funding for the improvement of defense services must be structured so as to provide continuity and stability over a significant number of years,
- (2) financial support should be instituted through a grant in aid program;
- (3) the funding program should contain incentives for local communities to maintain and augment their current efforts; and
- (4) the entity administering the program must be independent of any of the three branches of the federal government.¹⁵²

Based upon these principles it would be possible for federal assistance grants to fund a Center for Indigent Defense Improvement in each state requesting such assistance. Recognizing that a one-size-fits-all approach to standards is neither accurate nor politically feasible in California, the Center's first task would be to conduct an audit of the indigent defense delivery systems of each county. The audit would determine the need for additional attorneys, investigators, and other support personnel by conducting a Workload Assessment. Using methodology similar to that designed by the National Center for State Courts to determine when additional judges are needed, time studies can be employed to create objective data upon which to make evidence-based decisions. Such time studies can translate raw caseload filings into actual workload by measuring real events that accurately reflect the unique practice environment in a particular jurisdiction, including logistical considerations and other operational characteristics that impact defense representation, such as prosecutorial charging policies and judicial sentencing practices. By learning how much time it actually takes to handle different types of cases given, on average, their various levels of complexity, it can be mathematically determined how many attorneys will be needed to handle a given mix of cases.

¹⁵² *Id.* at 53-54.

After determining appropriate staffing levels, the center would then certify that a county is in compliance when those staffing levels are met.¹⁵³ Certification would also be conditioned upon the professional independence of the Public Defender being assured either by making the office a nonpartisan elected position for a term of years, or by creating a nonpartisan board of trustees, independent from any of the branches of local government, to oversee the office. While provision would be made to retain the existing chief Public Defender, the board would thereafter be empowered to select the chief Public Defender and only the board would have the power to terminate the chief Public Defender for good cause. The Board would also be authorized to award contracts for indigent defense services that would be governed by the same standards created for institutional Public Defender offices.

Upon satisfaction of these requirements, the county would then be reimbursed for the amount needed to bring the county's indigent defense system into compliance with its own locally established standards. This amount would become an annual subsidy payment to the county. The center would also assist in providing training for new attorneys, investigators, and support personnel, and in rural areas would create regional backup service centers that would provide qualified investigators and sentencing mitigation specialists in death penalty and other appropriate cases.

A condition of continued reimbursement would be a requirement that the Center receive from each county basic statistical data sufficient to permit it to monitor the health of the indigent defense delivery system. In the event excessive caseloads reappeared and were not corrected within a reasonable period, the Center would have the power to revoke the county's certification and stop the annual subsidy payment. The negative publicity from de-certification, the legal impact this would have on ineffective assistance of counsel claims arising from that county (as well as providing a basis for a lawsuit to order compliance), and of course the financial impact of withdrawal of federal reimbursement, would provide strong incentives for voluntary compliance with the maximum workload levels established by the Center. Because this proposed hybrid system would provide each county its own unique workload standard, there would be no race to the bottom.

¹⁵³ The author is indebted to Marshall J. Hartman, former National Director of Defender Services for NLADA who originally proposed the idea that defender offices should be accredited the same as police departments and departments of correction.

The argument for federal assistance is compelling especially because it is the federal Constitution that requires the provision of effective assistance of counsel. However, waiting for a federal bailout may also not be feasible in the short term as action is needed now to correct currently existing conditions. In *Ligda v. Superior Court*,¹⁵⁴ the California Court of Appeal stated: “When a public defender reels under a staggering workload, he . . . should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him.”¹⁵⁵ Litigation may thus be the most immediate way to obtain a remedy. As New York’s high court recently held in *Hurrell-Harring v. New York*, a civil action to obtain injunctive relief will lie where “systemic” deficiencies result in the denial of “core” assistance by counsel, despite the nominal appointment of counsel.¹⁵⁶ The complaint in *Hurrell-Harring* alleged that due to inadequate funding and staffing the indigent defense system was “structurally incapable” of providing legal representation at critical stages prior to trial as required by the Constitution.¹⁵⁷

There are also a number of other systemic conditions that could be reformed such as bringing back the traditional preliminary hearing and improving the discovery rules to ensure prompt and meaningful discovery by the defense. But until we reduce the glaring disparity in resources both between counties and between the prosecution and defense functions, we destroy the promise of the Public Defender that Clara Foltz envisioned to ensure administration of criminal justice honestly and equally for all.

¹⁵⁴ *Ligda v. Superior Court*, 5 Cal.App.3d 811 (1970). The Court stated: “Such relief, of necessity, involves the constitutional injunction to afford a speedy trial to a defendant. Boards of supervisors face the choice of either funding the costs of assignment of private counsel and often, increasing the costs of feeding, housing and controlling a prisoner during postponement of trials; or of making provision of funds, facilities and personnel for a public defender’s office adequate for the demands placed upon it.” *Id.* at 828. The court was apparently not aware that county administrators would come up with a third option: low bid contracts.

¹⁵⁵ *Id.* at 827-28.

¹⁵⁶ 15 N. Y. 3d, 8, at 22-24, 930 N.E. 2d 217 at 224-226 (2010).

¹⁵⁷ *Hurrell-Harring v. New York*, Brief for Plaintiff Appellants, 8, 2009 WL 6409871 (N.Y.). A multitude of systemic deficiencies were asserted including the fact that in some circumstances misdemeanor defendants were not provided counsel at arraignment. The complaint alleged as an independent claim that attorneys did not have any meaningful contact with their clients nor were investigative services essential to preparing a defense provided.

EPILOGUE

On October 20, 2010, the County of Fresno took the first step toward deinstitutionalizing its primary Public Defender office by issuing the following Request for Proposal:

The County of Fresno is soliciting proposals to provide appropriate and competent primary indigent defense services and associated criminal investigation services to financially eligible persons accused of crime in Fresno County, persons subject to the laws of the juvenile court, and to all those entitled to services of court-appointed counsel in other proceedings (services which have been historically provided by the Public Defender's Office in the Fresno County Superior Court).¹⁵⁸

In fiscal year 2006–2007, the institutional Public Defender had 76 staff attorneys and 19 investigators and was handling both felony and misdemeanor caseloads twice the maximum allowed by national standards. For fiscal year 2010–2011, the office was cut to only 48 staff attorneys and 9 investigators. As a result of such severe budget cuts, the chief Public Defender felt he was ethically obligated to declare the office unavailable to accept new cases and began refusing some new cases, which had to be assigned to private counsel.¹⁵⁹ The County's response was to put all the primary indigent defense services up for sale to the lowest bidder.

Research conducted for the Fair Commission found that the gap in funding between indigent defense and prosecution was significantly larger in counties employing contract defenders and those having an institutional Public Defender office.¹⁶⁰ There was also a statistically significant relationship between the type of provider and the rate at which felony cases were taken to trial: institutional Public Defenders were twice as likely to take a case to jury trial as a contract defender.¹⁶¹ If Clara Foltz were here today she would no doubt sound the alarm as she watched the dismantling of her legacy. ★

¹⁵⁸ COUNTY OF FRESNO, REQUEST FOR PROPOSAL NUMBER 962-4878: PRIMARY INDIGENT DEFENSE, October 20, 2010.

¹⁵⁹ Brad Brannon, *Fresno Co. public defender cuts may backfire*, FRESNO BEE, September 25, 2010.

¹⁶⁰ *Systemic Factors*, *supra* note 61, at 315.

¹⁶¹ *Id.* at 316.

THE CASE OF THE BLACK-GLOVED RAPIST:

*Defining the Public Defender's Role
in the California Courts, 1913–1948*

SARA MAYEUX*

For seven months, an assailant that the San Francisco newspapers had nicknamed the “Black-Gloved Rapist” terrorized the city, breaking into his victims’ homes at midnight wearing black gloves and carrying a pencil flashlight. Finally, the police nabbed their man. Frank Avilez was arrested on Saturday morning, July 12, 1947, “and for many hours questioned by police inspectors and assistant district attorneys” until he confessed to everything: fourteen rapes and attempted rapes.¹ Avilez was 24 years old — with a 17-year-old wife — but had, according to his psychiatric records, the “mental age” of a 10-year-old, an IQ in the 70s, and a possible

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¹ *People v. Avilez*, 86 Cal.App.2d 289, 292 (Cal.App. 1st Dist. 1948); *Rapist Confesses*, S. F. CHRONICLE, July 13, 1947, at 1.

diagnosis of “sexual psychopathy.”² “My married life was all right,” he told the *San Francisco Chronicle*, when asked about his motive. “I just didn’t like staying home nights.”³

After his bail hearing on Monday morning, July 14, Avilez’s family sought the help of Melvin Belli, a young trial lawyer who would soon win national fame and fortune as the flamboyant “King of Torts.”⁴ Belli agreed to take the case, and contacted the district attorney’s office to announce that he had been retained to represent Avilez. He also mentioned that the defendant’s family was planning to attend the next day’s arraignment, and asked that the case be held over until the family arrived.

The next morning in court, there was some confusion in the courtroom as to who was representing Avilez. The D.A. told the judge about his conversation with Belli, but no one told the defendant or the public defender about it. According to a police inspector, Avilez was unhappy because Belli had visited him in jail the night before and proposed an insanity plea; he said that “he was sane and guilty and wanted to get this over as soon as possible.”⁵ Meanwhile, not knowing the family had retained Belli, Avilez’s wife had visited the public defender’s office at some point to discuss the case.⁶

In light of all this, and since he was never told that Belli and Avilez’s family were on the way, Gerald Kenny, the public defender, assumed Avilez to be his client. Kenny looked over the complaint, then went over to the cage and spent “a matter of seconds” conversing with Avilez through

² Appellant’s Opening Brief at 12-13, *People v. Avilez*, 1 Crim. 2506 (Cal.App. 1st Dist. 1948). Avilez’s older brother had been committed to the Sonoma State Home for the Feeble-Minded since 1936. *Id.* All court documents related to *Avilez* cited in this essay are available at the California State Archives by requesting the file for California case number 1 Crim. 2506.

³ *Confessed Rapist in Jail*, S. F. CHRONICLE, July 14, 1947, at 3.

⁴ Belli was dubbed the “King of Torts” by *Time* magazine in 1954. In addition to being credited with pioneering modern products liability law, he grabbed headlines with his glamorous clientele, which included Mae West, Errol Flynn, the Rolling Stones, Jack Ruby, and Zsa Zsa Gabor. See Jim Herron Zamora, “King of Torts’ Belli dead at 88,” S.F. EXAMINER, July 10, 1996. A somewhat fawning biography of Belli is Mark Shaw, *MELVIN BELL: KING OF THE COURTROOM* (1976).

⁵ *Avilez*, 86 Cal.App.2d at 292.

⁶ Appellant’s Opening Brief, *supra* note 2, at 19.

the bars.⁷ “There are 32 charges against you,” he began. Avilez responded, “I know; I have admitted them all; I want to plead guilty.”⁸ As Kenny saw it, once Avilez said those words, “there was nothing else I could do. I am not supposed to obstruct justice.”⁹ According to Avilez, Kenny told him “not to worry about nothing,” just “to say whatever he told me” and “he would fix everything up.”¹⁰

Shortly thereafter Avilez’s case was called and the municipal court judge asked him to confirm that he wanted to be represented by the public defender. “Yes,” Avilez responded. The public defender added, “He stated he has no funds. His wife visited the office and she has no funds to employ private counsel.”¹¹ Satisfied with this brief colloquy, the judge appointed the public defender and accepted Avilez’s guilty pleas to seven counts of rape, four counts of attempted rape, one assault, and ten counts each of burglary and robbery.¹² By the time Belli arrived in court, the hearing was over and Avilez had been bound over to the superior court for sentencing. As Kenny was leaving the courtroom, he ran into Belli in the courthouse hallway. That was the first he heard that Avilez’s family had retained Belli’s firm.¹³

Belli moved to withdraw Avilez’s plea, but the superior court judge denied the motion and sentenced Avilez to 440 years in prison.¹⁴ On appeal, the First District overturned the convictions on the grounds that Avilez had been denied “a fair opportunity to secure the aid of counsel” and that “the aid of counsel furnished was not effective and substantial.”¹⁵ The appellate court’s central complaint about the proceedings below was that the judge and prosecutor had allowed Avilez to proceed with his guilty plea though knowing that his family, with private defense counsel, was on the

⁷ *Id.* at 16 (quoting testimony of Frank Avilez).

⁸ *Avilez*, 86 Cal.App.2d at 292-93.

⁹ Appellant’s Opening Brief, *supra* note 2, at 18 (quoting testimony of Gerald Kenny).

¹⁰ *Id.* at 16 (quoting testimony of Frank Avilez).

¹¹ *Avilez*, 86 Cal.App.2d at 293.

¹² *Gets 440 Years for Rape*, N. Y. TIMES, Aug. 7, 1947, at 18.

¹³ Appellant’s Opening Brief, *supra* note 2, at 19.

¹⁴ *Gets 440 Years for Rape*, N. Y. TIMES, Aug. 7, 1947, at 18. According to press reports, when he heard the sentence Avilez “made a wild attempt to escape,” kicking and flailing until six police officers “finally got [him] down and were able to hold him.” *Id.*

¹⁵ *Avilez*, 86 Cal.App.2d at 295.

way. However, the appellate court also rejected the public defender's contention "that when [Avilez] declared to him that he wanted to plead guilty there was nothing else for him to do without obstructing justice."¹⁶

By the time of Avilez's hearing, public defenders would have been familiar figures in San Francisco courtrooms. San Francisco established its public defender's office in 1921; it was one of several California jurisdictions to establish such an office in the Progressive Era, beginning with Los Angeles in 1913, in an effort to replace corrupt "shyster lawyers" with well-funded public servants, while also ensuring that indigent defendants would receive adequate representation.¹⁷ From the start, lawyers, judges, and reformers debated the proper role of this novel courtroom figure. The earliest public defender proposals, originated by California's pioneering woman lawyer Clara Shortridge Foltz, contemplated a skillful trial attorney who would provide the indigent accused with the same zealous representation that wealthy defendants could buy.¹⁸ But many Progressive reformers envisioned the public defender as a partner to the public prosecutor, rather than an adversary. The Progressive public defender would collaborate with the district attorney to develop the facts of each case and propose a fair resolution, taking into account not just the defendant's interests but also the needs and safety of the community.¹⁹

As the *Avilez* case demonstrates, as late as 1948 this debate over the public defender's function and ethical duties was still ongoing. The case can thus be read as an encapsulation of these competing views of the public defender's proper role: Is he a state official akin to the public prosecutor, whose overriding duty is to the public? If so, when a defendant admits his guilt, then the public defender should not waste valuable court time contesting the charges. For San Francisco public defender Gerald Kenny,

¹⁶ *Avilez*, 86 Cal.App.2d at 296.

¹⁷ The Los Angeles County Public Defender's website describes its history since 1913. Los Angeles County Public Defender, History of the office, <http://pd.co.la.ca.us/History.html> (last visited Aug. 31, 2009). See generally Barbara Allen Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267, 1270-77 (2006) [hereinafter *Inventing*] (describing the origins of the public defender idea and the rationales offered by its supporters).

¹⁸ *Inventing*, *supra* note 17, at 1275.

¹⁹ See *id.* at 1275-77 (contrasting Foltz's model with the Progressive model).

it would have been an “obstruct[ion of] justice”²⁰ not to allow the Black-Gloved Rapist to plead guilty right away. This approach apparently satisfied the judge who sentenced Avilez, who assured the defendant that the public defender “would not have proceeded” with the plea if there had been any available alternative, because in his experience lawyers from the public defender’s office “[didn’t] overlook anything when they appear[ed] in court.” He even praised public defenders for avoiding “the tricks and methods used by some criminal attorneys” and instead representing their clients “properly” and “honestly.”²¹

But in the competing view, the public defender is no different from a private defense attorney (apart from who signs his paychecks): His overriding duty is to provide each individual client with zealous advocacy. If so, it would be a violation of that duty to allow a defendant to plead guilty at an initial appearance. The appellate judge who decided *Avilez* sided with this latter view, holding that

[t]he public defender stands in the same relation to the accused he is appointed to represent as an attorney regularly retained. It is his task to investigate carefully all defenses of fact and of law which may be available to the defendant and to confer with him about them before he permits his client to foreclose all possibility of defense and submit to conviction without a hearing by pleading guilty. . . . By giving his client such aid the attorney does not obstruct, but assists justice.²²

This essay traces these two competing visions of the public defender in California from 1913 to 1948, and examines how and why the second view ultimately prevailed, at least doctrinally. On the ground, some public defenders may have continued to see themselves primarily as public servants, and some trial judges may have endorsed this view. But in the 1940s, California appellate judges rejected the Progressive ideal of the public defender. They constructed the public defender as an opponent of the state, leaving intact (at least in theory) the American adversary system of criminal justice.

²⁰ *Avilez*, 86 Cal.App.2d at 296.

²¹ Appellant’s Opening Brief, *supra* note 2, at 25 (quoting transcript of judge’s remarks).

²² *Avilez*, 86 Cal.App.2d at 296.

In so doing, they followed the direction of the United States Supreme Court, which had recently issued a robust defense of adversary process in the landmark right-to-counsel case of *Powell v. Alabama*.²³

That California courts defined the public defender in this way, eschewing the Progressive vision of cooperative justice, was a landmark development in the history of California criminal law and procedure. Through decisions like *Avilez*, appellate judges provided definition and guidance for a still-developing institution that has since become a cornerstone of California criminal practice. Today, half of California counties operate full-time public defender's offices, including the ten most populous counties — Los Angeles, San Diego, Orange, Riverside, San Bernardino, Santa Clara, Alameda, Sacramento, Contra Costa, and Fresno — which are home to almost 75% of the state's population.²⁴ In some California jurisdictions, the public defender's office represents almost everyone charged with a crime.²⁵

Yet historians have largely neglected the “little known” story of how and why public defenders came to occupy such a central place in California's criminal courtrooms.²⁶ The standard histories of Progressivism,

²³ *Powell v. Alabama*, 287 U.S. 45 (1932). See *infra* Part II.

²⁴ Counties that do not run a full-time public defender contract out to private attorneys to provide indigent defense. Of California's 15 most populous counties, only San Mateo County employs a contract public defender. California Public Defenders Association, “California Federal, State, and Local Public Defender Office Directory,” April 1, 2010, available at <http://www.cpda.org> (last visited June 29, 2010); State of California, Department of Finance, “Press Release: California Population Continues Slowed Growth, According to New State Demographic Report,” Dec. 17, 2009, available at <http://www.dof.ca.gov/research/demographic/reports/estimates/e-2/2000-09/> (last visited June 29, 2010).

²⁵ For instance, about 90% of defendants in the City and County of San Francisco qualify for the services of a public defender, as documented in “Presumed Guilty,” a documentary on the office by KQED (San Francisco's PBS affiliate). See PBS, Presumed Guilty, <http://www.pbs.org/kqed/presumedguilty/4.0.0.html> (last visited Aug. 31, 2009).

²⁶ *Inventing*, *supra* note 17, at 1269. Standard histories of the American legal profession do not discuss the development of the public defender, and histories of crime and punishment mention it only briefly, if at all. See, e.g., LAWRENCE FRIEDMAN, CRIME & PUNISHMENT IN AMERICAN HISTORY 394 (“A twentieth-century innovation was the public defender.”). A history that does discuss the early public defender movement in more detail is GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 195-99 (2003).

even those that focus on California, do not mention the public defender movement.²⁷ Yet the public defender idea was “widely advocated” throughout the country in the 1910s and 1920s, attracted a great deal of scholarly attention, and was viewed by many jurists as crucial to the broader project of modernizing the legal system.²⁸ Fortunately, the history of California’s public defenders has not gone entirely untold. In the course of her biographical work on Clara Shortridge Foltz, Barbara Babcock has excavated the forgotten origins of the public defender movement in Foltz’s writings, speeches, and model legislation; framed the competing visions of the public defender among Progressive-era reformers; and outlined the constitutional and legal arguments that Foltz marshaled to bolster her proposal.²⁹

Drawing on California court records, this essay builds on Babcock’s work by following the story of the public defender further into the twentieth century, and by focusing more on how the idea was translated into practice and doctrine. How did California lawyers and judges conceive of this new player in the criminal justice system? How did they define the public defender’s professional and ethical commitments? In Part I, I contrast Foltz’s original vision of the public defender with the Progressive conception, which was embraced by the nation’s first public defender, Walton J. Wood of Los Angeles. In part II, I analyze a key case in which the California Supreme Court embraced the adversary model, and suggest some broader constitutional and cultural developments that may explain this result.

²⁷ Barbara Allen Babcock, *Inventing the Public Defender* 8 n. 35 (Stanford Public Law Working Paper No. 899993, 2006), available at <http://www.law.stanford.edu/publications/details/3244/Inventing%20The%20Public%20Defender> [hereinafter *Inventing Working Paper*].

²⁸ ELIZABETH KEMPER ADAMS, *WOMEN PROFESSIONAL WORKERS* 74 (1921). For a bibliography of some 110 scholarly articles on the public defender between 1914 and 1924, see A. Mabel Barrow, *Public Defender: A Bibliography*, 14 J. AM. INST. CRIM. L. 556 (1924). On Progressive efforts to modernize the criminal justice system, see generally Jonathan Simon, *Visions of Self-Control: Fashioning a Liberal Approach to Crime and Punishment in the Twentieth Century*, in *LOOKING BACK AT LAW’S CENTURY* (Austin Sarat et al., eds., 2002).

²⁹ See generally *Inventing*, *supra* note 17. Prof. Babcock has shared with the author that she is also planning to include some information on the early public defender movement in her forthcoming biography of Foltz.

PART I: COMPETING VISIONS OF THE PUBLIC DEFENDER

The public defender was the invention of Clara Shortridge Foltz, California's first woman lawyer.³⁰ Based on her 15 years of trial practice, Foltz observed that although courts usually appointed counsel for "pauper" defendants who requested it, the caliber of those lawyers was low. Typically "they [had] no money to spend in an investigation of the case, and [came] to trial wholly unequipped either in ability, skill or preparation to cope with the man hired by the State."³¹ To level the field, Foltz envisioned replacing appointed counsel with salaried county officials, provided with public funds to maintain their offices — just as counties funded their district attorney's offices.³² Although Foltz lobbied for the public defender nationwide,³³ her campaign's earliest successes came at home. In 1913 Los Angeles County established the nation's first public defender office, and in 1921, California became the first state to pass her model legislation, the Foltz Defender Bill.^{34,35}

The public defender idea found sympathetic ears among elite jurists, who were horrified by the tawdry pageant of criminal law in general and by criminal defense attorneys in particular. Criminal defense had once been considered every lawyer's "sacred duty,"³⁶ and as late as 1900 it was

³⁰ *Inventing*, *supra* note 17, at 1271. Babcock has written several articles on Foltz's biography and pioneering achievements. See Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673 (1988), *reprinted with a new introduction* in 28 VAL. U.L. REV. 1231 (1994); Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 IND. L.J. 849 (1991); Barbara Allen Babcock, *Reconstructing the Person: The Case of Clara Shortridge Foltz*, in REVEALING LIVES 131 (Susan Groag Bell & Marilyn Yalom, eds., 1990).

³¹ *Inventing*, *supra* note 17, at 1271 (quoting Clara Foltz, *Public Defenders — Rights of Persons Accused of Crime — Abuses now Existing*, 48 ALB. L.J. 248 (1893)).

³² For the text of the bill, *see id.* at 1272 n.30.

³³ *Id.* at 1273.

³⁴ *Id.* For a bibliography of some 110 scholarly articles on the public defender between 1914–1924, see Barrow, *supra* note 28.

³⁵ CAL. STAT. 245 § 5 (1921). The bill allowed for counties to establish and fund public defender's offices, but did not require it.

³⁶ See Alan Rogers, "A Sacred Duty": *Court Appointed Attorneys in Massachusetts Capital Cases, 1780–1980*, 41 AM. J. LEGAL HIST. 440, 440–41 (1997). For representative nineteenth-century views of criminal defense as a duty lawyers owed in their

not uncommon for prominent lawyers to be generalists. But by the 1920s the bar had specialized and stratified, with criminal defenders joining the tort plaintiff's bar at the lowest stratum.³⁷ Surveys found that only a tiny minority of lawyers accepted criminal cases; most viewed the work as disreputable.³⁸ No longer a "sacred duty," neither did criminal practice offer much promise of earthly rewards, "since it is impossible to build up a clientele except among professional criminals."³⁹

In the Prohibition years, with tableaux of "g-men" and "gangsters" dominating newsreels and headlines, elite jurists lamented the rise of a cadre of "habitual defenders" who gleefully exploited loopholes and technicalities to keep their well-paying patrons out of prison.⁴⁰ Procedural

capacity as officers of the court (which persisted into the 20th century at least in a few influential works), see THOMAS COOLEY, 1 CONSTITUTIONAL LIMITATIONS 697 (8th ed. 1927). However, by 1929 the American Bar Association's *Canons of Professional Ethics* had recast criminal defense from a "duty" to a "right" of the bar. Compare CANONS OF PROF'L ETHICS (1908) ("I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice.") with CANONS OF PROF'L ETHICS (1929) ("A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.").

³⁷ Roscoe Pound observed, "The great achievements of the Bar were in the Forum and the most conspicuous success was before juries in the trial of criminal cases. . . . In the second stage leadership passed to the railroad lawyer. . . . Criminal law became the almost exclusive field of the lower stratum of the Bar." Sienna Delahunt, *Chapter IV: The Gentleman at the Bar*, in RAYMOND MOLEY, OUR CRIMINAL COURTS 62 (1930). For historical analysis of the specialization and stratification of the bar, see, e.g., Robert W. Gordon, *The Legal Profession*, in LOOKING BACK AT LAW'S CENTURY 287-336 (Austin Sarat et al., eds., 2002).

³⁸ The influential *Cleveland Survey of Criminal Justice Survey* found that of 386 Cleveland lawyers, almost 40% accepted no criminal cases at all, and only 3% took them regularly. Delahunt, *supra* note 37, at 62. President Hoover's Wickersham Commission reported on polls showing that lawyers considered criminal work "unremunerative," disreputable because "it involves association with an undesirable element in the profession," and overly technical. U.S. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, 4 U.S. WICKERSHAM COMM'N REPORTS 27 (1931) [hereinafter WICKERSHAM COMM'N].

³⁹ Delahunt, *supra* note 37, at 63.

⁴⁰ E.g. WICKERSHAM COMM'N, *supra* note 38, at 19 ("Habitual defenders of criminals have learned to take advantage of [the prosecutor's nol pros power]"). On the cultural image of the "gangster" in the Prohibition years, see generally DALE E. RUTH, INVENTING THE PUBLIC ENEMY: THE GANGSTER IN AMERICAN CULTURE, 1918-1935 (1996)

safeguards designed to protect the innocent in rural pioneer communities had become, in chaotic urban courtrooms, “pieces to be played” by the guilty.⁴¹ At the other end of the spectrum were a different but equally worrisome set of “habitual defenders,” who, rather than helping wealthy clients exploit the system, busied themselves with exploitation of a more direct sort. For Progressive reformers concerned with the plight of the poor, the problem was not that there were not enough lawyers. Rather, the courthouses were overrun with lawyers — of the wrong kind. Whether labeled “shysters,” . . . ‘snitch lawyers,’ ‘jail lawyers,’ ‘vampires,’ ‘legal vermin,’ ‘harpies,’”⁴² “‘Tombs runners,’”⁴³ or “parasites,”⁴⁴ these “unofficial public defenders”⁴⁵ were all too eager to volunteer their services to a hapless defendant, only to extort the defendant’s family for any payment they could muster and, if none was forthcoming, provide a perfunctory defense at best.

It is hard to know how many lawyers deserved the epithets.⁴⁶ As with criticisms of the plaintiff’s bar, criticisms of the criminal defense bar were tinged with ethnic and class biases.⁴⁷ However, there is probably a great deal of truth to the seamy picture that emerges from the pages of these reports on the urban criminal courts. Clara Foltz would not have disagreed with elite complaints about jailhouse lawyers: it was precisely her experience with such characters that had inspired her public defender proposal. Relegated to criminal courtrooms because, as a woman, she had few

(analyzing constructions of the “gangster” in mass culture); BRYAN BURROUGH, *PUBLIC ENEMIES: AMERICA’S GREATEST CRIME WAVE AND THE BIRTH OF THE FBI, 1933–34* (2004) (tracking the lives and crimes of some of the era’s most notorious real-life fugitive criminals and the FBI’s much-publicized attempts to track them down).

⁴¹ WICKERSHAM COMM’N, *supra* note 38, at 21.

⁴² MAYER GOLDMAN, *THE PUBLIC DEFENDER: A NECESSARY FACTOR IN THE ADMINISTRATION OF JUSTICE 19-20* (1917).

⁴³ CARNEGIE FOUNDATION, *JUSTICE AND THE POOR* 113 (1919).

⁴⁴ Delahunt, *supra* note 37, at 66. Delahunt was an editor of the *Columbia Law Review*.

⁴⁵ *Id.* at 64.

⁴⁶ See Gordon, *supra* note 37.

⁴⁷ *Id.* at 295; see also *id.* at 297 (describing how bar association disciplinary mechanisms were used not for self-regulation of the bar generally but primarily to discipline immigrant personal injury lawyers).

professional choices, Foltz observed her counterparts with dismay, noting their “soiled linen” and “whiskey breath.”⁴⁸

But while Foltz proposed to solve the problem by using the public purse to attract higher-caliber lawyers to criminal defense, some Progressive reformers reimagined the public defender as a replacement for criminal lawyers altogether.⁴⁹ Their goal was not to provide poor defendants with the equivalent of the gladiator that the rich could afford, but to remake the system entirely so that gladiator-style defense was no longer welcome, or rewarded. The Progressive public defender promised to transform each criminal prosecution into “a cooperative search for corrective and preventive care” rather “than a contest of skill,”⁵⁰ with “officers on the state” on both sides, sharing “a singleness of purpose.”⁵¹ Although the public defender could and should zealously defend an innocent client, his only duty to the guilty was to “see that [he was] fairly punished — not over-punished.”⁵²

In 1913 Los Angeles County was the first jurisdiction to implement Clara Foltz’s public defender proposal. But though Foltz took credit for the Los Angeles office, the office quickly departed from her vision.⁵³ The first public defender in Los Angeles and thus the nation, Walton J. Wood, adopted the Progressive model. In 1918 he wrote with pride that his young office had “worked harmoniously” with the prosecutor’s office: “We have not felt that it was our duty to oppose the district attorney, but rather to cooperate with him in setting all the facts before the courts.”⁵⁴ The district

⁴⁸ *Inventing*, *supra* note 17, at 1282 (quoting Foltz).

⁴⁹ *Id.* at 1275.

⁵⁰ Delahunt, *supra* note 37, at 62. In some of the more extreme proposals, private practice would be eliminated altogether and every defendant would be required to submit to the representation of a public official — ensuring that high-paid lawyers on the payroll of organized crime could no longer run circles around DAs, even as the public defender would also solve the different problem of indigent defense. See, e.g., Maurice Parmelee, *Public Defense in Criminal Trials*, 1 J. CRIM. L. & CRIMINOLOGY 735-47 (July 1911).

⁵¹ Delahunt, *supra* note 37, at 71.

⁵² GOLDMAN, *supra* note 42, at 8.

⁵³ *Inventing*, *supra* note 17, at 1275.

⁵⁴ Barrow, *supra* note 28, at 569 (quoting W. J. Wood, *Annual Report of the Public Defender of Los Angeles County, California*, 9 J. CRIM. L. & CRIMINOLOGY 289-96 (1918)). Barbara Babcock provides two examples of cases in which the Los Angeles

attorney returned the sentiment, having written to Wood as early as 1914 that they shared a common goal: “You are performing a duty which this office has attempted to perform in safeguarding the rights of the defendant, but I believe under the circumstances your position gives you a better opportunity to perform that duty than the prosecutor has.”⁵⁵ On the basis of these early reports, Progressive reformers around the country praised Wood’s office as a model of their vision of public defense.⁵⁶

By the time that the 1921 statewide public defender law passed, the pioneering Los Angeles public defender’s office had achieved a high degree of respectability, overcoming any disrepute that the public and legal profession reserved for criminal lawyers generally. The office enjoyed weeks of favorable press when it handled the 1921 trial of Louise Peete, accused of defrauding and murdering the wealthy oil magnate James Denton. Peete was convicted, but spared the death sentence⁵⁷ — as a Progressive might have put it, “punished — not over-punished.”⁵⁸ The trial “attracted headlines around the world and was the sensation of Los Angeles while it lasted,” with some 147,000 onlookers attempting to crowd into the courtroom.⁵⁹ The case received favorable coverage throughout the state, with the public defender’s

public defender’s approach differed from that of a traditional defense attorney. In one case, the defender facilitated a guilty plea in exchange for a lenient sentence “by showing that his client was starving and seeking work when he stole.” In contrast, Babcock suggests, “Clara Foltz’s defender . . . might well take these appealing facts to a jury.” *Inventing*, *supra* note 17, at 1277.

⁵⁵ GOLDMAN, *supra* note 42, at 38-39.

⁵⁶ A 1924 bibliography of articles on the public defender lists several that favorably assess the Los Angeles office. See Barrow, *supra* note 28. Mayer Goldman, a New York attorney who became a leading crusader for the Progressive public defender, cited its successes approvingly in his 1917 book on public defense, quoting the 1914 letter. GOLDMAN, *supra* note 42, at 38-39.

⁵⁷ Later Peete worked for many years as a housekeeper, and one by one her employers met with suspicious ends, but apart from her conviction in the Denton case, the apparent serial killer managed to convince the authorities that all of the deaths were accidents until she was finally convicted and sentenced to death in a 1945 prosecution for the murder of Margaret Logan. See *Louise*, TIME, June 11, 1945 (summarizing Peete’s biography upon the occasion of her death sentence).

⁵⁸ GOLDMAN, *supra* note 42, at 8.

⁵⁹ *Former S.J. Man Now L.A. Public Defender*, SAN JOSE MERCURY HERALD, March 23, 1921, at C13.

participation meriting prominent mention.⁶⁰ When the deputy P.D. who conducted Peete's defense was promoted to the head of the office — replacing Walton Wood, who had recently been named to a judgeship — his hometown paper, the *San Jose Mercury Herald*, reported with pride on this “signal honor.”⁶¹ The extent to which the Los Angeles model had convinced California reformers of the merits of the public defender idea is also indicated by the 1920 recommendations of a San Francisco civil grand jury.⁶² After sketching an image of the San Francisco justice system that would have been familiar to many Progressive reformers — “the absence of decorum, delinquences of judges, the prevalence of ‘shysters’” — the grand jury recommended sweeping reforms, including the establishment of a public defender's office.⁶³

PART II: JUDICIAL VISIONS OF THE PUBLIC DEFENDER — *IN RE HOUGH*

Throughout the 1920s, legal scholars debated whether the new public defenders should aspire to be “individual advocate[s]” or “Progressive public servant[s].”⁶⁴ As public defenders became fixtures in many counties, this debate moved from the pages of legal journals into courtrooms throughout California. In the 1940s, appellate judges stepped into the fray to provide an authoritative construction of the public defender's role. In California Supreme Court cases such as *In re Hough* and intermediate appellate cases

⁶⁰ See, e.g., *Slaying Case Is Opened*, SAN JOSE MERCURY HERALD, Jan. 20, 1921, at C20. The headlines read: “DENTON SLAYING CASE IS OPENED – Eleven Prospective Jurymen Are Selected in Los Angeles Court – Public Defender Acts as Attorney for Mrs. Louise M. Peete During Trial.”

⁶¹ *Former S.J. Man Now L.A. Public Defender*, SAN JOSE MERCURY HERALD, March 23, 1921, at C13.

⁶² California counties convene civil grand juries each year to scrutinize county government and propose reforms. See Calif. Pen. Code § 905; Calif. Const. art. I, § 23 (requiring counties to empanel a grand jury to serve during each fiscal year). California counties do also convene criminal grand juries for some cases, but the state does not require that every prosecution proceed by grand jury indictment. See Jon M. Van Dyke, *Trial Juries and Grand Juries*, in 2 ENCYC. OF THE AM. JUDICIAL SYSTEM 738-39 (1987).

⁶³ *Drive Shysters from S.F. Courts, Is Demand of Jury*, SAN JOSE MERCURY HERALD, July 21, 1920, at 8. The grand jury also proposed that the city increase judges' compensation, eliminate private practice by judges, and extend judicial terms to six years, among other reforms. *Id.*

⁶⁴ *Inventing*, *supra* note 17, at 1277.

like *Avilez*, the courts vindicated Foltz's model of the crusading trial lawyer — rejecting any suggestion that public defenders might have a different role than private defense attorneys.

Although California was unique in its early adoption of the public defender system, it took a confluence of legal-historical developments that were not unique to California to open the space for appellate judges to opine on the question. Beginning in the 1920s and '30s, state court judges across the country became increasingly willing to entertain prisoners' claims that their convictions should be overturned because they had suffered from ineffective or negligent defense at trial.⁶⁵ In some cases, judges familiar with the same courthouse conditions that so horrified Progressive reformers were sympathetic to young, uneducated, non-English-speaking prisoners who had been scammed by so-called jailhouse lawyers.⁶⁶ In such cases, it was difficult to maintain the legal fiction, carried over from the civil context, that attorney negligence must be imputed to the client, because the attorney was no more than the client's agent (i.e., the client had assumed the risk). The Supreme Court provided a constitutional imprimatur to this nascent line of cases with *Powell v. Alabama* in 1932, overturning the rape convictions of nine black teenagers who had effectively gone without counsel: a lawyer was appointed the morning of trial, leaving no time to investigate or prepare a defense.⁶⁷ Finally, the expansion of state and federal habeas corpus review beginning in the 1940s made it easier for prisoners to bring collateral appeals introducing new evidence. This last development was particularly important since it is often impossible to prove an attorney's negligence from the trial record alone.⁶⁸

⁶⁵ The early development of the “ineffective assistance of counsel” claim as a grounds for criminal appeal is discussed briefly in James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 443-44, 447 n.17 (1977). See also D.F.M., Note, *Incompetency of Counsel as the Basis for a New Trial in Criminal Cases*, 71 U. PA. L. REV. 379, 379 (1923) (discussing early cases and observing that “[t]he not infrequent jeopardizing of a man's life in a criminal trial by the inefficiency or negligence of his attorney has given rise to a new doctrine which, in several jurisdictions, has permitted a letting down of the bars of strict legal procedure”).

⁶⁶ E.g. *People v. Nitti*, 312 Ill. 73 (Ill. 1924); *Sanchez v. State*, 199 Ind. 235 (1927).

⁶⁷ *Powell v. Alabama*, 287 U.S. 45 (1932).

⁶⁸ See Strazzella, *supra* note 65, at 444. IAC litigation exploded in the 1960s after a series of landmark Supreme Court cases expanded avenues for collateral attack of criminal convictions.

To be sure, successful cases of this type remained relatively rare until the 1960s and the complex jurisprudence of “ineffective assistance of counsel” that has developed since the 1984 case *Strickland v. Washington*, after which IAC claims became the most common type of criminal appeal, did not yet exist.⁶⁹ Well into the twentieth century, most state courts took for granted that it was “beyond the power of the court to set aside a verdict because of the inefficiency of counsel.”⁷⁰ But whether or not his appeal was successful, every time a convicted prisoner pressed an attorney negligence claim he provided appellate judges with an occasion to opine on the proper role and duties of the defense attorney. It was through one such case, in 1944, that the California Supreme Court clarified the question of the public defender’s duties to his client.

The case of William Leva Hough got to the California Supreme Court on a writ of habeas corpus. Hough was on death row at San Quentin for the 1942 murders at a Long Beach café of his estranged wife and a gentleman friend of hers.⁷¹ Hough argued that his guilty pleas were void because he had been misled by the trial judge, prosecutor, and public defender to believe that if he pled guilty, he would be sentenced to life imprisonment.⁷² The court rejected Hough’s claims that the judge and prosecutor had misled him out of hand, finding no showing in the record of any promises to Hough.⁷³ Hough’s claims against his counsel — Erling Hovden, a 12-year veteran of the Los Angeles County public defender’s office — were no more

⁶⁹ *Strickland v. Washington*, 466 U.S. 688 (1984).

⁷⁰ *Commonwealth v. Dascalakis*, 246 Mass. 12, 26 (1923).

⁷¹ *In re Hough*, 24 Cal.2d 522, 524 (Cal. 1944); *Return to Writ of Habeas Corpus at 11*, *In re Hough*, Crim. 4500 (Cal. Sup. Ct. 1944). At the time of the murders, the Houghs had initiated divorce proceedings and each had taken out a restraining order against the other. *Return to Writ of Habeas Corpus at 11*. All court documents cited in this essay relating to *In re Hough* are available at the California State Archives by requesting the file for California criminal case number Crim. 4500.

⁷² *Hough*, 24 Cal.2d at 525, 527-28, 533. Hough, who suffered from syphilis and various neuroses, also argued on appeal that he was mentally incompetent at the time of the plea. The California Supreme Court quickly dispatched with this claim, observing that of the three alienists appointed by the trial court, two had evaluated him as sane at both the time of the murders and the time of their examination, and the third had been inconclusive. As such, the trial judge did not abuse his discretion when he allowed the prosecution could proceed. *Id.* at 533-34.

⁷³ *Id.* at 527.

successful, but in the course of rejecting them, the court took the opportunity to elaborate upon the public defender's role.

Hough's first contention (as construed by the court) was that "the public defender [was] an officer of the county, and represent[ed] the state in the prosecution of criminal actions, in the same light and to the same extent as the district attorney . . ." ⁷⁴ Echoing the Progressive reformers who imagined the public defender as a partner of the prosecutor, this position did have a certain logic: the public defender was on the county payroll. ⁷⁵ But the California Supreme Court rejected it out of hand: "Petitioner cites no authority in support of his contention and none has come to our attention." Rather, under the Court's interpretation of the California public defender statute,

when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before his court. ⁷⁶

Thus the public defender was an agent of the client, not the county. ⁷⁷

But the court had overstated Hough's argument. Hough's appellate lawyer was Morris Lavine of Los Angeles, who apparently took the case *pro bono* at the urging of friends of Hough's. ⁷⁸ Nowhere in his briefs or oral argument did Lavine argue, as the court claimed, that "the public defender . . . represents the state in the prosecution of criminal actions, in the

⁷⁴ *Id.* at 528.

⁷⁵ Compare recent cases that have tried (mostly unsuccessfully) to frame the public defender as a state actor for the purposes of constitutional analysis. *Vermont v. Brillon*, 556 U.S. ____ (decided March 9, 2009) (no speedy trial violation if delay was public defender's fault); *Polk County v. Dodson*, 454 U.S. 312 (1981) (public defenders are not state actors for Section 1983 litigation). Many studies have found that clients perceive public defenders as part of the criminal justice bureaucracy, rather than individual advocate. See William Stuntz, *The Uneasy Relationship between Criminal Law and Criminal Procedure*, 107 *YALE L.J.* 1, 33 n.117 (1997).

⁷⁶ *Hough*, 24 Cal.2d at 528-29.

⁷⁷ *Id.* at 529.

⁷⁸ Affidavit of Morris Lavine (January 17, 1944) at 2-3, In re *Hough*, Crim. 4500 (Cal. Sup. Ct. 1944).

same light and to the same extent as the district attorney . . .”⁷⁹ Rather, Lavine’s brief acknowledged that the public defender “acted on behalf of the defendant”; but it also made the common-sense observation that, as a public official, the public defender “was an officer of the state and county, just as much as the district attorney.”⁸⁰ Thus far Lavine had not written anything controversial or even controvertible. His novel legal argument came at the next step, when he argued that “any representations made by the court to Mr. Hovden,” and then conveyed by Hovden to Hough, were, by some transitive property of criminal law, direct representations from the state to the defendant. As such, Hough had a right to rely on them. For this proposition Lavine did indeed cite authority: a line of cases holding that public officials’ promises are binding.⁸¹ It is telling that the court did not distinguish these cases, instead implying that it was self-evident that public defenders were not public officials in a legal sense, even if they received a public salary.

But while a reasonable construction of the public defender statute, the court’s reading is not self-evident. The statute simply provided that the public defender “shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged with the commission of any contempt, misdemeanor, felony or other offense.”⁸² The precise content of the verb “shall defend” was not specified. Nor did any provision in the statute clarify whether the fact that public defenders were salaried by the county transformed them into public officials for other legal purposes. Nonetheless, after *Hough* the authoritative judicial construction of the statute was clear: “shall defend” meant “shall defend just as retained counsel would do.” The *Hough* court also elevated this statutory equivalence to a constitutional requirement:

The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents. Were it not so

⁷⁹ *Hough*, 24 Cal.2d at 528.

⁸⁰ Petitioner’s Brief at 10, *In re Hough*, Crim. 4500 (Cal. Sup. Ct. 1944).

⁸¹ *Id.* at 11-12 (citing cases).

⁸² *Hough*, 24 Cal.2d at 528 (quoting the statute as on the books at the time of *Hough*).

his client would not be afforded the full right 'to have assistance of counsel for his defense' which the Constitutions, both state and federal, give to one accused of crime.⁸³

Hough made a second argument that, even if Hovden's advice to plead guilty was attributed only to himself and not the county, it was still unconstitutionally coercive. In an affidavit, Hough testified that Hovden had told him, "I guarantee you that if you plead guilty you won't get gassed."⁸⁴ The *Hough* court did not reach the question of whether such a promise could ever be the basis for overturning a plea. Instead, the court rejected the factual predicate for the argument, finding it implausible that Hovden would have actually given such misleading advice. Not only did Hovden himself deny making any such assurances, the Court emphasized that he was an experienced public defender and that even Hough's appellate counsel admitted of his reputation as a "courageous" and "high class attorney."⁸⁵

To reach this result, the court engaged in some remarkably creative misreading of Hough's briefing. Lavine had indeed praised Hovden as "courageous" at oral argument, but he was not referring to Hovden's general reputation. Rather, he was praising Hovden (and his supervisor at the P.D.'s office) for supporting Hough in his habeas petition. Hovden had sworn a lengthy affidavit with his account of the plea negotiations, even though given "the circumstances" (presumably, the risk that he would face opprobrium for his conduct of Hough's defense), other public defenders would have likely been "inclined to forget it and let the defendant defend himself."⁸⁶ Hovden did deny making the verbatim statement, "I guarantee you that if you plead guilty you won't get gassed," or any other "guarantee" of a particular punishment.⁸⁷ But he did so only in response to a letter from the clerk of the California Supreme Court, requesting that he clarify whether or not he had made that precise statement.⁸⁸ In this supplemental

⁸³ *Id.* at 529.

⁸⁴ *Id.* at 529.

⁸⁵ *Id.* at 530.

⁸⁶ Oral Argument of Morris Lavine, Esq., on Behalf of Appellant (May 8, 1944), In re Hough, Crim. 4500 (Cal. Sup. Ct. 1944).

⁸⁷ Supplemental Affidavit of Erling J. Hovden (April 21, 1944), In re Hough, Crim. 4500 (Cal. Sup. Ct. 1948).

⁸⁸ Clerk of Supreme Court to Attorney General Robert W. Kenny and Morris Lavine, April 13, 1944, California State Archives, Crim. No. 4500.

affidavit filed at the court's request, Hovden remained quite clear that although he had made no guarantees, he had informed Hough that "in view of the repeated statements made to [him] by the trial court, [he] could not conceive of the imposition of the extreme penalty on a plea of guilty."⁸⁹ At oral argument, Lavine suggested that the issue was not Hovden's exact words but whether "it was a reasonable inference for Hough to conclude that the promise of a life sentence had been made."⁹⁰

In Hovden's original affidavit, he was even more explicit. He described multiple conversations with both the young deputy district attorney assigned to the case and a senior deputy district attorney with whom he had a close working relationship, as well as the trial judge, Leslie Still. Although the D.A.'s office insisted upon officially recommending a sentence of death, Hovden testified that Judge Still had repeatedly indicated that he would not impose such a sentence if the defendant pled guilty to two counts of first-degree murder, and at least one deputy D.A. agreed that a life sentence would be appropriate. True, the day before trial Judge Still had cautioned Hovden that he might have to impose death after all, but Hovden interpreted that proviso merely

as a statement by the court to defense counsel which would protect both the court and counsel from any criticism that a definite promise had been made as to the disposition of the case. . . . For many reasons trial judges are unwilling to make positive commitments but counsel is guided by and relies upon their expressed general impressions and act with complete confidence on tacit understandings as to the disposition of their cases. So in this instant case the court had on every occasion when he had expressed himself as to what he believed to be a proper punishment in the light of the facts of the case, he had agreed . . . that life imprisonment would serve the ends of justice. Furthermore, the court well knew that the sole and only reason for entering pleas of guilty would be to eliminate even the possibility of the death penalty. . . . Up to the very moment of the pronouncement of sentence there was no intimation by the court that such a penalty would be imposed.⁹¹

⁸⁹ *Id.*

⁹⁰ Oral Argument, *supra* note 86, at 8-9.

⁹¹ Petition for Writ of Habeas Corpus and Supporting Affidavit of Erling J. Hovden (May 25, 1943) at 7-8, *In re Hough*, Crim. 4500 (Cal. Sup. Ct. 1944).

Hovden concluded that he “was misled by the comments of the court,” that he had advised his client on that basis, and that Hough’s guilty pleas “would not have been entered had counsel not been so misled by the trial court’s remarks.”⁹²

Perhaps the California Supreme Court simply chose not to credit Hovden’s testimony over the competing affidavits filed by the state, in which the prosecutors and Judge Still denied much of Hovden’s account. But instead of saying so, the court misdescribed Hovden’s testimony, as if Hovden had testified against his former client, rather than acknowledging that Hovden’s affidavits, if credited, tended to support Hough’s claims. In a curious way, the court’s rewriting of Hovden’s testimony reveals the high regard in which California judges held public defenders. The court’s opinion portrays Hough as the typical disgruntled death row prisoner, turning his back on those who tried to help him, including Hovden, a veteran public defender and “high-class attorney” who would never have done what Hough had accused him of doing. Against the murderer stood the rule of law — judges and lawyers — and by ignoring Hovden’s testimony on the murderer’s behalf, the California Supreme Court welcomed him into that august circle. Perhaps the justices imagined themselves to be defending Hovden’s reputation against the slander of an ungrateful former client. But Hough had never accused Hovden of intentionally harming him. In his briefings Hough had argued that if Hovden had misled him, it was only because he had been misled in turn.

In fact, William Hough described his public defender Erling Hovden as his only friend in the days after his arrest. But to establish an identity between public defenders and private defense attorneys, the California Supreme Court necessarily ignored Hough’s descriptions of this relationship — a relationship quite different from that of wealthy defendants to their lawyers. A welder in the Long Beach shipyards, Hough could hardly afford

⁹² *Id.* at 15-16. Compare the court’s reasoning: The court acknowledged that Hovden had “filed a lengthy affidavit” and been “a most willing witness” in Hough’s behalf, but concluded that as “Mr. Hovden emphatically denies making any such assertion as that attributed to him by petitioner, we are unable to give credence to petitioner’s claim that he was misled in entering his pleas of guilty by any assurance or guarantee on the part of Mr. Hovden.” *In re Hough*, 24 Cal.2d 522 (1944).

to retain counsel to defend a double murder trial. What else could he do besides rely on the assurances made to him by his public defender?

You see I was a verry sick man all this time and I was trying to get money to Hire a Lawyer and it did look like I did not have a friend in the world and then Mr Houden come to me and told me. I have talked to Judge Still and he has led me to bee able to tell you if you will Change your Plee to Guilty and withdraw the Insanity Plee I can guarantee that he wont give you the Extreame Pinalty⁹³

Of course Hough had relied on Hovden's advice, he said: "I had no one else to rely on."⁹⁴

PART IV: CONCLUSION

The California Supreme Court's explication of the public defender's role did nothing to help William Hough; in the end, Hough was spared execution, but by executive rather than judicial clemency.⁹⁵ In fact, perhaps it was the justices' inclination to uphold Hough's conviction that motivated them to construe the public defender statute the way they did in *Hough*. But the precedent had been set, and in 1948 this precedent would work in the favor of another California prisoner, Frank Avilez.

Avilez's experience with the San Francisco public defender in 1947 demonstrates that confusion persisted among lawyers and trial judges about the public defender's role. Avilez's public defender apparently believed that his role was to facilitate quick guilty pleas, at least in egregious cases.⁹⁶ As Melvin Belli described it in his appellate brief, the public defender "spent some *seconds* with the defendant before a plea of guilty was entered, which subjects the defendant to some four hundred fifty-three

⁹³ Lavine Affidavit, *supra* note 78, at 3 (quoting letter from Hough).

⁹⁴ Traverse to the Return to Writ of Habeas Corpus and Affidavit of William Hough (July 5, 1943) at 6, *In re Hough*, Crim. 4500 (Cal. Sup. Ct. 1944).

⁹⁵ In 1945 Hough's death sentence was commuted to a life sentence by acting Gov. Frederick F. Houser. See AUSTIN SARAT, *MERCY ON TRIAL* 223 (2005).

⁹⁶ *But see Love Killer Spurns Test*, L. A. TIMES, June 21, 1936, at 3 (discussing a case in which Gerald Kenny did provide a vigorous defense, even though his client wanted to plead guilty).

years in prison!”⁹⁷ The Progressive reformers who imagined the public defender as a partner to the public prosecutor, with no interest in wasting the court’s time defending an admittedly guilty client, may have seen nothing wrong with this behavior.⁹⁸

But California’s appellate judges rejected this approach wholesale, as a derogation of the defense attorney’s duty. In overturning Avilez’s convictions, the First District Court of Appeal confirmed that it was Clara Foltz’s individual advocate, not the Progressive public servant, that a California public defender should aspire to be. As the California Supreme Court had held in *Hough*, “The public defender stands in the same relation to the accused he is appointed to represent as an attorney regularly retained.”⁹⁹ To allow a client to plead before conducting any investigation of the facts and the law beyond the client’s bare assertion of guilt was to risk overlooking meritorious defenses or mitigating evidence that the client might have, even if the client, unschooled in the law, did not dispute what he perceived to be the charges against him. For this proposition, the *Avilez* court quoted at length from the U.S. Supreme Court’s decision in *Powell v. Alabama*, which had elevated to the status of constitutional law the defense attorney’s central role in the American system of adjudicating criminal guilt:

The right to be heard would be of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one.¹⁰⁰

⁹⁷ Appellant’s Opening Brief, *supra* note 2, at 5, 22. Belli claimed this sentence was “the longest ever meted out in the history of the State.” *Id.* at 22.

⁹⁸ GOLDMAN, *supra* note 42, at 66-67. Mayer Goldman’s book *The Public Defender* spelled out what a public defender should do when a client admitted guilt, and it was precisely what the San Francisco public defender had done with Avilez: plead the client guilty.

⁹⁹ *People v. Avilez*, 86 Cal.App.2d 289, 296 (1948) (citing *Hough*).

¹⁰⁰ *Powell v. Alabama*, at 68-69. *Powell* is cited repeatedly in *Avilez*, 86 Cal.App.2d at 296. It had also been quoted in Avilez’s appellate brief. Appellant’s Opening Brief, *supra* note 2, at 30-31 (quoting *Powell* excerpt from *People v. McGarvy*, 61 Cal.App.2d 557).

Barbara Babcock notes that Clara Foltz herself never addressed explicitly the difference between the two competing models of public defense, and suggests that perhaps they differed only in emphasis.¹⁰¹ Even so, in cases at the margin, such as *Avilez*, which model the court adopted could mean the difference between upholding and reversing a conviction. And in the public defender's day-to-day work, any number of small decisions would come out differently depending on how the defender viewed himself: as a zealous advocate for each individual client, or a public servant helping the justice system as a whole run smoothly. By 1948 California courts had clearly established, doctrinally, the former view.

Although the appellate court used *Avilez* to make a point about public defenders, the subsequent story of Frank Avilez makes a different point: Sometimes there's only so much a defense attorney can do for a client — regardless of who signs his paychecks. After winning the appeal, Melvin Belli realized he “couldn't really put on a new trial, not one that would end up with any different verdict.”¹⁰² In addition to physical evidence and Avilez's own confessions, the state had five eyewitnesses. So Belli pled him guilty to ten counts, and 340 years.¹⁰³ Essentially it was still a life sentence. Nevertheless, as Belli recalled years later, “Avilez was grateful and sent me a telegram from San Quentin: THANK YOU FOR CUTTING MY SENTENCE IN HALF.”¹⁰⁴ ★

¹⁰¹ *Inventing*, *supra* note 17, at 1279. The narrow width of any gap between the two ideals is also indicated by the fact that Walton Wood, though upheld as an ideal Progressive public defender, did not dispute that in some cases a public defender should not allow his client to plead guilty right away: “Often the defendant does not know whether he has in fact committed a crime.” Walton J. Wood, *THE PLACE OF THE PUBLIC DEFENDER IN THE ADMINISTRATION OF JUSTICE* 17 (1914).

¹⁰² MELVIN M. BELLI & ROBERT BLAIR KAISER, *MELVIN BELLI* 84 (1976).

¹⁰³ *Prison Terms 340 Years*, L. A. TIMES, Dec. 4, 1948, at 4.

¹⁰⁴ BELLI, *supra* note 101, at 84. Belli likely embellished this account of Avilez's case for poetic effect, describing the sentence as having been halved from 440 to 220 years, but contemporary reports suggest it was only cut to 340 years. See *supra* text at note 102.

THE CALIFORNIA SUPREME COURT AND THE FELONY MURDER RULE:

A Sisyphean Challenge?

MIGUEL A. MÉNDEZ*

INTRODUCTION

This article examines the California Supreme Court's major encounters with the felony murder rule. In its unvarnished version, this rule allows a prosecutor to convict a defendant of murder without having to prove the mental states of murder as defined in the California Penal Code. The prosecutor, however, must prove that the homicide occurred during the commission or attempted commission of a felony. As will be explained, under California law the homicide will constitute first degree murder if the felony underlying the homicide is among the felonies enumerated in Section 189 of the Penal Code.¹ It will constitute second degree murder if the underlying felony is not among those felonies.

To appreciate the effects of the felony murder rule, it is necessary to understand how California law defines and punishes various homicides.

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¹ See CALIFORNIA PENAL CODE § 189 (West's 2010 Desktop Edition) [hereinafter CAL. PENAL CODE].

Part A provides this overview. Differentiating among the various homicides in turn requires an understanding of different homicidal mental states. Part B presents the classification of different homicidal mental states. Part C introduces the core doctrine surrounding the felony murder rule in California. It is followed by Part D which describes the major limitations the California Supreme Court has imposed on the doctrine. Part E traces the statutory roots of the second degree felony murder rule, as described by the California Supreme Court. Part F examines potential problems with the Court's explanation of the rule's roots. Part G explores the Court's construction of the Penal Code provisions setting out the first degree felony murder rule and questions whether it was necessary for the Court to rely on legislative history in construing the provisions. Part H presents a critique of the Court's felony murder jurisprudence by examining the felony murder rule's place in California's law of murder. Part I attempts to shed some light on why the Court has taken extraordinary measures to preserve the felony murder rule and concludes with a call on the California Legislature to reconsider the wisdom of retaining the rule.

A. AN OVERVIEW OF HOMICIDE IN CALIFORNIA

As a review of any standard criminal law casebook will attest, homicide is considered the most "graded" offense. This means that both the Common Law and statutory treatment of homicide focuses on the circumstances that differentiate one form of homicide (e.g., murder) from another (e.g., negligent homicide). Since the harm is the same in all cases — the death of a human being — the judicial and statutory focus has been on the mental state of the offender. If the offender, for example, intended to bring about the death of the victim, the offender will be deemed guilty of murder;² if on the other hand, the offender did not even contemplate the death of the victim, the offender may be guilty only of negligent homicide.³

² See, e.g., CALIFORNIA PENAL CODE §§ 187-188. That would be the case unless, of course, the offender acted within the parameters of such doctrines as self-defense or defense of others, see, e.g., CAL. PENAL CODE § 197(1), or heat of passion. See CAL. PENAL CODE § 192(a).

³ See CAL. PENAL CODE § 192(b).

The mental state is determinative not only of the kind of homicide of which the offender may be convicted, but also of the severity of the punishment imposed for that type of homicide. In California, where the crime of murder is divided into degrees, first degree murder is punishable by death, imprisonment for life without possibility of parole, or imprisonment for a term of twenty-five years.⁴ Second degree murder, on the other hand, is generally punishable only by a term of fifteen years to life.⁵ The lesser homicides are punished even less severely. Voluntary manslaughter is punishable by a term of three, six, or eleven years,⁶ and involuntary manslaughter (California's equivalent of negligent homicide), by a term of two, three or four years.⁷

As these punishments suggest, blameworthiness plays a critical role in the definition of, and punishment for, a particular homicide. The greater the offender's indifference to the value of human life, the greater the likelihood that the offender will be charged with a more serious homicide. The most blameworthy are those who choose to kill after considering the "pros" and "cons" of taking human life. This position is reflected in California's first degree murder statute which defines a "willful, deliberate, and premeditated" killing as first degree murder.⁸ As the standard instruction tells California jurors, a homicide is "deliberate" if it is the "result of careful thought and weighing of the considerations for and against the proposed [homicidal] course of action."⁹

Negligent homicide is at the other end of the blameworthiness spectrum. An offender can be convicted of this offense even if the offender was unaware that his or her course of conduct posed a substantial risk of death to others. Even if the offender, for example, mistakenly believed that the gun he or she fired was empty, the offender can still be convicted of negligent homicide if the jury believes that a reasonable person under similar circumstances would have been aware of a substantial risk that the gun might be loaded. As the standard instruction emphasizes to California

⁴ See *id.* at § 190(a).

⁵ *Id.*

⁶ *Id.* at § 193(a).

⁷ *Id.* at § 193(b).

⁸ *Id.* at § 189.

⁹ CAL. JURY INSTRUCTIONS, CRIMINAL 8.20 (Spring 2010 ed.) [hereinafter CALJIC].

jurors, the test is not “what the defendant actually intended, but what a person of reasonable and ordinary prudence would have expected likely to occur.”¹⁰

In California, second degree murder embraces one of two mental states. As in the case of first degree murder, one is the desire to take the life of the victim but without the deliberation required for first degree murder.¹¹ The other mental state requires proof that the offender was at least aware that his or her conduct posed a substantial risk of death to others but despite that awareness chose to run the risk.¹² Evidence that the offender did not intend to kill does not excuse. The gravamen of the offense is the conscious creation of homicidal risks that lamentably materialize.¹³ A classic example in California is the drunk driver who chooses to continue drinking even though he is aware of the homicidal risk he may pose to others if he attempts to drive home. Regrettably, he kills another driver on the way home, although at the time he chose to drink and drive he may have very much hoped that he would not.¹⁴

In California, voluntary manslaughter is defined as an unlawful killing without malice “upon a sudden quarrel or heat of passion.”¹⁵ Like second degree murder, it can embrace one of two mental states: a desire to bring about the death of the victim (purpose) or conscious creation and disregard of a homicidal risk (recklessness). As a doctrinal matter, however, the killing is not murder because killings committed under extenuating circumstances (upon a sudden quarrel or heat of passion) are not considered as having been committed with “malice aforethought,” the mental state of murder.¹⁶ Defendants charged with murder will be entitled to voluntary

¹⁰ *Id.* at 8.46.

¹¹ As stated in California Penal Code § 188, “a deliberate intention unlawfully to take away the life of a fellow creature.” *See* CAL. PENAL CODE § 188. This is known in California as “express malice.”

¹² As stated in California Penal Code § 188, “when the circumstances attending the killing show an abandoned and malignant heart.” *See id.* This is known in California as “implied malice.”

¹³ *See id.*

¹⁴ *See, e.g.,* *People v. Watson*, 30 Cal.3d 290, 300, 637 P.2d 279, 285, 179 Cal.Rptr. 43, 49 (1981).

¹⁵ *See* CAL. PENAL CODE § 192(a).

¹⁶ A homicide committed upon a sudden quarrel or heat of passion is by definition not a malicious killing. *See id.*

manslaughter instructions if they introduce evidence from which a reasonable jury could find that at the time they killed, their reason, due to some provocation, was obscured to the degree that they acted rashly and without deliberation or reflection.¹⁷ The classic example is the husband who admits killing his spouse upon learning about her infidelity.¹⁸ But to convict the defendant of the lesser homicide, it is not enough for the jury to accept the defendant's explanation. To place limits on the offense of voluntary manslaughter, the jury must also find that the provocation would have moved a reasonable person of average disposition to lose his or her self-control and act rashly in similar circumstances.¹⁹

Although this overview of homicide in California omits important details, it suffices for our purpose. Homicide is a highly nuanced concept. Whether one who kills is guilty of a particular homicide depends on whether the offender harbored the mental state or states associated with that homicide. Moreover, whether one is sentenced to a term of years, life, or even death for the homicide is a function of the mental state. Mental states requiring proof of a greater indifference to the value of human life describe the most blameworthy offenders and call for the heaviest punishments. Indeed, the justification for imposing the most severe penalties rests squarely on the moral principle that those who show the least regard for the value of human life deserve the least mercy. As we shall see, this approach to moral accountability contrasts sharply with the justifications advanced for another form of murder: felony murder.

B. CLASSIFICATION OF HOMICIDAL MENTAL STATES

It was not until the advent of the American Law Institute's Model Penal Code that clarity was brought to American criminal mental states. Prior to the promulgation of the Model Penal Code by the American Law Institute

¹⁷ See CALJIC 8.42.

¹⁸ See, e.g., *People v. Berry*, 18 Cal.3d 509, 556 P.2d 777, 134 Cal.Rptr. 415 (1976).

¹⁹ See CALJIC 8.42. In addition, the jury must find that a reasonable person, even if provoked to kill, would not have "cooled off" by the time the defendant killed. If a reasonable person would have cooled off by then, the jury should return a murder conviction. See CALJIC 8.43.

in 1962, legislatures and especially courts struggled with the definition of such vague Common Law terms as “intent,” “mens rea,” “scienter,” “recklessness,” “willfulness,” and “wantonness.” All of these terms (as well as others) were designed to signal the existence of a discrete mental state, but none succeeded in defining the mental states with sufficient particularity to allow legislators and judges to distinguish one mental state from another.²⁰ States that have relied on the Model Penal Code to reform their Common Law penal codes have been able to eliminate much of the uncertainty and confusion engendered by the Common Law terms. Unfortunately, California is among a minority of states that have opted to retain the Common Law approach to culpable mental states.²¹

Although the current California Penal Code was enacted by the legislature in 1872,²² it is nonetheless the product of Common Law jurisprudence. Strong evidence of its Common Law roots can be found in the provisions relating to homicide. The various homicides are not couched in the contemporary English associated with the Model Penal Code but with the terms first devised by the English Common Law judges. Murder, for example, is defined as “the unlawful killing of a human being, or a fetus, with malice aforethought.”²³

Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.²⁴

To the modern reader, the definition of malice — the mental state that sets murder apart from the lesser homicides — is not particularly helpful.

²⁰ For an extended discussion of how the Model Penal Code solves many of the problems stemming from the use of Common Law mens rea terms, see M. Méndez, *A Sisyphian Task: The Common Law Approach to Mens Rea*, 28 DAVIS L. REV. 407 (Winter 1995).

²¹ According to Professor Phillip Johnson, about half of the states have revised their penal codes since 1962, and the Model Penal Code played a significant role in the drafting of the revised provisions. See P. JOHNSON, CRIMINAL LAW 69 (West 6th ed. 2000).

²² See CAL. PENAL CODE § 2.

²³ *Id.* at § 187(a).

²⁴ *Id.* at § 188.

Although express malice denotes a desire to take human life, the definition of implied malice is hopelessly obscure. In particular, a modern reader cannot fathom the mental state conjured by a killer who acts with “an abandoned and malignant heart.” In *People v. Watson*,²⁵ the California Supreme Court brought some clarity to this aspect of implied malice:

We have said that second degree murder based on implied malice has been committed when a person does “‘an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life’” (*People v. Sedeno*, supra, 10 Cal.3d at p. 719, quoting from *People v. Phillips*, supra, 64 Cal.2d 574, 587.) Phrased in a different way, malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life. (*People v. Washington* (1965) 62 Cal.2d 777, 782 [44 Cal.Rptr. 442, 402 P.2d 130].)²⁶

In Model Penal Code terms, the killer who acts with express malice acts purposely;²⁷ his conscious object is to kill the victim.²⁸ The killer who acts with implied malice acts recklessly;²⁹ he consciously disregards a substantial risk that his conduct might result in the death of another human.³⁰ He might also be acting knowingly if he is aware that it is practically certain that his conduct will result in the death of another human.³¹ The California Penal Code’s reference to the absence of a considerable provocation can be understood only in relation to the crime of voluntary manslaughter. As has been noted, the Penal Code defines voluntary manslaughter as “the unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion.”³² For many years, the

²⁵ 30 Cal.3d 290, 637 P.2d 279, 179 Cal.Rptr. 43 (1981).

²⁶ *Id.* at 300, 637 P.2d at 285, 179 Cal.Rptr. at 49.

²⁷ See MPC § 2.02(2)(a).

²⁸ See *id.*

²⁹ See MPC § 2.02(2)(c).

³⁰ See *id.*

³¹ See MPC § 2.02(2)(b).

³² CAL. PENAL CODE § 192(a).

California courts construed this provision as applying only to intentional killings where the accused claimed he was provoked to kill. In *People v. Lasko*,³³ the California Supreme Court extended the provision to include the provoked killer who kills only with a conscious disregard for the life of the deceased.³⁴ As the Court correctly noted, under the statutory scheme for murder and manslaughter, there is no malice — either express or implied — when the accused kills upon a sudden quarrel or in the heat of passion.³⁵ If as a doctrinal matter the presence of provocation necessarily displaces express malice when the killer kills intentionally, it necessarily displaces implied malice when the killer kills recklessly.

Of particular relevance to this article, the Court cited the anomalous result that would ensue if it held that the doctrine of provocation displaced only express malice:

Under the Attorney General's approach, one who shoots and kills another in the heat of passion and with the intent to kill is guilty only of voluntary manslaughter, yet one who shoots and kills another in the heat of passion and with conscious disregard for life but with the intent merely to injure, a less culpable mental state than intent to kill, is guilty of murder. This cannot be, and is not, the law.³⁶

Although California is a Common Law state, the Court's sensitivity to different degrees of culpability is the key to understanding the Model Penal Code's mental states. Under the Model Penal Code, criminal homicide can be murder, manslaughter, or negligent homicide.³⁷ Criminal homicide is murder when it is committed purposely or knowingly,³⁸ or recklessly under circumstances manifesting an extreme indifference to the value of human life.³⁹ Criminal homicide is manslaughter when it is committed merely recklessly,⁴⁰ or when a homicide that would otherwise be murder is

³³ 23 Cal.4th 101, 999 P.2d 666, 96 Cal.Rptr.2d 441 (2000).

³⁴ *See id.* at 109, 999 P.2d at 671, 96 Cal.Rptr.2d at 446.

³⁵ *See id.*

³⁶ *Id.*

³⁷ *See* MPC § 210.1.

³⁸ *See* MPC § 210.2(1)(a),

³⁹ *See* MPC § 210.2(1)(b).

⁴⁰ *See* MPC § 210.3(1)(a).

committed under the influence of an extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.⁴¹ This is the Model Penal Code's equivalent of the California's voluntary manslaughter doctrine. Criminal homicide is negligent homicide when it is committed negligently.⁴² In Common Law jurisdictions such as California, this offense is known as involuntary manslaughter.⁴³

As one would expect, under the Model Penal Code murder is punished more heavily than manslaughter, and manslaughter is punished more heavily than negligent homicide.⁴⁴ This hierarchy stems from the Code's recognition that only the most blameworthy should be punished as murderers: those whose conscious object is to kill (purposeful killers);⁴⁵ those who are practically certain that their misconduct will result in death (knowing killers),⁴⁶ and those who persist in their misconduct even though they are substantially certain that it will result in death (extremely reckless killers).⁴⁷ What all three killers share is a mental state that evinces an extreme indifference to the value of human life. Those who merely disregard a substantial risk that death might ensue from their conduct are guilty only of manslaughter.⁴⁸ Those who fail to appreciate a homicidal risk that would have been apparent to reasonable persons are guilty only of negligent homicide.⁴⁹

⁴¹ See MPC § 210.3(1)(b).

⁴² See MPC § 210.4(1).

⁴³ See CAL. PENAL CODE § 192(b).

⁴⁴ Under the Model Penal Code, murder is a felony of the first degree, manslaughter is a felony of the second degree, and negligent homicide is a felony of the third degree. See MPC §§ 210.2(2), 210.3(2), and 210.4(2). Section 6.06 provides that a person who has been convicted of a felony may be sentenced to prison as follows: "(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than ten years, and the maximum of which shall be life imprisonment; (2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be ten years; (3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than two years, and the maximum of which shall be five years."

⁴⁵ See MPC § 2.02.(2)(a)(i).

⁴⁶ See MPC § 2.02.(2)(b)(ii).

⁴⁷ See *People v. Register*, 60 N.Y.2d 270, 285, 457 N.E.2d 704, 712, 469 N.Y.S.2d 599, 607 (1983) (Jasen, J. dissenting).

⁴⁸ See MPC § 2.02.(2)(c).

⁴⁹ See MPC § 2.02.(2)(d).

The Model Penal Code's mental state hierarchy has another important dimension, an evidential one, which is germane to this article.

When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.⁵⁰

Proof of a higher mental state, such as purpose, necessarily entails proof of a lower mental state, such as knowledge. With regard to murder, proof that the accused's conscious object was to kill the victim (purpose) necessarily proves that the accused was practically certain that his conduct would result in the victim's death (knowledge). Proof that the accused was practically certain that his conduct would result in the victim's death necessarily proves that he was substantially certain that death might result from his conduct (extreme recklessness). Whether all three mental states are sufficiently blameworthy to justify a murder conviction is, of course, a policy question for the legislature. The American Law Institute concluded that any of the three justify such a conviction. On the other hand, by adhering to the Common Law tradition, the California Legislature has declared that only one of two mental states justifies a murder conviction: express malice (purpose) or implied malice (a form of recklessness). In the absence of one of the necessary mental states, one would expect a defendant accused of murder to be acquitted. That, however, is not the case in California.

C. THE FELONY MURDER RULE: THE CORE DOCTRINE

One of the very few things that can be said with certainty about the felony murder rule is that it is mired in controversy. Even its origin has been questioned. In a landmark opinion abolishing the felony murder rule, the Michigan Supreme Court, after reviewing the authorities recounting the origin of the rule, concluded its examination by noting:

⁵⁰ MPC § 2.02(5).

[T]he doctrine is of doubtful origin. Derived from the misinterpretation of case law, it went unchallenged because of circumstances which no longer exist. The doctrine was continuously modified and restricted in England, the country of its birth, until its ultimate rejection by Parliament in 1957.⁵¹

Two other observations can be made about the rule with confidence. First, most of the opposition to the rule has come from courts, not legislatures, which have imposed various limitations on the operation of the rule.⁵² As we shall see, the California Supreme Court has been no exception. Second, the California felony murder rule, as construed by the courts, establishes a strict liability offense with respect to the death element. The clearest statement of the rule can perhaps be found in *People v. Stamp*.⁵³

Under the felony-murder rule of section 189 of the Penal Code, a killing committed in either the perpetration of or an attempt to perpetrate robbery is murder of the first degree. This is true whether the killing is willful, deliberate and premeditated, or merely accidental or unintentional, and whether or not the killing is planned as a part of the commission of the robbery. . . .

The doctrine is not limited to those deaths which are foreseeable. . . . Rather a felon is held strictly liable for all killings committed by him or his accomplices in the course of the felony. . . . As long as the homicide is the direct causal result of the robbery, the felony-murder rule applies whether or not the death was a natural or probable consequence of the robbery. So long as a victim's predisposing physical condition, regardless of its cause, is not the only substantial factor bringing about his death, that condition, and the robber's ignorance of it, in no way destroys the robber's criminal responsibility for the death. . . . So long as life is shortened as a result of the felonious act, it does not matter that the victim might have died soon anyway. . . . In this respect, the robber takes his victim as he finds him.⁵⁴

⁵¹ *People v. Aaron*, 09 Mich. 672, 698, 299 N.W.2d 304, 312 (1980).

⁵² *See id.*

⁵³ 2 Cal.App.3d 203, 82 Cal.Rptr. 598 (1969).

⁵⁴ *Id.* at 209-210, 82 Cal.Rptr. at 602-603.

The facts of *Stamp* are compelling. Stamp and an accomplice entered a business with the intent of robbing the employees. Stamp, who was armed with a gun, had the owner (Honeyman) lie down with the rest of the employees while Stamp and his accomplice took their money.

As the robbers, who had been on the premises 10 to 15 minutes, were leaving, they told the victims to remain on the floor for five minutes so that no one would “get hurt.”

Honeyman, who had been lying next to the counter, had to use it to steady himself in getting up off the floor. Still pale, he was short of breath, sucking air, and pounding and rubbing his chest. As he walked down the hall, in an unsteady manner, still breathing hard and rubbing his chest, he said he was having trouble “keeping the pounding down inside” and that his heart was “pumping too fast for him.” A few minutes later, although still looking very upset, shaking, wiping his forehead and rubbing his chest, he was able to walk in a steady manner into an employee’s office. When the police arrived, almost immediately thereafter, he told them he was not feeling very well and that he had a pain in his chest. About two minutes later, which was 15 to 20 minutes after the robbery had occurred, he collapsed on the floor. At 11:25 he was pronounced dead on arrival at the hospital. The coroner’s report listed the immediate cause of death as heart attack.

The employees noted that during the hours before the robbery Honeyman had appeared to be in normal health and good spirits. The victim was an obese, sixty-year-old man, with a history of heart disease, who was under a great deal of pressure due to the intensely competitive nature of his business. Additionally, he did not take good care of his heart.

Three doctors, including the autopsy surgeon, Honeyman’s physician, and a professor of cardiology from U.C.L.A., testified that although Honeyman had an advanced case of atherosclerosis, a progressive and ultimately fatal disease, there must have been some immediate upset to his system which precipitated the attack. It was their conclusion in response to a hypothetical question that but for the robbery there would have been no fatal seizure at that time. The fright induced by the robbery was too much of a shock to

Honeyman's system. There was opposing expert testimony to the effect that it could not be said with reasonable medical certainty that fright could ever be fatal.⁵⁵

The court affirmed the first degree murder convictions of Stamp and his accomplice. The court also affirmed the first degree murder conviction of an additional accomplice, the getaway driver, who never entered the business. Setting aside the matter of accomplice liability, it is clear from an analysis of *Stamp* that (as the court pointed out) the death element of the offense is predicated on strict liability. To survive a defense motion for a directed verdict, all the prosecution needs to do is offer evidence from which a reasonable jury could find (1) the actus reus of the underlying felony plus a death, (2) the mens rea of the underlying felony, and (3) the most basic causal connection between the commission or attempted commission of the underlying felony and the death. If it discharges this production burden, the prosecution will be entitled to have the judge instruct the jury on felony murder even if it fails to offer any evidence of the mental states associated with the homicides that have been discussed (i.e., purpose, recklessness, or negligence). Thus, the availability of the rule allows the prosecution to dispense with the requirement of producing evidence of express or implied malice or even negligence with respect to the death element.

Such a dispensation for an offense as serious as murder is surprising given our law's commitment to the principle that, as a rule, harms should not be punishable unless accompanied by a culpable mental state. As Justice Robert Jackson observed almost sixty years ago:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public

⁵⁵ *Id.* at 208, 82 Cal.Rptr. at 601.

prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."⁵⁶

D. JUDICIAL LIMITATIONS

Divorcing harms from what otherwise would be the associated mental state undermines the moral basis (a blameworthy mental state) that justifies the imposition of punishment. Not surprisingly, some state courts have responded to this dilemma by imposing limitations on the felony murder rule. One is to elevate the death element from strict liability to negligence.⁵⁷ In these jurisdictions, prosecutors must convince the jurors that the accused either foresaw or should have foreseen the death. The California courts, however, have never imposed this limitation in their construction of the state's felony murder rule. Instead, the California Supreme Court has imposed two other limitations. One, known as the merger doctrine, originally applied to both the first and second degree felony murder rules. As will be explained, it now applies only to the second degree murder rule. The other limitation has applied only to the second degree murder rule. This limitation requires that the felony underlying the murder charge be dangerous to human life in the abstract.

The Dangerous in the Abstract Requirement

In *People v. Ford*,⁵⁸ the California Supreme Court restricted the felonies that could support a conviction of second degree murder to those that are "inherently dangerous to human life."⁵⁹ As the Court explained in *People v. Williams*,⁶⁰ the purpose of the felony-murder rule is to deter felons from killing negligently or accidentally. "This purpose may be well served with

⁵⁶ *Morissette v. United States*, 342 U.S. 246, 250-251 (1952) (footnotes omitted).

⁵⁷ *See, e.g., State v. Hoang*, 242 Kan. 40, 43, 755 P.3d 7, 9 (1988) ("A requirement of the felony murder rule is that the participants could reasonably foresee or expect that a life might be taken in the perpetration of the felony.").

⁵⁸ 60 Cal.2d 772, 388 P.2d 892, 36 Cal.Rptr. 620 (1964).

⁵⁹ *Id.* at 795, 388 P.2d at 907, 36 Cal.Rptr. at 635.

⁶⁰ 63 Cal.2d 452, 406 P.2d 647, 47 Cal.Rptr. 7, 10 (1965).

respect to felonies such as robbery or burglary, but it has little relevance to a felony which is not inherently dangerous. If the felony is not inherently dangerous it is highly improbable that the potential felon will be deterred; he will not anticipate that any injury or death might arise solely from the fact that he will commit the felony.”⁶¹

As defined by the statute, the felony must carry “a high probability” that death will result.⁶² Whether a given felony is dangerous to human life in the abstract is a question of law,⁶³ and in reaching its decision the court may not take into account the facts giving rise to the felony.⁶⁴ The court is limited to a facial analysis of the statute defining the felony, unless the court needs expert help determining whether the commission of the felony as contemplated in the statute poses a high probability of death.⁶⁵

Policy concerns led the California Supreme Court to adopt the “in the abstract” requirement. Allowing the court to consider the evidence giving rise to the felony would inevitably result in a finding that the felony is dangerous to human life. “[T]he existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous.”⁶⁶ Such an analysis would extend the second degree felony murder rule beyond any rational purpose it serves and undermine the traditional requirement that the state prove malice when charging murder.

The Merger Doctrine

In *People v. Ireland*⁶⁷ the Court held that the underlying felony must be independent and not an integral part of the homicide.⁶⁸ Since most deaths result from some sort of assault, allowing the prosecution to use the assault as the predicate felony would relieve the prosecution from having to prove

⁶¹ *Id.* at 457 n.4, 406 P.2d at 650 n.4, 47 Cal.Rptr. at 10 n.4.

⁶² *See* *People v. Patterson*, 49 Cal.3d 615, 626, 778 P.2d 549, 558, 262 Cal.Rptr. 195, 204 (1989).

⁶³ *See* *People v. Williams*, 63 Cal.2d 452, 458 n.5, 406 P.2d 647, 650 n.5, 47 Cal.Rptr. 7, 10 n.5 (1965).

⁶⁴ *See id.*

⁶⁵ *See, e.g.,* *People v. James*, 62 Cal.App.4th 244, 259, 74 Cal.Rptr.2d 7, 15 (1998).

⁶⁶ *People v. Burroughs*, 35 Cal.3d 824, 830, 678 P.2d 894, 898, 201 Cal.Rptr. 319, 323 (1984).

⁶⁷ 70 Cal.2d 522, 539, 450 P.2d 580, 590, 75 Cal.Rptr. 188, 198 (1969).

⁶⁸ *Id.*

malice in most homicides.⁶⁹ That would undermine California's position, as reflected in the Penal Code, that only those killers who kill with malice aforethought should be treated as murderers. As the California Supreme Court emphasized in *Ireland*, "This kind of bootstrapping finds support neither in logic nor in law."⁷⁰

Ireland involved the second degree felony murder rule because the underlying felony (assault with a deadly weapon) is not among the felonies enumerated in Section 189 of the California Penal Code. Section 189 provides that "[a]ll murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206 [torture], 286 [sodomy], 288 [lewd and lascivious conduct], or 289 [forcible acts of sexual penetration] . . . is murder of the first degree."⁷¹

In *People v. Wilson*⁷² the California Supreme Court faced the question whether the *Ireland* limitation should be imposed on one of the felonies (burglary) enumerated in Section 189. Citing *Ireland*, the Court held that a burglary that was committed simply because the defendant entered a building with the intent to assault the victim could not serve as the predicate felony under Section 189.⁷³ According to the Court, using the burglary as the basis for felony murder would serve no purpose; it would not deter a defendant who enters the structure with the intent to inflict a felonious assault, such as assault with a deadly weapon.⁷⁴

Here the prosecution sought to apply the felony-murder rule on the theory that the homicide occurred in the course of a burglary, but the only basis for finding a felonious entry is the intent to commit an assault with a deadly weapon. When, as here, the entry would be nonfelonious but for the intent to commit the assault, and the assault is an integral part of the homicide and is included in fact in the offense charged, utilization of the felony-murder rule extends

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See CAL. PENAL CODE § 189.

⁷² 1 Cal.3d 431, 462 P.2d 22, 82 Cal.Rptr. 494 (1969) *overruled by* *People v. Farley*, 46 Cal.4th 1053, 210 P.3d 361, 96 Cal.Rptr.3d 191 (2009).

⁷³ *Id.* at 440, 462 P.2d at 28, 82 Cal.Rptr. at 499.

⁷⁴ *Id.*

that doctrine “beyond any rational function that it is designed to serve.” We have heretofore emphasized “that the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application.” (*People v. Phillips* (1966) *supra*, 64 Cal.2d 574, 582, 51 Cal.Rptr. 225, 232, 414 P.2d 353, 360.)

“The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.” (*People v. Washington* (1965) 62 Cal.2d 777, 781, 44 Cal.Rptr. 442, 445, 402 P.2d 130, 133.) Where a person enters a building with an intent to assault his victim with a deadly weapon, he is not deterred by the felony-murder rule. That doctrine can serve its purpose only when applied to a felony independent of the homicide.⁷⁵

In *People v. Farley*,⁷⁶ however, the Court overruled *Wilson*, holding that it could not ignore the legislature’s clear intention to allow the use of burglary as a predicate felony, even if the defendant committed the burglary by entering the structure with the intent to assault the victim.⁷⁷ In sharp contrast to its position in *Ireland* and *Wilson*, the Court in *Farley* found that the felony murder rule serves a rational function after all even in these circumstances:

First, a person who enters a building with the intent to assault, rather than to kill (in which case the felony-murder rule would be unnecessary), may be deterred by the circumstance that if the victim of the assault dies, the burglar “will be deemed guilty of first degree murder.” Second, the circumstance that the degree to which the peril is heightened may vary, depending upon the particular structure in which the assault occurs, does not negate the purpose of deterring assaults and the heightened risks entailed by assaults that are committed within structures. Individuals within any type of structure are in greater peril from those entering the structure with the intent to commit an assault, than are individuals in a public location who are the target of an assault. . . . Victims

⁷⁵ *Id.* at 440, 462 P.2d at 28, 82 Cal.Rptr. at 499-500.

⁷⁶ 46 Cal.4th 1053, 210 P.3d 361, 96 Cal.Rptr.3d 191 (2009).

⁷⁷ *Id.* at 1118-1120, 210 P.3d at 409-410, 96 Cal.Rptr.3d at 248-249.

attacked in seclusion have fewer means to escape, and there is a diminished likelihood that the crimes committed against them will be observed or discovered. These risks are present regardless of whether the burglary and assault occur in a home, a tent, or a trailer coach. . . . For these reasons, we reject *Wilson's* conclusion that no purpose is served by applying the felony-murder doctrine to a burglary premised upon an intent to assault.⁷⁸

The question whether a felony that is not enumerated in Section 189 merges with the homicide has generated its own jurisprudence. An example is Section 246 which punishes discharging a firearm into an occupied dwelling.⁷⁹ In *People v. Wesley*⁸⁰ two codefendants were charged with murdering the occupant of a dwelling. The evidence showed that the victim was killed when each discharged a firearm at the dwelling. Since the evidence showed that “the homicide and the underlying felony . . . were committed by the same act,”⁸¹ the California Court of Appeal held that *Ireland* barred the use of the underlying felony.

The discharge of the firearms by the defendants was the means by which the homicide was committed and was in fact an “integral part” and a “necessary element” of the homicide. Under the rule of *Ireland* and *Wilson*, the question as to whether the criminal act of committing the two lesser offenses was done with “malice aforethought” should have been left to the jury.⁸²

In *People v. Hansen*,⁸³ however, the California Supreme Court overruled *Wesley*. As in *Wesley*, the defendant in *Hansen* was charged with murder. Also, as in *Wesley*, the evidence in *Hansen* showed that the death resulted from the defendant’s discharging a firearm at an inhabited dwelling. The Court, however, rejected *Wesley's* premise that *Ireland's* “integral part of

⁷⁸ *Id.*

⁷⁹ CAL. PENAL CODE § 246.

⁸⁰ 10 Cal.App.3d 902, 89 Cal.Rptr. 377 (1970), *disapproved by* *People v. Hansen*, 9 Cal.4th 300, 885 P.2d 1022, 36 Cal.Rptr.2d 609 (1994), *overruled by* *People v. Chun*, 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

⁸¹ *Id.* at 907, 89 Cal.Rptr. at 380.

⁸² *Id.*

⁸³ 9 Cal.4th 300, 885 P.2d 1022, 36 Cal.Rptr.2d 609 (1994), *overruled by* *People v. Chun*, 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

the homicide” language constitutes the crucial test in determining the existence of merger.

Such a test would be inconsistent with the underlying rule that only felonies “inherently dangerous to human life” are sufficiently indicative of a defendant’s culpable mens rea to warrant application of the felony-murder rule. (See *People v. Satchell*, *supra*, 6 Cal.3d 28, 43, 98 Cal.Rptr. 33, 489 P.2d 1361.) The more dangerous the felony, the more likely it is that a death may result directly from the commission of the felony, but resort to the “integral part of the homicide” language would preclude application of the felony-murder rule for those felonies that are most likely to result in death and that are, consequently, the felonies as to which the felony-murder doctrine is most likely to act as a deterrent (because the perpetrator could foresee the great likelihood that death may result, negligently or accidentally).⁸⁴

The Court stressed that permitting the use of Section 246 as the underlying felony would not subvert the legislative policy of insisting on proof of malice for murder in most other cases. “[U]nlike the situation in *People v. Ireland* . . . , application of the felony-murder doctrine in the present context will not have the effect of preclud[ing] the jury from considering the issue of malice aforethought. . . .”⁸⁵ The reason, explained the Court, is that “[m]ost homicides do not result from a violation of section 246.”⁸⁶ In addition, the Court emphasized that allowing the use of Section 246 as the predicate felony would be consistent with the goal of the felony murder rule: “the deterrence of negligent or accidental killings that occur in the course of the commission of dangerous felonies.”⁸⁷

In *People v. Robertson*,⁸⁸ however, the Court took a different, seemingly inconsistent position. The issue was whether a related statute, Section 246.3, could serve as the predicate felony in applying the second degree felony murder rule. Section 246.3 makes it an offense to discharge a firearm

⁸⁴ *Id.* at 314, 885 P.2d at 1030, 36 Cal.Rptr.2d at 617.

⁸⁵ *Id.* at 315, 885 P.2d at 1030, 36 Cal.Rptr.2d at 617.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 34 Cal.4th 156, , 95 P.3d 872, 17 Cal.Rptr.3d 604 (2004), *overruled by* *People v. Chun*, 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

“in a grossly negligent manner which could result in injury or death to a person.”⁸⁹ A facial analysis of the statute suggests that the use of this felony would be barred by *Ireland*. Any death resulting from the commission of the felony would appear to be the outcome of the assaultive conduct contemplated by the statute.⁹⁰ Nonetheless, the Court could have affirmed the felony murder conviction on the ground advanced in *Hansen*: most deaths simply do not occur as a result of violating such felonies as Sections 246 and 246.3. Instead, the Court chose to rely on another ground,⁹¹ one the Court announced over thirty years earlier in *People v. Mattison*.⁹²

Mattison held that an inherently dangerous felony that would otherwise be barred by *Ireland* can nevertheless qualify as the predicate felony if the offender does not commit the felony “with the intent to commit an injury which would cause death.”⁹³ An example would be selling a beverage laced with methyl alcohol. Methyl alcohol is a poison, and Section 347 of the Penal Code makes it a felony to furnish beverages that contain poisons.⁹⁴ Since administering a poison is a form of assault, *Ireland* would preclude the use of Section 347 as the predicate felony. But under *Mattison* the felony can still be used if the offender furnishes the beverage not to cause the victim an injury that would cause death but to satisfy the victim’s desire for an intoxicating beverage.⁹⁵

⁸⁹ See CAL. PENAL CODE § 246.3.

⁹⁰ The California Supreme Court has defined an assault as a crime of negligence. See *People v. Williams*, 26 Cal.4th 779, 786-787, 29 P.3d 197, 202-203, 111 Cal.Rptr.2d 114, 120-121 (2001). Accordingly, the fact that gross negligence suffices for liability under Section 246.3 appears to satisfy *Ireland*’s requirement that the conduct contemplated by the statute be assaultive in nature.

⁹¹ See *People v. Robertson*, 34 Cal.4th 156, 171, 95 P.3d 872, 881, 17 Cal.Rptr.3d 604, 610 (2004), *overruled by* *People v. Chun*, 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

⁹² 4 Cal.3d 177, 481 P.2d 193, 93 Cal.Rptr. 185 (1971).

⁹³ *Id.* at 185, 481 P.2d at 198, 93 Cal.Rptr. at 190.

⁹⁴ See CAL. PENAL CODE § 347.

⁹⁵ In *Mattison*, the defendant and the victim were inmates in a California prison. The defendant worked as a technician in the prison lab where methyl alcohol was kept. He was known for selling alcohol to inmates. The victim offered to buy the alcohol from him. See *People v. Mattison*, 4 Cal.3d 177, 180, 481 P.2d 193, 195, 93 Cal.Rptr. 185, 187 (1971).

In *People v. Chun*⁹⁶ the issue was whether another provision of Section 246 could serve as the predicate felony under *Ireland*. Section 246 punishes discharging a firearm at occupied motor vehicles as well as at occupied dwellings.⁹⁷ The question in *Chun* was whether discharging a firearm at an occupied motor vehicle could serve as the predicate felony. The Court recognized that its merger jurisprudence had given rise to two tests to determine when *Ireland* does not apply when the commission of the underlying felony involves assaultive conduct: (1) when, as in *Hansen*, the violation of the felony rarely results in death or (2) when, as in *Robertson*, the felon did not intend to commit an injury that would result in death. As the Court acknowledged, the two tests cannot “apply at the same time.”⁹⁸ Concluding that *Robertson* had implicitly overruled *Hansen*, the Court overruled *Hansen* explicitly.⁹⁹

Determining whether the felon committed the underlying felony without the intent to commit an injury that would cause death requires a factual determination. Although the parties can be counted upon to present evidence on this issue, a crucial question is whether the issue is for the judge or jury to decide. Since the question whether the felony qualifies as a predicate felony has been viewed as one of law, it would seem that the judge, not the jury, would have to make this determination. On the other hand, determining the defendant’s intention may require passing on the credibility of the witnesses called on this issue, and questions regarding credibility are generally reserved for the jurors. To avoid resolving these difficulties, including the need for an evidentiary hearing, the Court in *Chun* rewrote the rules for implementing the *Ireland* limitation.

When the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction. An “assaultive” felony is one that involves a threat of immediate violent injury. (See *People v. Chance* (2008) 44 Cal.4th 1164, 1167-1168, 81 Cal.Rptr.3d 723, 189 P.3d 971.) In determining whether a crime merges, the court looks to its elements and not the

⁹⁶ 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

⁹⁷ See CAL. PENAL CODE § 246.

⁹⁸ *Id.* at 1198, 203 P.3d at 442, 91 Cal.Rptr.3d at 126.

⁹⁹ See *id.* at 1199, 203 P.3d at 442, 91 Cal.Rptr.3d at 126.

facts of the case. Accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive.¹⁰⁰

The Court's reference to "conduct that is not assaultive" is another example of the Court's efforts to clear some of the conceptual clutter that surrounds the felony murder rule. In making the merger determination, judges face a challenging task when the statute defines more than one offense, and one involves assaultive conduct but another does not. An example is the statute punishing child abuse by direct assault as well as by neglect.¹⁰¹ Child abuse by direct assault clearly disqualifies the felony as the predicate under *Ireland*. Child abuse resulting from neglect (e.g., by withholding nutrition) may not. After *Chun*, the task of judges is simplified. They may not allow a prosecutor to use a felony that is inherently dangerous to human life as long as one of its provisions contemplates injury resulting from assaultive conduct.

Although the Court's efforts to simplify the tasks facing judges is commendable, uncertainty still surrounds even this aspect of the second degree felony murder rule. The Court left for another day the question of which "felonies are assaultive in nature, and hence may not form the basis of a felony-murder instruction, and which are inherently collateral to the resulting homicide and do not merge."¹⁰²

Those who share the Court's skepticism about the value of the felony murder rule will applaud the Court's efforts to rein in the second degree felony murder rule. But a more intriguing question is whether California has such a rule in the first place. The Penal Code does not contain a provision explicitly referring to or defining second degree felony murder.

The only provision of the Penal Code that comes close to defining felony murder is Section 189. As has been stated, it provides in pertinent part that "[a]ll murder . . . which is committed in the perpetration of, or attempt to perpetrate, [enumerated felonies] is murder of the first degree."¹⁰³ But neither this section nor any other expressly refers to second degree felony

¹⁰⁰ *Id.* at 1200, 203 P.3d at 443, 91 Cal.Rptr.3d at 127.

¹⁰¹ See CAL. PENAL CODE § 273a(a).

¹⁰² See *People v. Chun*, 45 Cal.4th 1172, 1200, 203 P.3d 425, 443, 91 Cal.Rptr.3d 106, 128 (2009).

¹⁰³ CAL. PENAL CODE § 189.

murder. Occasionally, the omission has led some members of the Court to question its authority to define second degree felony murder. Justice Panelli has been among the most forceful in questioning the Court's authority.

There are, or at least should be, no nonstatutory crimes in this state. (*In re Brown* (1973) 9 Cal.3d 612, 624, 108 Cal.Rptr. 465, 510 P.2d 1017; see Pen.Code, § 6.) The second degree felony-murder rule, however, either creates a nonstatutory crime or increases the punishment for statutory crimes beyond that established by the Legislature. We derive such authority neither from the Constitution (see Cal. Const., art. III, § 3) nor from the Penal Code. (See Pen.Code, §§ 6, 12, 13, 15.)

My uneasiness with the second degree felony-murder rule is mirrored in the majority's adoption of the new "high probability of death" standard, which certainly will restrict the rule's future application. . . . It may also be reflected in how often the majority mentions that the Legislature has failed to act. . . . Today the majority expressly relies on that failure as a justification for continuing to "determine the scope" of this anomalous common law crime. . . . But in view of the Legislature's long-standing declaration that "[n]o act or omission . . . is criminal or punishable, except as prescribed or authorized by [the Penal Code]" (Pen.Code, § 6), I question whether subsequent legislative inaction is a sufficient justification.

In short, I am not quite convinced that the second degree felony-murder rule stands on solid constitutional ground. Since the rule permits a court to increase the punishment for certain dangerous crimes, the temptation to invoke it is great when we are facing the type of social crisis that illegal drugs have brought upon us. While I am aware of the crisis, nevertheless, I respectfully suggest that it is the Legislature that has the resources and constitutional authority to determine and define what conduct is criminal and to set the punishment for such crimes.¹⁰⁴

¹⁰⁴ *People v. Patterson*, 49 Cal.3d 615, 641, 778 P.2d 549, 568, 262 Cal.Rptr. 195, 214 (1989) (Panelli, J. dissenting).

Twenty years after Justice Panelli's criticism, the Court responded to his concerns. In *People v. Chun*,¹⁰⁵ the Court held that it was the legislature's intent to embody the second degree felony murder doctrine in the term "abandoned and malignant heart."¹⁰⁶

E. SECOND DEGREE FELONY MURDER: AN EXERCISE IN IMAGINATIVE STATUTORY CONSTRUCTION

A rich imagination helps when construing a statute that makes no express reference to the doctrine that is the focus of the inquiry. The fact is that the California Penal Code does not contain the term "felony murder," much less "second degree felony murder." The only reference to the felony murder doctrine is Section 189's specification that only murder committed in the perpetration or attempted perpetration of enumerated felonies is murder of the first degree.¹⁰⁷ But as we shall see, even with respect to first degree felony murder, it is questionable whether Section 189 creates the offense of felony murder as a matter of statutory interpretation.

The problem, however, is more acute with regard to second degree felony murder. As a matter of plain English, the term "abandoned and malignant heart" provides no hint whatever that it embodies the second degree felony murder rule. How, then, did the Court conclude that the term includes the rule? By taking full advantage of its very vagueness.

The term is unquestionably of Common Law origin and was adopted by the English judges to denote a mental state for murder where the killer did not intend to bring about the death of the victim.¹⁰⁸ If the offender intended to bring about the victim's death, then he was guilty of express malice murder. But if he did not intend to bring about the victim's death, he was guilty of implied malice murder.¹⁰⁹ In terms of punishment, however, whether one was guilty of express or implied malice murder was immaterial. The punishment for either form of murder was the same.

¹⁰⁵ 45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106 (2009).

¹⁰⁶ *See id.* at 1184, 203 P.3d at 431, 91 Cal.Rptr.3d at 113-114.

¹⁰⁷ *See* CAL. PENAL CODE § 189.

¹⁰⁸ *See* W. LAFAYE & A. SCOTT, CRIMINAL LAW § 7.1 at 605-606 (West 2d. ed. 1986).

¹⁰⁹ *See id.*

The debate at Common Law was whether the murderer who acts with implied malice had to be aware of the homicidal risk his conduct posed. “The English judge and criminal law historian Stephen took the view that one should not be guilty of murder of this type unless he was aware of the risk. Justice Holmes, on the other hand, thought he should be guilty of murder if a reasonable man would have realized the risk, regardless of whether he himself actually realized it.”¹¹⁰ The California Supreme Court sided with Stephen. In *People v. Watson*¹¹¹ it held that “malice may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life.”¹¹² Today, the standard jury instruction tells the jurors that malice may be implied when “1. The killing resulted from an intentional act; 2. The natural consequences of the act are dangerous to human life; and 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.”¹¹³

Since implied malice is concerned with the conscious creation of homicidal risks, how did the Court conclude that the term includes the second degree felony murder doctrine? By relying on a cryptic note by the commissioners who drafted the 1872 penal code and an early case of dubious authority.

The Court began with an analysis of Section 19 of California’s first penal code enacted in 1850.¹¹⁴ Section 19 defined murder “as the unlawful killing of a human being, with malice aforethought, either express or implied.”¹¹⁵ Section 21 provided that “[m]alice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.”¹¹⁶

As is evident, Sections 19 and 21 of the 1850 code are identical to Sections 187 and 188 of the current penal code. The 1850 code, however,

¹¹⁰ See *id.* § 7.4 at 620 (West 2d. ed. 1986) (footnotes omitted).

¹¹¹ 30 Cal.3d 290, 637 P.2d 279, 179 Cal.Rptr. 43 (1989).

¹¹² *Id.* at 296, 637 P.2d at 282, 179 Cal.Rptr. at 47.

¹¹³ See CALJIC 8.11.

¹¹⁴ *People v. Chun*, 45 Cal.4th 1172, at 1184, 203 P.3d 425, 432, 91 Cal.Rptr.3d 106, 114 (2009).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

contained one provision that differs from the current penal code. Section 25 provided as follows:

Involuntary manslaughter shall consist in the killing of a human being, without any intent so to do; in the commission of an unlawful act, which probably might produce such a consequence in an unlawful manner; *Provided* that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder.¹¹⁷

The current code's closest approximation to Section 25 is Section 192, which in pertinent part provides as follows:

Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: (a) Voluntary — upon a sudden quarrel or heat of passion. (b) Involuntary — in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.¹¹⁸

Both Section 21 and current Section 187 contain the language “when no considerable provocation appears.”¹¹⁹ As has been noted, the language of Section 187 should be read in connection with Section 192(a).¹²⁰ Such a reading reveals the legislature's intention to exempt some intentional and reckless homicides from the operation of the murder statutes. If these homicides are committed upon a sudden quarrel or in the heat of passion, they constitute the lesser homicide of voluntary manslaughter, not murder.¹²¹

Section 192(b) defines two offenses. The language “in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection” refers to negligent homicide, which in California is a form of involuntary manslaughter. The gravamen of the offense is that the accused is guilty even if he was unaware of the

¹¹⁷ *Id.* at 1185, 203 P.3d at 432, 91 Cal.Rptr.3d at 114 (italics in the original).

¹¹⁸ CAL. PENAL CODE § 192(a)-(b).

¹¹⁹ Compare Section 21 with CAL. PENAL CODE § 188.

¹²⁰ See text accompanying note 32 *supra*.

¹²¹ See CAL. PENAL CODE § 192(a).

homicidal risk if a reasonable person in similar circumstances would have been aware of it.¹²²

The language “in the commission of an unlawful act, not amounting to felony” refers to the misdemeanor manslaughter rule, although in California it should be called the “the unlawful act manslaughter rule.” Under this doctrine, defendants who kill while committing some misdemeanor or other unlawful act not amounting to felony are guilty of involuntary manslaughter even if they did not intend to kill the victim or were unaware that their conduct posed a homicidal risk.¹²³ Although no mental state attaches to the death element, the California Supreme Court requires the prosecution to prove that the accused committed the underlying unlawful act in a manner that endangers human life.¹²⁴

Since both old Section 25 and current Section 192 embody the unlawful act manslaughter rule, the key difference between the two is that Section 25 defined as murder a homicide that “is committed in the prosecution of a felonious intent. . . .” As the California Supreme Court underscored in *Chun*, the most plausible construction of the language is that the legislature that enacted the 1850 code intended to include the felony murder doctrine.¹²⁵ The problem, however, is that the legislature that enacted the 1872 code omitted this language from Section 192 and failed to include it in the provisions defining murder (Sections 187 and 188). As previously discussed, the only reference to felony murder in the 1872 code appears in Section 189 which defines as first degree murder homicides occurring during the commission or attempted commission of enumerated felonies.¹²⁶ Limiting the felony murder rule to the commission or attempted commission of specified felonies suggests that the rule cannot be predicated on the commission or attempted commission of other felonies. In short, when the legislature adopted the 1872 penal code, it eliminated second degree felony murder.

¹²² See CALJIC 8.45 – 8.46.

¹²³ See *People v. Cox*, 23 Cal.4th 665, 670, 2 P.3d 1189, 1192, 97 Cal.Rptr.2d 647, 650 (2000) and cases cited therein.

¹²⁴ *Id.*

¹²⁵ See *People v. Chun*, 45 Cal.4th 1172, 1185, 203 P.3d 425, 432, 91 Cal.Rptr.3d 106, 114 (2009).

¹²⁶ See CAL. PENAL CODE § 189.

In *Chun*, however, the Court refused to adopt this construction by relying principally on a note to Section 192 prepared by the commissioners who drew up the 1872 Code. The note states that “[t]his section embodies the material portions of Sections 22, 23, 24, and 25 of the Crimes and Punishment Act of 1850.”¹²⁷ According to the California Supreme Court:

This latter note strongly indicates that the language change from section 25 of the Act of 1850 to section 192 was not intended to change the law of manslaughter, much less to change the law of murder by abrogating the common law felony-murder rule. Any statute that “embodies the material portions” of predecessor statutes would not change the law in such a substantial manner.¹²⁸

The difficulty with this construction of the note is that new Section 192 retained only the unlawful act manslaughter rule and negligent homicide provisions of old Section 25. It omitted Section 25’s reference to felony murder. Moreover, the new sections of the 1872 code defining murder at most retain first degree felony murder and exclude second degree felony murder by omitting Section 25’s reference to felony murder.¹²⁹

To bolster its construction of the note, the Court cites felony murder cases decided after the enactment of the 1872 penal code that in turn cite *People v. Doyell*.¹³⁰ A felony murder case, *Doyell* arose under the 1850 penal code but was decided after the 1872 code was enacted.¹³¹ It held that “[w]henver one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is murder.”¹³² However, the Court’s reliance on *Doyell* is problematical. As the Court itself admits, *Doyell* was construing Section 25.¹³³ Nonetheless, the Court concluded:

[T]he Legislature’s replacement of the proviso language of section 25 of the Act of 1850 with the shorthand language “not amounting

¹²⁷ Reprinted in *People v. Chun*, 45 Cal.4th 1172, 1187, 203 P.3d 425, 433, 91 Cal. Rptr.3d 106, 116 (2009).

¹²⁸ See *People v. Chun*, 45 Cal.4th 1172, 1187, 203 P.3d 425, 433, 91 Cal. Rptr.3d 106, 116 (2009).

¹²⁹ See CAL. PENAL CODE §§ 187-189.

¹³⁰ 48 Cal. 85 (1874).

¹³¹ *Id.* at 86.

¹³² *Id.* at 94.

¹³³ See *id.*

to a felony” in section 192 did not imply an abrogation of the common law felony-murder rule. The “abandoned and malignant heart” language of both the original 1850 law and today’s section 188 contains within it the common law second degree felony-murder rule. The willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart. The second degree felony-murder rule is based on statute and, accordingly, stands on firm constitutional ground.¹³⁴

As a federal matter, however, that ground may not be as firm as the Court thinks.

F. SECOND DEGREE FELONY MURDER: INFERENCE V. PRESUMPTION V. VALID EXERCISE OF THE POLICE POWER

As has been discussed, the Court has construed the term “an abandoned and malignant heart” as a mental state characterized by the conscious creation of homicidal risks. “[M]alice,” the Court has held, “may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life.”¹³⁵ As an evidentiary matter, a jury can infer that a defendant acted with a conscious disregard for life from evidence that at the time he inflicted the fatal blow he was committing a felony that strikes jurors as inherently dangerous to human life. Take the case of a defendant who is prosecuted for murder because he furnished heroin of an unusually high strength to a victim who died of an overdose. A jury could legally convict him of implied malice murder if it found that he was aware of the substantial homicidal risk the heroin posed to the victim. Even if the prosecution lacked direct evidence that the defendant was aware of the strength of the heroin (through an admission, for example), a jury could infer his knowledge from other evidence, for example, his years dealing dangerous controlled substances, including heroin. Under the California Evidence Code, “An inference is

¹³⁴ *People v. Chun*, 45 Cal.4th 1172, 1187, 203 P.3d 425, 434, 91 Cal.Rptr.3d 106, 116 (2009).

¹³⁵ *People v. Watson*, 30 Cal.3d 290, 296, 637 P.2d 279, 282, 179 Cal.Rptr. 43, 47 (1989).

a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.”¹³⁶ A jury convicting the defendant of implied malice murder would simply be deducing his mental state from the evidence that he was aware of the homicidal risks of using unusually strong heroin as a result of his experience as a drug dealer.

A California appellate court would not reverse the defendant’s conviction on the ground that the evidence was insufficient to support the conviction for implied malice murder. In reviewing a sufficiency challenge, the appellate court must view the evidence in the light most favorable to the judgment.¹³⁷ If viewing the evidence in this light the court concludes that a reasonable jury could infer the defendant’s mental state, the court would have to affirm the judgment.¹³⁸ The only federal constitutional limitation on the jury’s fact finding in this respect was imposed by the United States Supreme Court in *Barnes v. United States*.¹³⁹ As a matter of due process, a judge should not instruct the jurors that they may draw an inference, unless the judge finds that the prosecution’s evidence, if believed, could move reasonable jurors to draw the inference.¹⁴⁰ Since the federal constitutional test is the same as the state sufficiency test, the Constitution is hardly a bar to a jury’s power to find criminal mental states from circumstantial evidence.

Federal due process concerns are elevated, however, when the jury’s fact finding takes the form, not of inferences, but presumptions. This would be the case, for example, if in the case under consideration the judge were to instruct the jurors as follows:

Evidence has been introduced that the defendant has been a dealer in heroin and other dangerous controlled substances for a number of years. If you find these facts to be true beyond a reasonable doubt, then you must find that the defendant consciously

¹³⁶ CAL. EVID. CODE § 600(b).

¹³⁷ See, e.g., *People v. Johnson*, 26 Cal.3d 557, 577-578, 606 P.2d 738, 750-751, 162 Cal.Rptr. 431, 433-444 (1980).

¹³⁸ *Id.*

¹³⁹ 412 U.S. 837 (1973).

¹⁴⁰ See *id.* at 843.

disregarded the homicidal risk he posed by furnishing heroin to the victim.¹⁴¹

This instruction describes a conclusive presumption.¹⁴² It tells the jurors that if they find one set of facts, they must find another. This kind of presumption violates due process because it relieves the prosecution from having to prove the presumed fact (the accused's mental state) beyond a reasonable doubt, it impermissibly withdraws the issue of the existence of the presumed fact from the jury, and it prevents the defendant from raising a reasonable doubt about the existence of the presumed fact.¹⁴³

In light of these due process considerations, the California Supreme Court's language in *Chun* justifying the second degree felony murder rule is troubling. The Court emphasized that a defendant's "willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart."¹⁴⁴ Clearly, the Court did not have inferences in mind. If the judge merely instructed the jurors to convict the

¹⁴¹ For purposes of this jury instruction, it is assumed that furnishing heroin is a felony inherently dangerous to human life in the abstract and that its use as the predicate felony is not barred by *Ireland*. For an extended discussion of these points, see text accompanying note 58 *supra*.

¹⁴² See CAL. EVIDENCE CODE § 600.

¹⁴³ See *Francis v. Franklin*, 471 U.S. 307, 313 (1985). See generally M. MÉNDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES — A PROBLEM APPROACH § 18.07 at 707 (Thomson-West 4th ed. 2008).

¹⁴⁴ *People v. Chun*, 45 Cal.4th 1172, 1187, 203 P.3d 425, 434, 91 Cal.Rptr.3d 106, 116 (2009). It is not absolutely clear, however, that the Court necessarily had recklessness with respect to the death element in mind when it observed that the defendant's "willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart." In its *Chun* opinion, the Court declined to equate the mental state of second degree felony murder with the kind of recklessness called for by the term "abandoned and malignant heart."

We have said that the "felony-murder rule eliminates the need for proof of malice in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree felony murder and second degree felony murder." [Citations omitted.] But analytically, this is not precisely correct. The felony-murder rule renders irrelevant *conscious-disregard-for-life* malice, but it does not render malice itself irrelevant. Instead, the felony-murder rule "acts as a substitute" for conscious-disregard-for-life malice. [Citations omitted.] It simply describes a different form of malice under section 188. "The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during

accused of murder only if they found, among other matters, his reckless state of mind beyond a reasonable doubt, the conviction would not rest on the felony murder doctrine.

Instead, the Court appears to be saying that, if believed by the jury, evidence of a defendant's "willingness to commit a felony inherently dangerous to life" is conclusive proof of his awareness and conscious disregard of the homicidal risk.¹⁴⁵ An instruction directing the jurors to find this mental state if they find beyond a reasonable doubt that the defendant displayed a willingness to commit the felony would constitute an impermissible conclusive presumption. Such a dire outcome, if possible, should be avoided.

One way to do so is by returning to the felony murder model. Under the model, the death element at Common Law and in California is predicated on strict liability. It has no mental state.¹⁴⁶ Setting aside the distinction between first and second degree felony murder, to convict someone of felony murder a California prosecutor has to prove only the mens rea and actus reus of the underlying felony, a death, and the most basic ("but for") causal connection between the commission or attempted commission of the felony and the death.¹⁴⁷ Because the death element has no mental state,

the perpetration of a felony inherently dangerous to life." (*Hansen, supra*, 9 Cal.4th at p. 308, 36 Cal.Rptr.2d 609, 885 P.2d 1022.)

People v. Chun, 45 Cal.4th 1172, 1184, 203 P.3d 425, 431-432, 91 Cal.Rptr.3d 106, 114 (2009) (italics in the original). The Court, however, fails to specify exactly what mental state is imputed.

¹⁴⁵ This is apparently the view of Justice Baxter, who concurred in *Chun*: "Put in terms of the modern definition of implied malice, where one commits a felony inherently dangerous to human life without legal justification or defense, then under operation of the second degree felony-murder rule, a homicide resulting therefrom *is* a killing 'proximately result[ing] from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" *See id.* at 45 Cal.4th at 1209, 203 P.3d at 449, 91 Cal.Rptr.3d 106 at 135. (Baxter, J. concurring and dissenting) (italics in the original; some internal quotation marks omitted).

¹⁴⁶ Occasionally, the Court has recognized that no mental state attaches to the death element of the second degree felony murder rule. *See, e.g., People v. Patterson*, 49 Cal.3d 615, 626, 778 P.2d 549, 557, 262 Cal.Rptr. 195, 203 (1989). The rule "eliminates the need for the prosecution to establish the *mental* component." *Id.* (italics in the original).

¹⁴⁷ California has replaced the "but for" causation in fact concept with more elaborate wording, but substantively the concept remains the same, and in the standard jury instruction it is still entitled "The But For Test." *See* CALJIC 3.40.

there is no danger that applying the felony murder rule would relieve the prosecution of having to prove the defendant's recklessness or deprive the defendant of the opportunity to contest the existence of this mental state. The only question is whether California can convict someone of murder without having to prove at least recklessness.

The answer depends on whether California can do so in the exercise of its police powers under the federal Constitution. The answer is "yes." The United States Supreme Court has long held that under the Constitution it is the states, not the federal government, that have plenary power to regulate crime.¹⁴⁸ Unless a state's exercise of its power invades a right or interest protected by the Constitution (e.g., the right of unmarried adults to engage in consensual sex),¹⁴⁹ the Court will generally uphold the state statute.¹⁵⁰ Accordingly, if the California Legislature chooses to permit the mens rea of the underlying felony to suffice for felony murder, it is free to do so.

The only limitation that the United States Supreme Court has imposed on the use of felony murder relates not to conviction of this offense but to its punishment. Under the Eighth Amendment's proscription of cruel and unusual punishments, a state may not impose the death penalty upon a murderer convicted under its felony murder rule, unless it proves that the murderer was at least reckless with respect to the death.¹⁵¹

The murder statutes of some states allow for conviction even if the assailant did not intend to kill the victim (express malice) or consciously disregard the homicidal risk to the victim (implied malice), but merely wished to inflict serious bodily injury.¹⁵² None of these statutes has been invalidated on the federal ground that they exceed the state's police powers. The California Supreme Court can thus avoid serious due process claims by jettisoning the fiction that those who commit felonies that are inherently dangerous to

¹⁴⁸ See, e.g., *Screws v. United States*, 325 U.S. 91, 109 (1945) ("Our National government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.").

¹⁴⁹ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁵⁰ See *id.*

¹⁵¹ See *Enmund v. Florida*, 458 U.S. 782, 797 (1982); see also *Tyson v. Arizona*, 81 U.S. 137, 157 (1987).

¹⁵² See, e.g., Section 9-1 of the Illinois Criminal Code, 720 ILCS 5/9-1; see generally, W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 7.4 at 620 (West 2d ed. 1986).

human life are necessarily aware of the homicidal risks they pose and, instead, emphasize the legislature's goal simply to punish as murderers those who kill while committing or attempting to commit felonies which as a matter of law are inherently dangerous to human life in the abstract.

G. FIRST DEGREE FELONY MURDER

The problem with first degree felony murder in California is not the absence but the *presence* of felony murder language in its penal code. After setting out the actus reus (Section 187) and mens rea (Section 188) of murder, the legislature in Section 189 declares that “[a]ll murder” that is committed in the perpetration or attempted perpetration of enumerated felonies is “murder of the first degree.”¹⁵³ A plain reading of this provision reveals that it is simply a degree-fixing statute. Murders committed under the enumerated circumstances are murder of the first degree. Under this construction, it is obvious that the state has to prove that the defendant acted with express or implied malice. Unlike second degree felony murder, the death element is not predicated on strict liability — the element requires proof of malice.

A fundamental canon of statutory construction provides that in interpreting a statute a court should not resort to legislative history when the statute is free of any ambiguity and its meaning is plain.¹⁵⁴ Section 189 is neither ambiguous nor is its meaning unclear. Yet, the California Supreme Court declined to apply this most basic rule of statutory construction to this provision. In *People v. Dillon*¹⁵⁵ the Court in effect held that the legislature intended “homicides” not murder when it used the term “murder” in connection with the enumerated felonies. By so holding, the Court rejected the claim that Section 189 was simply a degree-fixing statute and preserved the state's first degree felony murder rule.

How the Court reached this surprising conclusion is worth recounting. The Court began by examining the legislative history of Section 189

¹⁵³ See CAL. PENAL CODE § 189.

¹⁵⁴ See, e.g., *People v. Farley*, 46 Cal.4th 1053, 1118, 210 P.3d 361, 408, 96 Cal. Rptr.3d 191, 248 (2009) (holding that where the statutory language is clear and free of any ambiguities, the court has no authority to impose its own interpretation).

¹⁵⁵ 34 Cal.3d 441, 668 P.2d 697, 194 Cal.Rptr. 390 (1983).

and explaining why its history showed that Section 189 appeared to be only a degree-fixing provision. The 1850 penal code did not divide murder into first and second degrees. All murder was punishable by death. In 1856 when the legislature amended the code to divide murder into degrees, the new provision provided that only those homicides resulting from the commission or attempted commission of the felonies specified in the amendment were murder of the first degree; homicides resulting from the commission or attempted commission of other felonies remained murder of the second degree. Thus, according to the *Dillon* Court, the 1856 amendment was designed to serve as a degree-fixing provision.¹⁵⁶

When the legislature replaced the 1850 penal code with the 1872 code, it omitted that portion of Section 25 creating the felony murder rule. According to the *Dillon* Court, when the legislature deletes an express provision of a statute, “it is ordinarily to be presumed” that the legislature “intended a substantial change in the law.”¹⁵⁷ “Under this principle, the Legislature’s decision not to reenact the felony-murder provision of section 25 in the 1872 codification implied an intent to abrogate the common law felony-murder rule that the section had embodied since 1850.”¹⁵⁸ Such an abrogation, of course, supports the claim that Section 189 is only a degree-fixing provision.

The *Dillon* Court also noted that, aside from a few grammatical changes, the wording of Section 189 is identical to that of the 1856 amendment. “In these circumstances, the code itself decreed the proper construction of section 189: ‘The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments.’ (Pen. Code, § 5.)”¹⁵⁹ In other words, the new code itself requires that Section 189 be given the same construction as that of its 1856 predecessor: that of being a degree-fixing provision.

In addition, the *Dillon* Court cited another rule of statutory construction. “[W]hen a statute defines the meaning to be given to one of its terms, that meaning is ordinarily binding on the courts. [Citations omitted.] It is presumed the word was used in the sense specified by the Legislature,

¹⁵⁶ *See id.*

¹⁵⁷ *Id.* at 467, 668 P.2d at 712, 194 Cal.Rptr. at 405.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

and the statute will be construed accordingly.”¹⁶⁰ According to the *Dillon* Court, this rule of statutory construction requires the Court to give to “murder” in Section 189 the meaning specified in Sections 187 and 188.¹⁶¹ These define “murder” as the killing of a human with malice, either express or implied. To the *Dillon* Court, such a construction means that Section 189 is a degree-fixing provision.¹⁶²

Finally, the *Dillon* Court cited a fourth rule of statutory construction to support the claim that Section 189 is a degree-fixing provision. “[I]t is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute. [Citations omitted]. This rule would seem to apply a fortiori to section 189, where in a single compound sentence the Legislature used the word ‘murder’ only once but with two referents . . . : the section defined first degree murder as all ‘murder’ (1) which is committed by certain listed methods or (2) which is committed during certain listed felonies. As noted above . . . , in the first half of this sentence the word ‘murder’ means an unlawful killing committed *with malice aforethought*; under the foregoing rule, the same word would have had the same meaning in the second half of the same sentence (i.e., murder during the listed felonies).”¹⁶³

In light of these persuasive arguments, why did the Court nonetheless conclude that Section 189 retains the felony murder rule with regard to the enumerated felonies? By finding that in its note to Section 189 the commissioners who drafted the new penal code mistakenly assumed that its predecessor (the 1856 amendment) created a felony murder rule and not just a degree-fixing provision. According to the Court:

It no longer matters that the commission may have misread pre-1872 law on this point; what matters is (1) the commission apparently *believed* that its version of section 189 codified the felony-murder rule as to the listed felonies, and (2) the Legislature adopted section 189 in the form proposed by the commission. “When a statute proposed by the California Code Commission for inclusion in the Penal Code of 1872 has been enacted by the

¹⁶⁰ *Id.* at 468, 668 P.2d at 712, 194 Cal.Rptr. at 405.

¹⁶¹ *Id.* (italics in the original).

¹⁶² *Id.*

¹⁶³ *Id.* at 468, 668 P.2d at 713, 194 Cal.Rptr. at 406 (italics in the original).

Legislature without substantial change, the report of the commission is entitled to great weight in construing the statute and in determining the intent of the Legislature.” [Citations omitted.] If we assume the 1872 Legislature drew the inferences that the Attorney General now asks us to draw regarding the intent of the commission, the quoted rule compels us to conclude that the Legislature acted with the same intent when it adopted section 189.

Nothing in the ensuing history of section 189 . . . suggests that the Legislature acted with any different intent when it subsequently amended the statute in various respects, most recently in 1981. We infer that the Legislature still believes, as the code commission apparently did in 1872, that section 189 codifies the first degree felony-murder rule. That belief is controlling, regardless of how shaky its historical foundation may be.¹⁶⁴

In *Chun*, the California Supreme Court took advantage of the vagueness of a term (“abandoned and malignant heart”) to infuse it with the second degree felony murder doctrine. In *Dillon*, the Court disregarded the plain meaning of an unambiguous term (“murder”) to give it a meaning that not only contravenes its own rules of statutory construction but is based on an admittedly “shaky” historical foundation. In both instances, the Court obviously was trying to preserve the felony murder rule. An intriguing question is why the Court took these extraordinary measures when it has repeatedly expressed serious doubts about the utility and logic of the felony murder rule.¹⁶⁵ We will return to this question after examining the place of the felony murder rule in the California law of murder.

H. THE PLACE OF THE FELONY MURDER RULE IN THE LAW OF MURDER

In the absence of a felony murder rule, California prosecutors would have to prove malice in order to secure a murder conviction. Under California’s murder formulation, prosecutors would have to prove express or implied

¹⁶⁴ *Id.* at 471, 668 P.2d at 715, 194 Cal.Rptr. 390, at 408 (italics in the original).

¹⁶⁵ *See, e.g.,* *People v. Phillips*, 64 Cal.2d 574, 582-583, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232) (1966).

malice in connection with the death.¹⁶⁶ Express malice would require them to offer evidence that the accused's purpose was to kill the victim.¹⁶⁷ Implied malice would require them to offer evidence that the accused acted recklessly.¹⁶⁸ As pointed out earlier, recklessness is a compound concept. It involves the creation of substantial and unjustifiable homicidal risks. It also requires proof that the accused appreciated the existence of the risk but chose to disregard it.¹⁶⁹ Obviously, when a felon who does not seek to take human life is engaged in committing a felony that exposes others to a substantial homicidal risk, he will be reckless in the legal sense only if he appreciates and disregards the risk. It is immaterial that he sincerely hopes that no one will be injured, much less killed. He is being punished as a murderer because he engaged in conscious homicidal risk creation: he consciously created and disregarded a homicidal risk that, unfortunately for him and his victim, materialized.

From a moral perspective, a murder conviction is justified if the crime of murder is reserved for those who show an extreme indifference to the value of human life.¹⁷⁰ As has been explained, the killer who is most indifferent to the value of human life is the killer whose object is to take life, that is, the purposeful killer. A killer, who does not wish to take human life, but who persists in a course of conduct he believes is substantially or practically certain to result in death is likewise highly indifferent to the value of human life. This is why reckless killers are treated as murderers under the California Penal Code¹⁷¹ and by the codes of many other states.¹⁷²

The purpose of the felony murder rule is to extend this moral reprobation to felons who are neither purposeful nor reckless with respect to the death of their victims. The rule elevates what would otherwise be negligent homicides and even non-criminal homicides to murder. This is why

¹⁶⁶ See CAL. PENAL CODE §§ 186-187.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See text accompanying note 26 *supra*.

¹⁷⁰ This is the view of the California Legislature. Murder, depending on its degree, is punishable by a term of years, life imprisonment, and even death. See CAL. PENAL CODE §§ 190-190.2.

¹⁷¹ See CAL. PENAL CODE § 187.

¹⁷² See generally W. LAFAVE & A. SCOTT, CRIMINAL LAW § 7.4 at 617 (West 2d ed. 1986); see also MPC § 210.2(1).

the California courts have emphasized that the purpose of the rule is to condemn as murderers those who kill negligently or accidentally while committing or attempting to commit specified felonies.¹⁷³ It is precisely because the rule includes accidental killings that we can say that the death element is predicated on strict liability. This is why some California courts emphasize that, under the California formulation of the rule, felons who kill while committing or attempting to commit a felony are held strictly liable for the homicide.¹⁷⁴

A California prosecutor can bypass the need to prove malice by relying on the felony murder rule. Setting aside the limitations that the California Supreme Court has imposed on the rule, all the prosecutor has to prove is the mens rea and actus reus of the underlying felony, a death, and a causal connection between the commission or attempted commission of the felony and the death.

Unfettered use of the felony murder rule would, of course, undermine the moral determination that only those who kill maliciously should be punished as murderers. As has been discussed, in the case of second degree felony murder, the California courts have responded to this danger by requiring the use only of felonies that are inherently dangerous to human life in the abstract.¹⁷⁵ Felons who engage in such dangerous conduct should be condemned as murderers even if they did not want to kill or were unaware of the homicidal risks posed by their misconduct. But a problem with this rationale is that felons who engage in misconduct that is dangerous to human life may well be aware of the homicidal risks inherent in their conduct. It is precisely in these situations where prosecutors may have access to circumstantial evidence of implied malice. Such access diminishes the need for the felony murder rule and explains why the California Supreme

¹⁷³ See *People v. Washington* 62 Cal.2d 777, 781, 44 Cal.Rptr. 442, 445, 402 P.2d 130, 133 (1965).

¹⁷⁴ See, e.g., *People v. Stamp*, 2 Cal.App.3d 203, 209-210, 82 Cal.Rptr. 598, 602-603 (1969).

¹⁷⁵ See, e.g., *People v. Patterson*, 49 Cal.3d 615, 621, 778 P.2d 549, 553, 262 Cal.Rptr. 195, 199 (1989), citing *People v. Ford*, 60 Cal.2d 772, 795, 388 P.2d 892, 907, 36 Cal.Rptr. 620, 635 (1964) and *People v. Williams*, 63 Cal.2d 452, 458, 406 P.2d 647, 650, 47 Cal.Rptr. 7, 10 (1965).

Court has observed that “in almost all cases in which [the felony murder rule] is applied it is unnecessary.”¹⁷⁶

As has also been discussed, the California courts have responded to the threat posed by an unfettered use of the felony murder rule by excluding assaults as the predicate felony.¹⁷⁷ Most deaths are the result of some kind of assault. If prosecutors were permitted to use the assault as the predicate felony, malice would play an insignificant role in identifying those killers meriting condemnation as murderers. From a moral perspective, *Farley* is thus a singularly unfortunate decision. By holding the *Ireland* limitation inapplicable to the felonies enumerated in Section 189, the California Supreme Court has opened the door wider to murder convictions without the need for the state to prove malice.

In its earlier *Wilson* decision, the Court had justified applying *Ireland* to first degree felony murder by observing that a rule designed to punish as murderers negligent and accidental killers would not deter a killer who entered a building for the purpose of assaulting his victim.¹⁷⁸ Killers intent on achieving their assaultive goal simply could not be deterred by a rule that would be triggered by their unlawful entry into the building.¹⁷⁹ But in exempting the enumerated felonies in Section 189 from the *Ireland* limitation, the *Farley* Court concluded that despite its earlier findings in *Wilson*, the first degree felony murder rule retained a deterrent effect.¹⁸⁰ According to the Court, a would-be burglar-batterer may be deterred from killing the victim if he knows that if he enters the building with the intent to assault

¹⁷⁶ See *People v. Washington*, 62 Cal.2d 777, 783, 402 P.2d 130, 134, 44 Cal.Rptr. 442, 446 (1965).

¹⁷⁷ See text accompanying note 67 *supra*.

¹⁷⁸ See *People v. Wilson*, 1 Cal.3d 431, 440, 462 P.2d 22, 28, 82 Cal.Rptr. 494, 499-500 (1969), *overruled by* *People v. Farley*, 46 Cal.4th 1053, 210 P.3d 361, 96 Cal.Rptr.3d 191 (2009).

¹⁷⁹ This is why at one time the California courts held that under *Ireland* the homicide had to be independent of the felony, irrespective of whether the prosecution was relying on the second or first degree felony murder rule. See, e.g., *People v. Chun*, 45 Cal.4th 1172, 1188, 203 P.3d 425, 434, 91 Cal.Rptr.3d 106, 117 (2009) and cases cited therein. Accordingly, felonious conduct (such as assaults or entries into buildings for the purpose of assaulting an occupant) that was integral to the homicide “merged” with the homicide and could not serve as the predicate felony. See *id.*

¹⁸⁰ See *People v. Farley*, 46 Cal.4th 1053, 1118-1120, 210 P.3d 361, 409-410, 96 Cal.Rptr.3d 191, 248-249 (2009).

the victim he will be convicted of first degree burglary-murder if the victim dies.¹⁸¹ This defense, however, overlooks a point the California courts have emphasized repeatedly. The primary purpose of the felony murder rule is not to deter the commission of the underlying felony but “to deter felons from killing negligently or accidentally by holding them strictly liable for killings they commit.”¹⁸²

But is this claim plausible? Accidental harms are not foreseeable. This is why the Penal Code exempts persons who commit harms “through misfortune or by accident” from the criminal sanction.¹⁸³ If even a reasonable felon could not have foreseen the death, how can the felony murder rule deter an accidental killing that occurs during the commission or attempted commission of the felony?

The negligence justification for the rule poses problems as well. Negligence is the failure to appreciate a risk that would have been apparent to reasonable persons in similar circumstances. How can one be deterred from committing a killing if one cannot appreciate the homicidal risk in the first place? Whether the availability of the criminal sanction deters the truly negligent has been questioned. The framers of the Model Penal Code expressed serious reservations about using negligence as a basis of culpability:

Of the four kinds of culpability defined [purpose, knowledge, recklessness, and negligence], there is, of course, least to be said for treating negligence as a sufficient basis for imposing criminal liability. Since the actor is inadvertent by hypothesis, it has been argued that the “threat of punishment for negligence must pass him by, because he does not realize that it is addressed to him.” So too it has been urged that education or corrective treatment not punishment is the proper social method for dealing with persons with inadequate awareness, since what is implied is not a moral defect. Hall, *Principle of Criminal Law* 245. We think, however, that this is to over-simplify the issue. Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional

¹⁸¹ See *id.*

¹⁸² See *People v. Washington* 62 Cal.2d 777, 781, 44 Cal.Rptr. 442, 445, 402 P.2d 130, 133 (1965) and cases cited therein.

¹⁸³ See CAL. PENAL CODE § 26(5).

motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control. Certainly legislators act on this assumption in a host of situations and it seems to us dogmatic to assert that they are wholly wrong. Accordingly, we think that negligence, as here defined, cannot be wholly rejected as a ground of culpability which may suffice for purposes of penal law, though we agree that it should not be generally deemed sufficient in the definition of specific crimes, and it often will be right to differentiate such conduct for the purposes of sentence.¹⁸⁴

The framers' skepticism of negligence as a sufficient basis for imposing criminal liability led them to adopt a rule disfavoring its use. Under the Model Penal Code, a court may not use negligence unless it is expressly prescribed by the legislature.¹⁸⁵

The negligence rationale offered by the California Supreme Court poses other problems. Sometimes, the felons are not the killers. A resisting victim or a responding police officer may kill a felon (or even a bystander inadvertently). In its classic formulation, the surviving felons are still guilty of felony murder. But for their commission or attempted commission of the felony, the death would not have occurred. To prevent these outcomes, some jurisdictions apply an "agency" limitation.¹⁸⁶ The person delivering the fatal blow must have been acting on behalf of the felons. Resisting victims and responding police officers are clearly not their agents. California uses a different limitation. The homicide must have been committed to further the felony.¹⁸⁷ Because resisting victims and responding police officers are attempting to thwart, not further, the felony, the result is that in California the fatal blow must be inflicted by one of the felons.

Though this limitation is sensible, it fails to square with the rationale offered most often by the California Supreme Court to justify the felony

¹⁸⁴ MPC Commentary to § 2.02, Tent. Draft No. 4 at 126-127 (1955).

¹⁸⁵ See MPC § 2.02(3).

¹⁸⁶ See, e.g., *State v. Canola*, 73 N.J. 206, 211, 374 A.2d 20, 23 (1977).

¹⁸⁷ See *People v. Washington*, 62 Cal.2d 777, 781, 402 P.2d 130, 133, 44 Cal.Rptr. 442, 445 (1965).

murder rule — to deter felons from killing accidentally or negligently.¹⁸⁸ How can fatal actions designed to promote the commission of the felony be negligent or accidental? If the felon who inflicts the fatal blow did so to further the felony, most likely he will be guilty of express or implied malice murder and no need exists to resort to the felony murder rule. Whether his accomplices are also guilty of murder will be determined by California's rules governing accomplice liability. Under California's complicity rules, they will be guilty of murder if they either foresaw or should have foreseen their crime partner's fatal actions.¹⁸⁹ Under the rules pertaining to accomplice liability for conspirators, they too will be guilty of murder if their crime partner killed to further the conspiracy (commit the felony) and they either foresaw or should have foreseen his fatal actions.¹⁹⁰ In either case, resort to the felony murder rule would be unnecessary.¹⁹¹

To be sure, the Court emphasized in *Chun* that the felony murder rule serves another purpose — to deter the felons from committing the underlying felony.¹⁹² Acknowledging that the rule has this secondary purpose makes the Court's defense of the rule more plausible. Although felons cannot be deterred from committing killings they cannot anticipate, they might be deterred from committing the felony in the first place if they know they can be charged with murder for any accidental or negligent homicides that might occur during the commission or attempted commission of the felony. But as has been pointed out, that is an empirical question, and in *Chun* the Court offered no such evidence to support its claim.¹⁹³ Moreover, the existence of another deterrence purpose does not dispel other doubts about the overall utility and logic of the rule.

¹⁸⁸ See *People v. Chun*, 45 Cal.4th 1172, 1198, 203 P.3d 425, 441, 91 Cal.Rptr.3d 106, 125 (2009).

¹⁸⁹ See *People v. Beeman*, 35 Cal.3d 547, 560, 674 P.2d 1318, 1326, 199 Cal.Rptr. 60, 68 (1984).

¹⁹⁰ See *People v. Croy*, 41 Cal.3d 1, 12 n.5, 710 P.2d 392, 398 n.5, 221 Cal.Rptr. 592, 597 n.5 (1985).

¹⁹¹ As must be apparent, accomplice rules that elevate negligent homicide to murder present problems similar to those presented by the felony murder rule.

¹⁹² See *People v. Chun*, 45 Cal.4th 1172, 1198, 203 P.3d 425, 441, 91 Cal.Rptr.3d 106, 125 (2009).

¹⁹³ See *id.*

I. A FINAL MYSTERY (AND AN EXPLANATION AND A PLEA)

In light of the multiple problems attending the felony murder doctrine, one must wonder why it has survived. Part of the answer is that it has not escaped unscathed. Some jurisdictions have abolished the doctrine, including England where it originated.¹⁹⁴ Also, states that have adopted the approach elaborated by the American Law Institute have in essence abolished the doctrine. Under the Model Penal Code, criminal homicide is murder if it is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.¹⁹⁵ “Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape.”¹⁹⁶ Although this language appears to use a conclusive presumption to create a felony murder rule, it must be read in conjunction with another provision of the Model Penal Code. Section 1.12(5) provides:

When the Code establishes a presumption with respect to any fact which is an element of an offense, it has the following consequences: . . . (b) when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.¹⁹⁷

The effect of this provision is to convert what would otherwise be an unconstitutional conclusive presumption into a constitutional inference. A Model Penal Code judge would merely tell the jurors that they may, if they wish, take into account the evidence regarding the commission or attempted commission of the felony in determining whether the accused acted with an extreme indifference to the value of human life when he

¹⁹⁴ See, e.g., *People v. Aaron*, 409 Mich. 672, 698, 299 N.W.2d 304, 312 (1980).

¹⁹⁵ See MPC § 210.2(1)(b).

¹⁹⁶ *Id.*

¹⁹⁷ MPC § 1.12(5).

engaged in conduct he was aware posed a substantial homicidal risk to human life. In California, that would be the equivalent of telling the jurors that they can consider the circumstances attending the felony in determining whether the accused acted with implied malice. In either case, resort to the felony murder rule would be unnecessary.

California, of course, has not abolished the rule. The California Supreme Court could have abolished the first degree felony murder rule in *Dillon* simply by applying the plain meaning canon of statutory construction. The Court chose not to do so, even though its review of the rule's legislative history disclosed serious flaws. With regard to the second degree felony murder rule, the Court could have abolished the rule in *Chun* on the ground that its creation was beyond its competence. In *Dillon*, which predates *Chun* by twenty-six years, the Court openly acknowledged that "the second degree felony-murder rule [had been], since 1872, a judge-made doctrine without any express basis in the Penal Code."¹⁹⁸ But in *Chun* the Court chose to find such a basis.

The Court's actions to preserve the second degree felony murder rule in *Chun* and the first degree felony murder rule in *Dillon* are even more surprising given its stinging criticism of the rule. The Court has acknowledged "that the felony murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application" and that the rule "has been subjected to severe and sweeping criticism."¹⁹⁹ The Court is also aware that "in almost all cases in which [the rule] is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability."²⁰⁰

If in the Court's view the felony murder rule is of questionable utility and logical validity, why has the Court taken such extraordinary steps to preserve it? In the end, the answer lies in the Court's belief that it should not impose its policy preferences where the legislature has spoken. The Court believes that it has some latitude to impose restrictions on the second

¹⁹⁸ *People v. Dillon*, 34 Cal.3d 441, 472 n.19, 668 P.2d 697, 715 n.19, 194 Cal.Rptr. 390, 408 n.19 (1983).

¹⁹⁹ *People v. Phillips*, 64 Cal.2d 574, 582-583, 414 P.2d 353, 360, 51 Cal.Rptr. 225, 232 (1966).

²⁰⁰ *People v. Washington*, 62 Cal.2d 777, 783, 402 P.2d 130, 134, 44 Cal.Rptr. 442, 446 (1965).

degree murder rule because of its duty to clarify vague statutory terms (e.g., “an abandoned and malignant heart”). But in the case of the first degree felony murder rule, the Court believes that it has no authority to impose limitations where the legislature has spoken clearly. Whether California should retain the first or second degree felony murder rule is a matter the Court believes California law entrusts to the legislature.²⁰¹

Sisyphus was a mythological king who, as punishment for his misdeeds, was ordered by the gods to roll a heavy stone up a hill. His punishment became eternal as each time Sisyphus approached the crest, the stone would roll back down. Twenty-six years have elapsed since the Court said that “[a] thorough legislative reconsideration of the whole [felony murder] subject would seem to be in order.”²⁰² Until the legislature acts, the Court, like Sisyphus, will continue to face the seemingly endless task of trying to make sense of the contradictions, uncertainties, and other mysteries that surround the felony murder rule. ★

²⁰¹ See *People v. Dillon*, 34 Cal.3d 441, 472 n.19, 668 P.2d 697, 715 n.19, 194 Cal. Rptr. 390, 408 n.19 (1986).

²⁰² *Id.* at 472 n.19, 668 P.2d at 715 n.19, 194 Cal.Rptr. at 408 n.19 (1986).

CALIFORNIA'S ROLE IN THE MID-TWENTIETH CENTURY CONTROVERSY OVER PAIN AND SUFFERING DAMAGES:

*The NACCA, Melvin Belli, and the
Crusade for "The Adequate Award"*

PHILIP L. MERKEL*

INTRODUCTION

During a thirty-year period starting roughly at the end of World War II, California became the nation's most plaintiff-friendly state in personal injury cases. The California Supreme Court used its lawmaking power under the common law to revolutionize tort law. In a series of decisions, the Supreme Court created a strict liability cause of action in products liability cases,¹ replaced contributory negligence with pure comparative fault,² abolished the common law classifications for injuries caused by conditions on land,³ loosened requirements for establishing causation,⁴ expanded the application of *res ipsa loquitur*,⁵ abrogated sovereign immunity

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¹ *Greenman v. Yuba Power Products*, 377 P.2d 897 (Cal. 1962).

² *Li v. Yellow Cab*, 532 P.2d 1226 (Cal. 1975).

³ *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

⁴ *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

⁵ *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944); *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944).

for public entities,⁶ created duties of care in new situations,⁷ and allowed plaintiffs to recover for purely emotional injuries in new contexts.⁸ For injured plaintiffs and their lawyers, this was the golden era of California tort law. The Supreme Court developed a national reputation as the leader in court-instigated changes to tort law.⁹

In the mid-1970s, California again took a leadership role in modifying tort law, but this time the Legislature was the instigator and the change was not plaintiff-friendly. In 1975, the governor called the Legislature into special session to address the problem of rising medical liability insurance costs.¹⁰ Medical professionals and their insurers claimed that large judgments in medical malpractice cases were limiting the availability of liability insurance and driving health care providers from the state. The special session enacted a series of laws in 1975 known collectively as the Medical Injury Comprehensive Reform Act (MICRA). MICRA changed California tort law in medical negligence cases by limiting the contingent fees of plaintiffs' attorneys,¹¹ abolishing the collateral source rule,¹² and allowing for periodic payment of future damages.¹³

⁶ *Muskopf v. Corning Hospital District*, 359 P.2d 457 (Cal. 1961). The case was overruled by statute.

⁷ *Tarasoff v. Regents*, 551 P.2d 334 (Cal. 1976) (duty of psychiatrist to warn potential victim of threat posed by patient); *Vesely v. Sager*, 486 P.2d 151 (Cal. 1971) (duty owed by dram shop owner to victim of intoxicated patron); *Coulter v. Superior Court*, 577 P.2d. 669 (Cal. 1978) (duty owed by host to victim of intoxicated guest). *Vesely* and *Coulter* were abrogated by legislation.

⁸ *State Rubbish Collectors Association v. Siliznoff*, 240 P.2d 282 (Cal. 1952); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

⁹ For a discussion of how California Supreme Court justices rationalized making significant changes to the common law during the period, see G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 292-301 (1976). White focuses on the views of Roger Traynor, the Court's most influential member.

¹⁰ "The cost of medical malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the people of this State and threatens the closing of many hospitals. . . . It is critical that the Legislature enact laws which will change the relationship between the people and the medical profession, the legal profession and the insurance industry, and thereby reduce the costs which underlie these high insurance premiums." Proclamation by the Governor, 1975 Cal. Stat. 2d Ex. Sess. 3947.

¹¹ CAL. BUS. & PROF. CODE § 6146.

¹² CAL. CIV. CODE § 3333.1.

¹³ CAL. CIV. PROC. CODE § 667.7.

But the most controversial MICRA provision was one limiting damages for noneconomic injuries in medical negligence cases to \$250,000.¹⁴ The principal noneconomic damage in a medical negligence suit is compensation for the plaintiff's physical pain and mental suffering. California's limit or "cap" on noneconomic damages is fixed, as it does not provide for adjustments to reflect increases in the cost of living. The cap has survived constitutional challenge,¹⁵ and the Legislature has never raised the \$250,000 limit.

California once again became a national trailblazer in tort law when it limited noneconomic damages. Over the years, numerous state legislatures followed suit by setting their own limits in medical malpractice cases.¹⁶

This article examines how pain and suffering damages in personal injury cases became controversial, ultimately leading California and other states to limit them. The focus is on the enormous growth in personal injury litigation along with higher jury verdicts during the 1950s and 1960s and the reasons for these phenomena. The article consists of six parts. Part I discusses early California law governing pain and suffering damages. It examines case law from the late nineteenth and early twentieth centuries. The section explains why pain and suffering awards initially were not very large or controversial. Part II describes how tort litigation increased after World War I, mainly due to auto accidents and the availability of liability insurance. It explains how the lure of a collectable judgment encouraged more lawyers to handle personal injury cases. At the same time, developments in the social sciences led the legal community to a new awareness of the debilitating effects of physical pain and, especially, mental suffering. The result was that courts were more sympathetic toward accident victims claiming pain and suffering damages.

Part III reveals how, shortly after World War II, the plaintiffs' bar organized into a group known as the National Association of Claimants' Compensation Attorneys (NACCA), the predecessor to today's American Association for Justice. The goal of the NACCA founders was to unite and

¹⁴ CAL. CIV. CODE § 3333.2.

¹⁵ *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985).

¹⁶ See generally, Carol A. Crocca, *Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery in Medical Malpractice Claims*, 26 A.L.R. 5th 245 (1995).

professionalize lawyers who handled personal injury cases. The organization grew rapidly in the late 1940s and early 1950s. Its leaders traveled the country to promote interest in personal injury cases and educate lawyers in the latest trial techniques. Part IV recounts how the NACCA and California lawyer Melvin M. Belli — the attorney *Life Magazine* dubbed “the King of Torts” — joined forces. Belli was a key figure in the NACCA’s formative years. He served as the group’s president, published tort-related books and articles, and spoke before bar associations and law schools. His dynamic personality captured the imagination of a generation of personal injury attorneys. This part includes an overview of Belli’s early successes as a personal injury lawyer.

Part V examines Belli’s influence in the growth of personal injury recoveries in the 1950s through his crusade for “the Adequate Award.” Belli’s message was that personal injury victims were not being compensated fairly by defendants and their insurance companies. He put much of the blame for the problem on the victims’ lawyers. Belli believed that plaintiffs’ lawyers could obtain higher jury verdicts for their clients by using creative trial techniques, especially with regard to pain and suffering damages. His use of one particular trial tactic, known as the “per diem” argument, a mathematical way of computing pain and suffering damages, generated a vigorous debate in legal circles that continued throughout the 1950s and 1960s. Part VI discusses how the widespread use of the per diem argument led to dozens of appellate court cases around the country challenging the tactic. Belli and the NACCA were vindicated when the majority of states, including California, allowed the practice.

The article concludes by showing how, in the short term, the NACCA and Melvin Belli succeeded in dramatically increasing personal injury judgments. In the long term, however, the unpredictability and arbitrariness of pain and suffering awards led to calls for restricting noneconomic damages. Having lost faith in the courts to address the problem, insurance companies and their lawyers turned to the legislatures for help. The result has been the enactment of statutes, like the MICRA, that place limits on pain and suffering damages and calls for other legislation to check jury awards.

I. EARLY CALIFORNIA LAW GOVERNING PAIN AND SUFFERING DAMAGES IN PERSONAL INJURY CASES

In the nineteenth century, the California Supreme Court used its power under the common law to establish the legal rules governing tort cases.¹⁷ Early California law on pain and suffering damages in personal injury cases was not very remarkable, as it mirrored rules followed in many other American jurisdictions.¹⁸ Pain and suffering damages were a part of the compensatory damages award. They were considered to be general damages “because they result naturally and directly from bodily harm.”¹⁹ In an early decision, *Fairchild v. California Stage Company* (1859), the Supreme Court affirmed a judgment in favor of a passenger who was injured in a stage coach accident.²⁰ It held that a jury instruction allowing for the recovery of “mental anguish” was proper, stating, “We cannot see why compensation should not as well be given for pain of mind as pain of body.”²¹ Other nineteenth-century decisions involving personal injury also mentioned pain and suffering damages, but gave no detailed discussion of these injuries.²²

¹⁷ The Civil Code of 1872 set the basic parameters for damages in tort cases. “For the breach of any obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.” CAL. CIV. CODE § 3333. The courts interpreted the statute to create rules governing compensatory damages.

¹⁸ For a history of pain and suffering damages in the United States, see Jeffrey O’Connell & Theodore M. Bailey, *The History of Payment for Pain and Suffering, Appendix* to Jeffrey O’Connell & Rita James Simon, *Payment for Pain and Suffering: Who Wants What, When and Why?* 1972 U.ILL. L.F 1, 83.

¹⁹ *Shatto v. Crocker*, 25 P. 629, 630 (Cal. 1891). The Court made this statement when affirming a judgment that included damages for “injured feelings” in a malicious prosecution case.

²⁰ 13 Cal. 599 (1859).

²¹ *Id.* at 601.

²² For example, in *Aldrich v. Parker*, 24 Cal. 513 (1864), the Court upheld a personal injury judgment for \$2,500 after the plaintiff lost two toes in a workplace injury. The Court noted that the plaintiff had medical treatment “attended with much suffering and pain . . .” *Id.* at 516. In *Malone v. Hawley*, 46 Cal. 409, 414 (1873), *reversed on other grounds*, the Court stated that a jury instruction should include mention of compensation for “the physical and mental suffering he had sustained by reason of the injury . . .” And in *Karr v. Parks*, 44 Cal. 46, 50 (1872) *reversed on other grounds*, the Court held that

After the turn of the twentieth century, Supreme Court opinions became more instructive on pain and suffering damages, especially regarding the meaning of mental suffering. One of the most important cases was *Merrill v. Los Angeles Gas and Electric Co.* (1911), where the plaintiff suffered serious injuries caused when leaking natural gas exploded.²³ The plaintiff won at trial, and the defendant challenged several jury instructions on appeal, including one that allowed the jury to compensate plaintiff for the “mental worry” he endured and would suffer in the future. The issue was whether future emotional injuries resulting from a personal injury were recoverable. After reviewing conflicting authorities from other jurisdictions, the Supreme Court held “[t]hat the grief, anxiety, worry, mortification, and humiliation which one suffers by reason of physical injuries are component parts of the ‘mental suffering’ for which, admittedly, damages may be awarded. . . . If the law contemplated an award of damages solely for physical pain, it is meaningless to say that recovery may also be had for mental suffering.”²⁴ The Court found that mental suffering could take “numerous forms and phases” and could vary based on factors such as the individual’s temperament, ability to stand shock, financial condition, whether the injury was temporary or permanent, and whether it was disfiguring and humiliating.²⁵ Two years later, the Court of Appeal amplified on the meaning of mental suffering in *Ryan v. Oakland Gas, Light, and Heat Co.*,²⁶ where a worker was left permanently disabled after an accident. The court held the plaintiff could recover as general damages for the mental anguish associated with knowing he could no longer work even after physical pain from the injury had ended.²⁷

These decisions illustrated different ways in which a plaintiff could experience pain and suffering, but they also raised a very practical question:

a girl who was gored by defendant’s cow could recover for the discomfort caused by the injury as well as for the immediate pain and suffering caused by the wound.

²³ 111 P. 534 (Cal. 1910).

²⁴ *Id.* at 540.

²⁵ *Id.*

²⁶ 130 P. 693 (Cal.App. 1913).

²⁷ Noting that the plaintiff had not been able to work for over six years, the court stated: “Thus handicapped, his outlook into the world before him could not be otherwise than accompanied by gloomy forebodings and more or less mental anxiety and suffering.” *Id.* at 697-698.

How can money compensate for noneconomic injuries? The basic goal of damages in any personal injury case is to compensate the plaintiff for injuries caused by the defendant's tort. Most losses a plaintiff suffers are economic and can be measured by looking to the marketplace for their value. For example, if the victim incurs doctor bills or is hospitalized, she can recover the fair market value of these services. Likewise, if the plaintiff cannot work because of the injury, she can recover wages lost while incapacitated.²⁸ But it is not possible to objectively quantify noneconomic damages, as there is no marketplace for pain and suffering. Moreover, noneconomic damages are not really "compensatory," because money does not alleviate the pain and suffering.

The California Supreme Court identified this problem in *Zibbell v. Southern Pacific Co.* (1911),²⁹ a railroad accident case in which the defendant claimed the damages were excessive. The jury awarded the plaintiff \$100,000 in damages for lost earning capacity and pain and suffering. The trial court remitted the judgment to \$70,000, but the verdict was still one of the largest in state history.³⁰ In affirming the damages award, the Court first mentioned the claim for lost future earnings. Although these amounts could be difficult to prove, their extent, duration, and the plaintiff's earning capacity "may all be approximated with reasonable exactness."³¹ The same was not true, however, for pain and suffering damages. The Court wrote: "But to put a monetary value upon the elements of physical pain and mental suffering, their nature, extent, and continuance, is a much more difficult and delicate matter."³²

How then did the judicial system assign a money value for pain and suffering? The courts gave this responsibility to the jury, the traditional

²⁸ Plaintiff must meet her burden of proving pecuniary losses. This can be difficult in cases where a permanently disabled plaintiff seeks future medical expenses or loss of earning capacity, as one cannot prove with scientific certainty what these values will be down the road. California courts address this problem by allowing plaintiff to recover pecuniary damages reasonably certain to occur in the future.

²⁹ 116 P. 513 (Cal. 1911).

³⁰ "And herein it is said that the verdict is twice the amount of the largest judgment ever rendered in the State of California in a similar case, and is the largest verdict ever presented to an appellate court for review." *Id.* at 520.

³¹ *Id.*

³² *Id.*

fact-finding body under the common law. In *Aldrich v. Palmer* (1864), an early personal injury case, the Supreme Court held, “the law does not fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury.”³³ The Court acknowledged that determining what is fair compensation is a “judicial problem of difficult, if not impossible, solution,” but stated that none “are more competent to its proper solution than the jury.”³⁴ For this reason, jury instructions for pain and suffering damages were not really very instructive.³⁵

California appellate courts gave the jury wide latitude to decide pain and suffering damages, but they also recognized that jurors could be biased or unduly swayed by their emotions when rendering verdicts. They created a number of rules to check “runaway” juries. The Supreme Court prohibited plaintiffs’ lawyers from making the “golden rule” argument, whereby they asked jurors to award the amount of damages they would want if they were in the injured party’s position.³⁶ Also, if the trial judge who heard the evidence and had the opportunity to assess the credibility of witnesses believed the damages were excessive, the judge could remit them or order a new trial.³⁷ A later decision referred to the trial judge as “the thirteenth juror.”³⁸ The role of the appellate courts in reviewing verdicts, however, was much more limited. They were not to substitute their judgment for that of the jury and interfere with a verdict unless the evidence showed the

³³ *Aldrich*, 24 Cal. at 516.

³⁴ *Id.*

³⁵ For example, in *Wiley v. Young*, 174 P. 316, 318 (Cal. 1918), the Court approved of the following instruction. “You are instructed, however, that with regard to pain and suffering the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates, and as under all the circumstances may be just and proper.”

³⁶ “It is, of course, improper for the jury to attempt to measure the damage occasioned by the injury and the sufferings attendant upon it, by asking themselves what sum they would take to endure what the plaintiff has endured, and must endure.” *Zibbell*, 116 P. at 520.

³⁷ A trial court had the discretion to decide whether to grant a new trial because the damages award was excessive. Appellate courts only overturned these decisions if the trial court abused its discretion. *See, e.g., Lee v. Southern Pacific Co.*, 35 P. 572 (Cal. 1894).

³⁸ *Buswell v. San Francisco*, 200 P.2d 115, 117 (Cal.App. 1948)

award “was not the result of the cool and dispassionate consideration of the jury.”³⁹ The Supreme Court held: “We can reverse a judgment for excessive damages only when it appears that the amount allowed is so plainly unjust and oppressive as to suggest passion, prejudice, or corruption on the part of the jury.”⁴⁰

This review of early California law on pain and suffering damages leads to a number of conclusions. First, personal injury judgments generally were not very large and they were not very controversial. That the Supreme Court saw fit to comment on the \$70,000 remitted judgment in *Zibbell* illustrates how unusual it was. Lawrence M. Friedman’s study of personal injury judgments in Alameda County establishes that low awards were the rule.⁴¹ The reported cases also show that pain and suffering damages were not specially identified by juries but rather were lumped with economic damages in general verdicts. Second, courts recognized that pain and suffering awards were inherently subjective because jurors had no real standard against which to measure them. Jurors were told to act “reasonably” and “without passion or prejudice,” but this was of little practical guidance, as pain and suffering damages cannot be computed mathematically. Unlike economic damages which can be assessed objectively by reference to market values, there is no marketplace for pain and suffering. As a result, different jurors hearing the same facts might award wildly different amounts. Moreover, plaintiffs who suffered identical injuries could receive different awards because thresholds for physical pain and mental suffering vary among individuals. Despite these problems, the courts placed great faith in the jury and were confident that their verdicts would be fair. Third, judicial standards for review of pain and suffering awards were also subjective. Whether an award was “unjust” or “oppressive” depended on the viewpoint of the judge applying the standard. The trial judge, acting as the “thirteenth juror,” was the major check on excessive verdicts. The appellate

³⁹ “It is not a question of what damages this court would award or whether we would consider them high, but whether this court can say that the damages are so excessive as to suggest passion or prejudice.” *Id.*

⁴⁰ *Shaw v. Southern Pacific Railroad Co.*, 107 P. 108, 111 (1910).

⁴¹ See Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351. Friedman studied personal injuries filings in Alameda County from 1880–1900. He found that in the cases that went to trial, the average total award was \$3,651. *Id.* at 365.

courts counted on them to police excessive verdicts by granting new trials or remitting judgments. The appellate courts saw their reviewing powers as being very limited. They only reversed awards where the award was so “grossly disproportionate” as to “shock” the court’s sense of justice.⁴²

II. THE POST-WORLD WAR I INCREASE IN PERSONAL INJURY LITIGATION AND A NEW RECOGNITION OF THE DEBILITATING EFFECTS OF PAIN AND SUFFERING⁴³

Auto Accidents, the Availability of Liability Insurance, and the Changing World of Personal Injury Litigation

Before World War I, the defendants in most California personal injury lawsuits were corporations.⁴⁴ As the appellate cases discussed in Part I reveal, most lawsuits involved claims by persons injured in accidents caused by railroads or public utilities. After the war, this pattern changed. The number of tort cases nationwide rose dramatically, and the defendant was more likely to be an individual than a corporation. The reason for this development was the popularity of the automobile. As more people purchased cars and drove, the number of accidents increased. The carnage on the roads was substantial. In 1930, for example, over 30,000 persons were killed and another one million were injured in auto accidents in the United States.⁴⁵ Auto accidents were disturbing because of the personal tragedies they caused to victims and their loved ones, but they also confronted society with a new problem. Very often, careless drivers could not pay for the injuries they caused. Unlike corporations that had liability insurance or substantial assets, many defendants in auto accident suits were not financially responsible. Thus, even if the victim sued and won, the plaintiff might not be able to collect the award.

⁴² *Johnston v. Long*, 181 P.2d 645, 658 (1947).

⁴³ The author presented some of the ideas in this part in an earlier article. See generally, Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy’s First Responses*, 34 CAPITAL U. L. REV. 545 (2006).

⁴⁴ Friedman, *supra* note 41, at 360.

⁴⁵ Young B. Smith, *Compensation for Automobile Accidents: A Symposium*, 32 COLUM. L. REV. 785, 786-787 (1932).

The legal community took notice of the growing crisis. In the late 1920s, the Columbia University Council for Research in the Social Sciences created a commission to study and report on legal issues surrounding auto accidents.⁴⁶ The commission's report, which was the subject of a 1932 symposium in the *Columbia Law Review*, concluded that the negligence system was failing, as most accident victims received no compensation.⁴⁷ It proposed major changes to the tort system for auto accident cases. The report recommended replacing negligence with a no-fault program similar to workmen's compensation.⁴⁸ Another proposal was that pain and suffering damages be abolished in auto accident cases. The commission believed that resources should be spent to fully compensate victims for economic losses rather than for noneconomic injuries.⁴⁹

No state followed the Columbia commission's suggestions for a no-fault program and the abolition of pain and suffering damages, but the report led authorities to seriously consider the problem of the insolvent negligent motorist. A number of states enacted laws to encourage or require drivers to obtain liability insurance. The most common was the enactment of "security-responsibility laws," which required motorists involved in accidents causing losses over a certain dollar amount to post security.⁵⁰ Their effect was to induce drivers to purchase liability insurance. By 1949, many states had passed these laws,⁵¹ including California which had a security-responsibility law as early as 1929.⁵² The laws led to a dramatic rise in the percentage of motorists who were covered by liability insurance. The Columbia report found that only about 27 percent of registered vehicles were

⁴⁶ *Id.* at 785.

⁴⁷ *Id.* at 793-794. The Columbia report findings are summarized in Smith's article. References are to his summary.

⁴⁸ *Id.* at 786, 787.

⁴⁹ *Id.* at 800-801.

⁵⁰ Joseph P. Chamberlain, *Introduction* to Frank P. Grad, *Developments in Automobile Accident Compensation* 50 COLUM. L. REV. 300 (1950).

⁵¹ *Id.* at 309 n.30.

⁵² Note, *New Approach to Problem of Motorist Financial Responsibility Misses Mark*, 1 STAN. L. REV. 263 (1949). The note criticized California's law because it required that a motorist deposit security only after an accident involving property damage and/or personal injury had occurred.

insured in 1929;⁵³ by the mid-1940s, some states reported that almost 85 percent were covered.⁵⁴

The growth of liability insurance benefited auto accident victims as they now had a better chance of receiving some compensation for their injuries. This development also had a profound effect on the legal profession, as more lawyers were willing to represent clients in auto accident cases. The prospect of a settlement or collectable judgment provided an economic incentive for lawyers to take them.⁵⁵ Because the plaintiff was often unable to pay the attorney an hourly fee, the lawyer was usually retained on a contingent fee basis. This meant that the attorney's compensation was tied to the amount of the recovery; the higher the settlement or judgment, the larger the fee. Therefore, lawyers looked for ways to maximize payments from insurance companies.⁵⁶ The plaintiff's actual economic damages for losses such as medical expenses and lost earnings offered little opportunity for manipulation because they were set by marketplace measures. But pain and suffering damages were a different story, as the appellate cases gave the jury wide discretion in valuing them. A high pain and suffering damages award benefited both the client and the attorney. The client had to pay the lawyer's contingent fee if he won or settled, so if the pain and suffering damages were substantial, they could cover the fee and the client would still be left with enough money to compensate for economic losses.⁵⁷ It benefited the attorney because the amount of the fee rose with the settlement or award.

The Legal Community's New Recognition of the Debilitating Nature of Pain and Suffering

As the volume of personal injury cases was growing, judges, lawyers, and legal scholars were also learning more about the debilitating effects of physical pain and mental suffering. Law professors at some of the nation's leading schools took the lead in identifying the various ways physical pain

⁵³ Smith, *supra* note 45, at 787.

⁵⁴ Grad, *supra* note 50, at 311.

⁵⁵ LEON GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* 78-79 (1958).

⁵⁶ CLARENCE MORRIS, *MORRIS ON TORTS* 349 (1953).

⁵⁷ Clarence Morris, *Liability for Pain and Suffering*, 59 *COLUM. L. REV.* 476, 477 (1959).

can manifest itself and they gave special attention to mental suffering.⁵⁸ These developments coincided with the emergence of the Legal Realism movement at American law schools.⁵⁹ Some Legal Realists studied the law and legal institutions in light of advances in the behavioral sciences. They were fascinated with human psychology.⁶⁰ These scholars believed that mental disorders could be explained scientifically and that emotional injuries could be just as serious as the physical. They criticized the courts' limited knowledge about mental suffering and worked to expand liability in cases involving emotional harm. Until this time, mental suffering damages were available in most states only where the plaintiff suffered a physical impact. In the years following World War I, numerous articles on the topic of emotional injury appeared in the nation's law reviews. The legal academy pushed for the expansion of liability to cover cases where the only injury was mental anguish.⁶¹

For example, Herbert F. Goodrich relied on physiological studies to prove that fear was a genuine injury by looking at its physical manifestations.⁶² He believed that the common law's hesitance to compensate for emotional injury stemmed from the courts' lack of scientific information on the subject. Science recognized the negative effects of emotional injuries, and he thought the law should do likewise.⁶³ Other scholars argued for the recognition of a "new tort" for the intentional infliction of emotional distress. William L. Prosser, one of the most influential tort scholars of the twentieth century who would later become dean of the University of California,

⁵⁸ Many leading torts scholars of the twentieth century participated in these discussions, including Francis H. Bohlen, Leon Green, Calvin Magruder, and William L. Prosser.

⁵⁹ For a discussion of legal realism, see generally, G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 63-113 (expanded ed. 2003).

⁶⁰ The Legal Realist most famous for viewing law in light of human behavior was Jerome Frank whose book *Law and the Modern Mind* was popular even with a lay audience. JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

⁶¹ See, e.g., Archibald H. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921); Lyman P. Wilson, *The New York Rule as to Nervous Shock*, 11 CORNELL L. Q. 512 (1926); Leon Green, *Fright Cases*, 27 ILL. L. REV. 761 (1932); John E. Hallen, *Damages for Physical Injury Resulting from Fright or Shock*, 19 VA. L. REV. 253 (1933).

⁶² Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922).

⁶³ *Id.* at 501.

Berkeley, School of Law, was a major proponent. He believed the law had failed to keep pace with science governing mental injury. Prosser wrote: "Medical science has long recognized that not only fright and shock, but also grief, anxiety, rage and shame, are in themselves 'physical' injuries producing well marked changes in the body, and symptoms of major importance which are readily visible to the professional eye."⁶⁴ Calvert Magruder of the Harvard Law School predicted that courts would go beyond protecting persons from intentionally inflicted emotional distress and create tort liability for those who cause mental suffering through negligence.⁶⁵

This concentration on mental distress without physical impact carried over to personal injury cases where the plaintiff had physical injuries. Charles T. McCormick's *Handbook on the Law of Damages* (1935) revealed that appellate courts around the country were becoming more sympathetic to claims for physical pain and mental suffering. McCormick's review of appellate precedents showed that courts had little problem recognizing purely physical pain. It was "the immediate effect upon the nerves and brain of some lesion or injury to a part of the body."⁶⁶ This included any pain accompanying treatment of the injury.⁶⁷ The author even found a case involving what is now known as "phantom pain," where the court upheld a damages award to a man who lost an arm but still had the sensation of pain where the limb had been.⁶⁸ McCormick also found that courts considered mental suffering as the usual accompaniment to physical pain, but noted that they sometimes had trouble distinguishing between the two.⁶⁹ He found precedents for mental suffering in personal injury cases covering the victim's fright and terror at the time of injury, fear of how the injury might affect future health, apprehension of a pregnant woman for an injury to her child, anxiety over the inability to earn a living, fear of death

⁶⁴ William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 876 (1939).

⁶⁵ Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1058-1059 (1936).

⁶⁶ CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 315 (1935).

⁶⁷ *Id.* at 316.

⁶⁸ *Id.*

⁶⁹ *Id.*

or insanity, nervousness around cars after a collision, and the embarrassment, sadness, and humiliation caused by a disfiguring injury.⁷⁰

Young B. Smith and William L. Prosser also noted the heightened attention to pain and suffering damages in the 1952 edition of their casebook, *Cases and Materials on Torts*. They listed various forms of pain and suffering recognized by American appellate courts, including “loss of sense of taste and smell, loss of fecundity, mental pain and suffering from a consciousness that capacity to labor has been diminished for life, mental suffering of a virgin of strict religious faith because her hymen was ruptured by a doctor during a physical examination, acquisition of bad moral habits because of a head injury, permanent incontinence of urine, loss of desire for sexual intercourse and impotency, shock, change of personality . . . fear of death, increased stuttering, nervousness, neurotic condition, insomnia and inability to drive a car, fear of paralysis, and fear of injury to an unborn child.”⁷¹

But not everyone jumped on the band wagon of the movement to liberalize the law governing noneconomic damages, especially for mental suffering. Professor Clarence Morris of the University of Pennsylvania Law School was a leading critic. He believed that pain and suffering damages were arbitrary, could not be measured in dollars, and only led to more litigation and higher verdicts that society could not afford to pay. “Perhaps sufferers deserve special pocket money for books or television sets or other escapes from discomfort,” he wrote, but “the wisdom of increasing automobile liability insurance premiums to compensate for the non-economic aspects of pain seems questionable.”⁷² Prosser’s response to critics like Morris was that fear of more lawsuits and the possibility that judges would have to weed out fraudulent claims were not valid reasons for depriving injured parties of having justice: “It is the business of the law to remedy wrongs that deserve it, even at the expense of a “flood of litigation;” and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do.”⁷³

⁷⁰ *Id.* at 316-317.

⁷¹ YOUNG B. SMITH & WILLIAM L. PROSSER, *CASES AND MATERIALS ON TORTS* 617 (1952).

⁷² MORRIS, *MORRIS ON TORTS*, *supra* note 56, at 348-349.

⁷³ Prosser, *supra* note 64, at 877.

Those who favored compensation for emotional injuries were confident that juries, guided by the usual instructions relating to pain and suffering damages, would be able to recognize genuine mental suffering claims and quantify them. They also believed that trial courts and appellate courts, using the traditional standards of review for pain and suffering damages, could police for excessive verdicts. As Prosser put it, “Just as a substantial verdict for personal injuries or for ‘physical’ pain will be reversed when the evidence of damage consists of purely subjective testimony on the part of the plaintiff . . . the court may refuse to permit recovery for ‘mental’ suffering unless there is some sufficient assurance of the genuineness of the claim”⁷⁴

III. THE NATIONAL ASSOCIATION OF CLAIMANTS’ COMPENSATION ATTORNEYS AND THE PROFESSIONALIZATION OF THE PERSONAL INJURY BAR

Before World War II, lawyers who worked in the personal injury field by handling tort cases and workmen’s compensation claims were on the margins of the legal profession. They had virtually no role in the American Bar Association which was dominated by the large law firms. Unlike their counterparts on the defense side, they had no national organization. Personal injury lawyers also had a major image problem with the general public. Newspapers and magazine often portrayed them as “ambulance chasers” and “shysters” who were more interested in extorting a contingent fee from insurance companies than in helping their clients.⁷⁵

Things began to change in 1946, when a handful of lawyers who represented clients in workmen’s compensation cases attended a national conference of state industrial accident commissions in Portland, Oregon. Samuel B. Horowitz, a Boston attorney, law professor, and author of a practitioner’s guide to workmen’s compensation law, invited ten other lawyers who

⁷⁴ *Id.* at 877-878.

⁷⁵ For a typical article criticizing personal injury lawyers as “ambulance chasers,” see, e.g., Robert Monaghan, *The Liability Claim Racket*, 3 LAW & CONTEMP. PROBS. 491 (1936).

represented injured workers to meet in his hotel room.⁷⁶ Their discussions identified problems facing plaintiffs in workmen's compensation litigation. The main issue was that there was no professional group for lawyers specializing in the field. "There were patent lawyers, trade mark lawyers, lawyers trained in building, unbuilding and remodeling corporations, lawyers spending their lives in reducing the pain that comes from paying taxes, wills and estate lawyers, insurance company lawyers — all organized to the nines — but where was the organization to represent 9,000,000 people injured seriously enough every year to become statistics?"⁷⁷ The participants noted that employers and their insurers were represented by competent counsel, but there were not many knowledgeable lawyers for injured workers.⁷⁸ In many cases, workers were at an extreme disadvantage as they represented themselves in administrative hearings. Moreover, the insurance companies exerted their influence in the state legislatures to keep workmen's compensation benefits low.⁷⁹

The meeting ended with the decision to create a new professional organization, the National Association of Claimants' Compensation Attorneys (NACCA). Over the years, the group changed names a number of times. Today it is called the American Association for Justice, the nation's largest and most powerful plaintiff-lawyer organization.⁸⁰ Initially, the NACCA devoted its attention exclusively to workmen's compensation law. Under Horovitz's leadership, the NACCA pursued an ambitious agenda on

⁷⁶ "Editorial, NACCA — Rumor and Reflections," 18 NACCA L.J. 27 (1956).

⁷⁷ *Id.*

⁷⁸ For example, the International Association of Insurance Counsel was formed in 1920. It began publishing the *Insurance Counsel Journal* in 1933. 25 INS. COUNSEL J. 9 (1958).

⁷⁹ *Id.*

⁸⁰ Originally, the group was called the National Association of Compensation Attorneys, but the name was soon changed to National Association of Claimants' Compensation Attorneys in 1948 in recognition that some members handled personal injury cases outside the workmen's compensation field. Thereafter, the organization had a number of name changes. It became the National Association of Claimants' Counsel in 1960. In 1964, it was renamed the American Trial Lawyers Association and, a short time later, it became the Association of Trial Lawyers of America. RICHARD S. JACOBSON & JEFFREY R. WHITE, DAVID V. GOLIATH: ATLA AND THE FIGHT FOR EVERYDAY JUSTICE 163-164 (2004). The organization's current name, the American Association for Justice, was adopted in 2006.

a number of fronts. It developed an education program for lawyers who represented claimants. The goal was to professionalize claimant lawyers in workmen's compensation cases so as to match the expertise of their insurance-company-funded counterparts.⁸¹ One of the first decisions was to create a journal devoted to workmen's compensation law. The *NACCA Law Journal* began publication in 1948. The *Journal* followed legal developments in the field and highlighted notable victories. It soon had an impressive volume of subscribers, including most law school libraries.⁸² Within three years after it started publishing, the *Journal* was cited in appellate court decisions and law review articles.⁸³

An important part of the education program was reaching workmen's compensation lawyers in their own communities. NACCA members traveled the country and spoke before bar groups about their area of practice and encouraged other lawyers to take worker injury cases.⁸⁴ They recommended the establishment of local NACCA branches. The group also urged law schools to offer courses in all facets of personal injury law. The NACCA established lectureships at leading law schools and recruited top professors as presenters.⁸⁵ The central office in Boston developed a library of books and briefs and served as a clearinghouse for information for members.⁸⁶

The NACCA also had a legislative program. Because workmen's compensation law was created by statute, only the legislature could make changes. The group claimed that insurance and employer lobbyists had been successful in limiting recoveries to injured workers. The NACCA

⁸¹ "From the discussions it soon became evident that there were yearly tens of thousands of *litigated* cases in workmen's compensation cases; that the insurers were *always* represented by *able* counsel and that about half the workers came unrepresented, to do battle with skilled insurance counsel, doctors and investigators.

"There was an urgent need for *plaintiff* representation in litigated cases, if our American justice was to be maintained." Samuel B. Horovitz, *Early Tribulations (1946-1951)*, TRIAL, 23 (July-Aug. 1971) (emphasis in original).

⁸² *Editorial*, NACCA — *Rumor and Reflection* 18 NACCA L.J. 28 (1956).

⁸³ *Editorial*, 8 NACCA L.J. 19 (1951).

⁸⁴ In 1949, Horovitz traveled through the south and southwest in an Airstream trailer. He spoke before 32 groups about workmen's compensation issues. JACOBSON & WHITE, DAVID AND GOLIATH, *supra* note 80, at 16.

⁸⁵ *Editorial*, 8 NACCA L.J. 17-18 (1951). The professors included Mark DeWolfe Howe at Harvard and Fleming James at Yale. 18 NACCA L.J. 24 (1956).

⁸⁶ *Editorial*, 8 NACCA L.J. 17-18 (1951).

worked to level the playing field in the legislatures. Finally, the NACCA hoped to improve the image of lawyers who represented injured workers. It wanted the public to realize that plaintiff lawyers were friends of the working class and that the group's goal was justice for the poor as well as the rich.

NACCA membership grew at an impressive rate. Within six years, there were over 2,000 members.⁸⁷ Beginning in 1947, the group held annual national conventions.⁸⁸ Around the same time, it opened membership to lawyers who represented workers injured in railroad and shipping accidents. The *NACCA Law Journal* also expanded its coverage to include personal injury cases governed by federal railroad and admiralty laws.⁸⁹

IV. "THE KING OF TORTS" AND HIS RELATIONSHIP WITH THE NACCA

Melvin Belli's Background and His Early Work in Personal Injury Cases

By the time the NACCA was formed, San Francisco lawyer Melvin Belli had already built a reputation as a successful personal injury attorney. Belli would go on to be one of the most famous trial lawyers of the twentieth century. His flamboyant behavior in and out of the courtroom made him a national celebrity. His record of success in personal injury cases led a reporter for *Life Magazine* to refer to him as "the King of Torts" in a 1954 article, a title Belli relished.⁹⁰ Over the course of a long career, Belli represented and sometimes developed friendships with the famous, including actors Errol Flynn, Lana Turner, and Mae West; boxers Muhammad Ali and George Foreman; comedian Lenny Bruce; televangelists Jim and Tammy Faye Baker; mobster Mickey Cohen; stuntman Evil Knievel; stripper Carol Doda; Washington socialite Martha Mitchell; and the Rolling Stones rock group.⁹¹ Belli represented Jack Ruby at his trial for the murder of President

⁸⁷ By 1952, the NACCA had over 2,000 members. *Editorial*, 10 NACCA L.J. 20 (1952).

⁸⁸ *Id.* at 21.

⁸⁹ JACOBSON & WHITE, DAVID AND GOLIATH, *supra* note 80, at 13-14.

⁹⁰ Robert Wallace, *The King of Torts*, LIFE MAG., 71-82 (Oct. 1954).

⁹¹ MARK SHAW, MELVIN BELLI: KING OF THE COURTROOM, xiv (2007).

John F. Kennedy's assassin, Lee Harvey Oswald.⁹² He thrived in the public spotlight. Belli lived in a mansion, drove expensive cars, and wore the finest clothes. He bragged about his party life and trysts with numerous women.⁹³ His lifestyle took a toll on his family; he was married six times and his relationships with his children were sometimes rocky.⁹⁴ Belli's legal career ended on a tragic note when his law firm filed for bankruptcy in 1995, shortly before he died at age 88.⁹⁵ Even today, people have very different opinions of him. To some, he was a brilliant legal innovator and dedicated advocate for his clients, while to others Belli was a shameless self-promoter mainly interested in fame and financial enrichment.

Belli was born in 1907 in Sonoma, California, in the western foothills of the Sierras. He attended college at the University of California, Berkeley, and received his law degree from Boalt Hall in 1933. His early practice was criminal law, including the defense of two inmates who were convicted and executed for escaping from prison and taking hostages.⁹⁶ Circumstances surrounding the death of his father in 1938 were a factor that drew Belli to have an interest in personal injury cases. His father died after taking a prescription medication. Belli claimed that the pharmacist who filled the prescription gave the wrong dosage or, as he put it, "the goddamned drugstore had made a mistake on the goddamned prescription."⁹⁷

His first personal injury victory came in 1943, when he represented a worker who was hurt in a cable car accident. The trial gave him the opportunity to employ a tactic for which he would become famous: the use of demonstrative evidence. Belli had a craftsman build models of the accident site and the cable car. He also brought a blackboard into court to help the jury compute the damages award. The jury returned a \$32,000 verdict, a large award for the time.⁹⁸ Belli found that the creative use of

⁹² Ruby was convicted, but the conviction was reversed on appeal. He died before he could be retried. MELVIN M. BELLI, *MY LIFE ON TRIAL*, ch. 17 (1976).

⁹³ See generally, BELLI, *MY LIFE*, *supra* note 92.

⁹⁴ SHAW, MELVIN BELLI, *supra* note 91, at xiii, 225.

⁹⁵ The bankruptcy was filed in December, 1995. Belli died at age 88 on July 9, 1996. *Id.* at 218, 227.

⁹⁶ BELLI, *MY LIFE*, *supra* note 92, at 76-81.

⁹⁷ *Id.* at 86-87.

⁹⁸ *Id.* at 92-93. The judgment was affirmed on appeal. *Bryant v. Market Street Railway*, 163 P.2d 33 (Cal.App. 1945).

demonstrative evidence produced larger verdicts. In one of his famous cases, where a woman had lost a leg in an accident, he passed her artificial limb among the jurors. The jury returned a verdict of \$100,000.⁹⁹

In the late 1940s, Belli won three verdicts of over \$100,000 in personal injury cases with significant pain and suffering damages. These awards were the highest in California history. The defendants appealed the judgments, but the appellate courts affirmed them.¹⁰⁰ In all three cases, the courts followed California's traditional rule that appellate courts do not overturn verdicts as excessive except in unusual circumstances. As one of the courts held, "if there is substantial evidence in the record supporting the damages awarded by the jury and it is inferentially approved by the trial judge by his denial of a motion for a new trial without reducing the damages, we are powerless to reduce them or to hold the award excessive."¹⁰¹ The court also cited recent case authority affirming higher awards because the purchasing power of the dollar had declined.¹⁰² In 1950, Belli's string of large awards continued when a jury awarded his client \$225,000, the highest verdict ever in the state.¹⁰³

The amount of these awards and Belli's success in defending them on appeal had an important influence on his thinking. He realized that if the victim's lawyer could convince the jury and the trial judge — the thirteenth juror — that a high verdict was justified, California's standard of appellate review made it unlikely that a higher court would reverse the judgment. Belli also understood that the California decisions could have persuasive precedential value elsewhere. Courts in other states could rely on them when upholding high awards. The decisions were also very useful during negotiations with insurance companies, as the fear of high verdicts could motivate them to agree to more generous settlements.

⁹⁹ The incident is described in *BELLI, MY LIFE*, *supra* note 92, at 107-109.

¹⁰⁰ *Gluckstein v. Lipsett*, 209 P.2d 98 (Cal.App. 1949) (affirming judgment for \$115,000); *Sullivan v. San Francisco*, 214 P.2d 82 (Cal.App. 1950) (affirming judgment for \$125,000); *Duvall v. T.W.A.*, 219 P.2d 463 (Cal.App. 1950) (affirming judgments of \$35,000 for husband and \$85,000 for wife).

¹⁰¹ *Gluckstein*, *supra* at 104.

¹⁰² "It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one-half what it was prior to the present inflationary spiral." *Id.*

¹⁰³ The defendant appealed the verdict, and the parties later settled for \$187,500. *BELLI, MY LIFE*, *supra* note 92, at 117-123.

Belli Joins the NACCA

A major turning point in NACCA history was when Melvin Belli joined the organization in 1949. According to Belli, he was on vacation in Europe when a law partner contacted him and told him about Samuel Horovitz and the NACCA. After a telephone call to Horovitz, Belli interrupted his vacation, flew to Cleveland, and addressed the NACCA annual convention.¹⁰⁴ Belli wanted the group to expand its membership to include lawyers who took personal injury tort cases. Horovitz, who had never heard of Belli, told him that the group was only concerned with worker injuries. But after Belli spoke for over two hours about the use of demonstrative evidence and the inadequacy of awards for tort victims, he won the group over.¹⁰⁵ The immediate result was that the NACCA decided to admit tort lawyers to membership. The permanent consequence was that the NACCA quickly changed its focus from workmen's compensation law to personal injury tort litigation.¹⁰⁶

Belli shared Horovitz's vision of making the NACCA a national professional organization for lawyers representing injury victims. He was elected vice-president for 1950 and was president in 1951.¹⁰⁷ He organized the 1951 annual convention in San Francisco. The week-long program included 43 sessions on torts and medical science.¹⁰⁸ For many years, NACCA annual conventions were preceded by the "Belli Seminar," a loosely organized program at which speakers could discuss their notable achievements in personal injury law. Belli acted as moderator for the sessions.¹⁰⁹ The format of the *NACCA Law Journal* was also changed to include a section on recent important tort cases. In 1949, Belli began editing a feature called "Verdicts or Awards Exceeding \$50,000." Personal injury attorneys from around the country submitted information about their reported and unreported decisions and settlements. Belli used the feature to show "that juries and judges are taking into consideration the decreased value of the dollar, and the need, in cases of serious and permanent injury due to negligence,

¹⁰⁴ *Id.* at 127-128.

¹⁰⁵ Horovitz, *supra* note 81, at 44.

¹⁰⁶ JACOBSON & WHITE, DAVID AND GOLIATH, *supra* note 80, at 21-22, 327.

¹⁰⁷ *Id.* at 327.

¹⁰⁸ *Id.* at 72.

¹⁰⁹ *Id.* at 74-75.

of compensating injured persons for loss of wages, pain and suffering, humiliation, embarrassment, mortification, and for the psychological and psychic aspects, as well as other elements of damages.”¹¹⁰

NACCA members organized numerous state and local branches during Belli’s term. California had local groups in San Francisco, Los Angeles, and San Diego, more than any other state. The branches gave personal injury lawyers a forum for discussing common issues. The NACCA held a Western Regional Conference in Los Angeles in 1952, where Roscoe Pound, former dean of the Harvard Law School, spoke.¹¹¹ In the same year, lawyers from San Francisco and Los Angeles submitted an *amicus curiae* brief to the California Supreme Court on behalf of the NACCA in a personal injury case.¹¹²

Belli also played a major role in the NACCA’s effort to reach out to personal injury lawyers in their own communities. In 1951, he did a “barnstorming” tour of the country, making numerous presentations on personal injury law to local bar groups. He wrote that his efforts to raise the caliber of plaintiff-lawyer practice made him feel “as good as a Maryknoller bringing hybrid wheat and hospitals to southeastern Brazil.” He also spoke at major universities, including Princeton, Yale, Cornell, Columbia, Boston University, and Harvard.¹¹³

V. THE CRUSADE FOR “THE ADEQUATE AWARD”

Melvin Belli’s missionary zeal was ignited by a belief that personal injury judgments and settlements around the country were too low. As president of the NACCA, he began a national crusade for what he called “the Adequate Award” in personal injury cases. The goal was to increase substantially the amount of personal injury awards. Throughout the 1950s, Belli wrote and lectured extensively about how injury victims were not receiving adequate compensation for their injuries. Belli believed the trial tactics he

¹¹⁰ 9 NACCA L.J. 244 (1952).

¹¹¹ 10 NACCA L.J. 26 nn.35, 39, 104 (1952). By 1971, California was the largest affiliate of the group, known then as the American Trial Lawyers Association. There were 2,225 California members in 21 local and state chapters. Richard S. Jacobson, *Groans, Growth and Maturity*, TRIAL, 26, 27 (July–Aug. 1971).

¹¹² Lawyers from Belli’s firm participated in writing the brief. 9 NACCA L.J. 277 (1952).

¹¹³ BELLI, MY LIFE, *supra* note 92, at 135.

employed in California to win higher verdicts would work in other states. He suggested techniques plaintiff lawyers could use to convince judges and juries to give higher awards. Among them was an innovative approach for proving pain and suffering damages.

The Problem of Inadequate Personal Injury Judgments

Belli's campaign began in 1951 with publication of an article entitled "The Adequate Award" in the *California Law Review*.¹¹⁴ To write the article, Belli reviewed hundreds of awards in reported and unreported personal injury cases. The data came from published decisions and information about unreported cases and settlements provided by leading personal injury attorneys around the country.¹¹⁵ Belli separated the data into two broad groups: cases from California and cases from other jurisdictions. He then divided each group into "reported cases" and "unreported cases." The final organization was a summary of "California Reported Cases Tending to be Adequate," "Reported Cases of Awards from Other Jurisdictions Tending to be Adequate," "Unreported Cases (California) — Awards Approaching Adequacy," and "Unreported Cases (Other Jurisdictions) — Awards Approaching Adequacy." Each entry included the case name, basic facts about the victim's injury, and the amount of the recovery.

Belli's review of the cases led him to conclude that personal injury awards had risen over the last fifty years, but not sufficiently to keep up with the cost of living. He cited recent California appellate court decisions recognizing that inflation had undercut the value of the dollar.¹¹⁶ Belli's study showed that in some states, including California, awards were on the rise. He referred to these jurisdictions as "adequate verdict" states. But there were still many "low verdict" states where the recoveries were insufficient.¹¹⁷ Because a personal injury is the most catastrophic event a person can suffer, Belli argued that the legal community "should not be appalled" by the prospect of higher awards. Instead, "[j]udges and lawyers should dignify by new standards with justiciable awards infringements upon man's right to live out his life free from pain and suffering, with his mind

¹¹⁴ 39 CALIF. L. REV. 1 (1951).

¹¹⁵ *Id.* at 27.

¹¹⁶ *Id.* at 10 n.30.

¹¹⁷ *Id.* at 37.

and body intact.” The only way to do this was with “dollars,” the “money judgment.”¹¹⁸

The article generated huge publicity for the NACCA. The group sold thousands of reprints to lawyers around the country. Belli followed the article with a pamphlet in 1952 titled, *The More Adequate Award*.¹¹⁹ This publication updated the original article by mentioning over 300 new awards. Belli gave special attention to judgments in “high verdict centers,” including San Francisco and Los Angeles.¹²⁰ He reported that the highest California jury verdict was for \$358,000 in an Orange County case. Belli said the verdict was “the second Most Adequate Award” to be granted in the United States.¹²¹ In subsequent years, Belli provided regular updates on high recoveries in the *NACCA Law Journal’s* “Verdicts and Awards Exceeding \$50,000” section. He continued editing this feature until 1964.¹²² Belli also spotlighted substantial awards in *Modern Trials*, a three-volume practice manual that he published in 1954.¹²³

Belli’s Use of Demonstrative Evidence to Justify Higher Pain and Suffering Damages Awards

The adequate award was the main topic of Belli’s speeches when he toured the country on behalf of the NACCA. Although he criticized trial and appellate courts for overturning jury verdicts, he placed the primary responsibility for low verdicts on the victims’ lawyers. They were not using their imaginations when trying cases. Belli emphasized to his audiences the value of demonstrative evidence in swaying jurors.¹²⁴ He described how he used photographs and models to recreate accident scenes.¹²⁵ He also explained how he used demonstrative evidence to illustrate how personal injuries affected victims’ lives. Belli often told the story of the client who received a \$100,000 verdict after he passed her artificial leg among the jurors.¹²⁶

¹¹⁸ *Id.*

¹¹⁹ MELVIN M. BELL, SR., *THE MORE ADEQUATE AWARD* (1952).

¹²⁰ *Id.* at 2.

¹²¹ *Id.* at 3-4.

¹²² The feature last appeared in volume 30 of the *NACCA Law Journal*.

¹²³ MELVIN M. BELL, *MODERN TRIALS* (1954).

¹²⁴ Melvin M. Belli, Sr., *Demonstrative Evidence*, 10 WYO. L.J. 15 (1955).

¹²⁵ *Id.* at 22-25.

¹²⁶ *Id.* at 21-22.

But the key piece of demonstrative evidence in any jury trial was a blackboard. Belli called the blackboard “the most important instrument in legal surgery.”¹²⁷ He said he never tried a case without having blackboards present. The reason was simple: Teachers used blackboards to educate students from grammar school through college. The trial lawyer’s mission was to educate jurors about the client’s case in a very limited time. The blackboard helped jurors understand and remember important information. It was most useful in proving damages. Belli said that as witnesses testified about a client’s past and future economic losses, such as medical bills and lost wages, he listed them on the blackboard.¹²⁸ The list remained on the board throughout the trial, and he referred to it in closing argument.

Belli made the most original use of the blackboard in establishing pain and suffering damages. He explained to his audiences that putting a dollar amount on pain and suffering was a difficult but necessary task for the plaintiff’s lawyer. The personal injury victim, her family, and acquaintances could explain how the injury had affected her life, and medical experts could testify that the pain and suffering was real and predict how long it was likely to last. But putting a dollar figure on pain and suffering was another story. Belli warned that if the lawyer were to just throw out a high figure without breaking it down, this would “frighten your trier of facts and your reviewer of facts.”¹²⁹ His solution was to divide noneconomic damages into finite time periods and list them on the blackboard. He created a hypothetical case where the lawyer’s goal was to recover \$225,000 for pain and suffering expected to last for thirty years. “You must start at the beginning and show that pain is a continuous thing, second by second, minute by minute, hour by hour, year after year for thirty years,” he said. “You must interpret one second, one minute, one hour, one year of pain and suffering into dollars and cents and then multiply to your absolute figure to show how you have achieved your result of an award approaching adequacy at \$225,000.”¹³⁰ Belli was instructing his listeners on what came to be known as the “per diem” argument for pain and suffering damages.

¹²⁷ *Id.* at 28.

¹²⁸ *Id.*

¹²⁹ *Id.* at 34.

¹³⁰ *Id.*

He later claimed that he and a lawyer from Florida “invented” the per diem argument.¹³¹

Belli’s lectures on demonstrative evidence and the per diem argument excited personal injury lawyers around the country. If California juries were giving large verdicts and the state’s appellate courts were sustaining them, then Belli must be on to something. Plaintiffs’ lawyers in many states adopted his tactics, and won higher awards as a result.

Reactions against the Adequate Award Movement

The crusade for the adequate award energized personal injury lawyers, but it had a very different effect on insurance companies and their lawyers. They were surprised at the NACCA’s success in organizing plaintiff lawyers and stunned that personal injury awards were rising so rapidly. They fought against the adequate award movement, claiming that it was enriching personal injury lawyers while raising premium costs for the average insurance purchaser. Insurance defense lawyers were especially concerned about the growing use of the per diem argument around the country. They believed the tactic was a major contributor to high jury verdicts. One of their main goals was to convince courts to ban its use.

Insurance companies and their attorneys did not have to deal with a national plaintiff-lawyers organization before the NACCA. But after Melvin Belli became NACCA president in 1951, they realized they were facing a formidable opponent. At the 1952 meeting of the International Association of Insurance Counsel, the NACCA was a major topic. President Joseph A. Stray presented data from Los Angeles showing that the highest personal injury verdict had risen from \$33,000 in 1940 to \$185,000 in 1951. He blamed the NACCA for “arousing public interest in what they call ‘adequate awards’ but what we call excessive awards.”¹³² He recommended that insurers start a public relations campaign “to educate the public that they are the ones who are paying.”¹³³

The group devoted a full afternoon of the annual meeting to the NACCA. E.D. Bronson of San Francisco told how he attended the 1951

¹³¹ The other lawyer was Perry Nichols of Miami, Florida. MELVIN M. BELLI, 2 *THE LAW REVOLT*, 431 (1968).

¹³² *Report of the President*, 19 *INS. COUNS. J.* 250 (1952).

¹³³ *Id.* at 252.

NACCA annual meeting, and he reported to his insurance defense colleagues what he had learned. He gave detailed information about the NACCA's goals, organization, membership, and educational activities.¹³⁴ Bronson described Melvin Belli's adequate award theory and how Belli encouraged use of the per diem argument to prove pain and suffering damages. "He argues too for the copious use of colored crayons . . . particularly for visualizing numbers in arguing damages. It is proposed that the factor of pain be reduced to some finite medium, such as the day, hour and minute and to attach a money value to some small unit of time and then to resort to another method of 'blowing up' by multiplication."¹³⁵ Another speaker mentioned a presentation on demonstrative evidence that Belli made to the Iowa State Bar Association: "You can well appreciate that the attorneys from rural communities and smaller towns all over the state resolved to use the same means to secure high verdicts in their courts."¹³⁶ He suggested that insurance company representatives also tour the country and teach better methods of defense: "We must be ready to meet demonstrative evidence with demonstrative evidence, meet blackboard with blackboard . . ."¹³⁷ The discussion of the NACCA and rising awards was sobering. One speaker quipped that the mood in the room was so downcast "it might be appropriate at the close of this meeting to request the sergeant-at-arms to hang a black wreath from the door of this auditorium."¹³⁸

It was not long, however, before insurance companies and their lawyers launched a counterattack to the adequate award movement. Some of their efforts were directed at plaintiffs' lawyers. Articles in legal publications warned that if awards continued to rise, insurance companies would push for legislation replacing tort cases with no-fault insurance. A 1954 article in the *Insurance Counsel Journal* charged that the NACCA "wants its full pound of flesh and then some without regard to the foundations

¹³⁴ E.D. Bronson, *Activities and Objectives of Plaintiffs' Attorneys Who Foster the Adequate Award*, 19 INS. COUNS. J. 359-360 (1952).

¹³⁵ *Id.* at 361.

¹³⁶ Rupert G. Morse, *The Reinsurance Companies' Viewpoint of the Recent Trend Toward Higher Verdicts*, 19 INS. COUNS. J. 362, 363 (1952).

¹³⁷ *Id.* at 364.

¹³⁸ Comment of Gordon M. Snow. *Id.*

that are being undermined.”¹³⁹ Lawyers who deceived juries into awarding excessive and unreasonable verdicts were laying the groundwork for no-fault insurance. Unreasonable lawyers would destroy their own practices and “kill the goose that lays the golden egg.”¹⁴⁰ A new industry-friendly publication called the *Defense Law Journal* appeared in 1957. It mirrored the format of the *NACCA Law Journal* by covering developments in personal injury law, only from the defense perspective. Its editor charged the NACCA with preaching “adequacy” but fomenting “excessiveness.” He predicted that “in its relentless straining for ever-mounting verdicts and awards, it is only procreating a Frankenstein which one day will take the form of legislation similar in concept to the Workmen’s Compensation statutes.”¹⁴¹

Many attacks on the adequate award movement and the NACCA were intended to provoke outrage in the general public. Writers in newspapers and popular magazines warned that only lawyers were profiting from higher judgments. For example, a *Reader’s Digest* article accused plaintiff attorneys of collecting large fees and leaving their injury victims with little compensation.¹⁴² Other articles described personal injury lawyers as “shysters” and blamed the NACCA for higher insurance premiums.¹⁴³ A story in the Pasadena *Independent* compared personal injury lawyers to modern-day highwaymen who rob by bringing fraudulent claims.¹⁴⁴

Legal scholars also criticized the adequate award movement. Ironically, one of the most biting attacks was made by William L. Prosser who, as we have seen, was a major advocate of expanded liability for emotional injuries. Prosser wrote a review of Belli’s *Modern Trials* for the *California Law Review*.¹⁴⁵ Prosser called the book “an exposition in three volumes of how to wring from an impressed and sympathetic jury every last possible

¹³⁹ H. Beale Rollins, *The Industry’s Answer to “The More Adequate Award,”* 21 INS. COUNS. J. 455 (1954).

¹⁴⁰ *Id.* at 459.

¹⁴¹ Welcome D. Pierson, *The True Adequate Award*, 1 DEF. L.J. 275, 276 (1957).

¹⁴² *The Personal Injury Racket*, READER’S DIGEST (January, 1955).

¹⁴³ Belli claimed that the insurance industry sponsored the media campaign against the NACCA. See generally, MELVIN BELLI, *READY FOR THE PLAINTIFF* ch. 27 (1956).

¹⁴⁴ *Id.* at 293.

¹⁴⁵ William L. Prosser, *Book Review of Modern Trials*, 43 CALIF. L. REV. 556 (1955).

nickel that can be obtained for the plaintiff, and how to build up and magnify whatever case he may have until the recovery reaches or exceeds the absolute maximum which any court can conceivably allow to stand.”¹⁴⁶ Prosser called Belli’s approach “the Hollywood type of trial” designed to manipulate jurors into making excessive awards.¹⁴⁷

VI. THE PER DIEM ARGUMENT OVER PAIN AND SUFFERING DAMAGES IN THE APPELLATE COURTS

The controversy over rising personal injury verdicts moved to the nation’s appellate courts when a host of cases involving the per diem argument for pain and suffering damages became ripe for decision. In a ten-year period beginning roughly in 1958, appellate courts in over thirty states considered whether to allow the tactic. The NACCA and defense counsel groups tracked the cases closely. They were especially interested in how state courts with reputations for liberalizing tort law would decide. Insurance companies and their lawyers believed that the defeat of the per diem argument would be a major step in checking the rise in jury awards. For the NACCA and plaintiffs’ lawyers, vindication of the per diem argument would be a boost to the adequate award movement.

Opponents of the per diem argument presented the appellate courts with a variety of reasons for banning the practice. They claimed that there was no evidentiary basis for converting pain and suffering into monetary terms, so it was inappropriate for a plaintiff’s lawyer to suggest a per diem amount. In making a per diem argument, the attorney was really giving testimony and expressing opinions on matters not disclosed by the evidence. This could only mislead juries into giving excessive awards. Moreover, the defendant’s lawyer was put in the position of having to rebut an argument with no basis in fact, and if the lawyer responded in kind, he would imply approval of the per diem argument.¹⁴⁸

¹⁴⁶ *Id.* at 557.

¹⁴⁷ *Id.* at 559.

¹⁴⁸ The arguments are taken from *Ratner v. Arrington*, 111 So. 2d 82, 88-89 (Fla. App. 1959), a case often cited for objectively presenting the arguments of both sides of the per diem argument controversy.

Supporters had their own list of reasons why the per diem argument should be allowed. They claimed that the per diem argument assisted juries in making reasonable decisions. Without some guidance, the trier of fact would have to determine pain and suffering damages in the abstract and make a blind guess. The plaintiff's lawyer's suggestion that the evidence justified a certain amount, in total or by per diem, was a way of reaching a reasonable conclusion that the jury could find useful. Per diem arguments were not evidence, but are only used for illustration and suggestion. Any alleged problems with the per diem argument were exaggerated and could be cured by proper jury instructions. Defense counsel also had the opportunity to suggest a proper recovery and could draw inferences from the evidence.¹⁴⁹

The first state supreme court to decide the issue was New Jersey's, a state Belli listed as an "inadequate verdict" center in *The More Adequate Award*.¹⁵⁰ In *Botta v. Brunner* (1958),¹⁵¹ the New Jersey Supreme Court rejected the per diem argument. The court held that a plaintiff lawyer's suggestion that pain and suffering could be measured at so many dollars per day had no foundation in the evidence and could lead jurors to rely on "unproven, speculative and fanciful standards of evaluation for evidence."¹⁵² *Botta* was a major victory for insurers and their lawyers. Many expected that other states would follow New Jersey's lead and help bring a halt to large pain and suffering awards. The NACCA was quick to condemn the decision. By prohibiting plaintiff lawyers from using mathematical guides to help the jury compute pain and suffering damages, the jury was left "wrapped in a Grand Banks of fog," forced to use the "by guess and by golly" method of measuring noneconomic damages.¹⁵³ By 1966, ten other states had followed *Botta* in banning the per diem argument. Significantly only one, Illinois, was a state with a large urban center.¹⁵⁴

¹⁴⁹ *Id.*

¹⁵⁰ BELLI, *MORE ADEQUATE AWARD*, *supra* note 119, at 2.

¹⁵¹ 138 A.2d 713 (N.J. 1958).

¹⁵² *Id.* at 725.

¹⁵³ 28 NACCA L.J. 280-281 (1961-1962).

¹⁵⁴ The other states were Delaware, Hawaii, Kansas, Missouri, New Hampshire, Virginia, West Virginia, Wisconsin, and Wyoming.

Botta and the other decisions that mirrored its reasoning ended up being the high water mark for the insurance industry, as many subsequent state appellate court decisions authorized use of the per diem argument or left it to the trial judge's discretion to permit it in individual cases. By 1966, appellate court decisions in eighteen states followed this plaintiff-friendly trend. While the courts sometimes acknowledged that unit-of-time arguments could lead to larger pain and suffering awards, they found the guidance they provided to the jury outweighed their danger.¹⁵⁵

While appellate courts in many states were tackling the per diem argument issue, one remained conspicuously silent: the California Supreme Court. Ironically, the state where Melvin Belli first used the per diem argument with great success and the one that topped his list of "most adequate verdict centers" did not play a leadership role. The California Supreme Court passed up an opportunity to examine the issue in *Seffert v. Los Angeles Transit Lines* (1961).¹⁵⁶ In *Seffert*, the defendant appealed a judgment that included a substantial sum for past and future pain and suffering damages. The trial judge had allowed the plaintiff's lawyer to make a per diem argument to the jury. The Court affirmed the judgment but refused to consider the per diem argument issue because the defense attorney failed to preserve it for appeal.¹⁵⁷

Five years later, the Supreme Court finally addressed whether the per diem argument was permissible in *Beagle v. Vasold* (1966).¹⁵⁸ At the outset of the legal discussion, the Court noted that few issues in tort law had evoked more controversy in the last decade.¹⁵⁹ It tallied the number of jurisdictions permitting the argument and those prohibiting it, finding that the trend was toward allowing it. The Court also examined a large number of law reviews and found that a substantial majority of authors believed it was desirable to permit the per diem argument.¹⁶⁰ The Court sided with these majority positions when it found in favor of the per diem argument. It held

¹⁵⁵ Appellate court decisions on the issue are described in James O. Pearson, *Per Diem or Similar Mathematical Basis for Fixing Damages for Pain and Suffering*, 3 A.L.R. 4th 940. The annotation includes rules currently followed in the states.

¹⁵⁶ 364 P.2d 337 (1961).

¹⁵⁷ *Id.* at 344.

¹⁵⁸ *Id.* 417 P.2d 673 (1966).

¹⁵⁹ *Id.* at 676.

¹⁶⁰ *Id.* at 677.

that an attorney who suggests pain and suffering damages be computed on a unit-of-time basis was not presenting evidence but rather merely drawing inferences from the testimony of plaintiff, experts, and other witnesses.¹⁶¹ The Court rejected a suggestion by defendant's counsel that the trial judge be given the discretion to decide whether the per diem argument should be allowed or not in individual cases.¹⁶² The end result was there would be no obstacle to California lawyers using the tactic. The Court acknowledged the argument of critics who claimed that the per diem argument resulted in higher verdicts, but concluded the existing standards of judicial review were adequate to check the problem. The trial judge, sitting as "the thirteenth juror," and appellate courts, using the state's traditional standards for appellate review, could police excessive awards.¹⁶³

Interestingly, the California Supreme Court justice who wrote or joined in many of the plaintiff-friendly tort opinions listed at the beginning of this article opposed the per diem argument. Roger Traynor, the justice whom many saw as the leader of the movement for expanding tort liability, filed a strong dissent in *Seffert*, arguing the pain and suffering damages were excessive and should be reversed. Traynor was very critical of the per diem argument. He agreed with those who claimed it misleads jurors into thinking they can compute pain and suffering damages by a mathematical formula. Traynor wrote that the truth is not served by the use of "sophistic arguments."¹⁶⁴ He then went a step further by questioning whether personal injury plaintiffs should receive any damages for pain and suffering. He cited a number of law review articles criticizing these awards. However, once having raised the issue of abolishing pain and suffering damages, Traynor quickly backed away from it. He wrote, "any change in this regard must await reexamination of the problem by the Legislature."¹⁶⁵ When *Beagle* was decided, Traynor, who by then was chief justice, renewed his criticism of the per diem argument in a concurring opinion, stating, "an argument that damages for pain and suffering should be computed as so much per unit of time is so misleading that it

¹⁶¹ *Id.* at 678.

¹⁶² *Id.* at 682.

¹⁶³ *Seffert*, *supra* note 156, at 680.

¹⁶⁴ *Id.* at 347.

¹⁶⁵ *Id.* at 345.

should never be allowed.”¹⁶⁶ One observer who was surprised by Traynor’s views on the per diem argument was Melvin Belli. He wrote that Traynor “seems to have Frankfurterized, i.e., ‘trended conservative’ — or at least become more social planning and economically ‘cautious.’”¹⁶⁷

CONCLUSION

The individuals who founded the NACCA in 1946 could not have imagined how successful the group would be in organizing the personal injury bar. When the group, now named the American Trial Lawyers Association, celebrated its twenty-fifth anniversary in 1971, it had more than 25,000 members in affiliates, branches, and chapters around the country.¹⁶⁸ The campaign for the adequate award had also produced stunning results. Writing in 1968, Melvin Belli said that \$100,000 was once a “spectacular” verdict; now there were awards exceeding \$1 million.¹⁶⁹ Belli’s lectures and writings on the use of demonstrative evidence and his techniques for increasing pain and suffering awards helped account for the larger judgments.

But the success of the plaintiffs’ lawyers also had a down side. The increase in personal injury litigation in the 1950s and 1960s and the rise in awards raised questions about whether injury costs were getting out of hand. Critics identified pain and suffering damages, which are inherently arbitrary and unpredictable, as a special concern. Many articles focusing on problems with pain and suffering damages appeared in the nation’s law reviews.¹⁷⁰ Some authors lost faith in the ability of the courts to address the issue. They believed that judges lacked the will to make meaningful changes in the rules governing noneconomic damages.¹⁷¹ Judicial standards of

¹⁶⁶ Beagle *supra* note 158, at 683.

¹⁶⁷ BELL, 2 THE LAW REVOLT, *supra* note 131, at 433. The comment makes reference to U.S. Supreme Court Justice Felix Frankfurter. Proponents of judicial activism criticized Frankfurter for his philosophy of judicial restraint. *See generally*, PHILIP B. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION (1971).

¹⁶⁸ Richard S. Jacobson, *Groans, Growth and Maturity*, TRIAL, 26, 27 (July–August 1971). California was the largest affiliate, with 2,225 members.

¹⁶⁹ BELL, 2 THE LAW REVOLT, *supra* note 131, at 400-401.

¹⁷⁰ *See, e.g.*, Morris, *supra* note 57; Marcus L. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200 (1958); William Zelermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27 (1955).

¹⁷¹ *See, e.g.*, Morris, *supra* note 57, at 482-484.

review governing excessive verdicts did little to check the dramatic rise in personal injury awards. Indeed, the courts appeared to have exacerbated the problem in states like California by permitting the per diem argument.

Many critics believed that change would only come if the legislatures acted. They suggested different proposals for legislative intervention. One author suggested a law creating a system similar to workmen's compensation where there would be a schedule for pain and suffering awards based on the type and severity of the injury.¹⁷² Another argued for limiting pain and suffering damages to 50 percent of medical expenses.¹⁷³ These proposals would retain pain and suffering damages, but lower their amount and make them more predictable. Other writers called for the abolition of pain and suffering damages because society could not afford them. They linked pain and suffering awards to the rising cost of insurance premiums and consumer goods. A debate over no-fault insurance in auto accident cases had already been ongoing since the late 1950s. No-fault schemes often called for the elimination of pain and sufferings damages so that resources could be spent to fully compensate for economic losses.¹⁷⁴ However, the movement for no-fault insurance, which defense attorneys had warned plaintiff lawyers would "kill the goose that lays the golden egg," fizzled out.

Insurance companies and their lawyers ultimately had some success in fighting pain and suffering damages awards in medical malpractice cases where liability policy limits are high and the chances for catastrophic injuries are great. The California Legislature's decision to enact MICRA in 1975 and place a cap on noneconomic damages in medical negligence cases was their first major victory, and they have repeated it elsewhere. Efforts to limit pain and suffering damages are not surprising when viewed in the context of the spectacularly rising jury verdicts described in this article. The question whether pain and suffering damages should be limited or even abolished is still being debated today, and noneconomic damages are a main target of those who would reform personal injury law. ★

¹⁷² Zelermyer, *supra* note 170, at 41.

¹⁷³ Plant, *supra* note 170, at 211.

¹⁷⁴ LEON GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* 88 (1958); Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408, 418 (1959).

CALIFORNIA LEGAL HISTORY MANUSCRIPTS IN THE HUNTINGTON LIBRARY:

An Update

PETER L. REICH*

INTRODUCTION

The Huntington Library in San Marino, California, is one of the two primary repositories of California history manuscripts, along with UC Berkeley's Bancroft Library.¹ A key component of the Huntington collection is its materials on California legal history, which have been used for numerous scholarly publications.² In 1989, the Huntington published

* Professor of Law and Sumner Scholar, Whittier Law School; J.D., UC Berkeley, Ph.D, UCLA; past chair of the Legal History Section of the Association of American Law Schools; and past vice-chair of the California State Bar Committee on History of Law in California. This survey could not have been completed without the assistance of the wonderful Huntington Library staff, particularly Bill Frank, Curator of Hispanic, Cartographic, and Western Historical Manuscripts, Associate Curator Jennifer Goldman, and Chief Cataloger Brooke Black. The author dedicates the essay to the memory of Martin Ridge, late Director of Research at the Huntington and tireless supporter of California legal historical scholarship.

¹ See John C. Parish, *California Books and Manuscripts in the Huntington Library*, 7 HUNTINGTON LIBR. BULL. 1 (1935); Archibald Hanna, *Western Americana Collectors and Collections*, 2 W. HIST. Q. 401 (1971).

² See GORDON M. BAKKEN, *PRACTICING LAW IN FRONTIER CALIFORNIA* (1991); MIROSLAVA CHÁVEZ-GARCÍA, *NEGOTIATING CONQUEST: GENDER AND POWER IN CALIFORNIA, 1770s TO 1880s* (2004); DAVID J. LANGUM, *LAW AND COMMUNITY ON THE*

California Legal History Manuscripts in the Huntington Library: A Guide, compiled and edited by legal historian Gordon M. Bakken (hereinafter *Guide*). The current essay updates the *Guide* by including materials catalogued or acquired since its production, as well as some that were omitted due to the definition of “legal history” it employed.

Before discussing specific materials, a few words regarding the role of legal historical theory and organization are in order. A recent study of legal history’s disciplinary development divides the field into “classical,” “liberal,” and “critical” approaches.³ The first focuses on the intellectual history of doctrine and institutions, the second emphasizes the integration of law with society and the economy, and the third asserts law’s contingency and inconsistency over time.⁴ Assuming that scholars applying such different methodologies may conduct research in the Huntington, I did not want to restrict excessively the parameters of legal historical materials, and have thus attempted to capture as broad a range of sources as might conceivably be useful.

In terms of organization, the *Guide* categorized manuscripts into twenty-six subject areas, with additional subdivisions, and summarized the collections in alphabetical order. Many of the categories were extremely narrow, and some then-extant collections were omitted, such as the Frank Latta materials, because they were “not specifically law related.”⁵ In the interests of inclusiveness, as well as of providing latitude for a wider use of documents, I have created six groupings: Business Enterprises, Courts and Judges, Government Offices, Land, Natural Resources (mining, oil, and water), and Law Firms and Lawyers. Each entry includes a brief description of the person(s) or institution generating the manuscripts, the types of materials included, their quantity, and whether there is a finding aid. It should be noted that a number of these collections are only semi-catalogued; for further information the researcher should consult one of the Huntington’s superlative curators.

MEXICAN CALIFORNIA FRONTIER: ANGLO-AMERICAN EXPATRIATES AND THE CLASH OF LEGAL TRADITIONS, 1821–1846 (1987); JOHN PHILLIP REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* (1997). See also the author’s modest contribution to this literature, Peter L. Reich, *Dismantling the Pueblo: Hispanic Municipal Land Rights in California Since 1850*, 45 AMER. J. LEGAL HIST. 353 (2001).

³ Jonathan Rose, *Studying the Past: The Nature and Development of Legal History as an Academic Discipline*, 31 J. LEGAL HIST. 101, 117 (2010).

⁴ *Id.* at 118, 120, 121.

⁵ GUIDE at 2.

BUSINESS ENTERPRISES

BANNING COMPANY RECORDS, 1859–1948. Transportation business instrumental in developing Los Angeles, Wilmington, and Santa Catalina Island. Includes legal papers, correspondence, letter books, ledgers, and account books. 12,104 items, with finding aid.

BERNAL FAMILY PAPERS, 1849–1896. Landowning family in San Francisco Bay area. Includes legal contracts, mortgages, title deeds, and promissory notes. 67 items, with finding aid.

THOMAS ANTHONY “TONY” FORSTER COLLECTION OF FORSTER FAMILY PAPERS, 1849–1921. 1833 British immigrant to California, John Forster, married into *Californio* Pico family, engaged in multi-year litigation over Santa Margarita land grant. Includes correspondence, business, and legal papers. 147 items, negatives and microfilms of 11 diary volumes.

GUERRA FAMILY COLLECTION, 1752–1955. Prominent *Californio* family, particularly in Santa Barbara. José Antonio de la Guerra y Noriega commanded the Santa Barbara Presidio, 1815–42. Includes facsimile copies of land, legal, personal, and political papers; originals in Santa Barbara Mission Archive Library. 4,179 items, with finding aid.

LOS ANGELES TIMES COMPANY RECORDS, LEGAL DEPARTMENT, 1911–1980. Newspaper and business and politics during the twentieth century. Legal documents regarding 1911 Los Angeles Times bombing trial, antitrust, labor, and tax cases. 6 boxes, oversize scrapbook, with finding aid.

OREÑA FAMILY PAPERS, 1838–1955. *Californio* landowning family linked to the de la Guerras of Santa Barbara through marriage of Spanish immigrant Gaspar Oreña. Includes land claims, land grants, title deeds, and litigation documents. 65 items, with finding aid.

PROTEST FILED ON BEHALF OF PALMER, COOK, & COMPANY, BANKERS, 1854. San Francisco notary public’s official protest filed for creditor bank against defaulting debtor, and original loan agreement. 2 pages.

STONEMAN FAMILY PAPERS, 1891–1920. Henry Stoneman, Civil War general and California governor, 1883–87, led family involved in various financial and real estate matters. Includes legal, financial, and transactional documents. 72 items, with finding aid.

CALIFORNIA GRAND JURY (NEVADA COUNTY). Indictment of Julia Moore, Sept. 19, 1859. Charge that defendant Moore murdered pregnant victim Lucy Nuttall by causing her to “miscarry, abort, and bring forth the said child . . .” 7 pages.

COURTS AND JUDGES

WALTER ELY PAPERS, 1944–1984. Judge of U.S. Ninth Circuit Court of Appeals, 1964–84, who decided cases on censorship, education, feminism, immigration, labor relations, offshore drilling, and racial discrimination. Includes case files, internal court memoranda, county, state, and national documents. 68 cartons, uncatalogued.

PEIRSON M. HALL PAPERS, 1925–1979. Judge of U.S. District Court, Southern and Central Districts of California, 1942–79; who also served as U.S. attorney, 1933–37; in U.S. Reparations Mission to Japan, 1945; and on Uniform Air Crash Legislation Committee, 1968–75. Includes correspondence, documents relating to opinions and air crash legislation, litigation in Southern California, 1920s. 16 boxes, 15 scrapbooks, semi-catalogued.

IRVING HILL PAPERS, c. 1950s–1998. Judge of U.S. District Court, Southern and Central Districts of California, 1965–98. Includes correspondence, documents relating to opinions, trial notes, attorney discipline, judicial committee work, community activities. 51 boxes, 2 sacks, semi-catalogued.

HOFFMAN, OGDEN, LETTER TO OGDEN HOFFMAN, SR., FEB. 15, 1851. U.S. district judge, Northern District of California and District of California, 1851–91, prominent in deciding land grant cases. Letter to father describing cases and scenery in San Francisco. 1 letter, photocopy.

LOS ANGELES AREA COURT RECORDS, 1850–1899. Trial-level local courts in Southern California after the American takeover. Includes cases and case files dealing with civil, criminal, and probate matters, as well as those of justices of the peace and county justices, registers of actions, minutes, dockets, and miscellaneous records. 2,159 boxes, 295 bound volumes, with finding aid.

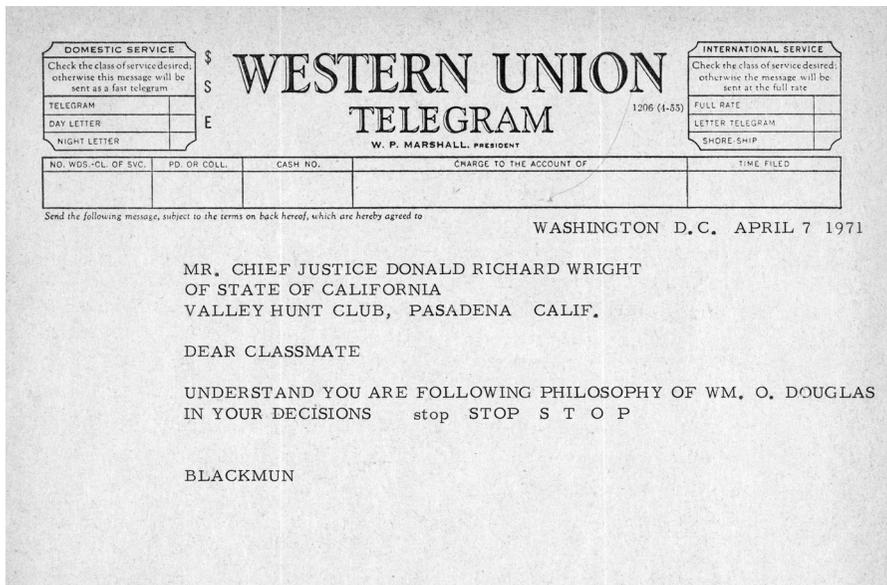
TUOLUMNE COUNTY (CALIFORNIA) JUSTICE OF THE PEACE DOCKET, 1855–1857. Court of local jurisdiction in gold country. Includes docket listing

information for each case heard by justices of the peace in Tuolumne County. 202 pages.

PAPERS OF DONALD R. WRIGHT, 1933–1977. Chief Justice of California, 1970–77, known for twice striking down death penalty. Includes correspondence with jurists and politicians, including Harry Blackmun, Warren Burger, William O. Douglas, and Ronald Reagan, meeting minutes, scrapbooks. 87 items, with finding aid. Includes message from Blackmun to Wright (see photo this page). The message reads:

UNDERSTAND YOU ARE FOLLOWING PHILOSOPHY OF WM.
O. DOUGLAS IN YOUR DECISIONS stop STOP S T O P

Note that the message was not actually transmitted via the Western Union Company, but was typewritten on an order blank to borrow the context of a telegram. In telegram usage, the word “STOP” indicated the end of a sentence because punctuation was not used. Here, the word “STOP” was borrowed by Justice Blackmun as a device to indicate the increasing vehemence of his disapproval.



MESSAGE FROM ASSOCIATE JUSTICE HARRY BLACKMUN OF THE U.S. SUPREME COURT TO CALIFORNIA CHIEF JUSTICE DONALD R. WRIGHT ON A WESTERN UNION ORDER BLANK. SEE ABOVE FOR DESCRIPTION.

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GOVERNMENT OFFICES

LETTERS OF JESSE WASHINGTON CARTER, 1941–1942. Letters from Associate Justice Jesse Carter of the California Supreme Court to Superior Court Judge Herbert S. Gans and Ernest Besig, executive director of the ACLU of Northern California, dealing with beatings and harassment of Jehovah's Witnesses. 5 letters.

PAPERS OF EDMUND D. EDELMAN, 1953–1994. Los Angeles County supervisor, 1975–94. Correspondence regarding county government, public welfare, urban transportation. 1,118 boxes, with finding aid.

PAPERS OF LEWIS GRANGER, 1851–1874. Lawyer and politician who moved to Los Angeles in 1849, and to Oroville in 1857. Elected to California Assembly, later U.S. Land Office receiver. Includes business receipts, deeds, leases, litigation documents. 24 items.

PAPERS OF ALEXANDER POPE, 1932–2000. Los Angeles lawyer and public administrator who held offices of Legislative Secretary to Governor Edmund G. "Pat" Brown, 1959–61, Los Angeles Airport commissioner, 1973–77, Los Angeles County assessor, 1977–86. Includes administrative letters, memoranda, reports, and litigation documents. 369 boxes, with finding aid.

SAN LUIS OBISPO HISTORICAL DOCUMENTS, 1844–1861. Documents (some in Spanish) regarding development and history of San Luis Obispo County. Includes land appraisals, Committee of Vigilance materials, letters from prisoner and County Sheriff. 18 items, facsimiles of documents in San Luis Obispo Historical Society.

LAND

(Note: Many collections overlap with those in NATURAL RESOURCES)

PAPERS OF ALAMITOS LAND COMPANY, 1885–1907. Land sale company organized during real estate boom of 1880s in Southern California, operated in Long Beach and Signal Hill areas. Includes business records, ledgers, and legal documents. 95 boxes, 95 maps, with finding aid.

BRADBURY LAND PAPERS, 1855–1933. Family and related company involved in land and water development in Southern California cities of Du-

arte and Monrovia. Includes correspondence, certificates of title, deeds, and contractual agreements relating to land sales and mortgages, leases, and water rights. 54 items, with finding aid.

CROSBY, ELISHA OSCAR, LETTER TO J. WILCOXSON, MARCH 24, 1857, SAN FRANCISCO, CALIFORNIA. Gold Rush pioneer, delegate to 1849 state constitutional convention, state senator. Letter refers to land grant litigation in late 1850s California, and to prominent figures such as landowner John A. Sutter and attorney Henry W. Halleck. 1 page.

DERBY, GEORGE HORATIO, QUITCLAIM DEED FOR BEACH LOTS AT LA PLAYA, SAN DIEGO, CALIFORNIA, DEC. 10, 1853. Prominent humorist and U.S. Army topographical engineer who mapped San Diego River. 2 pages.

GRAHAME HARDY COLLECTION, 1849–1909. Various legal, administrative, municipal and real estate transactions of railroad and mining interests, businessmen and cities in San Francisco Bay area, Northern California, Western Nevada. Includes legal proceedings, title deeds, mining reports, claims, construction of Nicaragua Canal. 85 items, with finding aid.

HEARD, JOHN, LETTER FROM JOHN HEARD TO PETER H. BURNETT, 1850. Sacramento resident's report to California's first governor on August 14, 1850, "squatter riots." Litigation over claims to Sutter land grant led to gunfight and attack on prison ship in Sacramento River. 3 pages.

RECORDS OF KERCKHOFF-CUZNER MILL AND LUMBER COMPANY, 1883–1933. Company owned mills and yards throughout Southern California, involved in legal dispute regarding purchase and division of Boschke's Island (or Smith Island) in San Pedro Bay. Includes business records, correspondence, maps. 113 items, 15 oversize folders, with finding aid.

KROESEN, J. L., LAND CLAIM IN TRINITY COUNTY, CALIFORNIA, JUNE 16, 1851. Claim for land near Eel River. 2 pages.

LAND AND WATER TITLES AND AGREEMENTS: FACSIMILES, 1896–1907. Agreements between various individuals and companies regarding land titles and water rights in Imperial and Mexicali valleys in California and Baja California, Mexico. 13 items, facsimiles of documents in San Diego County Recorder's Office.

LOS ANGELES LAND PAPERS, 1850–1889. Documents certifying sale, purchase, pre-emption, or surveying of land by Los Angeles County officials,

many referring to transfers from *Californios* to Americans. Some involve significant individuals such as Ignacio del Valle, Pio Pico, and Abel Stearns. Includes inventories of women's separate property, mortgage agreements, inheritances, wills, certificates of sale due to taxes owed, lawsuits, foreclosures, pre-emption claims, lease agreements, and miscellaneous legal documents. 237 items, with finding aid.

MELLUS, FRANCIS, INDENTURE BETWEEN MANUELA AVILA AND FRANCIS MELLUS FOR LAND IN LOS ANGELES COUNTY, MAY 28, 1857. Salem, Massachusetts, merchant arrived in San Francisco, 1840, Los Angeles, 1850s, became state assemblyman, Los Angeles County supervisor. Deed for property, part of Rancho de Los Cuervos, including adobe house. 1 item.

MILLS, MINNIE TIBBETS, THE MAN AND THE TREE: EPIC OF THE NAVAL ORANGE AND LUTHER C. TIBBETS, 1942. Daughter of Luther C. Tibbets, who planted first navel orange tree in Southern California and was president of Riverside Land and Irrigating Company. Includes unpublished monograph on crops, land company, and legal troubles causing property loss, and two volumes of court transcripts. 3 typescripts.

PAPERS RELATED TO THE DEVELOPMENT OF PINTO BASIN, CALIFORNIA, 1924–1932. Real estate development of Pinto Basin, Riverside County, by several development companies. Includes correspondence discussing litigation between business entities. 16 items.

LAND CLAIM OF EDWARD POTTER, MAY 3, 1854. Claim made before Judge K. H. Limmish in Los Angeles, describing boundaries and bordering ranch belonging to Los Angeles County District Attorney Lewis Granger. 1 page.

COLLECTION OF RANCHO SESPE, 1829–1944. Mexican land grant in Santa Clara Valley, Ventura County, subject of claim before California Land Commission, and against various squatters. Includes copies of legal documents submitted by Carrillo family to Commission in order to prove title. 412 items, with finding aid.

COLLECTION OF HISTORICAL DOCUMENTS CONCERNING RED BLUFF, CALIFORNIA, 1856–1864. Related to lawsuits over confusion in land titles in Red Bluff, Tehama County. Includes letters, lawyers' arguments, citizens' petitions, 1859 map of city showing various land titles. 12 items, facsimiles.

SAN FRANCISCO (CALIF.) DISTRICT, BLOTTER B: DISTRICT RECORD OF LAND GRANTS AND DEEDS IN THE CITY OF SAN FRANCISCO, 1847–1849. Includes grants and deeds signed by various San Francisco *alcaldes* in early American period. 63-page bound volume.

SANTA CLARA LAND PAPERS, 1849–1890. Estates and land transactions of prominent *Californio* citizens, including Pablo de la Guerra, Juan Sepúlveda, Robert Stockton. Includes depositions, powers of attorney, wills, leases, indentures, and plats. 136 items, with finding aid.

TAYS, GEORGE, CALIFORNIA LAND GRANT RESEARCH MATERIALS FOR WILLIAM W. CLARY, 1938. Independent researcher hired by Clary, an O'Melveny & Myers partner, to investigate Mexican land grants in Bancroft Library. Includes letters and notes on land acquisition in pre-Conquest Southern California boundary litigation in 1820s. Example of legal historian at work: Tays complains that a document copyist, "leaving out all the details . . . left me in a state of futile rage." 5 items.

NATURAL RESOURCES (MINING, OIL, AND WATER)

PAPERS OF JAMES B. AND KATHERINE M. CLOVER, 1855–1990. James B. Clover owned Mono County land, defended against Los Angeles's eminent domain case to condemn land and accompanying water rights for city use. Los Angeles eventually won its suit. Includes correspondence, legal documents, reports, publications, and clippings. 5,941 items, 102 oversize folders, with finding aid.

RECORDS OF THE CONSERVATIVE WATER COMPANY, 1900–1967. Water supply company in Watts, Los Angeles area. Includes correspondence regarding public health, financial, legal issues. 310 items, with finding aid.

PAPERS OF O. S. DAWSON, 1873–1911. Relates to three mining companies, two in California (Bodie and Sonora) and one in Nevada. Includes correspondence and documents regarding mine management, debts, purchases. 146 items, with finding aid.

A HISTORY OF ESCONDIDO AND ITS WATER AND POWER DEVELOPMENT, SEPT. 1932. Unpublished manuscript focuses on irrigation and development

of hydro-electric energy, discussing reservoirs, disputes with neighboring localities, and legal battles over water supply. 16 pages.

CONTRACT WITH ELIAS G. GRANGER, LOS ANGELES, CALIFORNIA, MARCH 10, 1856. Contract between various parties concerning sale and transfer of Los Angeles water canal property. 1 item.

PAPERS OF JOHN R. HEINLEN, 1864–1907. Lemoore, California, landowner involved in property disputes with irrigation companies and individuals over river boundaries and water rights. 79 items, with finding aid.

FRANK F. LATTA COLLECTION: SKYFARMING, 1802–1982. Historian, curator of Kern County Museum, researched San Joaquin Valley development and dry farming (“skyfarming”). Includes documents on irrigation, canals, water rights. 17, 230 items, with finding aid.

FRANK F. LATTA COLLECTION: MILLER & LUX PAPERS, 1869–1939. Land-owning company involved in litigation over San Joaquin Valley riparian rights. Includes agreements, correspondence with irrigation companies, lists of lawsuits, receipts, maps, ledgers. 78 boxes, 51 maps, 185 bound volumes, with finding aid. Several hundred boxes are unprocessed.

NORTH BLOOMFIELD GRAVEL MINING CO. RECORDS, 1890–1891. California company pioneered hydraulic gold mining, Nevada County, 1870s. Court-imposed restrictions forced monitoring of water-borne debris to protect downstream farmers. Includes correspondence discussing accounts of field superintendents and efforts to control runoff. 96 items, with finding aid.

ROE, JAMES H., NOTES ON THE EARLY HISTORY OF RIVERSIDE, CALIFORNIA, 1900. Notes on development of Riverside Valley water systems. 91-page typescript copy of original in Riverside Public Library.

ROJAS, JOSÉ MIGUEL, LAWS OF THE CORSO MINING DISTRICT, INYO COUNTY, CALIFORNIA, AUGUST 3, 1869. Translation (from Spanish?) of miners’ laws, including claims and sales from district. 1 item.

FINANCIAL RECORDS OF HARRY F. SINCLAIR, 1905–1960. Oil tycoon involved in 1920s Teapot Dome Scandal, awarded non-competitive bids to California and Wyoming petroleum fields by Secretary of the Interior Albert B. Fall. (Fall papers also in Huntington.) Includes contractual agreements, affidavits, and other information related to legal claims, documents

related to Teapot Dome, tax records submitted in trials against Sinclair. 2,176 items, with finding aid.

PAPERS OF THE VIRGINIA AND TRUCKEE RAILROAD, 1865–1906. Railroad, built in late 1860s, connected Comstock Lode mines with quartz reduction mills and lumberyards. Includes business correspondence regarding mines and minerals in Nevada and California, pumping machinery, and water rights in Inyo County, California, and in Nevada. 40 items.

WRIGHTWOOD PAPERS, 1922–1929. Wright Ranch in San Gabriel Mountains converted from struggling cattle ranch and apple orchard to Los Angeles area vacation destination in 1920s. Includes correspondence of business associates and development consultants, legal and business documents, photographs of landscape and environment. 1922 Superior Court judgment allows water diversion by second user on any day when water was insufficient to reach crops on first user's land by six o'clock. 30 items, with finding aid.

LAW FIRMS AND LAWYERS

PAPERS OF JOHN DUSTIN BICKNELL, 1872–1914. Counsel for Southern Pacific Railroad, and Los Angeles practitioner of land patent law. His firm merged in 1903 with Los Angeles lawyers Dunn & Crutcher, later Gibson, Dunn, & Crutcher. Includes correspondence regarding rights of way with Colis P. and Henry E. Huntington. 9,802 items, 51 bound volumes, 6 rolls, with finding aid.

LAW OFFICES OF CHOW & SING COLLECTION, 1949–1998. San Francisco firm handling immigration cases and other matters of interest to Chinese immigrant and Chinese-American community. Founder William Jack Chow was first Chinese deputy district attorney for San Francisco, and president of Asian American Bar Association. Includes firm's business records (open), and case files (closed under rolling 75-year hold until 2024). 300 boxes, semi-catalogued, with brief summary.

HOMER DANIEL CROTTY PAPERS, c. 1930–1972. Partner, Los Angeles firm Gibson, Dunn, & Crutcher, represented Ventura Land and Water Company, active in Los Angeles Bar Association, Huntington Library. Semi-catalogued, with biographical information sheet.

DEPOSITION OF JOHN THOMAS DOYLE ON THE PIOUS FUND, 1903. Attorney for archbishop of San Francisco and bishop of Monterey in successful case to recover Jesuits' Baja California mission fund from Mexico, decided by Permanent Court of Arbitration at Hague, 1902. Document concerns fee dispute between Doyle and Catholic Church. 35 pages.

PAPERS OF WILLIAM I. FOLEY, C. 1903–1920. Attorney in Los Angeles law firm with Henry T. Gage, California governor, 1899–1903. Includes legal documents and correspondence concerning, among other matters, a lawsuit by Aguirre family against San Francisco archbishop claiming interest in Pious Fund, and financial litigation. 84 items, with finding aid.

HONG FAMILY PAPERS, 1764–2006. Immigration firm founded by You Chung Hong, first Chinese American to pass California bar exam, advocate for repeal of Chinese Exclusion Acts, founder of Los Angeles's New Chinatown. Eldest son Nowland Hong served as deputy city attorney of Los Angeles; chief counsel, Los Angeles Board of Harbor Commissioners; and private practitioner. Includes documents on business and community activities, immigration case files (some open on rolling 75-year hold), coaching books, political activities. 350 boxes, with finding aid.

LOCKWOOD, P. A., LAW LICENSE AND LETTERS, 1833–1860. San Francisco attorney in 1850s, represented John C. Frémont and Biddle Boggs in subsurface rights litigation against Merced Mining Company. Includes letters regarding Merced case, Governor John G. Downey, and title request. 3 items.

PAPERS OF LOREN MILLER, 1876–1903. African-American journalist, civil rights activist, attorney, and judge in Los Angeles. Assisted Thurgood Marshall with 1954 case *Brown v. Board of Education* in U.S. Supreme Court, Los Angeles Municipal Court judge, 1964–67. Includes briefs and other legal documents regarding racially restrictive real estate covenants, correspondence with Tom Bradley, Edmund G. "Pat" Brown, Langston Hughes, John F. Kennedy, Robert F. Kennedy, Thurgood Marshall, ACLU, NAACP, National Urban League. 10,454 items, with finding aid.

COLLECTION OF HENRY WILLIAM O'MELVENY, 1885–1940. Co-founder of oldest Los Angeles law firm with Jackson Graves, which later became O'Melveny & Myers, litigated land title and electric power cases, president

of various civic boards. Includes correspondence, business files, financial documents, and journals. Some missing years are in Graves Collection listed in *Guide*. 51 boxes, 52 volumes, 4 rolls, oversize items, with preliminary inventory.

ROBINSON-FARRAND PAPERS, 1905–1958. Lawyers representing Southern California banks and other institutions. Henry M. Robinson practiced in Los Angeles, George E. Farrand in Ventura, and both were involved with merger of First National and Security Pacific Banks. Includes correspondence, legal files, judicial opinions, legal documents, and research memoranda. 3,504 items, with finding aid.

ROCKWELL COLLECTION, 1791–1871. John A. Rockwell, attorney and land developer, Connecticut Whig politician who practiced law in that state, was county judge, congressman, and moved to Washington, D.C., where he litigated before U.S. Court of Claims. Treatise *Spanish and Mexican Law in Relation to Mines and Titles to Real Estate* (1851) was cited by parties and judges in numerous California and Southwestern land, mining, and water cases. Represented claimants in Fossat and New Almaden, California land grant cases. Includes correspondence and memoranda regarding various legal matters, real estate investments, and political issues. Approximately 3,000 items, with finding aid.

PAPERS OF FRANK WHEAT, c. 1950–2000. Los Angeles securities lawyer at Gibson, Dunn, & Crutcher, political activist, and major proponent of 1994 California Desert Protection Act. Includes documents regarding legal career, presidency of Los Angeles County Bar Association, SEC commissioner under Lyndon Johnson, involvement in environmental issues. 154 boxes, with finding aid.

CONCLUSION

Without question the Huntington Library's vast collections constitute an almost inexhaustible resource for writing California legal history. These materials await the patient researcher, whether he or she takes a doctrinal, institutional, contextual, or revisionist approach. John Phillip Reid, perhaps the most prolific of Huntington legal historians, recognized the Library's potential when he commented, "Were we to stop guessing and look

at the evidence, it could well reveal a source of social behavior previously unsuspected or deliberately ignored by historians.”⁶ Using Overland Trail journals, Reid soundly rebutted the traditional stereotype that California Gold Rush pioneers had no respect for property rights.⁷

This brief survey is only a way station on the long (and perhaps never-ending) journey to archival illumination. But if it inspires and assists future scholarship of the caliber of John Reid’s, it will have served its purpose. ★

⁶ REID, *supra* note 2, at 10.

⁷ *Id.* at 363-64.

BOOKS

WOMAN LAWYER:

The Trials of Clara Foltz

BARBARA BABCOCK

Stanford: Stanford University Press, 2011

392 pp., ill.

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

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

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

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

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

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

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

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.

Between myself and the members of the bar the most friendly relations have always been maintained. Sometimes one of the riraf [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." ★

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

Stanford: Stanford University Press, 2009

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 Cauter'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

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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

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 HO SANG

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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”

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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

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lvi, 225 pp.

REVIEW ESSAY BY MICHAEL TRAYNOR*

“**T**he 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*

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 Johnson⁷; 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

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 Chessman 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 anti-miscegenation 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

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

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 hypertechanical 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

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

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]

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/jesseccarter/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

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.

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 forgotten 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

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. ★

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., ill.

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 indispensable — 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 judgeships 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

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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

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.

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

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

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.

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

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

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

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

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

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

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

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

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

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

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

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

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 ★

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.

BOOK REVIEWS

WOMEN WHO KILL MEN: California Courts, Gender, and the Press

GORDON MORRIS BAKKEN
AND BRENDA FARRINGTON

Lincoln: University of Nebraska Press, 2009
xi, 272 pp.

In *Women Who Kill Men*, the authors discuss the interesting cases of a number of women who went on trial for killing men in California, from the late nineteenth century until just before the 1960s. Laura Fair was the defendant in the first of these trials; she had shot Alexander Crittenden to death on a ferry boat in San Francisco Bay in 1870. The last in the series is the sensational case arising out of the death in 1958 of Johnny Stompanato, the thuggish boyfriend of Lana Turner, the movie star. Cheryl Crane, Lana's daughter, killed him, supposedly to protect her mother.

Each of the cases has its own fascination. The authors try to use these cases to examine changing gender roles and changing norms in society. And, indeed, trials of women for killing men do have a special interest. For one thing, they are comparatively rare. Most killers are men; and so are most of their victims. Women rarely kill; and they kill in ways and under circumstances that differentiate them sharply from men who commit homicide. Women, for example, do not kill in barroom brawls. They do not kill in the course of armed robbery. When they kill, they almost always do so in the context of intimate relationships. Some women do kill for money — but it is usually family money. Gertrude Gibbons was accused of poisoning her husband in 1918; according to the prosecution, she did the bloody deed in order to collect an insurance policy (and also to “get rid of an invalid,” p. 72). A grand jury failed to indict her.

Gertrude Gibbons escaped trial. Others of the women defendants were acquitted; or, if convicted, won their case on appeal. Other studies, in other jurisdictions, have confirmed the impression that women defendants had a better chance at trial than men. These studies have shown that judges and juries were often quite sympathetic to women accused of murder in the late nineteenth and early twentieth centuries. Today, we hear a great deal about the battered woman syndrome. From a formal and doctrinal standpoint, this defense has emerged fairly recently. But some juries, long before the development of this doctrine, seemed willing to give a good deal of slack to women who killed abusive husbands or lovers. Bakken and Farrington point to a number of instances in which women “resorted to murder to defend themselves and family members,” and in which juries “judged these defendants’ actions as justifiable homicide” (p. 78).

The cases described in this book were chosen in part because they were quite sensational; they were the stuff of front page news. What is it that makes a crime and its punishment sensational?: There are, in fact, quite a few reasons. The simplest reason is that the public is attracted to the lurid, and cases that appeal to the rather prurient interests of the public are extremely likely to make headlines. The public, particularly in the last few generations, has an almost morbid curiosity about the lifestyles of the rich and famous. Trials become media events when they

seem to open a window into the world of prominent people — especially Hollywood stars — and which expose a world that is both glittering and morally repellent at once. This was true of the notorious trials of Roscoe (“Fatty”) Arbuckle in the 1930s; and it was true in the case of Lana Turner and her daughter. The media, to be sure, play an important role in the process of creating sensational news; and in publicizing and magnifying headline trials. The newspapers, and later television, greatly expanded the salience of many of these trials. The swarms of reporters who infested the trials of Dr. Sam Sheppard and O. J. Simpson, certainly contributed to the notoriety of these cases. The O. J. Simpson case was televised, which brought it to the attention of millions of people. The media do not and cannot invent these headline cases and headline trials; but they are clearly responsible for inflating their importance.

Another factor may be particularly salient in trials of women for murder. Such trials sometimes tested norms and ideas about gender roles. Well into the twentieth century, the conventional picture of respectable women was completely inconsistent with any notion that such women could be murderers. Murder was not, supposedly, in their nature. If they killed, there must have been a good reason. Of course, prosecutors tended to take a quite different view; they tended to describe the women in much less glowing terms. In the trial of Laura Fair, the prosecution described her as “an immoral seductress, a money-hungry opportunist, and an exploiter of male weakness.” The defense argued that Laura suffered “maniacal spells due to delayed menstruation”; that this “female complaint” led to an “irresistible impulse to kill” (p. 19). The jury found her guilty. She appealed, and won a new trial. At this second trial, in 1872, a jury found her “not guilty by reason of insanity” (p. 37).

Perhaps the most famous criminal trial (other than political trials) in American history was the trial of a woman: Lizzie Borden. This was the sensation of the 1890s. It has given rise to an enormous literature; not many criminal trials have provided the inspiration for an opera and a ballet. Lizzie Borden was accused of murdering her father and stepmother, quite brutally, with an axe. The Bordens were leading citizens of Fall River, Massachusetts. Lizzie was unmarried, in her 30s — the very picture of a respectable, upper middle-class, church-going woman. There

was considerable evidence against her. But the jury acquitted her. The twelve men in the box apparently could not imagine that a woman of her stamp could be in fact a savage killer, someone capable of bashing in her own father's head with an axe.

Arguably, then, in the trial of Lizzie Borden, it was not just one woman who was on trial, but well-to-do women in general, or, perhaps bourgeois society itself was on trial. The case would tap into quite different norms, concepts, and intuitions today; and the trial might have come out differently. Bakken and Farrington, as we said, try to use these cases as examples of the way norms and ideas (mostly about women and crime) have changed in California during the period they studied. No doubt these norms and ideas are still evolving.

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TESTIMONIOS: Early California through the Eyes of Women, 1815–1848

TRANSLATED WITH INTRODUCTION AND COMMENTARY
BY ROSE MARIE BEEBE AND ROBERT M. SENKEWICZ

Berkeley: Heyday Books, 2006
xxxvii, 470 pp.

The authors translated interviews of thirteen women done in the nineteenth century that provide historians of California with a gendered window into Mexican society and law. The periodization is important because far too much of our knowledge of early California is burdened with class and culture. Further, the authors point out that the documents were “marred by actual mistranslations.” In returning to the original transcripts of the interviews, the authors found “that sentences, even entire paragraphs, of the women’s words have been left out of some English translations” (p. xxxi). The authors have translated from the original interviews and, most importantly, given readers a precise explanation of the methodology of the interviewers and their personal

histories. Clearly, cultural bias had infiltrated the process in the nineteenth century.

What was on the minds of these women? Crime was a significant aspect of life. Rosalía de Leese remembered on June 27, 1874, “Frémont and his ring of thieves were in Sonoma, robberies were very common” (p. 29). Teresa de la Guerra de Hartnell reflected on March 12, 1875 that the Americans were not the only enemy deviants; Mexican “governors and officials . . . were men of very bad principles . . . very bad individuals . . . cowards and bad people” (p. 62). Catarina Avila de Ríos remembered on June 20, 1877, “three or four Irishmen . . . murdered the children with the hatchet while they were sleeping . . . and killed a black man who worked as a cook” (pp. 90-1). Angustias de la Guerra told Thomas Savage in 1878 that around 1829 “a ship from Mexico arrived in Santa Bárbara with two hundred or more men. All of them were convicts and the majority of them had committed very serious crimes” (p. 213). She also thought Mexican “soldiers were consummate thieves who committed all sorts of crimes every day” (p. 259).

Women also reflected upon land titles. Dorotea Valdez of Monterey on June 27, 1874 looked to the future, saying that “as soon as the railroad begins to operate, many foreigners will come to settle here. Rest assured, that is when Señor Jacks will receive the punishment he deserves. All we want is for some clever lawyer to take the pueblo land away from him” (p. 38). The Mexicans of Monterey were convinced that David Jacks had stolen their pueblo lands from them. Valdez gave a reason: “This is land that nobody had the right to give away, because it rightfully belongs to every man, woman, and child who was born in our town” (p. 38). Jacks had constructed fences to keep Mexican cattle and horses off his land and was “a natural-born enemy” (p. 38). Linda Heidenreich’s *This Land Was Mexican Once: Histories of Resistance from Northern California* (2007) recounted similar tales of stolen lands, mostly in Napa. Rosaura Sanchez’s *Telling Identities: The California Testimonios* (1995) gave the oral histories gendered, ideological, and protonational interpretations. As we know from Gordon Morris Bakken’s *The Development of Law in Frontier California: Civil Law and Society, 1850–1890* (1985) David Jacks successfully defended his title and encroachments on his pueblo lands.

The bulk of remembrances regarding land focused on American lawyers, bankers, and squatters stealing Mexican land. Yet María Antonia Rodríguez saw it in a world history context. “[S]he replied that though the Americans had taken away from her nearly the whole of her lands, she had no grudge against them — for, she said, ‘It is the law of nature that the poor should steal from the rich. We Californians in 1846 owned every inch of soil in this country, and our conquerors took away from us the greater part. The same thing, I suppose, has happened over and over again in every conquered nation’” (pp. 45-6). She was not a victim as so many others remembered themselves.

This volume is an outstanding contribution to California legal history, providing researchers with correctly translated oral histories. The authors must be commended for taking on such a daunting task.

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*WATER AND THE WEST:
The Colorado River Compact and the
Politics of Water in the American West*

NORRIS HUNDLEY, JR.

Berkeley: University of California Press, 2nd. ed., 2009
xv, 415 pp., bibl., index, maps, notes.

The most important stream in the American West, the Colorado River flows through or past parts of seven states (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming), as well as a small portion of Mexico, before its depleted flows drain into the Gulf of California. The Colorado is not the largest river in the United States in terms of volume (it ranks sixth), but the Colorado provides life-giving water to much of the southwest quarter of the United States, sustaining a significant amount of the area’s economy as well as generating hydro-electric power for the nation’s energy grid. Thus, the Colorado River has

— and has had — an enormous impact on the United States that goes well beyond the river's regional geography.

Norris Hundley's *Water and the West* traces the history of that influence, particularly the struggles over the Colorado's water supplies — conflicts that continue to this day. This is the second edition of Hundley's book, the first having been published in 1975. Nonetheless, this book is still essential reading for water planners, lawyers, environmentalists, historians, and others concerned with water in the American West. Indeed, copies of the first edition of this book appear outside academic libraries on the shelves of countless attorneys and government officials throughout the entire American West.

And for good reason. Hundley's book surveys the history of the "Law of the River" — the legislation, regulations, court decisions, and administrative rulings that have shaped the uses of the Colorado River over the past century and a half — all of which clearly show that water allocation and control issues involving the Colorado were highly complex and involved multitudes of interested parties at all levels of government as well as in business and other aspects of society as a whole. Hundley begins with a review of late nineteenth- and early twentieth-century attempts to control the highly irregular and erratic flows of this stream to supply nascent irrigation communities and speculative land development schemes in southern California, and he carefully documents how what initially was a localized water question evolved into a regional contest of enormous consequences over how the Colorado River would be tamed and simultaneously allocated among the seven basin states. It is this part of the story that occupies most of Hundley's narrative. Here, he demonstrates how the newly formed Reclamation Service and growing demands for water supplies up and down the Colorado River, as well as increasing needs for hydroelectric power, laid the foundation for the negotiation of the Colorado River Compact of 1922 — the first such use of the Constitution's authorization for states to form agreements among themselves to solve any interstate water conflict. Hundley carries the narrative through the long and difficult attempts to have that accord ratified by the seven Colorado River Basin states, the 1928 Boulder Canyon Act (which authorized the construction of Hoover Dam), and the

interstate litigation between Arizona and California over the following few decades leading to the U.S. Supreme Court's landmark 1963 decision in *Arizona v. California*, which, according to the Court, established that Congress had intended to apportion the stream when the federal legislators had passed the Boulder Canyon Act.

For the second edition of *Water and the West*, Hundley has brought the Colorado River history down to the present by offering a lengthy epilogue on various issues now affecting the stream. These include: how modern water measurement techniques (notably tree-ring analysis) have shown that the original assumptions about the Colorado's flows were probably overestimated; how global warming and greenhouse gases are affecting (and will continue to affect) water use and control; how more recent water-conservation attitudes will play a role in future Colorado River planning; how concerns over wildlife have become more influential on water allocation; and how recognizing Native American interests in water and the environment will play a major role in future Colorado River planning.

Most notably, however, Hundley's book remains fundamentally the bedrock foundation to understanding the background to Colorado River water issues as well as the multitude of forces shaping water use and control. This is due to Hundley's thorough grasp of documentary sources relating to his topic as well as to his careful footnoting and attention to detail in organization and writing. This is an exceptional book. It should continue to be at the top of anyone's list who truly wants to grasp the complexities of water and the American West.

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